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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK GABRIELE; JEN-FANG LEE, *Plaintiffs-Appellants*, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000; SERVICE EMPLOYEES INTERNA-TIONAL UNION, *Defendants-Appellees*, and NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES; et al., *Defendants.*	No. 20-16353 D.C. No. 2:19-cv-00292-WBS-KJN MEMORANDUM*

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

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

Submitted October 22, 2021**
San Francisco, California

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

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

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

(9th Cir. 2019) ("[P]rivate parties may invoke an affirmative defense of good faith to retrospective 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.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARK GABRIELE; JEN-FANG LEE; STACY PENNING; CHARLES FRIEDRICHS, as individuals, and on behalf of all others similarly situated, Plaintiffs, -v.- SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000; SERVICE EMPLOYEES NTERNATIONAL UNION, LOCAL 1020; NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES; CALIFORNIA TEACHERS ASSOCIATION; CALIFORNIA FACULTY ASSOCIATION,, Defendants.	No. 2:19-cv-00292 WBS KJN MEMORANDUM AND ORDER RE: MOTION TO DISMISS FIRST AMENDED COMPLAINT

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Plaintiffs bring this action against Service Employees International Union, Local 1000 ("Local 1000" or "union defendant"), Service Employees International Union, Local 1020, the National Education Association of the United States, the California Teachers Association, and the California Faculty Association, alleging that defendants unlawfully deducted agency fees from their paychecks prior to the Supreme Court's decision in Janus v. American Federation of State, County, &

Municipal Employees, Council 31, 138 S. Ct. 2448 (2018). Before the court is defendant Local 1000's motion to dismiss (Docket No. 89).

I. Relevant Allegations

The court previously dismissed the claims of all but plaintiffs Mark Gabriele and Jen-Fang Lee against Local 1000. (Docket No. 30.) Gabriele and Lee were at all relevant times employees of the State of California. (First Amended Complaint ("FAC") ¶¶ 1, 2 (Docket No. 17).) Local 1000 is plaintiffs' exclusive collective bargaining representative. (Id. ¶ 5.) Although plaintiffs chose not to be members of Local 1000, prior to the Supreme Court's decision in Janus, plaintiffs' employers withheld fair-share fees from their wages and paid those fees to union defendant Local 1000. (Id. ¶¶ 1-2, 15.)

On June 27, 2018, the Supreme Court decided Janus and held that payment to a union may not be collected from an employee without the employee's affirmative consent. 138 S. Ct. at 2486. Plaintiffs then filed suit alleging the following causes of action: (1) violation of plaintiffs First Amendment right, 42 U.S.C. § 1983; (2) conversion; and (3) restitution. (See generally FAC.) Plaintiffs request a refund of fees collected, as well as declaratory and injunctive relief. (Id. ¶ 45.) Defendants now move to dismiss the complaint.

II. Discussion

A. Injunctive and Declaratory Relief

Plaintiffs seek declaratory judgment providing that the collection of agency fees, and any state statute or collective bargaining agreement that provides for such a collection, is unconstitutional

under the First Amendment. (Id. ¶ 45(B).) Plaintiffs also ask the court to enjoin defendants from collecting or receiving agency fees. (Id. ¶ 45(C).)

For the following reasons, the court finds that plaintiff's claims for declaratory and injunctive relief are moot because the Supreme Court in Janus already declared all collections of agency fees to be unconstitutional and because the collection of agency fees permanently ended immediately after Janus.

1. Legal Standard

Article III grants federal courts authority to adjudicate cases and controversies. Already, LLC v. Nike, Inc., 568 U.S. 85, 90 (2013). "A case becomes moot---and therefore no longer a 'Case' or 'Controversy' for purposes of Article III--'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Rosebrock v. Mathis, 745 F.3d 963, 971–72 (9th Cir. 2014) (citing Already, 568 U.S. at 91). The party asserting mootness must show that the "allegedly wrongful behavior could not reasonably be expected to recur." Already, 568 U.S. at 91 (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190 (2000)).

2. Injunctive Relief

At the outset, the court notes that "every other district court to consider this issue has found claims for prospective relief moot after Janus." See Babb v. Cal. Teachers Ass'n, 378 F. Supp. 3d 857, 871 (C.D. Cal. 2019) (citing Cook v. Brown, 364 F. Supp. 3d 1184, 1188 (D. Or. 2019); Carey v. Inslee, 364 F. Supp. 3d 1220, 1225-27 (W.D. Wash. 2019); Danielson v. Inslee, 345 F. Supp. 3d 1336, 1339-40 (W.D. Wash. 2018)); see also Penning v. Service Emps. Int'l Union,

Local 1021, No. 19-cv-03624-YGR, 2020 WL 256126, at *1 (N.D. Cal. Jan. 16, 2020); Seidemann v. Prof'l Staff Congress Local 2334, 432 F. Supp. 3d 367 (S.D.N.Y. 2020); Lee v. Ohio Educ. Ass'n, 366 F. Supp. 3d 980, 981-82 (N.D. Ohio 2019); Crockett v. NEAAlaska, 367 F. Supp. 3d 996, 1002-03 (D. Alaska 2019); Lamberty v. Conn. State Police Union, No. 3:15-cv-378 (VAB), 2018 WL 5115559 at *6-9 (D. Conn. Oct. 19, 2018); Danielson v. AFSCME Council 28, 340 F. Supp. 3d 1083, 1084 (W.D. Wash. 2018), aff'd, 945 F.3d 1096 (9th Cir. 2019); Yohn v. Cal. Teachers Ass'n, 17-cv-202-JLS-DFM, 2018 WL 5264076, at *3-4 (C.D. Cal. Sept. 28, 2018).

This court agrees that because it cannot reasonably be expected that the union defendants will resume withholding agency fees in contravention of Janus, plaintiffs' claim for injunctive relief is moot. The Janus court held that states and public-sector unions cannot compel the payment of agency fees from nonconsenting employees because such a practice violates the First Amendment. 138 S. Ct. at 2486. On June 28, 2018, the day after Janus was decided, the California State Controller's Office cancelled the deduction of agency fees in compliance with Janus. (Ex. 3 (Docket No. 42-2).) The Controller's Office also said that it would refund all June 2018 agency fees. (Id.) The California Attorney General then issued an advisory statement concerning the Supreme Court's decision in Janus, 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." (Ex. 4 (Docket No. 42-2).)

Similarly, in-house counsel for Local 1000 has filed an affidavit stating that the union ceased the collection agency fees following Janus. (See Decl. of Anne M. Giese ("Giese Decl.") ¶¶ 3, 9 (Docket No. 42-2).) Union counsel agrees that the entire practice is unconstitutional in light of Janus and that this determination binds the union. (Giese Decl. ¶ 9.) And even if the union decided to withdraw fees in violation of Janus, the union would be incapable of doing so because only the State Controller's Office actually deducts the fees. (Id. ¶ 10.) These circumstances demonstrate that defendant Local 1000 is not likely to withdraw agency fees from nonconsenting employees.

Plaintiffs point out that the California statutes authorizing the deduction of agency fees have not been repealed. (Opp'n at 1 (Docket No. 46).) However, this court has previously found, under identical circumstances, that the repeal of the California statutes is not a requirement for this court to declare this case moot. See Hamidi v. Serv. Emps. Int'l Union Local 1000, 386 F. Supp. 3d 1289, 1297 (E.D. Cal. 2019). "The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue." Id. (quoting Winsness v.

Yocom, 433 F.3d 727, 732 (10th Cir. 2006)). For the reasons above, the court finds that such a threat does not exist, and plaintiffs' claim for declaratory relief as moot.[1]

3. Declaratory Relief

"The test for mootness is 'not relaxed in the declaratory judgment context.'" Id. at 1295 (quoting Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc)). Plaintiffs must demonstrate that "a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" exists. Id. (quoting Gator.com, 398 F.3d at 1129).

Applying this standard here, the court finds that plaintiffs' claim for declaratory relief is also moot. The complaint requests declaratory judgment providing that it is "unconstitutional under the First Amendment . . . to withhold or require payment of fair share service fees or agency fees from [p]laintiffs"; that the state statutes "that allow the imposition of fair share service fees are unconstitutional under the First Amendment [and] null and void]"; and that "any collective bargaining agreement provision imposing

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1 To the extent that plaintiffs are relying on the voluntary cessation exception to mootness, that exception does not apply here. "Under Ninth Circuit precedent, 'voluntary cessation must have arisen because of the litigation' for this exception to mootness to apply." Hamidi, 386 F. Supp. 3d at 1295–96 (quoting Pub. Utilities Comm'n of State of Cal. v. F.E.R.C., 100 F.3d 1451, 1460 (9th Cir. 1996) (emphasis in original)). Here, plaintiffs filed suit months after defendants ceased the collection of agency fees, so defendant's voluntary cessation was not a result of this litigation.

fair share service fees or agency fees against [p]laintiffs . . . is unconstitutional under the First Amendment [and] null and void." (FAC ¶ 45(B).) The action plaintiffs object to -- the nonconsensual deduction of agency fees -- ceased months before plaintiffs filed suit, however. At this point, the controversy is neither sufficiently immediate nor real enough to warrant a declaratory judgment.

Plaintiffs argue that neither the unions nor the Public Employment Relations Board ("PERB") has declared anything unconstitutional and that Janus did not address the California statutes, specifically. Again, however, given the circumstances described above, it cannot reasonably be expected that these statutes will be used to collect fees in contravention of Janus in the future. "[T]he existence of potentially problematic agreements and laws is not sufficient to overcome mootness." Cf. Cook, 364 F. Supp. 3d at 1190 (finding request for declaratory relief moot despite Janus not addressing Oregon statutes and bargaining agreements, specifically). The court will therefore dismiss plaintiffs' claim for declaratory relief as moot.

B. Good Faith Defense

In requesting a refund for agency fees collected from plaintiffs in violation of Janus, plaintiffs ask the court to apply Janus retroactively. The Ninth Circuit, however, recently held that, where the union defendant "relied on presumptively-valid state law and then-binding Supreme Court precedent," the union defendant is entitled to a good-faith defense and "is not retrospectively liable" for pre-Janus collection of agency fees. Danielson v. Inslee, 945 F.3d 1096, 1103, 1105 (9th Cir. 2019). Danielson is the law of the circuit and binds this court.

Here, it is undisputed that the union defendants relied on presumptively valid state statutes and then-applicable Supreme Court precedent. Accordingly, the good faith defense applies and the court will dismiss plaintiffs' claim for a refund of fees collected.

All of plaintiffs' arguments in response merely disagree with the Ninth Circuit's decision in Danielson. (Opp'n at 4 ("Plaintiffs disagree with almost every part of Danielson related to the good-faith defense."); id. at 6 ("Danielson wrongly rejects the most analogous tort analysis."); compare id. at 10 ("Owen [v. City of Independence, Mo., 455 U.S. 622, 654-55 (1980)] shows that the Unions are not entitled to a good-faith defense."), with Danielson, 945 F.3d at 1103 ("The good faith defense applies to the Union as a matter of law.").) Ninth Circuit precedent, however, is binding on this court, and because plaintiffs fail to identify any meaningful distinction between this case and Danielson, the court will follow the Ninth Circuit. Accordingly, union defendants here are entitled to the good faith defense and, as a matter of law, cannot be liable for agency fees collected prior to Janus.

C. State Law Claims

Defendants argue that plaintiffs' state law claims are preempted by the Dills Act, Cal. Gov't Code §§ 3512-3524, and that PERB has exclusive jurisdiction over these claims. The court agrees and finds that plaintiff's state law claims for conversion and restitution are preempted by the Dills Act. See Babb, 378 F. Supp. 3d at 877-78; Penning v. Service Emps. Int'l Union, Local 1021, 424 F. Supp. 3d 684, 686 (N.D. Cal. 2020).

Plaintiffs' allegations under the state law claims identify conduct expressly permitted by the Dills Act, and therefore that conduct cannot form the basis for common law claims. Plaintiffs' employment is governed by the Dills Act. (See Complaint ¶¶ 1-2; Cal. Gov't Code §3513(c).) The Act expressly permits the collection of fair-share fees. (See Cal. Gov't Code §§ 3512, 3515, 3515.7.) Because the common law is necessarily displaced by a statute, the collection of fair-share fees is not a violation of state common law. See Babb, 378 F. Supp. 3d at 877 ("'Janus does not change the fact that [the state's public employee collective-bargaining statute] displaced any state common law tort claims that could have been brought with regard to [fair-share fees] collected prior to Janus.'" (quoting Crockett, 367 F. Supp. 3d at 1009; substitutions altered)); 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.").

Further, PERB possesses "exclusive jurisdiction" over matters covered by the Act, subject to appeal to the California Courts of Appeal. Cal. Gov't Code §§ 3514.5. Pursuant to Section 3514.5, that "exclusive jurisdiction" extends to "[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter," i.e., whether a violation of the Act has occurred and, if so, what remedy should be ordered. Cal. Gov't Code § 3514.5. Noting "the broad powers expressly conferred upon PERB," El Rancho Unified School District v. National Education Association, 33 Cal. 3d 946, 953 (1983), the California Supreme Court has held that

identical language[2] in California's Educational Employment Relations Act ("EERA") "broadly preempts state tort claims that allege conduct that is even 'arguably protected or prohibited under EERA.'" Babb, 378 F. Supp. 3d at 877 (quoting El Rancho, 33 Cal.3d at 960). The Dills Act therefore strips the courts' jurisdiction not only to adjudicate claims arising from conduct that is prohibited or protected by the Act, but also to determine whether conduct is in fact prohibited or protected by the Act, as long as it is arguably prohibited or protected. Because plaintiffs' claims depend on whether the unions are entitled to keep the fair share fees that the Dills Act arguably permitted the unions to collect, PERB has exclusive jurisdiction over these claims.

Plaintiffs assert that their common law claims are not preempted because those claims do not arise from conduct constituting "unfair practices" under the Dills Act but, at most, conduct that is protected or prohibited by the Act. (Opp'n at 18.) But the courts have rejected the argument that preemption is limited to claims arising from conduct that would constitute an "unfair practice," as opposed to some other violation of the Dills Act. See Babb, 378 F. Supp. 3d at 877-78; Leek v. Wash. Unified Sch.

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[2] Compare EERA, Cal. Gov't Code § 3541.5 ("The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board."), with Dills Act, Cal. Gov't Code § 3514.5 ("The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.").

Dist., 124 Cal. App. 3d 43, 48-49 (Third Dist. 1981); accord Link v. Antioch Unified Sch. Dist., 142 Cal. App. 3d 765, 768-69 (1st Dist. 1983). Indeed, the very case plaintiffs ask the court to rely on for their proposition that PERB has limited jurisdiction (Opp'n. at 18) explicitly declines to limit PERB's jurisdiction only to claims alleging unfair practices under the Act. See Hott v. Coll. of Sequoias Cmty. Coll. Dist., 3 Cal. App. 5th 84, 94 (5th Dist. 2016) ("PERB's exclusive jurisdiction extends to all alleged violations of [the Act], not just those which constitute unfair practices."). PERB instead has jurisdiction to adjudicate both unfair practices and whether conduct is protected or prohibited by the Act. See id.

Next, plaintiffs argue that their complaint does not allege a violation of the Dills Act. (Opp'n at 18-19.) Specifically, plaintiffs contend that the Dills Act is "irrelevant" to their claims because, regardless of what the Dills Act provides, the unions' receipt of any agency fees constituted conversion. Id. Plaintiffs, however, are not permitted to "plead around" preemption by not alleging Dills Act violations. Instead, "what matters is whether the underlying conduct on which the suit is based -- however described in the complaint -- may fall within PERB's exclusive jurisdiction." El Rancho, 33 Cal. 3d at 954 n.13.; cf. Link, 142 Cal. App. 3d at 769 (finding that claims fall under PERB's exclusive jurisdiction where plaintiffs alleged only constitutional challenges). The preemption question therefore turns on whether plaintiffs' claims arise from conduct that is protected, prohibited, or arguably protected or prohibited under the Dills Act, regardless of the legal labels they assign to their claims. Because the Dills Act expressly authorizes the collection of agency fees, Cal. Gov. Code §§ 3513(k), "[c]hallenges to agency

fees, even on constitutional grounds, are subject to [PERB's] exclusive jurisdiction." Babb, 378 F. Supp. 3d at 877. Accordingly, the court lacks jurisdiction to hear plaintiff's state law claims.

IT IS THEREFORE ORDERED that defendants' motion to dismiss (Docket No. 89) be, and the same hereby is, GRANTED. All claims against defendants are DISMISSED. Because all of plaintiff's claims must be dismissed as a matter of law, any amendment would be futile, and no leave to amend is granted.

The Clerk of Clerk shall enter final judgment in favor of defendants.

Dated: June 11, 2020

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARK GABRIELE; ET AL.,

v.

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

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JUDGMENT IN A CIVIL CASE

2:19-cv-00292 WBS KJN

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 6/12/2020

Keith Holland

Clerk of Court

ENTERED: **June 12, 2020**

by: /s/ H. Huang
Deputy Clerk