No. 20-1824

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HOLLIE ADAMS, JODY WEABER, KAREN UNGER, and CHRIS FELKER

Plaintiffs-Appellants

v.

TEAMSTERS UNION LOCAL 429, LEBANON COUNTY, ATTORNEY GENERAL JOSH SHAPIRO, *in his official capacity*, and JAMES M. DARBY, ALBERT MEZZAROBA, and ROBERT H. SHOOP, JR., *in their official capacities as members of Pennsylvania Labor Relations Board*

Defendants-Respondents

On Appeal from the United States District Court
for the Middle District of Pennsylvania
No. 1:19-CV-0336
Hon. Sylvia H. Rambo

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, Appellants in this case are natural persons, and therefore, have no corporate interests to disclose

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the First Amendment to the United States Constitution and, therefore, presents a federal question, and had jurisdiction under 28 U.S.C. § 1343 because relief is sought under 42 U.S.C. § 1983. On April 17, 2020, Appellants filed a timely Notice of Appeal, App. 003, from the District Court's March 31, 2020 Memorandum, App. 009, and Order, App. 006, adopting the Report and Recommendation of the Magistrate Judge, App. 108, granting the motions for summary judgment of Defendants James M. Darby, Albert Mezzaroba, Robert H. Shoop, Jr., and Attorney General Josh Shapiro, Doc. 26; and the District Court's Order, App. 007, adopting the Report and Recommendation of the Magistrate Judge, App. 128, granting the summary judgment motions filed by County of Lebanon, Doc. 25, and Teamsters Local 429, Doc. 27, and denying the summary judgment motion filed by Appellants, Doc. 43. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs provided affirmative consent to waive their First Amendment right to not pay money to a union as articulated by the Supreme Court in *Janus* when they signed a union membership card and dues deduction authorization prior to the Court's *Janus* decision?

See Doc. 043-2 (Pls.' Memo. Mot. Summ. J.); App. 007 (Order).

2. Whether the Commonwealth Defendants violated the free speech and free association rights of Plaintiffs by granting a labor union the power to speak on Plaintiffs behalf as their exclusive representative to their public employer even though they are no longer members of the union?

See Doc. 043-2 (Pls.' Memo. Mot. Summ. J.); App. 009 (Mem. Op.).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court prior to this appeal. This Court previously considered the questions presented by this case in *Oliver v. SEIU Local 668,* No. 19-3876, 2020 U.S. App. LEXIS 31805 (3d Cir. Oct. 7, 2020). The Court's Opinion in that case was labeled "NOT PRECEDENTIAL." *Id.*

STATEMENT OF THE CASE

Factual Background

Plaintiffs-Appellants Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker were employed by Lebanon County Mental Health/Intellectual Disabilities/Early Intervention Program ("the Program") during the relevant time period in this case. App. 080 (Defs.' Stmt. Material Facts, hereinafter "SOF"). All Plaintiffs became members of Defendant-Appellee Teamsters Local 429 ("the Union" or "Local 429") at some point after they began their employment with the Program. App. 086-087, 090, 093, 095 (SOF). At the time they joined the Union, they were required pay money to the Union as a condition of their employment regardless of whether they became members of the Union: either in the form of union dues as a member or agency fees as nonmembers. App. 105 (Defs.' Suppl. Stmt. Facts, hereinafter "Suppl. SOF").

On June 27, 2018, the Supreme Court decided *Janus v. AFSCME, Council 31*, holding that government employees have a First Amendment right not to be compelled by their employer to pay any fees to a union unless an employee "affirmatively consents" to waive that right. 138 S. Ct. 2448, 2486 (2018). Such a waiver must be "freely given and shown by

'clear and compelling' evidence." *Id.*

After the Supreme Court issued its decision in *Janus* on June 27, 2018, Plaintiffs learned that they had the right to pay no money to the Union if they were nonmembers of the Union. App. 035 (Compl.). In July 2018, all Plaintiffs except for Felker sent letters to the Union indicating that the Union no longer had their consent to withdraw dues from their paychecks; Felker sent a similar letter in September 2018. App. 087, 090, 093, 096 (SOF). All Plaintiffs, through counsel, sent a second letter in October 2018. App. 036 (Compl.). Nonetheless, Defendant-Appellee Lebanon County continued withholding dues on behalf of the Union from Plaintiffs' paychecks until they reached their respective "resignation windows" between October 2018 and March 2019. App. 087-088, 090-091, 094, 096-097 (SOF).

Local 429 is an "employee organization" as defined in Pennsylvania Public Employee Relations Act ("PERA"). App. 080 (SOF). Pursuant to the provisions of PERA governing the designation of employee representatives, the Union has been certified by the Pennsylvania Labor Relations Board as the exclusive representative of a bargaining unit of certain pub-

lic employees of the Lebanon County, including Plaintiffs, for the purposes of collective bargaining under PERA. App. 085 (SOF).

Acting in concert under color of state law, Lebanon County and Local 429 entered into a collective bargaining agreement ("Agreement"), effective on July 1, 2016 through June 30, 2019. App. 085 (SOF). The Agreement contains a "Union Security" article, which limits when union members may resign their union membership and stop union dues from being withheld from their paycheck. That article provides:

> Section 1. Each employee who, on the effective date of this Agreement, is a member of the Union, and each employee who becomes a member after that date shall maintain membership in the Union. An employee may, however, resign from the Union within fifteen (15) days prior to the expiration of this Agreement without penalty by serving written notice to Teamsters Local Union No. 429 . . .

App. 085-086 (SOF).

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

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

43 P.S. § 1101.301(18); App. 082 (SOF).

PERA permits the limitation of the rights of government employees to resign from the union and stop union dues from being withheld from their paychecks. *See* 43 P.S. § 1101.401 ("It shall be lawful for public employes to organize, form, join or assist in employe organizations . . . and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement."); App. 082 (SOF).

The terms of both the Collective Bargaining Agreement and PERA limit a union member's right stop union dues from being withheld from his or her paycheck by their employer to only the 15-day window immediately preceding the expiration of the Agreement. App. 082 (SOF).

Article 4, Section 1 of the Agreement states in pertinent part:

> Section 1. Union Dues. The County agrees to deduct the Union membership initiation fees, assessment and once each month, either dues from the pay of those employees who individually request in wiring that such deduction be made or fair share. The amount to be deducted shall be certified to the County by the Union, and the aggregate deductions of all employees shall be remitted together with an itemized statement to the Union by the 10th of the succeeding month, after such deductions are made. This authorization shall be irrevocable during the term of this Agreement.

App. 086 (SOF).

In a similar vein, PERA provides that:

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

43 P.S. § 1101.705; App. 082 (SOF).

Under Pennsylvania law, a union selected by public employees in a unit appropriate for collective bargaining purposes is the exclusive representative of all the employees in such unit to bargain on wages, hours, terms and conditions of employment. 43 P.S. § 1101.606; App. 083 (SOF). Once a union is designated the exclusive representative of all employees in a bargaining unit, it negotiates wages, hours, terms and conditions of employment for all employees, even employees who are not members of the union or who do not agree with the positions the union takes on the subjects. App. 084. Defendant Local 429 is the exclusive representative of Plaintiffs and their coworkers in the bargaining unit, with respect to wages, hours, and terms and conditions of employment, pursuant to 43 P.S. § 1101.606. App. 085 (SOF).

Procedural History

Plaintiffs filed suit on February 27, 2019 against the Union; Lebanon

County; Pennsylvania Attorney General Josh Shapiro in his official capacity; and James M Darby, Chairman, and Albert Mezzaroba and Robert H. Shoop, Jr., members, of the Pennsylvania Labor Relations Board in their official capacities (the Attorney General and Labor Relations Board collectively are the "Commonwealth Defendants"), seeking injunctive relief, declaratory relief, and damages in the amount of the dues previously deducted from their paychecks. The Union, Lebanon County, and the Commonwealth Defendants each filed Motions to Dismiss on May 20, 2019, Docs. 025, 026, 027, which were all later converted to Motions for Summary Judgment, Doc. 030. The Defendants jointly filed a Statement of Material Facts not in Dispute in support of their motions for summary judgment, App. 080, and a Supplemental Joint Statement of Material Facts Not in Dispute, App. 101, which Plaintiffs did not dispute. *See* Doc. 44. The magistrate judge issued two documents entitled Report and Recommendation, App. 108, 128, granting the Defendants' motions for summary judgment in their entirety, and denying Plaintiffs' motion for summary judgment, and on March 31, 2020, the District Court adopted both the magistrate judge's recommendations. App. 006, 007, 009.

Plaintiffs timely appealed, App. 003, and then moved this Court to

stay proceedings pending the outcome of *Oliver v. SEIU Local 668,* No. 19-3876. Appellants did not oppose the motion. On June 3, 2020, this Court ordered briefing stayed until *Oliver* was decided, and further ordered Appellants brief filed within thirty days of the issuance of the mandate in *Oliver*. *Oliver*'s mandate was issued on December 1, 2020. Appellants requested and were granted an extension to file their brief through January 14, 2021.

SUMMARY OF ARGUMENT

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

In addition, citizens enjoy a First Amendment right not to be forced by government to associate with organizations with which they do not wish to associate. *Roberts v. Jaycees*, 468 U.S. 609, 623 (1984). Yet Pennsylvania law grants public sector unions the power to speak on behalf of employees as their exclusive representative. 43 P.S. §§ 1101.604, 606. Pursuant to this law and by agreement between the Union and Lebanon County, the Union purports to act as the exclusive representative of Plaintiffs and other nonmembers. As the Supreme Court in *Janus* recognized, such an arrangement creates "a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. It should no longer be tolerated in this context either: Plaintiffs' rights of speech and association are violated by a government-compelled arrangement whereby the Union lobbies their employer on their behalf without their permission and in ways that they do not support.

STANDARD OF REVIEW

This Court exercises plenary, or de novo, review over a District Court's grant of summary judgment and applies the same standard that the District Court would apply. *Burton v. Teleflex Inc.*, 707 F.3d 417, 424–25 (3d

Cir. 2013). A grant of summary judgment is appropriate where the moving party has established "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (*quoting* Fed. R. Civ. P. 56(a)).

ARGUMENT

I. In *Janus* the Supreme Court set forth waiver requirements that must be met before public employers withhold money from employees on behalf of a union.

Decisions in much of the post-*Janus* litigation, including this Court's prior opinion in *Oliver v. SEIU Local 668,* faultily rest on the misapprehension that the plaintiff "chose to join the Union when . . . not compelled to do so," and therefore their membership was "voluntary." *See, e.g., Oliver*, No. 19-3876, 2020 U.S. App. LEXIS 31805 at *2 (3d Cir. Oct. 7, 2020). This misapprehension turns on an ultimately irrelevant distinction between Mark Janus, who paid compulsory so-called "fair share" fees in lieu of union membership, and Plaintiffs who joined their union rather than pay "fair share" fees — when in fact they were due the option to do *neither*, and pay nothing to the Union; an option they were denied. The mere fact that a plaintiff "chose" to join a union does

not necessarily mean that the plaintiff properly waived her First Amendment right to not pay money to the union.

This distinction comes into play when courts interpret *Janus*'s prohibition against the deduction of "an agency fee nor any other payment to the union . . . from a *nonmember*'s wages," *Janus,* 138 S. Ct. 2448 at 2486 (emphasis added), to find no First Amendment violation when such deduction is made from a *member*'s wages, regardless of how that member came to be a member in the first place. *See Oliver* at *5 ("*Janus* [only] protects nonmembers from being compelled to support the Union"). This argument fails to recognize that before Plaintiffs signed the union membership card, they were nonmembers just like Janus. Because all employees are nonmembers when they first sign a union membership card and authorize dues deductions, the *Janus* waiver test applies before a public employer withholds any money from any employee's paycheck on behalf of a union.

The Supreme Court in *Janus* made this clear when it held that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* This sentence clearly applies to an employee in Plaintiffs' position: employees that

have agreed to pay money to the union. And it clearly states that waiver analysis must be applied. Notably, this sentence does *not* apply to someone in Janus's position, because Janus never agreed to pay and never waived his First Amendment rights. An employee in Janus's position who *does* wish to pay money to her union would join the union in order to do so. Thus, the only way for the second sentence of the *Janus* waiver analysis to apply — where an employee agrees to pay a union — is when a nonmember employee agrees to become a member. That is exactly the position Plaintiffs were in when they signed the union membership cards. When they were nonmembers, they signed the union card and dues deduction authorizations, which meant they agreed to pay money to the Union. When an employee agrees to pay money to a union, before a government employer withholds money from the employee's paycheck on behalf of a union, *Janus* requires that the employee affirmatively consent to waive her right to not pay the union. The question, therefore, is whether Plaintiffs' signing of the union member card and dues deduction authorization constitutes waiver under *Janus*.

A. Defendants violated Plaintiffs' First Amendment rights by collecting dues from them without their affirmative consent.

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

1. Plaintiffs did not provide affirmative consent to pay the Union by signing the union membership card before the Supreme Court's decision in *Janus*.

Plaintiffs did not provide affirmative consent to waive their First Amendment right to not pay money to a union. The union dues authorization cards that Plaintiffs signed before the *Janus* decision cannot constitute affirmative consent because they do not meet the Court's standard for waiving constitutional rights.

The Supreme Court has long held that certain standards must be met in order for a person to properly waive his or her constitutional rights. First, waiver must be of a "known [constitutional] right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be

freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185–86 (1972). Third, because the Court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937), the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. Thus, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

The union membership forms signed by Plaintiffs fail on all these counts. They did not provide affirmative consent when they signed the union membership card and dues deduction authorization. First, by signing the union membership cards, Plaintiffs did not waive a *known* right or privilege because at the time they signed the union membership cards *Janus* had not yet been decided, so they were unaware that they were entitled to pay nothing at all. *See Curtis Pub. Co. v. Butts*, 388

U.S. 130, 144-45 (1967) (cannot waive a right before knowing of the relevant law). Nor did Local 429 or Lebanon County ever provide notice to Plaintiffs that they had a right to not pay the Union. Thus, at the time they signed the membership form, Plaintiffs did not know that they had a constitutional right to not pay the Union.

Second, Plaintiffs could not have freely waived their right to not pay money to the Union by signing the union membership cards because when they began employment with Lebanon County, they were forced to pay the Union regardless of whether they became members: either in the form of dues as a member or agency fees as nonmembers. App. 105 (Suppl. SOF). They never had the option — as they were entitled to under *Janus* — to pay *nothing*. Similarly, they did not make a *voluntary* choice to waive their right to not pay the Union because, at the time they signed the union dues authorization, they were required to pay Local 429 either as a member or as a nonmember in the form of agency fees.

Finally, there is no clear and compelling evidence that Plaintiffs wished to waive their constitutional right to pay no money to the union. One cannot presume that Plaintiffs intended to waive their constitutional

right by signing the union membership card and dues deduction authorization to join Local 429, because that decision was constrained by the fact that at the time they no choice but to pay Local 429 regardless of whether they joined because nonmembers were required to pay agency fees.

2. *Janus* applies retrospectively at the time Plaintiffs, as nonmembers, signed the union membership cards.

Local 429 and Lebanon County can find no safe harbor by claiming they were operating in accordance with pre-*Janus* case law. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), the Supreme Court explained that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *See also United States v. Security Industrial Bank,* 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) ("Judicial decisions have had retrospective operation for near a thousand years"); *Kolkevich v. AG of the United*

States, 501 F.3d 323, 337 n.9 (3rd Cir. 2007) (declining to apply a ruling "only in a purely prospective fashion"). This Court has called it a "truism" that "in the context of adjudication, retrospectivity is, and has since the birth of this nation been, the norm." *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 394 (3d Cir. 1994). The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

Applying the rule of *Janus* retrospectively to the moment when Plaintiffs signed their union dues authorization, in order for Lebanon County to withhold money from Plaintiffs' paychecks on behalf of the Union, it needed clear and compelling evidence that Plaintiffs freely, voluntarily, knowingly, and intelligently provided affirmative consent to waive of their right not to pay money to the Union. There is no clear and compelling evidence in this case that Plaintiffs freely, voluntarily, knowingly, and intelligently wished to waive their right not to pay money to the Union. Without affirmative consent, any dues withheld from Plaintiffs were unconstitutional and therefore need to be returned.

Local 429's liability for dues paid by Plaintiffs, therefore, extends backward before *Janus*; limited only, if at all, by a statute of limitations

defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. *Harper*, 509 U.S. at 97. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98–99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976); *Pasha v. United States*, 484 F.2d 630, 632–33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835 (5th Cir. 1973). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

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

B. Plaintiffs' damage claims for a refund of their dues are not mooted by the fact that the Union paid some of their dues back.

Although Local 429 refunded Plaintiffs' dues from the dates of their resignation letters, App. 105 (Suppl. SOF), Plaintiffs have consistently sought the full refund of all their dues, stretching back to when they forced to begin paying money to the union upon starting their job. App. 105 (Compl.). Pennsylvania's statute of limitations is two years, see 42 Pa. Consol. Stat. § 5524(2), so if Local 429 asserted this defense, Plaintiffs would be owed back dues from March 2017. Because *Janus* is applied retroactively, *see Harper*, 509 U.S. at 97, Plaintiff's claim for a refund of dues extends all the way back to when Lebanon County began withholding dues on behalf of the Union since neither the Union nor Lebanon County ever obtained affirmative consent to take such dues from Plaintiffs. Since the Union only refunded dues withheld after September 2018 (at the *earliest*), Plaintiffs' claim for damages in the form of the return of union dues is not mooted by the Union's refund.

C. The actions of the Union and Lebanon County to deprive Plaintiffs of their First Amendment rights involve state action.

There can be no argument that Defendants did not act under color of state law in enforcing its Constitutionally-offensive dues collection provisions. As the Seventh Circuit has recently held in *Janus v. AFSCME Council 31,* 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"), the defendant union acted under color of state law when the Illinois Department of Central Management Services "deducted . . . fees from employees' paychecks and transferred that money to the union." *Janus II* at 361.

Any attempt to differentiate this case from *Janus II* by asserting that the source of Plaintiffs' alleged harm is the Union's membership agreement not any state statute or collective-bargaining-agreement provision must fail because such a distinction is irrelevant to the Seventh Circuit's reasoning in *Janus II.* The Seventh Circuit noted that "[w]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II* at 361, quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478 (1988) (quote marks omitted). In *Janus II,* the defendant union "was a joint participant with the state in the agency-fee arrangement," and spent

the money garnered from the plaintiff's paycheck "on authorized labor-management activities pursuant to the collective bargaining agreement." *Id.* The Court found this "sufficient for the union's conduct to amount to state action." *Id.* Here, Plaintiffs were the victim of an unconstitutional scheme between Lebanon County and the Union — the exclusive representative of County employees — to garnish their wages and spend the money on union activities. The distinction between union dues and agency fees is thus irrelevant.

The key connection between Lebanon County and the Union establishing state action on behalf of the Union is that but for state law, the Union would have no entitlement to any portion of Plaintiffs' wages whatsoever. *Davenport v. Wash. Ed. Ass'n*, 551 U.S. 177, 187 (2007). State labor laws establish the conditions governing "the union's extraordinary state entitlement to acquire and spend other people's money." *Id. See also Smith v. United Transp. Union Local No. 81*, 594 F. Supp. 96, 99 (S.D. Cal. 1984) ("The state action in the instant case is the law, implemented by the Union and the Transit District, which allows the Union to operate an agency shop and thus compel non-members to finance

Union political expression."); *Lutz v. Int'l Ass'n of Machinists and Aerospace Workers*, 121 F. Supp. 2d 498, 505 (E.D. Va. 2000) ("state action [] is the source of" the union's "authority to impose a fee on nonmembers.").

The state action underlying Plaintiffs' complaint is Lebanon County's deduction of union dues from her wages, without her affirmative consent, for the purposes of subsidizing a political organization (the Union). *See Int'l Ass'n of Machinists Dist. Ten and Local Lodge 873 v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018); *Stewart v. N.L.R.B.*, 851 F.3d 21, 22 (D.C. Cir. 2017); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 201 (2018) ("[S]tate statutes authorizing the collection of agency fees are unconstitutional state action, just as in *Lugar* [*v. Edmonton Oil Co.*, 457 U.S. 922, 934 (1982)]. And the unions 'invoked the aid of state officials' to collect those fees, just as in *Lugar*.") (footnotes omitted).

Further, dues deduction authorizations signed by government employees are not simply contracts between two private actors. First, a dues-deduction authorization is a three-party assignment, not a traditional two-party contract. 29 U.S.C. § 186(c)(4) (part of the Taft-Hartley

Act) provides, "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." (emphasis added). *Accord* 5 U.S.C. § 7115 (referring to payroll union dues authorizations by federal employees as a "written assignment"). There are a number of cases which also refer to dues-deduction authorizations as an assignment, not as contract. *See, e.g., NLRB v. Cameron Iron Works, Inc.,* 591 F.2d 1, 3 (5th Cir. 1979); *Brotherhood of Locomotive Firemen & Enginemen v. Northern P. R. Co.*, 274 F.2d 641 (8th Cir. 1960). Dues-deduction authorizations or collective bargaining agreements themselves often also use the language of assignment. *See, e.g., NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d 396, 398 (4th Cir. 1977); *Ozolins v. Northwood-Kensett Community Sch. Dist.*, 40 F. Supp. 2d 1055, 1071 (N.D. Iowa 1999); *Halsey v. Cessna Aircraft Co.*, 626 P.2d 810, 811 (Kas. App. 1981).

As a three-party assignment, union authorizations clearly involve state action: the employee (party one) directs the public employer (party two) to assign a portion of his wages to the union (party three). The state is an integral party to the process, and thus execution of the authorization is appropriately considered state action subject to First Amendment scrutiny.

Alternatively, unions in other contexts have argued that dues deduction authorizations are contracts between the employer (in this case, Lebanon County) and the employee. *See, e.g., Int'l Ass'n of Machinists Dist. Ten*, 904 F.3d at 492 ("A dues-checkoff authorization is a contract between an employer and employee for payroll deductions. . . . The union itself is not a party to the authorization . . ."). If the dues authorization is a contract with Lebanon County as employer, then clearly it is state action and not a private contract.

Even if the dues authorization is a private contract between the employee and the union — which it is not — it is well-established that private contracts that require a person to waive a constitutional right must meet certain standards for informed, affirmative consent without pressure, which the union cannot do here. *Fuentes v. Shevin*, 407 U.S. 67

(1972) (establishing the standards for waiver of constitutional rights in private contracts, drawing upon *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972)).

Thus, there is no basis for the argument that no state action existed in the scheme by which Lebanon County withheld union dues from Plaintiffs on behalf of Local 429 pursuant to the Collective Bargaining Agreement and state law.

D. The Union does not have a good-faith defense for taking dues from Plaintiffs against their will.

The magistrate judge's Report and Recommendation, adopted by the District Court, found that Plaintiffs' § 1983 damages claims were barred by a defense of good-faith reliance upon then existing law. App. 147-148. But the magistrate judge and the District Court failed to differentiate Plaintiffs' claim for damages. Even if the good faith defense applies, it would apply only to dues taken from Plaintiffs before the Supreme Court's decision in *Janus*, on June 27, 2018. But Plaintiffs sought damages in the amount of dues taken since the they signed the union membership card through the time that Lebanon County eventually stopped withholding dues on behalf of the Union, subject only to the statute of limitations. That includes dues taken from Plaintiffs after the decision

in *Janus* on June 27, 2018. For that time period, the Union cannot say it was relying in good faith upon *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), as the law as it existed at the time the dues were taken, because after *Janus* it was clear that *Abood* had been overruled and could not be relied upon.

It is true that the Union returned dues deductions taken from all Plaintiffs from the time they submitted their resignation letters until the time when dues deductions from Plaintiffs' paychecks ceased. App. 088–098 (SOF). But the Union never returned dues taken from Plaintiffs from June 27, 2018, the day *Janus* was decided, until the day each Plaintiffs submitted their resignation letters. Plaintiffs, therefore, are entitled to damages in the amount of dues withheld from their paychecks from June 27, 2018 until the date of the resignation letters. And the Union may not rely on the good faith defense in opposing these damages because the Union could no longer rely on *Abood* once *Janus* had been decided. Further, these claims for damages are not moot, like those dues withheld after the date of Plaintiffs' respective resignation letters, because the Union never paid those dues back to Plaintiffs. App. 025–035.

1. This Court should not rely on *Diamond* because it is distinguishable and incorrectly decided.

As stated, the magistrate judge held that Plaintiffs' damages (at least damages sought for dues withheld prior to the Supreme Court's decision in *Janus* on July 27, 2018), were barred by a defense of good faith reliance upon then existing law. App. 147–148. The magistrate judge's Report and Recommendation relied on the Seventh Circuit Court of Appeals decision in *Janus II*,[1] 942 F.3d at 364, and this Court's decision in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994).

Subsequent to the Report and Recommendation and the District Court order adopting it, this Court issued a decision in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020). In *Diamond*, this Court, in a 2–1 decision, held that plaintiffs who were nonmembers required to pay agency fees prior to *Janus* were not entitled to recover that money. 972 F.3d. at 268. The two majority judges on the

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[1] Plaintiff in *Janus II* filed his petition for certiorari to the United States Supreme Court on March 9, 2020. The Supreme Court has distributed and rescheduled that petition for conference eight times. The Court most recently had set the petition for its January 15, 2021 conference, but rescheduled it on January 14 without setting a new date. Should the Court grant the petition in *Janus II*, it could not only overturn *Janus II*, but this Court's holding in *Diamond* on which the Union's good-faith defense relies.

panel in *Diamond* reached a different conclusion on why defendant had no retroactive § 1983 liability. Judge Rendell accepted that private parties may assert an affirmative good faith defense to damages liability under § 1983. *Id.* at 269. In a concurring opinion, Judge Fisher did not recognize an affirmative good faith defense, but relied on the history of § 1983 to conclude that the union had no retroactive civil liability. *Id.* at 284. Judge Phipps, dissenting, found no categorical good faith defense to § 1983 liability and rejected Judge Fisher's alternative limit on retroactive § 1983 liability. *Id.* at 287-290. *Diamond's* application here, in the first place, is questionable.

Further, *Diamond* does not completely dispose of Plaintiffs' claims for damages. As explained above, Plaintiffs' claims for damages after the *Janus* decision but before the date on which Plaintiffs respectively resigned are not subject to the good faith defense. *Diamond* held that the union was not liable under § 1983 for agency fees withheld prior to the Supreme Court's decision in *Janus*, on June 27, 2018. Even if *Diamond* applied to Plaintiffs' claims for damages of union dues taken out before the *Janus* decision, it certainly does not apply to dues after the *Janus* decision on June 27, 2018. The Union clearly could not have a good-faith belief that

it could take money from employees without affirmative consent after the Supreme Court issued *Janus*. Contrary to the magistrate judge's and District Court's conclusion, the good faith defense (subsequently adopted by one judge in *Diamond*) does not preclude Plaintiffs' entire claim for damages.

In addition, this Court should not rely on *Diamond* to find that a good-faith defense is available to the Union as a defense from Plaintiffs' damages claims for dues withheld before *Janus* was decided. In *Diamond*, only one judge, Judge Rendell, held that the good faith defense was available to defendant. *Diamond*, 972 F.3d at 271. Judge Fisher, concurring in the judgment, rejected the categorical good faith defense that Judge Rendell and some other circuits had recognized. *Id.* 274. Judge Fisher and Judge Phipps agreed that there is no good faith defense to Section 1983. *Id.* 285. Thus, a majority of the panel in *Diamond* held that there is no good-faith defense available to the union in that case. For that reason alone, this Court should find that the Union in this case is not entitled to a good faith defense to Plaintiffs' claims for damages for dues taken prior to the *Janus* decision.

It is true that Judge Fisher found an alternative limit to Section 1983

liability. According to Judge Fisher, prior to 1871, "[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision." *Id.* at 274. But this Court should not rely on Judge Fisher's alternative theory to limit the Union's Section 1983 liability in this case, either. As Judge Fisher acknowledges, the common law only limited retroactive civil liability with regard to financial transactions or agreements *without duress of fraud*. *Id.* at 281. But in this case, it cannot be said that the financial transactions between the Union and Plaintiffs was without duress. Indeed, under the law at the time Plaintiffs signed the union membership card, Plaintiffs were *required* to pay money to the Union, either as a member in the form of dues, or in the form of agency fees as a nonmember. In other words, the financial transaction between Plaintiffs and the Union was one of duress. Plaintiffs were forced to pay the Union no matter what. Thus, Judge Fisher's common law application limiting the Union liability does not apply.

Yet, even if this Court is not bound by *Diamond*, it still should not

adopt the reasoning of Judge Rendell's decision in *Diamond*, *id*. at 270–71, that a good-faith defense is available to the Union and/or required by *Jordan*, 20 F.3d at 276.

2. A good-faith defense is not available for Section 1983 claims for a violation of First Amendment rights.

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The elements and defenses material to different constitutional and statutory deprivations vary considerably.

The good-faith defense this Court recognized in *Jordan*, on which the magistrate and District Court relied, and on which Judge Rendell in Diamond relied, does not help the Union because, unlike in claims arising from abuses of judicial processes, malice, and lack of probable cause are not elements of a First Amendment deprivation under *Janus*. And in this respect, *Diamond* was incorrectly decided.

"[S]ection 1983 does not include any *mens rea* requirement in its text." *Jordan,* 20 F.3d at 1277. However, there can be a "state of mind requirement specific to the particular federal right underlying a Section 1983 claim." *Id.* Unlike with malicious prosecution or abuses of process claims,

"free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). A compelled speech violation, in particular, does not require any specific intent (much less malice). Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial.

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

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

Plaintiff's First Amendment claim has no common law analogue. The Supreme Court explained that "[c]ompelling a person to subsidize the speech of other private speakers" violates the First Amendment because

it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common law torts. It is peculiar to the First Amendment. There is no basis for importing the elements of any common law tort into a First Amendment, compelled-subsidization-of-speech claim.

This includes malice and probable cause elements of an abuse of process tort. "[T]he tort of abuse of process requires misuse of the *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (emphasis added). That means an action literally taken by a court. *Id.* "Misuse of an administrative proceeding—even one that is quasi-judicial—does not support a claim for abuse of process." *Id.* Moreover, the tort exists to protect the integrity of the judicial process and litigants from harassment. *See* 8 Am. Law of Torts § 28:32 (2019). In contrast, the First Amendment prohibits compelled speech to protect individual autonomy and government distortion of the marketplace of ideas. *See Janus*, 138 S. Ct. at 2464. There is no basis to import an abuse-of-process tort's malice and probable cause elements into Plainitffs' First Amendment claim. To do so would defy *Janus*, which requires only that a government

union seize money from individuals without their affirmative consent. 138 S. Ct. at 2486.

3. A good-faith defense is incompatible with the text of Section 1983.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Section 1983 means what it says: "[u]nder the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg*, 566 U.S. at 361 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)) (emphasis added).

A good-faith defense to Section 1983 cannot be reconciled with the statute's mandate that "every person" — not some persons, but "every person" — who deprives a party of constitutional rights "shall be liable to the party injured in an action at law . . ." The term "shall" is not a permissive term, but a mandatory one. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013) (comparing a statute's permissive "may" with the "mandatory" "shall"). The statute's plain language requires that Local 429 be held liable to Plaintiffs for damages.

4. A good-faith defense is incompatible with the statutory basis for qualified immunity and Local 429's lack of that immunity.

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

Owen v. City of Independence, 445 U.S. 622, 657 (1980) (holding municipalities lack qualified immunity).

Private defendants are not usually entitled to qualified immunity. *See Richardson*, 521 U.S. at 409–11; *Wyatt*, 504 U.S. at 164–65. A narrow exception to that rule is for private individuals who "perform[] duties [for the government] that would otherwise have to be performed by a public official who would clearly have qualified immunity." *Williams v. O'Leary*, 55 F.3d 320, 324 (7th Cir. 1995) (citation omitted) (private physician contracted to provide medical services at state prison); *see, e.g., Filarsky*, 566 U.S. at 393–94 (holding private attorney retained by a city to conduct an official investigation entitled to qualified immunity).

Local 429 has never claimed qualified immunity to Section 1983 liability. And nor could it. There is no history of unions enjoying immunity before section 1983's enactment in 1871. Public sector unions did not exist at the time. The government's interest in ensuring that public servants are not cowed by threats of personal liability has no application to the union.

The relevance of the foregoing is three-fold. First, qualified immunity law shows that exemptions to Section 1983 liability cannot be created out

of whole cloth. Immunities are based on the statutory interpretation that Section 1983 did not abrogate entrenched, pre-existing immunities. *See Filarsky*, 566 U.S. at 389–90. The good-faith defense to Section 1983 which Local 429 asserts, by contrast, is based on nothing more than (misguided) notions of equity and fairness. Given that courts "do not have a license to create immunities based on [their] view[s] of sound policy," *Rehberg*, 566 U.S. at 363, it follows that courts do not have license to create equivalent defenses to Section 1983 liability based on policy reasons.

Second, unlike with recognized immunities, there is no common law history prior to 1871 of private parties enjoying a good-faith defense to constitutional claims. As one scholar recently noted: "[t]here was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment." William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49 (2018); *see Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (Justice Marshall rejecting a good faith defense "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."); *Anderson v. Myers*, 238 U.S. 368, 378 (1915) (rejecting good-faith defense).

Finally, it is anomalous to grant defendants that lack qualified immunity the functional equivalent of an immunity under the guise of a "defense." Yet that is what Local 429 seeks here. Qualified immunity bars a damages claim against an individual if his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That accurately describes the ostensible "defense" the union asserts. It makes little sense to find that defendants who are not entitled to qualified immunity to Section 1983 damages liability are nonetheless entitled to substantively the same thing, but under a different name.

5. A good-faith defense to Section 1983 is inconsistent with equitable principles that injured parties be compensated for their losses.

"As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). That especially is true here. There is nothing equitable about depriving relief to victims of constitutional deprivations. Nor is there anything equitable about letting wrongdoers like

SEIU keep ill-gotten gains. Equity cannot justify writing into Section 1983 a defense found nowhere in its text.

If anything, equity favors enforcing Section 1983 as written, for "elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 654. The Supreme Court in *Owen* wrote those words when holding municipalities are not entitled to a good-faith immunity to Section 1983. The Court's two equitable justifications for so holding are equally applicable here.

The *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id*. at 651. That injustice also should not be tolerated here. Countless victims of constitutional deprivations will be left remediless if defendants to Section 1983 suits can escape liability by showing they had a good faith, but mistaken, belief their conduct was lawful. Those victims include not just Plaintiff and other public employees. Under the union's argument, every defendant to every Section 1983 damages claim can as-

sert a good faith defense. For example, the municipalities that the Supreme Court in *Owen* held not to be entitled to a good-faith immunity could raise an equivalent good-faith defense, leading to the very injustice the Court sought to avoid.

The *Owen* Court further recognized that Section "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52 (emphasis added). The same rationale weighs against a good-faith defense to Section 1983.

E. Plaintiffs have standing for their claims for declaratory relief.

The District Court held that Plaintiffs' claims for declaratory relief were moot because the Union allowed them to resign and refunded the Union dues they paid after they sent their letters of resignation. App. 141–45.

In this case Plaintiffs sought declaratory relief and damages against the Union in the form of dues taken from them, and not returned, since they signed the union dues authorizations, subject only to a statute-of-limitations defense.[2] As explained above, even assuming a good-faith defense applies to Plaintiffs' claim for damages for dues taken before the *Janus* decision on July 27, 2013, and even assuming that Plaintiffs' claims for damages for dues withheld after their respective resignation letters, which the Union returned, renders Plaintiffs' damages claim for those specific damages moot, that still leaves Plaintiff's damages claims for dues withheld after Janus on July 27, 2018 and before the dare of Plaintiffs' respective resignation letters. Plaintiffs allege that they are entitled to this money in damages because their signing of the union membership card did not constitute affirmative consent to waive their right to not pay money to the Union, as explained above. The declaratory relief that Plaintiffs seek is a necessary foundation to their theory for damages. The fact that the Union returned dues withheld from Plaintiffs'

[2] While Plaintiffs' Complaint did initially seek injunctive relief in the form of and injunction to stop the withholding of dues from Plaintiffs' paychecks by Lebanon County, App. 110 (Compl.), Plaintiffs acknowledge that their request for injunctive relief is moot. However, Plaintiffs' claims damages and declaratory relief are not moot.

after they wrote their resignation letters is irrelevant to their claims for damages before the date of the resignation letters and after the Court's decision in *Janus*. Plaintiffs' request for declaratory relief supporting those claims 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 (2012). Here, Plaintiffs' claim for damages remains and their request for declaratory relief supports their claim for damages. In order to grant damages, the Court would also need to grant at least two of their requests for declaratory relief: (1) Plaintiffs' signing of the union dues deduction authorization did not constitute their affirmative consent to waive her First Amendment rights upheld in *Janus*, and (2) withholding union dues from Plaintiffs' paychecks was unconstitutional because they did not provide affirmative consent.

In addition, Plaintiffs 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 Plaintiffs, to stop union dues from being withheld from their

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 Plaintiffs, 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 Plaintiffs' signing of the union membership cards do not constitute their affirmative consent to waive their First Amendment rights upheld in *Janus*, and Plaintiffs are 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 Plaintiffs after the time they signed the union card and before they withdrew from the Union is unconstitutional.

Therefore, Plaintiffs' request for a declaratory judgment that 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 are unconstitutional is not moot.

Even if all of Plaintiffs' damages claims were moot or subject to a good faith defense — which they are not — Local 429's attempt to moot this case by refunding Plaintiffs their money and allowing them to resign does not relieve the Union and Lebanon County from having to defend the unconstitutional policy that they continue to enforce against any employee who is not determined enough, or has the means, to sue.

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

The Ninth Circuit has already rejected a similar argument on mootness that Local 429 presents here. As it explained:

> Although no class has been certified and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory

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

Fisk v. Inslee, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2-3 (9th Cir. Dec. 17, 2018).[3] The Ninth Circuit recognized that claims

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

like Plaintiffs' would never be addressed by courts if the union is allowed to moot them by refunding dollars to individual plaintiffs. Indeed, since most windows are annual, few cases would reach judgment in a district court, much less have the opportunity for appellate review.

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

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

567 U.S. at 307. As in *Knox,* here Local 429 wishes to avoid this Court determining the legality of its policies.

It is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is sufficient . . . that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court there pointed to *Roe v. Wade,* 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire,* 416 U.S. at 125. This policy continues to impact present interests, as Local 429 and Lebanon County continue to enforce it. This continuing direct effect on the behavior of public employees is grounds for this Court's issuance of a declaration that these provisions of the collective bargaining agreement, and the statutes they rely on, are unconstitutional.

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

Recognizing the Union as Plaintiffs' exclusive representative for bargaining purposes violates their First Amendment rights of speech and association. They cannot be forced to associate with a group that they disagree with.

A. The Commonwealth Defendants do not have Eleventh Amendment immunity against Count II of the Complaint.

Below, the Commonwealth Defendants argued, and the District Court appeared to accept, that the Commonwealth Defendants are immune from suit by the Eleventh Amendment to the U.S. Constitution. But the Eleventh Amendment is not a bar to a suit against an unconstitutional law. The Commonwealth Defendants are the state officials charged with enforcing 43 P.S. § 1101.606. And while it is true that the Eleventh Amendment bars damages or other forms of retroactive financial relief, Count II[4] does not seek such relief. It seeks declaratory and

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[4] In their motion for summary judgment, Commonwealth Defendants appear to have sought immunity from liability from Count I of Plaintiffs' Complaint. Doc. 37, pp. 15–17 (Commonwealth Mot.), but none of the relief Plaintiffs seek in Count I involve the Commonwealth Defendants. (See App. 102–06, 108–10 (Compl.). The magistrate judge seems to

injunctive relief against the Commonwealth Defendants, enjoining them from enforcing 43 P.S. § 1101.606.

B. Forcing Plaintiffs to have the Union serve as their exclusive representative is unconstitutional.

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

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have suffered from the same confusion: "The Eleventh Amendment Bars The Plaintiffs' Damages Claims Against State Agencies or State Officials Acting in Their Official Capacity." App. 061–63. Again, Plaintiffs do not seek damages against the Commonwealth Defendants.

speech.

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

Legally compelling Plaintiffs to associate with the Union demeans their First Amendment rights. Although the issue has not been directly before the Supreme Court, it has questioned whether exclusive-representation in the public-sector context imposes a "significant impingement" on public employees' First Amendment rights. *Janus*, 138 S. Ct. at 2483; *see Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014); *Knox v. Service Employees*, 567 U. S. 298, 310–11 (2012). Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). Exclusive representation

forces the employees "to voice ideas with which they disagree, [which] undermines" First Amendment values. *Janus*, 138 S. Ct. at 2464. Pennsylvania laws command Plaintiffs' involuntary affirmation of objected-to beliefs. The fact that she retains the right to speak for herself in certain circumstances does not resolve the fact that the Union organizes and negotiates as her representative in her employment relations.

Exclusive representation is also forced association: Plaintiffs are forced to associate with the Union as their exclusive representative simply by the fact of their employment in this particular bargaining unit. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Yet Plaintiffs have no such freedom, no choice about their association with the Union; it is imposed, coerced, by the Commonwealth's laws.

Exclusive representation is therefore subject to at least exacting scrutiny, if not strict scrutiny. It must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 597 U.S. at 310. This the Defendants cannot show. *Janus* has already dispatched "labor peace" and the so-called "free-rider problem" as sufficiently compelling interests to justify

this sort of mandate. 138 S. Ct. at 2465-69. And Plaintiffs are not seeking the right to form a rival union or to force the government to listen to their individual speech. They only wish to disclaim the Union's speech on their behalf. They are guaranteed that right, not to be forced to associate with the Union and not to let the Union speak on her behalf by the First Amendment.

C. The Magistrate Judge and the District Court's reliance on *Knight* is misplaced.

In *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984), the Supreme Court held that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the issue, "The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273.

The plaintiffs in *Knight* were community college faculty who dissented from the certified union. *Id*. at 278. The Minnesota statute at issue required that their employer "meet and confer" with the union alone

regarding "non-mandatory subjects" of bargaining. The statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276. The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations.

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

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

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

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

Knight is, therefore, not responsive to the question Plaintiffs now raise: whether someone else can speak in their name, with their imprimatur granted to it by the government. They do not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify the Union's voice. They do not demand that the government schedule meetings with them, engage in negotiation, or any of the other demands made in *Knight*. They only ask that the Union not do so in their name.[5]

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

CONCLUSION

For the reasons stated above, this Court should reverse the District Court's orders denying Plaintiffs' motion for summary judgment and granting Local 429, Lebanon County, and the Commonwealth Defendants' motions for summary judgment.

Dated: January 14, 2021

Respectfully submitted,

/s/ Jeffrey M. Schwab

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COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

Certificate of Bar Admission

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

Certificate of Compliance

I certify that this brief contains 11,404 words, excluding the items exempted by Fed. R. App. P. 32(f), in compliance with Fed. R. App. P. 32(a)(7)(B)(i) and 32(g)(1).

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.

Electronic Document Certificate

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

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

/s/ Jeffrey M. Schwab
January 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2021, I electronically filed the foregoing Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jeffrey M. Schwab

Counsel for Plaintiffs-Appellants

No. 20-1824

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HOLLIE ADAMS, JODY WEABER, KAREN UNGER, and CHRIS FELKER

Appellants

v.

TEAMSTERS UNION LOCAL 429, LEBANON COUNTY, ATTORNEY GENERAL JOSH SHAPIRO, in his official capacity, JAMES M. DARBY, Chairman, Pennsylvania Labor Relations Board; ALBERT MEZZAROBA, Member, Pennsylvania Labor Relations Board; and ROBERT H. SHOOP, JR., Member, Pennsylvania Labor Relations Board, in their official capacities

Respondents

On Appeal from the United States District Court
for the Middle District of Pennsylvania
No. 1:19-cv-00336
Hon. Sylvia H. Rambo

APPENDIX – Volume I, pp. 001-014

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

Hollie Adams, et al., Plaintiffs, v. Teamsters Union Local 429, et al., Defendants.	Case No. 1:19-CV-0336 Judge Sylvia H. Rambo **Notice of Appeal**

Plaintiffs Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker respectfully appeal to the United States Court of Appeals for the Third Circuit from the District Court's Memorandum (Dkt. 67) and Order (Dkt. 68), entered March 31, 2020, granting the motion for summary judgment filed by Defendants James M. Darby, Albert Mezzaroba, Robert H. Shoop, Jr., and Attorney General Josh Shapiro; and the District Court's Order (Dkt. 69), entered March 31, 2020, granting the summary judgment motions filed by Defendant County of Lebanon and Defendant Teamster Union Local 429, and denying the summary judgment motion filed by Plaintiffs Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker.

Dated: April 15, 2020

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

Dated: April 15, 2020

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

HOLLIE ADAMS, et al.,	:	**Civil No. 1:19-CV-336**
Plaintiffs,	:	
v.	:	
TEAMSTERS UNION LOCAL 429, et al.	:	
Defendants.	:	**Judge Sylvia H. Rambo**

O R D E R

Before the court is a report and recommendation ("R&R") of Magistrate Judge Carlson (Doc. 55) in which he recommends that the motion for summary judgment filed by Defendants James M. Darby, Albert Mezzaroba, Robert H. Shoop, Jr., and Attorney General Josh Shapiro (collectively, "the Commonwealth Defendants") (Doc. 26) be granted in its entirety. For the reasons explained in the accompanying memorandum, **IT IS HEREBY ORDERED** as follows:

1) The R&R is **ADOPTED**;

2) The Commonwealth Defendants' motion for summary judgment is **GRANTED**; and

3) All claims against the Commonwealth Defendants are **DISMISSED**.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
UNITED STATES DISTRICT JUDGE

Dated: March 31, 2020

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

HOLLIE ADAMS, et al.,	:	**Civil No. 1:19-CV-336**
Plaintiffs,	:	
v.	:	
TEAMSTERS UNION LOCAL 429, et al.	:	
Defendants.	:	**Judge Sylvia H. Rambo**

O R D E R

Before the court is Magistrate Judge Carlson's report and recommendation ("R&R") (Doc. 56) regarding three motions for summary judgment filed by: (1) Defendant County of Lebanon (Doc. 25); (2) Defendant Teamster Union Local 429 (Doc. 27); and (3) Plaintiffs Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker (Doc. 43). Plaintiffs have timely submitted objections to the R&R, which the court has thoroughly reviewed. (Doc. 58.)

Viewing the objections globally, the court finds that Plaintiffs' arguments do not rely upon law that is binding on this court. Instead, it appears that Plaintiffs are preparing to file an appeal that they hope will result in changes to the law. For example, Plaintiffs effectively ask the court to predict, based on dicta, that the Supreme Court intends to overturn *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984)—a Supreme Court case that has not been overturned and which explicitly held unions are constitutionally permitted to operate as

exclusive representatives—and thus rule that unions are constitutionally barred from operating as the exclusive representative of a group of employees. Additionally, Plaintiffs argue the good-faith defense should not apply to Section 1983 claims against private entities and then fail to cite or distinguish any authority discussing the good-faith defense. The court thus finds none of these objections accurately characterize the law binding on this court. Instead, the court agrees with the R&R's description of the governing law and its applicability to Plaintiffs' claims.

As such, **IT IS HEREBY ORDERED** as follows:

1) The R&R is **ADOPTED** in in its entirety;.
2) The motions for summary judgment filed by Defendants County of Lebanon and Teamster Local Union 429 are **GRANTED**, and Plaintiffs' claims against them are **DISMISSED, WITH PREJUDICE**;
3) The motion for summary judgment filed by Plaintiffs is **DENIED**; and
4) The Clerk of Court is **DIRECTED** to close this case.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
UNITED STATES DISTRICT JUDGE

Dated: March 31, 2020

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

HOLLIE ADAMS, et al.,	:	**Civil No. 1:19-CV-336**
Plaintiffs,	:	
v.	:	
TEAMSTERS LOCAL UNION 429, et al.,	:	
Defendants.	:	**Judge Sylvia H. Rambo**

M E M O R A N D U M

Before the court is a report and recommendation ("R&R") of Magistrate Judge Carlson (Doc. 55) in which he recommends that the motion for summary judgment filed by Defendants James M. Darby, Albert Mezzaroba, Robert H. Shoop, Jr., and Attorney General Josh Shapiro (collectively, "the Commonwealth Defendants") (Doc. 26) be granted in its entirety. Plaintiffs have timely filed objections to the R&R. (Doc. 57.) For the reasons set forth below, the R&R will be adopted.

I. BACKGROUND

Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker (collectively, "Plaintiffs") are Lebanon County employees who either joined Teamsters Union Local 429 ("the Union") or signed an agreement to pay agency fees[1] as nonmembers of the Union, due to a set of Pennsylvania statutory schemes and a collective

[1] Agency fees are charges made to non-union members, which are lower than fees paid by union members. These were permitted under pre-*Janus* case law.

bargaining agreement ("CBA"). Years after Plaintiffs came to their arrangements with the Union, however, necessary parts of the CBA and governing statutes were rendered unconstitutional by *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Shortly after the Supreme Court decided *Janus*, the plaintiffs who were members of the Union filed requests to be withdrawn from it, while those who were paying agency fees as nonmembers submitted requests that agency fees cease being deducted from their wages. Some Plaintiffs were immediately granted their requests and others were denied due to a maintenance of membership provision in the CBA.

On February 27, 2019, Plaintiffs filed suit against Lebanon County, the Union, and the Commonwealth Defendants. (Doc. 1.) Plaintiffs brought two claims. Count 1 is a Section 1983 claim alleging that "Defendants Lebanon County and Teamsters" violated Plaintiff's first amendment rights by compelling them to join the Union or pay agency fees through an unconstitutional scheme. (Doc. 1, p. 10 (emphasis deleted).) Count 2 is a Section 1983 claim brought against the Commonwealth Defendants, asserting that the Pennsylvania statutes authorizing unions to operate as exclusive representatives are unconstitutional. (Doc. 1, p. 14.)

Shortly after Plaintiffs filed suit, Defendants took actions to: (1) ensure all Plaintiffs were deemed nonmembers of the Union; (2) cease dues deductions from Plaintiffs' wages; and (3) refund Plaintiffs all dues deducted from their wages plus interest.

On May 20, 2019, the Commonwealth Defendants filed a motion to dismiss for lack of jurisdiction and failure to state a claim. (Doc. 26.) The court proceeded to convert the motion to one for summary judgment. (Doc. 35.) The parties then briefed the motion, which was referred to Magistrate Judge Carlson.

On December 3, 2019, Magistrate Judge Carlson issued an R&R recommending that the motion be granted in full, dismissing all claims against the Commonwealth Defendants. (Doc. 55, p. 20.) The R&R's logic is that: (1) the requests for injunctive relief against the Commonwealth Defendants were moot because Plaintiffs were removed from the Union, were no longer having dues deducted, and had dues reimbursed; and (2) any claims for damages against the Commonwealth Defendants were barred by the Eleventh Amendment.

On December 17, 2019, Plaintiffs submitted their objections to the R&R. (Doc. 57.) These matters are now fully briefed and thus ripe for review.

II. STANDARD OF REVIEW

When objections are timely filed to the report and recommendation of a magistrate judge, the district court must review *de novo* those portions of the report to which objections are made. 28 U.S.C. § 636(b)(1); *Brown v.* Astrue, 649 F.3d 193, 195 (3d Cir. 2011). Although the standard is *de novo*, the extent of review is committed to the sound discretion of the district judge, and the court may rely on the recommendations of the magistrate judge to the extent it deems proper. *Rieder v.*

Apfel, 115 F. Supp. 496, 499 (M.D. Pa. 2000) (citing *United States v. Raddatz*, 447 U.S. 667, 676 (1980)).

For those sections of the report and recommendation to which no objection is made, the court should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b), advisory committee notes; *see also Univac Dental Co. v. Dentsply Intern., Inc.*, 702 F. Supp. 2d 465, 469 (M.D. Pa. 2010) (citing *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987) (explaining judges should give some review to every report and recommendation)). Nonetheless, whether timely objections are made or not, the district court may accept, not accept, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); L.R. 72.31.

III. DISCUSSION

Plaintiffs raise three objections to the R&R, two of which the court will address together. In their first and third objections, Plaintiffs argue that the R&R improperly issued advisory opinions concerning Count 1 and sovereign immunity because Count 1 was not pleaded against the Commonwealth Defendants and Plaintiffs did not request damages from them. In their second objection, Plaintiffs contend that the R&R did not discuss the substance of Plaintiffs' exclusive representation claim against the Commonwealth Defendants. Plaintiffs

acknowledge, however, that the other R&R issued by Magistrate Judge Carlson in this case both substantively addressed the exclusive representation claim and stated that it may implicate the Commonwealth Defendants. Plaintiffs request that the court address the issue to preserve their right to appeal. As the court will explain below, Plaintiffs' objections fail to demonstrate that the R&R erred in recommending that the Commonwealth Defendants' motion be granted.

Beginning with Plaintiffs' first and third objections, the court has thoroughly reviewed Plaintiffs' complaint. While their claim against the entirety of the Commonwealth Defendants—who have exercised distinct actions relevant to this case—is rather unclear, the court agrees that Plaintiffs have not asserted a claim against the Commonwealth Defendants in Count 1. However, because Plaintiffs "do not disagree with the Report's statement of the law of immunity and the Eleventh Amendment" (Doc. 57, p. 5),[2] the only implication of their objection is that the analysis is dicta. While the court will not specifically reference either Count 1 in its order, neither of these objections affect the court's granting of the Commonwealth Defendants' motion nor the adoption of the R&R.

Turning to Plaintiffs' second objection, the court agrees that *this* R&R did not directly address Plaintiffs complaint that it is allegedly unconstitutional for unions

[2] Plaintiffs argue, in a footnote, that they have certain objections to the R&R's analysis in a separate brief, but Local Rule 7.8(a) states that "[n]o brief may incorporate by reference all or any portion of any other brief."

to operate as exclusive representatives, however, the corresponding R&R addresses it at length. The court finds that the R&R's analysis of the law and Plaintiffs' claim is correct, as several courts have held that, even in light of *Janus*, unions may constitutionally operate as exclusive representatives. (*See* Doc. 56, pp. 23-26.)[3] Plaintiff's second objection will therefore be overruled.

IV. CONCLUSION

For the reasons outlined above, the court will adopt the R&R by granting the Commonwealth Defendants' motion for summary judgment and dismissing all claims against them with prejudice.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
UNITED STATES DISTRICT JUDGE

Dated: March 31, 2020

[3] Plaintiffs also fail to include, in the brief supporting their objection to this R&R, any legal basis for why their exclusive representation claim should go forward. Instead, they merely violate Local Rule 7.8(a) a second time by incorporating other briefing by reference.