No. 20-___

IN THE
Supreme Court of the United States

KIERNAN J. WHOLEAN
JAMES A. GRILLO,
Petitioners,

v.

CSEA SEIU LOCAL 2001
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY D. JENNINGS
Counsel of Record
MILTON L. CHAPPELL
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
jdj@nrtw.org

Counsel for Petitioners

QUESTION PRESENTED

Is there a "good faith defense" to 42 U.S.C. § 1983 that shields a defendant from damages liability for depriving citizens of their constitutional rights if the defendant acted under color of a law before it was held unconstitutional?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, Plaintiff-Appellants in the court below, are Kiernan J. Wholean and James A. Grillo.

Respondent, Defendant-Appellee in the court below, is the CSEA SEIU Local 2001.

Other parties to the original proceedings below who are not Respondents are Benjamin Barnes, in his official capacity as Secretary of the Office of Policy and Management, State of Connecticut; Sandra Fae Brown-Brewton, in her official capacity as Undersecretary of Labor Relations, State of Connecticut; Robert Klee, in his official capacity as Commissioner of the Department of Energy and Environmental Protection, State of Connecticut.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Second Circuit, No. 19-1563-cv, *Wholean v. CSEA SEIU Local 2001*, judgment entered April 15, 2020, rehearing en banc denied June 9, 2020 mandate issued June 16, 2020.

U.S. District Court for the District of Connecticut, No. 3:18-cv-1008 (WWE), *Wholean v. CSEA SEIU Local 2001*, final judgment entered April 29, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 955 F.3d 332 and reproduced at Pet. App. 1a. The Second Circuit order denying rehearing en banc is reproduced at Pet. App. 21a. The Second Circuit affirmed an order and unpublished opinion by the United States District Court for the District of Connecticut, which is reproduced at Pet. App. 11a, that dismissed the Petitioners' complaint.

JURISDICTION

The Second Circuit entered judgment on April 15, 2020. It denied a petition for rehearing en banc on June 9, 2020. Pet. App. 21a.

In its March 19, 2020 order, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1983, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

> action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

On June 27, 2018, the Court in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) overruled *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) and held that it violates the First Amendment for states and unions to seize agency fees from nonconsenting employees. 138 S. Ct. at 2486. The Court explained that "unions have been on notice for years regarding this Court's misgiving about *Abood"* and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.* at 2484-85. The Court also lamented the "considerable windfall" that unions wrongfully received from employees during prior decades, finding "[i]t 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." *Id.* at 2486.

Petitioners Kiernan J. Wholean and James A. Grillo are such employees whose First Amendment rights were violated. They both are employees of the Connecticut Department of Energy and Environmental Protection who the state government compelled to pay

agency fees to Respondent CSEA SEIU Local 2001 before this Court's decision in *Janus*. Pet. App. 3a-4a.

Shortly after *Janus* was decided, Wholean and Grillo filed suit and sought damages from Local 2001 for agency fees it unconstitutionally seized from them and a class of similarly situated state employees within the applicable limitations period. *Id.* at 4a. Wholean and Grillo did so under Section 1983, which provides that "[e]very person who, under color of any statute" deprives citizens of their constitutional rights "shall be liable to the party injured in an action at law[.]" 42 U.S.C. § 1983.[1]

The district court, however, held that a so-called "good faith defense" renders defendants who act under color of presumptively valid statutes *not* liable to injured parties in an action at law. Pet. App. 18a-19a. It reasoned that Local 2001 had relied on a state statute to seize the fees (Conn. Gen. Stat. § 5-280) and it was constitutional under *Abood* at the time Local 2001 seized the fees. *Id.* at 18a. The district court then "incorporate[d]" the reasoning of *Mooney v. Illinois Education Association*. *Id.* (incorporating 372 F. Supp. 3d 690 (C.D. Ill. 2019), *aff'd* 942 F.3d 368 (7th Cir. 2019), *cert. pet. filed*. No. 19-1126 (Mar. 10, 2020)). The *Mooney* court held that this "good faith defense" is based on "principles of fairness and equality." 372 F. Supp. 3d at 703. It also held that the court did not

[1] The district court had jurisdiction over this action based on both 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

need to look to common tort analogies to determine whether it should recognize a defense to the First Amendment claim. *Id.* Based on *Mooney*, the district court below concluded that this ostensible defense shields Local 2001 from liability because it collected fees in "reliance on existing law." *Id.* at 19a.

Wholean and Grillo appealed to the Second Circuit. It held that Local 2001 was entitled to an affirmative good faith defense to Section 1983 liability because it relied on "directly controlling Supreme Court precedent and then-valid state statutes . . . ." Pet. App. 8a. The court did not identify any other basis or rationale for this defense.

Three other circuit courts have also held that there is a good faith defense to Section 1983 that shields unions that acted under agency fee statutes before they were held unconstitutional from paying damages to employees. *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *petition for cert. filed* No. 20-486 (U.S. Oct. 8, 2020); *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"), *petition for cert. filed* No. 19-1104 (U.S. Mar. 9, 2020); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *petition for cert. filed* No. 19-1130 (U.S. Mar. 12, 2020).

The courts, however, cite different rationales for a good faith defense. The Ninth Circuit—like the district court here—found the defense to be rooted in concerns about equality and fairness. *See Danielson*, 945 F.3d. at 1101. Conversely, the Sixth Circuit held the

defense could be justified by an analogy to the common law tort of abuse of process. 951 F.3d at 797. The Seventh Circuit also suggested the abuse of process tort analogy justified the defense. *Janus II*, 942 F.3d at 365-66. But it also questioned whether a common law justification for the good faith defense was even necessary. *Id.*

But the Third Circuit rejected the good faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020). There were three separate opinions in *Diamond*. Judge Rendell accepted the good faith defense other circuits had recognized. 972 F.3d at 269. Judge Fisher did not, finding it "beyond our remit to invent defenses to § 1983 liability based on our views of sound policy." *Id.* at 274 (Fisher, J., concurring in the judgment). Judge Fisher, however, found an alternative limit to retroactive liability under Section 1983 based on pre-1871 common law history. *Id.* at 278. Judge Phipps rejected both a good faith defense and Judge Fisher's alternative limit on Section 1983's scope. *Id.* at 285 (Phipps, J., dissenting). Judge Phipps found that "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id.* at 289. Taking the opinions together, a majority of the Third

Circuit panel in *Diamond* held there is no affirmative good faith defense to Section 1983.

REASONS FOR GRANTING THE PETITION

Three times this Court has raised, but then not decided, the question of whether there exists a good faith defense to Section 1983. *See Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997); *Wyatt v. Cole*, 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). The Court should now resolve this important question to disabuse lower courts of the misconception that a defendant acting under color of a statute before it is held unconstitutional always has an affirmative defense to Section 1983.

That misconceived defense is not the defense members of this Court suggested in *Wyatt*. Several Justices in that case wrote that good faith reliance on a statute could defeat the *malice and probable cause elements* of certain constitutional claims. 504 U.S. at 166 n.2 (majority opinion); *id.* at 172 (Kennedy, J., concurring); *id.* at 176 n.1 (Rehnquist, C.J., dissenting). Those Justices were not suggesting that a defendant's reliance on a yet to be invalidated statute should be an affirmative defense to all Section 1983 claims for damages.

A majority of the Third Circuit panel in *Diamond* recognized as much, and rejected the broad good faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits. 972 F.3d at 274 (Fisher, J., concurring in the judgment); *id.* at 289-90 (Phipps, J., dissenting).

The Court should resolve this disagreement amongst circuit courts over the existence of this defense.

This is especially so because a good faith defense cannot be reconciled with Section 1983's text, which makes acting "under color of any statute" an element of the statute that renders defendants "liable to the party injured in an action at law." 42 U.S.C. § 1983. Nor can the defense be reconciled with this Court's retroactivity doctrine. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995).

The different rationales cited for a good faith defense—either equitable principles, or an analogy to an abuse of process tort—are all untenable. Courts cannot create equitable exemptions to congressionally enacted statutes like Section 1983. And even if they could, fairness to victims of constitutional deprivations supports enforcing the statute as written. As for common law analogies, a First Amendment claim for compelled subsidization of speech is not so akin to an abuse of a judicial process as to justify importing that tort's malice and probable cause elements into a First Amendment speech claim.

The Court should reject the proposition that a defendant relying on a state law before it is invalidated is exempt from compensating injured parties under Section 1983. It is important that the Court do so. Unless corrected, the lower courts' misapprehension of *Wyatt* will cause tens of thousands of victims of agency fee seizures to go uncompensated for their injuries. It

will also result in victims of other constitutional deprivations not being made whole for their injuries. The petition should be granted.

A. The *Wyatt* Court Did Not Suggest That a Defendant's Reliance on a Statute Should Be an Affirmative Defense to Section 1983.

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The elements of different constitutional deprivations vary considerably. "In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017).

The claim in *Wyatt* was that a private defendant deprived the plaintiff of due process of law when seizing his property under an *ex parte* replevin statute. 504 U.S. at 160. The Court found the plaintiff's due process claims analogous to "malicious prosecution and abuse of process," and recognized that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id.* at 164–65; *see id.* at 172–73 (Kennedy, J., concurring) (similar).

The Court in *Wyatt* held that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified *immunity* from suit accorded government officials . . .

." *Id.* at 165 (emphasis in original). The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. *Wyatt* left open whether Section 1983 defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.

The good faith defense suggested in *Wyatt* was *not* a broad statutory reliance defense to all Section 1983 damages claims, as some courts have concluded. *See, e.g., Janus II*, 942 F.3d at 366. Rather, several Justices suggested a defense to Section 1983 claims in which malice and lack of probable cause are necessary elements for establishing damages. This is clear from all three opinions in *Wyatt*.

Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it is a "misnomer" to use the term good faith "defense" because "under the common law it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice *and* without probable cause." 504 U.S. at 176 n.1 (emphasis in original) (citation omitted). "Referring to the defendant as having a good-faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing *either* a lack of malice or the presence of probable cause." *Id.* (emphasis in original).

Justice Kennedy, in his concurring opinion joined by Justice Scalia, agreed that "it is something of a misnomer to describe the common law as creating a good-

faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." *Id*. at 172. Justice Kennedy explained that "[t]the common-law tort actions most analogous to the action commenced here are malicious prosecution and abuse of process," and that in both actions "it was essential for the plaintiff to prove that the wrongdoer acted with malice and without probable cause." *Id*. Justice Kennedy found that because "a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law . . . lack of probable cause can *only* be shown through proof of subjective bad faith." *Id*. at 174.

Finally, Justice O'Connor's majority opinion in *Wyatt* recognized that the good faith defense discussed in the dissenting and concurring opinions was in reality a defense to a plaintiff proving malice and lack of probable cause. *Id*. at 166 n.2. The majority opinion found that "[o]ne could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs bringing an analogous suit under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action." *Id*.

On remand in *Wyatt*, the Fifth Circuit recognized that this Court "focused its inquiry on the elements of these torts." *Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993). It therefore found "that plaintiffs seeking to recover on these theories were required to prove

that defendants acted with malice *and* without probable cause." *Id.* The Third and Second Circuits followed suit in cases also arising from abuses of judicial processes and held the defendants could defeat the malice and probable cause elements of those claims by showing good faith reliance on a statute. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 & n.31 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

More recently, Judge Fisher of the Third Circuit recognized that the defense discussed in *Wyatt* is "whether the defendant acted with malice and without probable cause." *Diamond*, 972 F.3d at 278-79 (Fisher, J., concurring in the judgment). Judge Fisher recognized that this defense does not "appl[y] categorically to all cases involving private-party defendants," but rather depends on the claim at issue. *Id.* at 279. Judge Phipps similarly recognized that Chief Justice Rehnquist's discussion of a good faith defense "actually referred to elements of the common-law torts of malicious prosecution and abuse of process," and that he "identified no authority for the proposition that good faith functions as transsubstantive affirmative defense–applicable across a broad class of claims . . ." *Id.* at 287 (Phipps, J., dissenting).

The Second, Sixth, Seventh, and Ninth Circuits erred in interpreting *Wyatt* to signal that a defendant who relies on a statute before it is held unconstitutional always has an affirmative "good faith" defense to Section 1983 damages. *See* Pet. App. 8a; *Ogle*, 951 F.3d at 797; *Janus II*, 942 F.3d at 366; *Danielson*, 945

F.3d at 1101-02. The Court in *Wyatt* was suggesting nothing of the sort. Indeed, such a statutory reliance defense would conflict with both Section 1983's plain language and this Court's retroactivity doctrine.

B. A Good Faith Defense Conflicts with Section 1983's Text and Retroactivity Law.

1. A Good Faith Defense Conflicts with Section 1983's Text.

Section 1983 states, in relevant part, that "[e]very person who, *under color of any statute*, ordinance, regulation, custom, or usage, of any State" deprives a citizen of a constitutional right "*shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (emphasis added). Section 1983 means what it says. "Under the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

It turns Section 1983 on its head to conclude that persons who act under the color of state laws that are later held unconstitutional are *not* liable to the injured parties in a suit for damages. The proposition effectively makes a statutory *element* of Section 1983—that defendants must act under color of state

law—a *defense* to Section 1983.[2] An affirmative defense predicated on a defendant's reliance on a state law cannot be reconciled with Section 1983's plain language.

The Court rejected a comparable defense over one hundred years ago in *Myers v. Anderson*, 238 U.S. 368 (1915). There, the Court held that a statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued that they were not liable for money damages under Section 1983 because they acted on a good faith belief that the statute was constitutional. The Court noted that "[t]he nonliability . . . of the election officers for their official conduct is seriously pressed in argument." *Id.* at 378. The Court rejected the contention for being contrary to its decision in *Guinn v. United States*, 238 U.S. 347 (1915) and "*the very terms*" of the statute. *Id.* at 379 (emphasis added).[3]

---

[2] Defendants in Section 1983 actions will almost always act under color of state laws that have not been held invalid at the time, because it is difficult for a party to invoke a state law that a court has already declared to be unconstitutional.

[3] The lower court, whose judgment this Court affirmed, was more explicit in its reasoning:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages . . . in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910).

It is telling that the Second Circuit here, as well as the Sixth and Ninth Circuits, made no attempt to square a good faith defense with Section 1983's text. The Seventh Circuit's only response to the argument that it violates Section 1983's text to deem a defendant's reliance on state law an affirmative defense to this statute was to claim this Court "abandoned" strictly following Section 1983's language when recognizing immunities. *Janus II*, 942 F.3d at 362.

To the contrary, the Court has held that "[w]e do not simply make our own judgment about the need for immunity," and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. The Court accords an immunity only when a "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'" when it enacted Section 1983. *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164).

Unlike with immunities, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364; *see Diamond*, 972 F.3d at 288 (finding "[a] good faith defense is inconsistent with the history of the Civil Rights Act of 1871") (Phipps, J., dissenting); William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 55 (2018) (finding "[t]here was no well-established, good faith defense in suits about constitutional violations when Section 1983 was

enacted, nor in Section 1983 suits early after its enactment."). Thus, unlike with immunities, there is no justification for deviating from Section 1983's mandate that "[e]very person who, under color of any statute" deprives a citizen of a constitutional right "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983.

2. A Good Faith Defense Conflicts with This Court's Retroactivity Doctrine.

Janus has retroactive effect under the rule this Court announced in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) and applied in *Reynoldsville Casket*, 514 U.S. at 759. The good faith defense the Second Circuit and other courts have fashioned to defeat *Janus'* retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

Reynoldsville Casket concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at 751. This Court had earlier held the statute unconstitutional. *Id.* An Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed under the statute before this Court invalidated it. *Id.* at 751-52. The plaintiff asserted this was a permissible, equitable remedy because she relied on the statute before it was held unconstitutional. *Id.* at 753 (describing the state court's remedy "as a state law 'equitable' device [based on] reasons of reliance and fairness").

This Court rejected that contention, holding the state court could not do an end run around retroactivity by creating an equitable remedy based on a party's reliance on a statute later held unconstitutional by this Court. *Id.* at 759.

The Second Circuit engaged in just such an end run here. It created a defense based on a defendant's reliance on a statute before it was effectively deemed unconstitutional by a decision of this Court. The Second Circuit's good faith reliance defense is incompatible with this Court's retroactivity doctrine.

C. Circuit Courts Disagree on Whether There Is a Good Faith Defense and the Justifications for That Defense.

A majority of the opinions in *Diamond* rejected the good faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits. 972 F.3d at 274 (Fisher, J., concurring in the judgment); *id.* at 289-90 (Phipps, J., dissenting). While Judge Fisher in *Diamond* found a different exemption to retroactive liability under Section 1983, *see id.* at 284,[4] the relevant point here is

---

[4] Judge Fisher's limit on retroactive liability under Section 1983 and a good faith defense have different elements and rationales. The latter is purported to be an affirmative defense that applies when a defendant relies in good faith on presumptively valid law, *see* Pet. App. 8a, and is based on equitable interests or a tort analogy, *see infra* 16-23. Judge Fisher found, based on pre-1871 common law history, that a court decision that invalidates a statute or overrules a decision does not generate Section 1983 liability "except where duress or fraud was present." *Diamond*, 972 F.3d at 284. Judge Fisher's proffered limit on Section 1983's

that the circuit courts disagree on whether there exists an affirmative good faith defense to Section 1983. The Court should resolve that disagreement.

Even the circuit courts that have recognized a good faith defense disagree on the basis for that defense.[5] The Sixth Circuit held that it "looks to the most closely analogous tort at common law in deciding whether private defendants may assert a good-faith defense to certain § 1983 claims." 951 F.3d at 797. The Court concluded that the union in that case could assert the defense because "abuse of process is the most plausible common-law tort analogue to employees' post-*Janus* First Amendment claims." *Id.*

The Seventh Circuit in *Janus II* stated that the "search for the best [tort] analogy is a fool's errand." 942 F.3d at 365. The court found "reasonable arguments for several different torts," though it was "inclined to agree . . . that abuse of process comes closest." *Id.* Ultimately, the Seventh Circuit chose to "leave common-law analogies behind." *Id.* at 366.

The Ninth Circuit in *Danielson* also held a good faith defense is not rooted in common law. 945 F.3d at 1101.

---

scope is untenable for the reasons stated by Judge Phipps in his dissent in *Diamond*, 972 F.3d at 287-88, and because it conflicts with this Court's retroactivity doctrine.

[5] The Second Circuit below did not explain the basis for the good faith defense it recognized other than citing *Wyatt* as recognizing such a defense, and held that defendants who rely "directly [on] controlling Supreme Court precedent and then-valid state statutes . . . ." have such a defense. Pet. App. 8a.

The court held "the availability of the defense arises out of general principles of equality and fairness—values that are inconsistent with rigid adherence to the oft-arbitrary elements of common law torts as they stood in 1871." *Id*. According to the Ninth Circuit, "[i]t would be an odd result for an affirmative defense grounded in concerns for equality and fairness to hinge upon historical idiosyncrasies and strained legal analogies for causes of action with no clear parallel in nineteenth century tort law." *Id*. But the Court alternatively held that, if common law analogies mattered, "abuse of process provides the best analogy to Plaintiffs' claim." *Id*. at 1102.

The lower courts' struggle to agree upon a basis for recognizing a good faith defense is additional reason for the Court to grant review. This is especially true given that neither common law tort analogies, nor equity support recognizing this defense to Section 1983.

In *Diamond*, Judge Fisher recognized that courts cannot just "invent defenses to § 1983 liability based on our views of sound policy." 972 F.3d at 274 (Fisher, J., concurring in the judgment). He also found "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to a First Amendment compelled speech claim. *Id*. at 280. Judge Phipps rejected both rationales for a good faith defense. *Id*. at 288-90 (Phipps, J., dissenting). As discussed below, Judge Phipps was right. Neither tort analogies, nor equity can justify creating this new affirmative defense to Section 1983.

1. An Analogy to Abuse of Process Does Not Justify Creating a Good Faith Defense.

The Sixth Circuit suggested that abuse of process is analogous to a First Amendment compelled speech claim. *Ogle*, 951 F.3d at 797. "Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Manuel*, 137 S. Ct. at 921. "Sometimes . . . [a] review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. But not always." *Id*. at 920-21 (citations omitted). Some Section 1983 claims have no common law equivalent. "[Section] 1983 is not simply a federalized amalgamation of pre-existing common-law claims.'" *Id*. at 921 (quoting *Rehberg*, 566 U.S. at 366).

A First Amendment claim for compelled subsidization of speech has no common law equivalent. "Compelling a person to *subsidize* the speech of other private speakers" violates the First Amendment because it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common law torts. It is peculiar to the First Amendment.

A violation of First Amendment speech rights is nothing like an abuse of process tort. "[T]he tort of abuse of process requires misuse of a *judicial* process." *Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008). The tort exists to protect the integrity of the judicial process and to protect litigants from

harassment. *See* 8 Am. Law of Torts § 28:32 (2019). The tort does not exist, as the First Amendment does, "to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Abuse of process is certainly not so similar to a compelled subsidization of speech claim to justify making malice and lack of probable cause *elements* of that constitutional claim. And that is the only potential relevance of common law analogies—to determine whether to import a tort's elements into a particular Section 1983 claim. *See Manuel*, 137 S. Ct. at 920-21.

Malice and lack of probable cause are not elements of a First Amendment claim under *Janus*. Under *Janus*, a union deprives employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when doing so is immaterial. The limited good faith defense members of this Court suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights under *Janus*.

2. Policy Interests in Fairness and Equality Do Not Justify a Good Faith Defense.

a. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so. "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S.

365, 376 (1990). "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984). The "fairness" rationale for a good faith defense to Section 1983 is inadequate on its own terms.

In any event, fairness to *victims* of constitutional deprivations requires enforcing Section 1983's text as written. It is not fair to make employees pay for unconstitutional union conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980).

The Court wrote those words in *Owen* when holding that Section 1983's legislative purposes did not justify extending good faith immunity to municipalities. The Court's reasons for so holding apply here.

First, the Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id.* at 651 (footnote omitted). So too here. It would be an injustice to leave innocent victims of agency fee seizures and other constitutional violations remediless for their injuries.

Second, the Court recognized that Congress enacted Section 1983 to "serve as a deterrent against future constitutional deprivations." *Id.* "The knowledge that

a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id*. at 651–52 (footnote omitted). This deterrence interest also weighs against a reliance defense, which will encourage defendants to risk infringing on constitutional rights by limiting their exposure for so doing.

Third, the *Owen* Court reasoned that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss" to the entity that caused the harm "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id*. at 655. So too here. It is not fair to have Wholean and Grillo pay for Local 2001's unconstitutional conduct. Equity favors requiring Local 2001 to return the monies it unconstitutionally seized from them.

b. As for the proposition that principles of "equality" justify extending to private defendants a defense similar to the immunity enjoyed by some public defendants, *see Danielson*, 945 F.3d at 1101, that proposition makes little sense. That unions are not entitled to qualified immunity is not reason to create a similar defense for unions. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for an immunity.

Even if principles of equality required treating Local 2001 like its closest government counterpart, that still would not entitle it to an immunity-like defense. An organization like Local 2001 is nothing like individual persons who enjoy qualified immunity. Local 2001 is most like a governmental body that lacks qualified immunity—a municipality. *Owen*, 445 U.S. at 654. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby." *Id*. Nor is it unjust to require an organization, like the Local 2001, to compensate the public employees it represents for violating their constitutional rights.

Neither fairness nor equality justifies recognizing a good faith defense to Section 1983. Rather, both principles weigh against carving this exemption into Section 1983's remedial framework.

D. It Is Important That the Court Finally Resolve Whether Congress Provided a Good Faith Defense to Section 1983.

Section 1983 is the nation's preeminent civil rights statute and is often used by citizens to protect their constitutional rights. It is no small matter when lower courts create a new affirmative defense to Section 1983 liability.

Several circuit courts have now done just that based largely on the misconception that this Court in *Wyatt* signaled that private defendants should be granted a

defense to Section 1983 liability akin to qualified immunity. Yet *Wyatt* did not suggest such a defense, but only suggested that reliance on a statute could defeat the malice and lack of probable cause elements of certain due process claims. *See supra* 8-12. The Court should clarify what it meant in *Wyatt*.

It is important the Court act quickly because whether tens of thousands of victims of agency fee seizures can receive compensation hangs in the balance. Over 37 class action lawsuits are pending that seek refunds from unions for agency fees they seized from workers in violation of their First Amendment rights. *See* Amicus Br. of Goldwater Inst. et al., 4, *Janus v. AFSCME, Council 31*, No. 19-1104 (Apr. 9, 2020). The vast majority of these cases are in or from the Second, Third, Sixth, Seventh, and Ninth Circuits, which have accepted a defense to these unconstitutional agency fee seizures. *Id.* at 1a-6a (listing cases). Most individual actions seeking a return of agency fees also are in these circuits. *See id.* at 7a-9a. The employees in these suits should be permitted to recover a portion of the "windfall," *Janus*, 138 S. Ct. at 2486, of compulsory fees unions wrongfully seized from them. But without this Court's review, these employees will be denied relief.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. The Sixth Circuit acknowledged that its decision could shield from liability defendants that invoke state law processes to

discriminate against individuals on the basis of "race, gender, or faith." *Ogle*, 951 F.3d at 797.

The purpose of Section 1983 is to provide damages to citizens who have been injured by actions taken under color of state law in violation of their constitutional rights. *See Diamond*, 972 F.3d at 288-89 (Phipps, J., dissenting). A good faith defense is inconsistent with that purpose. *Id*. The Court should grant review to repudiate this ostensible new defense to Section 1983.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

OCTOBER 30, 2020

JEFFREY D. JENNINGS
Counsel of Record
MILTON L. CHAPPELL
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
jdj@nrtw.org

APPENDIX A

955 F.3d 332

United States Court of Appeals,
Second Circuit.

Kiernan J. WHOLEAN and James A. Grillo,
Plaintiffs-Appellants,

Lakeisha Christopher, Plaintiff,
v.

CSEA SEIU LOCAL 2001; Benjamin Barnes, in his official capacity as Secretary of the Office of Policy and Management, State of Connecticut; Sandra Fae Brown-Brewton, in her official capacity as Undersecretary of Labor Relations, State of Connecticut; Robert Klee, in his official capacity as Commissioner of the Department of Energy and Environmental Protection, State of Connecticut,

Defendants-Appellees,

Kevin Lembo, in his official capacity as Comptroller, State of Connecticut,

Defendant.

No. 19-1563-cv
|

August Term 2019

|

Argued: December 12, 2019

|

Decided: April 15, 2020

Synopsis

Background: Non-union state employees filed § 1983 action against state officials and union seeking return of fair-share union fees they had paid to union as condition of their employment, in violation of First Amendment. The United States District Court for the District of Connecticut, Warren W. Eginton, Senior District Judge, 2019 WL 1873021, dismissed complaint, and employees appealed.

The Court of Appeals, Reiss, District Judge, sitting by designation, held that good faith defense barred employees' § 1983 claim for return of fair-share union fees.

Affirmed.

Before: Cabranes and Lohier, Circuit Judges, and Reiss, District Judge.*

Opinion

Christina Reiss, District Judge:

---

* Judge Christina Reiss, of the United States District Court for the District of Vermont, sitting by designation.

Plaintiffs-Appellants Kiernan J. Wholean and James A. Grillo contend that the United States District Court for the District of Connecticut (Eginton, J.) improperly dismissed their First and Fourteenth Amendment claims brought pursuant to 42 U.S.C. § 1983 against Defendants-Appellees CSEA SEIU Local 2001 ("Local 2001"); Benjamin Barnes, Secretary of the Office of Policy and Management for the State of Connecticut; Sandra Fae Brown-Brewton, Undersecretary of Labor Relations for the State of Connecticut; and Robert Klee, Commissioner of the Department of Energy and Environmental Protection for the State of Connecticut (collectively, "Appellees"). We hold that a good-faith defense applies to Appellees' collection of fair-share union fees from Appellants and therefore AFFIRM the District Court's dismissal of Appellants' Second Amended Complaint.

I. BACKGROUND

Appellants Kiernan J. Wholean and James A. Grillo are employees of the State of Connecticut. Appellee Local 2001 is a union that represents State of Connecticut employees. The remaining Appellees are State of Connecticut officials.[1]

On June 13, 2018, Appellants, who are not members

[1] Although Appellants appealed the entirety of the District Court's decision and judgment in their notice of appeal, in their brief they abandon their appeal of the District Court's dismissal of their claims against the State of Connecticut officials. See Appellants' Br. at 3 n.1 ("[Appellants] also sued certain officials of the Connecticut state government but they do not appeal the [D]istrict [C]ourt's dismissal of their claims against the State Defendants.").

of Local 2001, filed a Complaint against Appellees, asserting that they were forced to pay fair-share union fees to Local 2001 as a condition of their employment in violation of the First Amendment to the United States Constitution. ***334** Appellees admit that they collected fair-share fees from Appellants, but contend they were entitled to do so under applicable law. During the pendency of Appellants' lawsuit, the United States Supreme Court decided *Janus v. American Federation of State, County, and Municipal Employees ("AFSCME"), Council 31*, —— U.S. ——, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018) wherein it overruled *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261 (1977), to hold that the collection of fair-share fees from public-sector employees violated the First Amendment because they "forced [nonmembers] to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities," thereby "compelling them to subsidize private speech on matters of substantial public concern." *Id.* at 2459-60.

After *Janus* was decided, Appellees ceased deducting fair-share fees from Appellants' pay and refunded any such fees collected post-*Janus*. Thereafter, Appellants amended their Complaint to seek the return pursuant to 42 U.S.C. § 1983 of all fair-share fees collected by Appellees pre-*Janus* allegedly in violation of the First and Fourteenth Amendments to the United States Constitution.

On October 1, 2018, Appellees moved to dismiss the First Amended Complaint, asserting a good-faith defense based upon their compliance with Conn. Gen.

Stat. § 5-280 (authorizing, among other things, the collection of fair-share fees from non-members) and directly controlling Supreme Court precedent that rendered the collection of fair-share fees from non-consenting, non-waiving, non-member public-sector employees lawful. *See Abood*, 431 U.S. at 235-36, 97 S.Ct. 1782. While the motion to dismiss was pending, Appellants filed a Second Amended Complaint.

On April 26, 2019, the District Court dismissed the Second Amended Complaint, finding Appellants' claims for declaratory judgment and injunctive relief were moot based on *Janus*. With regard to Appellants' assertion that Local 2001 continued to violate the First and Fourteenth Amendments by retaining pre-*Janus* fees, the District Court concluded those claims were barred by the defense of good-faith adherence to existing precedent.

II. DISCUSSION

The Second Circuit reviews a district court's dismissal of a complaint *de novo* using the same standard employed by the district court. *See Purcell v. N.Y. Inst. of Tech. – Coll. of Osteopathic Med.*, 931 F.3d 59, 62 (2d Cir. 2019). Appellants urge this court to reverse on two grounds.

First, Appellants contend that 42 U.S.C. § 1983 does not recognize a good-faith defense beyond qualified immunity. They assert one cannot be implied because a First Amendment violation does not turn on a violator's motive and there is no analogous common law tort from which a good-faith defense may be extrapolated. Second, Appellants urge this court to find that

Appellees should have anticipated *Janus* and ceased collecting fair-share fees on that basis.

We hold that a party who complied with directly controlling Supreme Court precedent in collecting fair-share fees cannot be held liable for monetary damages under § 1983. In so holding, we do not write on a blank slate. The Supreme Court in *Wyatt v. Cole*, 504 U.S. 158, 168, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992), observed 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 ***335** protection from liability, as do their government counterparts." Although the Court ultimately held that private defendants are not entitled to qualified immunity, the Court refused to "foreclose the possibility that private defendants faced with § 1983 liability ... could be entitled to an affirmative defense based on good faith and/or probable cause." *Id.* at 169, 112 S.Ct. 1827; *see also id.* at 168, 112 S.Ct. 1827 (noting that the interests underlying a good-faith defense "are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion" of immunity to private parties). Indeed, in *Wyatt*, several Justices opined that a good-faith defense for private individuals who rely on precedent has always existed. *See id.* at 174, 112 S.Ct. 1827 (Kennedy, J., concurring) (joined by Justice Scalia in finding "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 176, 112 S.Ct. 1827 (Rehnquist, J., dissenting) (joined by Justices Souter and Thomas in stating "it is clear that at the time §

1983 was adopted, there generally was available to private parties a good-faith defense to the torts of malicious prosecution and abuse of process") (footnote omitted).

Since *Wyatt*, every Circuit Court of Appeals to have considered the question has held that a good-faith defense exists under § 1983 for private individuals and entities acting under the color of state law who comply with applicable law, including three circuits who have concluded that a good-faith defense is available to unions that relied on *Abood* and applicable state law in collecting fair-share fees prior to *Janus*.[2]

---

[2] *See, e.g.*, *Ogle v. Ohio Civil Serv. Emps. Ass'n*, 951 F.3d 794, 797 (6th Cir. 2020) ("A narrow good-faith defense protects those who unwittingly cross that line in reliance on a presumptively valid state law—those who had good cause in other words to call on the governmental process in the first instance."); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 390-91 (6th Cir. 2020) ("[A] consensus has emerged among the lower courts 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 [including for pre-*Janus* collection of fair-share fees.] ... We now add our voice to that chorus.") (citations and internal quotation marks omitted); *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019) ("[j]oining a growing consensus" following *Janus* in holding that "private parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. § 1983, where they acted in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law"); *Janus v. AFSCME*, 942 F.3d 352, 366 (7th Cir. 2019) (holding on remand that until the Supreme Court "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"); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008) (holding that a towing company was entitled to assert a good-faith defense to a Fourteenth

Consistent with *Wyatt*, a 2016 panel of this court found "a good faith defense was available to a private defendant sued under ***336** § 1983 for a First Amendment violation." *Jarvis v. Cuomo*, 660 F. App'x 72, 75 (2d Cir. 2016), *cert. denied*, —— U.S. ——, 137 S. Ct. 1204, 197 L.Ed.2d 246 (2017). In *Jarvis*, the lack of a scienter element for a First Amendment violation did not defeat the recognition of a good-faith defense because "unlike standard defenses, affirmative defenses need not relate to or rebut specific elements of an underlying claim." *Id.* (citing Black's Law Dictionary 482 (9th ed. 2009)). We find *Jarvis* well-reasoned. Because Appellees collected fair-share fees in reliance on directly controlling Supreme Court precedent and then-valid state statutes, their reliance was objectively reasonable, and they are entitled to a "good-faith" defense as a matter of law. *See Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996) ("There is common law authority that it is objectively reasonable to act on the basis of a statute not yet held invalid."); *Jarvis*, 660 F. App'x at 76 (affirming the district court's application of the

---

Amendment due process claim based on the lack of notice to a towed vehicle's owner because "[t]he company did its best to follow the law and had no reason to suspect that there would be a constitutional challenge to its actions"); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994) (recognizing a good-faith defense under § 1983 for due process deprivations); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993), *cert. denied*, 510 U.S. 977, 114 S.Ct. 470, 126 L.Ed.2d 421 (1993) (on remand from the Supreme Court, holding that "private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity").

good-faith defense because "CSEA relied on a validly enacted state law and the controlling weight of Supreme Court precedent," and thus it was "objectively reasonable for CSEA 'to act on the basis of a statute not yet held invalid' ") (quoting *Pinsky*, 79 F.3d at 313).

In finding a good-faith defense, we note that nothing in *Janus* suggests that the Supreme Court intended its ruling to be retroactive. Indeed, the *Janus* Court held that "States and public-sector unions *may no longer* extract agency fees from nonconsenting employees," *Janus*, 138 S. Ct. at 2486 (emphasis supplied), and the Supreme Court reversed and remanded for further proceedings rather than apply its new rule to the parties before it. *Cf. Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 90, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) (holding that the Supreme Court's "application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision"). Even if the retroactivity of *Janus* is presumed, no different outcome is warranted. A good-faith defense would still preclude the relief Appellants seek.

Contrary to Appellants' second argument on appeal, Appellees cannot reasonably be deemed to have forecasted whether, when, and how *Abood* might be overruled. Instead, they were entitled to rely on directly controlling Supreme Court precedent, and in good faith, they did so. *See Agostini v. Felton*, 521 U.S. 203, 207, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (holding that courts, and by extension citizens, should "follow the case which directly controls, leaving to [the Su-

preme] Court the prerogative of overruling its own decisions").

III. CONCLUSION

We have reviewed all of the remaining arguments raised by Appellants on appeal and find them without merit. For the foregoing reasons, we **AFFIRM** the April 29, 2019 judgment of the District Court.

APPENDIX B

2019 WL 1873021
United States District Court, D. Connecticut.

Kiernan J. WHOLEAN and James A. Grillo,

Plaintiffs,
v.

CSEA SEIU LOCAL 2001, Benjamin Barnes, in his official capacity as Secretary of Policy and Management, State of Connecticut, Sandra Fae Brown-Brewton, in her official Capacity as Undersecretary of Labor Relations, State of Connecticut, and Robert Klee, in his official capacity as Commissioner of the Department of Energy and Environmental Protection, State of Connecticut,

Defendants.

3:18-cv-1008 (WWE)
|
Signed 04/26/2019

RULING ON DEFENDANTS' MOTION TO DISMISS

Warren W. Eginton, Senior United States District Judge

***1** Plaintiffs are employees of the Connecticut Department of Energy and Environmental Protection who paid fair-share or "agency" fees to Local 2001 prior to the United States Supreme Court decision, Janus v. AFSCME Council 31, 138 S. Ct. 2448 (June 27, 2018), which held that public employers may not require public employees to pay fair-share fees. Plaintiffs' second amended complaint alleges a putative class action challenging the constitutionality of requiring non-union members to pay union fees as a condition of state employment pursuant to 42 U.S.C. § 1983. Plaintiffs also allege one claim of unjust enrichment pursuant to state law.

Defendant CSEA and the defendant state officials have filed motions to dismiss, which assert that plaintiffs' claims for declaratory and injunctive relief are now moot. Defendant CSEA argues further that plaintiffs' request for repayment of such fees should be dismissed because defendant had a good faith reliance on existing law authorizing collection of such fees.

For the following reasons, the motions to dismiss will be granted.

BACKGROUND

On a motion to dismiss, the Court considers the facts alleged in the complaint to be true. For purposes of considering a motion to dismiss for lack of subject matter jurisdiction, the Court also considers factual issues outside of the pleadings, including the affidavits attached to the motions to dismiss See State Emps. Bargaining Agent Coal. v. Rowland, 494 F.3d

71, 77 n.4 (2d Cir. 2007).

Defendant Local 2001 serves as the collective bargaining representative for a bargaining unit comprising employees of the Connecticut Department of Energy and Environmental Protection ("DEEP"). Plaintiffs are not union members.

Prior to June 27, 2018, the collective bargaining agreements governing plaintiffs' bargaining unit required non-members to pay fair-share fees to Local 2001 to cover their portion of the costs of collective bargaining representation.

The day after Janus was issued, Local 2001 notified DEEP that it should stop deducting fees from non-members. Two days later, the State of Connecticut informed Local 2001 and other labor unions representing State employee to discontinue deducting agency fees from non-union members. Due to the processing time required for payroll changes, these fees were deducted from non-members' wages for the payroll issued on July 6, 2018. However, Local 2001 did not accept those fees and sent refunds directly to the non-members.

Local 2001 as part of a Coalition representing all state employee unions and the State of Connecticut signed a formal agreement eliminating from their collective bargaining agreements any provisions requiring payment of fair-share fees. In September 2018, the parties signed a stipulated agreement providing, in part, "any provisions of ... [the parties'] collective bargaining agreements requiring or authorizing the collection

of fair share fees from non-union bargaining unit members without the specific affirmative consent of such non-union members are and shall be null and void as of the date of issuance of the Janus decision."

***2** Plaintiffs' second amended complaint recognizes that "the State Defendants stopped deducting forced fees from the Plaintiffs and class members' wages;" and that "the Defendants on September 17, 2018, entered a stipulated agreement which made the forced fees provisions in the existing CBA null and void in light of *Janus*." However, plaintiffs assert that defendants "failed to notify Plaintiffs or the proposed class that the CBA no longer requires forced fees even though the existing CBA's other provisions are still ongoing until June 30, 2021." Plaintiffs maintain that "the bargaining unit's membership knowledge that the forced fees provisions continue to exist chills their exercise of First Amendment rights to free speech and association." Plaintiffs allege that "Local 2001 has not refunded the fees it collected before July 6, 2018, to Plaintiffs and the class." Plaintiffs maintain that defendants were on notice regarding the Supreme Court's misgivings about Abood and have thereby received a windfall from the unconstitutional collection of non-members' fees.

DISCUSSION

A motion to dismiss under FRCP 12(b)(1) "challenges the court's statutory or constitutional power to adjudicate the case before it." 2A James W. Moore et al., Moore's Federal Practice, ¶ 12.07, at 12-49 (2d ed. 1994). Once the question of jurisdiction is raised, the

burden of establishing subject matter jurisdiction rests on the party asserting such jurisdiction. See Thomson v. Gaskill, 315 U.S. 442, 446 (1942).

The function of a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King, 467 U.S. 69, 73 (1984). The complaint must contain the grounds upon which the claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A plaintiff is obliged to amplify a claim with some factual allegations to allow the court to draw the reasonable inference that the defendant is liable for the alleged conduct. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1944 (2009).

Section 1983 Claims for Declaratory and Injunctive Relief

Plaintiffs seek entry of declaratory judgments, stating that the forced fee provisions of the collective bargaining agreements are unconstitutional; that defendant Local 2001 violated plaintiffs' and class members' constitutional rights by accepting fees from plaintiffs' wages and failing to inform them that the CBA no

longer requires forced fees; and that defendant Local 2001 unjustly enriched itself by collecting forced fees from their wages. Plaintiffs request that the Court enjoin defendant Local 2001 from requiring, requesting, collecting, receiving, possessing or obtaining forced fees from nonmembers; and order defendants to notify the employees that any relevant agreements no longer require forced fees or automatic deduction of union fees without an employee's affirmative consent and waiver of First Amendment rights.

Article III requires a live case or controversy to exist at the time that a federal court decides a case. Burke v. Barnes, 479 U.S. 361, 363 (1987) "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects" O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974); see also City of Los Angeles v. Lyons, 461 U.S. 95, 107 & n.8 (1983) (subjective fear of repeated injury without an actual threat of such injury occurring is not sufficient to establish Article III standing).

Thus, pursuant to Article III, the court lacks subject matter jurisdiction when the question before it becomes moot. Boyle v. Midland Credit Mgmt., Inc., 722 F.3d 78, 80 (2d Cir. 2013). "Mootness can be demonstrated by showing no practical relief can follow a judicial determination of controversy." Lillbask ex rel. Mauclaire v. Sergi, 193 F. Supp. 2d 503, 509 (D. Conn. 2002). Significant changes in law or a defendant's voluntary cessation of the injury-causing conduct that is unlikely to reoccur will render moot a claim or case. See Lamberty v. Connecticut State Poiice Union, 2018 WL 5115559, at *5 (D. Conn. Oct. 19, 2018).

***3** Here, Janus overturned existing Supreme Court precedent, Abood *v.* Detroit Board of Education, 431 U.S. 209, 222 (1977), which authorized public sector unions to charge non-members for a proportionate share of union dues attributable to collective bargaining representation. Janus, 138 S. Ct. at 2484-86 ("This procedure violates the First Amendment and cannot continue. Neither an agency 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.").

Plaintiffs' claims for declaratory judgment and injunctive relief regarding the collection of agency fees from non-members are moot because (1) the Supreme Court has already determined the issue, and (2) defendants have demonstrated that collection of such fees has ceased and is unlikely to recur. Plaintiffs cannot assert a claim for prospective relief based on past unconstitutional conduct that has now ceased or based on a subjective belief that the unconstitutional conduct may reoccur. It is well established that a defendant cannot reasonably be expected to resume conduct that it acknowledges is contrary to binding precedent. Berman v. New York State Public Employee Federation, 2019 WL 1472582, at *3 (D. Conn. March 31, 2019). Accordingly, the case or controversy regarding the constitutionality of the collection of agency fees no longer exists for this court to determine and remedy. Defendants' motions to dismiss will be granted because plaintiffs' claims for declaratory and injunctive

relief are moot.

Section 1983 Claim for Damages/Repayment of Fess with Interest

Plaintiffs assert that Local 2001 continues to violate the First and Fourteenth Amendments of the United States constitution by retaining these fees and that plaintiffs are entitled to a full refund with interest of all union fees collected by Local 2001 prior to Janus. Defendants assert that this claim is barred by the defense of good faith adherence to existing law.

Prior to Janus, the Connecticut General Statutes § 5-280 authorized the collection of agency fees, which was considered constitutional under United States Supreme Court and Second Circuit precedent. See Abood, 431 U.S. 209; Scheffer v Civil Service Employee Association, Local 828, 610 F.3d 782 (2d Cir. 2010).

Since Janus, courts considering similar claims have concluded that the good faith defense is available to private defendants faced with liability. See Akers v. Maryland State Education Association, 2019 WL 1745980, *5 (D. Md. April 18, 2019) (noting courts have uniformly held that good-faith defense bars refund claims); Mooney v. Illinois Educ. Ass'n., 2019 WL 1575186 (C.D. Ill. April 11, 2019) (recognizing growing consensus concluding that fees collected prior to Janus may not be recovered). The Court incorporates herein the extensive analysis finding that a good faith affirmative defense is available to a private defendant

facing similar claims for repayment of agency fees articulated by the district court in Mooney v. Illinois Educ. Ass'n. See also Jarvis v. Cuomo, 660 Fed. Appx. 72, 75-76 (2d Cir. 2016) (good faith defense available to private defendant under Section 1983). As one district court observed, "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." Bermudez v. Service Employees International Union, Local 521, 2019 WL 1615414, *1 (N.D. Calif. April 16, 2019). Defendant Local 2001's motion to dismiss will be granted on the basis of the good faith defense.

Unjust Enrichment

***4** Plaintiffs have alleged a state law claim of unjust enrichment. Pursuant to 28 U.S.C. § 1367(c)(3), The Court will decline to exercise supplemental jurisdiction over the such state law claim. This claim will be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the motions to dismiss [doc. 37 and 39] are GRANTED. Plaintiffs' claims for prospective declaratory and injunctive relief are dismissed as moot; plaintiffs' claims for compensatory damages or repayment of fees with interest are dismissed based on the affirmative defense of good faith reliance on existing law. The Court declines to exercise supplemental jurisdiction over plaintiffs' state

law claim for unjust enrichment, which is dismissed without prejudice. The clerk is instructed to close this case.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of June, two thousand twenty.

Kiernan J. Wholean, James A. Grillo,

Plaintiffs - Appellants,

Lakiesha Christopher,

Plaintiff,

v.

CSEA SEIU Local 2001, Benjamin Barnes, in his official capacity as Secretary of Office of Policy and Management, State of Connecticut, Sandra Fae Brown-Brewton, in her official capacity as Undersecretary of Labor Relations, State of Connecticut, Robert

AMENDED ORDER

Docket No. 19-1563

Klee, in his official capacity as Commissioner of the Department of Energy and Environmental Protection, State of Connecticut,

Defendants - Appellees,

Kevin Lembo, in his official capacity as Comptroller, State of Connecticut,

Defendant.

Appellants, James A. Grillo and Kiernan J. Wholean, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk