APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1636

PATRICK DOUGHTY; RANDY SEVERANCE,
Plaintiffs, Appellants,
v.
STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE,
SEIU LOCAL 1984, CTW, CLC,
Defendant, Appellee.

JUDGMENT

Entered: November 30, 2020

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
Maria R. Hamilton, Clerk

cc: Bryan K. Gould, Frank D. Garrison IV, Milton L. Chappell, Cooley Ann Arroyo, Leon Dayan, Ramya Ravindran, John S. Krupski

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1636

PATRICK DOUGHTY; RANDY SEVERANCE,
Plaintiffs, Appellants,
v.
STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU LOCAL 1984, CTW, CLC,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
Hon. Paul J. Barbadoro, U.S. District Judge

Before
Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

Frank D. Garrison, with whom Milton L. Chappell, National Right to Work Legal Defense Foundation, Inc., Bryan K. Gould, Cooley Ann Arroyo, and Cleveland, Waters & Bass, P.A., were on brief, for appellants.
Leon Dayan, with whom Ramya Ravindran was on brief, for appellee.

November 30, 2020

BARRON, **Circuit Judge**. This appeal concerns a suit by two New Hampshire state employees, Patrick Doughty and Randy Severance, against the State Employees' Association of New Hampshire ("the Union") pursuant to 42 U.S.C. § 1983. They seek retrospective relief for themselves and other state employees who were not members of the Union but were forced to pay so-called "agency fees" to it prior to the United States Supreme Court's decision in Janus v. American Federation of State, County & Municipal Employees, Council 31, 138 S. Ct. 2448 (2018). There, the Court overruled its decades-old decision in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and held that such "agency fee" arrangements violate the First Amendment of the United States Constitution by compelling the speech and association of non-union governmental employees. The District Court granted the Union's motion to dismiss Doughty and Severance's complaint, and we affirm, aligning ourselves with every circuit to have addressed whether such a backward-looking, Janus-based claim is cognizable under § 1983.[1]

I.

A.

New Hampshire state law imposes on unions that serve as the exclusive representative of a bargaining unit for state or local government

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[1] See generally Wholean v. CSEA SEIU Loc. 2001, 955 F.3d 332 (2d Cir. 2020); Diamond v. Pa. State Educ. Ass'n, 972 F.3d 262 (3d Cir. 2020); Ogle v. Ohio Civ. Serv. Emps. Ass'n, 951 F.3d 794 (6th Cir. 2020); Lee v. Ohio Educ. Ass'n, 951 F.3d 386 (6th Cir. 2020); Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 942 F.3d 352 (7th Cir. 2019); Danielson v. Inslee, 945 F.3d 1096 (9th Cir. 2019).

employees a duty of fair representation to the unit's non-union employees during the collective bargaining process. See Nashua Tchrs. Union v. Nashua Sch. Dist., 707 A.2d 448, 451 (N.H. 1998) (citing N.H. Rev. Stat. Ann. § 273-A:3). Prior to Janus's overruling of Abood, the New Hampshire Supreme Court held that the State's "overall legislative scheme to promote labor peace" impliedly permitted the negotiation of collective bargaining agreements between unions and governmental employers that called for the payment of agency fees. See id. at 450. In addition, the New Hampshire Supreme Court held that, under Abood, the First Amendment was not violated if a state or local governmental employer made the payment of these fees in connection with such agreements a condition of employment for their employees. Id.

The New Hampshire Supreme Court explained that collective bargaining agreements are contracts forged betweenthe employer and the union that serves as the exclusive bargaining representative for the relevant bargaining unit. Id. at 451. It further explained that agency fees compensate for the fact that, although such a union secures benefits through the collective bargaining process for the bargaining unit's union and non-union employees alike, only the union employees pay dues to the union. Id. Thus, until Janus, New Hampshire permitted "agency fees" to "defray the costs associated with [the union's] exclusive representation and collective bargaining," and such fees were regularly a subject of collective bargaining agreements between unions and public employers in the state. Id. at 449.

B.

On January 14, 2019, following Janus, Doughty and Severance filed suit in the United States District Court for the District of New Hampshire against the Union under § 1983. Their complaint alleged that the Union was the exclusive representative for their respective bargaining units and that they were not themselves members of the Union. The complaint further alleged that, at the time relevant to this suit, they were "forced" to pay agency fees to the Union" as a condition of employment" in connection with the Union's collective bargaining agreements with their respective state employers. Finally, their complaint claimed that "the State" deducted the agency fees from their paychecks and remitted them to the Union, although the record offers no further details about the mechanics of the payment process.

By the time that Doughty and Severance filed their suit, the Union had ceased collecting agency fees, as deductions from the employees' paychecks to pay those fees ended in Janus's wake. Their complaint nevertheless requested, based on Janus's retroactive application, that the District Court certify a class of "all individuals employed by the State, and other public employers, who, as a condition of employment, were forced to pay union fees to [the Union], which distributed some of the fees to its affiliates, any time during the limitations period." Doughty and Severance further claimed that the members of this class were entitled, pursuant to § 1983, to "compensatory damages, refunds, or restitution in the amount of compulsory union fees paid to the Union from their wages without their written consent, and

other amounts as principles of justice and equity require."

C.

On March 18, 2019, the Union moved to dismiss the plaintiffs' complaint for failure to state a claim on which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). The District Court held a hearing on that motion on May 30, 2019 and granted it that same day.

The District Court proceeded on the understanding -- which the Union did not contest -- that, due to Janus's retroactive application, the state employers' requirement that the agency fees be paid as a condition of Doughty's and Severance's employment violated the First Amendment. The District Court also assumed -- and, again, without dispute -- that the Union, although a private entity, was a proper defendant under § 1983 for this Janus-based suit, despite the fact that the requirement to pay the agency fees had been imposed on them by their employer as a condition of their employment and not by the Union itself.[2] Finally, the District Court implicitly

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[2] In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Court held that a private party who attached the assets of a debtor under a state attachment statute could be a proper defendant under § 1983 for a claim brought by a property owner based on a violation of the property owner's right to procedural due process on the ground that the defendant was acting under color of law in bringing about the attachment pursuant to that statute's summary attachment process. Id. at 924, 933-34; see also Wyatt v. Cole, 504 U.S. 158, 159-60 (1992) (same). Here, of course, the Union merely received the agency fees pursuant to a freely negotiated contractual provision with the plaintiffs' employer and those fees were made available to it, in turn, based on the plaintiffs' contract with their employer. Nevertheless, as we

recognized that the doctrine of qualified immunity, which protects governmental officials from damages liability when sued in their individual capacities under § 1983 in the absence of their having violated "clearly established" law, see District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018), does not protect private defendants, see Wyatt v. Cole, 504 U.S. 158, 168-69 (1992), and so provided no such immunity to the Union here.

Nevertheless, the District Court expressed skepticism that § 1983 permitted Doughty and Severance's claim against the Union to go forward, given their claim's exclusive focus on agency-fee payments made prior to Janus. In that connection, the District Court asked the plaintiffs' counsel at the hearing on the motion to dismiss to "step back for a second" and explain "how in any version of the world" it would be "right to require [the Union] to pay damages for acting consistent with the requirements of state law and . . . [S]upreme [C]ourt precedent." The District Court emphasized that the Union's "behavior was entirely constitutional at the time they engaged in it," and that it is an unusual situation where the Supreme Court "decides to flatly overturn its prior precedent." Because, as a general matter, "[o]ne of the reasons that judges express their views in written opinions is so that people can rely on" them, the District Court explained, it would be "arrogant in the extreme" to allow individuals who had so relied to be "subjected to suits for damages" in the rare cases

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have noted, there is no dispute on appeal as to whether, on these facts, the Union is a proper § 1983 defendant for the claimed First Amendment violation. Thus, like the District Court, we assume that the Union is, despite the possible reasons to question that assumption.

where "judges flip 180 degrees on the law." The District Court added that it was "incomprehensible" that "damage[s] actions [could] be maintained under" the "unique circumstances" of this case.

The District Court then granted the Union's motion to dismiss Doughty and Severance's complaint based on two independent grounds. First, the District Court ruled that "a good faith defense must be available to protect defendants under these kinds of circumstances" (emphasis added), and that Doughty and Severance could not overcome that defense. Second, the District Court held that Doughty and Severance's § 1983 claim was analogous to the common-law tort of abuse of process, for which a "good faith defense has traditionally been recognized."[3] For this reason, too, the District Court held, Doughty and Severance would have to overcome a "good faith defense" to succeed in obtaining their requested relief, which they could not do, given that the Union collected the fees at issue before Janus overruled Abood.

The District Court emphasized that it did not find the plaintiffs' claim for retrospective relief -- whether for damages or restitution -- to be "frivolous," but it closed by stating that it did not "see how it [could] possibly proceed." Instead, the District Court suggested that the plaintiffs appeal the case because

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[3] Although the District Court referred to the plaintiffs' § 1983 claim as being subject to a "good faith defense," it is clear that it was merely holding that an element of their § 1983 claim was proof of "malice," such that their claim must be dismissed if they failed to show that the Union had not acted in "good faith" in collecting the agency fees at issue. See Wyatt, 504 U.S. at 172 (Kennedy, J., concurring).

it "would need guidance from the First Circuit explaining. . . why the claim is potentially viable" to recognize it.

D.

Following the District Court's ruling, Doughty and Severance timely filed this appeal on June 21, 2019, in which they challenge the District Court's grant of the Union's 12(b)(6) motion. We have jurisdiction under 28 U.S.C. § 1291. We review the District Court's dismissal of a case under Federal Rule of Civil Procedure 12(b)(6) de novo. See Reisman v. Associated Faculties of Univ. of Me., 939 F.3d 409, 411 (1st Cir. 2019).

II.

As to the claim for damages, Doughty and Severance ask us to focus on § 1983's text, which expressly provides that "[e]very person" responsible for depriving another of their constitutional rights "shall be liable to the party injured in an action at law," 42 U.S.C. § 1983. They then proceed to argue that, because Janus applies retroactively and the Union is a proper defendant for the First Amendment violation resulting from its collection of agency fees, there is no basis for denying them a damages remedy against the Union for the federal constitutional violation that they suffered. For, Doughty and Severance point out, on its face, § 1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted," Owen v. City of Independence, 445 U.S. 622, 635 (1980).

The District Court rightly emphasized, however, that the plaintiffs are seeking damages for a private party's role in imposing a payment requirement on

them during a period of time in which the nation's highest court had expressly held that the requirement did not give rise to the First Amendment violation on which their damages claim under § 1983 now depends. We thus must attend to the District Court's concern that the recognition of such a damages claim under § 1983 would unduly upset the justifiable reliance interests of the private defendant.

In attending to that concern, we do not embark on a free-wheeling assessment of whether to import into § 1983 a policy based on protection of reliance interests. See Malley v. Briggs, 475 U.S. 335, 342 (1986). Rather, we follow the Supreme Court in recognizing that the text of § 1983 should be read with some consideration of the background against which the statute was enacted and thus with an understanding that the common law's rules "defining the elements of damages and the prerequisites for their recovery[] provide the appropriate starting point for the inquiry under § 1983."" Carey v. Piphus, 435 U.S. 247, 257-58 (1978); see also Monroe v. Pape, 365 U.S. 167, 187 (1961) (noting that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"); cf. Heck v. Humphrey, 512 U.S. 477, 483 (1994) (explaining that "to determine whether there is any bar to the present [§ 1983] suit, we look first to the common law of torts"). Moreover, in undertaking that review of the common law to assess the scope of relief available for a claim for a constitutional violation under § 1983, we must keep in mind the Court's observation that if "the interests protected by a particular branch of the common law of torts . . . parallel closely the interests protected by a particular constitutional right," then it may be

"appropriate to apply the tort rules of damages directly," Carey, 435 U.S. at 258, even if that rule is not favorable to the plaintiff, see, e.g., id. at 254-57, 260-62 (relying on principles of common-law damages to conclude substantial nonpunitive damages were unavailable in the absence of proof of real injury).

A number of our sister circuits have followed this approach to assessing the viability of similar retroactive Janus-based damages claims under § 1983, and they have found that such claims closely parallel common-law torts that provide relief for a defendant's misuse of official governmental processes. See Diamond v. Pa. State Educ. Ass'n, 972 F.3d 262, 280 (3d Cir. 2020) (Fisher, J., concurring in the judgment) (collecting cases). They have also recognized that those common-law torts -- abuse of process and malicious prosecution -- require a plaintiff to show malicious or improper use of the process by the defendant. See, e.g., Janus v. Am. Fed. of State, Cnty. & Mun. Emps., 942 F.3d 352, 365 (7th Cir. 2019); see also 54 C.J.S. Malicious Prosecution § 2 (2020) ("The wrongful use of a civil proceeding is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause."); Pinsky v. Duncan, 79 F.3d 306, 312 (2d Cir. 1996) ("[A]buse of process tort has but two elements: 'first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding.'" (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121, at 898 (5th ed. 1984))). Accordingly, they have rejected retroactive Janus-based claims for damages under § 1983, precisely because Janus had not overruled Abood at the time that the agency fees at issue in them were collected and thus the malicious- or

improper-use-of-process element, whichthe analogy to those common-law torts suggests that Congress intended to be imported into those plaintiffs' § 1983 claims, could notbe satisfied. See Diamond, 972 F.3d at 280 (Fisher, J., concurring in the judgment) (collecting cases); see also Wyatt, 504 U.S. at 174 (Kennedy, J., concurring) ("[T]here 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 . . . ."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) (noting that "one of the first principles of constitutional adjudication" is "the basic presumption of the constitutional validity of a duly enacted state or federal law" (citing James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129(1893))).

The Union urges us to follow that same logic here, and thus to find that the District Court correctly held that Doughty and Severance's damages claim fails. In support of our doing so, moreover, the Union points to a substantial body of § 1983 precedent that they contend is directly analogous here. In it, circuits have consistently treated the common-law torts concerning misuse of state processes -- whether the tort of abuse ofprocess or malicious prosecution -- as closely analogous to § 1983 claims for violations of procedural due process that have been brought against private defendants who have availed themselves of state summary process statutes for effecting the seizure of property, whether through attachment or replevin or the like. See, e.g., Pinsky, 79 F.3d at 312; Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1276 & n.31 (3d Cir. 1994);

Wyatt v. Cole, 994 F.2d 1113, 1119 (5th Cir. 1993); see also Duncan v. Peck, 844 F.2d 1261, 1267-68 (6th Cir. 1988). To be sure, the constitutional violation that grounds those § 1983 claims is a product of the flawed design of the state-backed summary process that the private defendant relied upon to acquire the plaintiff's property, Wyatt, 504 U.S. at 161-62, and not of the defendant's use of that process for other than its intended purpose. And, in that respect, there is not a perfect match between the interests protected by those common-law torts and the interests protected by the constitutional right to procedural due process that underlies the § 1983 claim in those cases. Nonetheless, that line of authority still holds that such § 1983 claims are properly analogized to these common-law torts, and thus courts consistently have held those claims to be unavailing when they seek damages for a defendant's use of a summary process statute that was entirely lawful when invoked but that was then retroactively held to violate procedural due process only due to a subsequent change in the law. See, e.g., Wyatt, 994 F.2d at 1120-21.

Notably, Doughty and Severance do not argue that we must reject this line of § 1983 authority concerning challenges to summary process statutes to rule for them in this case. They contend only that this substantial body of § 1983 precedent is distinguishable due to the type of claim that they are bringing under § 1983, such that this line of precedent that is seemingly problematic for them in fact provides no support for the Union's position. That is so, Doughty and Severance contend, both because their § 1983 claim seeks to vindicate a violation of the First Amendment, not the right to procedural due process, and because the Union did not invoke any

court-like process in collectingthe agency fees, as the plaintiffs in the summary-process-focused § 1983 cases did in acquiring the property at issue in them. Additionally, Doughty and Severance assert that, given thenature of their § 1983 claim, the common-law backdrop of § 1983 in fact cuts in their favor, because if any common-law tort is analogous to the one that they are bringing under that statute, it is the common-law tort of conversion, which permits a plaintiff to recover damages without showing the defendant's malicious or improper use of any legal process. But, we are not persuaded by these arguments.

We do not dispute that Doughty and Severance are right that their claim under § 1983 protects against the harm caused by governmentally forced speech and association. In that respect, it does protect interests quite different from those protected by the common-law torts of malicious prosecution and abuse of process. But, as we have just explained, the constitutional right to procedural due process that underlies the § 1983 claims targeting summary process statutes discussed above protects against a failure of the state to provide enough process, not against the misuse of a process that the state has otherwise properly provided. Yet, it is that latter type of misuse that constitutes the harm against which the common-law torts of abuse of process and malicious prosecution provide protection. So, there is little force to this asserted point of distinction between Doughty and Severance's § 1983 claim and the body of § 1983 case law concerning summary process statutes. Rather, their § 1983 claim, like the plaintiffs' § 1983 claims in those cases, is similar to claims for those common-law torts in that it seeks to compensate them

for a private party having used a lawful-when-invoked, state-backed process to acquire their property, even though that process was subsequently held to be unlawful due to a change in the law. See Ogle v. Ohio Civ. Serv. Emps. Ass'n, 951 F.3d 794, 797 (6th Cir. 2020) ("Think about the problem this way. Public-sector unions may enlist the State's help (and its ability to coerce unwilling employees) to carry out everyday functions. But a union that misuses this help, say because the state-assisted action would violate the U.S. Constitution, may face liability under § 1983.").

Finally, while Doughty and Severance are right that their Janus-based § 1983 claim seeks recompense for the invocation of a state-backed process for collecting payments that is distinct from the use of a court process to effect a seizure, we do not see why that distinction is a salient one. Some divergence is to be expected even between a § 1983 claim and a common-law tort that it closely parallels. See Rehberg v. Paulk, 566 U.S. 356, 366 (2012) (explaining that § 1983 is not "simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more"). Doughty and Severance, however, do not explain -- nor does any explanation occur to us -- why the distinction between the use of an adjudicative process and an administrative one supports the conclusion that the Union should receive less protection for its good-faith reliance on the lawful-when-invoked, state-backed process than the defendants in the summary-process § 1983 cases received for theirs.

We suppose the distinctions that Doughty and Severance point to between their § 1983 claim and the common-law torts of abuse of process and malicious prosecution might have force if there were any indication that the common law was as indifferent to reliance interests in a circumstance like the one at issue here as they impliedly suggest is the case. For, in that event, there would be no reason to be concerned that, in permitting their damages claim to lie, we would be anachronistically reading § 1983 without regard for the common-law understandings that the Supreme Court has made clear informed Congress in enacting that measure. But, Doughty and Severance's attempt to make that case with reference to the common-law tort of conversion -- which does not require a showing of malice and which they contend supplies a more apt analogy to their Janus-based claim -- is notconvincing.

As an initial matter, Doughty and Severance provide no support for their implicit premise that a claim for conversion could have been brought at common law for the recovery of a plaintiff's payment of a required fee when the funds used to pay it were comingled with the defendant's other funds following its collection. See 7 Am. Law of Torts § 24:7 (explaining that "before there can be a conversion" of money, there is a "requirement that there be 'ear-marked money or specific money capable of identification'"); 44 A.L.R.2d 927 (1955) ("Money can be the subject of conversion and a conversion action only when it can be described, identified, or segregated in the manner that a specific chattel can be . . . ."). Nor do they identify a single case in which a claim for conversion was successfully brought at common law for damages arising from the defendant's collection of money payments revealed to

have been made pursuant to an illegal requirement only in retrospect, and then only due to the subsequent overruling of a prior Supreme Court precedent under which the requirement was lawful at the time that it was imposed. Their failure on that score is especially conspicuous given how common- law claims for recovering licensing fees and taxes based on the retroactive application of such a sharp change in the law fared. Cf. Diamond, 972 F.3d at 281 (Fisher, J., concurring in the judgment) (describing the "contemporaneous" rule that "ajudicial decision either voiding a statute or overruling a prior decision does not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duressor fraud, in reliance on the invalidated statute or overruled decision"); Note, The Effect of Overruled and Overruling Decisions on Intervening Transactions, 47 Harv. L. Rev. 1403, 1404(1934).

From this review, then, we see no support for concluding that the common law was as indifferent as Doughty and Severance impliedly suggest that it was to the threat to relianceinterests posed by affording a damages remedy for a private defendant's acquisition of payments via the invocation of then-lawful state processes that -- due only to a subsequent change in the law -- retroactively are revealed to have been unlawful. And, because the Court has reminded us in connection with § 1983 that "[r]ights, constitutional and otherwise, do not exist in a vacuum," Carey, 435 U.S. at 254, we are wary of attributing to the Congress that enacted § 1983 an intent to permit a damages claim to go forward in these most unusual circumstances, just because § 1983 provides that a remedy "at law" "shall be" available for a constitutional violation.

That said, we do recognize that "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." See Carey, 435 U.S. at 258. For that reason, we are mindful that "[i]n applying, selecting among, or adjusting common-law approaches"to the new setting of § 1983, we "must closely attend to the values and purposes of the constitutional right at issue." Manuel v. City of Joliet, 137 S. Ct. 911, 921 (2017).

But, although Doughty and Severance assert that their claim for damages seeks to vindicate their First Amendment right against compelled speech and association and that this right provides protection from harm that the common law itself did not, they ignore the unusual nature of their attempt to secure relief for the violation of that constitutional right. They thus develop no argument -- nor does any occur to us -- why close attention to the values and purposes of the First Amendment right against compelled speech and association supports the conclusion that the Congress that enacted § 1983 must have meant to create a claim for damages for its retroactive violation when the violation results in payments made pursuant to a lawful-when-invoked, state-backed process.

Nor are we persuaded by Doughty and Severance's contention that we must rule in their favor based on Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), in which the Court held that when it applies a rule of federal law to the parties before it that rule "must be given full retroactive effect in all cases still . . . on direct review." Id. at 97. Insofar

as the agency fees at issue here may be analogized to the taxes collected in Harper -- itself a debatable proposition -- Doughty and Severance make no argument that they were precluded from bringing a pre-collection claim challenging the lawfulness of the required payment of agency fees on the ground that Abood should be overruled. As a result, they do not explain how the Supreme Court's retroactivity jurisprudence provides any support for the conclusion that § 1983 provides a remedy for the First Amendment violation that grounds their claim under that statute. See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 38 n.21 (1990) (explaining that the "availability of a predeprivation hearing" can also "constitute[] a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure"); see also Nat'l Private Truck Council, Inc. v. Okla. Tax. Comm'n, 515 U.S. 582, 587 (1995) ("As long as state law provides a 'clear and certain remedy,' the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)." (internal citations omitted) (quoting McKesson Corp., 496 U.S. at 51)).

III.

Doughty and Severance do separately make a demand for restitution, which is an equitable rather than a legal remedy. And it is true that § 1983 empowers courts to hold a party that violated another's federal rights "liable" in a "suit inequity."

42 U.S.C. § 1983. But, as Doughty and Severance do not plead that the specific agency fees they paid can

"clearly be traced to particular funds or property in the [Union's] possession," see Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002), their claim is necessarily "one against the union's treasury generally, not one against an identifiable fund or asset," which makes it inherently legal in nature, Mooney v. Ill. Educ. Ass'n, 942 F.3d 368, 371 (7th Cir. 2019). Accordingly, their restitution claim fails, too.

IV.

The judgment of the District Court is **affirmed**.

Appendix C

UNITED STATES DISTRICT COURT DISTRICT OF NEW HAMPSHIRE

PATRICK DOUGHTY and RANDY SEVERANCE, as individuals and representatives of the requested class, Plaintiffs,	)	**Case No. 19-cv-53-PB**
v.	)	
STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU, LOCAL 1984, CTW, CLC, Defendant.	)	

JUDGMENT

In accordance with the Oral Order by Judge Paul Barbadoro on May 30, 2019, judgment is hereby entered.

The prevailing party may recover costs consistent with Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920.

By the Court:

Daniel J. Lynch
Clerk of Court

Date: May 30, 2019
cc: Counsel of Record

Appendix D

UNITED STATES DISTRICT COURT DISTRICT OF NEW HAMPSHIRE

PATRICK DOUGHTY and RANDY SEVERANCE, as individuals and representatives of the requested class, Plaintiffs, v. STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU, LOCAL 1984, CTW, CLC, Defendant.	**Case No. 19-cv-53-PB** May 30, 2019 2:01 p.m.

TRANSCRIPT OF MOTION HEARING BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Plaintiff: Frank D. Garrison, Esq.
Milton L. Chappell, Esq.
National Right to Work
Legal Defense Foundation

Cooley Ann Arroyo, Esq.
Cleveland, Waters & Bass

For the Defendant: Ramya Ravindran, Esq.
Leon Dayan, Esq.
Bredhoff & Kaiser PLLC
John S. Krupski, Esq.
Milner & Krupski, PLLC

Court Reporter: Liza W. Dubois, RMR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire

THE CLERK: This Court is in session and has for consideration motion hearing in civil matter 19-cv-53-PB, Patrick Doughty, et al., vs. State Employees' Association.

THE COURT: Does anybody want to draw at cases to my attention – my attention that have been decided since the last supplemental authority that I've been provided with.

No, Okay. All Right.

So I's like the plaintiffs to explain to me why I shouldn't grant to motion to dismiss from the bench for the reasons set forth in the court's opinion in *Babb* and the unanimous reasoning expressed in all of the other district court cases that have addressed the question.

MR. GARRISON: Thank you, your Honor.

I would submit that those cases, they don't take into consideration the proper analysis that the Supreme Court has put forth to find new defenses and immunities under 1983. Those cases basically state that you have to look to the common law.

THE COURT: So let me - - let me be clear.

Your argument is not that this cases is in any way distinguishable: your case is based on the premise that these opinions are all wrongly decided.

MR. GARRISON: They – yes, your Honor.

THE COURT: Okay.

MR. GARRISON: So the Supreme Court has always said that Section 1983, if they find immunities or defenses you have to look to common law. And if you can find something, usually through an analogous tort or there's a defense at common law, then you can adopt that. Otherwise, you are acting outside of basically what Congress intended and any - - anything else is just pure policymaking. And - -

THE COURT: You mean like the government contractor defense Justice Scalia created in the helicopter case?

MR. GARRISON: No.

THE COURT: That's a Supreme Court case where Justice Scalia, the great critic of judicial activism, created an affirmative defense essentially out of whole cloth and called it Federal Common Law Government contracting defense.

Mr. GARRISON: Yeah, I submit that this Court shouldn't do that. Basically, you know, if they're going to - - if a defense is going to be found, it should be found through common law.

Like I said, congress is –

THE COURT: Can we step back for a second just tell me how in any version of the world would it be right to require these defendants to pay damages for acting consistent with the requirements of the state law and the -- and the Supreme Court precedent?

MR. GARRISON: Because if you like at cases like *Owen,* the Supreme Court has said the point of 1983 is to make people whole for violations of constitutional law.

THE COURT: But without regard of fault?

MR. GARRISON: That's what Congress enacted, and there is no immunity or defense in section 1983.

THE COURT: No, you're missing the point. I mean, I'm making you a broader theoretical question. Of course I'll ultimately decide the question in accordance with what the requirements of law are, but how could you possibly construct an argument that it's right and just to make defendants pay damages for acting in a way that the state law and the Supreme Court told them to act?

MR. GARRISON: Well, I think the Supreme Court had foreshadowed that they were doing was likely unconstitutional.

THE COURT: So the – the – the defendants should have disregarded state law, refused to follow state law?

MR. GARRISON: It – Section 1983 is a deterrent statute. If they had any qualms about what –

THE COURT: So really what you're saying, though, is they should have defied state law. They should have said the Constitution – even though they Supreme Court has said this behavior is constitutional, we are – will refuse to comply with state law because we thing the Supreme Court in the future will change its mind.

MR. GARRISON: I think that's true. If you look at the Supreme Court's retroactivity jurisprudence, in *Harper* they said that we can apply law retroactively. The unions must have known that. And there's a change you're violating somebody's First Amendment rights. That's the whole point of Section 1983 - -

THE COURT: It is –

MR. GARRISON: -- is to vindicate people.

THE COURT: Is it true that at the same time these defendants were engaging in the conduct that you are challenging that state law authorized the collection of fees?

MR. GARRISON: Yes.

TRE COURT: Okay, so you want them to defy state law.

MR. GARRISON: State law only authorizes these contracts. They don't have to put those in their contracts. These are negotiations between the state and the union. They could have, out of abundance of caution for respecting people's First Amendment rights, not included that in their contract.

THE COURT: I have a lot of trouble seeing it.

So - - all right. So let's get back to your legal argument. Your legal argument is that a good faith defense can only be recognized where you can identify an analog in state law, a state tort affirmative defense of good faith.

MR. GARRISON: I believe that's so, your Honor, because what the Supreme Court has said is -

THE COURT: Well, didn't the Court in *Babb* - - and following reasoning that other courts have looked at - - said the injury that you're suing for is a constitutional injury and the analog to conversion that you're trying to draw just isn't is an appropriate one.

And so you're suggesting that there shouldn't be any good faith defense for engaging in conduct that you in a good faith believe is constitutional. You don't dispute that these defendants in good faith, looking at Supreme Court precedent at the time they were acting, that they acted in good faith in believing that the - - their actions were constitutional, right?

MR. GARRISON: I would dispute that, your Honor. I - -

THE COURT: Really, what is the basis in your complaint or in any facts you want to draw to my attention to suggest that these defendants did not act in good faith?

MR. GARRISON: Well, I think, your Honor, that when *Harris* and *Knox* were decided, they were told that *Abood* was on shaky ground. And so if you can – I mean, that is a 12(b) (6) motion, so –

THE COURT: Yeah, I'm just saying tell me that you've pleaded that would support a conclusion that -

MR. GARRISON: I don't - -

THE COURT: a plausible claim that these defendants have acted in bad faith.

MR. GARRISON: Well, I don't think we have to, your Honor. This - -

THE COURT: Because you don't think there's a – so I'm just saying – yeah, I – what I'm asking you is essentially to say, Judge, we agree that if there's a good faith defense, we lose, because we are not going to try to prove that these defendants acted in bad faith; our claim depends entirely upon our view that the law does not authorize a good faith defense in this circumstances.

I think that's what you're saying. If you'll say it, we can move on.

MR. GARRISON: No, no. I - - I would not day that your Honor, because if you look at case like *Wyatt*, if the Court finds that common law analog closer to abuse of process, which we don't think it can because that tort just doesn't fit, then we have to be able to prove subjective bad faith. And that's something we can do through discovery in - -

THE COURT: How?

MR. GARRISON: - - in summary judgment.

We can look at correspondence the union had, what their internal thoughts were when it came to - -

THE COURT: But the law was the law. Their behavior was entirely constitutional at the time they engaged in it.

MR. GARRISON: And that would - - well, that's questionable, your Honor.

THE COURT: Why is it questionable? The Supreme Court precedent has said that their behavior is constitutional.

MR. GARRISON: The Supreme Court had said that, but the law –

THE COURT: But you're - - you are – you want to take the law back to pre-*Erie* against *Tompkins*.

You – your theory of the constitution is that the Constitution and all the law is a brooding omnipresence that is - - in which it is found by the Court. It predates humanity. It predates the existence of human beings. There is a constitutional law that does not require any human action and the Court finds it somewhere.

Is that what you're saying?

MR. GARRISON: That - - since the Constitution was ratified, the Supreme Court - - they find law. They do not make law. The - - the violations in this case have always been - -

THE COURT: You've read *Erie against Tompkins*, right?

MR. GARRISON: I - - in law school, your Honor.

THE COURT: Okay. Well, go back to it. Do you know the phrase "brooding omnipresence"? That - - that was a view of the law that has been rejected by the Supreme Court for over hundred years.

So I just don't - - I - - I personally don't understand that kind of conception. You're saying that even though the Supreme Court at the time has declared the actions to be constitutional, their actions were, in fact, unconstitutional and they're just waiting for the Supreme Court to correctly declare the law.

MR. GARRISON: I - - I think that's right, your Honor. And the Supreme Court in *Harris* and *Knox* foreshadowed that, which would reduce any reliance interest anybody had.

Plus, cases - - the - - cases like *Harper* say that the law applies retroactively. If - - if that wasn't the case, then if the Supreme Court just made law, then there would be no retroactivity.

THE COURT: Okay. So you want to finish your argument about why a good faith defense requires reference to a common law analog? Is there more you want to say on that?

MR. GARRISON: Right. So Congress in 1871 provided to immunities or defenses. The Supreme Court had said that if there was - - that basically Congress wouldn't have intended to do away with all of the previous immunities and defenses.

So - -

THE COURT: Well, 1983 doesn't provide for qualified immunity.

MR. GARRISON: No, it doesn't, and the Court has - - but the court has found exceptions of where there - -

THE COURT: Right.

MR. GARRISON: - - where those were present at common law.

THE COURT: And Courts like *Babb* say that you don't look to a common law analog; you look to the same kind of reasoning that led the court to recognize qualified immunity.

And you just think that's wrong, right?

MR. GARRISON: Yeah, I think the Supreme Court has said that. They have basically - - if you look at Justice King's concurrence in *Wyatt*, he said, we look to the common law because we can't just - - it's just not freewheeling policymaking when we find these things. And if there's a - - if there's no defense in common law, then courts are just making it up; they are just saying, we think - -

THE COURT: You think they just make up the qualified immunity for 1983 claims against government officials? They just made it up; is that it?

MR. GARRISON: No, I don't think so, your Honor.

THE COURT: Where'd it come from?

MR. GARRISON: They look to common law. In fact, for absolute immunity, they found these things were always there in common law, so they were going to apply them. They said Congress couldn't have intended to get rid of these.

But if they're not there at the common law, then it's just making up - - Congress - - it just wasn't there. You can't just defy Congress and say that we're just going to create these things without congressional intent.

THE COURT: I'm not a fan of defying Congress.

MR. GARRISON: No, I wasn't saying - -

THE COURT: That's not what I do.

MR. GARRISON: -- you. Sorry.

But it's statutory construction, right? Congress is the one that makes the law. They make the defenses and immunities.

THE COURT: Yeah. They didn't make immunity. Immunity was created by Court.

MR. GARRISON: And the Court said that the only reason that we're going to do that is because that common law - - Congress would have abrogated these immunities. That's the whole basis for the immunities and defenses.

THE COURT: You think that the majority of the Supreme Court, applying their approach to statutory construction today, would say the same thing?

MR. GARRISON: Absolutely not, your Honor.

THE COURT: Yeah.

MR. GARRISON: I think they are looking at precedent. But it - - the - - I mean, the rationale still holds, though, that without Congress providing these things, then it's just common law judging.

THE COURT: Okay. So your view is it's most analogous to conversion. Conversion didn't have a good faith defense; it's not analogous to other torts that do have a good faith defense; you can't find good faith defense unless you can find a state court analog; because you can't, there isn't one; because there isn't one, the plaintiffs' claim - - the defendant's motion to dismiss should necessarily be denied.

MR. GARRISON: Exactly, your Honor.

THE COURT: All right. Is there anything more you want to add on that subject?

MR. GARRISON: No.

THE COURT: All right. Thank you.

I'll hear your response.

MS. RAVINDRAN: I'll be brief, your Honor. So I think your Honor has already drilled down to what the dispositive fact in this case is, which is as the plaintiffs acknowledged in their brief, their claim is directed solely at fees that were collected prior to the *Janus* decision. It is disputably the case that those fees were collected - - were authorized by New Hampshire law and were upheld as constitutional by then-controlling law.

THE COURT: If you accept the plaintiffs' premise that it would be improper as a matter of statutory construction to recognize an affirmative good faith defense unless you can find an analog in state common law, if you accept that premise as a starting point, what would you say is the most analogous tort in which a common law defense has been recognized?

MS. RAVINDRAN: Right. So the - - the analog that I would use is abuse of process and it's for this reason.

So the reason that we are here on this Section 1983 claim with - - as with the private party, as my client is, goes back to *Lugar*. It's the reason that - - that the conduct there falls under the - - you know, arguably falls under the rubric of under color of state law is that the defendant, acting with participation of state officials, had invoked a state process by which

fees were deducted by the state, by the plaintiff's employer, and then remitted to the union. So and it's that use of the state process is the reason that we are even here for Section 1983 - -

THE COURT: Explain that to me in a little more detail.

MS. RAVINDRAN: Yes. So the way fair share fees, the fees that are at issue here, are collected under the state procedure that's set up here in New Hampshire is under the New Hampshire Public Employee Labor Relations Act, unions are authorized to negotiate and to collect a bargaining agreement that is at issue here and that time period that's relevant here authorized the deduction - - required that payment of fair share fees by employees like the plaintiffs who are in the bargaining unit that is represented by union, but who declined to become members of the union.

THE COURT: Right. So it is that process that you say authorizes the fees and to the extent there was a wrong, it was misuse of that process. Since the most analogous tort in your view would then be abuse of the process and a good faith defense was available to an abuse of process tort, it should be - - also be recognized here.

MS. RAVINDRAN: Correct - -

THE COURT: Okay.

MS. RAVINDRAN: - - that would be our position under the analysis.

THE COURT: All right, Now, what do you say to his - - I assume you take the same position as the Court did in *Babb* that it is not necessary to find a

state law analog to the good faith defense that you're asking us to - - asking the Court to recognize here.

What do you say to the defendant's argument that any defense to a 1983 claim can only be recognized - - and he says including qualified and absolute immunity are all derivative of state common law claims and, therefore, to the extent that the Court in *Babb* or you contend that there isn't a need for state precedent? What do you say to that?

MS. RAVINDRAN: Well, what I would say is that if we – and we can go back to Justice Kennedy's concurrence in *Wyatt*, as plaintiffs have cited, where – which is where the roofs of the good faith defense first started. And what Justice Kennedy says in that concurrence is that there was support in the common law for the proposition that is reasonable as a matter of prior to any judicial determination of unconstitutionality.

So that – that is already embedded in the common law and that is the rationale that – in the five circuit courts that have had occasion to address the good faith defense, who adopted that rationale of that - -

THE COURT: This goes beyond that. This is a case where they - - the defendant had not just state law that authorized the specific action they engaged in, but Supreme Court precedent - -

MS. RAVINDRAN: Correct.

THE COURT: -- recognized that their actions were entirely consistent with the constitution.

MS. RAVINDRAN: That's correct, your Honor.

So applying the good faith defense into the circumstances of this case is actually a small subset of the - - of what the other circuit courts who have had reason to address the issue of the good faith defense have recognized. Because in those five circuit courts, there was no on-point Supreme Court decision that had evaluated the exact same conduct that was at issue in the Section 1983 claim.

There was a state – a state law that authorized the conduct and under those circumstances, those courts did recognize a good faith defense that would be applicable in that situation.

Our case is much stronger, in my view, because there is - - if you take the language in the Fifth Circuit in *Wyatt*, which was the First Circuit Court to recognize the good faith defense, the standard they use is whether they knew - - whether the defendant knew or should have known that the statute they're relying on is constitutional.

At the time period in which the fees were collected, there's no question that the statute on which the union was relying on was constitutional because *Abood* had - - was the controlling law of the land at the time and it had addressed the exact same conduct that is at issue here.

THE COURT: Yeah, I - - as I said, stepping away from the pure technical legal analysis, it is incomprehensible to me the idea that under the unique circumstances of this case, which is something that will occur very rarely during the life of the county - -

MS. RAVINDRAN: Right.

THE COURT: - - in which the Supreme Court decided to flatly overturn its prior precedent - - we want people to rely on our decisions. One of the reasons that judges express their views in written options is so that people can rely on it. And then to suggest that when judges flip 180 degrees on the law that people who we want to rely on our decisions are then subjected to suits for damages because we changed our mind seems arrogant in the extreme.

It - - it's incomprehensible to me that courts would allow for damage actions to be maintained under those unique circumstances. I just - - I can't even begin to understand the idea that any court could award - - allow an action to proceed in a case like this. I - - I mean, it's just incomprehensible.

We want - - we issue decisions and we want people to follow them. We don't want people - - to tell people, look, follow us, but if we decide to change our mind later, you're going to have to pay damages. That - - that's crazy.

MS. RAVINDRAN: I agree with every word of that, your Honor.

THE COURT: All right. So, in any event, what else would you like to say?

MS. RAVINDRAN: Unless the Court has questions - -

THE COURT: No, I want to hear a response to anything that's been said by the defendant's counsel.

MR. GARRISON: Your Honor, I would just like to respond to a couple points.

So the first one being about people not being liable for damages. Our clients had their constitutional right violated, their First Amendment rights - -

THE COURT: No, I doubt - - I don't even understand that. I thought their constitutional rights were actually - - were not violated at all because the Supreme Court at the time the actions occurred said that their conduct was constitutional.

MR. GARRISON: So basically in saying that - -

THE COURT: The Supreme Court changed the law. You have – you – you have this idea that the law was always there and it was always unconstitutional, but it was just hidden because the Supreme Court was screwed up when they said something. And I just have a different conception of the way the law works.

MR. GARRISON: I understand, your Honor, but as the Supreme Court said, the retroactivity jurisprudence says these cases are retroactive to every case that's open.

So our clients' First Amendment rights were violated. They had their money taken, spent on ideological things that they did not want. They objected the whole time.

If there's a – if this is purely equities and not a statutory interpretation case, then those equities need to be balanced. I don't think there's any opinion that has ruled on this case that has looked to our clients' or other people's First Amendment rights when balancing the equities. As the Supreme Court said in *Owen*, 1983, the history and purpose of it was give people damages for - -

THE COURT: The State Employees' Association is an association of current and former employees, is that - - state employees? Is that what the - - the State Employees' Association is?

MR. GARRISON: Yes.

THE COURT: Yeah.

MR. GARRISON: Yes.

THE COURT: And so what you're saying now is people who are - - who are paying fees to support the State Employees' Association today should be required to have their money diverted to pay employees for things that happened in the past. So we should take money from them and give it to these employees whose – whose conduct - - who were injured, in your view, in the past. So it's basically taking money from someone who's done nothing wrong, through their association, and giving it to your clients because they were wronged.

MR. GARRISON: If you look at the Supreme Court's jurisprudence in *Owen*, that's pretty much exactly what they were doing. It was a municipality. This is a private association corporation. And if we're going to decide who the equities go for, then it should be the people that got their First Amendments rights violated. Most of - -

THE COURT: Yeah, I don't agree with that. It's not - - I don't think it matters one way or the other to the analysis of the questions raised your complaint.

MR. GARRISON: Well, the - - what I'm saying is if - - if we're just going off pure equities, not looking at the common law statutory construction, we'd just ask the Court to balance the equities. That's what

they're asking for. They're asking for basically an affirmative defense based in policy.

THE COURT: Okay. Why - - why is not abuse of process the better analog than conversion?

MR. GARRISON: Because abuse of process is an historical tort, is using the court system to basically try to get people's property through unconstitutional means.

THE COURT: All right. Aren't they using process authorized by the state law?

MR. GARRISON: Your Honor, if you define process at that level of generality, then everything is an abuse of process tort. We just don't believe that - - they're trying to shoehorn that in here and it just doesn't fit. The most analogous tort is conversion. They took people's property against their will and spent it on stuff that they did not want, on ideological activities that they did not want. Their First Amendment rights were violated and - - by taking their money and spending it.

THE COURT: Okay. What else would you like to say?

MR. GARRISON: I would just like to say that the Ninth Circuit cases, *Babb* included, are all following *Clement,* which did not do a common law analysis. It just assumed that there was a good faith defense, applied it to the facts of the case. So the Ninth Circuit cases, *Babb* included, are basically just ruling on those free from any common law basis. I mean, some in passing have said, you know, this is more likely the abuse of process, but haven't given it really any analysis. We just ask the Court - -

THE COURT: Well, *Babb* - - *Babb* does that analysis.

MR. GARRISON: Well, it – not in any – I don't think it does it in any proper – it doesn't give it the proper, I don't know, analysis that it deserves.

THE COURT: All right. Hang on a minute.

MR. GARRISON: It does give an analysis. I apologize, your Honor.

THE COURT: I thought it did. I just – I - - I just wanted to look through.

And when I read it earlier, I understood it to present that analysis. But you can disagree with it. I –

MR. GARRISON: Yeah, I do disagree with it. And it's just – we think it's a little - - you know, it's in one paragraph.

THE COURT: Yeah.

MR. GARRISON: So…

THE COURT: That's fine. I understand that. Anything else that you'd like to say?

MR. GARRISON: No, your Honor.

THE COURT: Okay.

MR. GARRISON: I just would like to close with, you know, if we're going to be balancing equi8ties, we would like the court to take into consideration that our clients had their First Amendment rights violated and we don't think that any of the previous cases have done that.

THE COURT: All right. And I - - and, believe me, I think it's very important for courts to pay careful attention to First Amendment considerations. I don't think you'll find a judge who has a more aggressive enforcement of First Amendment rights than me. The only two times I have found state statutes to be unconstitutional are claims - - cases in which those state statutes have been applied to violate the First Amendment rights of the plaintiffs. One was a pharmacy information law that violated the rights of the plaintiffs in that case. I invalidated the law on First Amendment grounds. I was reversed by the Supreme Court and my view was prevailed.

A couple years – a few years ago, I invalidated a law that banned what are called ballot selfies on First Amendment grounds. My view on that point was upheld by the First Circuit Court of Appeals.

I fully undoes vigorous enforcement of people's First Amendment rights. In my view, this issue has nothing to do with that. It - - the underlying claim is a First Amendment claim, but the - - the fundamental problem here is that this is a case that requires a good faith defense, in my view. It's a case in which without regard to a state law analog, a good faith defense must be available to protect defendants under these kinds of circumstances and it can - - its existence can be inferred from Supreme Court precedent recognizing the qualified immunity doctrine in a related context.

To the extent that a state law analog is required, I agree with the plaintiffs in this case that abuse of process is a much stronger analog than conversion. A good faith defense has traditionally been recognize for the abuse of process torts and it's appropriate to analogize to that.

I don't believe conversion is the appropriate analogy here. The injury to your clients, as the Court points out in *Babb*, is an - - a First Amendment injury. It's an injury to their dignity and autonomy in being forced to support speech that they don't agree with. That tort is not really a conversion tort and I think the abuse of process tort is a better analog. To the extent that a future court should decide that there must be a state law analog, I agree with the court in *Babb* that abuse of process provides the better analog.

I find the reasoning of the court in *Babb* to be very carefully expressed. I don't find there to be any facts in this case as pleaded in the complaint that distinguish the - - your clients' claims from the claims that were at issue in *Babb.* I recognize that *Babb.* I recognize that *Babb* was decided in the Ninth Circuit and is subject to Ninth Circuit precedent. It doesn't restrict me here.

But I find the reason that underlies that precedent to be entirely persuasive. I endorse it. I don't find any basis on which to distinguish your case from the cases in which courts around the country have unanimously agreed that your cause of action is subject to a good faith defense. I do not see any - - any unusual circumstances in this case which would prevent me from recognizing the existence of a good faith defense and determining that it's appropriate to consider it here on a Rule 12(b) (6) motion.

Of course, in ruling on 12(b) (6) motion, I - - I am required to follow the standard adopted by the Supreme Court in *Iqbal* and *Twombly*. I'm required to examine the complaint, strike out any allegations in the complaint that are conclusory, look at what

remains and ask whether it states a plausible claim for relief.

First Circuit precedent does allow me to grant a motion to dismiss in certain circumstances based on the availability of an affirmative defense. As I've explained, I believe for the reasons set forth by the court in *Babb* and the other courts that have reached a similar conclusion that a good faith defense is available to the plaintiffs here and I agree - - I agree with those courts that it is appropriate to recognize that defense and apply it here in response to the complaint that you have brought.

Doing that, and using the 12(b)(6) standard, I have concluded that even construing the allegations in the complaint in the light most favorable to you that you have not stated a plausible claim for relief in light of the affirmative defense that I find is available to the plaintiff.

Accordingly, I grant the motion to dismiss. And I don't see any reason to allow you to leave to amend because there doesn't appear to be any - - to be any unusual circumstances that would require an amendment or that an amendment could cure the defects that I've identified in the complaint.

I think you'd be better off, frankly, just devoting your resources to an appeal. So you should try to get the First Circuit to reach a different conclusion from me, which I respect that it's always possible that it could do. And that's where you really need to be expending your time and your energy.

I don't think I have anything to add to the analysis that the other district courts that have taken it on have addressed, but if you think there's more

that I need to do, questions that you think I need to respond to, tell me now and I'm happy to provide further analysis to support my conclusion. But I think I've made it clear to you how I think about the case and as I said, I - - I think you should go ahead and appeal and see what the First Circuit says.

But do you want - - is there more you need me to do by wat of analysis so that the case can be ready for appellate review by the First Circuit?

MR. GARRISON: I don't think so, you Honor.

THE COURT: All right.

Is there anything more that the plaintiff wants me to do?

MS. RAVINDRAN: No.

THE COURT: I really don't see any point in writing - - not because I think your argument is legally frivolous. I want to be clear about that. First Amendment issues are important. People like you should be able to come to the courts and express novel ideas about how your clients should be entitled to relief. I respect that and I'm not saying your claims are frivolous.

I'm saying I just can't conceive of how they could ever be allowable under the law as I understand it to be. And to the extent you wish to break new ground, the fact that all the other courts are ruling against you shouldn't deny you an opportunity to seek review from an appellate court that's very experienced at addressing First Amendment claims and issues of this sort.

And so I - - I'm not, in ruling from the bench, intending to suggest that your claim is frivolous. I'm merely suggesting that I don't see how it can be possibly proceed. And to the extent I would allow it to proceed, I would need guidance from the First Circuit explaining to me why the claim is potentially viable. And that's all I'm trying to say here today. Okay?

All right. The defendant's motion to dismiss is granted.

Thank you.

MR. GARRISON: Thank you.

(Proceedings concluded at 2:35 p.m.)

CERTIFICATE

I, Lisa W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 6/6/19 /s/ Liza W. Dubois

LIZA W. DUBOIS, RMR, CRR

Appendix E

UNITED STATES DISTRICT COURT DISTRICT OF NEW HAMPSHIRE

PATRICK DOUGHTY and RANDY SEVERANCE, as individuals and representatives of the requested class, Plaintiffs, v. STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU, LOCAL 1984, CTW, CLC, Defendant.	**Case No. 19-cv-53-PB** **COMPLAINT CLASS ACTION** Jury Demand if any issues so triable

INTRODUCTION

1. Patrick Doughty and Randy Severance ("Plaintiffs") are public employees of the State of New Hampshire who are exclusively represented by the State Employees' Association of New Hampshire, SEIU, Local 1984, CTW, CLC ("SEIU 1984" or "Union"). SEIU 1984 maintains and has maintained collective bargaining agreements ("CBAs") within the limitations period with the State of New Hampshire ("State") that establishes and established the terms and conditions of employment for Plaintiffs' respective bargaining units. Although Plaintiffs are not members of the Union, they were forced by provisions of the operative CBAs to pay union fees to the Union as a condition of their employment. The State deducted those compulsory fees without their consent and remitted them to the Union.

2. On June 27, 2018, the United States Supreme held:

> States and public-sector unions may no longer extract fees from nonconsenting employees. * * * Neither [a forced] fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.

Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018) (citations omitted).

3. SEIU 1984 violated the First and Fourteenth Amendments to the United States Constitution by requiring Plaintiffs and other state employees (the "Class Members"), the Class Plaintiffs seek to represent, to pay compulsory union fees – despite Plaintiffs' and the Class Members' not belonging to the Union or authorizing the deductions.

4. Plaintiffs bring this civil rights action pursuant to 42 U.S.C. § 1983 on behalf of themselves and all others similarly situated, seeking: (a) judgment declaring the Union's practice of forcing Plaintiffs to pay fees to fund union activities of any kind violates the First and Fourteenth Amendments; (b) judgment declaring the forced fee provisions of the CBA covering Plaintiffs' and Class Members' bargaining units violate the First and Fourteenth Amendments

and are null and void; and (c) damages in the amount of the unlawful compulsory fees seized from Plaintiffs and Class Members that SEIU 1984 demanded or received; and (d) costs and attorneys' fees under 28 U.S.C. § 1920 and 42 U.S.C. §1988.

JURISDICTION AND VENUE

5. This is an action that arises under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the deprivation, under color of state law, of rights, privileges, and immunities secured to Plaintiffs and Class Members by the United States Constitution, particularly the First and Fourteenth Amendments.

6. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

7. This action is an actual controversy in which Plaintiffs seek a declaration of their rights under the United States Constitution. Pursuant to 28 U.S.C. §§ 2201-2202, this Court may declare the rights of Plaintiffs and grant further necessary and proper relief based thereon, including injunctive relief pursuant to Fed. R. Civ. P. 65.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the claims arise in this judicial district and SEIU 1984 operates and does business in this judicial district.

PARTIES

9. Plaintiff Patrick Doughty resides in Grafton County, New Hampshire, and works throughout the State of New Hampshire ("State") as a public employee of the State in a bargaining unit represented by SEIU 1984.

10. Plaintiff Randy Severance resides in Merrimack County, New Hampshire, and works in Merrimack County, New Hampshire, as a public employee of the State in a bargaining unit represented by SEIU 1984.

11. The State Employees' Association of New Hampshire, SEIU, Local 1984, CTW, CLC ("SEIU Local 1984" or "Union") is a state-wide labor union incorporated in the State of New Hampshire, headquartered at 207 N. Main Street, Concord, New Hampshire 03301. The Union represents public employees and enters into collective bargaining agreements with public employers throughout New Hampshire, including the State.[4]

FACTUAL ALLEGATIONS

12. Plaintiff Patrick Doughty has worked for the State in the Department of Transportation and has been in a bargaining unit represented by the Union since October of 2001. Between October 2012 and June 22, 2018, Plaintiff Doughty was forced by the Union and the State, as a condition of employment, to pay

[4] There are at least two collective bargaining agreements that cover Plaintiffs' employment during this litigation: Collective Bargaining Agreement between the State of New Hampshire and the State Employees' Association of New Hampshire, Service Employees International Union, Local 1984, 2018-2019, http://www.seiu1984.org/files/2012/03/2018-2019 -CBA.pdf; Collective Bargaining Agreement between the State of New Hampshire and the State Employees' Association of New Hampshire, Service Employees International Union, Local 1984, 2015-2017, https://das.nh.gov/hr/cba2015/CBA%202015-2017.pdf. SEIU 1984 also entered into CBAs with other public employers during the period that also contained forced fee requirements.

fees out of his wages, without his consent, to the Union.

13. Plaintiff Randy Severance has worked for the State in the Department of Information Technology and has been in a bargaining unit represented by the Union since December of 1990. Between August 2006 and June 22, 2018, Plaintiff Severance was forced by the Union and the State, as a condition of employment, to pay fees out of his wages, without his consent, to the Union.

14. Though Plaintiffs were members of neither the Union nor its affiliates during the limitations period, both were compelled, pursuant to the compulsory union fee provisions of Article 5.7 of their relevant CBAs, to pay a nonmember fee to SEIU 1984, which distributed some of the fee to its affiliates as a condition of their public employment prior to *Janus*.

15. Defendant acted under color of state law when it required, collected, and received these compulsory fees from Plaintiffs and the Class Members pursuant to the relevant CBAs which required these payments from Plaintiffs' and Class Members' wages.

PLAINTIFFS' CLASS ALLEGATIONS

16. Plaintiffs bring this class action under Fed. R. Civ. P. 23(b)(3). The class includes all individuals employed by the State, and other public employers, who, as a condition of employment, were forced to pay union fees to SEIU 1984, which distributed some of the fees to its affiliates, any time during the limitations period. The class includes everyone who paid compulsory union fees for the period(s) during which compulsory nonmember fees were collected and remitted to the Union – including former and retired

employees, those who have moved to other states, and those who eventually joined the Union. Collectively, the individuals who satisfy these criteria are referred to as "Class Members."

17. The number of persons in the class makes joinder of the individual class members impractical.

18. There are questions of fact and law common to all Class Members. Factually, Plaintiffs and all Class Members are or were public employees who were not members of the Union and were compelled to pay agency fees to SEIU 1984, which distributed some of those fees to its affiliates, as a condition of public employment. The U.S. Constitution affords the same rights to Plaintiffs and all Class Members. The common questions include whether they are entitled to the return of the compulsory union fees required as a condition of employment without their consent.

19. Plaintiffs' claims are typical of other Class Members, because the Class Members did not affirmatively consent to financially support the Union and/or its affiliates yet have been forced by the applicable CBA provisions to financially support SEIU 1984 and/or its affiliates in violation of their rights.

20. Plaintiffs can adequately represent the interests of all Class Members and have no interests antagonistic to any Class Member because all have been forced to pay, as a condition of employment, fees from their wages without their consent.

21. A class action can be maintained under Fed. R. Civ. P. 23(b)(3) because the common questions of law and fact identified in this Complaint predominate over any questions affecting only individual Class

Members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy because, among other things, all Class Members have been subjected to the same violation of their constitutional rights, but the amount of money involved in each individual's claim would make it burdensome for Class Members to maintain separate actions. The amount of the forced fee deductions taken from Plaintiffs and Class Members and the amount of damages are known to SEIU 1984.

CAUSE OF ACTION COUNT 1

(Forced fees violate 42 § 1983 and the

First and Fourteenth Amendments)

22. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

23. By and through the terms of the compulsory union fee provisions of the CBAs between Plaintiffs' and the Class Members' public employers and SEIU 1984, the Union has illegally compelled Plaintiffs and Class Members to financially support the Union, which distributed some of those fees to its affiliates.

24. As a result of the actions set forth in the foregoing paragraph, SEIU 1984 has violated Plaintiffs' and the Class Members' First Amendment rights, as secured by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, not to associate with or financially support a labor organization and its affiliates as a condition of employment, without their affirmative consent and knowing waiver of their First Amendment rights.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray that this Court:

A. **Class action:** Enter an order, as soon as practicable, certifying this case as a class action, certifying the class as defined in this Complaint, certifying Plaintiffs as class representatives for the class, and appointing Plaintiffs' counsel as class counsel for the class;

B. **Declaratory Judgment:** Enter a declaratory judgment that all compulsory union fee provisions of collective bargaining agreements that compelled Plaintiffs and Class Members to pay fees to the Union and its affiliates as a condition of their employment, and the receipt and use of those forced fees by SEIU 1984, which distributed some of these fees to its affiliates, are unconstitutional under the First Amendment, as secured by the Fourteenth Amendment to the United States, and are null and void;

C. **Damages:** Enter a judgment awarding Plaintiffs and Class Members compensatory damages, refunds, or restitution in the amount of compulsory union fees paid to the Union from their wages without their written consent, and other amounts as principles of justice and equity require;

D. **Interest:** Award Plaintiffs and Class Members pre-judgment and post-judgment interest, as appropriate, on all amounts due to them as a result of this action;

E. **Costs and attorneys' fees:** Award Plaintiffs their costs and reasonable attorneys' fees pursuant to

28 U.S.C. § 1920 and 42 U.S.C. § 1988, and as otherwise permitted by law; and

F. **Other relief:** Award Plaintiffs and Class Members such other and additional relief as this Court deems just, equitable, or proper.

Respectfully submitted,
PATRICK DOUGHTY and RANDY SEVERANCE,
As individuals and representatives of the requested class,

By Their Attorneys,

Dated: January 14, 2019

/s/ Bryan K. Gould

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