IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CASE NO. 17-15434

KOUROSH KENNETH HAMIDI *ET AL.*, AND THE CLASS THEY REPRESENT,

Plaintiffs-Appellants,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000;
AND BETTY T. YEE, CONTROLLER, STATE OF CALIFORNIA,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of California
Case No. 2:14-cv-00319-WBS-KJN
(Hon. William B. Shubb)

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

W. JAMES YOUNG, Esq.
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PLAINTIFFS-APPELLANTS AND THE CLASS THEY REPRESENT

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Plaintiffs-Appellants Kourosh Kenneth Hamidi *et al.*, and the class they represent ("the Employees"), respectfully submit this Supplemental Brief in response to the Clerk's Order dated 4 December 2018 (ECF No. 51), as follows:

I. THE DISTRICT COURT'S DECISION CANNOT SURVIVE *JANUS*.

The single significant point made by Local 1000 in its Supplemental Brief (ECF No. 48-2) is that the final judgment entered in the United States District Court for the Eastern District of California, ECF No. 7 at 138 (8 February 2017), cannot survive the Supreme Court's decision in *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018). The remainder of Local 1000's submission is surplusage.

II. THE EFFORT TO MISDIRECT DISPOSITION OF THIS CASE ON REMAND SHOULD BE REJECTED.

Local 1000 suggests that, rather than deciding the merits of the Employees' appeal, this Court should vacate the decision below and "simply remand the case to the district court for further proceedings in light of *Janus*." ECF No. 48-2 at 2. For the reasons stated in Section II(A), such a disposition is inappropriate.

Similarly inappropriate is Local 1000's attention to three issues which it may seek to raise below. First, Local 1000 urges partial mootness by introducing new evidence on appeal. *Id.* at 4. Second, Local 1000 suggests that the District Court on remand must consider its "good faith" defense in reliance upon state law permitting — but not requiring — it to extract from non-consenting nonmember

Employees failing to respond to an annual union notice fees exceeding those for nonchargeable portions of its agency or "fair share" fee. *Id.* at 5. Finally, Local 1000 suggests that the District Court should be directed to reconsider its class-certification order, RE 99-103. ECF No. 48-2 at 6. As these suggestions are at best premature, all should be rejected.

A. This Court Should Decide the Merits of the Employees' Appeal and Reverse, Not Merely Vacate the Decision.

Local 1000 contends that the District Court's decision should be vacated. *Id.* at 2. That Local 1000's opt-out scheme cannot survive the "exacting scrutiny" required by *Janus*, 138 S.Ct. at 2464-65,[1] cannot be gainsaid. But simply vacating the decision below will not do. Logically, this Court must *reverse* the District Court's holding that the opt-out requirement does not violate the First Amendment before it remands the case to determine its appropriate disposition.

The opposite procedure, implied by Local 1000, makes no sense. How could this Court remand the case for determination of whether Local 1000 has a "good faith" defense to a First Amendment violation without first reversing the decision that no First Amendment violation occurred? It cannot. The District Court's holding must be reversed before the case is remanded for consideration of

[1] For this reason, *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9TH CIR. 1992), is no longer good law.

remedies or defenses to them. But this Court should not take this opportunity to comment prematurely on matters appropriately considered in the first instance on remand, and should simply reverse and remand the case for further consideration.

B. The Case Is Not Moot.

Local 1000 supplements the record on appeal to inform the Court of "subsequent developments" (ECF No. 48-3) and to argue that the Court should "remand this case ... for a determination regarding whether [the Employees'] claims for declaratory and injunctive relief against the discontinued opt-out system are moot." ECF No. 48-2 at 4. If the former sounds familiar, it should. *See Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012) (rejecting Local 1000's efforts to moot a case on appeal). But Local 1000 raises nothing that cannot be considered on remand.

Nevertheless, the case is not moot. Volumes of Federal decisionmaking — including against Local 1000, *see Knox*, 567 S.Ct. at 307-08 — unambiguously reject the notion that a defendant's voluntary cessation of the activity giving rise to the lawsuit renders the case moot. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (citing cases). Informed by "the principle that a party should not be able to evade judicial review, or to defeat a

judgment, by temporarily altering questionable behavior," *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987) ("Mootness doctrine ... protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform'") (citation omitted), the standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *U.S. v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)) emphasis added). The burden lies with the proponent of mootness to demonstrate with absolute clarity that the behavior will not recur. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 190 (2000) (describing that burden as "formidable"). It is not met where a defendant "t[ells] the court that the [objectionable practices] no longer exist[] and disclaim[s] any intention to revive them." Voluntary cessation only moots a case if "there is no reasonable expectation that the wrong will be repeated." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). But this case is not moot, for three well-established reasons.

First, the Employees' claims retain vitality under the Supreme Court's

decisions expounding upon the voluntary-cessation doctrine, because this is a paradigm "voluntary cessation" case. The primary remedy the Employees seek — a declaratory judgment that the opt-out system maintained by Local 1000 under the authority of an unconstitutional forced-unionism provisions of the Dills Act, CAL. GOVT. CODE §§ 3513(k) & 3515, is likewise unconstitutional — has a continuing impact upon the parties because the State maintains the Dills Act's forced-unionism provisions and its Agreement with Local 1000,[2] and the State Controller could resume fee seizures at any time. "[I]t 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." *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite*, 455 U.S. at 289). "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" *Id.* at 189. If anything, the situation has been made worse by the enactment of SB 866,[3] rendering public-sector unions a virtual "master's voice" to public officials

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[2] Available at http://contract.seiu1000.org/contract.php?action=displaySearchResult&searchText=security&ArticleH1=4 (last accessed on 11 December 2018).

[3] Signed by the Governor on the day *Janus* was handed down, this new law "require[s] that ... requests [to make, cancel, and change a deduction for an organization] be directed to the employee organization rather than the public employer or Controller. SB 866, § 1, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB866 (last accessed on 11 December 2018).

when it comes to the extraction of union dues from public employees.

Here, neither condition is met. The Dills Act's forced-unionism provisions, CAL. GOVT. CODE §§ 3513(k) & 3515, remain intact and on the books.[4] And Local 1000 has not even suggested that the forced-unionism provisions of its Master Agreement with the State have been rescinded, expunged, or altered to conform to the law. *See* note 2, *supra*. The relief sought by the Employees has not been granted. The case is not moot. *See also Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 305 n.14 (1986) (burden not met where a union alters its behavior after being hailed into court); *Knox*, 567 U.S. at 307-08 (maneuvers that purportedly moot a case "must be viewed with a critical eye").

Second, the "remedies" do not provide complete relief, as the Employees seek a declaratory judgment regarding a California statute and an existing contract, as well as damages, interest, and nominal damages. RE 13-14, ¶¶ A & C (Prayer for Relief). Certainly, these standards are not satisfied here. Local 1000 does not even pretend that the Employees have been provided all of the relief sought.

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[4] While these patently unconstitutional provisions remain, California legislators have busied themselves protecting public-sector labor unions and their *fiscs*. *See* SB 866, § 1. And on 14 September, the Governor signed SB 846, enacting CAL. GOVT. CODE § 1159 (West), which purports to insulate "The Controller, a public employer, an employee organization, or any of their employees or agents" against state-law claims or actions for agency fees seized prior *Janus*. SB 846, available at http://leginfo.legislature.ca.gov/faces/billNav Client.xhtml?bill_id =201720180SB846 (last accessed on 11 December 2018).

Third, as State employees, many of the Employees remain subject to the Dills Act's forced-unionism provisions, CAL. GOVT. CODE §§ 3513(k) & 3515, and the existing State/Local 1000 Master Agreement, Art. 3.1. Thus, Local 1000 cannot show, as it must, "that it is *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66 (quotation marks and citation omitted; original emphasis). The statutory and contractual authority to do so remains extant. This exception to the voluntary-cessation doctrine does not apply.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (quoting *Davis*, 440 U.S. at 631), such that it become impossible for a court to grant "'any effectual relief whatever' to the prevailing party," *id.* (quoting *Church of Scientology v. U.S.*, 506 U.S. 9, 12 (1992)). "'As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 669 (2016) (citation and internal quotation marks omitted).

Such is the case here. Local 1000 vigorously defended against this lawsuit for years. Now, only after *Janus*, Local 1000 offers only voluntary forebearances (but not including refund of monies illegally seized from the Employees, from

which its purported "good faith" insulates it) that Local 1000 asserts satisfies the Employees' claims for declaratory and injunctive relief.[5]

In short, then, Local 1000's claim of mootness fails for all three reasons.

C. Local 1000's Claim of "Good Faith" Ring Hollow.

Local 1000 also asserts that the District Court "will have to resolve" its "good faith" defense to avoid an award of damages, previously not reached. ECF No. 48-2 at 5-6. But Local 1000's claims of "good faith" ring hollow.

First, unlike *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9TH CIR. 2008), ECF No. 48-2 at 5, where there are few apparent constitutional implications in the tow service's activities, it has long been recognized that efforts "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). And Local 1000 was well aware that its effort are fraught with constitutional implications in a way that most litigants usually are not: it has twice violated the constitutional rights of similar classes of nonmembers by

[5] In this way, the case is distinguishable from *Lamberty v. Connecticut State Police Union*, 2018 WL 5115559 (D.CONN. 19 Oct. 2018), and *Danielson v. Inslee*, 2018 WL 3917937, at *3 (W.D. WASH. 16 Aug. 2018), cited by Local 1000. ECF No. 48-2 at 4. These courts dismissed as moot claims in which fee seizures from nonmembers ceased promptly after *Janus* was decided. In the former, a full refund of illegally-seized dues was made, as well, so the claim against the union was dismissed. In *Danielson*, only the state defendants were dismissed, because they ceased fee seizures.

enforcing its forced-unionism ideology. *Cummings v. Connell*, 177 F.Supp.2d 1079 (E.D.CAL. 2001), *rev'd in part on other grounds*, 316 F.3d 886 (9TH CIR. 2003); *Knox*, *supra*. And, as detailed in the Employees' Briefs, ECF Nos. 8 & 34, *Knox* rendered the treatment of "Dissent is not to be presumed" as Holy Writ unjustified, as well as obviously self-serving.

Furthermore, Local 1000's stubborn insistence on seizing from non-objecting Employees — rather than simply soliciting their voluntary support — fees for nonchargeable purposes far exceeds this narrow violation of each individual's constitutional rights; Local 1000 also impeded exercise of those rights, causing many of the named Plaintiffs considerable inconvenience, time, and expense to vindicate their constitutional rights by forcing them to simply repeat what they had told Local 1000 many times before. Similarly, the distortions to the political process with hundreds of thousands or millions of dollars forcibly extracted from Nonmembers to subsidize union political activities are dire, and unknowable. *See Janus*, 138 S.Ct. at 2486 ("hard to estimate how many billions ... have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment").

Finally, any suggestion that Local 1000 acted in "good faith" cannot be sustained in the face of its agreement indemnifying the State "against any claims

made of any nature and against any suit instituted against the State arising from this section and the deductions arising there from." State/Local 1000 Master Agreement, Article 3.1(3). As the Second Circuit has observed in a related context, "the logical reason why the contract contained a 'hold harmless' clause was because at least one of the parties (probably, the [State]) thought that there was a good chance that the [scheme] would be held [unlawful]," or perhaps, "thought that there was a good chance that [Local 1000] would [direct it to violate someone's First Amendment rights]." *Stamford Bd. of Educ. v. Stamford Educ. Ass'n.*, 697 F.2d 70, 73-74 (2D CIR. 1982). How "good faith" can be divined from these facts is a mystery.

Thus, protestations of Local 1000's "good faith" ring hollow. It is a two-time constitutional tortfeasor which has proven to this Court over and over again that it acts to maximize its income at the expense of the constitutional rights of the nonmembers, and pursues it own political agenda notwithstanding the fact that tens of thousands of employees it purports to represent have little or no interest in joining it. All of the relief sought — including a full refund of fees, plus interest — should be awarded as part of the judgment in the Employees' favor.

D. Consideration of the District Court's Class Certification Ruling Would Be Premature.

For the first time in its Supplemental Brief, Local 1000 now suggests that

the District Court should "consider whether the previously-certified classes should be decertified in light of *Janus* and the mootness of claims for prospective relief." ECF No. 48-2 at 6. Local 1000 does so based upon its meritless argument that some of the Employees' claims are moot, and the nature of the District Court's class certification order. *Id.* Even if Local 1000's mootness argument had merit, its suggestion is premature, and does not merit the present attention of this Court.

III. CONCLUSION

For all of the foregoing reasons, the decision of the District Court should be reversed, and the case remanded for entry of an appropriate judgement and remedial order.

IX. CERTIFICATION PURSUANT TO CIRCUIT RULE 32-3

Pursuant to Rule 32(a), FED.R.APP.P. and Ninth Circuit Rule 32-3, I certify that the foregoing Plaintiffs-Appellants' Supplemental Brief is proportionally spaced, has a typeface of 14 points, and contains 2,515 words. Utilizing the formula set forth in Rule 32-3(2), it complies with the ten-page limit set forth in the Clerk's Order dated 4 December 2018.

DATED: 11 December 2018

Respectfully submitted,

/s/ W. James Young

W. JAMES YOUNG
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
FACSIMILE — (703) 321-8510
E-MAIL — wjy@nrtw.org

ATTORNEY FOR PLAINTIFFS-APPELLANTS
AND THE CLASS THEY REPRESENT

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CERTIFICATE OF SERVICE

I, W. James Young, counsel for Plaintiffs, hereby certify that I electronically filed with the Clerk of Court the foregoing **PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF** using the CM/ECF system which will send notification of such filing to all counsel of record, this 11th day of December, 2018.

/s/ W. James Young
W. JAMES YOUNG

I hereby certify that true and correct copies of the foregoing **PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF** were deposited in the United States Mail, first class postage prepaid, addressed to:

Jeffrey B. Demain, Esq.
Eric P. Brown, Esq.
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108

Anne M. Giese, Esq.
SEIU Local 1000
1808 14th Street
Sacramento, California 95811

Peter H. Chang, Esq.
Office of the Attorney General, State
of California
455Golden Gate Avenue, Suite 11000
San Francisco, California 94102

this 11th day of December, 2018.

/s/ Laverne K. Stanley
LAVERNE K. STANLEY