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18 **UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

20 Isaac Wolf,
21 Plaintiff,

22 v.

23 University Professional & Technical
24 Employees, Communications Workers of
25 America Local 9119 et al.,
26 Defendants.

Case No. 3:19-cv-02881-WHA

**PLAINTIFF’S JOINT RESPONSE IN
OPPOSITION TO DEFENDANTS’
MOTIONS FOR SUMMARY
JUDGMENT**

Hearing Date: September 3, 2020
Time: 8:00 A.M.
Courtroom: 12
Judge: Hon. William Alsup

Action Filed: July 30, 2019

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INTRODUCTION

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2 Plaintiff, Isaac Wolf, hereby submits this Joint Response in Opposition to the
3 Motions for Summary Judgment filed by the Defendants in this case. *See* Defendant
4 UPTE’s Notice of Motion and Motion for Summary Judgment (Fed. R. Civ. P. 56), and
5 Memorandum of Points and Authorities in Support (Dkt. 76) (“UPTE Memo”); Defendant
6 Attorney General Xavier Becerra’s Point of Authorities in Support of Motion for
7 Summary Judgment (Dkt. 75-1) (“AG Memo”); Defendant Janet Napolitano’s Notice of
8 Motion and Motion for Summary Judgment [and] Memorandum of Points and Authorities
9 in Support of Motion (Dkt. 77) (“UC Memo”). Because Wolf has already presented his
10 affirmative case in his own Motion for Summary Judgment, *see* Memorandum in Support
11 of Plaintiff’s Motion for Summary Judgment (Dkt. 78-1) (“Wolf Memo”), he limits
12 himself here to those points raised by Defendants which require a response.
13

STATEMENT OF FACTS

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15 Plaintiff included his proposed statement of facts with supporting exhibits as part of
16 his Motion. Wolf Memo at 6. After reviewing the factual submissions of the Defendants,
17 Wolf finds them generally consistent with his own submission.

18 Wolf disputes one fact from the Attorney General, which he finds immaterial to the
19 outcome of the case. The Attorney General’s submission states that Wolf “currently still
20 works” at the Lawrence Berkeley National Lab. AG Memo at 2. Plaintiff clarified in his
21 own submission that he recently changed employment. Wolf Memo at 5, n.1.

22 Regarding UPTE’s statement of the facts, Wolf does not dispute the facts, but he
23 does dispute two characterizations of the facts offered. First, Wolf disputes UPTE’s
24 characterization of his state of mind that, “He became a member so that he could attend
25 and speak his mind at members-only meetings where contract negotiations were being
26 discussed.” UPTE Memo at 4. Rather, Wolf contends that he became a member of the
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1 union because he “was not informed that he had the constitutional right to pay nothing to
2 the Union.” Wolf Memo at 7 ¶ 6.

3 Second, Wolf disputes UPTE’s characterization that represented employees “can
4 resign from membership at any time.” UPTE Memo at 3. Wolf’s Union Agreement
5 explicitly restricted his ability to withdraw his membership, and UPTE enforced that
6 provision. *See* Wolf Memo at 6-7, ¶¶ 4-5, ¶ 9. As argued on the law below, *Janus* holds
7 that a union cannot withhold dues from a nonmember; therefore, if UPTE continued to
8 withhold his dues after he requested they stop, which is an undisputed fact, Wolf
9 characterizes his position as still being forced to be a member of the Union.

10 With these caveats, Wolf’s position remains that there is no genuine dispute of
11 material fact in this case, and therefore, summary judgment is appropriate.

12 ARGUMENT

14 **I. Joint action between the Union and state officials taking money from the 15 paycheck of a state employee constitutes state action under 42 U.S.C. 1983.**

16 Defendants assert that actions taken by state officers pursuant to a state statute do
17 not constitute state action. AG Memo at 6-7; UPTE Memo at 7-12; UC Memo at 5-8.
18 When state universities use the state payroll system to deduct dues from state-issued
19 paychecks of state employees, that is the very definition of state action required for a suit
20 brought under 42 U.S.C. § 1983.

21 Moreover, the escape window time limitation that UPTE is enforcing is asserted
22 pursuant to state statutes that expressly grant the UPTE this special privilege. *See* Cal.
23 Gov’t Code §§ 1157.12(b); 3513(i); 3515; and 3583(a). California Government Code §
24 1157.12(b) sanctions the Union’s withdrawal period in this case: “Deductions may be
25 revoked only pursuant to the terms of the employee’s written authorization.” No other law
26 need be consulted to establish joint state action between the Union and the state.

27 However, the California Higher Education Employer-Employee Relations Act

1 (“HEERA”) goes further and explicitly sanctions a narrow 30-day withdrawal period at
2 the end of the multiyear life of a collective bargaining agreement: “[N]othing shall
3 preclude the parties from agreeing to a maintenance of membership provision, as defined
4 in subdivision (i) of Section 3513” Cal. Gov’t Code § 3515. A “maintenance of
5 membership” provision is limited only in that it, “shall not apply to any employee who
6 within 30 days prior to the expiration of the memorandum of understanding withdraws
7 from the employee organization by sending a signed withdrawal letter to the employee
8 organization and a copy to the Controller’s office.” Cal. Gov’t Code § 3513(i). The
9 narrow 30-day time period is repeated in the code section describing the permissible
10 forms for dues authorization: “This arrangement shall not deprive the employee of the
11 right to resign from the employee organization within a period of 30 days prior to the
12 expiration of a written memorandum of understanding.” Cal. Gov’t Code § 3583(a). By
13 following all four of these statutes, the Union is participating in “joint action” with the
14 state.

15 UPTE claims that the union agreement in this case doesn’t count as a “maintenance
16 of membership” provision because the opt-out window at issue does not occur at the end
17 of the collective bargaining agreement. UPTE Memo at 18-19. However, this provision of
18 California law is merely the bare minimum of when the opt-out provision must occur: it
19 sets a floor for how often unions must allow members to resign their membership. The
20 fact that Wolf’s 30-day opt-out window occurs every year, rather than when the collective
21 bargaining agreement expires every few years, does not mean that this statute is
22 inapplicable. Quite the opposite, it means that the Union is complying with the statute by
23 setting its opt-out window slightly above the floor required by the statute. It is still a
24 “maintenance of membership” provision because it requires Wolf to maintain his
25 membership in the Union beyond when he requested to resign. UPTE claims that Wolf did
26 resign but that he was still required to pay union dues. UPTE Memo at 5. As Wolf
27 explained in his own motion, *Janus* does not allow this bifurcation of membership in the
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1 union from the requirement to pay dues to the union. *See* Wolf Memo at 15-17. Rather,
2 dues deduction goes hand-in-hand with membership, and an employee who is not a
3 member cannot be charged any money by the union, according to the holding of *Janus*.

4 Other recent courts to consider this issue have found the actions of unions and
5 governments in deducting union moneys constitute joint state action. For example, the
6 Seventh Circuit did so in its second decision in the case of *Janus v. AFSCME, Council 31*,
7 942 F.3d 352 (7th Cir. 2019) (*Janus II*). In that decision, part of the ongoing post-
8 Supreme Court litigation in the *Janus* case itself, the issue was whether Janus could
9 recover the agency fees that had been taken from him against his will. The Seventh
10 Circuit held that the union had acted jointly with the state in deducting money from Janus:
11 “[I]f AFSCME's receipt . . . of the fair-share fees is attributable to the state, then the ‘color
12 of law’ requirement is satisfied.” *Id.* at 361. The Seventh Circuit went on to quote *Tulsa*
13 *Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988): “[W]hen private parties
14 make use of state procedures with the overt, significant assistance of state officials, state
15 action may be found.” *Janus II* at 361.

16 Similarly, the District of Hawaii came to the same conclusion of state action in a
17 case identical to the one at hand. *See Grossman v. Haw. Gov't Emples. Ass'n/AFSCME*
18 *Local 152*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866, at *17 n.10 (D.
19 Haw. Jan. 31, 2020). As in the present case, *Grossman* involved a plaintiff being denied
20 the ability to withdraw her consent to have union dues deducted from her paycheck. The
21 court found that state action gave it jurisdiction over the claim: “The Court notes that the
22 ‘under color of law’ or ‘state action’ requirement of 42 U.S.C. Section 1983 is far more
23 expansive than [the union] would have it.” *Id.* The court noted, “Misuse of power,
24 possessed by virtue of state law and made possible only because the wrongdoer is clothed
25 with the authority of state law, is action taken ‘under color of’ state law.” *Id.*, citing
26 *Monroe v. Pape*, 365 U.S. 167, 184 (1961). The court refused defendants’ attempts to
27 distinguish *Janus II*:

1 Here, [the state] deducted fair-share fees from Grossman’s paychecks and
2 transferred that money to [the union] pursuant to Hawaii statute and a
3 collective bargaining agreement. While Grossman initially had voluntarily
4 agreed to pay these dues prior to *Janus*, the dues deducted after she sent her
5 membership resignation letter were no longer voluntary or made pursuant to
6 a “private” agreement. As such, *Janus II* is not inapposite merely because the
7 case involved claims by nonmembers. 942 F.3d at 361. The dispositive fact is
8 [the union] obtained Grossman’s post-resignation dues (after she was
effectively a nonmember), and that was made possible only because of [the
union’s] joint action with the State and its statutory regime. Therefore, [the
union] is a proper defendant under Section 1983.

9 *Grossman* at *17 n.10 (citations omitted).

10 The Supreme Court has gone much further to impart state action to unions in cases
11 of unconstitutional dues deductions. This Court need look no further than the *Janus*
12 decision itself, in which the union’s deduction of agency fees constituted state action. An
13 even more extreme example is the case of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922
14 (1982), which held that a private debt collector’s actions constituted state action under §
15 1983. In that case, the Court also struck down an unconstitutional state statute because the
16 private parties “invok[ed] the aid of state officials to take advantage of state-created
17 attachment procedures.” *Id.* at 934. In the present case, UPTE has also invoked the aid of
18 state officials to take advantage of a state statutory scheme to withdraw these dues. State
19 actors carrying out these state statutes constitutes state action under § 1983, and the
20 question of whether such action is constitutional is properly before this Court.

21 The Attorney General and UPTE argue that complained-of conduct in this case is
22 not attributable to the state because it arises out of private agreements between Wolf and
23 the Union. AG Memo at 6; UPTE Memo at 9. That is not the relevant question. The
24 relevant question is whether the state required Wolf to continue paying membership dues
25 to the union after *Janus*, and the answer is that the University of California did. State
26 officials followed and continue to enforce Cal. Gov’t Code §§ 3513(i) and 3583, which
27 permitted Defendants to keep Wolf stuck as a member of the union after he withdrew his
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1 consent.

2 Among the tests for state action, “[j]oint action’ exists where the government
3 affirms, authorizes, encourages, or facilitates unconstitutional conduct through its
4 involvement with a private party.” *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013). In
5 this case, the government has affirmed, authorized, and facilitated the deduction of dues
6 from Wolf’s paycheck. The state university and the Union sat down together and
7 negotiated the contractual terms by which they would take members’ dues, and the state
8 university carried out the Union’s instructions, just as it had regarding agency fee payers
9 in *Janus*, where the Supreme Court never questioned the matter of state action.

10 Adopting Defendants’ position on state action would require this Court to ignore a
11 host of Supreme Court decisions on the subject. In *Knox v. SEIU*, union exactions were
12 held to be a First Amendment violation with requisite state action. 567 U.S. 298, 315
13 (2012). Likewise, union accounting of chargeable and non-chargeable expenses from state
14 employee paychecks constituted state action. *Chi. Teachers Union, Local No. 1 v.*
15 *Hudson*, 475 U.S. 292, 303 (1986). The Defendants’ argument would even mean that
16 *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977), which *Janus* overturned, was
17 likewise a mistake, because there could be no First Amendment question presented to the
18 Court if the union exaction had not constituted state action. Wolf humbly submits that the
19 Court should find that decades of Supreme Court cases applying First Amendment
20 standards to public sector unions were not in error.

21 Napolitano asserts that because the dues deduction depends on a private agreement,
22 it does not matter that the money it is deducted by the state University of California. UC
23 Memo at 5. But Napolitano cannot claim to be an innocent middleman, performing a
24 ministerial task because that same task was found to be state action in *Janus*. *Janus* holds
25 that “*States* and public-sector unions may no longer extract agency fees from
26 nonconsenting employees.” *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (emphasis
27 added). The state University of California is subject to a constitutional duty not to take
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1 money from nonconsenting employees. The analysis in *Janus* is premised on this idea that
2 it is the *state* that has a duty to respect its employees’ rights. *See e.g.*, 138 S. Ct. at 2463-
3 2464 (“Suppose, for example, that the State of Illinois required all residents to sign a
4 document expressing support for a particular set of positions on controversial public
5 issues—say, the platform of one of the major political parties. No one, we trust, would
6 seriously argue that the First Amendment permits this.”). The Supreme Court rejected a
7 similar line of reasoning to that offered by Napolitano when it rejected the framework of
8 *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *See Janus*, 138 S. Ct. at 2473-74. As the
9 Court explained, “Under *Pickering* and later cases in the same line, employee speech is
10 largely unprotected if it . . . involved a matter of only private concern.” *Id.* at 2473.
11 However, the *Janus* Court rejected the argument that collecting union fees regarded a
12 matter of private concern between the employee and the union, not involving the state:
13 “*Pickering* is a poor fit indeed.” *Janus*, 138 S. Ct. at 2474. Therefore, this Court should
14 follow the direction from *Janus* and reject the same argument from Napolitano.

15 Finally, that the University of California may enjoy sovereign immunity from
16 damages claims for the money it takes also does not absolve state official Napolitano from
17 her responsibility to protect her employees’ fundamental rights.

18 Therefore, this Court should find that the conduct complained of in this case
19 constitutes state action.

20 21 **II. Wolf’s signing of the Union agreement was not knowing and voluntary.**

22 *Janus* is clear that workers must not only consent to waive their First Amendment
23 rights not to pay union dues, but also they must “clearly and affirmatively consent before
24 any money is taken from them.” *Janus*, 138 S. Ct. at 2486. *Janus* further explains:

25 By agreeing to pay, nonmembers are waiving their First Amendment rights,
26 and such a waiver cannot be presumed. Rather, to be effective the waiver
27 must be freely given and shown by “clear and compelling” evidence.

1 *Id.* (internal citations omitted). Wolf’s consent was not “freely given” because he was not
2 informed of his right to pay nothing to the union. That right had not yet been recognized
3 by the Supreme Court. Therefore, the waiver of that right “cannot be presumed.” *Janus*,
4 138 S. Ct. at 2486. Wolf could not possibly have waived a right that he did not know
5 existed.

6 UPTE claims that *Janus* applies only to “nonmembers” and that it, therefore, does
7 not apply to Wolf, who was a member of the union. UPTE Memo at 15. This is wrong for
8 two reasons. First, UPTE, itself, claims that Wolf was a nonmember of the union. UPTE
9 Memo at 5. This is not just a semantic point; it has legal consequences. UPTE says that
10 Wolf was a nonmember of the union because he withdrew his consent to join the union.
11 *Id.* Once that clear and affirmative consent has been withdrawn, then the *Janus* decision
12 applies directly to him and all nonmembers: the Union must “clearly and affirmatively
13 consent before any money is taken from them.” *Janus*, 138 S. Ct. at 2486. If *Janus* stands
14 for anything at all, it stands for the proposition that you cannot bifurcate union
15 membership from the collection of union dues. If you’re a union member, the union can
16 take your money, and if you’re not, it cannot. Union dues may only be collected from
17 employees who have who have consented to their deduction. If that consent is invalid or
18 withdrawn, no money can be taken. If Wolf is not a member, then the Union cannot
19 continue to take his money.

20 Second, *Janus* bestows its First Amendment rights on all public employees in
21 America. It is not limited just to nonmember fee payers, as UPTE contends. UPTE Memo
22 at 15. The *Janus* decision is explicit in to whom it applies: “Unless employees clearly and
23 affirmatively consent before any money is taken from them, this standard cannot be met.”
24 138 S. Ct. at 2486. It is all “employees” who must “clearly and affirmatively consent.” *Id.*
25 In this case, Wolf did not consent to waiving his First Amendment right to pay nothing to
26 the Union because that right had not yet been recognized.

27 None of Defendants’ citations overcome this basic problem. For instance, UPTE
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1 invokes *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), in defense of its argument. *See*
2 UPTE Memo at 2, 17. *Cohen* is inapposite because it involves an agreement between two
3 private parties with equal bargaining position and with no enforcement mechanism by the
4 government, as exists in this case. In *Cohen* newspaper reporters agreed with their source
5 not to reveal the identity of the source. 501 U.S. at 665-66. Having made that agreement,
6 their editors then changed their minds and published the source anyway. *Id.* at 666. When
7 sued, the newspaper attempted to cover its tracks by invoking the First Amendment. *Id.*
8 UPTE cites this case to prove that parties can waive their Free Speech rights in a private
9 agreement. Wolf does not deny this conclusion, which is consistent with *Janus*. The
10 question before this Court is how and under what circumstances can such a waiver be
11 given. *Cohen* involved an arms-length agreement between two private parties with equal
12 bargaining positions. That is not the case in the present instance. Instead, UPTE has
13 admitted it added the window provision to its union agreements in light of the impending
14 *Janus* decision. *See* Wolf Memo at 8-9. This effort by the Union represented an explicit
15 attempt to trap agency fee payers in the Union before the release of the *Janus* decision.
16 His Union authorization could and should have informed Wolf that he was waiving his
17 First Amendment rights to pay nothing to the Union, yet it did not.

18 The Supreme Court in *Janus* set a different standard from that of *Cohen* for
19 “employees.” Employees are presented by unions with an adhesion contract, the terms of
20 which they cannot negotiate. They are often, as in the case of Wolf, presented this
21 contract on their jobsite, and the contract itself is enforced by their employer, who collects
22 their dues. Such employer enforcement implies tacit approval of the terms of the
23 agreement from a party who has tremendous power over workers—including the power to
24 hire and fire them. This atmosphere presents a power imbalance that is totally foreign to
25 the arms-length transaction in *Cohen*. In the public employee union context, the Supreme
26 Court has prescribed a heightened standard for waiving one’s constitutional rights: such a
27 waiver “cannot be presumed. Rather, to be effective the waiver must be freely given and
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1 shown by ‘clear and compelling’ evidence.” *Janus*, 138 S. Ct. at 2486.

2 Here, no clear and compelling evidence exists because, unlike in *Cohen*, Wolf did
3 not know of the right the Union claims he was waiving: to pay nothing at all to the Union.
4 On the other hand, the First Amendment rights of newspapers were long established when
5 *Cohen* was decided in 1991. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713
6 (1971). There was no intervening Supreme Court case that recognized a new right of
7 newspapers between when the promise was made and when the case was decided. In this
8 case, by contrast, an intervening Supreme Court decision has clarified that Wolf signed
9 his authorization subject to an unconstitutional choice between paying dues to the Union
10 or paying agency fees to the Union.

11 UPTE also cites *Circuit City Stores v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002).
12 But nothing in that opinion addresses the standards for waiving a constitutional right. The
13 opinion simply states that an arbitration agreement was enforceable when the party had a
14 reasonable chance to reject it. Moreover, unlike the Plaintiff in *Ahmed*, Wolf was never
15 given a free and fair chance to withdraw his dues deduction.

16 Another case upon which UPTE relies is *United States v. Brady*, 397 U.S. 742
17 (1970), in which a criminal defendant was held to his plea agreement. *See* UPTE Memo at
18 16. In that case, the defendant pled guilty to kidnapping and was sentenced to 50 years’
19 imprisonment. 397 U.S. at 743-44. He waived his right to trial, in part, he later claimed,
20 because he would have been subject to the death penalty. *Id.* at 744. The Supreme Court
21 later struck down the death penalty as a punishment for his offense. *Id.* at 746.
22 Nonetheless, he was held to his guilty plea because a guilty plea is part of an adjudication:
23 “Central to the plea and the foundation for entering judgment against the defendant is the
24 defendant's admission in open court that he committed the acts charged in the indictment.”
25 *Id.* at 748. The finality of judgments is not something a court undermines lightly, and the
26 Supreme Court determined it could “see no reason on this record to disturb the judgment
27 of those courts [who entered judgment against the defendant].” *Id.* at 749. There is
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1 nothing like that in this case. Wolf does not ask that this Court find its way around *res*
2 *judicata*-- only that it find an alleged contract between the parties unenforceable because
3 UPTE admits its terms were added to avoid the *Janus* decision.

4 This Court should reject this brazen attempt to work around or limit the Supreme
5 Court ruling in *Janus* and, instead, should recognize the right affirmed in the case by
6 awarding Wolf the dues he is owed.

7 8 **III. Wolf's claims are not moot.**

9 For months, Wolf was denied his right to withdraw his union membership. After
10 continuing to take his money during this period, UPTE and the government now contend
11 the case is moot, and they should not have to defend the unconstitutional policy that they
12 continue to enforce against any employee who is not determined enough to sue. Union
13 Memo at 19; *See* AG Memo at 4. This is the same avoidance strategy that other unions have
14 employed across the country, as they attempt to dodge employees who would challenge
15 them. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7
16 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it
17 would “instruct the State to end dues deductions for each Plaintiff on the one year
18 anniversary” of their membership without requiring employees to send the notice their
19 policy required). This Court should not allow the Union to avoid judicial review by picking
20 off employees one by one. A “defendant cannot automatically moot a case simply by ending
21 its unlawful conduct once sued.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing
22 *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)). Yet that is precisely
23 what the Union would like the Court to allow in this case. Wolf respectfully submits that
24 this Court should not countenance such gimmicks.

25 The Ninth Circuit has already rejected the exact same mootness argument Defendants
26 present here. As it explained:

1 Although no class has been certified and SEIU and the State have stopped
2 deducting dues from Appellants, Appellants' non-damages claims are the sort
3 of inherently transitory claims for which continued litigation is permissible.
4 *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54
5 (1975) (deciding case not moot because the plaintiff's claim would not last
6 "long enough for a district judge to certify the class"); *see also County of*
7 *Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49
8 (1991). Indeed, claims regarding the dues irrevocability provision would last
9 for at most a year, and we have previously explained that even three years is
10 "too short to allow for full judicial review." *Johnson v. Rancho Santiago*
11 *Cnty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly,
12 Appellants' non-damages claims are not moot simply because the union is no
13 longer deducting fees from Appellants.

14 *Fisk v. Inslee*, 759 F.App'x 632, 633 (9th Cir. 2019). The Ninth Circuit recognized that
15 claims like Wolf's would never be addressed by the Court if the union is allowed to moot
16 them in this way. Indeed, since most windows are annual, few cases would reach judgment
17 in a district court, much less have the opportunity for appellate review.¹ Further, the Ninth
18 Circuit recognized that its reasoning was not based on the purported class in the *Fisk* case
19 because it explicitly stated that no class had been certified.

20 Such avoidance tactics by unions are not new; they are a typical and longstanding
21 strategy to avoid judicial scrutiny. In *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), the
22 Supreme Court rejected an attempt by the union to moot a case by sending a full refund of
23 improperly exacted dues to an entire class:

24 In opposing the petition for certiorari, the SEIU defended the decision below
25 on the merits. After certiorari was granted, however, the union sent out a
26 notice offering a full refund to all class members, and the union then promptly
27 moved for dismissal of the case on the ground of mootness. Such post-
28 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

¹ The Ninth Circuit ultimately dismissed the case because of defective pleading that had failed to make the arguments in the district court that Wolf now presents to this Court. The circuit court found such arguments had been waived.

1 case moot because a dismissal for mootness would permit a resumption of the
2 challenged conduct as soon as the case is dismissed. *See City of Mesquite v.*
3 *Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152
4 (1982). And here, since the union continues to defend the legality of the
5 Political Fight-Back fee, it is not clear why the union would necessarily refrain
6 from collecting similar fees in the future.

7 *Knox*, 567 U.S. at 307. As in *Knox*, here the Union continues to assert the legality of its
8 withdrawal window policy but wishes to avoid this Court examining that legality. Unlike
9 in *Knox*, the Union has not even offered Wolf a full refund of his dues. Even if this Court
10 were to determine this claim is limited to the statute of limitations, that would amount to a
11 year's worth of dues. *See Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) (California's
12 statute of limitations for §1983 claims is one year).

13 Also, UPTE did not offer Wolf anything in satisfaction of his claims for declaratory
14 relief, nor attempt to satisfy his demand for attorneys' fees. Therefore, Wolf has a live
15 damages claim for the union dues taken from him, and his challenge to the revocation policy
16 cannot be moot. Whether Wolf should have been allowed to end his dues deduction when
17 he first requested it in November is a necessary question for the Court to answer when
18 determining whether he is owed damages, and if so in what amount. As was the case in
19 *Knox*, one question is a logical predicate of the other. Therefore, this Court must make some
20 sort of declaration of the rights of the parties in determining the amount of damages owed
21 Wolf.

22 These principles of law are not novel or unique to this case: it is well settled that
23 where a claim is capable of repetition but will evade review, courts are empowered to issue
24 declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the
25 Supreme Court recognized that “[i]t is sufficient...that the litigant show the existence of an
26 immediate and definite governmental action or policy that has adversely affected and
27 continues to affect a present interest.” The Court pointed to *Roe v. Wade*, 410 U.S. 113
28 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to

1 abortion. The Court explained that even if the need for an injunction had passed, declaratory
2 relief was still appropriate where there was “governmental action directly affecting, and
3 continuing to affect, the behavior of citizens in our society.” *Super Tire*, 416 U.S. at 125.
4 The opt-out window Wolf was subject to is a policy of the State of California, embodied in
5 an agreement it negotiated with UPTE to withhold his dues. This policy continues to impact
6 present interests, as the government defendants continue to enforce it and assert its legality.
7 This continuing direct effect on the behavior of public employees is grounds for this Court’s
8 issuance of a ruling in this case.

9
10 **IV. Wolf’s claims are properly brought in federal court, not before the PERB.**

11 Napolitano contends that Wolf’s claims “would form the basis for[] unfair practice
12 allegations against the Union under HEERA,” and therefore, “this lawsuit falls within [the
13 California Public Employee Relations Board (PERB)’s] exclusive jurisdiction.” UC Memo
14 at 13. But PERB’s role is to interpret and apply California’s labor regulations. Wolf’s claim
15 is not that UPTE is committing an unfair labor practice under California law—indeed,
16 Wolf’s injury derives in significant part from the faithful application of California law. It is
17 for that reason that, at the request of the Attorney General after depositions had been taken
18 in the case, Wolf voluntarily dismissed the Executive Director of PERB from the lawsuit.
19 (Dkt. 71.) Wolf contends, instead, that the application of California’s labor regime to him
20 abridges his First Amendment rights of speech and association. Such a suit is properly
21 before this Court under 42 U.S.C. § 1983.

22 As the Central District of California found when rejecting the exact same argument
23 from Napolitano, “PERB’s jurisdiction is not implicated here because [Plaintiff’s] claim is
24 not that the Union or Napolitano are committing an unfair labor practice, but that in
25 following California labor law, Defendants violated their First Amendment rights.”
26 *O’Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist.
27 LEXIS 208392, at *8 (C.D. Cal. Sep. 30, 2019). Wolf’s claim is not that the union has
28

1 charged dues that would be excessive or unfair under HEERA; Wolf’s claim is that being
2 charged dues at all violates the First Amendment. Whether or not the dues are appropriate
3 under California law is of no moment when considering whether they are permissible at all
4 under the U.S. Constitution.

5 Napolitano quotes several cases from California state courts which found that PERB
6 had jurisdiction over unfair labor practices. But Wolf has not alleged anything that
7 constitutes an unfair labor practice. Rather, he alleges that in following California labor law,
8 Defendants are violating the U.S. Constitution. There are only two federal citations in this
9 portion of Napolitano’s brief. The first, *Marsh v. AFSCME Local 3299*, No. 2:19-cv-02382-
10 JAM-DB, 2020 U.S. Dist. LEXIS 133767, at *23 (E.D. Cal. July 27, 2020), is
11 distinguishable. The district court in *Marsh* does not provide a full recounting of the facts,
12 but it does say, “Plaintiffs allege they only signed the Union's membership forms because .
13 . . they believed Union membership was a mandatory condition of their employment.” *Id.*
14 at 15. Both before and after *Janus*, it was unlawful to make union membership a condition
15 of employment, so perhaps the making of dishonest statements was an unfair labor practice,
16 subject to PERB jurisdiction. But this alleged unlawful activity is what distinguishes *Marsh*
17 from this case. Wolf has never claimed that he was lied to-- only that his agreement was
18 signed on the basis of a mutual misunderstanding of what his rights were. In this case, the
19 Union was following California law in depriving Wolf of his rights. That is not an unfair
20 labor practice; it is a practice that fairly follows California law and a claim that the
21 California law enforced by PERB is unconstitutional. This factual difference distinguishes
22 the *Marsh* case.²

23 The second federal citation, *Stevenson v. L.A. Unified Sch. Dist.*, was a case that
24 alleged a union breached its fiduciary duty by allowing the employer to discriminate against
25

26 ² To the extent the opinion in *Marsh* reaches further than that, Plaintiff submits that the
27 Eastern District of California was mistaken, and the better guidance is the opinion directly
28 on point from the Central District in *O’Callaghan*, quoted above.

1 the employee. No. CV 09-6497 ODW (PLAx), 2010 U.S. Dist. LEXIS 153333, at *5 (C.D.
 2 Cal. June 28, 2010). A union’s breach of fiduciary duty may well be an unfair labor practice
 3 in California, but a union enforcing the escape window at issue in accordance with
 4 California law is not.

5 Moreover, that PERB has “exclusive jurisdiction” in examining issues of California
 6 law is of no moment in a federal court when the questions asserted are of federal law.
 7 “The Civil Rights Act of 1871 . . . guarantees a federal forum for claims of
 8 unconstitutional treatment at the hands of state officials, and the settled rule is that
 9 exhaustion of state remedies is not a prerequisite to an action under [42 U. S. C.] §1983.”
 10 *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (quoting *Heck v. Humphrey*, 512 U.
 11 S. 477, 480 (1994) (internal quotation marks omitted). In contradiction of settled federal
 12 law on the subject, Napolitano asserts that Wolf must exhaust his claims in a state
 13 administrative proceeding, instead of invoking his right to a federal forum. This assertion,
 14 if accepted, would undermine the very purpose of § 1983 to give federal courts the
 15 authority to enforce constitutional rights.

16 Therefore, this Court should retain its jurisdiction over this case under § 1983.

18 CONCLUSION

19 For the reasons stated above, Wolf is entitled to a refund of union fees taken from
 20 him after he withdrew his consent on July 2, 2018. He is also entitled to a declaration that
 21 such action was an unconstitutional violation of his First Amendment rights under *Janus*.
 22

23 Dated: August 13, 2020

Respectfully submitted,

24 /s/ Brian K. Kelsey

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