**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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No. 19-1774

STACEY MOONEY,

*Plaintiff-Appellant*,

*v.*

ILLINOIS EDUCATION ASSOCIATION, *et al.*,

*Defendants-Appellees*.

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Appeal from the United States District Court for the
Central District of Illinois.
No. 1:18-cv-1439-JBM — **Joe Billy McDade**, *Judge.*

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ARGUED SEPTEMBER 20, 2019 — DECIDED NOVEMBER 5, 2019

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Before WOOD, *Chief Judge*, and MANION and ROVNER, *Circuit Judges*.

WOOD, *Chief Judge*. Stacey Mooney is a public-school teacher in Eureka (Illinois) Community School District #140. She is not a member of respondent Illinois Educa-

tion Association ("IEA"), the union that serves as the exclusive representative of her employee unit in collective bargaining with the school district. From the time she started as a public employee until June 2018, the District deducted from her paycheck and sent to the union a fair-share fee that contributed to the costs incurred by the union in its labor-management activities. Both the Illinois Public Relations Act, 5 ILCS § 315/6, and existing Supreme Court precedent, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), authorized this fee arrangement.

That state of affairs came to an end when, in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court overruled *Abood* and announced that compulsory fair-share fee arrangements violate the First Amendment rights of persons who would prefer not to associate with the union that represents their employee unit. 138 S. Ct. at 2460. Following *Janus*, state employers in Illinois immediately ceased deducting fair-share fees from the paychecks of nonmembers of public sector unions.

Mooney filed suit in the Central District of Illinois on behalf of herself and a putative class of similarly situated persons, seeking restitution pursuant to 42 U.S.C. § 1983 for the fees that had been deducted from her pay prior to *Janus*. The district court entered judgment for IEA on April 23, 2019, dismissing Mooney's claims with prejudice. In so doing, it joined the consensus across the country concluding that unions that collected fair-share fees prior to *Janus*, in accordance with state law and *Abood*, are entitled to assert a good-faith defense to section 1983 liability.

We heard oral argument on Mooney's case on September 20, 2019, in conjunction with *Janus v. AFSCME*, No. 19-1553. We now affirm the judgment of the district court, largely for the reasons set forth in our opinion of today's date in *Janus v. AFSCME*, No. 19-1553.

We write briefly here to address one difference between the claim brought by Mooney and that brought by Mark Janus. On remand from the Supreme Court, Mr. Janus sought damages pursuant to 42 U.S.C. § 1983 in the amount of the fair-share fees he had paid prior to *Janus*. Mooney, in contrast, insists that she is not seeking damages, but instead that she is entitled to the equitable remedy of restitution under the same statute. From the point of view of the union, the two requests are identical: each one seeks a refund of the fees that the plaintiff paid under the *ancien régime*. Mooney, however, believes that there is something special about restitution that is outcome-determinative. Perhaps that is true in some situations, but as we now explain, in substance Mooney is also seeking damages, and so her claim must fail.

Section 1983 allows for remedies either at law or in equity. 42 U.S.C. § 1983 ("... [covered persons] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."). The district court has discretion to tailor an appropriate remedy for the constitutional violation. See *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."); *Lieberman v. Univ. of Chicago*, 660 F.2d 1185, 1193 (7th Cir. 1981) ("[F]ederal courts have

the role of providing broad and flexible remedies for violations of federal statutory and constitutional rights.").

Mooney would like us to regard her requested relief as restitutionary in nature. She believes that even if she concedes that a good-faith defense protects the union against a damages award, an equitable demand for restitution cannot be defeated on good-faith grounds. She argues that there is nothing unfair about requiring the union to return monies that, according to *Janus*, should never have been deducted from her paychecks in the first place. In fact, she concludes, the union would receive a windfall based on its violations of her constitutional rights if no restitution were ordered.

IEA responds that Mooney is simply playing with labels, and that calling her claim equitable, or one for restitution, does not make it so. In substance, IEA says, Mooney's suit is exactly the same as Mr. Janus's: one for damages flowing from a First Amendment violation. The gravamen of Mooney's complaint is that her First Amendment rights were violated by the fair-share requirement because she was compelled to furnish financial support to union activities with which she disagreed.

As have all other district courts that have faced this question, the court here agreed with IEA's position. It concluded that "Plaintiff's claim lies in law rather than equity, and there is consequently no reason to consider whether the good-faith defense applies where the claim is for equitable restitution." See also, *e.g.*, *Carey v. Inslee*, 364 F. Supp. 3d 1220 (W.D. Wash. 2019), appeal pending, No. 19-35290 (9th Cir.); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), appeal pending, No. 19-35299 (9th Cir.); *Babb v. California Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019); *Al-*

*len v. Santa Clara Cnty. Correctional Peace Officers Ass'n*, 2019 WL 4302744 (E.D. Cal. Sept. 11, 2019).

The characterization of Mooney's claim presents a legal question on which our consideration is de novo. That said, we agree with the district court's analysis, which finds ample support in the law. Indeed, many years ago we held that a claim for a refund of an agency-fee overcharge under the *Abood* regime was a legal rather than an equitable claim. *Gilpin v. Am. Fed'n of State, Cnty., & Mun. Employees, AFL-CIO*, 875 F.2d 1310, 1314 (7th Cir. 1989) (citing Dobbs, Handbook on the Law of Remedies 224 (1973) ("The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep.")). But see *Laramie v. Cnty. of Santa Clara*, 784 F. Supp. 1492, 1501–02 (N.D. Cal. 1992) (labeling a refund of nonchargeable fees under the *Abood* regime as restitution).

Furthermore, as the Supreme Court explained in *Montanile v. Bd. of Trustees of Nat. Elevator Indust. Health Benefit Plan*, 136 S. Ct. 651 (2016), "restitution in equity typically involved enforcement of a 'constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.'" *Id.* at 657 (citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002)). Where a plaintiff seeks "recovery from the beneficiaries' assets generally" because her specific property has dissipated or is otherwise no longer traceable, the claim "is a *legal* remedy, not an equitable one."

Id. at 658 (emphasis in original) (internal quotation marks omitted).

Mooney is bringing just such a claim—that is, one against the union's treasury generally, not one against an identifiable fund or asset. She attempts to escape this conclusion with the argument that the entire treasury is an identifiable fund against which she can pursue an equitable lien, but that proves too much. Every defendant will always have a "fund" consisting of all of its assets, but that is not what the Supreme Court was talking about in *Great-West Life* and *Montanile*. It is not enough that Mooney's fees once contributed to IEA's overall assets. According to *Montanile*, she must point to an identifiable fund and show that her fees specifically are still in the union's possession. 136 S. Ct. at 657–59. This she has not done. Her claim is against the general assets of the union, held in its treasury, and can only be characterized as legal.

In substance, then, Mooney's claim is one for damages. For the reasons we set forth in more detail in *Janus v. AFSCME*, No. 19-1553, decided today, we AFFIRM the district court's judgment.

MANION, *Circuit Judge*, concurring. I concur with the court's ultimate conclusion. I write separately here for the same reason I write separately in *Janus v. AFSCME, Council 31*, No. 19-1553, also decided today. *Janus II* recognized *Abood* gave unions a windfall for 41 years. But *Janus II* also implied unions need not disgorge this windfall.

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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No. 19-1553

MARK JANUS,

*Plaintiff-Appellant*,

*v.*

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31; AFL-CIO, *et al.*,

*Defendants-Appellees,*

*and*

KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois,

*Intervenor-Defendant-Appellee*.

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:15-cv-1235 — **Robert W. Gettleman**, *Judge.*

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ARGUED SEPTEMBER 20, 2019 — DECIDED NOVEMBER 5, 2019

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Before WOOD, *Chief Judge*, and MANION and ROVNER, *Circuit Judges*.

WOOD, *Chief Judge*. For 41 years, explicit Supreme Court precedent authorized state-government entities and unions to enter into agreements under which the unions could receive fair-share fees from nonmembers to cover the costs incurred when the union negotiated or acted on their behalf over terms of employment. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). To protect nonmembers' First Amendment rights, fair-share fees could not support any of the union's political or ideological activities. Relying on *Abood*, more than 20 states created statutory schemes that allowed the collection of fair-share fees, and public-sector employers and unions in those jurisdictions entered into collective bargaining agreements pursuant to these laws.

In 2018, the Supreme Court reversed its prior position and held that compulsory fair-share or agency fee arrangements impermissibly infringe on employees' First Amendment rights. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2461 (2018). The question before us now is whether Mark Janus, an employee who paid fair-share fees under protest, is entitled to a refund of some or all of that money. We hold that he is not, and so we affirm the judgment of the district court.

## I

### A. History of Agency Fees

Before turning to the specifics of the case before us, we think it useful to take a brief tour of the history behind agency fees. This provides useful context for our consideration of Mr. Janus's claim and the system he challenged.

The principle of exclusive union representation lies at the heart of our system of industrial relations; it is reflected in both the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151–165 (first enacted in 1926), and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151–169 (first enacted in 1935). In its quest to provide for "industrial peace and stabilized labor-management relations," Congress authorized employers and labor organizations to enter into agreements under which employees could be required either to be union members or to contribute to the costs of representation—so-called "agency-shop" arrangements. See 29 U.S.C. §§ 157, 158(a)(3); 45 U.S.C. § 152 Eleventh. Unions designated as exclusive representatives were (and still are) obligated to represent all employees, union members or not, "fairly, equitably, and in good faith." H.R. Rep. No. 2811, 81st Cong., 2d Sess., p. 4.

In *Railway Employment Dep't v. Hanson*, 351 U.S. 225 (1956), a case involving the RLA, the Supreme Court held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* at 231. In approving agency-shop arrangements, the Court said, "Congress endeavored to safeguard against [the possibility that compulsory union membership would impair freedom of expression] by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.'" *Id.* Hanson thus held that the compulsory payment of fair-share fees did not contravene the First Amendment.

Several years later, in *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court discussed the careful balancing of interests reflected in the RLA, observing that "Congress did not completely abandon the policy of full freedom of choice embodied in the [RLA], but rather made inroads on it for the limited purposes of eliminating the problems created by the 'free rider.'" *Id.* at 767. The Court reaffirmed the lawfulness of agency-shop arrangements while cautioning that unions could receive and spend nonmembers' fees only in accordance with the terms "advanced by the unions and accepted by Congress [to show] why authority to make union shop agreements was justified." *Id.* at 768. Legitimate expenditures were limited to those designed to cover "the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Id.* The Court left the question whether state public agencies were similarly empowered under state law to enter into agency-shop arrangements for another day.

That day came on May 23, 1977, when the Supreme Court issued its opinion in *Abood*. 431 U.S. 209. There, a group of public-school teachers challenged Michigan's labor relations laws, which were broadly modeled on federal law. *Id.* at 223. Michigan law established an exclusive representation scheme and authorized agency-shop clauses in collective bargaining agreements between public-sector employers and unions. *Id.* at 224. The Court upheld that system, stating that "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller," *id.*, and that "[t]he same important government interests recognized in the *Hanson* and *Street* cases presumptively support

the impingement upon associational freedom created by the agency shop here at issue." *Id.* at 225. It recognized that "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* at 233–34. Nonetheless, it said that a public employee has no "weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation," *id.* at 229, and thus concluded that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232.

The correct balance, according to *Abood*, was to "prevent[] compulsory subsidization of ideological activities by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237. And for four decades following *Abood*, courts, state public-sector employers, and unions followed this path. See, *e.g.*, *Locke v. Karass*, 555 U.S. 207 (2009); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). Agency-shop arrangements, the Court repeatedly held, were consistent with the First Amendment and validly addressed the risk of free riding. See *Comm'cns Workers of America v. Beck*, 487 U.S. 735, 762 (1988) ("Congress enacted the two provisions for the same purpose, eliminating 'free riders,' and that purpose dictates our construction of § 8(a)(3) . . . ."); *Ellis*, 466 U.S. at 447, 452, 456 (referring in three places to the free-rider concern); see also *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring).

In time, however, the consensus on the Court began to fracture. Beginning in *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298 (2012), the rhetoric changed. *Abood* began to be characterized as an "anomaly," and the Court started paying more attention to the "significant impingement on First Amendment rights" *Abood* allowed and less to the balancing of employees' rights and unions' obligations. Id. at 310–11. Building on *Knox*, *Harris v. Quinn* criticized the reasoning in *Hanson* and *Abood* as "thin," "questionable," and "troubling." 573 U.S. 616, 631–35 (2014). *Harris* worried that *Abood* had "failed to appreciate the conceptual difficulty of distinguishing between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends" and to anticipate "the practical administrative problems that would result." *Id.* at 637. The *Harris* Court also suggested that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id.* at 649.

Nonetheless, and critically for present purposes, these observations did not lead the Court in *Harris* to overrule *Abood*. Informed observers thought that *Abood* was on shaky ground, but it was unclear whether it would weather the storm, be restricted, or be overturned in its entirety. That uncertainty continued after the Court signaled its intention to revisit the issue in *Friedrichs v. California Teachers Ass'n*, 135 S. Ct. 2933 (2015), which wound up being affirmed by an equally divided Court. 136 S. Ct. 1083 (2016).

B. Janus's Case

Plaintiff Mark Janus was formerly a child-support specialist employed by the Illinois Department of

Healthcare and Family Services. Through a collective bargaining agreement between Illinois's Department of Central Management Services ("CMS") (which handles human resources tasks for Illinois's state agencies) and defendant American Federation of State, County and Municipal Employees ("AFSCME"), Council 31, AFSCME was designated as the exclusive representative of Mr. Janus's employee unit. Mr. Janus exercised his right not to join the union. He also objected to CMS's withholding $44.58 from his paycheck each month to compensate AFSCME for representing the employee unit in collective bargaining, grievance processing, and other employment-related functions.

Initially, however, Mr. Janus was not involved in this litigation. The case began instead when the then-governor of Illinois challenged the Illinois Public Labor Relations Act ("IPLRA"), which established an exclusive representation scheme and authorized public employers and unions to enter into collective bargaining agreements that include a fair-share fee provision. 5 ILCS § 315/6. Under that law, a union designated as the exclusive representative of an employee unit was "responsible for representing the interests of all public employees in the unit," whether union members or not, § 315/6(d). Fair-share fees were earmarked to compensate the union for costs incurred in "the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." § 315/6(e).

The district court dismissed the governor for lack of standing, but at the same time it permitted Mr. Janus (and some others) to intervene as plaintiffs. Mr. Janus asserted that the state's compulsory fair-share scheme

violated the First Amendment. He recognized that *Abood* stood in his way, but he argued that *Abood* was wrongly decided and should be overturned by the high court. Although the lower courts that first considered his case rejected his position on the ground that they were bound by *Abood*, see *Janus v. AFSCME, Council 31*, 851 F.3d 746, 747–48 (7th Cir. 2017) ("*Janus I*"), Janus preserved his arguments and then, as he had hoped, the Supreme Court took the case.

This time, the Court overruled *Abood*. *Janus*, 138 S. Ct. at 2486 ("*Janus II*"). It held that agency-shop arrangements that require nonmembers to pay fair-share fees and thereby "subsidize private speech on matters of substantial public concern," are inconsistent with the First Amendment rights of objectors, no matter what interest the state identifies in its authorizing legislation. 138 S. Ct. at 2460. This is so, the Court explained, because "the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Id.* at 2467.

Several aspects of the Court's opinion are relevant to Mr. Janus's current claim for damages. First, the Court characterized the harm inflicted by the agency-fee arrangement as "compelled subsidization of private speech," 138 S. Ct. at 2464, whereby "individuals are coerced into betraying their convictions," *id.* It was not concerned in the abstract with the deduction of money from employees' paychecks pursuant to an employment contract. Rather, the problem was the lack of *consent* (where it existed) to the use of that money—*i.e.* to support the union's representation work. In other words, the

case presented a First Amendment speech issue, not one under the Fifth Amendment's Takings clause.

The Court found that any legitimate interest AFSCME had in those fees had to yield to the objecting employees' First Amendment rights. In so doing, it rejected the approach to free riding that earlier opinions had taken, holding to the contrary that "avoiding free riders is not a compelling interest" and thus Illinois's statute could not withstand "exacting scrutiny." 138 S. Ct. at 2466. Yet it came to that conclusion only after weighing the costs and benefits to a union of having exclusive representative status: on the one hand, the union incurs the financial burden attendant to the requirement to provide fair representation even for nonmembers who decline to contribute anything to the cost of its services; on the other hand, even with payments of zero from objectors, the union still enjoys the power and attendant privileges of being the exclusive representative of an employee unit. The Court's analysis focused on the union rather than the nonmembers: the question was whether requiring a *union* to continue to represent those who do not pay even a fair-share fee would be sufficiently inequitable to establish a compelling interest, not whether requiring *nonmembers* to contribute to the unions would be inequitable.

Nor did the Court hold that Mr. Janus has an unqualified constitutional right to accept the benefits of union representation without paying. Its focus was instead on freedom of expression. That is why it said only that the state may not force a person to pay fees to a union with which she does not wish to associate. But if those unions were not designated as exclusive representatives (as they are under 5 ILCS §§ 315/6 and 315/9), there

would be no obligation to act in the interests of nonmembers. The only right the *Janus II* decision recognized is that of an objector not to pay *any* union fees. This is not the same as a right to a free ride. Free-riding is simply a consequence of exclusivity; drop the duty of fair representation, and the union would be free to cut off all services to the nonmembers.

Finally, the Court did not specify whether its decision was to have retroactive effect. The language it used, to the extent that it points any way, suggests that it was thinking prospectively: "Those unconstitutional exactions cannot be allowed to continue indefinitely," 138 S. Ct. at 2486; "States and public-sector unions may no longer extract agency fees from nonconsenting employees," *id*; "This procedure violates the First Amendment and cannot continue," *id*. In the end, however, the Court remanded the case to the district court for further proceedings, in particular those related to remedy. *Id.* at 2486.

C. District Court Proceedings

The most immediate effect of the Court's *Janus II* opinion was CMS's prompt cessation of its collection of fees from Mr. Janus and all other nonmembers of the union, and thus the end of AFSCME's receipt of those monies. That relief was undoubtedly welcome for those such as Mr. Janus who fundamentally disagree with the union's mission, but matters did not stop there. Still relying on 42 U.S.C. § 1983 for his right of action, Mr. Janus followed up on the Court's decision with a request for damages from AFSCME in the amount of all fairshare fees he had paid. The State of Illinois joined the litigation as an intervenor-defendant in support of AFSCME.

The district court entered summary judgment for AFSCME and Illinois on March 18, 2019. *Janus v. AFSCME, Council 31*, No. 15 C 1235, 2019 WL 1239780 (N.D. Ill. Mar. 18, 2019) ("*Janus III*"). It began with the observation that in 1982, the Supreme Court held that private defendants could in some circumstances act "under color of state law" for purposes of section 1983 by participating in state-created procedural schemes. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941–42 (1982). Although such private defendants are not entitled to the identical immunity defenses that apply to public defendants, the Court later indicated, they may be entitled to an affirmative defense based on good faith or probable cause. *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) ("*Wyatt I*"). Noting that "every federal appellate court that has considered the good-faith defense [to a damages action] has found that it exists for private parties," the court followed that rule and found that the defense applies here. The key question, it said, is whether the defendant's reliance on an existing law was in good faith. Given the fact that "the statute on which defendant relied had been considered constitutional for 41 years," it found good faith. In so doing, it rejected the idea that earlier intimations from the Court that *Abood* ought to be overruled undermined the necessary good faith. Accordingly, it held that Mr. Janus was not entitled to damages.

Mr. Janus timely filed a notice of appeal on March 27, 2019. We heard oral argument in both Mr. Janus's appeal and a related case, *Mooney v. Ill. Educ. Ass'n*, No. 19-1774, on September 20, 2019. The predicate for each case is the same—the Supreme Court's decision in *Janus II*—but whereas Mr. Janus seeks damages from the union, Mooney insists that her claim lies in equity and is

one for restitution. As we explain in more detail in a separate opinion filed in *Mooney*, we find no substantive difference in the two theories of relief, and so much of what we have to say here also applies to Mooney's case.

## II

This appeal presents only questions of law. Accordingly, we review the district court's grant of summary judgment in favor of AFSCME *de novo*. *Mazzai v. Rock-N-Around Trucking, Inc.*, 246 F.3d 956, 959 (7th Cir. 2001).

### A. Retroactivity

We begin with the question whether *Janus II* is retroactive. If it is not, that is the end of the line for Mr. Janus, because the union's collection of fair-share fees was expressly permitted by state law and Supreme Court precedent from the time he started his covered work until the Court's decision, which all agree marked the end of his payments. If it is, then we must reach additional questions that also bear on the proper resolution of the case. As we noted earlier, the Supreme Court's opinion did not address retroactivity in so many words.

Mr. Janus relies primarily on *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), for the proposition that "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Id.* at 97; see also *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) ("*Harper*. . . held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or

not those cases involve predecision events."). Mr. Janus's assertion is that *all* Supreme Court cases, without exception, "must be applied retroactively." AFSCME responds that "[i]t is not at all clear, in the first place, that the Supreme Court's decision in this case is to be applied retroactively."

We agree with AFSCME that the rules of retroactivity are not as unbending as Mr. Janus postulates. Even in *Harper*, the Court said only that its "consideration of remedial issues meant necessarily that we retroactively applied the rule we announced . . . to the litigants before us." 509 U.S. at 99. Right and remedy are two different things, and the Court has taken great pains to evaluate them separately. See, *e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 65–66 (1992) ("As we have often stated, the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place.").

Retroactivity poses some knotty problems. The Supreme Court disapproved of what it called "selective prospectivity" in *Harper* (that is, application of the new rule to the party before the court but not to all others whose cases were pending), but it did not close the door on "pure prospectivity"—i.e., wholly prospective force, equally inapplicable to the parties in the case that announces the rule and all others—as used in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"). In that case, after invalidating a Pennsylvania program permitting nonpublic sectarian schools to be reimbursed for secular educational services, see *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon I*"), the Court affirmed a district court order permitting the state to reimburse the

schools for all services performed up to the date of *Lemon I*. *Lemon II*, 411 U.S. at 194. One could argue that similar reliance interests on the part of AFSCME and the state argue for pure prospectivity here.

On the other hand, in later decisions the Supreme Court has stated that the "general practice is to apply the rule of law we announce in a case to the parties before us . . . even when we overrule a case." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Only when there is "grave disruption or inequity involved in awarding retrospective relief to the petitioner" does the option of pure prospectivity come into play. *Ryder v. United States*, 515 U.S. 177, 184–85 (1995). See also *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 650 (7th Cir. 2014) (en banc).

Rather than wrestle the retroactivity question to the ground, we think it prudent to assume for the sake of argument that the *right* recognized in *Janus II* should indeed be applied to the full sweep of people identified in *Harper* (that is, Mr. Janus himself and all others whose cases were in the pipeline at the time of the Court's decision). That appears also to be the approach the district court took. We thus turn to the broader question whether Mr. Janus is entitled to the remedy he seeks.

### B. Requirements under Section 1983

Section 1983 supports a civil claim against "every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

*1. AFSCME is a "person" that can be sued*

To be liable under section 1983 a defendant must be a "person" as Congress used that term. While "person" is a broad word, the Supreme Court has held that states do not fall within its compass. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). But it is hard to find other exclusions. The union, as an unincorporated organization, is a suable "person," and we are satisfied that it is sufficiently like other entities that have been sued under section 1983 to permit this action. Compare *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (municipalities and other local government units are "persons" for purposes of section 1983); *Walsh v. Louisiana High School Athletic Ass'n*, 616 F.2d 152, 156 (5th Cir. 1980) (voluntary association of schools); *Frohwerk v. Corr. Med. Servs.*, 2009 WL 2840961 (N.D. Ind. Sept. 1, 2009) (prison contractors). *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

*2. AFSCME acted "under color of" state law*

The next question is whether AFSCME acted under color of state law. Unions generally are private organizations. See, *e.g.*, *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009). Nonetheless, private actors sometimes fall within the statute. See *Lugar*, 457 U.S. at 935. Indeed, the "color of law" requirement for section 1983 is more expansive than, and wholly encompasses, the "state action" requirement under the Fourteenth Amendment. *Id.* For our purposes, the analysis is the same—if AFSCME's receipt from CMS of the fair-share fees is attributable to the state, then the "color of law" requirement is satisfied.

A "procedural scheme created by . . . statute obviously is the product of state action" and "properly may be addressed in a section 1983 action." *Id.* at 941. "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); see also *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992). Here, AFSCME was a joint participant with the state in the agency-fee arrangement. CMS deducted fair-share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement. This is sufficient for the union's conduct to amount to state action. We therefore conclude that AFSCME is a proper defendant under section 1983.

C. Statute of Limitations

Mr. Janus's claim is also timely under the applicable statute of limitations. Section 1983 does not have its own organic statute of limitations but rather borrows the state statute of limitations for personal-injury actions. *Wilson v. Garcia*, 471 U.S. 261, 279 (1985). In Illinois, this is two years. 735 ILCS § 5/13–202. "The claim accrues when the plaintiff knows or should know that his or her constitutional rights have been violated." *Draper v. Martin*, 664 F.3d 1110, 1113 (7th Cir. 2011).

In this case, the statute began running on the date of the Supreme Court's decision in *Janus II*: June 27, 2018. Mr. Janus neither knew nor should have known any earlier that his constitutional rights were violated, because before then it was the settled law of the land that the contrary was true. Thus, his suit is timely.

## III

### A. Existence of Good-faith Defense

We now turn to the ultimate question in this case: to what remedy or remedies is Mr. Janus entitled? As the Supreme Court wrote in *Davis v. United States*, 564 U.S. 229 (2011), retroactivity and remedy are distinct questions. "Retroactive application does not . . . determine what 'appropriate remedy' (if any) the defendant should obtain." *Id.* at 243; see also *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 189 (1990) (plurality opinion) ("[T]he Court has never equated its retroactivity principles with remedial principles. . .."). It thus does not necessarily follow from retroactive application of a new rule that the defendant will gain the precise type of relief she seeks. See *Powell v. Nevada*, 511 U.S. 79, 84 (1994). To the contrary, the Supreme Court has acknowledged that the retroactive application of a new rule of law does not "deprive[] respondents of their opportunity to raise . . . reliance interests entitled to consideration in determining the nature of the remedy that must be provided." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991).

Sometimes the law recognizes a defense to certain types of relief. An example that comes readily to mind is the qualified immunity doctrine, which is available for a public employee if the asserted constitutional right that she violated was not clearly established. See, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). We must decide whether a union may raise any such defense against its liability for the fair-share fees it collected before *Janus II*.

This is a matter of first impression in our circuit. But, as the district court noted, every federal appellate court

to have decided the question has held that, while a private party acting under color of state law does not enjoy qualified immunity from suit, it is entitled to raise a good-faith defense to liability under section 1983. See *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275–78 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118–21 (5th Cir. 1993) ("*Wyatt II*").

Mr. Janus takes issue with this consensus position. He points to the text of section 1983, which we grant says nothing about immunities or defenses. That, he contends, is the end of the matter. "Shall be liable to the party injured" is mandatory language that, in his view, allows for no exceptions. The problem with such an absolutist position, however, is that the Supreme Court abandoned it long ago, when it recognized that liability under section 1983 is subject to common-law immunities that apply to all manner of defendants.

The Court discussed that history in *Wyatt I*, where it noted that despite the bare-bones text of section 1983, it had "accorded certain government officials either absolute or qualified immunity from suit if the 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." 504 U.S. at 163–64 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)) (internal quotation marks omitted). In *Wyatt I*, the Court had to decide how far its immunity jurisprudence reached, and specifically, whether *private* parties acting under

color of state law would have been able, at the time section 1983 was enacted (in 1871), to invoke the same immunities that public officials had. (That is more than a bit counterfactual, as the Court did not recognize this type of private liability until 1982, but we put that to one side.) Surveying its immunity jurisprudence, including *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Wood v. Strickland*, 420 U.S. 308 (1975), and *Pierson v. Ray*, 386 U.S. 547 (1967), the Court "conclude[ed] that the rationales mandating qualified immunity for public officials are not applicable to private parties." 504 U.S. at 167.

The Court recognized that this outcome risked leaving private defendants in the unenviable position of being just as vulnerable to suit as public officials, per *Lugar*, but not protected by the same immunity. *Id.* at 168. But, critically for AFSCME, the Court pointed toward the solution to that problem. It distinguished between defenses to suit and immunity from suit, the latter of which is more robust, in that it bars recovery regardless of the merits. *Id.* at 166. It then confirmed that its ruling rejecting qualified immunity did "not foreclose the possibility that private defendants faced with § 1983 liability under [*Lugar*] could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Wyatt I*, 504 U.S. at 169.

Mr. Janus rejects the line that the Court drew between qualified immunity and a defense to liability; he sees it as nothing but a labeling game. But *Wyatt I* directly refutes this criticism. Adding to the language above from the majority, Justice Kennedy, in concur-

rence, explained why a defense on the merits might be available for private parties even if immunity is not. "By casting the rule as an immunity, we imply the underlying conduct was unlawful, a most debatable proposition in a case where a private citizen may have acted in good-faith reliance upon a statute." 504 U.S. at 173 (Kennedy, J., concurring). The distinction between an immunity and a defense is one of substance, not just nomenclature, and "is important because there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *Id.* at 174; see also *Lugar*, 457 U.S. at 942 n.23 ("Justice Powell is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense.").

The *Wyatt I* Court remanded the case to the Fifth Circuit, which decided that the "question left open by the majority"—whether a good-faith defense is available in section 1983 actions—"was largely answered" in the affirmative by the five concurring and dissenting justices. *Wyatt II*, 994 F.2d at 1118. The court accordingly held "that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Id.*

Other circuits followed suit. In *Jordan*, the Third Circuit noted "the [Supreme Court's] statement [in *Wyatt I*] that persons asserting section 1983 claims against private parties could be required to carry additional burdens, and the statements in *Lugar* which warn us [that] a too facile extension of section 1983 to private parties could obliterate the Fourteenth Amendment's limitation to state actions that deprive a person of constitutional rights and the statutory limitation of section 1983 actions to claims against persons acting under color of law." 20 F.3d at 1277 (cleaned up). Those considerations, the court said, lead to the conclusion that "'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity." *Id.* The Sixth Circuit concurred in *Vector Research*, 76 F.3d at 699, as did the Ninth Circuit in *Clement*, 518 F.3d at 1096–97. Most recently, in a case decided after *Harris v. Quinn*, the Second Circuit allowed a good-faith defense to a section 1983 claim for reimbursement of agency fees paid prior to decision. *Jarvis v. Cuomo*, 660 F. App'x 72, 75–76 (2d Cir. 2016).

Mr. Janus pushes back against these decisions with the argument that there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims. As we hinted earlier, however, the reason is simple: the liability of private parties under section 1983 was not clearly established until, at the earliest, the Court's decision in *United States v. Price*, 383 U.S. 787 (1966). For nearly 100 years, nothing would have prompted the question.

We now join our sister circuits in recognizing that, under appropriate circumstances, a private party that

acts under color of law for purposes of section 1983 may defend on the ground that it proceeded in good faith. The final question is whether that defense is available to AFSCME.

B. Good-faith Defense for AFSCME

Although this is a new question for us, we note that every district court that has considered the precise question before us—whether there is a good-faith defense to liability for payments collected before *Janus II*—has answered it in the affirmative.[1] While those views are not binding on us, the unanimity of opinion is worth noting.

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1. See *Hamidi v. SEIU Local 1000*, 2019 WL 5536324 (E.D. Cal. Oct. 25, 2019); *LaSpina v. SEIU Pennsylvania State Council*, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019); *Casanova v. International Ass'n of Machinists, Local 701*, No. 1:19-cv-00428, Dkt. #22 (N.D. Ill. Sept. 11, 2019); *Allen v. Santa Clara Cty. Correctional Peace Officers Ass'n*, 2019 WL 4302744 (E.D. Cal. Sept. 11, 2019); *Ogle v. Ohio Civil Serv. Emp. Ass'n*, 2019 WL 3227936 (S.D. Ohio July 17, 2019), appeal pending, No. 19-3701 (6th Cir.); *Diamond v. Pennsylvania State Educ. Ass'n*, 2019 WL 2929875 (W.D. Pa. July 8, 2019), appeal pending, No. 19-2812 (3d Cir.); *Hernandez v. AFSCME California*, 386 F. Supp. 3d 1300 (E.D. Cal. 2019); *Doughty v. State Employee's Ass'n*, No. 1:19-cv-00053PB (D.N.H. May 30, 2019), appeal pending, No. 19-1636 (1st Cir.); *Babb v. California Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021 (D. Conn. Apr. 26, 2019), appeal pending, No. 19-1563 (2d Cir.); *Akers v. Maryland Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019), appeal pending, No. 19-1524 (4th Cir.); *Bermudez v. SEIU Local 521*, 2019 WL 1615414 (N.D. Cal. Apr. 16, 2019); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980 (N.D. Ohio 2019), appeal pending, No. 19-3250 (6th Cir.); *Hough v. SEIU Local 521*, 2019 WL 1274528 (N.D. Cal. Mar. 20, 2019), amended, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), appeal pending, No. 19-15792 (9th Cir.); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), appeal pending, No. 19-35299

(continued…)

The first task we have under *Wyatt I* is to identify the "most closely analogous tort" to which we should turn for guidance. 504 U.S. at 164 (citations and internal quotation marks omitted). Arguing in some tension with his statute-of-limitations position, Mr. Janus says that his claim lacks any common law analogue. His back-up position is that good faith is pertinent only if the underlying offense has a state-of-mind element, and he asserts that the most analogous tort in his case lacks such an element.

Mr. Janus compares the First Amendment violation in his case to conversion. But that analogy does not work, at least with regard to the state's deduction of fair-share fees and its transfer of those fees to the union. Conversion requires an intentional and serious interference with "the right of another to control" a chattel. Restatement (Second) of Torts § 222A (1965). At the time AFSCME received Mr. Janus's fair-share fees, he had no "right to control" that money. Instead, under Illinois law and *Abood*, the union had a right to the fees under the collective bargaining agreement with CMS. This rules out conversion. As the Supreme Court said in *Chicot Cnty.*

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(9th Cir.); *Carey v. Inslee*, 364 F. Supp. 3d 1220 (W.D. Wash. 2019), appeal pending, No. 19-35290 (9th Cir.); *Cook v. Brown*, 364 F. Supp. 3d 1184 (D. Or. 2019), appeal pending, No. 19-35191 (9th Cir.); *Danielson v. AFSCME, Council 28*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018), appeal pending, No. 18-36087 (9th Cir.). See also *Winner v. Rauner*, 2016 WL 7374258 (N.D. Ill. Dec. 20, 2016) (post-*Harris* claim for fee reimbursement); *Hoffman v. Inslee*, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016) (same). But see *Lamberty v. Connecticut State Police Union*, 2018 WL 5115559 (D. Conn. Oct. 19, 2018) (dismissing for lack of standing but implying plaintiffs were entitled to previously withheld fees, plus interest).

*Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), "the actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored." *Id.* at 374.

There are also at least two privileges that may be relevant to a conversion-style claim: authority based upon public interest, Restatement (Second) of Torts § 265 (1965), and privilege to act pursuant to court order, Restatement (Second) of Torts § 266 (1965). Section 265 provides that "one is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if he is acting in discharge of a duty or authority created by law to preserve the public safety, health, peace, or other public interest, and his act is reasonably necessary to the performance of his duty or the exercise of his authority." While the usual context for the assertion of this privilege is law enforcement, it is not too much of a stretch to apply it to the union's conduct here. CMS and AFSCME acted pursuant to state law. That sounds like action in discharge of a duty imposed by law. Section 266, which provides a privilege when one acts pursuant to a court order, is not directly applicable because there was no court order directing AFSCME to receive fair-share fees—*Abood* was permissive, not mandatory. Nevertheless, CMS and AFSCME did rely on the Supreme Court's opinion upholding the legality of exactly this process.

AFSCME contends that the better analogy is to the tort of abuse of process. Abuse of process occurs where a party "uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." Restatement (Second) of Torts § 682 (1977). Alternatively, the most analogous tort

might be interference with contract. See Restatement (Second) of Torts § 766A (1979). Under the agency-fee arrangement, a certain portion of the salary CMS contracted to pay employees went instead to the union. This arguably made the contract less lucrative for objecting employees and violated their First Amendment rights.

None of these torts is a perfect fit, but they need not be. We are directed to find the *most analogous* tort, not the exact-match tort. This is inherently inexact. Although there are reasonable arguments for several different torts, we are inclined to agree with AFSCME that abuse of process comes closest. But perhaps the search for the best analogy is a fool's errand. As several district courts have commented, the Supreme Court in *Wyatt I* embarked on the search for the most analogous tort only for *immunity* purposes—the Court never said that the same methodology should be used for the good-faith defense. See, *e.g.*, *Carey*, 364 F. Supp. 3d at 1229–30; *Babb*, 378 F. Supp. 3d at 872–73; *Diamond*, 2019 WL 2929875 at *25–26. In the alternative, therefore, we leave common-law analogies behind and consider the appropriateness of allowing a good-faith defense on its own terms.

### C. Good-faith Defense under *Wyatt I*

Like our sister circuits, we read the Court's language in *Wyatt I* and *Lugar*, supplemented by Justice Kennedy's opinion concurring in *Wyatt I*, as a strong signal that the Court intended (when the time was right) to recognize a good-faith defense in section 1983 actions when the defendant reasonably relies on established law. This is not, we stress, a simple "mistake of law" defense. Neither CMS nor AFSCME made any mistake about the state of the law during the years between 1982 and June

27, 2018, when *Janus II* was handed down. *Abood* was the operative decision from the Supreme Court from 1977 onward, until the Court exercised its exclusive prerogative to overrule that case. Like its counterparts around the country, the State of Illinois relied on *Abood* when it adopted a labor relations scheme providing for exclusive representation of public-sector workers and the remit of fair-share fees to the recognized union. The union then relied on that state law in its interactions with other actors.

We realize that there were signals from some Justices during the years leading up to *Janus II* that indicated they were willing to reconsider *Abood*, but that is hardly unique to this area. Sometimes such reconsideration happens, and sometimes, despite the most confident predictions, it does not. See, *e.g.*, *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming the *Miranda* rule); see also *Agostini*, 521 U.S. at 237 ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent." (cleaned up)). The Rule of Law requires that parties abide by, and be able to rely on, what the law is, rather than what the readers of tea-leaves predict that it might be in the future.

Notably, Mr. Janus does not allege that CMS and AFSCME, acting pursuant to state law, failed to comply with *Abood*. Mr. Janus says only that AFSCME did not act in good faith because it "spurned efforts to have agency fees placed in escrow while their constitutionality was determined." But AFSCME was under no legal obligation to escrow the fairshare fees for an indefinite period while the case was being litigated. Such an action, as AFSCME says, would (in the absence of a court order

requiring security of some kind) "have been hard to square with the fiduciary duty the Union owes to its own members," as the unit's exclusive representative.

Until *Janus II* said otherwise, AFSCME had a legal right to receive and spend fair-share fees collected from nonmembers as long as it complied with state law and the *Abood* line of cases. It did not demonstrate bad faith when it followed these rules.

### D. Entitlement to Money Damages

No one doubts that Mr. Janus is entitled to declaratory and injunctive relief. The Supreme Court declared that the *status quo* violated his First Amendment rights and that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 138 S. Ct. at 2486. Mr. Janus is now protected from that practice. Any remaining relief was for the district court to consider. That court declined to grant monetary damages, on the ground that AFSCME's good-faith defense shielded the union from such liability. We agree with that conclusion.

While this may not be all that Mr. Janus hoped for in this litigation, it is not unusual for remedies to be curtailed in light of broader legal doctrines. Moreover, though Mr. Janus contends that he did not want any of the benefits of AFSCME's collective bargaining and other representative activities over the years, he received them. Putting the First Amendment issues that concerned the Supreme Court in *Janus II* to one side, there was no unjust "windfall" to the union, as Mr. Janus alleges, but rather an exchange of money for services. Our decision in *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989) is on point:

> [T]he union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things . . . . The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law, and the conferral of the benefits on the plaintiffs would therefore give rise under conventional principles of restitution to a valid claim by the union for restitution if the union were forced to turn over the escrow account to the plaintiffs and others similarly situated to them.

*Id.* at 1316.

We have followed similar principles in the ERISA context. "If restitution would be inequitable, as where the payor obtained a benefit that he intends to retain from the payment that he made and now seeks to take back, it is refused." *Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 651 (7th Cir. 2001); see also *Constr. Indus. Ret. Fund of Rockford, Ill. v. Kasper Trucking, Inc.*, 10 F.3d 465, 467 (7th Cir. 1993) ("The welfare fund pooled the money to provide benefits for all persons on whose behalf contributions were made. Because the drivers received the health coverage for which they paid through the deductions Kasper sent to the fund, no one is entitled to restitution."); *UIU Severance Pay Tr. Fund v. Local Union No. 18-U, United Steelworkers of Am.*, 998 F.2d 509, 513 (7th Cir. 1993) ("[B]ecause the cause of action we are au-

thorizing is equitable in nature, recovery will not follow automatically upon a showing that the Union contributed more than was required but only if the equities favor it." (internal quotation marks omitted)). We conclude that Mr. Janus has received all that he is entitled to: declaratory and injunctive relief, and a future free of any association with a public union.

## IV

Before closing, we emphasize again that the good-faith defense to section 1983 liability is narrow. It is not true, as Mr. Janus charges, that this defense will be available to "every defendant that deprives any person of any constitutional right." We predict that only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute. But for those rare occasions, following the lead first of the Supreme Court in Wyatt I and second of our sister circuits, we recognize a good-faith defense for private parties who act under color of state law for purposes of section 1983.

We AFFIRM the judgment of the district court.

MANION, *Circuit Judge*, concurring. The court's opinion in this challenging case is thorough, and I concur with the court's ultimate conclusion. I have a couple additional thoughts. Some might observe that *Abood* had some benefit to the objectors because they no longer had to pay service fees equal to union dues as a condition of employment. But for 41 years, the nonunion employees had to pay their "fair share."

The unions received a huge windfall for 41 years. As the Supreme Court acknowledged in *Janus II*, *Abood*

was wrong, so the unions got what the Court called a "considerable windfall." The Court in *Janus II* sums it up pretty well:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

*Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2485–86 (2018).

Even though the Supreme Court reached the wrong result in *Abood* 41 years before *Janus II*, the unions justify their acceptance of many millions of dollars because they accept ed the money in "good faith." Probably a better way of looking at it would be to say rather than good faith, they had very "good luck" in receiving this windfall for so many years. Since the court is not holding that the unions must repay a portion of the windfall, they can remind themselves of their good luck for the years ahead.

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**
**PEORIA DIVISION**

| | | |
|---|---|---|
| STACEY MOONEY, on behalf of herself and all others similarly situated, | ) | |
| Plaintiff, | ) | |
| v. | ) | |
| ILLINOIS EDUCATION ASSOCIATION; CONGERVILLE-EUREKA-GOODFIELD EDUCATION ASSOCIATION, as representative of the class of all chapters and affiliates of the Illinois Education Association; and NATIONAL EDUCATION ASSOCIATION. | ) | Case No. 1:18-cv-1439 |
| Defendants. | ) | |

**ORDER & OPINION**

This matter is before the Court on Defendants' Motion to Dismiss (Doc. 11).

Plaintiff has filed a response (Doc. 14) and Defendants have filed a reply with the Court's leave (Doc. 18). Although Defendants requested oral argument (Doc. 11 at 2), the Court denies the request because this matter can be decided on the papers. The matter is therefore ripe for review.

## BACKGROUND

Plaintiff Stacey Mooney is a public school teacher in the Eureka Community School District # 140 and resides in Tazewell County, Illinois. (Doc. 1 at 2). Over the course of her nearly three decades of teaching, she has declined to join Defendant Illinois Education Association or its affiliates, Defendant Congerville-Eureka-Goodfield Education Association and Defendant National Education Association, because she "disapproves of their political advocacy and collective bargaining activities" and "the excessive salaries" paid to high-ranking union officials. (Doc. 1 at 2).

Though not a member of any union, Plaintiff was nevertheless required by law to pay "fair-share" fees to Defendants. (Doc. 1 at 2). Relying on the Supreme Court's recent ruling in Janus v. American Federation of State, County, & Municipal Employees, Council 31, 138 S. Ct. 2448 (2018),[1] Plaintiff now seeks reimbursement of the fair-share fees she and the putative class members paid to Defendants.

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1. The American Federation of State, County, and Municipal Employees is hereinafter referred to as "AFSCME".

**DISCUSSION**

The discussion of this case must begin with the Supreme Court's decision in *Janus*, which held the Illinois law requiring certain employees pay fair-share fees violated the First Amendment. Prior to *Janus*, Illinois law was as follows:

> Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, § 315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§ 315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their coworkers, but whether they join or not, that union is deemed to be their sole permitted representative. *See* §§ 315/6(a), (c).

*Janus*, 138 S. Ct. at 2460. Because "the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike," and "[e]mployees who decline to join the union are not assessed full union dues," the law required non-union employees to pay fair-share fees, "a percentage" of the full union fee. *Id.* These fees could not be used for political expenditures. *Id.* at 2460–61.

A similar scheme was held constitutional in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Id.* at 2460. Prior to *Janus*, the Supreme Court "cited *Abood* favorably many times, and ha[d] affirmed and applied its central distinction between the costs of collective bar-

gaining (which the government can charge to all employees) and those of political activities (which it cannot)." *Id.* at 2497 (Kagan, J., dissenting). Nevertheless, in recent years the Supreme Court twice cast doubt on *Abood*'s continuing validity. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012) ("Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly . . . ."); *Harris v. Quinn*, 573 U.S. 616, 635, 645–46, 635 (2014) (stating "[t]he *Abood* Court's analysis is questionable on several grounds" and declining to extend *Abood* because of its "questionable foundations.").

In *Janus*, the Supreme Court overruled *Abood*, holding state laws compelling public employees who are not union members to pay fair-share fees to a union violate the free-speech rights of those non-union employees. 138 S. Ct. at 2460. The Supreme Court concluded "*Abood* was wrongly decided" and refused to allow "unconstitutional exactions"—mandatory fair-share fees—"to continue indefinitely." *Id.* at 2486.

Plaintiff is not the first to offer an argument based on *Janus* seeking recovery of fair-share fees paid prior to its pronouncement. Among this Court's colleagues to have considered these suits, there is a consensus concluding fair-share fees collected prior to *Janus* may not be recovered. *Danielson v. AFSCME, Council 28, AFL-CIO*, 340 F. Supp. 3d 1083, 1087 (W.D. Wash. 2018); *Cook v. Brown*, ___ F. Supp. 3d ___, No. 18-cv-1085, 2019 WL 982384, at *8 (D. Or. Feb. 28, 2019); *Carey v. Inslee*, ___ F. Supp. 3d ___, No. 18-cv-5208, 2019 WL 1115259, at *8–10 (W.D. Wash. Mar. 11, 2019); *Crockett v. NEA-Alaska*, ___ F. Supp. 3d ___, No. 18-cv-0179, 2019 WL

1212082, at *6 (D. Alaska Mar. 14, 2019); *Janus v. AFSCME, Council 31*, No. 15-cv1235, 2019 WL 1239780, at *3 (N.D. Ill. Mar. 18, 2019); *Hough v. SEIU Local 521*, No. 18-cv-4902, 2019 WL 1274528, at *1 (N.D. Cal. Mar. 20, 2019); *Lee v. Ohio Educ. Ass'n*, ___ F. Supp. 3d ___, No. 18-cv-1420, 2019 WL 1323622, at *2 (N.D. Ohio Mar. 25, 2019). For following reasons, the Court joins this growing consensus.

**I. Good-Faith Defense**

Defendants argue Plaintiff's primary claim—that under *Janus* she and the putative class members are entitled to a refund of all the fair-share fees they paid prior to *Janus*—is barred by a good-faith defense available to private parties sued under 42 U.S.C. § 1983. (Doc. 11 at 1). They assert this defense is particularly warranted here because the conduct was authorized by state statutes, which were not only presumptively valid, but valid under the Supreme Court's holding in *Abood*. The existence and contours of this good-faith defense are a matter of first impression in this District. On review, the Court concludes private parties facing a § 1983 lawsuit may advance a good-faith affirmative defense and Defendants have successfully done so in this case.

*A. Type of Motion & Legal Standard*

As an initial matter, Defendants have erred by making this argument under Federal Rule of Civil Procedure 12(b)(6) rather than Rule 12(c) or Rule 56. The good-faith defense is an affirmative defense. *See Wyatt v. Cole*, 504 U.S. 158, 169 (1992) ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability

. . . could be entitled to an affirmative defense based on good faith . . . ."); *Cook*, 2019 WL 982384, at *6.[2] "[C]ourts should usually refrain from granting Rule 12(b)(6) motions on affirmative defenses." *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012). Whether to dismiss a case due to an affirmative defense is a question properly resolved under Rule 12(c). *Yassan v. J.P. Morgan Chase & Co.*, 708 F.3d 963, 975 (7th Cir. 2013). Though Plaintiff does not object to the improper usage of Rule 12(b)(6), the Court declines to consider this portion of Defendants' motion under that Rule.

Nevertheless, the Seventh Circuit has "found such procedural missteps [are] harmless when all the facts necessary to rule on the affirmative defense are properly before the court on the motion to dismiss." *United States v. Rogers Cartage Co.*, 794 F.3d 854, 861 (7th Cir. 2015); see also *Brownmark*, 682 F.3d at 692 ("The district court could properly consider an affirmative defense in the

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2. Although the Court is persuaded by the above-cited authority concluding the good-faith defense is an affirmative defense, the Court recognizes some authority suggests the good-faith defense is a standard, rather than affirmative, defense. *See Wyatt*, 504 U.S. at 172 (Kennedy, J., concurring) ("[I]t is something of a misnomer to describe the common law as creating a good-faith *defense*; we are in fact concerned with . . . the essential elements of the tort." (emphasis in original)); *Pinsky v. Duncan*, 79 F.3d 306, 312 (2d Cir. 1996). However, the Court's ultimate decision would be unaffected if it is a standard defense. If it were, the Court would not construe Defendants' motion under Rule 12(c) but rather would decide it under Rule 12(b)(6) and would find that the inquiry requires looking to the most analogous common law tort, contrary to the holding *infra* in Section I(C)(2). For the reasons stated in footnote five, *infra*, this inquiry would not alter the outcome in this case.

context of a motion for summary judgment, which it did here, regardless of the caption [the defendant] used."). Indeed, this particular procedural misstep "is of no consequence because [the] standard of review is the same." *Veit v. Frater*, 715 F. App'x 524, 526–27 (7th Cir. 2017). "To survive a motion for judgment on the pleadings, a complaint must 'state a claim to relief that is plausible on its face.' " *Wagner v. Teva Pharm. USA, Inc.*, 840 F.3d 355, 357–58 (7th Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has 'facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " Id. at 358 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). And "[i]n assessing a motion for judgment on the pleadings," the Court draws "all reasonable inferences and facts in favor of the nonmovant, but need not accept as true any legal assertions." *Id.*

*B. There is a Good-Faith Defense for Private Parties Sued Under § 1983*

Plaintiff never quite argues the good-faith defense does not exist. (See Doc. 14 at 23 ("There is much to be said in support of a 'good faith' defense that shields private defendants from liability for *damages* that result from an innocent but unconstitutional seizure of property.") (emphasis in original)). However, she repeatedly indicates in that direction (e.g. Doc. 14 at 16 ("There is obviously no 'good faith' defense in the text of section 1983")), uses quotation marks to offset the words "good faith," and spends over a page arguing Defendants overstated the support in the judiciary for the defense (Doc. 14 at 21-23). The Court therefore infers she is not conceding the existence of such a defense. Accordingly, the

threshold consideration is whether a good-faith defense exists for private parties sued under § 1983. *See Cook*, 2019 WL 982384, at *5.

The Seventh Circuit has yet to issue a decision on the good-faith defense in this context. *Janus*, 2019 WL 1239780, at *2; *Winner v. Rauner*, No. 15-cv-7213, 2016 WL 7374258, at *5 (N.D. Ill. Dec. 20, 2016). The Supreme Court has also explicitly left this question open. *Wyatt*, 504 U.S. at 169; *Richardson v. McKnight*, 521 U.S. 399, 414 (1997). Therefore, no binding precedent dictates this Court's determination.

Lack of binding precedent, however, does not mean this Court is left adrift. State entities, state employees, and municipal entities enjoy labyrinthine fortresses of immunities and protections against liability under § 1983.[3] Following the Supreme Court's holding that pri-

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3. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65–66 (1989) ("[A] State is not a 'person' within the meaning of § 1983 . . . ."); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (noting sovereign immunity extends to cases where a State is the party in interest, although an individual is named in the caption, because the action in essence seeks recovery from the State); *Nixon v. Fitzgerald*, 457 U.S. 731, 749–52 (1982) (noting presidents, prosecutors, and judges enjoy absolute immunity from damages and liability for actions taken in their respective presidential, prosecutorial, and judicial functions); *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694 (1978) ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents" but only "when execution of a government's policy or custom" made by an official policymaker

(continued…)

vate parties may be liable under § 1983 in situations where they act according to a state-created system, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982), private parties newly exposed to § 1983 liability sought to gain access to similar forms of immunity. The Supreme Court first considered this question in *Wyatt*, where it held "qualified immunity, as enunciated in *Harlow*" was not "available for private defendants faced with § 1983 liability" under *Lugar*. 504 U.S. at 168–69.

However, as noted above, the Supreme Court did not "foreclose the possibility that private defendants faced with § 1983 liability under *Lugar* . . . could be entitled to an affirmative defense based on good faith . . . or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Id.* at 169. The Supreme Court was particularly concerned that "principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts." *Id.* at 168. Chief Justice Rehnquist and Justice Kennedy, writing in dissent and concurrence, respectively, believed a good-faith defense did exist but differed on its application. *Id.* at 169–70 (Kennedy, J., concurring), 175–77 (Rehnquist, C.J., dissenting).

Since *Wyatt*, every federal appellate court to have decided the question has held a good-faith defense exists for private parties sued under § 1983. *Winner*, 2016 WL 7374258, at *5 (citing *Pinsky*, 79 F.3d at 311–12; *Jordan*

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"inflicts the injury [may] the government as an entity [be held] responsible under § 1983.").

*v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275–78 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118–21 (5th Cir. 1993); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); and *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008)).[4] This Court finds the consensus of post-*Wyatt* circuit decisions and the reasoning contained therein persuasive. Also persuasive are opinions from other district courts in this circuit: *Winner*, 2016 WL 7374258, and *Janus*, 2019 WL 1239780, in which the Northern District of Illinois concluded a good-faith defense existed, and *Lewis v. McCracken*, 782 F. Supp. 2d 702, 715 (S.D. Ind. 2011), in which the Southern District of Indiana concluded the same. But most persuasive is *Wyatt* itself. Although the statement regarding the good-faith defense in the Supreme Court's opinion was dicta, the reasoning—that it would be anomalous to grant broad immunities or protections to all state actors while simultaneously denying private actors a longstanding common law defense—is convincing. This Court therefore holds at least some private actors sued under § 1983 may invoke an affirmative defense of good-faith.

4. Plaintiff suggests the First Circuit in *Downs v. Sawtelle*, 574 F.2d 1, 15–16 (1st Cir. 1978) and the Ninth Circuit in *Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983) rejected the good-faith defense. These cases, however, were decided prior to *Wyatt*. To the extent these cases stand for the proposition Plaintiff suggests, the Court therefore would find them an unpersuasive counterweight to later decisions—including the Ninth Circuit's later holding—by courts of appeals considering this question.

*C. The Good-Faith Defense is Available in this Case*

Plaintiff argues that if a good-faith defense is available, it is not available here for several reasons. Those proffered reasons are: (1) the good-faith defense shields a defendant solely from damages, not from return of unlawfully taken property; (2) the good-faith defense can only exist where the most analogous tort at common law required scienter; (3) Seventh Circuit precedent requires this Court to hold non- members who paid fair-share fees are entitled to a refund; and (4) the good-faith defense ought not apply to private institutional defendants, just as qualified immunity does not apply to public institutional defendants.

**1. The Good-Faith Defense is Available in Restitution Cases, at Least Where the Relief Sought is Legal Rather Than Equitable**

The Western District of Washington ably explained why merely casting a remedy as equitable relief does not defeat the good-faith defense, even assuming the good-faith defense cannot apply to equitable relief:

> A plaintiff may not circumvent qualified immunity or the good faith defense simply by labeling a claim for legal damages as one for equitable restitution. *See Lenea v. Lane*, 882 F.2d 1171, 1178–79 (7th Cir. 1989) ("Regardless of what label is placed on the monetary relief which Lenea wants, 'equitable' or 'legal damages,' it remains a personal monetary award out of the official's own pocket."); *see also Clanton v. Orleans Par. Sch. Bd.*, 649 F.2d 1084, 1101 (5th Cir. 1981) (rejecting the

> "distinction between equitable and legal relief for purposes of the qualified immunity defense"). In other words, Plaintiffs cannot save their claim through a mere "semantic exercise" if equitable relief is not actually available. *Lenea*, 882 F.2d at 1179.

*Carey*, 2019 WL 1115259, at *9.

"[N]ot all relief falling under the rubric of restitution is available in equity." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002). An equitable remedy typically seeks return of a specific object as opposed to the monetary value of that object. *Montanile v. Bd. of Trs. of Nat'l. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 658–59 (2016). As the *Carey* court noted, the presupposition in cases like the one at hand is that all identifiable money was used to fund union activities and, consequently, has already been dissipated; Plaintiff could receive the value of her fair-share fees but not the specific money she paid. *Carey*, 2019 WL 1115259, at *9. Plaintiff's citations to cases concerning cows and cars, undissipated specific objects, seized in good faith but unconstitutionally (Doc. 14 at 23) are thus inapposite.

If all identifiable monies sought by a plaintiff have been expended, the "plaintiff then may have a personal claim against the defendant's general assetsbut recovering out of those assets is a *legal* remedy, not an equitable one." *Montanile*, 136 S. Ct. at 658 (emphasis in original). Plaintiff's claim lies in law rather than equity, and there is consequently no reason to consider whether the good-faith defense applies where the claim is for equitable restitution. See *Crockett*, 2019 WL 1212082, at *5 ("Plaintiffs' argument is also flawed in that the relief

they seek does in fact sound in law. Their fair-share fees paid for ongoing costs of representation the Union Defendants provided on their behalf.").

Plaintiff argues that *Carey* and other cases rejecting claims essentially identical to hers fail to sufficiently explain why the good-faith defense can apply against a claim for restitution and suggests the defendants in those cases received a windfall. (Doc. 14 at 23-24). The Court disagrees with Plaintiff's suggestion that the Court's counterparts have failed to provide thorough explanations, but will try its hand at one nonetheless.

The gravamen of Plaintiff's objection is that "the union was unjustly enriched by the unconstitutional agency-shop arrangements that it enforced." (Doc. 14 at 17). She further suggests the *Janus* Court disavowed or abrogated the view that fairshare fees were justly paid for services rendered. (Doc. 14 at 17 n.6 ("Petitioner . . . argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage") (quoting *Janus*, 138 S. Ct. at 2466)). She is incorrect. The portion of *Janus* cited merely describes an argument. The Supreme Court went on to decline to determine whether that description was accurate, merely noting "avoiding free riders is not a compelling interest." *Janus*, 138 S. Ct. at 2466.

Even with *Janus* holding mandatory fair-share fees are unconstitutional, unions were not unjustly enriched by the payment of fair-share fees because, as the name implies, the fees covered the costs of union representation for non-union members. The Seventh Circuit has explained:

> [T]he union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things .... The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law, and the conferral of the benefits on the plaintiffs would therefore give rise under conventional principles of restitution to a valid claim by the union for restitution if the union were forced to turn over the escrow account to the plaintiffs and others similarly situated to them .... In claiming restitution the plaintiffs are standing that remedy on its head.

*Gilpin v. AFSCME, AFL-CIO*, 875 F.2d 1310, 1316 (7th Cir. 1989)

The legal landscape has shifted since *Gilpin*, but the underlying principle has not. The unions may not have spent Plaintiff's funds as she would have, but there is no allegation that they failed to provide services as required by Illinois law to her or others similarly situated. Because the fair-share fees were expended on Plaintiff and others similarly situated, she would gain their benefit twice if legal restitution were allowed. Of course, had the fees not been spent for Plaintiff's benefit—and thus been available through equitable restitution—the calculus might be different.

The Court concludes the good-faith defense may be maintained in actions at law, and this action sounds in

law rather than equity. Therefore, the good-faith defense is available here. The Court does not reach the question of whether it may be used in suits at equity.

**2. No Inquiry into a Common Law Tort Analog is Necessary**

The *Wyatt* concurrence and dissent suggest the good-faith defense is available only where "[t]he common-law tort actions most analogous to the action" required "that the wrongdoer acted with malice and without probable cause." 504 U.S. at 172 (Kennedy, J., concurring); *id.* at 176 (Rehnquist, C.J., dissenting); *see also id.* at 164 (stating, in the majority opinion, "[i]n determining whether there was an immunity at common law that Congress intended to incorporate . . . we look to the most closely analogous torts."). Relying on these statements, Plaintiff advances the argument that the good-faith defense can only be maintained where the most analogous common law tort required scienter and, further, the most analogous tort here is conversion, which lacked a scienter requirement at common law. (Doc. 14 at 11-12).

Plaintiff also asserts the majority opinion in *Wyatt* is binding precedent which "precludes a 'good faith' defense when the most analogous common-law tort imposed strict liability." (Doc. 14 at 13). Supreme Court decisions interpreting federal law are, of course, binding on this and every court, but not everything stated in a Supreme Court opinion constitutes binding precedent. "When an opinion issues for the Court," courts are bound by the result and "those portions of the opinion necessary to that result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996).

Dicta are "the part[s] of an opinion that a later court, even if it is an inferior court, is free to reject." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988). There are sound foundations underlying the distinction between dicta and holdings. Dicta "not being integral elements of the analysis underlying the decision—not being grounded in a concrete legal dispute and anchored by the particular facts of that dispute—[ ] may not express the judges' most careful, focused thinking." *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998). Additionally, allowing dicta binding force would undermine the separation of powers; "to give the inessential parts of an opinion the force of law would give judges too much power, and of an essentially legislative character." *Id.*

It can be difficult to tell where a holding ends and dictum begins in some situations. But not so with the *Wyatt* Court's musings on the good-faith defense. The Supreme Court was clear that "the precise issue" decided in *Wyatt* was "whether qualified immunity . . . is available for private defendants faced with § 1983 liability" under *Lugar*. 504 U.S. at 168–69. The Supreme Court answered in the negative but refused to "foreclose the possibility that private defendants . . . could be entitled to an affirmative defense based on good faith." *Id.* at 169; *see also Richardson*, 521 U.S. at 413 ("*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."). Therefore, all that *Wyatt* says about the good-faith defense is dicta. Persuasive dicta, but dicta nonetheless.

Plaintiff's statement that *Wyatt* is binding precedent in this context brings her perilously close to

misrepresenting the state of the law. Particularly concerning is that Attorney Jonathan F. Mitchell, representing Plaintiff, knew or should have known this when he submitted and signed Plaintiff's response. The response cites *Carey* (Doc. 14 at 23)—a case in which Attorney Mitchell was also counsel and advanced the same argument. *Carey* states in no uncertain terms that the portion of *Wyatt* discussed is nonbinding dicta. 2019 WL 1115259, at *6 ("The Court's holding in *Wyatt* was far narrower . . . than Plaintiffs present it.").

*Carey* also correctly explained the dicta in *Wyatt* was "far murkier" than Plaintiff suggests. *See id.* Whether a common law analog is necessary is therefore susceptible to dispute and has, in fact, been disputed. *See Danielson*, 340 F. Supp. 3d at 1086 (noting the Ninth Circuit did not require an analysis of analogous common law torts in *Clement* but suggesting the Second Circuit in *Pinsky* did); *Cook*, 2019 WL 982384, at *6. Additionally, no court has yet barred the good-faith defense on common law analog grounds. *Carey*, 2019 WL 1115259, at *6 (noting all courts to have required a common law analog tort determined the one in question had a scienter requirement).

Several courts recently considering the question have provided compelling reasons why the good-faith defense should not involve looking to the most analogous common law tort. The Northern District of Illinois held "limiting principles of scienter or motive are not consistent with the Supreme Court's approach [in *Wyatt*] because they would still leave private parties exposed to a damages verdict for relying on seemingly valid state laws that were later held to be unconstitutional." *Winner*, 2016 WL 7374258, at *6. The District of Oregon

noted "affirmative defenses need not relate to or rebut specific elements of an underlying claim," so to require the good-faith affirmative defense to effectively rebut a scienter element of a common law tort would be in tension with its status as an affirmative defense. *Cook*, 2019 WL 982384, at *6 (citing *Jarvis v. Cuomo*, 660 F. App'x 72, 75–76 (2d Cir. 2016)).

This Court agrees with the Northern District of Illinois and District of Oregon. The principles of fairness and equality underlying the good-faith defense in the § 1983 context demand a private defendant relying in good faith on a presumptively constitutional statute not be abandoned and exposed when the law is subsequently held unconstitutional, while the State remains cloaked in sovereign immunity and its officials are shielded by the veil of qualified immunity. Quibbles over which tort as it existed at common law in 1871 is most analogous to the harm wrought by the statute in question would only undercut these purposes.[5]

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5. If, however, this Court were to reach the issue, it would determine that either tortious interference with a contract (or business expectancy) or abuse of process was more analogous to the instant claim than conversion; and both of those torts require scienter. *See Carey*, 2019 WL 1115259, at *7. The reason these torts are the proper analogs is that "[c]onversion involves taking another's property, regardless of intent, whereas the gravamen of the First Amendment claim in this case is that the Union Defendant[s] expended compelled agency fees on political and ideological activities that Plaintiffs oppose." *Danielson*, 340 F. Supp. 3d at 1086; *see also Carey*, 2019 WL 1115259, at *7; *Cook*, 2019 WL 982384, at *6; *Crockett*, 2019 WL 1212082, at *5.

### 3. Seventh Circuit Precedent Does Not Require the Court to Deny the Good-Faith Defense Here

In *Riffey v. Rauner*, 910 F.3d 314, 315 (7th Cir. 2018) (*Riffey II*), *petition for cert. filed*, No. 18-1120, the Seventh Circuit described its prior opinion in that matter as agreeing "with the putative class that no one could be compelled to pay fair-share fees . . . and that any such objector would be entitled to have his or her payments refunded." Plaintiff seizes upon this line, proffering: "*Riffey* did not consider or discuss the good-faith issue, but its statement regarding the propriety of refunds is a binding pronouncement on this [C]ourt." (Doc. 14 at 22).

This Court has already explained the difference between binding precedent and dicta in detail. *Supra* Section I(C)(2). The phrase Plaintiff cites is dicta. The question addressed by the earlier opinion was whether a class could be certified. *Riffey v. Rauner*, 873 F.3d 558, 560 (7th Cir. 2017), *vacated*, 138 S. Ct. 2708, 2708–09 (2018) (*Riffey I*). The appellant filed a petition for a writ of certiorari, which the Supreme Court granted, vacating and remanding "for further consideration in light of *Janus*." 138 S. Ct. at 2708. On remand, the Seventh Circuit held "the district court acted well within its authority when it declined to certify a class action," determining the Supreme Court's intervening decision in *Janus* did not alter its calculation. *Riffey II*, 910 F.3d at 319. The Seventh Circuit specifically stated, however, that individuals "who wish to pursue refunds are free to seek to do so; we make no comment on such cases or the defenses the Union may endeavor to raise in them." *Id.*

As previously explained, not every phrase jotted by the Seventh Circuit or the Supreme Court binds this

Court. Although this Court is readily persuaded by dicta from those courts, this single statement taken out of context does not mean the Seventh Circuit intended to suggest no affirmative defenses were available. The Seventh Circuit's express disavowal of deciding such issues in *Riffey II* makes clear the Court is right to be unpersuaded.

**4. The Good-Faith Defense is Available to Private Institutional Defendants**

Plaintiff next argues the good-faith defense cannot shield institutions, but only individuals, just as qualified immunity protects officers but not counties and municipal corporations. (Doc. 14 at 18-19). Defendants respond the defense has been applied to institutions and the rationale behind the good-faith defense supports that application. (Doc. 18 at 8).

It is certainly true that some of the circuits to have considered the good-faith defense have allowed it for institutional defendants. *Jordan*, 20 F.3d at 1277 (holding a law firm might be entitled to assert a good-faith defense); *Vector Research*, 76 F.3d at 699 (appearing to hold the same); *Clement*, 518 F.3d at 1097 ("The facts of this case justify allowing Monterey Tow Service," a private corporation, "to assert such a good faith defense."). While institutions were before the courts in those cases, however, it does not appear the argument made by Plaintiff here was presented to them; those opinions are therefore of limited persuasive value in answering the instant question.

Nothing in the good-faith defense suggests it ought to be understood as perfectly congruent with qualified immunity. As the Supreme Court explained in *Wyatt*, "the reasons for recognizing [qualified] immunity were

based not simply on the existence of a good faith defense at common law, but on the special policy concerns involved in suing government officials." 504 U.S. at 167; *see also id.* at 170–71 (Kennedy, J. concurring) ("In the context of qualified immunity" the Supreme Court has "diverged to a substantial degree from the historical standards .... This transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits.").

But these special policy concerns also made qualified immunity improper for municipal corporations. Qualified immunity rests on "two mutually dependent rationales": (1) allowing liability for officers who must exercise discretion and who do so in good faith would be unjust and (2) the threat of liability might deter officers from executing their duties "with the decisiveness and the judgment required by the public good." *Owen v. City of Independence*, 445 U.S. 622, 654 (1980) (internal quotation marks omitted) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) *abrogated in part on other grounds by Harlow*, 457 U.S. 800). But no injustice necessarily arises from requiring a policymaker to bear the costs of an unconstitutional policy. *Owen*, 445 U.S. at 655. And while society has an interest in executive officials executing the laws without paralysis resulting from potential liability for split-second calls on complicated constitutional questions, legislative or quasi-legislative decisions ought to be made with an eye toward the Constitution.[6] *Id.* at 656. This accords with

6. This is not to imply that executive officials can simply ignore the constitutionality of their actions. Their immunity is qualified ra-

(continued…)

restrictions on municipal liability, which "is limited to action for which the municipality is actually responsible," action taken "pursuant to a municipality's 'official policy.'" *Pembauer v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

These concerns do not inhere in private institutional defendants. Defendants did not make a policy which ultimately was held unconstitutional; the State of Illinois did. Defendants are not governmental actors who should consider at every step the potential they might be violating constitutional rights; they are private actors entitled to rely on the State's laws. So, the reasons against extending qualified immunity to municipal corporations and counties are inapposite.

Plaintiff notes this standard creates the anomaly that public institutions are treated differently from public officials, but private institutions are not treated differently from their agents. But she misunderstands the nature of the anomaly. The oddity is not that private institutions are treated the same as private individuals, but rather that public institutions are not treated the same as public officials. This oddity is justified because of the particular policy concerns essential to the public, legislative character of public institutions. Those concerns being absent here, the Court rejects Plaintiff's argument that private institutional defendants may not avail themselves of the good-faith defense.

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ther than absolute for good reason. *See Scheuer*, 416 U.S. at 247–48.

*D. The Requirements of the Good-Faith Defense*

The good-faith defense exists and is available to Defendants in this case to argue against Plaintiff's specific claim. What remains is to determine whether Defendants have shown they acted in good faith. Plaintiff argues Defendants cannot establish a good-faith defense to her *Janus* claim without (1) affirmatively showing they complied with *Abood* and (2) presenting evidence of Defendants' officers' subjective beliefs, both of which she argues require factual development and therefore cannot be decided at this time. (Doc. 14 at 20-21). The Court disagrees.

**1. Defendants Need Not Show Perfect Compliance with *Abood* to Avail Themselves of the Good-Faith Defense Against a *Janus* Claim**

Plaintiff asserts "the union cannot establish 'good faith' unless it shows that it fully complied with the pre-*Janus* constitutional strictures on agency shops." (Doc. 14 at 20). But as the District of Alaska explained, the "argument that discovery is needed on a different claim for different relief on a different class before the court can apply the good faith defense simply does not track." *Crockett*, 2019 WL 1212082, at *6; *see also Carey*, 2019 WL 1115259, at *6.

*Janus* held the First Amendment is violated when "an agency fee []or any other payment to the union" is "deducted from a nonmember's wages." 138 S. Ct. at 2486. Under *Abood*, this was not true. 431 U.S. at 223. The good-faith defense requires only the alleged unlawful conduct—here the taking of fair-share fees—be done in good faith. It does not require complete good

faith in all actions. If Defendants improperly spent the fair-share fees, Plaintiff would have an independent *Abood* claim but it would not render the exaction of the fee an act in bad faith. Plaintiff cannot embed an *Abood* claim in a *Janus* claim and thereby shift the burdens of pleading, proof, and persuasion.

### 2. Defendants Have Shown the Good-Faith Defense Bars Plaintiff's *Janus* Claim

Although there may be some disagreement as to what showing is needed to establish good faith, see *Carey*, 2019 WL 1115259, at *5 ("Circuit Courts disagree about precisely what standard should apply in the good faith analysis"), the primary differentiation appears to be whether the analysis is solely subjective or also includes an objective component, *id. See also Lewis*, 782 F. Supp. 2d at 715. Determining a precise standard is unnecessary here because Defendants' reliance on Abood was not only objectively reasonable but shows subjective good faith as a matter of law. *See Danielson*, 340 F. Supp. 3d at 1086–87. "[R]egardless of personal opinions, individuals are entitled to rely upon binding United States Supreme Court precedent." *Lee*, 2019 WL 1323622, at *2. Thus, where there is a valid state statute constitutional under then-current Supreme Court precedent, subjective good faith may be presumed.

Indeed, to do otherwise results in an odd situation: if Defendants' officers "subjectively believed the Supreme Court would *not* overrule *Abood*, [Defendants'] collection of agency fees, up until *Janus*, would be shielded by the good faith defense, but not so if the same [officers] instead subjectively believed (correctly) that the Supreme Court *would* overrule *Abood*." *Danielson*, 340 F. Supp. 3d at 1086 (emphasis in original). But "reading the

tea leaves of Supreme Court dicta has never been a precondition to good faith reliance on governing law." *Cook*, 2019 WL 982384, at *7; *see also Winner*, 2016 WL 7374258, at*5 ("Any subjective belief [Defendants] could have had that the precedent was wrongly decided and should be overturned would have amounted to telepathy."). To require such divinations would "imperil the rule of law." *Cook*, 2019 WL 982384, at *7. "Inviting discovery on the subjective anticipation of an unpredictable shift in the law undermines the importance of observing existing precedent and ignores the possibility that prevailing jurisprudential winds may shift. This is not a practical, sustainable or desirable model." *Danielson*, 340 F. Supp. 3d at 1086.

Presuming subjective good faith, by contrast, follows from bedrock principles. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The highest court in the land held a law identical in all relevant respects to the Illinois statutory scheme did not offend the First Amendment. *Abood*, 431 U.S. 209. That "*Abood* was wrongly decided," *Janus*, 136 S. Ct. at 2486, was a decision only that Court could make. Until it did so, reliance on *Abood* was nothing less than justified reliance on the law of the land. The Court agrees with the other courts to have considered this question and holds Defendants' good faith is established as a matter of law. *Danielson*, 340 F. Supp. 3d at 1086; *Cook*, 2019 WL 982384, at *7; *Carey*, 2019 WL 1115259, at *5–6; *Crockett*, 2019 WL 1212082, at *6; *Janus*, 2019 WL 1239780, at *3; *Hough*, 2019 WL 1274528, at *1; *Lee*, 2019 WL 1323622, at *2; *see also Winner*, 2016 WL 7374258, at *5. Plaintiff's argument that discovery into

Defendants' officers' state of mind is necessary (Doc. 14 at 21) is therefore rejected.

In *Wyatt*, the dissent charged there was no reason "other than a needlessly fastidious adherence to nomenclature" to deny private § 1983 defendants qualified immunity while allowing the existence of a good-faith defense. 504 U.S. at 177. Justice Kennedy responded in his concurrence: "By casting the rule as an immunity, we imply the underlying conduct was unlawful, a most debatable proposition in a case where a private citizen may have acted in good-faith reliance upon a statute." *Id.* at 173. This case demonstrates the importance of the concurrence's observation. Plaintiff does not allege Defendants meant to behave unlawfully. Rather, they acted in the utmost good faith reliance upon a state statutory scheme so similar to one upheld by the Supreme Court that Court could not find it unconstitutional without overruling its prior decision. To suggest Defendants' conduct was "unlawful" or even wrong while it was in accordance with state law and Supreme Court precedent would undermine basic principles of equity and fairness. The good-faith defense prevents that injustice here.

## II. Availability of Retrospective Monetary Relief for Conduct Previously Authorized by the Supreme Court

The Court also agrees with the Northern District of California's observation "there is a strong argument that when the highest judicial authority has previously deemed conduct constitutional, reversal of course by that judicial authority should never, as a categorical matter, result in retrospective monetary relief based on that conduct." *Hough*, 2019 WL 1274528, at *1. That court

suggested "in situations where the Supreme Court has reversed a prior ruling but not specified that the party before it is entitled to retrospective monetary relief, it seems unlikely that lower courts should even consider awarding retrospective monetary relief based on conduct the Court had previously authorized." *Id.*

This line of reasoning is deeply persuasive to this Court. It is buoyed, moreover, by the Supreme Court's statement in *Janus* that although "the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term" those "disadvantages" had to be weighed "against the considerable windfall that unions have received under *Abood* for the past 41 years." 138 S. Ct. at 2485–86. Although certainly not dispositive, the Supreme Court does not appear to contemplate the "windfall" being disgorged, nor the potential that some unions might face an existential threat from lawsuits such as the present one. Prudence, equity, and fairness would have counseled the same result even absent the good-faith defense.

**III. Plaintiff's Possible *Abood* Claim**

In the Complaint, Plaintiff separately requests a refund of "any and all 'fairshare fees' " and "any and all 'fair-share service fees' that were spent on political and ideological expenditures, in violation of *Abood* and pre-*Janus* cases." (Doc. 1 at 5-6). Defendants have moved to dismiss this as a separate claim (Doc. 12 at 26-27). Plaintiff does not directly address this portion of Defendants' motion but does include the now-rejected argument that Defendants must prove compliance with Abood to establish the good-faith defense against Plaintiff's *Janus* claim. (Doc. 14 at 20). The Court is uncertain if Plaintiff intended this request to be a

separate claim or rather a more limited request in case the Court determined there was a good-faith defense which applied to fair-share fees except where Defendants failed to show they had complied with *Abood*.

Either way, the request does not survive. Plaintiff has not alleged any facts indicating an *Abood* violation. If it was intended as an independent claim, the claim lacks "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. The claim therefore would be dismissed under Rule 12(b)(6). If the request is merely a separate request for damages that anticipates a potential application of the good-faith defense, the attempt to acquire any damages fails because the Court held above that the good-faith defense bars Plaintiff's *Janus* claim in toto.

**IV. State-Law Claims**

Invoking supplemental jurisdiction, Plaintiff asserts claims for "conversion, trespass to chattels, replevin, unjust enrichment, restitution, and any other legal or equitable cause of action that offers relief" to her. (Doc. 1 at 5). Defendants seek dismissal of these claims, arguing they are preempted by an Illinois statutory scheme and that Plaintiff has failed to state the elements of the various asserted claims because the fair-share fees were authorized. (Doc. 12 at 24-25). Defendants further argue the state law claims have been abandoned by Plaintiff's failure to defend them in her response. (Doc. 18 at 2 n.1).

The Court declines the invitation to reach these claims. "The supplementaljurisdiction statute provides that the district court 'may decline to exercise supplemental jurisdiction' over state-law claims if the court 'has dismissed all claims over which it has original

jurisdiction.'" *RWJ Mgmt. Co., Inc. v. BP Prods. N. Am., Inc.*, 672 F.3d 476, 479 (7th Cir. 2012) (quoting 28 U.S.C. § 1367(c)(3)). "Indeed, when the federal claims are dismissed before trial, there is a presumption that the court will relinquish jurisdiction over any remaining state law claims." *Dietchweiler ex rel. Dietchweiler v. Lucas*, 827 F.3d 622, 630–31 (7th Cir. 2016). There are three circumstances which may rebut the presumption:

> (1) the statute of limitations has run on the pendent claim, precluding the filing of a separate suit in state court; (2) substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort; or (3) when it is absolutely clear how the pendent claims can be decided.

*Sharp Elecs. Corp. v. Metro. Life Ins. Co.*, 578 F.3d 505, 514–15 (7th Cir. 2009) (internal quotation marks and citation omitted).

No claims remain over which this Court has original jurisdiction. There is no statute of limitations issue which the Court is aware of, and the Court has not expended substantial resources such that a duplication of effort would occur in state court. And while Defendants have made strong arguments in favor of the dismissal of the pendent claims, the Court does not believe it is "absolutely clear" that all of the various state theories of liability alleged are preempted or require a wrongful or unauthorized taking.[7] In accordance with the presump-

7. The Court is skeptical that abandonment applies to the failure to respond to an argument in a motion to dismiss where the mo-

(continued…)

tion, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.

**CONCLUSION**

Defendants' Motion to Dismiss (Doc. 11) is GRANTED in part as a motion under Rule 12(b)(6) and in part construed as a motion for judgment on the pleadings under Rule 12(c). Plaintiff's *Janus* claim is DISMISSED WITH PREJUDICE. To the extent Plaintiff sought to plead a claim under *Abood*, it is DISMISSED WITHOUT PREJUDICE. Plaintiff may replead the *Abood* claim within twenty-one (21) days of the date of this Order. However, to ensure expedient handling of this matter, Plaintiff MUST submit a notice within seven (7) days of the date of this Order indicating whether she intends to replead the *Abood* claim; if not, the matter will be terminated and judgment entered. Plaintiff's various and sundry state law claims are DISMISSED WITHOUT PREJUDICE.

SO ORDERED.

Entered this 11th day of April 2019.

s/ Joe B. McDade
JOE BILLY McDADE
United States Senior District Judge

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vant bears the burden, given that the caselaw cited by Defendants discusses failure to respond to motions for summary judgment and failure to raise arguments in appellant's briefs on appeal. (Doc. 18 at 2 n.1 (citing *Palmer v. Marion Cty.*, 327 F.3d 588, 597–98 (7th Cir. 2003)). But there is no need to address the issue here.

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**Chicago, Illinois 60604**

December 12, 2019

**Before**

DIANE P. WOOD, *Chief Judge*

DANIEL A. MANION, *Circuit Judge*

ILANA D. ROVNER, *Circuit Judge*

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| No. 19-1774 | Appeal from the United States District Court for the Central District of Illinois. |
| STACEY MOONEY, *Plaintiff-Appellant*, | |
| *v.* | No. 1:18-cv-1439 |
| ILLINOIS EDUCATION ASSOCIATION, *et al.*, *Defendants-Appellees.* | Joe Billy McDade, *Judge.* |

**ORDER**

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on November 19, 2019. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.