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' REPLY BRIEF

Jeffrey M. Schwab
jschwab@libertyjusticecenter.org
Daniel R. Suhr
dsuhr@libertyjusticecenter.org
Liberty Justice Center
208 South LaSalle St., Ste. 1690
Chicago, Illinois 60604
Phone: 312-637-2280

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

Attorneys for Plaintiffs-Appellants

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I. The question in this case is whether Plaintiffs freely provided affirmative consent to waive their First Amendment right to not pay the Union by signing the union membership card.

In *Janus v. AFSCME, Council 31*, the Supreme Court explained that *any* payment to a union can be deducted from a public employee's wages *only* if that employee "affirmatively consents" to waive the right to not pay a union. 138 S. Ct. 2448, 2486 (2018). Such a waiver cannot be presumed and must be freely given and shown by "clear and compelling" evidence. *Id.* "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.*

The correct question in this case is whether Plaintiffs' signatures of the union dues authorization cards constitute affirmative consent to waive their First Amendment right to not pay the union, thereby permitting the County to withdraw money from their paychecks on behalf of the Union. Following Supreme Court precedent, including *Janus*, dictates that the answer to this question is no.

A. Defendants misstate the relevant issue in the case.

Defendants Teamsters Union Local 429 and County of Lebanon ignore the Supreme Court's "affirmative consent" test in *Janus*, and instead focus on whether Plaintiffs' signatures of the union deductions agreements were compelled or voluntary. Union Br. 15; County Br. 13. But the mere fact that Plaintiffs chose to join the Union does not necessarily mean that they properly waived their First Amendment right not to pay money to the Union. *See* Appellant's Br. 11-13. The way Defendants frame the case incorrectly assumes that the *Janus* waiver test is either inapplicable or that voluntarily signing a union dues deduction authorization *always* constitutes a waiver of one's First Amendment rights.

B. The *Janus* waiver test — whether Plaintiffs' signing of the union membership card constitutes affirmative consent to waive their First Amendment right — is applicable in this case.

The *Janus* waiver test applies to "an agency fee [or] *any other payment to the union* . . . deducted from a nonmember's wages." *Janus*, 138 S. Ct. at 2486 (emphasis added). The Union asserts that Plaintiffs are not nonmembers and therefore *Janus* does not apply. Union Br. 17. But employees are not born union members. They become union members by signing a union membership card. Before Plaintiffs signed the union

membership card, they were nonmembers. Because all employees are nonmembers when they first sign a union membership card and authorize dues deductions, the *Janus* waiver test applies any time a public employer withholds any money from an 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 — "such waiver cannot be presumed. . . . [T]o be effective, the waiver must be freely given and shown by 'clear and compelling' evidence . . ." *Id.* In contrast, this sentence clearly *does not* apply to an employee in Janus's position. Janus never agreed to pay and never waived his First Amendment rights. The only way an employee in Janus's position — a nonmember of the union — could voluntarily pay money to a union would be for that employee to join the union. Thus, the only way for the second sentence of the *Janus* waiver analysis to apply — where a nonmember agrees to pay a union — is when a nonmember employee agrees to pay

money to the union by signing the union card and dues deduction authorization and becoming a member. That is exactly the position Plaintiffs are in. When they were nonmembers, they signed the union card and dues deduction authorization, which meant they agreed to pay money to the union. By doing so, the Supreme Court said they are waiving their First Amendment right. The Court held that waiver cannot be presumed — in other words, the *Janus* waiver test must apply.

The clear language of the Court's decision in *Janus* shows that the Court intended to apply the waiver test set forth in *Janus* to situations like this case — inquiring whether Plaintiffs' signing of the union membership card and dues-deduction authorization, constituted a proper waiver of their First Amendment rights.

Waiver of a constitutional right must be freely given, *Janus*, 138 S. Ct. at 2486, "voluntary, knowing, and intelligently made," *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972), by "clear and compelling" evidence, *Janus*, 138 S. Ct. at 2486. In other words, in order to show that Plaintiffs waived their constitutional right to not pay money to the Union, there must be clear and compelling evidence that they freely, voluntarily, knowingly, and intelligently waived that right.

C. Plaintiffs' signing of the union membership card before the Supreme Court's decision in *Janus* does not constitute affirmative consent to waive their right to not pay the Union.

Plaintiffs' signing of the union membership card does not meet the waiver standards. First, they did not *knowingly* waive their right because *Janus* had not yet been decided, so they were unaware of their right to pay nothing to the Union. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144–45 (1967) (one cannot waive a right before knowing the relevant law). Second, they did not *freely* waive their right to pay nothing to the Union because when they began employment with the County, they were forced to pay the Union either in the form of an agency fees as a nonmember or in the form of membership dues. For the same reason, their waiver could not have been *voluntary*. Nor is there clear and compelling evidence that Plaintiffs wished to waive their constitutional right to pay no money to the Union. The mere fact that they signed the union membership card cannot serve as clear and compelling evidence that they wished to waive their right to pay nothing to the Union since at the time they signed it, they would have still been compelled to pay the Union without signing the membership card. Thus, Plaintiffs did

not waive their right to not pay the Union by signing the union membership card.

Local 429 asserts that Plaintiffs' choice to join the Union is not proscribed by the First Amendment. But applying *Janus*'s waiver test would not affect the Unions' contracts with members at all. It simply would require waiver before the public employer withholds money from an employee on behalf of the union. Since most other private associations do not rely on the government to collect dues on their behalf, the *Janus* waiver test does not apply. Because the Union relies on government to withhold dues from the employees' paychecks on the union's behalf, those employees must properly waive their rights under *Janus*.

Local 429 asserts that there is no First Amendment right to renege on contractual obligations. Union Br. 19. And while that may generally be true, the Union's assertion begs the question in this case. Here, the issue is whether the union dues-deduction authorization signed by Plaintiffs constitutes a waiver of their constitutional right to not pay money to the union. While a party cannot defeat a valid contract that waives one's First Amendment rights after-the-fact, see *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the question in this case is whether the

contract itself validly constituted a waiver of Plaintiffs' rights. And the Supreme Court has long-recognized that 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.*, 405 U.S. 174 (1972)).

The Union's reliance on *Coltec Industries, Inc. v. Hodgood*, 280 F. 3d 262 (3d Cir. 2002), is inapposite. Union Br. 21. In that case, a coal company entered into a settlement agreement for a lawsuit it filed under the Coal Industry Retiree Health Benefit Act of 1992. When the Supreme Court subsequently found application of that Act to companies similar to the plaintiff unconstitutional, the coal company attempted to reopen the claims it had already waived via the settlement agreement, which the court rejected. *Id.* at 274–75. In contrast, here, Plaintiffs never settled claims they wished to reopen. Plaintiffs are not attempting to undo a contract because the circumstances changed. Plaintiffs argue that the contract itself is invalid because it lacked their knowing, affirmative consent.

The Union points to *United States v. Brady*, 397 U.S. 742 (1970), for the proposition that changes in intervening constitutional law do not invalidate a contract. Union Br. 21. In *Brady*, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment. 397 U.S. at 743–44. Defendant waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id.* at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id.* at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication. *Id.* at 748. But even after the Supreme Court struck down the death penalty as unconstitutional, Brady's choices between pleading guilty or going to trial were the same. There was no "third option" the defendant could have taken that was unconstitutionally withheld from him. In contrast, in this case before *Janus*, Plaintiffs were given the option of paying money to the Union as a member or as a nonmember. They were not given the option of paying nothing to the Union. It was the deprivation of this choice that prevented Plaintiffs in this case from making a knowing, voluntary choice to waive their constitutional right to not pay the union.

Local 429 asserts that even if *Janus* waiver analysis applied, that the Plaintiffs' signatures on the union membership and dues deduction authorization cards would constitute waiver because the union membership card "clearly stated their intent to apply for membership in the Union," "states that non-membership is an option," and the dues deduction agreements "make plain that the signatory's intent is to authorize dues deductions." Union Br. 23. But the Union's analysis simply ignores the right that *Janus* protected and the requirements *Janus* set forth to provide waiver. As *Janus* made clear, public employees have a right to not have their government employers withhold money on behalf of public sector unions unless the employee affirmative consents to waive that right. *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*. The Union asserts that simply by agreeing to join the union, knowing that one does not have to join the union, and by signing the dues authorization form, that Plaintiffs provided waiver of their right to not have their employer withhold money from their paychecks on behalf of the Union. But Plaintiffs could not have provided affirmative consent to freely and knowingly waive their right to not have their

employer withhold money on behalf of the Union because they were given the unconstitutional choice between having the County withhold dues as a member or agency fees as nonmembers — either way, the County would withhold money from their paychecks on behalf of the Union. They did not waive a *known* right or privilege because *Janus* had not yet been decided, so they were unaware that they were entitled to pay nothing at all. *See Curtis Pub. Co.*, 388 U.S. at 144–45 (cannot waive a right before knowing of the relevant law).

The Union misstates the relevant right at issue as "the right not to join [the Union]." Union Br. 24. The relevant right at issue in this case is not the right to not join the Union, but rather the right of Plaintiffs to not have their government employer withhold money from their paychecks on behalf of the union. That right was not established until *Janus* because before then Plaintiffs were required to pay money to the Union either by the County withholding union dues on behalf of the Union or the County withholding agency fees on behalf of the Union.

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 they intended to waive their constitutional

right by their decision to join Local 429, because that decision was constrained by the fact that at the time they were unconstitutionally forced to pay Local 429 whatever decision they made — the County would withhold money on behalf of the Union from Plaintiffs' paycheck either as a member or as agency fees for nonmembers.

D. Defendants' actions to deprive Plaintiffs of their First Amendment rights involve state action.

The Union asserts that there is no state action in this case and therefore Plaintiffs have no proper Section 1983 claim. Union Br. 26.

Yet the Seventh Circuit has held that a union engages in state action when it uses the machinery of the government to impose and collect dues through a statutory scheme, collective bargaining agreement, and state payroll system. *Janus v. AFSCME Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus II*").[1] This Court has not held to the contrary.

[1] Many district courts have concluded that there was state action in cases similar to Plaintiffs'. *See O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392, at *13 (C.D. Cal. Sep. 30, 2019); *Grossman v. Haw. Gov't Emples. Ass'n/Afscme Local 152*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866, at *17 n.10 (D. Haw. Jan. 31, 2020); *Hernandez v. AFSCME Cal.*, No. 2:18-CV-02419 WBS EFB, 2019 U.S. Dist. LEXIS 219379, at *16 (E.D. Cal. Dec. 19, 2019); *Kabler v. United Food & Commercial Workers Union*, No. 1:19-CV-395, 2019 U.S. Dist. LEXIS 214423, at *41 (M.D. Pa. Dec. 11, 2019); *Laspina v. SEIU Pa. State*

The Union's claim that there is no state action in this case cannot be reconciled with *Janus* or *Janus II*. Nor can it be reconciled with the body of case law finding state action to be present in cases concerning state procedures for garnishing monies or property from individuals. *See Lugar v. Edmonton Oil Co.*, 457 U.S. 922, 941 (1982) (state procedure for attaching property); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (state garnishment of bank account); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (state garnishment of employees' wages); *Jackson v. Galan*, 868 F.2d 165, 167–68 (5th Cir. 1989) (same); *Copelan v. Croasmun,* 84 F. App'x 762, 763 (9th Cir. 2003) (state assistance to execute writ for property).

The Union attempts to distinguish *Janus II* by asserting that the sources of the deprivation in that case were a state statute and the collective bargaining agreement between the public employer and the union. Union Br. 29. But the state action is the same in either context: a government entity and union acting jointly together to deduct and collect payments for a union from employees. Whether these payments are

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Council, 2019 U.S. Dist. LEXIS 168917, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019).

called agency fees or union dues makes no difference. As the Supreme Court stated in *Janus*: "[n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486 (emphasis added). "When private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II*, 942 F.3d 361 (*quoting Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (quote marks omitted)). "[A] private entity can qualify as a state actor in a few limited circumstances — including . . . when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

The Union claims that this case is distinguishable because "the County in this case merely implemented the private membership and voluntary payroll deduction agreements between each Plaintiff-Appellant and the Union." Union Br. 30. But the source of Plaintiffs' alleged constitutional harm is not their signing the membership agreement. The state action here is the same as state action in *Lugar* (and *Janus*):

the government seizure of money or property pursuant to a state-created "system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." *Lugar,* 457 U.S. at 942; *see also 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*. And the unions 'invoked the aid of state officials' to collect those fees, just as in *Lugar*.") (footnotes omitted).

Further, both the collective bargaining agreement between the Union and the County and the Pennsylvania Public Employe Relations Act ("PERA") authorized the County to withhold money from an employee's paycheck on behalf of the Union. App. 082. Here, the County, as Plaintiffs' employer, did not simply withhold dues on behalf of any private entity: Local 429 was the majority-designated exclusive bargaining representative of the bargaining unit under PERA. App. 085.

The Union's mischaracterization of the County's role in deducting union dues from dissenting employees' wages as "purely ministerial"

also misses the mark. Union Br. 28. There is nothing "ministerial" about a County systematically deducting thousands in union dues from hundreds of its employees throughout the year.

In *Jackson*, the Fifth Circuit rejected an argument that a public official was "not a state actor" because his "garnishment of appellee's wages was a ministerial duty which he was required to perform under state law." 868 F.2d at 167–68. The court recognized that, "[s]tate officials acting pursuant to a state statute are acting under color of state law for purposes of § 1983, regardless of whether state law gave them any discretion in carrying out their duties." *Id*. at 168.

The Union mischaracterizes the dues deduction authorizations contained in the union cards that Plaintiffs signed as being a private agreement between the union and employees. Union Br. 27. To the contrary, the County is a party to the authorizations. "A dues-checkoff authorization is a contract between an employer and employee for payroll deductions." *Int'l Ass'n of Machinists*, 904 F.3d at 492. The union membership card Plaintiffs signed contained a dues-deduction authorization whereby the employees authorize their employer to deduct dues from

their wages and remit them to the Union. County Br. 15. The County is a necessary party to those dues-deduction authorizations.

The Union asserts that it is not a state actor. Union Br. 30. Yet it is not operating as a private association, but rather as the government-authorized agency-shop. When it acts in that capacity, it acts in such close concert with the state that its actions are fairly attributable as state actions. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977) (a public-sector union when undertaking actions pursuant to a union-shop agreement is state action). All of the Union's actions in this case also followed a collective bargaining agreement with the County that, among other things, required the County to withhold dues from employees' paychecks on behalf of the Union. App. 086. Such an agreement shows the deep intertwining between the government and the union, such that decisions made by the Union pursuant to the bargaining agreement constitute state action. *See Beck v. Communications Workers of Am.*, 776 F.2d 1187 (4th Cir. 1985); *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971). *See also Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

There is an overwhelming degree of state action present here: the County is withholding money from its employees on behalf of the Union with authority from the collective bargaining agreement between the County and the Union and state law.

E. Plaintiffs are entitled to declaratory relief and damages in the amount of dues taken from their wages without their affirmative consent to waive their right to pay nothing to the Union.

The Union argues that a "good faith" defense from Section 1983 liability precludes Plaintiffs' claim for a refund of pre-*Janus* membership dues under this Court's decision in *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020). But as Plaintiffs pointed out in their opening brief, a majority of the panel in *Diamond* held that there is no good-faith defense available to the union in that case. Appellants' Br. 30. The Union agrees that only one judge, Judge Rendell, found a good faith defense in *Diamond*, yet the Union asserts that Judge Fisher "agreed that the union should *not* be held retroactively liable for fair share fees because plaintiff failed to assert facts 'suggesting that their payments were either sufficiently involuntary or exacted on a fraudulent basis' and concurred with Judge Rendell in the result, *i.e.*, that the union had

no retroactive liability." Union Br. 35. Even so, the Union cannot dispute Plaintiffs' point that the majority in *Diamond* did not adopt a good-faith defense, and thus, a good-faith defense is not required by precedent. The Union relies on *Oliver v. SEIU Local 668,* 830 Fed. Appx. 76, 77-78 (3d Cir. 2020), to say that a three-judge panel in that case did find that defendant had a good faith defense. But that three-judge panel deemed their opinion "Not Precedential" and therefore, this Court is not bound by the *Oliver* decision.

And, in any event, Judge Fisher's conclusion that the union had no retroactive liability is based on his conclusion that those fees were voluntary or not exacted on a fraudulent basis. But as Plaintiffs explained in their opening brief, 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. Appellants' Br. 31. Plaintiffs were forced to pay the Union no matter what. Thus, Judge Fisher's common law application limiting the Union liability does not apply and the Union cannot rely on his outcome in *Diamond*.

The Union asserts that Plaintiffs "wrongly claim that *Jordan* limits the good faith defense to constitutional torts for which malice and lack

of probable cause are elements of the constitutional claim." Union Br. 36. But the Union's reading of *Jordan* ignores its specific language and its context. This Court in *Jordan* held, in the context of deciding defendants' liability under § 1983 for making use of Pennsylvania's established procedure for executing on a confessed judgment, that it was "in basic agreement" with the Fifth Circuit decision that "'[p]rivate defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity.'" *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1276 (7th Cir. 1994) (*quoting Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993)). This Court in *Jordan* looked to the torts of malicious prosecution and abuse-of-process to define the elements of the due process claim before the courts, which arose from an alleged misuse of judicial procedures. The Court found malice and lack of probable cause to be elements of such claims. *Jordan*, 20 F.3d at 1276; *see also Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992); *id.* at 172–73 (Kennedy. J., concurring).

Jordan, and the cases on which it relied, held that good faith reliance on existing law can defeat the malice and probable cause elements of a

constitutional claim arising from malicious prosecution or an abuse of judicial process. That was the claim at issue in those cases. *See Wyatt*, 504 U.S. at 160 (state court complaint in replevin); *Jordan*, 20 F.3d at 1276–77 (state court judgment and garnishment process); *see also Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988) (state court prejudgment attachment order); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996) (state court prejudgment attachment procedure).

Jordan limited the "good faith" defense to claims in which malice and lack of probable cause are elements. But those elements are unnecessary to establish liability for a violation of the First Amendment under *Janus*. 138 S. Ct. at 2486. *Janus* does not require proof of malice or a lack of probable cause. It would defy *Janus* to add those additional elements to the claim. Therefore, the "good faith" defense that rebuts those elements has no application to the First Amendment claim made here.

Given that malice and probable cause are not elements of a First Amendment claim made under *Janus*, it is irrelevant what tort is most analogous to such claims. Common law is merely a guide for determining the elements of § 1983 claims. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 920–21 (2017). That guide is unnecessary when, as here, the

Supreme Court has already defined the elements of the claim. *See Janus,* 138 S. Ct. at 2486. Nonetheless, the Union claims that the closest common law tort analogy here is to abuse of process. Union Br. 36. But abuse of process requires misuse of the *judicial* process. *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008); *see also Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009) (first element of malicious prosecution in Pennsylvania is that "the defendants initiated a criminal proceeding"); *Tulp v. Educ. Comm'n for Foreign Med. Graduates*, 376 F. Supp. 3d 531, 545 (E.D. Pa. 2019) (first element of abuse of process in Pennsylvania is that the defendant "used a legal process against him"). That means an action literally taken by a court. *Tucker,* 515 F.3d 1037. In contrast, a First Amendment claim is not limited to defendant's use of a court. Thus, there is no basis to import an abuse-of-process tort's malice and probable cause elements into Plaintiffs' First Amendment claim. *See Janus*, 138 S. Ct. at 2486.

The Union asserts that *Jordan* forecloses Plaintiffs' contention that the recognition of a "good faith" defense is incompatible with the text of § 1983. Union Br. 37. But *Jordan* did not find a broad "good faith" defense to § 1983, which would be incompatible with its text. Defenses to

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

The Union additionally contends that *Jordan* forecloses Plaintiffs' argument that the adoption of a § 1983 good faith defense for private parties is incompatible with the statutory basis for qualified immunity and the Union's lack of that immunity. Union Br. 37. But, again, *Jordan* did not find a broad, general "good faith" defense to § 1983. Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012). Courts accord an immunity only when a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine' when it enacted Section 1983." *Richardson v. McKnight*,

521 U.S. 399, 403 (1997) (citation omitted). Here, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364. This Court in *Jordan* did not hold otherwise.

Finally, the Union asserts that applying the good faith defense is consistent with equitable principles because it bears no fault for acting in reliance on state law and Supreme Court precedent. Union Br. 38. Even if enforcing § 1983 were considered unfair to defendants who relied on state law, it would certainly be *more unfair* to make victims of those defendants' conduct pay the costs. *See Janus*, 138 S. Ct. at 2486 (noting "the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.") It is not fair to make victims of constitutional deprivations pay for the Union's unconstitutional conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Independence*, 445 U.S. 622, 654 (1980). *Owen* held that municipalities are not entitled to a good faith

immunity to § 1983. The Court's equitable justifications for so holding are equally applicable here.

For these reasons, there is no broad "good faith" defense available to every private defendant under § 1983 or available to the Union barring Plaintiffs' § 1983 claims for damages.

But as Plaintiffs point out in their opening brief, even if this Court accepts Judge Rendell's good faith defense in *Diamond*, that defense does not bar all of Plaintiffs' claims for damages; only damages in the form of union dues taken prior to the Supreme Court's decision in *Janus* on June 27, 2018. Any dues taken after June 27, 2018, that Plaintiffs seek as damages are not covered by the "good faith" defense since the Union could not have had a good faith belief after *Janus* that taking dues without Plaintiffs' affirmative consent to waive their right to not pay money to the Union was constitutional. Appellant's Br. 26.

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. If the Court decides that the Union may assert a good faith defense, Plaintiffs are at least entitled to damages in the amount of the 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.

As Plaintiffs explained in their opening brief, Plaintiffs' damage claims for dues withheld after the date of the *Janus* decision on July 27, 2018 and before the date of Plaintiffs' respective resignation letters, are valid even if this Court adopted the good faith defense. Appellants' Br. 40. And those damage claims support their claims for declaratory relief. Appellants' Br. 40-44. The Union and the County ignore these claims for damages, and therefore incorrectly conclude that Plaintiffs' claims for declaratory relief are moot. *See* Union Br. 41-45; County Br. 21-24.

II. Forcing Plaintiffs to associate with the Union as their exclusive representative violates their First Amendment rights.

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

Like the District Court, Defendants assert that the Supreme Court's decision in *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271

(1984), forecloses Plaintiffs' argument that forcing them to associate with Local 429 as their exclusive representative violates their First Amendment rights to free speech and freedom of association. Union Br. 46; Commonw. Br. 14. The issue in *Knight* was whether the plaintiffs "have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. That question is fundamentally different from Plaintiffs' claim that the government cannot compel them to associate with Local 429 by authorizing the Union to bargain on their behalf. Appellant's Br. 53–55.

Nonetheless, Local 429 asserts that the Court went on to consider whether Minnesota's public employee labor relations act violated the right to speak and the right to "associate or not to associate," finding that speech rights were not infringed because, while the exclusive representative's status "amplifie[d] its voice in the policymaking process," that amplification did not "impair[] individual instructors' constitutional freedom to speak." Union Br. 48 (*citing Knight* 465 U.S. at 288; *accord* Commonw. Br. 15. But Defendants are wrong. The Court was not considering whether Minnesota's public employee labor relations act

violated the right to speak and the right to "associate or not to associate." Rather, it was still addressing the question of whether there is a constitutional right to be heard. The Court explained that the government's right to "choose its advisers" was upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288. The *Knight* Court raised the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id.* This is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

The Court in *Knight* did not directly address whether exclusive representation, by itself, violates the speech or associational rights of public employees who are not members of the union and does not foreclose Plaintiffs' claim that their First Amendment rights are violated by forcing them to have the Union serve as their exclusive representative.

Nor is the Commonwealth Defendants' assertion that *Janus* "expressly approved of exclusive representation schemes" credible. Commonw. Br. 20. The Commonwealth Defendants quote *Janus* as saying that "the State may require that a union serve as exclusive bargaining agent for its employees." Commonw. Br. 33 (*quoting Janus*, 138 S. Ct. at 2478). But the full quote provides: "*It is also not disputed that* the State may require that a union serve as exclusive bargaining agent for its employees—*itself a significant impingement on associational freedoms that would not be tolerated in other contexts*." *Janus*, 138 S. Ct. at 2478 (emphasis added). Far from "expressly approv[ing] of exclusive representation schemes," the Court was simply stating that Mr. Janus had not brought a claim challenging the constitutionality of exclusive representation schemes. And the Court's comments that such schemes are themselves a "significant impingement on associational freedoms that would not be tolerated in other contexts," *id*., is far from a solid endorsement.

B. Forcing Plaintiffs to have Local 429 serve as their exclusive representative is unconstitutional.

Local 429 asserts that even if *Knight* did not foreclose Plaintiffs' argument, that their claim is properly denied because the Union's representation of Plaintiffs' bargaining unit says nothing about their *own*

views or positions, so there is no compelled *expressive* association. Union Br. 52 (*citing Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65, 69 (2006)). But this ignores the fact that the Court's "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *Rumsfeld*, 547 U.S. at 63. Pennsylvania's exclusive representation requirement takes away dissenting employees "choice . . . not to propound a particular point of view," a matter "presumed to lie beyond the government's power to control" in the same way that compelling a parade organizer to accept a group carrying a banner with an unwanted message. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). The fact that Plaintiffs must speak out to distance themselves from the Union's speech on their behalf escalates, not diminishes, their constitutional injury. *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). In any event, the Union's reliance on *Rumsfeld* is inapposite: while "a law school's decision to allow recruiters on campus is not inherently expressive," 547 U.S. at 64, the Union's advocacy on matters of public concern

in the context of collective bargaining surely is, *see Janus*, 138 S. Ct. at 2475–77.

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

The "labor peace" concept was borrowed by *Abood*, 431 U.S. at 220–21, from the Court's jurisprudence concerning Congress's Commerce

Clause power to regulate economic affairs. *See, e.g.*, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937). That the promotion of labor peace might justify congressional regulation of economic affairs, subject only to rational-basis review, says nothing about whether labor-peace interests suffice to clear the higher bar of First Amendment scrutiny. The Court's cases recognize that the First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791, 795 (1988). But that is in essence what the labor peace rationale does.

CONCLUSION

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

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Respectfully submitted,

/s/ Jeffrey M. Schwab

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

Jeffrey M. Schwab
jschwab@libertyjusticecenter.org
Daniel Suhr
dsuhr@libertyjusticecenter.org
Liberty Justice Center
208 S. LaSalle St., Ste. 1690
Phone: 312-637-2280
Fax: 312-263-7702

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COUNSEL

I, Jeffrey M. Schwab, hereby certify the following:

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

2. I certify that this brief contains 6470 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).

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/s/ Jeffrey M. Schwab
March 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2021, I electronically filed the foregoing Appellants' Reply 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