UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SUSAN HALLORAN, Plaintiff, v. AFSCME COUNCIL 5 and ERIC DAVIS, in his official capacity as vice chancellor for human resources of the Minnesota State Colleges and Universities, Defendants.	Case No. 0:19-cv-02529-SRN-ECW **PLAINTIFF'S RESPONSE TO MR. DAVIS' MOTION TO DISMISS**

PLAINTIFF'S RESPONSE TO MR. DAVIS' MOTION TO DISMISS

This Court should reject Mr. Davis' motion to dismiss for lack of jurisdiction. Doc. 54. Ms. Halloran's claims are not moot, and Mr. Davis' other arguments for dismissal are unavailing.

I. Mr. Davis' argument for sovereign immunity is irrelevant.

Mr. Davis contends that the Eleventh Amendment grants him sovereign immunity from any claim for damages against him or the State. Davis Memo. Supporting Motion to Dismiss, Doc. 57, at 7-8 (hereinafter Davis Memo.). In her prayer for relief, Plaintiff asks this Court to "Award damages against AFSCME for all union dues collected from her from April 2019 to present." Compl., Doc. 1, at 8. Plaintiff does not and has never sought monetary relief against Mr. Davis or the

State, and so sovereign immunity does not apply here. Writing on an issue that is not ripe or relevant would amount to issuing an advisory opinion, which this Court should avoid. *United States v. Gates*, 915 F.3d 561, 564 (8th Cir. 2019). The Court should simply pronounce the point irrelevant to this case and move on.

II. Ms. Halloran needs and deserves injunctive and declaratory relief to protect her from a resumption of the union's prior practice.

As Mr. Davis acknowledges, once a defendant has been sued for unconstitutional conduct, that "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). *Accord Knox v. SEIU, Local 1000*, 567 U.S. 298, 397 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot . . ."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) ("A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."). (*See* Davis Memo. at 10). Where voluntary cessation of challenged conduct occurs "*because of* the litigation," the claims against the challenged conduct are not moot by virtue of the cessation. *Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1460 (9th Cir. 1996) (emphasis in original). *Accord Mohamed v. Sessions*, No. 16-3828 (SRN/BRT), 2017 U.S. Dist. LEXIS 164576, at *15 (D. Minn. Sep. 14, 2017).

There are limited circumstances in which voluntary cessation does moot a case, namely when "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189. *Accord Dalton v. NPC Int'l, Inc.*, 932 F.3d 693, 695 (8th Cir. 2019). However, "[t]he burden of demonstrating mootness is on the defendants," *Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000), and this is a "heavy burden" indeed. *Charleston Hous. Auth. v. USDA*, 419 F.3d 729, 740 (8th Cir. 2005).

In this case, Mr. Davis did not voluntarily cease his conduct of deducting union dues from Ms. Halloran's paychecks. The union choose to voluntarily end its dues collections from Ms. Halloran, and Mr. Davis implemented the union's voluntary cessation. Muellner Decl. ¶ 5. But Mr. Davis did not voluntarily change his conduct; in fact, he is contractually obligated to make these deductions for the union. *See* "Agreement between Minnesota State Employees Union, AFSCME, Council No. 5, AFL-CIO, and the State of Minnesota," Art. 3, Sec. I, https://mn.gov/mmb-stat/000/az/labor-relations/afscme/contract/afscme-contract-accessible.pdf at 2 ("The Employer shall deduct the bi-weekly membership dues from the earnings of those employees who authorize such deductions in writing. The Union shall submit such authorizations and certify the amounts to be deducted at least seven (7) days prior to the end of the payroll period for which the

deductions are to be effective and the deductions shall continue in effect until canceled by the employee through the Union."). This dues checkoff provision in the collective bargaining agreement is specifically authorized by statute. Minn. Stat. § 179A.06. Mr. Davis should not be able to argue mootness based on voluntary cessation when he made no voluntary choice as to Ms. Halloran.

Second, dismissing this case without resolution would provide no reassurance that the union would not order Mr. Davis to resume dues collection instantaneously. Ms. Halloran signed a union-card that did not permit an opt-out window until April 2020. (*See* Memorandum Supporting Motion for Preliminary Injunction, Doc. 7, Ex. One (email from AFSCME staff person); Ex. Four (memorandum from AFSMCE)). If the Court dismisses this suit, AFSCME could order Mr. Davis to reinstitute dues deduction immediately, and Mr. Davis would be contractually bound to do so until April 2020, when Ms. Halloran could exercise her right to opt-out.[1]

The voluntary cessation exception to mootness "applies where the resumption of the challenged conduct depends solely on the defendants' capricious

[1] The union's decision to permit Ms. Halloran's resignation and to end her dues deduction are independent facts. Even if the union did not revoke Ms. Halloran's resignation, it could resume her dues deduction until her opt-out window, since the union would argue that the dues are contractually guaranteed regardless of membership.

actions by which they are free to return to their old ways." *Jones v. Fed. Bureau of Prisons*, No. 09-1074 (MJD/RLE), 2010 U.S. Dist. LEXIS 78912, at *20-22 (D. Minn. Feb. 8, 2010) (internal citations and punctuation omitted). Mr. Davis and the union have done nothing more than "temporarily discontinue[] an illegal policy, which [they] may reinstitute at any time, or any other ongoing illegal conduct, which has been temporarily halted to avoid responsibility." *Id*. Without a judgment on the merits, Mr. Davis and the union are both "free to return to [their] old ways" regardless of their voluntary cessation upon the filing of this case. *Lowry v. Watson Chapel Sch. Dist*., 540 F.3d 752, 761 n.8 (8th Cir. 2008). In fact, without a judgment, the union "can at any time implement its policy" against Ms. Halloran from now until April 2020. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 795 (8th Cir. 2016).

Important here, the Court should take judicial notice of the union's aggressive defense of its conduct in its answer to the complaint; this sort of vigorous defense is further evidence that the union may resume its conduct at the conclusion of this litigation. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) ("In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation. Brief for Respondents in No. 05–908, at 16–17. But the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this

litigation is resolved in its favor it will not resume using race to assign students."). *Accord United States v. Virgin Islands*, 363 F.3d 276, 286 (3d Cir. 2004).

This is also not a case where Mr. Davis or his employer have adopted a new policy or rule that ensures Ms. Halloran continues to receive this relief or that future cases do not arise because they have fundamentally changed their behavior. *See Moore v. Thurston*, 928 F.3d 753, 757 (8th Cir. 2019); *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013); *Plisner v. Sweeney*, No. 04-3352 (JNE/SRN), 2007 U.S. Dist. LEXIS 9646, at *11 (D. Minn. Feb. 9, 2007). If Mr. Davis' employer (the Minnesota State Regents) adopted a policy that they will let employees end dues deductions regardless of their opt-out windows based on a legal opinion that such a stance is compelled by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), then the case would be moot as to Mr. Davis. But they have not done so and show no interest in doing so.

Nor is this a case like the union-fee cases cited in Mr. Davis' brief. Davis Memo. at 11, 12, 14. *Babb v. Cal. Teachers Assoc*., 378 F. Supp. 3d 857, 870-71 (C.D. Cal. 2019), *Cook v. Brown*, 364 F. Supp. 3d 1184, 1188 (D. Or. 2019), *Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1339 (W.D. Wash. 2018), *Yohn v. Cal. Teachers Assoc.*, Civ. No. 17-202, 2018 WL 5264076, at *4 (C.D. Cal. Sept. 28, 2018), and *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1227 (W.D. Wash. 2019) each concerned agency fees charged to nonmembers, which is impossible for the unions

to resume given *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). A better guide for this court is the Ninth Circuit's decision in *Fisk v. Inslee*, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2 (9th Cir. Dec. 17, 2018), where the Ninth Circuit found that the three individual plaintiffs who were union members, like Ms. Halloran, had standing to continue their case even though their dues deductions had ended.

Ms. Halloran is in a very different position from the fee-payers in Mr. Davis' cited cases; the union could order Mr. Davis to resume deduction of dues at any time, and Ms. Halloran would have no contractual protection until her opt-out window in April 2020. This reality alone should be sufficient to resolve Mr. Davis' motion to dismiss: he is legally obligated to deduct dues as the union directs, and the union may so direct him at any time by changing its mind about its post-suit voluntary cessation. Precedent is clear that such post-suit voluntary cessation does not justify a finding of mootness; without an order from this court, the union could resume its illegal activity at a moment's notice.

Third, there is no reason to believe that the union would excuse another employee in a different factual posture making the same legal claim. Public-sector unions across the country have been taken to court for refusing requests to end dues-deductions before the opt-out window specified on the union card. Nicole Ault, "Still Paying Union Dues, Even After Janus," Wall St. J., (July 26, 2019),

https://www.wsj.com/articles/still-paying-coerced-labor-dues-even-after-janus-11564181195 (reporting that more than 40 opt-out challenges are pending nationwide). This includes one case in Minnesota. *Loescher v. Minnesota Teamsters Public & Law Enforcement Employees' Union, Local No. 320 et al* (0:19-cv-01333) (D. Minn.). In other words, that the union has let Ms. Halloran out here is not the same as showing that "the conditions could not reasonably be expected to recur in the . . . future . . . ." *Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012).

Finally, though the immediate need for injunctive relief may have passed (see Doc. 20, withdrawing motion for preliminary injunction), the need for permanent injunctive and declaratory relief is ongoing. (*Contra* Davis Memo. at 14-16) "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to *determine the legality of the practice*." *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982). This is precisely what Plaintiff seeks here: a determination as to the legality of the practice, namely a declaration that Mr. Davis' policy of rejecting withdrawal requests from employees is unconstitutional. Ms. Halloran does not seek relief that "is functionally equivalent to a money judgment," which "would amount to an impermissibly retrospective remedy." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 311 (1997) (Souter, J., dissenting) (succinctly describing the majority opinion's

holding). Rather, she seeks an injunction and declaration that will protect her from reinstitution of her dues at the conclusion of the litigation, and that will protect her coworkers from the same policy.

The Eleventh Amendment is no bar to such relief. The Supreme Court's decision in *Green v. Mansour* is a useful contrast point. There, the Court held that a declaratory judgment would be inappropriate under Eleventh Amendment principles.

> There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction. Nor can there be any threat of state officials violating the repealed law in the future. Cf. *Steffel* v. *Thompson*, *supra*, at 454. … [T]he issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.

Green v. Mansour, 474 U.S. 64, 73 (1985). This case is different on numerous points from *Green*. Though there is no ongoing violation of federal law because the deductions have voluntarily ended after Ms. Halloran had to sue the defendants, without a decision and injunction there is no guarantee that the defendants will not resume their violation. There is no repealed law here; in fact, the collective bargaining agreement and its authorizing statute (the Public Employee Labor Relations Act or PELRA) continue in full force. There is no claim for monetary damages against Mr. Davis, which would be the sort of relief barred by the Eleventh Amendment; there is only a demand for an order "determin[ing]

the legality of the practice" and protecting Ms. Halloran from its resumption. In short, the need for prospective relief is real because the threat of resumption against Ms. Halloran is possible up until April 2020.

III. The focus of the recurrence analysis is on Mr. Davis' policy, not Plaintiff's membership.

Mr. Davis' argument that Ms. Halloran's claims are moot because she is out of the union and is unlikely to rejoin, and thus unlikely to experience a recurrence of the unconstitutional dues deduction, puts the focus on the wrong actor. Davis Memo. at 12. He asks whether Plaintiff would join a union again, when instead he should be asking whether he or the union would decline to cancel an unconstitutional dues deduction in the future. Whether the plaintiff "would be subjected to the same action again," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990), is focused on whether *the government* has in place a policy that would be applied again if the plaintiff were in the same situation again. *Amsterdam v. KITV 4 TV Station*, No. 10-00253 DAE-KSC, 2010 U.S. Dist. LEXIS 91021, at *16 (D. Haw. Aug. 31, 2010). It is the defendant who is the focus of the inquiry:

> Prison Fellowship, InnerChange, and the DOC contend that Americans United has not successfully demonstrated potential recurrence of the unlawful action. This argument misplaces the burden of showing the likelihood of recurrence. "The defendant faces a heavy burden of showing that 'the challenged conduct cannot reasonably be expected to start up again.'" *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006), quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610

> (2000). Prison Fellowship, InnerChange, and the DOC have not met this burden. They effectively ask this court to vacate the injunction without any assurance that they will not resume the prohibited conduct. Therefore, under the voluntary cessation exception, the district court's injunctive relief is not moot.

Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 421 (8th Cir. 2007). This Court should ask whether defendants will decline dues cancellations in future similar situations—whether for this plaintiff or another plaintiff—until a plaintiff brings litigation. *United States v. Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) ("the mere fact that the Governor has terminated a contract in this one instance with litigation lurking a couple of days away gives no assurance that a similar contract will not be entered into in the future.").

Three Supreme Court cases are illustrative. In *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188, 99 S. Ct. 983, 992 (1979), the Supreme Court said that the plaintiff failed to establish the defendant board had a policy, consistent pattern of behavior, or statute compelling its repeated application of the same action. The Court compared this to two earlier decisions where statutes guaranteed the same future application: *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) and *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). In *Storer*, for instance, the Court said "this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes

are applied in future elections." *Storer*, 415 U.S. at 737 n.8. In none of the three cases did the Court ask whether the particular plaintiff would act in the same way; in all three the Court focused on whether the government would act in the same way. *Accord Farris v. Seabrook*, 677 F.3d 858, 863-64 (9th Cir. 2012); *ACLU v. Lomax*, 471 F.3d 1010, 1018 (9th Cir. 2006); *Johnson v. FCC*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987).

Seen in this light, this Court has no guarantee that Mr. Davis will not continue unconstitutional dues deductions in plaintiff's or a similar case. In fact, it has every reason to expect that he will do so, because he is contractually obligated to do so under the collective bargaining agreement. This Court can hardly presume that the union's voluntary cessation in this case, given Ms. Halloran's facts and sympathetic personal situation, will translate into a policy of instructing Mr. Davis to cancel all future dues deductions when an employee seeks to exit a union outside his or her window.

IV. Plaintiff may assert the rights of others to avoid mootness.

Courts consistently hold that plaintiffs may represent a class of people affected even if they are no longer in that class themselves, and will never be again, because the question would consistently evade review otherwise. *See Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972). (*Contra* Davis Memo. at 16-17) This circuit recognizes that same complaining party rule may be waived when necessary

to ensure resolution of an otherwise mooted issue. *McLain v. Meier*, 637 F.2d 1159, 1162 n.5 (8th Cir. 1980).[2] Many other circuits hold the same view. *Cogswell v. City of Seattle*, 347 F.3d 809, 813 n.3 (9th Cir. 2003); *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) ("Even if the court could not reasonably expect that the controversy would recur with respect to Lawrence or Shilo, the fact that the controversy almost invariably will recur with respect to some future potential candidate or voter in Ohio is sufficient… Since the harm Plaintiffs allege was the direct result of an extant Ohio statute, future independent congressional candidates will suffer the same harm Plaintiffs are alleging."); *Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013) ("There is also a reasonable expectation that this controversy will recur, at least with respect to some other candidate and political party…"); *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) ("[E]ven if it were doubtful that the plaintiff would again be affected by the allegedly offending election statute, precedent suggested that the case was not moot, because other individuals certainly would be affected by the continuing existence of the statute." Internal punctuation omitted; citing *Ctr.*

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[2] In this sense, the Eighth has planted itself on one side of a circuit split: "To the extent that the Fifth Circuit in *Kucinich*, the Ninth Circuit in *Schaefer*, or the Eighth Circuit in *McLain* suggests that the same complaining party rule does not apply at all, we respectfully disagree…" *Hall v. Sec'y, State of Ala.*, 902 F.3d 1294, 1304 n.6 (11th Cir. 2018).

for Individual Freedom v. Carmouche, 449 F.3d 655, 662 (5th Cir. 2006)); *Sims v. Fla., Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1460 (11th Cir. 1989); *La Botz v. FEC*, 889 F. Supp. 2d 51, 59 (D.D.C. 2012) ("In the electoral context, many courts have concluded that a plaintiff need only show that others similarly situated might suffer a comparable harm in the future."). *See Clarke v. United States*, 915 F.2d 699, 703 n.4 (D.C. Cir. 1990) (en banc) ("It may be that the requirement of probable recurrence between the same parties is dropped where it is likely that the issue will recur between the defendant and others without ever reaching the Supreme Court.").

In one frequent example, courts do not insist that a candidate in a past election must declare his intention to run again in a future election to avoid mootness. *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 165 (5th Cir. 2009); *N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 435 (4th Cir. 2008); *Caruso v. Yamhill Cty.*, 422 F.3d 848, 853 (9th Cir. 2005); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000); *Fulani v. Brady*, 935 F.2d 1324, 1336 (D.C. Cir. 1991) (Mikva, J., dissenting); *Delaney v. Bartlett*, No. 1:02CV00741, 2003 U.S. Dist. LEXIS 24059, at *12 (M.D.N.C. Dec. 24, 2003). These cases ask instead whether "the issue will recur between the defendant and the public at large." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 423 (5th Cir. 2014).

Though these cases often arise in the electoral or abortion context, nothing about their logic limits them to those settings. Those are simply the areas of the law in which these types of cases most often arise because they are highly litigated and always time-bound. But the variance in context does not change the principle: a plaintiff may continue her suit even if she personally is unlikely to be in the same position again as long as she is representative of a group of people who are likely to experience the same problem in the future. This should be one of those instances, then, when a court "dispense[s] with the same-party requirement…" *Wilson v. Birnberg*, 667 F.3d 591, 596 (5th Cir. 2012). *Accord State v. Rochon*, 75 So. 3d 876, 885 (La. 2011) ("[f]ederal courts … frequently disregard the requirement that a claim be capable of repetition for the same claimant...").

Mr. Davis' brief quotes cases repeating the typical phrasing insisting on recurrence against the same plaintiff. *See* Davis Memo. at 16-17. These are typical, as the Seventh Circuit aptly noted:

> [W]hile canonical statements of the exception to mootness for cases capable of repetition but evading review require that the dispute giving rise to the case be capable of repetition *by the same plaintiff*, . . . the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases . . . .

Majors v. Abell, 317 F.3d 719, 723 (7th Cir. 2003) (internal citations omitted) (emphasis in original). This Court should not interpret the requirement literally

here either, but instead recognize the ongoing need for declaratory relief between Ms. Halloran and Mr. Davis.

V. General principles of standing weigh in favor of Plaintiff in this case.

Finally, the Court should not lose sight of the point of the "voluntary cessation" test: to ensure that a case does not "avoid meaningful judicial review." *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988). "[T]he purpose of this exception to the general mootness doctrine… [is to] prevent[] defendants from avoiding judicial scrutiny by ceasing their illegal conduct. *See, e.g., City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 284 n.1, 148 L. Ed. 2d 757, 121 S. Ct. 743 (2001) (holding that the voluntary cessation exception to mootness 'traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.'"). *Aaran Money Wire Serv., Inc. v. United States*, Nos. 02-CV-789 (JMR/FLN), 02-CV-790 (MJD/JGL), 2003 U.S. Dist. LEXIS 16190, at *17 (D. Minn. Aug. 21, 2003).

Just such a purpose is at work in this instance. The defendant union has temporarily altered its problematic policies as to Ms. Halloran, and thus tries to evade judicial review; the Court should not let the union (and by extension Mr.

Davis) off the hook so easily. Rather, it should extend to Ms. Halloran's claims the meaningful judicial review they are due.

CONCLUSION

For the foregoing reasons, the Court should deny Mr. Davis' motion to dismiss.

Dated: December 23, 2019

Respectfully submitted,

SUSAN HALLORAN

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