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

SHALEA OLIVER, Plaintiff v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668, et al. Defendants.	CASE NO. 2:19-cv-00891-GAM *Judge McHugh*

PLAINTIFF'S RESPONSE TO SEIU 668's
MOTION FOR SUMMARY JUDGMENT

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I. Oliver is owed back all of the dues taken from her (Count I).

A. Oliver's choice to join the union was not made freely because she was forced into a choice between two unconstitutional options.

In its motion to for summary judgment, as to Count I, Defendant SEIU Local 668 ("Local 668") asserts that Plaintiff Shalea Oliver voluntarily joined the union, and "such voluntary conduct does not infringe any First Amendment rights." (Local 668's Memo. In Supp. of its Mot. for Summ. J. (hereinafter "Local 668 Memo.) at 7 (Doc. 36-1).) But Ms. Oliver's choice to join the union was not made freely. She was pushed by Local 668 and the Commonwealth into an unwanted choice: pay money to the union as a member or pay money to the union as a non-member. Either way she was going to be forced to pay money to the union. Being coerced into picking between two unwanted options is hardly a voluntary choice. *Janus* sets a higher standard: a union may only begin deducting dues after the employee grants it "affirmative consent . . . freely given." *Janus*, 138 S. Ct. at 2486. Oliver clearly did not have such a free choice.

The fact that Ms. Oliver chose to join Local 668 when she could have chosen to become a non-member does not constitute affirmative consent to waive her First Amendment right to not pay a union as a condition of her employment. In order to do so, the Supreme Court requires at least three conditions be met, none of which are satisfied in this case:

1. The waiver must be of a "known [constitutional] right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

2. 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).

3. The waiver must be shown by "clear and compelling evidence" that the employee wishes to waive his or her First Amendment right to not pay money to the union. *Janus*, 138 S. Ct. 2484.

Oliver's decision to join Local 668 and the dues authorization she signed fails on all three counts. (*See* Pl.'s Memo. in Supp. of Mot. Summ. J. at 4-6 (Doc. 34-1).)[1]

Further, courts 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), but rather should "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). In this case, when Ms. Oliver signed the union card, she could not have known that she had a First Amendment right to not pay money to the union as a non-member. Nor did she voluntarily, knowingly, or intelligently waive that constitutional right at the time she signed the union card. Finally, there is no clear and compelling evidence that Ms. Oliver wished to waive her constitutional right to pay no money to the union. And this Court should not presume that she intended to waive her constitutional rights by her mere decision to join Local 668, which was influenced by the fact that she was (unconstitutionally) forced to pay Local 668 whatever decision she made – either as a member or as a non-member. Therefore, this Court should declare the dues deduction authorization invalid.

In response, Local 668 relies on a pre-*Janus* case decided under the Railway Labor Act for the proposition that the decision to join a union is a voluntary choice. (Local 668 Memo. at 16-17, citing *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1991)). However, the Supreme Court's decision in *Janus* makes clear that the decision of a public-sector worker to join a union was a forced choice between two unconstitutional options, rendering

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[1] Local 668's reference to voiding a private contract on grounds of duress is inapposite. (Local 668 Memo. at 9 n.1). The Supreme Court's jurisprudence on what is required to waive a constitutional right is different, and provides a higher burden than voiding a contract for duress. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Kidwell inapposite. Analyzed in the light of *Janus*, it is clear that Ms. Oliver and other public-sector workers' rights did not have a voluntary choice because of a government policy that coerced them into paying money to unions to hold their jobs.

B. The union dues authorization is not a valid contract.

Local 668 argues that the dues authorization constitutes a binding contract between the union and the employee. (Local 668 Memo. at 17.) The cases it cites do not stand for the proposition it wishes. The first, *Adams v. Int'l Bhd.of Boilermakers*, 262 F.2d 835, 838 (10th Cir. 1958), states in relevant part:

> It is well settled that the relationship existing between a trade union and its members is contractual and that the constitution, charter, by-laws and regulations, if any, constitute a binding contract between the union and its members and between its members, which the courts will enforce, if the contract is free from illegality or invalidity.

Local 668 asserts here that the dues-authorization is the contract between the union and the member, whereas *Adams* says that it is the constitution and by-laws that are the contract. The dues-authorization is not mentioned by *Adams*, perhaps because the dues-authorization is not a contract between the union and the member, but between the employee and the employer.

In fact, Local 668 follows its citation to *Adams* with a cite to *NLRB v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987) with the summary proposition "dues-deduction authorization is a contract." (Local 668 Memo. at 17). First, *NLRB v. U.S. Postal Service* did not hold that the dues-deduction authorization is a contract—the opinion simply relates the fact that the NLRB has said the dues-deduction authorization is a contract. 827 F.2d at 554. And the sentence in full reads, "The Board has established that a dues-checkoff authorization is a contract between an employee and the employer." *Id.* And, in fact, unions in other contexts have argued (and courts have held) that dues deduction authorizations are contracts between the employer (in this case, the

Commonwealth) and the employee. *See, e.g., Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018) ("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 . . ."); *NLRB v. Atlanta Printing Specialties & Paper Prods. Union*, 523 F.2d 783, 785 (5th Cir. 1975). But if the dues authorization is a contract with the Commonwealth as employer, then Local 668 cannot assert any rights under the contract in this motion for summary judgment.

Further, the full paragraph from *Adams* simply begs the question: is this contract free from illegality or invalidity because of the unconstitutional choice that it forced upon Ms. Oliver? It is well-established that private contracts that require a person to waive a constitutional right must meet certain standards for informed, affirmative consent, which 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)). In this case, Ms. Oliver could not have knowingly and voluntarily waived her rights, so any contract waiving rights is invalid, as in *Fuentes*.

C. The union dues authorization includes state action.

If the dues authorization is a contract between the employee and the Commonwealth as the employer, *see Int'l Ass'n of Machinists Dist. Ten*, *U.S. Post. Serv*., and other cases cited above, then it also clearly involves state action.

Alternatively, Oliver's dues-deduction authorization could be categorized as a three-party *assignment of wages*, not a 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). In fact, the *NLRB v. U.S. Post. Serv.* case cited by Local 668 refers to the dues-authorization at issue there as a "wage assignment." 827 F.2d at 550-555.

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 again a party to the contract, with particular responsibilities for its fulfillment, and thus execution of the authorization is appropriately considered state action subject to First Amendment scrutiny.

But even if the dues authorization is a private contract between the union and the employee, the dues authorization agreement in this case still meets the test for state action. Here Local 668 is not operating as a private association, but as the government-authorized agency-shop. (Statement of Stipulated Undisputed Facts, (hereinafter "SOF"), ¶¶ 20, 22, 23 (Doc. 35).) 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 Local 668's actions in this case also followed a collective bargaining agreement with the Commonwealth that, among other things, includes a union security provision governing membership. (Doc. 1-1, Article II). Such an agreement shows the deep intertwining between the government and the union, such that decisions made by Local 668 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). In summary, state action is present because regardless of how the union card is categorized, the state is an intimately entwined participant with the union in all three scenarios, such that the test for action taken in close concert is met.

D. Oliver has a valid claim for her non-refunded dues, and good-faith is no defense to this claim.

Although Local 668 refunded Ms. Oliver's dues from August 2018 to January 2019, (SOF, ¶¶ 20, 22, 23 (Doc. 35)), Ms. Oliver has consistently sought the full refund of all her dues, stretching back to when she was forced to begin paying money to the union upon starting her job. (*See* Complaint, ¶¶ 46-47 (Doc. 1) (Pennsylvania's statute of limitations is two years, *see* 42 Pa. Consol. Stat. § 5524(2), so if Local 668 asserted this defense, she would be owed back dues from March 2017 to August 2018). This demand for the return of funds taken under an unconstitutional choice is an ongoing claim that this Court must adjudicate.

Local 668 relegates to a single footnote and string cite its claim that Count I is meritless "because Local 668 acted in good faith reliance on state law and then-binding precedent in collecting fair-share fees from non-members, and thus has a complete good faith defense to any claims for retrospective monetary relief under § 1983 arising from the change in law effected by

Janus." (Local 668 Memo at 13, n.2 (Doc. 36-1).) This footnote presumes such a good-faith defense exists and is well established in law. It is not.

There is no good-faith defense to Section 1983 liability. The ostensible defense is: (1) incompatible with the statute's text, which mandates "that "every person" who deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . ." 42 U.S.C § 1983; (2) incompatible with the statutory basis for immunities and the union's lack of an immunity; and (3) incompatible with "[e]lemental notions of fairness [that] dictate that one who causes a loss should bear the loss." *Owen v. City of Indep*., 445 U.S. 622, 654 (1980). Moreover, creating this sweeping mistake-of-law defense would undermine Section 1983's remedial purposes and burden the courts with having to evaluate defendants' motives for depriving others of their constitutional rights.

1. A good faith defense conflicts with Section 1983's text.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. 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 v. Paulk*, 566 U.S. 356, 361 (2012) (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. The statute's plain language requires that Local 668 be held liable to Plaintiff for damages.

2. A good faith defense is incompatible with the statutory basis for qualified immunity and Local 668'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*, 445 U.S. at 657 (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 668 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 668 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 668 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.

3. 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 Plaintiffs and other employees who had agency fees seized from them. Under the union's argument, every defendant to every Section 1983 damages claim can assert 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.

4. Recognizing a good faith defense to Section 1983 will undermine the statute's remedial purposes.

The Court should pause to consider the implications of recognizing this sweeping defense. Given the SEIU's argument, every defendant that deprives any person of any constitutional right

can escape damages liability by claiming it had a good faith, but mistaken, belief its conduct was lawful.

This ostensible defense would be available not just to unions, but to all defendants sued for damages under Section 1983. Of course, individuals with qualified immunity would have little reason to raise the defense, since their immunity is similar. But defendants who lack immunity, such as private parties and municipal governments, would gain the functional equivalent of a qualified immunity.

These defendants could raise a good-faith defense not just to First Amendment compelled-speech claims, but against any constitutional or statutory claim brought under Section 1983 for damages. This includes claims alleging discrimination based on race, sex, or political affiliation.

A good-faith defense is exceedingly broad. It would apply to any private party acting in concert with the state. In effect, a reasonable mistake of law would become a cognizable defense to depriving a citizen of his or her constitutional rights.

This defense would deny citizens compensation for their injuries, as well as burden the courts with having to adjudicate whether defendants acted in good faith. Courts would have to determine both if a defendant violated the Constitution and weigh the reasonableness of their subjective motives for so doing.

Even if Section 1983's text did not preclude courts from refusing to hold defendants who act in good faith liable to injured parties in actions at law—which it does—practical concerns justify not creating this massive exemption to Section 1983 liability. Doing so would undo Congress' remedial purpose in passing Section 1983.

5. Other circuit courts recognized a good faith defense not to all Section 1983 claims, but only to certain constitutional deprivations.

A close reading of the cases where a good-faith defense has been found reveals that the courts did not recognize a defense to Section 1983 writ large, but found that good faith was a defense to a particular due-process deprivation actionable under Section 1983.

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. For example, the elements of a Fourteenth Amendment due-process deprivation are different than those of a Fourth Amendment search and seizure violation. Most importantly here, state of mind is material to some constitutional deprivations, but not others. For instance, a specific intent is required in "due process claims for injuries caused by a high-speed chase," "Eighth Amendment claims for injuries suffered during the response to a prison disturbance," and invidious discrimination claims under the Equal Protection clauses. *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). In contrast, "free speech violations do not require specific intent." *Id.*

A chronological review of the case law reveals that the published appellate decisions that found defendants can raise a good-faith defense did so because bad faith and lack of probable cause were material to the Fourteenth Amendment due-process deprivations at issue in those cases. The Sixth Circuit was the first appellate court to find that private parties can raise a "common law good faith defense to malicious prosecution and wrongful attachment cases" brought under Section 1983. *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988). The court did so because malice and lack of probable cause are elements of those types of due process deprivations. *Id.*

At the time, *Duncan's* holding conflicted with other appellate decisions holding that private parties enjoy good-faith immunity to Section 1983 liability. *See id.* at 1265. A "defense" and an

"immunity" are different things: a defense rebuts the alleged deprivation of rights, while an immunity is an exemption from Section 1983 liability, even if there is a deprivation. *See Richardson*, 521 U.S. at 403. "As the *Wyatt* concurrence pointed out, a legal defense may well involve 'the essence of the wrong,' while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Id*. (quoting *Wyatt*, 504 U.S. at 171– 72 (Kennedy, J., concurring)). The Sixth Circuit in *Duncan* believed that "courts who endorsed the concept of good faith immunity for private individuals improperly confused good faith immunity with a good faith defense." 844 F.2d at 1266.

In 1992, the Supreme Court in *Wyatt* held that private parties seldom enjoy good-faith immunity to Section 1983 liability. 504 U.S. at 161, 168. *Wyatt* involved "private defendants charged with 42 U.S.C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional" for violating due process guarantees. 504 U.S. at 159. The claim was analogous to "malicious prosecution and abuse of process," and at common law, "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id*. at 164–65. The Court determined that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id*. at 165. The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167.

The *Wyatt* Court left open the question of whether the defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id*. at 168–69. As the Supreme Court later explained in *Richardson*, "*Wyatt* explicitly stated that it did not decide whether or not the private

defendants before it might assert, not immunity, but a special 'good-faith' defense." 521 U.S. at 413. The Court in *Richardson*, "[l]ike the Court in *Wyatt*," also "[did] not express a view on this last-mentioned question." *Id.* at 414. The Supreme Court has yet to resolve the question.

On remand in *Wyatt*, the Fifth Circuit held the defendants could raise this defense because malice and lack of probable cause are elements of the due-process claim. 994 F.2d at 1119–21. The Fifth Circuit recognized that the Supreme Court "focused its inquiry on the elements of these torts," and found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice and without probable cause." *Id.* at 1119 (first emphasis added).

Three other circuits later followed the Sixth and Fifth Circuits' lead and recognized that good faith is a defense to a due-process deprivation arising from private party's *ex parte* seizure of property. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008). The Second Circuit in *Pinsky* required proof of "malice" and "want of probable cause" because "malicious prosecution is the most closely analogous tort and look[ed] to . . . for the elements that must be established in order for [the plaintiff] to prevail on his § 1983 damages claim." 79 F.3d at 312–13. The Third Circuit in *Jordan* required proof of "malice" for the same reason, recognizing that while "section 1983 does not include any *mens rea* requirement in its text, . . . the Supreme Court has plainly read into it a state of mind requirement specific to the particular federal right underlying a § 1983 claim." 20 F.3d at 1277 (emphasis added).

This line of cases recognized only a "rule to govern damage claims for due-process violations under § 1983 where the violation arises from a private party's invocation of a state's statutory remedy." *Pinsky*, 79 F.3d at 313. The cases did not hold that all deprivations of constitutional

rights and statutory rights actionable under Section 1983 require proof of malice and lack of probable cause, which would be absurd. Nor did the cases hold good faith to be a blanket defense to Section 1983 liability itself—i.e., find it an immunity. In fact, the Supreme Court in *Wyatt* rejected the proposition that private parties generally enjoy immunity to Section 1983 liability. 504 U.S. at 159.

Local 668 cannot escape liability for its illicit acts by asserting a good-faith defense. Nor should this Court permit it to make an underdeveloped argument for such a controversial point-of-law in a single sentence followed by a string cite. *See Pa. Dep't of Pub. Welfare v. United States HHS*, 101 F.3d 939, 945 (3d Cir. 1996).

II. Oliver has standing for her claims for declaratory relief.

Local 668 contends the case is moot, and it should not have to defend the unconstitutional policy that it and the Commonwealth continue to enforce against any employee who is not determined enough, or has the means, to sue. (Local 668 Memo. at 16-17 (Doc. 36-1).)

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 668 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). The Ninth Circuit recognized that claims like Ms. Oliver's 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.[2]

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.

Knox, 567 U.S. at 307. As in *Knox*, here Local 668 wishes to avoid this Court determining the legality of its policies.

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[2] The Ninth Circuit ultimately dismissed the case because of defective pleading that had failed to make the arguments in the district court that Plaintiff now presents to this Court. The circuit court therefore found such arguments had been waived. *Id.* at *3.

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. Even with the side letter, Local 668 and Commonwealth continue to force employees to pay union dues taken from employees without their affirmative consent, because the letter obligates the Commonwealth to continue with dues deduction even when an employee resigns union membership (Side Letter ¶ 5). This policy continues to impact present interests, as Local 668 and the Commonwealth 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 side letter and collective bargaining agreement, and the statutes they rely on, are unconstitutional.

III. The Plaintiff is compelled to associate with the union as her exclusive representative against her will.

Local 668's arguments on exclusive representation track those made by the Commonwealth in its motion for summary judgment, (Doc. 29), such that the Plaintiff incorporates here the arguments made in her previous briefing. (See Pl's Resp. to Commonwealth's Mot. for Summ. J. at 9-14 (Doc. 31).)

However, Plaintiff will make one point specific to a citation made in Local 668's brief. Local 668 cites two pre-*Janus* decisions that straightforwardly recognize that the exclusive-

representation statute forces some employees to associate with a union which they oppose which advocates viewpoints they oppose. (Local 668 Memo. at 4 (Doc. 36-1).) This is the definition of a First Amendment burden: when a law forces an individual to associate with an organization even when the organization advocates views the individual opposes. To survive, such a law must be narrowly tailored to a compelling state interest. Defendants Local 668 and the Commonwealth simply cannot prove such an interest when *Janus* has dispatched "labor peace" as a justification, *Janus*, 138 S. Ct. at 2465-66 (2018), and other cases have rejected "governmental convenience" as a compelling interest. *Lovelace v. Lee*, 472 F.3d 174, 212 (4th Cir. 2006) (Wilkinson, J., concurring) ("administrative convenience is normally seen as a rational or legitimate interest, not a compelling one."). The Commonwealth's requirement that Ms. Oliver must associate with Local 668 as her exclusive representative in meaningful speech to her employer cannot withstand First Amendment scrutiny.

CONCLUSION

Ms. Oliver was given an unconstitutional choice: pay money to the union in dues or pay a substantially similar amount of money to the union in fees. Under *Janus*, she should have been given a third option to pay nothing at all. She seeks the return of her money deducted from her hard-earned wages, and though Local 668 has given some of it back, it has not returned all that she seeks and to which she is entitled. Ms. Oliver not only wants her money back, but she also wants to be freed from Local 668's claim to speak in her name in its negotiations with her employer. She does not wish to be represented by Local 668, and the Commonwealth should not force her to be by its statutes mandating exclusive representation. Local 668's motion for summary judgment, therefore, must be denied.

Dated: September 20, 2019

Respectfully Submitted,

/s/ Jeffrey M. Schwab

Jeffrey M. Schwab*
Daniel R. Suhr*
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668
jschwab@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

Charles O. Beckley II
Beckley & Madden LLC
212 N. Third St., Suite 301
Harrisburg, PA 17101
Phone: (717) 233-7691

Attorneys for Plaintiff

* Admitted pro hac vice

CERTIFICATE OF SERVICE

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Dated: September 20, 2019

Respectfully Submitted,

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab*
Daniel R. Suhr*
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668
jschwab@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

Charles O. Beckley II
Beckley & Madden LLC
212 N. Third St., Suite 301
Harrisburg, PA 17101
Phone: (717) 233-7691

Attorneys for Plaintiff

* Admitted pro hac vice