

No. _____

IN THE
Supreme Court of the United States

MARK GABRIELE, ET AL.,

Petitioners,

v.

SERVICE EMPLOYEES INTL. UNION, LOCAL 1000, ET AL.,

Respondents.

**APPLICATION TO THE HONORABLE ELENA KAGAN FOR AN
EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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To the Honorable Elena Kagan, as Circuit Justice for the United State Court of Appeals for the Ninth Circuit:

Pursuant to this Court's Rules 13.5, 22, 30.2, and 30.3, Petitioners Mark Gabriele and Jen-Fang Lee respectfully request that the time to file their Petition for Writ of Certiorari in this matter be extended 60 days, up to and including March 25, 2022. The Court of Appeals issued its opinion on October 26, 2021. (Appendix ("App.")). Absent an extension of time, the Petition for Writ of Certiorari would be due on January 24, 2022. Petitioners file this Application more than 10 days before that date. See S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. 1254(1). *Respondents, through their counsel, have consented to this 60-day extension request.*

Background

Petitioners represent a putative class of California public sector employees. They filed suit in the United States District Court for the Eastern District of California, seeking declaratory and monetary relief under 42 U.S.C. 1983, plus state-law conversion and restitution, for agency fees that were unconstitutionally taken from their paychecks by the Respondent unions.

The United States Court of Appeals for the Ninth Circuit affirmed dismissal of Petitioners' claims based on the Respondent unions' alleged "good faith," applying that court's previous decision in *Danielson v. Inslee*, 945 F.3d 1096, 1097–99 (9th Cir. 2019). App., pp. 2–3. That court also rejected Petitioners' claim for prospective declaratory relief as moot, *id.* at 3, and held Petitioners' state-law claims barred.

Reasons for Granting an Extension of Time

The time within which to file a Petition for a Writ of Certiorari should be extended for 60 days for the following reasons:

1. Petitioners' Counsel of Record, John J. Bursch, has had since October 26, 2021, and will continue to have, numerous litigation deadlines in the weeks leading up to and following the current deadline for filing a Petition, including but not limited to the following:
 - A reply brief in support of an application for leave to appeal filed in the Michigan Supreme Court on October 27, 2021 (*TruGreen Limited Partnership v. Department of Treasury*, No. 163515);
 - A merits amicus brief filed in the United States Court of Appeals for the Eleventh Circuit on October 26, 2021 (*Adams v. School Board of St. John's County*, No. 18-13592);
 - A merits reply brief filed in the United States Court of Appeals for the Sixth Circuit on October 29, 2021 (*JPMorgan Chase Bank, NA v. Winget*, No. 21-1568);
 - A merits reply brief filed in the United States Court of Appeals for the Second Circuit on October 28, 2021 (*Soule v. Connecticut Assoc. of Schools*, No. 21-1365);
 - A petition to appeal in the Virginia Supreme Court filed on November 12, 2021 (*Vlaming v. West Point School Board*, No. 211061);
 - A reply brief in support of a petition for certiorari filed in this Court on November 15, 2021 (*Gordon College v. DeWeese-Boyd*, No. 21-145);
 - A reply brief in support of a petition for certiorari filed in this Court on November 15, 2021 (*Seattle's Union Gospel Mission v. Woods*, No. 21-144);
 - A merits amicus brief filed in this Court on November 21, 2021 (*Shurtleff v. Boston*, No. 20-1800);
 - A merits reply brief filed in the United States Court of Appeals for the Seventh Circuit on November 22, 2021 (*Kluge v. Brownsburg Community Schools Corp.*, No. 21-2475);

- An appellant's brief and appendix filed in the United States Court of Appeals for the Ninth Circuit on November 29, 2021 (*Tingley v. Ferguson*, No. 21-35815);
- A petition for certiorari filed in this Court on December 3, 2021 (*Carmack v. Janny*, No. 21-844);
- A merits reply brief filed in the United States Court of Appeals for the Seventh Circuit on December 6, 2021 (*Kluge v. Brownsburg Community Sch. Corp.*, No. 21-2475);
- An appellant's brief and appendix filed in the United States Court of Appeals for the Ninth Circuit on December 6, 2021 (*Tingley v. Ferguson*, No. 21-35815);
- An application for an injunction on appeal filed in this Court on December 17, 2021 (*The Southern Baptist Theological Seminary v. Department of Labor*, No. 21A246);
- A merits amicus brief filed in the Michigan Supreme Court on December 17, 2021 (*Rouch World, LLC v. Mich. Dep't of Civil Rights*, No. 162482);
- A reply brief in support of a petition for certiorari filed in this Court on December 22, 2021 (*303 Creative, LLC v. Elenis*, No. 21-476);
- A reply brief in support of an application for injunction on appeal filed in this Court on January 2, 2022 (*The Southern Baptist Theological Seminary v. Department of Labor*, No. 21A246);
- Assisting advocates to prepare for a January 6, 2022 oral argument in this Court (*National Federation of Independent Business v. Department of Labor*, No. 21A244);
- A merits amicus brief filed in the United States Court of Appeals for the Fourth Circuit on January 7, 2022 (*Speech First v. Sands*, No. 21-2061);
- Preparation for and oral argument in the Genesee County, Michigan, Circuit Court on January 12, 2022 (*People v. Lyon*, No. 21-47378-FH);
- A merits amicus due in the Supreme Judicial Court of Massachusetts on January 12, 2022 (*Klinger v. Healey*, No. SJC-13194);
- Assisting a colleague with preparation for oral argument in the United States Court of Appeals for the Seventh Circuit on January 20, 2022 (*Kluge v. Brownsburg Community Sch. Corp.*, No. 21-2475);

- Preparation for and argument in the United States Court of Appeals for the Fourth Circuit on January 26, 2022 (*Planned Parenthood South Atlantic v. Kerr*, No. 21-1043);
- Assisting a colleague with preparation for oral argument in the United States Court of Appeals for the Fourth Circuit on January 27, 2022 (*Updegrave v. Herring*, No. 21-1506);
- A merits reply brief in the Colorado Court of Appeals due February 11, 2022 (*Scardina v. Masterpiece Cakeshop, Inc.*, No. 2021CA1442)
- An appellant's brief and appendix in the United States Court of Appeals for the D.C. Circuit due February 17, 2022 (*Frederick Douglas Foundation v. District of Columbia*, No. 21-7108);
- A merits reply brief in the United States Court of Appeals for the Ninth Circuit due March 4, 2022 (*Tingley v. Ferguson*, No. 21-35815);
- Assisting a colleague with preparation for oral argument in the United States Court of Appeals for the Ninth Circuit on March 8, 2022 (*Anita Green v. Miss United States of America*, No. 21-25228); and
- Possible en banc oral argument in the United States Court of Appeals for the Sixth Circuit on March 9, 2022 (*Resurrection School v. Hertel*, No. 20-2256), among other things.

2. This case presents issues of tremendous importance to public employees who have suffered damages for the violation of their constitutional rights by governments who defend on the ground that their wrongful actions were made in "good faith."

3. The Ninth Circuit's decision conflicts with this Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209, 237–42 (1977), which invalidated agency fees used for political activities and held that a refund of unlawfully collected fees was appropriate.

4. The Ninth Circuit's decision also conflicts with this Court's ruling in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1983), which makes

clear that the Court's decisions must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the Court's announcement of the rule.

5. In addition, the Ninth Circuit's decision conflicts with decisions of other circuits, first regarding whether a good-faith defense to liability under 42 U.S.C. 1983 exists, and second regarding whether private unions may invoke a good-faith defense to section 1983 liability if it exists.

6. As a result of these conflicts, a significant prospect exists that this Court will grant certiorari and reverse the Ninth Circuit.

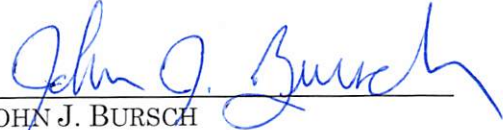
7. Petitioners' counsel requires the additional requested time to fully research the legal issues and to prepare an appropriate petition for consideration by this Court.

8. No meaningful prejudice would arise from granting the extension. The mandate has already issued, and it is not stayed. Moreover, counsel for Respondents has consented to the 60-day extension.

Conclusion

For the foregoing reasons, Petitioners hereby request that an extension of time to and including March 25, 2022, be granted within which Petitioners may file a petition for a writ of certiorari.

Respectfully submitted,



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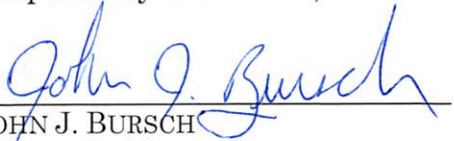
January 11, 2022

CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court rule 22.2 and 29.3:

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 26 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARK GABRIELE; JEN-FANG LEE,

No. 20-16353

Plaintiffs-Appellants,

D.C. No.

v.

2:19-cv-00292-WBS-KJN

SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1000;
SERVICE EMPLOYEES
INTERNATIONAL UNION,

MEMORANDUM*

Defendants-Appellees,

and

NATIONAL EDUCATION
ASSOCIATION OF THE UNITED
STATES; et al.,

Defendants.

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted October 22, 2021**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,^{***} District Judge.

Plaintiffs Mark Gabriele and Jen-Fang Lee (“Appellants”) appeal the district court’s dismissal of their putative class action brought against Service Employees International Union Local 1000 and Service Employees International Union. Appellants seek declaratory and monetary relief under 42 U.S.C. § 1983 for agency fees collected from paychecks in violation of the First Amendment. They also bring common law conversion and restitution claims.

We have jurisdiction under 28 U.S.C. § 1291. We review *de novo*. *Serra v. Lappin*, 600 F.3d 1191, 1195–96 (9th Cir. 2010) (reviewing dismissal for failure to state a claim and for lack of subject matter jurisdiction *de novo*).

The district court properly dismissed Appellants’ First Amendment claim, as it is established law in this Circuit that a public sector union may “invoke an affirmative defense of good faith to retrospective monetary liability under section 1983” for agency fees it collected prior to the Supreme Court’s decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). *Danielson v. Inslee*, 945 F.3d 1096, 1097–99 (9th Cir. 2019) (“[P]rivate parties may invoke an affirmative defense of good faith to retrospective

^{***} The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

monetary liability under 42 U.S.C. § 1983, where they acted in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law.”).

Appellants’ claim for prospective declaratory relief is moot. “It is an inexorable command of the United States Constitution that the federal courts confine themselves to deciding actual cases and controversies.” *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128 (9th Cir. 2005) (en banc). “The limitations that Article III imposes upon federal court jurisdiction are not relaxed in the declaratory judgment context.” *Id.* at 1129. When the Supreme Court issued *Janus*, Appellants’ union stopped collecting agency fees from non-union members. Shortly thereafter, the California Attorney General issued an advisory opinion explaining that the state “may no longer automatically deduct a mandatory agency fee from the salary or wages of a non-member public employee who does not affirmatively choose to financially support the union.” Similarly, the state administrative agency that enforces public employment collective bargaining statutes stated that it “will no longer enforce existing statutory or regulatory provisions requiring non-members to pay an agency fee without having consented to such a fee.” Accordingly, the conduct found unconstitutional in *Janus* has ceased and “could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968)).

That the California statutes governing agency fees have not been repealed does not revive Appellants' claims. Unconstitutional statutes, without more, give no one a right to sue. *See, e.g., Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (“[T]he mere existence of a . . . statute . . . [does not] satisf[y] a ‘case or controversy’ requirement. . . . Rather, there must be a ‘genuine threat of imminent prosecution.’”) (citation omitted).

The district court also properly dismissed Appellants' state law claims. Collection of agency fees was permitted by the Dills Act, California Government Code §§ 3513(k), 3515.7, 3515.8. Appellants' common law claims, asserting conversion and seeking restitution for such collection, are inconsistent with the statute. Cal. Civ. Code § 22.2 (“The common law . . . so far as it is not . . . inconsistent with . . . laws of this State, is the rule of decision in all the courts of this State.”). Furthermore, the common law claims are preempted. *See El Rancho Unified Sch. Dist. v. Nat'l Educ. Ass'n*, 663 P.2d 893, 901–02 (Cal. 1983); *Sullivan v. State Bd. Of Control*, 176 Cal. App. 3d 1059, 1063–66 (1985).

AFFIRMED.