No. _____

IN THE

Supreme Court of the United States

WILLIAM D. BRICE,

Petitioner,

v.

CALIFORNIA FACULTY ASSOCIATION,

Respondent.

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

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JOINT PETITION FOR WRIT OF CERTIORARI

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September 23, 2021

[Additional Caption Information On Inside Cover]

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CHE' S. COOK, ET AL.,

Petitioners,

v.

OREGON AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES COUNCIL 75,

Respondent.

WILLIAM HOUGH,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,

Respondent.

STEVEN MASUO, ET AL.,

Petitioners,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,

Respondents.

QUESTION PRESENTED

Petitioners are current and former public employees in the States of California and Oregon who exercised their First Amendment right not to join a union. Despite petitioners not being union members, their respective public employers seized portions of their wages and, without their affirmative consent, transferred that money to the respondent unions. This practice was invalidated in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018), since "public-sector agency-shop arrangements violate the First Amendment, and *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)] erred in concluding otherwise." *Janus*, 138 S. Ct. at 2478.

Petitioners brought lawsuits, some as class actions, for refunds of the "agency fees" illegally taken from them and other nonmember employees for decades when they were "wrongly denied First Amendment rights," *id.,* but limited the requested refunds to the two-year statute of limitations period. The Ninth Circuit rejected petitioners' claims and allowed respondent unions to keep all their ill-gotten gains because "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." *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019), *cert. den.*, 141 S. Ct. 1265 (2021) (App. I (App. 54-77)).

The question presented is:

Whether an affirmative good faith defense denying damages to the victims of First Amendment wrongdoing is faithful to the language and purpose of 42 U.S.C. § 1983 or to the principles of "equality and fairness" to all the parties involved?

PARTIES TO THE PROCEEDING

This joint petition seeks Supreme Court review of four Ninth Circuit decisions that granted respondent unions an affirmative good faith defense that denies petitioners any damages within the two-year limitations period for violating their First Amendment rights under *Janus v. AFSMCE, Council 31*, 138 S. Ct. 2448, 2486 (2018).

Petitioners are William D. Brice, Che' S. Cook, Clifford H. Elliott, Bethany Harrington, William Lehner, Carmen Lewis, Trudy Metzger, William Hough, Steven Masuo, Gloria Carlson, Jacyn Gallagher, Lindsey Hart, Craig Leech, Matthew Puntney, Bryan Quinlan, Marina Shadrin, Misty Staebler, and Betty Sumega.

Respondents are the California Faculty Association; Oregon American Federation of State, County, and Municipal Employees Council 75; Service Employees International Union Local 521; American Federation of State, County and Municipal Employees International Union, AFL-CIO; AFSCME, Local 3336; Association of Engineering Employees of Oregon; City of Cornelius Employees Union, AFSCME Local 189; Marion Employees Association, Local 294 of Oregon

Public Employees Union; Multnomah County Employees Union, Local 88, AFSCME, AFL-CIO; National Education Association of the United States; Oregon Education Association; Oregon Public Employees Union (OPEU), Linn County Local 390; Service Employees International Union, CTS, CLC; Service Employees International Union Local 503, Oregon Public Employees Union; Southern Oregon Bargaining Council; and Three Rivers Education Association.

Petitioners were all plaintiffs in their respective district courts and appellants in the Ninth Circuit. Respondents were all defendants in their respective district courts and appellees in the Ninth Circuit.

The following persons or entities were parties in the district court proceedings, but were not parties at the Ninth Circuit and are not parties here:

J. Scott English was a plaintiff in the district court in *Cook*, but did not appeal the dismissal of his lawsuit. Kate Brown, in her official capacity as Governor of the State of Oregon, and Katy Coba, in her official capacity as Director of the Oregon Department of Administrative Services, were defendants in the *Cook* case who were dismissed by the district court without objection from the *Cook* plaintiffs.

The Santa Clara Valley Transportation Authority, Edmund G. Brown, Jr., in his official capacity as Governor of the State of California, and Xavier Becerra, in his official capacity as Attorney General of the State of California were defendants in the *Hough* case who were voluntarily dismissed by William Hough.

Jenni Chambers, lead plaintiff in the district court in *Masuo* (then captioned *Chambers v. AFSCME International Union, AFL-CIO*), and Terry Godwin did not appeal the dismissal of their lawsuit.

CORPORATE DISCLOSURE STATEMENT

A corporate disclosure statement is not required under Supreme Court Rules 14(b)(ii) and 29.6 because no petitioner is a corporation.

STATEMENT OF RELATED PROCEEDINGS

There are no directly related proceedings arising from any of the same trial court cases involved in the judgments sought to be reviewed by this Joint Petition.

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William D. Brice, Che' S. Cook, Clifford H. Elliott, Bethany Harrington, William Lehner, Carmen Lewis, Trudy Metzger, William Hough, Steven Masuo, Gloria Carlson, Jacyn Gallagher, Lindsey Hart, Craig Leech, Matthew Puntney, Bryan Quinlan, Marina Shadrin, Misty Staebler, and Betty Sumega petition the Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in the cases *Brice v. California Faculty Ass'n*, No. 19-56164, *Cook v. Oregon AFSCME Council 75*, No. 19-35191, *Hough v. SEIU Local 521*, No 19-15792, and *Masuo v. AFSCME International Union, AFL-CIO*, No. 20-35355. This joint petition is permitted by Supreme Court Rule 12.4 and warranted because of the identity of the legal issues and interests in these cases.

INTRODUCTION

The Ninth Circuit created an affirmative good faith defense that denies the victims of First Amendment violations any damages. It did so based on "equality and fairness" to the violators of the First Amendment without considering the victims 42 U.S.C. §1983 was enacted to protect and remedy. The Court's intervention is urgently needed to determine whether a good faith defense that denies all damages to the victims of wrongly denied First Amendment rights is faithful to § 1983's language and purpose or to the principles of "and fairness" to all the parties involved. This is a question of exceptional importance to all citizens that bring § 1983 lawsuits to remedy the violations of their First Amendment rights, particularly the thousands

of nonunion public employees who were forced to subsidize union speech in violation of the First Amendment.

Petitioners are nonunion public employees in California and Oregon who were for years compelled as a condition of their employment to subsidize the respondent unions' speech. In 2018, the Court overruled *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) in *Janus v. AFSCME*, *Council 31*, 138 S. Ct. 2448 (2018), finding that compelling nonunion member employees to subsidize union speech violates the First Amendment and that *Abood* erred in concluding otherwise. *Id.* at 2478, 2486. Shortly before or soon thereafter, petitioners sued on behalf of themselves and, in some cases, other similarly situated employees to recover the money that respondents took from them, during the applicable two-year statutory limitations period, *see* Cal. Civ. Proc. Code § 335.1 or Or. Rev. Stat. § 12.110(1), in violation of their First Amendment rights.

Petitioners sued under 42 U.S.C. § 1983, which Congress enacted to provide a remedy for those who have suffered constitutional violations. Naturally, petitioners' claim sought damages or restitution for the respondent's constitutional violations under the First Amendment. After all, *Janus* held that identical compelled fee seizers violated public-sector employees' First Amendment rights.

Nevertheless, the four district courts below dismissed petitioners' claims because they decided as a matter of law that unions had a good faith defense that shielded them from retrospective money damages for their First Amendment violations. A panel of the

Ninth Circuit in three almost identical unpublished memoranda and another panel in an order granting summary affirmance upheld the four district courts' dismissals based on the Ninth Circuit's earlier decision in *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019), *cert. den.*, 141 S. Ct. 1265 (2021) (App. I (App. 54-77).[1]

Danielson held 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." *Id.* at 1097 (App. 59). To justify this holding, the *Danielson* panel cited at 1099, 1103-04, 1105 (App. 62, 73-75, 77) the union's reliance interests—reliance interests that the Court already held in *Janus* were insufficient to retain *Abood*. *Janus*, 138 S. Ct. at 2484-86.

The Ninth Circuit's holdings defy the Court's precedent and cannot stand. The decision to import a one-sided application of "equality and fairness" into petitioners' First Amendment claims undermines the Constitution and will have adverse consequences for civil rights plaintiffs. If lower courts can manipulate constitutional claims to achieve what they feel is the best policy under a one-sided application of "equality and fairness," many victims of civil rights abuses will be left without a remedy. It is therefore exceptionally

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[1] The Court denied the *Danielson* petition for certiorari during the 2020 term. 141 S. Ct. 1265 (2021). That petition did not raise or challenge the "equitable and fairness" bases for granting a good faith defense as the petition here does. *See* Cert. Pet., *Danielson v. Inslee,* No. 19-1130 (Mar. 12, 2020). The two petitions are vastly different in scope and substance.

important that the Court take this case, overrule the Ninth Circuit's decisions, and direct the lower court to remedy petitioners' First Amendment violations within the two-year limitations period.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit were each issued as a memorandum in *Brice*, *Cook* and *Hough* and an order in *Masuo*. The three memoranda are designated "not for publication" but available at 846 Fed.Appx. 557 (Mem), 845 Fed.Appx. 671 (Mem), and 846 Fed.Appx. 540 (Mem), respectively, and are reprinted in the Appendix at App. A (App. 1-2) for *Brice*; App. B (App. 3-5) for *Cook*; and App. C (App. 6-7) for *Hough*. The *Masuo* order is unpublished and unavailable but reprinted in the Appendix at App. D (App. 8-9).

The United States District Court for the Central District of California's (In Chambers) Order in *Brice* is unpublished and unavailable but reprinted in the Appendix at App. E (App. 10-11). The United States District Court for the District of Oregon's Opinion & Order in *Cook* is reported at 364 F. Supp. 3d 1184 (D. Or. 2019), and reprinted at App. F (App. 12-32). The United States District Court for the Northern District of California's Amended Order Granting Motion for Summary Judgment in *Hough* is unpublished but available at 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), amending typographical error in 2019 WL 1274528 (N.D. Cal. Mar. 20, 2019), and reprinted at App. G (App. 33-35). The United States District Court for the District of Oregon's unpublished Opinion and Order in *Chambers* (now *Masuo*) is reported at 450 F.

Supp. 3d 1108 (D. Or. 2020), and reprinted at App. H (App. 36-53).

JURISDICTION

The various judgments of the Ninth Circuit in these four cases were individually entered on April 27, April 28, and May 25, 2021. On March 19, 2020, the Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. On July 19, 2021, the Court rescinded that extension order, except that relevant lower court judgments issued before July 19, 2021, would remain extended to 150 days from the date of that judgment or order. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution's First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides in relevant part: "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 * * *[.]"

STATEMENT

A. Legal Background

1. In 2018, the Court held it violates the First Amendment for states and unions to exact agency fees from nonconsenting employees. *Janus*, 138 S. Ct. at 2486. In doing so, the Court recognized that the freedom of speech includes the freedom to refrain from speaking—just as it protects the right to speak. *Id.* at 2463. For this reason, forcing individuals to subsidize the speech of another private speaker creates "similar First Amendment concerns." *Id.* at 2464. And, the Court found, a "'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Id.* at 2464 (quoting *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310–11 (2012)).

The Court thus held "public-sector agency-shop arrangements violate the First Amendment[.]" *Id.* at 2478. Unions therefore cannot "extract agency fees from nonconsenting employees." *Id.* at 2486. In addition, for a state and union to legally extract agency fees from public-sector employees, those employees must waive their First Amendment rights and affirmatively consent to pay. *Id.* None of the petitioners waived their First Amendment rights and affirma-

tively consented to pay any moneys to the union respondents or their affiliates.

During the four-decade span between *Abood* and *Janus*, unions were allowed to exact vast amounts of money for their expressive activities from nonunion public employees' wages. *Id.* As the Court noted in *Janus*, it is "hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Id.* The Court likewise found "unions have been on notice for years regarding this Court's misgiving about *Abood*." *Id.* at 2484. Moreover, 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 2485.

The *Janus* Court also determined "'that [even though] (public-sector unions) may view (agency fees) as an entitlement [that] does not establish the sort of reliance interest that could outweigh the countervailing interest that (nonmembers) share in having their constitutional rights fully protected.'" *Id.* at 2484, quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009).

2. Congress enacted § 1983 to give victims of constitutional violations a cause of action to vindicate their constitutional rights in federal court. This purpose is clear from § 1983's text:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depriva-

> tion 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 * * *[.]"

42 U.S.C. § 1983.

The statutory text "'on its face admits of no immunities' * * * [i]ts language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Indep.*, 445 U.S. 622, 635 (1980) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). Even so, the Court has found that if an immunity or defense 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 § 1983, then a court can find an immunity or defense. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 164 (1992)). However, courts "do not have a license to create immunities based solely on [their] view[s] of sound policy," *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012), and thus "do not have a license to establish immunities from § 1983 actions in the interests of * * * sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984).

In the absence of the Court deciding whether, as a matter of law, a good faith defense can be raised against a § 1983 First Amendment claim, some Justices have suggested that "principles of equality and fairness" might apply in answering that question in

certain situations. *See Wyatt*, 504 U.S. at 168. In this void, the Ninth Circuit applied "equality and fairness" in deciding the cases below and granted the union respondents a good faith defense to petitioners' §1983 First Amendment action for damages. In doing so, the Ninth Circuit failed to mention or recognize any "equality and fairness" to the countervailing interests of the nonmember petitioners in vindicating and remedying their wrongly denied First Amendment rights.

B. Facts and Procedural History

1. *Brice Petitioner*

Petitioner William D. Brice is a professor at California State University Dominguez Hills in a unit of employees that respondent California Faculty Association ("CFA") exclusively represents. Before *Janus*, although Brice was not a union member, he was compelled, as a condition of public employment, to pay fees to CFA without his consent. CFA has not returned any of the fees it seized before *Janus*. *See* App. A (App. 1-2); Br. of Appellant, *Brice v. Cal. Fac. Ass'n*, No. 19-56164, Docket No. 10, pp. 4-6 (12-14 of 51) (9th Cir., Jan. 2, 2020), available at 2020 WL 709469 at *4-*6.

Five months after the Court's holding in *Janus*, Brice sued CFA under § 1983, alleging that the union violated his First Amendment rights as recognized in *Janus*, seeking damages or restitution for himself, and a class of similarly situated employees, for the agency fees CFA unconstitutionally exacted from their wages before *Janus* during the two-year statutory limitations period. *Id.*

The district court dismissed Brice's putative class-action complaint for the same reasons stated in *Babb v. California Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019), *appeal decision pending*. App. E (App. 10-11). The *Babb* court held the union as a matter of law acted in good faith because it relied on Supreme Court precedent and state law that had not yet been declared unconstitutional until *Janus* overruled *Abood*. *Babb*, 378 F. Supp. 3d at 867, 870-73, 876.

2. *Cook Petitioners*

Petitioners Che' S. Cook, Clifford H. Elliott, Bethany Harrington, William Lehner, Carmen Lewis, and Trudy Metzger are public employees employed by the State of Oregon in bargaining units exclusively represented by respondent AFSCME, Council 75. Before *Janus*, although the Cook petitioners were not union members, they were compelled, as a condition of public employment, to pay fees to AFSCME, Council 75. The union has not returned any of the fees it seized before *Janus*. App. 12-13.

A week before the *Janus* decision, the Cook petitioners sued AFSCME, Council 75 under § 1983, alleging that the union violated their First Amendment rights by seizing fees from their wages without their consent, and seeking damages or restitution for the fees the union unconstitutionally exacted from their wages during the two-year statutory limitations period. *Id.*

While *Cook* was pending, the Court decided *Janus*, which the district court described as the "zenith" of a forty-year "fight to overrule *Abood*" and its holding "that public employees could be required to pay

agency fees as a condition of their employment without violating the First Amendment," App. 14, which caused a "systemic effect[] . . . in areas of great public importance." App. 28-29. Rather than applying *Janus* to the similar facts raised in *Cook*, the lower court granted summary judgment to the union and dismissed the complaint. App. 15. It did so because it thought a good faith defense was available in § 1983 actions to private entities that had violated the First Amendment when they relied on a presumptively-valid state law that then binding Supreme Court precedent said was constitutional. App. 27-30.

In granting AFSCME a good faith defense, the district court admitted that the Court has not decided whether private defendants might assert a special good faith defense in § 1983 actions. But the lower court found guidance in a 2008 Ninth Circuit decision, *Clement v. City of Glendale*, 518 F.3d 1090, allowing a good faith defense through "a facts and circumstances analysis" that is "more akin to the traditional equitable basis" "without a precise articulation of its contours" but with an underpinning of the "traditional principles of equality and fairness." App. 23-25, 27-28.

3. *Hough Petitioner*

Petitioner William Hough is a public employee of the Santa Clara Valley Transportation Authority. Before the Supreme Court's ruling in *Janus* Hough was required as a condition of employment to pay fees to respondent SEIU Local 521. This compulsory fee was automatically deducted from his paycheck without his consent. The union has not returned any of the fees it

seized before *Janus*. *See* App. G (App. 33-35); Appellant's Br., *Hough v. SEIU Local 521*, No. 19-15792, Docket No. 8, pp. 2-3 (10-11 of 47) (9th Cir., July 26, 2019), available at 2019 WL 3525961 at *2-*4.

Two weeks after the *Janus* decision, Hough sued SEIU Local 521 under § 1983, alleging that the union violated his First Amendment rights as recognized in *Janus*, and seeking damages or restitution for himself, and a class of similarly situated employees, for the fees Local 521 unconstitutionally exacted from their wages before *Janus* during the two-year statutory limitations period. *Id.*

The district court granted the union's motion for summary judgment and dismissed Hough's putative class-action complaint because it believed a defendant's good-faith reliance on then-existing law bars any refund claim under § 1983. Then considering the issue outside the "rubric of good-faith reliance," the lower court opined: "there is a strong argument that when the highest judicial authority has previously deemed conduct constitutional, reversal of course by that judicial authority should never, as a categorical matter, result in retrospective monetary relief based on that conduct." In other words, "it seems unlikely that lower courts should even consider awarding retrospective monetary relief based on conduct the Court had previously authorized." App. G (App. 33-35).

4. *Masuo Petitioners*

Petitioners Steven Masuo, Gloria Carlson, Jacyn Gallagher, Lindsey Hart, Craig Leech, Matthew Puntney, Bryan Quinlan, Marina Shadrin, Misty Staebler, and Betty Sumega are public employees employed by

the State of Oregon and various Oregon counties, cities and school districts in various bargaining units exclusively represented by their respective respondent unions.[2] Before *Janus*, although the Masuo petitioners were not union members, they were compelled, as a condition of public employment, to pay fees to the respective union representing their bargaining unit. None of those unions has returned any of the fees it seized before *Janus*. App. 37-39.

Less than three months after the Court's holding in *Janus*, the Masuo petitioners sued AFSCME International and the other unions listed in note 2 under § 1983. Their class-action complaint alleged that the unions violated their First Amendment rights as recognized in *Janus*, and sought damages or restitution for themselves, and a class of similarly situated employees, for the fees AFSCME and the other unions unconstitutionally exacted from their wages during the two-year statutory limitations period before *Janus*. *Id* at 39.

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[2] Those respondent unions are AFSCME International, its Oregon state affiliate, Oregon AFSCME Council 75, its local affiliates: Multnomah County Employees Union AFSCME Local 88, AFSCME Local 3336, and City of Cornelius Employees Union AFSCME Local 3786-2 (sued as Local 189); National Education Association ("NEA"), its Oregon state affiliate Oregon Education Association ("OEA"), and local affiliates Southern Oregon Bargaining Council and Three Rivers Education Association; SEIU International, its Oregon state affiliate SEIU Local 503 Oregon Public Employees Union ("OPEU"), and local affiliates Marion County Employees Association OPEU Local 294 and OPEU Linn County Local 390; and the Association of Engineering Employees of Oregon.

The district court granted summary judgment to the unions and dismissed the putative class-action complaint because the Ninth Circuit *Danielson* decision "addressed a case involving almost identical facts, claims, and defense," App. 42, and "involve[d] issues that are nearly identical to those here and is binding precedent on this Court." App. 40 (note omitted). Quoting *Danielson*, the district court held: "'Because the Union's action was sanctioned not only by state law, but also by directly on-point Supreme Court precedent, we hold that the good faith defense shields the Union from retrospective monetary liability as a matter of law.'" App. 44-45, quoting *Danielson*, 945 F.3d at 1104 (App. 75).

5. *The Ninth Circuit Memoranda and Order*

Petitioners timely appealed their respective district court dismissals of their actions to the Ninth Circuit. The same Ninth Circuit panel affirmed three of those dismissals, *Brice*, *Cook*, and *Hough*, over a two-day period, April 27 & 28, 2021, in three substantively identical unpublished memoranda that found the respective district courts properly had dismissed the action or granted summary judgment. The panel held that "a public sector union can, as a matter of law, 'invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for agency fees it collected' prior to the Supreme Court's decision in *Janus*. . . *Danielson*, 945 F.3d at 1097-99." App. A, App. B, App. App. C (App. 1-7).

The fourth dismissal affirmance, *Masuo*, occurred on May 25, 2021, when a different Ninth Circuit panel

granted the involved unions' motion for summary affirmance because "the questions presented in this appeal are so insubstantial as not to justify further proceedings. *Danielson* . . ., 945 F.3d [at] 1103-05 . . . (holding that good faith defense shielded union 'as a matter of' law where conduct 'was sanctioned not only by state law, but also by directly on-point Supreme Court precedent.')." App. D (App. 8-9).

These four summary affirmances were all based on the earlier Ninth Circuit *Danielson* decision. The *Danielson* panel felt bound by the earlier Ninth Circuit decision in *Clement* that private parties may invoke a good faith defense to liability under 42 U.S.C. § 1983, based solely on "equality and fairness." *Danielson*, 945 F.3d at 1099-1100 (App. 63-65). In the absence of Supreme Court guidance, the *Danielson* and *Clement* panels admitted they were "driven not by the strictures of common law, but rather by principles of equality and fairness" when they granted a good faith defense to private entities that relied on presumptively-valid state laws. *Id.* at 1101-02 (App. 68-69); *see also Clement*, 518 F.3d at 1096-97.

REASONS FOR GRANTING THE JOINT PETITION

It is hard to overstate the cases' legal importance. For more than thirty years lower courts[3] have decided

[3] *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275-77 (3d Cir. 1994); *Vector Rsch., Inc. v. Howard & Howard Att'ys, P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Pinsky v. Duncan*, 79 F.3d 306, 311-12 (2d Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97

whether private parties sued under 42 U.S.C. § 1983 may assert a good faith defense to liability and damages without the Court answering that question[4] and, if necessary, providing the criteria and principles for granting such a defense, especially to violators of the First Amendment. With no supervision, the Ninth Circuit, along with other lower courts, have applied a patchwork of standards and rationales devoid of any connection to the language of and the Court's pronouncements on § 1983.

Courts cannot devise limitations to the remedial scope of § 1983 "based on our notions of policy or efficiency." *Wyatt*, 504 U.S. at 171-72 (Kennedy, J., concurring). This is what the Ninth Circuit in *Clement* did when it created a good faith defense to § 1983 litigation. The *Cook* district court recognized that *Clement* relied on "a facts and circumstances analysis" that is "more akin to the traditional equitable basis" but

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(9th Cir. 2008); *Janus v. AFSCME, Council 31*, 942 F.3d 352, 366-67 (7th Cir. 2019) ("*Janus II*"); *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 391 (6th Cir. 2020); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020); *Wholean v. CSEA SEIU Loc. 2001*, 955 F.3d 332, 334 (2d Cir. 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262, 271-73 (3d Cir. 2020); *Doughty v. State Emps. Ass'n of N.H., SEIU Loc. 1984,* 981 F.3d 128, 134-38 (1st Cir. 2020); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 379-82 (4th Cir. 2021). Clearly, this question has percolated long enough among the lower courts with seven of the thirteen circuits having decided the question presented.

[4] Three times the Court has considered but not decided whether an affirmative good faith defense to § 1983 liability even exists. *See Richardson*, 521 U.S. at 413-14; *Wyatt*, 504 U.S. at 169; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982).

"without a precise articulation of its contours," except for lip service to "equality and fairness." App. 24-25, 27-28.

The decisions below essentially nullify petitioners' congressionally provided relief by looking only at "equality and fairness" that a good faith defense provides to unions, without considering the equitable interests of victims who were wrongly denied their First Amendment rights. In these decisions, there was no balancing of the competing equities and, certainly, no fairness to the victims for whom § 1983 was enacted.

It is exceptionally important the Court take this case because the Ninth Circuit's decisions undermine the Constitution and will have adverse consequences for civil rights plaintiffs. Lower courts should not be permitted to manipulate constitutional claims to predetermine the outcome of cases based on what they think is good policy or fair to the violators of constitutional rights. The Court should thus reject the proposition that courts can engage in judicial gerrymandering by granting a good faith defense based on "equality and fairness" to the violators of the First Amendment that leave the victims with no remedy.

The time is ripe for the Court's intervention to disabuse lower courts of the misconception that a defendant acting under color of a statute before it is held unconstitutional has an affirmative good faith defense to § 1983 claims, which denies damages to victims whose First Amendment rights were violated. Certiorari is warranted.

I. The Decisions Below Conflict with the Court's Precedents.

A. Allowing a good faith defense imposes a state-of-mind-requirement for First Amendment compelled speech violations and ignores the Court's holding in *Janus*.

The Ninth Circuit's decisions granting unions a good faith defense to retrospective monetary liability because they acted in reliance on state law and a later overruled Supreme Court precedent contravene the Court's § 1983 precedents and effectively impose a state-of-mind requirement on First Amendment compelled speech violations when none exists. In doing so, the Ninth Circuit ignored the Court's holding for what a compelled speech and association claim requires under *Janus* and the remedy § 1983 provides petitioners.

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 statute does not include a "state of mind requirement." *Parratt v. Taylor*, 451 U.S. 527, 534–35 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). As the Court explained in *Parratt*, "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." *Id.* at 534.[5]

[5] *See also Parratt*, 451 U.S. at 534 ("[§] 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement.") (note omitted); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("[L]ook at [§ 1983] as

Several years later, the Court reaffirmed § 1983 does not have a general state of mind requirement. In *Daniels*, the Court explained that § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." 474 U.S. at 330 (citing *Parratt*, 451 U.S. at 534–35). In other words, if a plaintiff must prove a defendant's state of mind, it is only because the constitutional right at issue requires that proof.

First Amendment speech violations usually require no specific intent or *mens rea*. *See, e.g.*, *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012) ("free speech violations do not require specific intent"); *accord Diamond*, 972 F.3d at 289 (Phipps. J, dissenting) ("At most, a showing of good faith can negate a mental state element of a claim – such as gross negligence required for a procedural due process claim. But that is of no moment here because a claim for compelled speech does not have a *mens rea* requirement.") (citations omitted); *cf. United States v. O'Brien*, 391 U.S. 367, 377 (1968) (government need not target speech to violate the Free Speech Clause).

As most relevant here, a First Amendment claim for compelled subsidization of speech does not have a state of mind requirement. The Court held in *Janus* that the First Amendment protects public employees' freedom from being compelled financially to support a labor union's speech as a condition of employment without their affirmative consent. 138 S. Ct. at 2486.

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long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit.")

This is because "[c]ompelling a person to *subsidize* the speech of other private speakers" undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Id.* at 2464 (emphasis in original). Under the First Amendment as construed by the Court in *Janus*, then, all that is required for a defendant to "deprive" employees of their First Amendment rights is to compel speech by taking their money without affirmative consent. 138 S. Ct. at 2486.

The allowance of a good faith defense by the Ninth Circuit inserts a state of mind element into these §1983 First Amendment claims when such an element does not exist.[6] The Court's intervention is necessary to stop this dilution of § 1983 protecting and remedying First Amendment violations, especially those that were wrongly denied when they occurred.

B. Policy interests in "equality and fairness" do not justify a good faith defense.

1. 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

[6] A violation of First Amendment speech rights is nothing like the abuse of process tort that the Ninth Circuit used to rationalize its granting of a good faith defense to the unions. *Danielson*, 945 F.3d at 1102 (App. 69-71). This is another area of the *Danielson* decision that the *Danielson* petition did not raise or address. *See* note 1.

whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower*, 467 U.S. at 922–23. The "fairness" rationale, especially the one-sided one applied by the Ninth Circuit, for a good faith defense to § 1983 is inadequate on its own terms.[7]

Indeed, fairness to victims of constitutional deprivations requires enforcing § 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*, 445 U.S. at 654.

The Court said that in *Owen* when holding that § 1983's legislative purposes did not justify extending

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[7] The separation-of-powers doctrine, also, bars courts from creating equitable defenses to federal statutes. "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). For example, in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), the Court recently held it would violate "separation-of-powers principles" for courts to apply the equitable defense of laches to a statutory damages remedy. *Id.* at 960. The Court found that allowing courts to superimpose this equitable defense onto a federal statute would "give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *Id.* (citation omitted).The Ninth Circuit was wrong to refuse to enforce § 1983 on its sense of fairness to the unions. "Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J. dissenting) (citation omitted).

good-faith immunity to municipalities. The Court's reasons for that holding apply here.

First, the *Owen* Court reasoned, "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." 445 U.S. at 651 (footnote omitted). So too here. It would be an injustice to leave innocent victims of fee seizures constituting compelled political speech 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 (note 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 employees pay for unconstitutional union con-

duct. Equity favors requiring unions to return to employees monies unconstitutionally seized from them within the two-year limitations period. The records below lack any suggestions that being required to rebate two years of the forced fees "taken from nonmembers and transferred to public-sector unions in violation of the First Amendment" would cause respondents serious financial harm. *Janus*, 138 S. Ct. at 2486.

2. *Owen* establishes why public and private entities do not have immunity from § 1983 liability, while some individuals do, and why it is fair that entities, like unions, lack a good faith defense to the statute even when the entity could not reasonably have known it violated individual's constitutional rights.

In April 1972, Owen, the city's former police chief, was fired for alleged wrongdoing without first being provided notice of the reasons for the firing and an opportunity for a pre-termination hearing. *Owen*, 445 U.S. at 629. Two months later, the Court decided *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), holding that a public employee had a right to notice and an opportunity for a hearing before being fired. Because these rights were not crystalized until after the city fired Owen, the Eighth Circuit held that (a) the individual defendants involved in firing him acted in good faith and were thus entitled to good-faith immunity, and (b) the city was "'not liable for actions it could not reasonably have known violated [Owen's] constitutional rights.'" *Owen*, 445 U.S. at 634 (quoting *Owen v. City of Independence,* 589 F.2d 335, 338 (8th Cir. 1978)).

While the Court did not object to granting good-faith immunity to the individuals, the Court refused to allow the city to ride the coattails of its employees' good faith. Explaining why, the Court began with the fact that, "[b]y its terms, § 1983 'creates a species of tort that on its face admits of no immunities.'" *Id.* at 635 (quoting *Imbler*, 424 U.S. at 417). So any immunity (or defense, as *Imbler* shows) that would be applied against a § 1983 claim must be "'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Id.* at 638 (quoting *Imbler*, 424 U.S. at 421). Not only that, public-policy justifications must also support the application of an immunity before it can be applied against a § 1983 claim. *Id.* The Court held that neither of these requirements protected the city based on its employees' good faith. *Id.*

Looking first at the state of the law in 1871, the Court observed that, "by 1871, municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Id.* at 638–39. "[I]t is clear that at the time § 1983 was enacted, local governmental bodies did not enjoy the sort of 'good-faith' qualified immunity extended to them by the Court of Appeals." *Id.* at 640. Indeed, "one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers," such that "the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful." *Id.* at 641.

> In sum, we can discern no "tradition so well grounded in history and reason" that would

> warrant the conclusion that in enacting § 1 of the Civil Rights Act [now codified at § 1983], the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers.

Id. at 650 (citations omitted).

The Court also held that public policy considerations did not support extending good-faith protection to public employers. Central to this conclusion was the rule that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees[.]" *Id.* at 651. While it may be unfair to hold individual employees liable for their good-faith violations, it is not unfair to hold the employer entity liable for those violations. *Id.* at 654–55.

The public policy of ensuring that government employees carry out their duties unimpeded by concerns about personal liability does not come into play if only the employer is liable. *Id.* at 655–56. Thus, under *Owen*, even if an employee's good faith protects that employee against § 1983 liability, it does not protect the employer entity: "We hold . . . that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983." *Id.* at 638.

If municipal organizations lack a good faith defense to § 1983, then so do other organizations subject to the statute (such as the unions here). The Court observed that, in 1871, "a municipality's tort liability in damages was *identical* to that of private corporations[.]" *Id.* at 640 (emphasis added). A public-sector union's

labiality in damages should thus be the same as a municipal employer's liability for which no immunity or good faith defense exists.

3. The proposition that "equality and fairness" justify extending to private defendants a defense like the immunity enjoyed by some public defendants, which the Ninth Circuit did in *Danielson*, 945 F.3d at 1101 (App. 67-69), and these cases, makes little sense.[8] That unions are not entitled to qualified immunity is not reason to create a similar defense for unions under a different rubric. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for an immunity.

Even if principles of "equality and fairness" required treating a union like its closest government counterpart, that still would not entitle it to an immunity-like defense. As *Owen* shows, a large organization like a public sector union is nothing like individual persons who enjoy qualified immunity. A union 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 unfair to require a large organization, like a public sector union, to compensate citizens for violating their constitutional rights, even if it thought its actions were constitutionally permissible.

Neither "equality nor fairness" justifies recognizing a good faith defense to § 1983. Rather, both principles

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[8] *See* note 1.

weigh against carving this exemption into § 1983's remedial framework. Without the Court's express resolution of the question presented, the lower courts will continue this freewheeling application of a good faith defense whenever they disagree with the Court's First Amendment jurisprudence or disfavor those who the Court protected.

C. Even if the principles of "equality and fairness" are the applicable standard, the Ninth Circuit failed; i) to apply those principles to all the parties involved; ii) to balance the competing equities; or iii) to devise a fair remedy for those wrongly denied their First Amendment rights.

The Ninth Circuit created a good-faith exception to § 1983 damages for First Amendment violators based on the proposition that "equality and fairness" justify the defense. Yet the courts below only applied those principles to the perpetrators of these violations, without considering the rights or interests of the victims of those constitutional violations.

This one-sided focus on what is equitable and fair to unions who violated the First Amendment rights of the nonmember employees they represent, with no mention or consideration of either the nonmember victims or the public interest, is wrong. Any consideration of adopting a good faith defense against First Amendment violations must include an evenhanded analysis of all involved, which is sadly missing here. This failure to consider victims' interests justifies the granting of certiorari.

The *Janus* Court recognized "the considerable windfall that unions have received under *Abood* for the past 41 years," and found it "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." *Janus*, 138 S. Ct. at 2486. The nonmembers in these cases and others like them do not seek the indefinite return of all unconstitutional exactions for the past 41 years. Instead, they seek only damages going back the two years allowed under the California and Oregon statutes of limitations.[9] The damages sought here and in similar cases seek a return of but a fraction of the billions of dollars unions unconstitutionally seized from nonmembers over the past 41 years.

The statute of limitations also reduces and eventually eliminates the unions' risk of new suits to recover pre-*Janus* damages. In forty states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, the risk has passed. *See supra* n.9. Of the remaining ten states with four to six-year limitations periods, *id.*, only two, Maine and Missouri, had allowed nonmember forced fees.[10] The other eight states had prohibit

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[9] The limitations period for § 1983 actions, which is usually the state's personal liability tort period, *Wilson v. Garcia*, 471 U.S. 261 (1985), ranges from one to six years, with most state periods being between two and three years. Matthiesen, Wickert & Lehrer, S.C. (2021), "Statute of Limitations for All Fifty States," https://www.mwl-law.com/wp-content/uploads/2018/02/SOL-CHART.pdf.

[10] National Right to Work Legal Defense Foundation, "Right to Work States" (2021), https://www.nrtw.org/right-to-work-states.

union forced fees by statute. *See supra* n.10. Even without a good faith defense, the statute of limitations allows unions to retain nearly all funds they seized from employees in violation of the First Amendment.

Granting a good faith defense gives nothing to the victims whose First Amendment rights were violated. They are left with a right, but no remedy. This result is wholly inconsistent with "equality and fairness," especially when the courts below failed to even mention or consider their interests and the First Amendment rights at stake. There is nothing fair about depriving these victims of all compensation for their injuries within the limitations period. As Judge Phipps correctly observed when rejecting the proposition that there is a good faith defense to Section 1983 liability:

> Neither equality nor fairness overwhelmingly favors the reliance interests of the unions in pre-existing law over the free speech rights of non-members who were compelled to support the unions. The Supreme Court in *Janus* already accounted for those reliance interests in overturning *Abood*. *See Janus*, 138 S. Ct. at 2484-86 . . . Those considerations need not be double-counted under the guise of a good faith affirmative defense. And that is to say nothing of the text, history, and purpose § 1983, which make it particularly ill-suited to a construction that elevates reliance interests over the vindication of constitutional rights.

Diamond, 972 F.3d at 289 (Phipps, dissenting) (other citations omitted).

This statutory basis, the statute of limitations, provides "equality and fairness" to the competing interests involved in the unions' demands for an affirmative good faith defense. The victims of First Amendment violations get some remedy and recognition while the violators have a reasonable limit on their liability for the billions of dollars taken from nonmembers and transferred to public-sector unions over four decades in violation of the First Amendment.

The Court should correct the injustices that lower courts imposed on victims of forced fee seizures when they did not consider the interests of all the parties involved. This lack of even-handed fairness is even more unsettling when there is a statutory basis that equally and fairly resolves the competing interests involved when employees wrongly were denied their First Amendment rights by unions following then-binding Supreme Court precedent.

II. This Case is Exceptionally Important.

This case is profoundly important not just for the vindication of petitioners' wrongly denied First Amendment rights, but also for other civil rights plaintiffs who rely on § 1983 to obtain a remedy for violations of their constitutional rights. Congress enacted § 1983 to give plaintiffs a mechanism to enforce the Constitution's mandates against those who use governmental power to invade protected liberties. However, if lower courts, like the Ninth Circuit did here, can deny remedies to constitutional claims brought under § 1983 when they feel that is the best policy; it will undermine the Constitution and will leave many victims of civil rights abuses remediless.

Given § 1983's status as the nation's preeminent civil rights statute, whether the statute includes a common-law or equitable-driven good faith defense is no small matter. The issue is vital to many, but particularly to the thousands of nonunion public employees wrongly denied vindication of their First Amendment rights in the cases presented by this petition and the other pending cases, including many putative class actions lawsuits, seeking refunds from unions for fees seized from workers' paychecks in violation of the First Amendment. *See* Amicus Br. of Goldwater Inst. 4, *Janus v. AFSCME, Council 31*, No. 19-1104 (Apr. 9, 2020). It is long past time for the Court to decide the question left open in *Wyatt* and determine whether a good faith defense is available to a § 1983 claim and, if necessary, the contours to and principles for establishing that defense based on all the parties involved as well as the public good.

CONCLUSION

For all these reasons, petitioners respectfully request that the Court grant their joint petition for a writ of certiorari to the Ninth Circuit.

Respectfully submitted,

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September 23, 2021

APPENDIX

TABLE OF APPENDICES

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Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM D. BRICE, Plaintiff-Appellant, v. CALIFORNIA FACULTY ASSOCIATION, Defendant-Appellee.	No. 19-56164 D.C. No. 2:19-cv-040 95-JLS-DFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Submitted April 20, 2021**

Before: THOMAS, Chief Judge, TASHIMA and SILVERMAN, Circuit Judges.

William D. Brice appeals from the district court's judgment dismissing his 42 U.S.C. § 1983 putative class action alleging a First Amendment claim arising

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

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

out of compulsory agency fees (also known as fair share fees) paid to the California Faculty Association. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal under Federal Rule of Civil Procedure 12(c). *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877 (9th Cir. 2011). We affirm.

The district court properly dismissed Brice's action because a public sector union can, as a matter of law, "invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected" prior to the Supreme Court's decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). *Danielson*, 945 F.3d at 1097-99 ("[P]rivate parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. § 1983, where they acted in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law.").

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

Appendix B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHE' S COOK; et al, Plaintiffs-Appellants, v. KATE BROWN, in her official capacity as Governor of the State of Oregon; KATY COBA, in her official capacity as Director of the Oregon Department of Administrative Services, Defendants, and OREGON AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES COUNCIL 75, Defendant-Appellee.	No. 19-35191 D.C. No. 6:18-cv-01085-AA MEMORANDUM*

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

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Submitted April 20, 2021**

Before: THOMAS, Chief Judge, TASHIMA and SILVERMAN, Circuit Judges.

Che' S. Cook, Clifford H. Elliott, Bethany Harrington, William Lehner, Carmen Lewis, and Trudy Metzger appeal from the district court's summary judgment in their 42 U.S.C. § 1983 action alleging a First Amendment claim arising out of compulsory agency fees (also known as fair share fees) paid to Oregon American Federation of State, County, and Municipal Employees ("AFSCME") Council 75. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Danielson v. Inslee*, 945 F.3d 1096, 1098 (9th Cir. 2019), *cert. denied*, No. 19-1130, 2021 WL 231555 (Jan. 25, 2021). We affirm.

The district court properly granted summary judgment because a public sector union can, as a matter of law, "invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected" prior to the Supreme Court's decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). *Danielson*, 945 F.3d at 1097-99 ("[P]rivate parties may invoke an

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Appellants' request for oral argument, set forth in the opening brief, is denied.

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.").

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n. 2 (9th Cir. 2009).

AFFIRMED.

Appendix C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM HOUGH, Plaintiff-Appellant, v. SEIU LOCAL 521, Defendant-Appellee.	No. 19-15792 D.C. No. 3:18-cv-04902-VC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Submitted April 20, 2021**

Before: THOMAS, Chief Judge, TASHIMA and SILVERMAN, Circuit Judges.

William Hough appeals from the district court's summary judgment in his 42 U.S.C. § 1983 putative class action alleging a First Amendment claim arising

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Hough's request for oral argument, set forth in the opening brief, is denied.

out of compulsory agency fees (also known as fair share fees) paid to SEIU Local 521. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Danielson v. Inslee*, 945 F.3d 1096, 1098 (9th Cir. 2019), *cert. denied*, No. 19-1130, 2021 WL 231555 (Jan. 25, 2021). We affirm.

The district court properly granted summary judgment because a public sector union can, as a matter of law, "invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected" prior to the Supreme Court's decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). *Danielson*, 945 F.3d at 1097-99 ("[P]rivate parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. § 1983, where they acted in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law.").

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n. 2 (9th Cir. 2009).

AFFIRMED.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN MASUO; et al., Plaintiffs-Appellants, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO; et al., Defendants-Appellees.	No. 20-35355 D.C. No. 3:18-cv-01685-SI District of Oregon, Portland ORDER

Before: PAEZ, BRESS, and FORREST, Circuit Judges.

Appellees' motion for summary affirmance (Docket Entry No. 21) is granted because the arguments raised in the opening brief and in response to the summary disposition motion demonstrate that the questions presented in this appeal are so insubstantial as not to justify further proceedings. *See* 9th Cir. R. 3-6(a)(2); *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also Danielson v. Inslee*, 945 F.3d 1096, 1103-05 (9th Cir. 2019) (holding that good faith defense shielded union "as a matter of law" where conduct "was sanctioned

not only by state law, but also by directly on-point Supreme Court precedent").

AFFIRMED.

LCC/MOATT

Appendix E

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: 2:19-cv-04095-JLS-DFM
Date: September 10, 2019
Title: William D. Brice v. California Faculty Association

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:

Not Present

ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 52)

Before the Court is Defendant's Motion to Dismiss. (Mot., Doc. 52.) The parties recognize that

the issues presented by this case are indistinguishable from those the Court addressed in *Babb v. California Teachers Association*, 2019 WL 2022222 (C.D. Cal. May 8, 2019). (*See* Mot. at 1-2; Opp. At 2, Doc. 53; Reply at 1, Doc. 55.) The Court agrees.

Accordingly, for the same reasons stated in the Court's order in *Babb*, the Court GRANTS Defendant's Motion to Dismiss.

Initials of Preparer: tg

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EUGENE DIVISION

CHE' S. COOK, *et al.*,	Case No. 6:18-cv-01085-AA
Plaintiffs,	**OPINION & ORDER**
v.	
KATE BROWN, *et al.*,	
Defendants.	

AIKEN, District Judge:

Che' S. Cook, Clifford H. Elliott, J. Scott English, Bethany Harrington, William Lehner, Carmen Lewis, and Trudy Metzger (collectively, "Plaintiffs")[1] were forced to pay compulsory union agency fees to the American Federation of State, County, and Municipal Employees, Council 75 ("AFSCME"). They brought

[1] AFSCME notes that Che' Cook and William Lehner never paid agency fees and that any funds deducted from their wages were pursuant to a signed membership card authorizing the deductions.

suit against AFSCME as well as against two public officials: Kate Brown and Katy Coba ("State Defendants"). Before the Court is AFSCME's Motion for Judgment on the Pleadings *or*, Motion for Summary Judgment (doc. 24). For the reasons discussed, AFSCME's motion is GRANTED.

BACKGROUND

Plaintiffs are public employees who were exclusively represented by AFSCME. Oregon's Public Employee Collective Bargaining Act ("PECBA") gives certain public employees the right to unionize and to elect an exclusive representative. AFSCME is such an exclusive representative and PECBA requires it to also represent the interests of non-members during collective bargaining negotiations. To avoid free-riders, the Act authorizes public employers to deduct a fraction of full union dues, often called "agency fees," from non-members to cover the costs of general collective bargaining representation.

Plaintiffs filed an action under 42 U.S.C. § 1983 challenging the constitutionality of these fees. They argued that Defendants were violating their First Amendment rights by forcing compulsory agency fee payments to AFSCME as a condition of their employment, even though Plaintiffs did not belong to this union and did not wish to subsidize the union's activities. Plaintiffs sought (i) a declaratory judgment that all pertinent statutes, rules, regulations, and collective-bargaining agreements that compel agency fees violate the First Amendment; (ii) an injunction against activities that violate the declaratory

judgment; and (iii) compensatory damages or restitution from AFSCME for the wrongfully seized agency fees.

While this case was pending, the Supreme Court handed down its decision in *Janus v. AFSCME* on June 27, 2018. 138 S. Ct. 2448 (2018). *Janus* was the culmination of a series of cases that expressed skepticism about the core holding of *Abood v. Detroit Board of Education* – namely, that public employees could be required to pay agency fees as a condition of their employment without violating the First Amendment. 431 U.S. 209, 209 (1977). In 2012, the Supreme Court considered *Knox v. Service Employees International Union* and called *Abood* "something of an anomaly." 567 U.S. 298, 311 (2012). Two years later in *Harris v. Quinn*, the Supreme Court was asked to overrule *Abood* but declined to do so even after including notably pointed dicta about *Abood* in its opinion. 573 U.S. 616, 635 (2014) (stating that *Abood* "seriously erred" in its treatment of prior cases and "did not foresee the practical problems that would face objecting nonmembers."). Twelve months later, the Supreme Court again considered overruling *Abood* in *Friedrichs v. California Teachers Association, et al.*, but split 4-4. 136 S. Ct. 1083 (2016) (per curiam)). After over forty years of litigation, the fight to overrule *Abood* finally reached its zenith in *Janus*, which held that compulsory union payments, including agency fees, cannot be collected from nonconsenting employees. 138 S. Ct. 2486. *Abood* was thus overruled. *Id.*

State Defendants submitted declarations evincing immediate compliance with *Janus*'s holding and moved to dismiss the claims against them with prejudice. Plaintiffs failed to file a response and I granted State Defendants' motion.

On October 19, 2018, AFSCME filed a Motion for Judgment on the Pleadings *or*, Motion for Summary Judgment. It argues that it has fully complied with *Janus*, has no intention of doing otherwise, and Plaintiffs' requested prospective relief is therefore moot. It further argues that it is entitled to a good faith defense against claims for monetary liability. For the reasons discussed below, AFSCME's motion is granted and this case is dismissed.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law.[2] Fed. R. Civ. P. 56(a). The moving party bears the initial burden to show an absence of a dispute of material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). If the moving party meets its burden, the burden shifts to the non-moving party to show that there is a genuine dispute of material fact for trial. *Id.* To meet its burden, "the non-moving party must do more than show there is some metaphysical doubt as

[2] Because the Court has considered material outside of the pleadings in making its decision, the Court only assesses the parties' claims under the summary judgment standard.

to the material facts at issue." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

The court must draw all reasonable inferences in favor of the non-moving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). A "mere disagreement or the bald assertion that a genuine issue of material fact exists" is not sufficient to preclude the grant of summary judgment. *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989). When the non-moving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *LVRC Holdings, LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009) (citation and internal quotation marks omitted).

The substantive law governing a claim or defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

AFSCME argues that (i) Plaintiffs' claims for declaratory and injunctive relief are moot because AFSCME stopped collecting agency fees after *Janus*, and (ii) Plaintiffs' claims for monetary relief—both compensatory damages and restitution—must be dismissed because pre-*Janus* agency fees were collected in good faith reliance on state law and controlling Supreme Court precedent.

With respect to mootness, Plaintiffs argue that the voluntary cessation exception precludes dismissing the claims for injunctive relief and that the request for declaratory relief is not moot. With respect to good faith, they argue that private parties have no good faith defense in § 1983 First Amendment cases, and even if they do, that AFSCME cannot claim good faith. They also argue that allowing a good faith defense would fly in the face of the Supreme Court's retroactivity doctrine.

I. Mootness

AFSCME argues that Plaintiffs' claims for injunctive and declaratory relief are moot because AFSCME immediately ceased its unconstitutional practices after *Janus* and has no plan to reverse course. Plaintiffs argue that the voluntary cessation exception to mootness precludes summary judgment.

Article III of the Constitution grants federal courts the authority to decide cases and controversies. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). "A case becomes moot—and therefore no longer a Case or Controversy for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 91, (citation and internal quotation marks omitted). However, the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case" unless "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cnty. Of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citation and

internal quotation marks omitted). A party asserting mootness must also persuade the court that the challenged conduct cannot reasonably be expected to reoccur. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000).

Ninth Circuit precedent provides the contours of the voluntary cessation inquiry. *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018). First, the form of government action is critical and can be dispositive. *Id.* "A statutory change …is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994). As the Eight Circuit has observed, the rigors of the legislative process "bespeak ... finality and not ... opportunistic tentativeness." *Libertarian Party of Arkansas v. Martin*, 876 F.3d 948, 951 (8th Cir. 2017). On the other hand, "an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015).

A. *Injunctive Relief*

Plaintiffs' request for injunctive relief is moot. By all indications, AFSCME has stopped collecting agency fees from non-members: it submitted sworn declarations and supporting exhibits evincing full compliance with *Janus*.

For example, Jeneane Ramseier is the Fiscal Director for AFSCME and submitted a sworn declaration stating "AFSCME Council 75 has not

retained any fair-share fees deducted from any of the plaintiffs' wages on or after June 27, 2018. None of the plaintiffs had any fair-share fees deducted after June 30, 2018, and all fair-share fees deducted from any of the plaintiffs' wages for the month of June 2018 were refunded." Ramseier Decl. ¶¶ 5–7 (doc. 25). Similarly, Nettie Pye, who is Oregon's State Labor Relations Manager for the Department of Administrative Services ("DAS"), submitted a declaration stating that "following *Janus,* DAS stopped making fair share deductions from all non-union employees effective June 1, 2018. DAS also issued reimbursements for fair share fees collected in June 2018 to all non-union employees." Pye Decl. ¶¶ 3–4 (doc. 11).

AFSCME also provided copies of the letters it sent to state employers who were collecting agency fees on its behalf. *See* Ramseier Decl. Ex. A. These letters requested that the recipient state employers "[i]mmediately cease and desist the deduction of fair share payments[ ] [and] [r]etain any fair share dues that have been deducted but not yet paid to AFSCME, and immediately reimburse employees for those payments." *Id.*

These declarations and letters demonstrate that there is no live controversy between the parties necessitating injunctive relief. Plaintiffs seek to enjoin the very act that the petitioner in *Janus* sought to declare unconstitutional. The Supreme Court agreed with the *Janus* petitioner and AFSCME immediately took steps to comply with its holding. Plaintiffs, then, have received the benefit of their request and there is

no Article III case or controversy for me to enjoin. *See Danielson v. Inslee*, 345 F. Supp. 3d 1336 (W.D. Wash. 2018) (also finding the state-defendants' declarations of compliance with *Janus* and no evidence of equivocation sufficient to find mootness); *see also Yohn v. California Teachers Ass'n*, No. 8:17-cv-00202-JLS-DFM, 2018 WL 5264076, at *5 (C.D. Cal. Sept. 28, 2018) (relying on *Danielson* and concluding the same).

There is also no reasonable expectation that AFSCME will resume collecting agency fees. A change in Supreme Court case law coupled with evidence of AFSCME's compliance with that case law is an interim event that precludes further legal violations. *Cnty. of Los Angeles*, 440 U.S. at 631 (finding that interim events and no reasonable expectation of continued violations to be sufficient to establish mootness). I see no reason to assume, without evidence, AFSCME's willingness to flagrantly violate the law. While changes in the law resulting from executive action can be reversed with relative ease, a reversal of Supreme Court precedent is analogous to a statutory change that "bespeaks finality" and is not a change that could easily be altered. Therefore, the voluntary cessation doctrine is inapplicable.

B. *Declaratory Relief*

District courts must decide the merits of a declaratory judgment claim even when an injunction request becomes moot. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974). The test for mootness in the declaratory judgment context is

whether there is a substantial controversy between parties with adverse legal interests that are sufficiently immediate to warrant declaratory relief. *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, 1174-75 (9th Cir. 2002) (citation and internal quotation marks omitted). In other words, the issue is "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 925 n.4 (9th Cir. 2000) (citation and internal quotation marks omitted).

Applying that standard here, Plaintiffs' request for declaratory relief is also moot. The Complaint solicits a declaration "that all pertinent statutes, rules, regulations, and collective-bargaining agreements that compel Plaintiffs to pay agency fees to AFSCME ... are unconstitutional [and] null and void." Compl. at 8 (doc. 1). But the action in question, *i.e.*, the forced deduction of agency fees from their paychecks and transfer to AFSCME, is not occurring. There is simply no controversy, let alone an immediate one, to warrant a declaratory judgment. Such a declaration would therefore be an impermissible advisory opinion. *See Akina v. Hawaii*, 835 F.3d 1003, 1011 (9th Cir. 2016) (citing *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam)) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.").

Plaintiffs argue that *Janus* only affected the parties before it and does not impact other states' laws

automatically. They insist that this Court needs to act for *Janus* to be applied to Oregon's statutes and AFSCME's agreements with the State. But the existence of potentially problematic agreements and laws is not sufficient to overcome mootness.

In *City of Los Angeles v. Lyons*, for example, the plaintiff alleged that he was the past victim of an unconstitutional chokehold and that the police department's unconstitutional chokehold policy still existed. 461 U.S. 95, 98-99 (1983). Even so, the Supreme Court concluded that his claim for prospective relief against the policy did not present an Article III case or controversy because the plaintiff could not show a real risk of being personally subject to the policy in the future. *Id.* at 111.

The same is true here: *Janus* held agency fees to be unconstitutional and AFSCME stopped collecting them. AFSCME submitted declarations and letters demonstrating no real risk that Plaintiffs will be subject to the laws, agreements, and conduct that they challenge. No plaintiff is presently being required to pay agency fees and none has posited a realistic possibility that they will be required to do so in the future. Therefore, the declaratory relief request is moot.

II. Good Faith Defense

AFSCME argues that it should not be held liable for monetary damages because it relied in good faith on presumptively valid state law that was constitutional under then-binding Supreme Court

precedent. Plaintiffs make three arguments in response: (i) the good faith defense is unavailable to private parties for First Amendment violations in a § 1983 action; (ii) that even if good faith is available, AFSCME cannot meet the defense's requirements; and (iii) allowing AFSCME to claim good faith would run afoul of the Supreme Court's retroactivity doctrine. Each are addressed below.

A. *Private Parties & Good Faith in § 1983 Actions*

The threshold question of whether the good faith defense is available to private parties in § 1983 actions has been answered affirmatively by the Ninth Circuit.

In *Clement v. City of Glendale*, the plaintiff brought a § 1983 action against a towing company, an officer in his individual capacity, and the City of Glendale for towing her car from a hotel parking lot in violation of the Fourteenth Amendment. 518 F.3d 1090, 1092-93 (9th Cir. 2008). The district court granted summary judgment to the officer based on qualified immunity and to the towing company based on good faith. *Id.* at 1093. The Ninth Circuit affirmed. *Id.* at 1097-98. It acknowledged that the Supreme Court in *Wyatt v. Cole* and again in *Richardson v. McKnight* had held open whether private defendants could avail themselves of the good faith defense in a § 1983 action. *Id.* at 1096-97; *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability ...

could be entitled to an affirmative defense based on good faith."); *Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) ("*Wyatt ex*plicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense ... we do not express a view on this last-mentioned question."). But *Clement* found it appropriate to allow the private towing company to utilize the good faith defense through a facts and circumstances analysis. *Clement*, 518 F.3d at 1097 ("[T]he facts of this case justify allowing Monterey Tow Service to assert such a good faith defense.").

To this Plaintiffs respond that a good faith defense is nevertheless not available to private parties in the First Amendment context and put forth the following syllogism: that a good faith defense to a constitutional tort is only available if an analogous common law tort in 1871 contained an intent element; that there are no analogous common law torts to First Amendment free speech violations with an intent element; that AFSCME committed a free speech violation; and that it therefore cannot avail itself of the good faith defense.

But Plaintiffs' syllogism suffers from three flaws. First, Plaintiffs['] argument fails because affirmative defenses need not relate to or rebut specific elements of an underlying claim. *See Jarvis v. Cuomo*, 660 F.App'x 72, 75-76 (2d Cir. 2016) (extending the good faith defense to a private party in a § 1983 First

Amendment action and citing Black's Law Dictionary to distinguish between affirmative defenses and standard defenses in rejecting a nearly identical argument).

Second, Ninth Circuit precedent does not require an analysis of pre-1871 common law torts for extending the good faith defense against an alleged constitutional violation. Instead, the Ninth Circuit's analysis in *Clement* is more akin to the traditional equitable basis for extending good faith than to a formalistic analysis that would require an analogous tort over 130 years ago. To warrant good faith, the *Clement* court explained that the towing company "did its best to follow the law ... the tow was authorized by the police department [and it was] permissible under both local ordinance and state law." *Clement*, 518 F.3d at 1097. The court also explained that the "constitutional defect—a lack of notice to the car's owner—could not have been observed by the towing company at the time when the tow was conducted; there would be no easy way for a private towing company to know whether the owner had been notified or not." *Id*. The court was therefore more concerned about the inequities of holding the private towing company liable than by anchoring its analysis with pre-1871 torts, or the fact that the defense was being raised in a Fourteenth Amendment context rather than in the context of some other constitutional tort.

Third, there *are* analogous common law torts to the First Amendment violation at issue in this case. Namely, the common law tort of abuse of process, which coincidentally was the cause of action in *Wyatt*. 504 U.S. at 164; *see also Danielson v. AFSCME*, 340 F. Supp. 3d 1083, 1086 (W.D. Wash. 2018) (finding that defamation may also constitute an analogous tort to plaintiff's First Amendment claim against the union).

Abuse of process is a "cause[ ] of action against private defendants for unjustified harm arising out of the misuse of governmental processes." *Wyatt*, 504 U.S. at 164. It required the plaintiff "to establish ... both that the defendant acted with malice and without probable cause." *Id.* at 172 (Kennedy, J., joined by Scalia, J., concurring).

Here, Plaintiffs' First Amendment claim against AFSCME depends on AFSCME's use of governmental processes to collect agency fees. AFSCME used a state law procedure in violation of the First Amendment to deduct a portion of each non-member's paycheck for the benefit of AFSCME and to the detriment of Plaintiffs. And what makes AFSCME's action a § 1983 constitutional issue is its use of the Oregon statutes authorizing the deduction of agency fees from employees. The Oregon statutes provide the necessary link between AFSCME's actions and the "under color of any statute" requirement of a § 1983 claim. Had AFSCME's

actions occurred prior to § 1983's enactment in 1871, then, Plaintiffs could have brought their action under an abuse of process theory. The state-of-mind requirement for an abuse of process claim is malice and acting in good faith would preclude the claim because it would negate the malice requirement. Thus, good faith is not precluded even under Plaintiffs' theory of the defense.

B. *AFSCME's Good Faith Defense*

I find that AFSCME is entitled to a good faith defense against claims of monetary liability. *See Danielson*, 340 F. Supp. 3d at 1085 (finding "ample authority" for the good faith defense to apply under nearly identical facts).

Courts have acknowledged that good faith is not susceptible to a precise definition. *See, e.g., In re Agric. Research & Tech. Grp.*, 916 F.2d 528, 536 (9th Cir. 1990) (citing *In re Roco Corp.*, 701 F.2d 978, 984 (1st Cir. 1983)). The defense has been applied by the Ninth Circuit without a precise articulation of its contours. *See, e.g., Clement*, 518 F.3d at 1097 (not articulating a standard for good faith for § 1983 claims but still applying it).[3] Nevertheless, traditional principles of

[3] Plaintiffs also argue that even if the good faith is available, that *Clement* sets out the "necessary factors" for this defense and AFSCME cannot demonstrate these factors. Nowhere does *Clement* characterize any of these "factors" as "necessary." And what Plaintiffs characterize as "factors" are simply the circumstances that, in totality, persuaded the *Clement* court to find the good faith defense appropriate.

equity and fairness are generally understood to underpin the defense. *Danielson*, 340 F. Supp. 3d at 1085.

Here, AFSCME collected agency fees in accordance with Oregon's laws and then-controlling Supreme Court precedent that upheld their constitutionality. It would be highly inequitable to hold private parties retroactively liable for § 1983 damages in such a circumstance. Much like the defendant towing company in *Clement*, AFSCME's actions "appeared to be permissible under [the] law." *Clement*, 518 F.3d at 1097. It is highly relevant that AFSCME, as the exclusive bargaining representative, had an official role under Oregon's public labor relations statutes and a legal duty to represent all employees within its respective bargaining unit. The agency fees were collected pursuant to contracts with public employers to pay the costs of that representation. As such, AFSCME was not pursuing its own private interests; its actions were good faith attempts to comply with its statutory obligations.

Whether AFSCME subjectively believed that the Supreme Court was poised to overrule *Abood* is irrelevant, as reading the tea leaves of Supreme Court dicta has never been a precondition to good faith reliance on governing law. And so are any steps it took to mitigate potential disruptions from *Abood*'s possible reversal prior to *Janus*. Given the potentially systemic effects of Supreme Court decisions in areas of

great public importance, failure to contingency plan can be ruinous and AFSCME sensibly decided to manage this risk. As the district court in *Danielson e*xplained, "[a]ny subjective belief [the union] could have had that the precedent was wrongly decided and should be overturned would have amounted to telepathy." 340 F. Supp. 3d at 1086.

Precluding a good faith defense based on subjective predictions of when the Supreme Court would overrule precedent would also imperil the rule of law. State officials are entitled to rely on Supreme Court precedent in their official conduct, even if that precedent's reasoning has been questioned. *See Davis v. United States*, 564 U.S. 229, 241 (2011) (declining to apply exclusionary rule to evidence generated in searches that were consistent with then-binding case law because police were entitled to rely on that precedent, even though its reasoning had been questioned); *Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996) ("[I]t is objectively reasonable to act on the basis of a statute not yet held invalid."). Similarly, AFSCME justifiably relied on statutes that were valid under *Abood* and holding it liable for monetary damages solely because certain Justices had expressed doubt about *Abood*'s reasoning would be unworkable and highly inequitable. *See Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) ("[S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping

their conduct."). AFSCME is therefore entitled to a good faith defense.

C. *Civil Retroactivity*

Finally, Plaintiffs argue that the good faith defense runs afoul of the Supreme Court's retroactivity doctrine because *Janus*'s holding entitles them to monetary damages.

Under the retroactivity doctrine, new Supreme Court holdings are "controlling interpretation[s] of federal law and must be given full retroactive effect in all cases still open on direct review." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). But retroactive application of a new Supreme Court ruling does not determine what remedy, if any, a party should obtain. *Davis*, 564 U.S. at 243; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 750 (1995) (no retroactive liability where there is "a previously existing, independent legal basis for denying relief").

Here, there is no indication that *Janus* intended to open the floodgates to retroactive monetary relief. Even if *Janus* does apply retroactively, it does not mean that parties are always retroactively liable for damages. In *Davis v. United States*, for example, the petitioner alleged that the search of his car subsequent to arrest violated the Fourth Amendment. 564 U.S. at 229. While his appeal was pending, the Supreme Court announced a new rule governing

automobile searches incident to arrests which would have required the exclusion of any evidence obtained by the officer through his search of the petitioner's car. *Id.* A strict application of retroactivity would have necessitated this result, but the Supreme Court explained that such a result "erroneously conflates retroactivity with remedy." *Id.* at 230. Moreover, the Supreme Court found that applying the good faith exception to the exclusionary rule did not run afoul of retroactivity. *Id.*

Applying *Davis*'s reasoning in the instant case makes clear that allowing AFSCME to avail itself of the good faith defense is not contrary to the retroactivity doctrine. Just like the officer in *Davis*, AFSCME was "in strict compliance with then-binding [case] law and was not culpable in any way." *Id.* at 229-30. While this case was pending the Supreme Court overturned *Abood* and announced a new rule in *Janus* that made agency fees unlawful. AFSCME immediately complied and, for the reasons outlined above, I find that it is entitled to the good faith defense. Since extending the good faith defense only concerns the appropriate remedy for Plaintiffs, it is consistent with the retroactivity doctrine.

CONCLUSION

For the reasons herein, the Court GRANTS AFSCME's Motion for Judgment on the Pleadings or, Motion for Summary Judgment (doc. 24).

IT IS SO ORDERED

Dated this 28th day of February, 2019.

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Ann Aiken
United States District Judge

Appendix G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM HOUGH, Plaintiff, v. SEIU LOCAL 521, Defendant.	Case No. 18-cv-04902 -VC **AMENDED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT** Re: Dkt. No. 29

Local 521's motion for summary judgment is granted. *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) does not entitle Hough to a refund of the fair-share fees he paid before the ruling came down. Assuming it's necessary to inquire whether the defendant's good-faith reliance on then-existing law bars Hough's refund claim under 42 U.S.C. § 1983, the defendant has indeed established good-faith reliance as a matter of law. This is so for the reasons provided in the following cases: *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, No. 15 C 1235, 2019 WL 1239780, at *3 (N.D. Ill. Mar. 18, 2019); *Carey v. Inslee*, No. 3:18-CV-05208-RBL, 2019 WL 1115259, at *9 (W.D. Wash. Mar. 11, 2019);

Cook v. Brown, No. 6:18-CV-01085-AA, 2019 WL 982384, at *7 (D. Or. Feb. 28, 2019); *Danielson v. American Federation of State, County, & Municipal Employees, Council 28*, 340 F. Supp. 3d 1083, 1087 (W.D. Wash. 2018).

Moreover, considering this issue outside the rubric of good-faith reliance, there is a strong argument that when the highest judicial authority has previously deemed conduct constitutional, reversal of course by that judicial authority should never, as a categorical matter, result in retrospective monetary relief based on that conduct. Perhaps that's why the Supreme Court did not address whether Mr. Janus himself was entitled to the refund he sought, instead simply remanding for further proceedings. *Janus*, 138 S. Ct. at 2486. At least 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. *Cf. Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 91 (2d Cir. 1998); *see also Nunez-Reyes v. Holder*, 646 F.3d 684, 691 (9th Cir. 2011); *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004); *Glazner v. Glazner*, 347 F.3d 1212, 1216-21 (11th Cir. 2003).

IT IS SO ORDERED.

Dated: April 16, 2019

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VINCE CHHABRIA
United States District Judge

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JENNI CHAMBERS, et al. Plaintiffs, v. **AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, et al.** Defendants.	Case No. 3:18-cv-1685-SI **OPINION AND ORDER**

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COON, NEWTON & FROST, 820 SW Second Avenue, Suite 200, Portland, OR 97204; James M. Weyland, TEDESCO LAW GROUP, 12780 SE Stark Street, Portland, OR 97233: Jeffrey W. Burritt, NATIONAL EDUCATION ASSOCIATION, 1201 Sixteenth Street NW, Eighth Floor, Washington, DC 20036. Of Attorneys for Defendants.

Michael H. Simon, District Judge.

Plaintiffs are public employees in Oregon.[1] Defendants are unions or their affiliates (collectively, "Defendants" or the "Unions") that exclusively represent Plaintiffs in the public workplace.[2] The

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[1] Plaintiffs are Jenni Chambers, Terry Godwin, Steven Masuo, Bryan Quinlan, Marian Shadrin, Misty Staebler, Betty Sumega, Gloria Carlson, Jacyn Gallagher, Lindsey Hart, Craig Leech, and Matthew Puntney.

[2] Defendants are American Federation of State, County, and Municipal Employees International Union, AFL-CIO ("AFSCME"), its Oregon state affiliate Oregon AFSCME Council 75, local affiliates Multnomah County Employees Union AFSCME Local 88, AFSCME Local 3336, and City of Cornelius Employees Union AFSCME Local 3786-2 (erroneously sued as City of Cornelius Employees Union AFSCME Local 189); National Education Association ("NEA"), its Oregon state affiliate Oregon Education Association ("OEA"), and local affiliates Southern Oregon Bargaining Council ("SOBC") and Three Rivers Education Association ("TREA"); Service Employees International Union ("SEIU"), its Oregon state affiliate SEIU Local 503 Oregon Public Employees Union ("OPEU"), and local affiliates Marion County Employees Association OPEU Local 294 and OPEU Linn County Local 390; and the Association of Engineering Employees of Oregon ("AEE").

Unions negotiated collective bargaining agreements ("CBAs") with Plaintiffs' public employers. These CBAs established the terms and conditions of employment for the relevant bargaining units. Although Plaintiffs were not members of the Unions, Oregon law had previously required Plaintiffs to pay compulsory union fees, often by automatic deduction from Plaintiffs' wages, to the Unions as a condition of Plaintiffs' public employment. In addition, certain provisions in Plaintiffs' respective CBAs reinforced this obligation. Plaintiffs did not consent to paying these fees to the Unions.

Under Oregon's Public Employee Collective Bargaining Act ("PECBA"), Or. Rev. Stat. ("ORS") §§ 243.650-243.782 (2017), bargaining units of public employees may choose, by majority vote, to form a union for collective bargaining with public employers about their terms and conditions of employment. PECBA also had previously authorized public employers and employee unions to enter into agreements that required represented employees who were not union members to pay "fair-share fees"[3] to cover their proportionate share of the costs of

[3] Fair-share fees are sometimes called "agency fees," "service fees," "representation fees," or "payments-in-lieu-of-dues." Plaintiffs call them "forced fee deductions." In this Opinion and Order, the Court will use the terms "forced fee deductions," "fair-share fees," and "payments-in-lieu-of-dues" interchangeably.

collective-bargaining representation. *See* ORS § 243.650(10) and (18) (2017); ORS § 243.666(1) (2017); ORS § 243.672(1)(c) (2017); and ORS § 292.055(5) (2017).[4] In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the United States Supreme Court explicitly upheld this practice of collecting compulsory fair-share fees from public employees under state law. It was also standard practice in public-sector bargaining agreements throughout the United States for more than 40 years. That all changed in June 2018, when the Supreme Court overturned *Abood* in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, —— U.S. ——, 138 S. Ct. 2448 (2018). In *Janus*, the Supreme Court held that collecting fair-share fees from nonconsenting public sector employees violates the First Amendment rights of those nonconsenting employees, no matter how the fees were spent.

In September 2018, Plaintiff brought this putative class action against Defendants. Plaintiffs allege that the forced fee deductions, or fair-share fees, violate their rights under the First and Fourteenth Amendments and are actionable under 42 U.S.C. § 1983. Plaintiffs seek money damages and declaratory relief. Plaintiffs also allege state a tort claim of conversion of property for which they seek replevin or restitution. Defendants have moved to

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[4] *See* n.7, *infra*.

dismiss or for summary judgment, and the Court will treat Defendants' motion as a motion for summary judgment. Finally, the Court notes that a recent Ninth Circuit decision, *Danielson v. Inslee*, 945 F.3d 1096 (2019), involves issues that are nearly identical to those here and is binding precedent on this Court.[5] For the reasons below, including the Ninth Circuit's decision in *Danielson*, Defendants' motion for summary judgment is granted.

STANDARDS

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Although "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate

[5] The Court also notes that the Ninth Circuit's decision in *Danielson* accords with the Seventh Circuit's decisions in *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31* ("*Janus II*"), and the Sixth Circuit's decision in *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020). Indeed, the Court is aware of no contrary appellate caselaw.

inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient..." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and quotation marks omitted).

DISCUSSION

Defendants primarily make three arguments. First, Defendants assert that Plaintiffs' claims for monetary relief should be dismissed because before *Janus* Defendants collected fair-share fees in good-faith reliance on state law and controlling Supreme Court precedent. Second, Defendants maintain that Plaintiffs cannot prevail on their state claim for conversion and are not entitled to either replevin or restitution. Finally, Defendants contend that Plaintiffs' request for declaratory relief is moot. In response, Plaintiffs offer essentially four points. First, Plaintiffs assert that "good faith" is not a recognized defense for a private party against a claim under § 1983 for violating First Amendment rights. Second, Plaintiffs contend that even if good faith were a defense, Defendants have not established their good

faith. Third, Plaintiffs argue that they have presented evidence of conversion under Oregon law as well as their entitlement to the equitable remedy of restitution. Fourth, Plaintiffs reject Defendants' assertion of mootness. The Court will address each point in turn.[6]

A. Whether Good Faith Is Available as a Defense for a Private Party in a § 1983 Claim

In *Danielson*, the Ninth Circuit addressed a case involving almost identical facts, claims, and defenses. The Ninth Circuit, agreeing with the Seventh Circuit, stated:

> We hold that the district court properly dismissed Plaintiffs' claim for monetary relief against the Union. In so ruling, we join the Seventh Circuit, the only other circuit to have addressed the question before us. *See Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019). We agree with our sister circuit that a union defendant can invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected pre-*Janus*, where its conduct was directly authorized under both

[6] In *Danielson*, the Ninth Circuit assumed without deciding the retroactivity of the rule established in *Janus*. *Danielson*, 945 F.3d at 1099. This Court does likewise.

> state law and decades of Supreme Court jurisprudence. The Union was not required to forecast changing winds at the Supreme Court and anticipatorily presume the overturning of *Abood*. Instead, we permit private parties to rely on judicial pronouncements of what the law is, without exposing themselves to potential liability for doing so.

Danielson, 945 F.3d at 1098-99. In that case, the Ninth Circuit thoroughly explained its rationale. *See Danielson*, 945 F.3d at 1099-102. There is no need to repeat it here. Under binding Ninth Circuit precedent, Defendants here may assert good faith as a complete defense to Plaintiffs' claim under § 1983.

B. Whether Defendants Have Established Good Faith as a Matter of Law

Plaintiffs argue that, even if good faith is available as a defense, Defendants have not established their good faith as a matter of law. Plaintiffs make several arguments. First, Plaintiffs state that Defendants subjectively "knew" that the Supreme Court was likely to reverse *Abood* and hold that mandatory fair-share fees are unconstitutional. Second, Plaintiffs maintain that Defendants also expected and planned for the outcome in *Janus* and even used indemnity clauses, further reflecting their legal uncertainty in the viability of *Abood*. Third,

Plaintiffs argue Defendants were not acting under "close government supervision."

Plaintiffs maintain that their evidence shows that Defendants subjectively anticipated the Supreme Court's ruling in *Janus* and planned for its outcome, including by using indemnity clauses. Even if that were true, none of it is legally relevant. As did the defendants in *Danielson*, Defendants here relied on presumptively valid state law and then-binding Supreme Court precedent. As the Ninth Circuit explained in *Danielson*:

> The Supreme Court has admonished the circuit courts not to presume the overruling of its precedents, irrespective of hints in its decisions that a shift may be on the horizon…We decline to hold private parties to a different standard. It would be paradoxical for the circuit courts to be required to follow *Abood* until its overruling in *Janus*, while private parties incur liability for doing the same.
>
> The ability of the public to rely on the courts' pronouncements of law is integral to the functioning of our judicial system. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). If private parties

> could no longer rely on the pronouncements of even the nation's highest court to steer clear of liability, it could have a destabilizing impact on the judicial system.
>
> Because the Union's action was sanctioned not only by state law, but also by directly on-point Supreme Court precedent, we hold that the good faith defense shields the Union from retrospective monetary liability as a matter of law.

Danielson, 945 F.3d at 1103-105 (citations omitted).

In addition, that Defendants planned for the contingency that a Supreme Court majority, depending on its membership, might someday disagree and overturn 40 years of precedent, thereby ending fair-share fee collections, is a reflection of responsible planning and Defendants' good faith commitment to the rule of law. After *Janus*, Defendants were able promptly to alert public employers of the change in law, request that all fair-share fees cease immediately, and ensure that they retained no further fair-share fees going forward. A legal rule that provided a disincentive to such sound contingency planning would delay compliance with the law.

Further, the indemnification clauses in Defendants' CBAs have been standard contract terms

for decades because public employers relied on the exclusive representative correctly to follow the procedures for collecting fair-share fees set out in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). *See, e.g., Cummings v. Connell*, 316 F.3d 886, 898 (9th Cir. 2003) (discussing a similar indemnification clause in a collective bargaining agreement in 1995). The indemnification clauses thus do not raise a genuine issue for trial about Defendants' good faith. They simply clarified the liability of the parties for any errors associated with the administration of the system of collecting fair-share fees. Finally, there is no requirement that a defendant act under close government supervision or at government instruction to maintain a defense of good faith to a claim brought under § 1983.

C. Whether Defendants Have Shown the Absence of Conversion and Plaintiffs' Lack of Entitlement to Restitution as a Matter of Law

The "rules of the common law" have force in Oregon only "so far as the same . . . are not in conflict with the Constitution or special enactments of the Legislature." *Peery v. Fletcher*, 93 Or. 43, 53 (1919). "If the Legislature has expressed its will and that will disagrees with the common law, the latter must give way." *Nadstanek v. Trask*, 130 Or. 669, 680 (1929); *see also Oatman v. Bankers' & Merchants' Mut. Fire Relief*

Ass'n, 66 Or. 388, 400 (1913) ("So far as th[e] statute is inconsistent with the common law, it supersedes it. * * * It is the duty of the courts to give effect to the statute[.]").

The Oregon Legislative Assembly foreclosed any common law conversion claim here by adopting PECBA, "a comprehensive statutory scheme authorizing and regulating collective bargaining between municipal and other public employers and employees." *Am. Fed'n of State Cty. & Mun. Emps. v. City of Lebanon*, 360 Or. 809, 815 (2017) (citation omitted); *see* ORS § 243.650 *et seq*. Part of that statutory scheme required that the unions represent all bargaining unit workers, including Plaintiffs here. *See* ORS 243.650(8) (2017); ORS § 243.666 (2017). Another part authorized public employers to collect fair-share fees and provide them to the unions to cover the costs associated with collective-bargaining representation. *See* ORS § 243.650(10) and (18) (2017); ORS § 243.666(1) (2017); ORS § 243.672(1)(c) (2017); and ORS § 292.055(5) (2017). Indeed, in their Complaint, Plaintiffs acknowledge that Oregon statutes authorized the collection of the fair-share fees they now seek to recover. Complaint ¶52 ("the laws of Oregon . . . authorized these automatic deductions and transfer[s]…to defendants"); *see also id.* ¶¶2, 50-51 (acknowledging that deduction of fair-share fees was "pursuant to" statute).

The adoption of statutes creating a labor-relations system that includes fair-share fees is incompatible with an interpretation of Oregon common law that imposes tort liability for conversion on private parties for having received those fees while those statutes were in force and while United States Supreme Court precedent allowed precisely that action. Holding Defendants liable for common law conversion under these facts would be not only "inconsistent with other applicable laws" but directly in conflict with the regime established by the Oregon Legislative Assembly. *See Espinoza v. Evergreen Helicopters, Inc.*, 359 Or. 63, 87 (2016); *cf. Bell v. Pub. Emps. Ret. Bd.*, 239 Or. App. 239, 251 (2010) ("Where, as here, the relationship is created and defined by statute, references to common-law relationships cannot supersede the statutory framework that the legislature actually established.").

In addition, under Oregon common law, "[c]onversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Scott v. Jackson Cty.*, 244 Or. App. 484, 499 (2011) (quoting RESTATEMENT (SECOND) OF TORTS § 222A (1965)); *see also Mustola v. Toddy*, 253 Or. 658, 664 (1969). To state a claim for conversion under Oregon law, Plaintiffs must allege that they were entitled to "immediate possession" of the "chattel" at

issue. *Willamette Quarries, Inc. v. Wodtli*, 308 Or. 406, 413 (1989) (quoting *Artman v. Ray*, 263 Or. 529, 531 (1972)) (alterations omitted); *see also Berry v. Blair*, 209 Or. 15, 18 (1956); RESTATEMENT (SECOND) OF TORTS § 225 ("Either the person in possession of the chattel at the time of the conversion or the person then entitled to its immediate possession may recover the full value of the chattel at the time and place of the conversion."). Plaintiffs, however, had no right to immediate possession of the fair-share fees they now seek to recover at the time of the deductions, and Plaintiff thus cannot state a claim for conversion.

Finally, under Oregon law, the fair-share fees were not a "chattel" subject to conversion. Money can qualify as chattel for purposes of a conversion claim only "when the money was wrongfully received by the party charged with conversion, or an agent is obligated to return specific money to the party claiming it." *Waggoner v. Haralampus*, 277 Or. 601, 604 (1977) (citation omitted); *see also Marquard v. New Penn Fin., LLC*, 2017 WL 4227685, at *6 (D. Or. Sept. 22, 2017); *Duty v. First State Bank of Or.*, 71 Or. App. 611, 618 (1985). When the fair-share fees were deducted from Plaintiffs' wages, doing so was entirely consistent with Oregon law and pre-*Janus* Supreme Court precedent. Thus, at that time, the money was not wrongfully received nor received by an agent with an obligation to return it. There was, therefore, no conversion.

Finally, to the extent that Plaintiffs are seeking an equitable remedy of restitution under their conversion claim, that avenue similarly is unavailing. As the Ninth Circuit explained in *Danielson*:

> Even accepting Plaintiffs' restitutionary premise, the equities do not weigh in favor of requiring a refund of all agency fees collected pre-*Janus*. The Union bears no fault for acting in reliance on state law and Supreme Court precedent. It collected and spent fees under the assumption—sanctioned by the nation's highest court—that its conduct was constitutional. And the Union provided a service to contributing employees in exchange for the agency fees it received. Indeed, under *Abood*, the Union was required to use those fees for collective bargaining activities that inured to the benefit of all employees it represented—an exchange that cannot be unwound. It is true that, under current law, the employees suffered a constitutional wrong for which they may have no viable means of compensation if the good faith defense prevails. Nonetheless, it would not be equitable to order the transfer of funds from one innocent actor to another, particularly where the latter received a benefit from the exchange. . . .Under the circumstances here,

> the most equitable outcome is a prospective change in the Union's policy and practice (which undisputedly occurred), without retrospective monetary liability.

Danielson, 945 F.3d at 1103 (citations omitted). Equity dictates the same result here.

D. Whether Plaintiffs' Request for Declaratory Judgment is Moot

In their Complaint, Plaintiffs request two separate types of declaratory relief. First, Plaintiff ask for a declaration

> that all pertinent statutes, forced fee provisions of collective-bargaining agreements that compelled plaintiffs and class members to pay nonmember fees to the respective defendants and affiliates as a condition of their employment, the deductions of forced nonunion fees, and the receipt and use of those forced deductions by defendants are unconstitutional under the First Amendment, as secured against state infringement by the Fourteenth Amendment to the United States, and are null and void[.]

Complaint, Prayer, ¶ B. Plaintiffs also ask for a declaration

> that defendants committed the tort of conversion in entering into and enforcing forced fee provisions and receiving and using the respective plaintiffs' and class members' forced fee deductions[.]

Complaint, Prayer, ¶ C. Because the Court finds that Defendants did not commit the tort of conversion as a matter of law, there is no basis for Plaintiffs' second request.

As to Plaintiffs' first request, Oregon law no longer allows what Plaintiffs call "forced fee deductions," what Defendants call "fair-share fees," and what Oregon calls "payments-in- lieu-of-dues."[7] Further, Defendants modified their behavior to conform to the ruling in *Janus* immediately after the Supreme Court announced that decision.

The Ninth Circuit has "routinely deemed cases moot where 'a new law is enacted during the pendency of an appeal and resolves the parties' dispute.'" *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011) (quoting *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1181 (9th Cir. 2006)). This rule applies with equal force to intervening changes in the applicable case law. *See, e.g., Aikens v. California*,

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[7] In 2019, the Oregon Legislative Assembly amended ORS § 243.666 and repealed both ORS § 243.776 and ORS § 292.055, effective January 1, 2020. *See* Chapter 429 Oregon Laws 2019 (HB 2016) §§ 9 and 19.

406 U.S. 813, 814 (1972); *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1195 (9th Cir. 2000). For example, in *Aikens*, the Supreme Court dismissed as moot a California prisoner's pending federal constitutional challenge to California's death penalty statute "based on the intervening decision of the California Supreme Court in *People v. Anderson*, 6 Cal. 3d 628 (1972)," which had "declared capital punishment in California unconstitutional under … the state constitution." 406 U.S. at 814. The petitioner in that case "no longer face[d] a realistic threat of execution, and the issue on which certiorari was granted—the constitutionality of the death penalty under the Federal Constitution—[was] now moot in his case." *Id.* Soon after the Supreme Court decided *Janus*, the Oregon legislature changed Oregon law and Defendants ceased their challenged actions. Plaintiffs' request for a declaratory judgment addressing Defendants' past conduct that is no longer occurring or even permitted under state law is moot.

CONCLUSION

Defendants' motion for summary judgment (ECF 32) is GRANTED. This case is dismissed.

IT IS SO ORDERED.

DATED this 31st day of March, 2020.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

Appendix I

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE DANIELSON, a Washington State employee; BENJAMIN RAST, a Washington State employee; TAMARA ROBERSON, a Washington State employee; employee; as individuals, and on behalf of all others similarly situated, *Plaintiffs-Appellants*,	No. 18-36087 D.C. No. 3:18-cv-05206-RJB OPINION
v.	
JAY ROBERT INSLEE, in his official capacity as Governor of the State of Washington; DAVID SCHUMACHER, in his official capacity as Director of Washington State Office of Financial Management; AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 28, AFL-CIO, a labor organization, *Defendants-Appellees*.	

Appeal from the United States District Court for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted November 6, 2019
Seattle, Washington

Filed December 26, 2019

Before: Ronald M. Gould and Jacqueline H. Nguyen, Circuit Judges, and Gregory A. Presnell[*], District Judge.

Opinion by Judge Nguyen

SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal of a claim for monetary relief bought pursuant to 42 U.S.C. § 1983 by public sector employees against their union following the Supreme Court's decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448

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[*] The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

(2018), which held that the compulsory collection of agency fees by unions violates the First Amendment.

Prior to the Supreme Court's decision in *Janus*, public sector unions around the country relied on the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that the unions could collect compulsory agency fees from nonmembers to finance their collective bargaining activities, without running afoul of the First and Fourteenth Amendments. State laws and regulations further entrenched the union agency shop into the local legal framework. In 2018, the Supreme Court uprooted its precedent by overturning *Abood*. Immediately thereafter, the defendant Union stopped collecting mandatory fees from nonmembers. Plaintiffs subsequently brought suit seeking, among other things, a refund of all agency fees that were allegedly unlawfully collected from plaintiffs prior to the Supreme Court's decision in *Janus*.

Joining the Seventh Circuit, the panel held 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. *See Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019). The panel held that the

good faith affirmative defense applied as a matter of law, and the district court was right to dismiss plaintiffs' claim for monetary relief.

COUNSEL

Jonathan F. Mitchell (argued), Mitchell Law PLLC, Austin, Texas; Talcott J. Franklin, Talcott Franklin PC, Dallas, Texas; Eric Stahlfeld, Freedom Foundation, Olympia, Washington; Christopher Hellmich, Hellmich Law Group P.C., Anaheim Hills, California; for Plaintiffs-Appellants.

P. Casey Pitts (argued), Scott Kronland, and Matthew J. Murray, Altshuler Berzon LLP, San Francisco, California; Edward E. Younglove III, Younglove & Coker P.L.L.C., Olympia, Washington; for Defendants-Appellees.

OPINION

NGUYEN, Circuit Judge:

"*Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). But on rare occasion, even longstanding precedent can be overruled. What happens when the Supreme Court reverses course, but private parties

have already acted in reliance on longstanding bedrock precedent?

This question lies at the center of this appeal. For over 40 years, public sector unions around the country relied on the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that the unions could collect compulsory agency fees from nonmembers to finance their collective bargaining activities, without running afoul of the First and Fourteenth Amendments. State laws and regulations further entrenched the union agency shop into the local legal framework. But in 2018, the Supreme Court uprooted its precedent by overturning *Abood*. In *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court held that unions' compulsory collection of agency fees violated the Constitution.

Many public sector unions, including the defendant union here, immediately stopped collecting agency fees. But uncertainty remained as to whether they would be monetarily liable for their pre-*Janus* conduct—conduct that was once explicitly authorized under *Abood* and state law.

Throughout the country, public sector employees brought claims for monetary relief against the unions pursuant to 42 U.S.C. § 1983. Many unions asserted a good faith defense in response. Joining a growing

consensus, the district court here ruled in favor of the union. We affirm and hold 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.

I. FACTS AND PROCEDURAL HISTORY

A. Factual Background

Plaintiffs are Washington state employees who work within bargaining units exclusively represented by the American Federation of State, County, and Municipal Employees, Council 28, AFL-CIO (the "Union"). Plaintiffs are not members of the Union and object to financing its activities. Nonetheless, until recently, they were required to pay agency fees to the Union. Collection of agency fees from nonmembers was authorized by the governing collective bargaining agreement, by Washington law, and by over four decades of U.S. Supreme Court precedent dating back to *Abood*.

On June 27, 2018, the Supreme Court issued its decision in *Janus*, reversing course on the constitutionality of the traditional agency shop regime. *Janus* overruled *Abood* and held that the mandatory collection of agency fees from objectors violated the First Amendment. 138 S. Ct. at 2486. It

is undisputed that, immediately thereafter, the Union stopped collecting mandatory fees from nonmembers.

B. Procedural Background

On March 15, 2018, Plaintiffs brought a putative class action pursuant to 42 U.S.C. § 1983 against Jay Inslee, in his official capacity as Governor of Washington; David Schumacher, in his official capacity as Director of the Washington Office of Financial Management; and the Union. In anticipation of the Supreme Court's decision in *Janus*, Plaintiffs alleged that the imposition of compulsory agency fees violated their constitutional rights under the First and Fourteenth Amendments. They sought declaratory and injunctive relief, a refund of "all agency fees that were unlawfully collected from Plaintiffs and their fellow class members," and an award of attorney's fees and costs.

In the wake of *Janus* and changes to the Union's practices, the district court determined that the claims against Inslee and Schumacher (the "State Defendants") for declaratory and injunctive relief were moot, and they were dismissed from the case.[1] Shortly thereafter, the Union filed a motion for judgment on the pleadings or summary judgment. The Union argued that the claims for declaratory and

[1] Plaintiffs sought monetary relief from only the Union, not the State Defendants.

injunctive relief should be dismissed as moot, as the parallel claims against the State Defendants had been. The Union further argued that the claim for monetary relief should be dismissed because it had relied in good faith on presumptively-valid state law and then-binding Supreme Court precedent. The district court granted the Union's motion as to all claims and dismissed the case. Plaintiffs then sought reconsideration of the ruling, which the district court denied. This appeal timely followed.[2]

II. STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo an order granting summary judgment or judgment on the pleadings. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 975, 978 (9th Cir. 1999).

III. DISCUSSION

We hold that the district court properly dismissed Plaintiffs' claim for monetary relief against the Union. In so ruling, we join the Seventh Circuit, the only other circuit to have addressed the question before us. *See Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*");

[2] On appeal, Plaintiffs argue only that the district court erred in dismissing their claim for monetary relief against the Union. They do not contest the dismissal of their claims for declaratory and injunctive relief.

Mooney v. Ill. Educ. Ass'n, 942 F.3d 368 (7th Cir. 2019). We agree with our sister circuit that a union defendant can invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected pre-*Janus*, where its conduct was directly authorized under both state law and decades of Supreme Court jurisprudence. The Union was not required to forecast changing winds at the Supreme Court and anticipatorily presume the overturning of *Abood*. Instead, we permit private parties to rely on judicial pronouncements of what the law is, without exposing themselves to potential liability for doing so.

1. We assume the retroactivity of the rule established in Janus, but that does not answer the remedial question before this court.

As an initial matter, Plaintiffs urge the retroactive application of the Supreme Court's decision in *Janus*. But, like the Seventh Circuit, we find it unnecessary to "wrestle the retroactivity question to the ground." *Janus II*, 942 F.3d at 360. The Supreme Court has made clear that right and remedy must not be conflated, and that retroactivity of a right does not guarantee a retroactive remedy. *Davis v. United States*, 564 U.S. 229, 243 (2011). Therefore, we will assume that the right delineated in *Janus* applies retroactively and proceed to a review of available remedies.

2. A private entity may avail itself of a good faith defense in litigation brought pursuant to 42 U.S.C. § 1983.

The Supreme Court has held that private parties sued under 42 U.S.C. § 1983 cannot claim qualified immunity, but it has suggested in dicta that such parties might be able to assert a good faith defense to liability instead. *Wyatt v. Cole*, 504 U.S. 158, 168–69 (1992); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). Although the Supreme Court has never squarely reached the question, we held in *Clement v. City of Glendale* that private parties may invoke a good faith defense to liability under section 1983.[3] 518 F.3d 1090, 1096–97 (9th Cir. 2008).

Plaintiffs argue that *Clement* should be disregarded. They contend the Ninth Circuit previously reached a contrary outcome in *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), and a three-judge panel cannot overturn existing precedent.

Because "we are required to reconcile prior precedents if we can do so," we first assess whether *Clement* and *Howerton* are truly at odds. *Cisneros-*

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[3] Every other circuit that has considered the issue agrees. *Janus II*, 942 F.3d at 364; *Jarvis v. Cuomo*, 660 F. App'x 72, 75 (2d Cir. 2016); *Pinsky v. Duncan*, 79 F.3d 306, 311-12 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993).

Perez v. Gonzales, 465 F.3d 386, 392 (9th Cir. 2006). We find the two decisions reconcilable. *Howerton* stands for the unremarkable proposition that private parties cannot avail themselves of *qualified immunity* to a section 1983 lawsuit. 708 F.2d at 385 n.10. Both the Supreme Court and later panels of our court have adopted that reading of *Howerton*. *See, e.g.*, *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Howerton* for the proposition that the Ninth Circuit has held that private parties acting under color of state law are not entitled to qualified immunity); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989) (citing *Howerton* for the proposition that "the Ninth Circuit has stated that private defendants are not entitled to qualified immunity in section 1983 actions").

Although *Howerton* used the somewhat less precise language of a "good faith immunity," 708 F.2d at 385 n.10, we do not read the decision to foreclose a good faith *affirmative defense*. Indeed, *Howerton* cited favorably to *Lugar*, 457 U.S. at 942 n.23, for the proposition that "compliance with [a] statute might be raised as an affirmative defense" to section 1983 liability. 708 F.2d at 385 n.10. As the Supreme Court has explained, "a distinction exists between an 'immunity from suit' and other kinds of legal defenses." *Richardson v. McKnight*, 521 U.S. 399, 403 (1997); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (holding that qualified immunity "is an *immunity from suit* rather than a mere defense to

liability"). We assume the *Howerton* court appreciated that distinction and grappled only with the former. Thus, the *Clement* court acted well within its authority to find that, while private parties cannot assert an immunity to suit under section 1983, they can invoke a good faith defense.[4] We are bound by *Clement*, which is dispositive as to the threshold question presented by Plaintiffs.

Plaintiffs also argue that an entity cannot invoke the good faith defense, just as a municipality cannot invoke qualified immunity. This argument, however, runs counter to *Clement*, in which we applied the good faith defense to an entity defendant. Plaintiffs' argument is also at odds with the purpose underlying the good faith defense: that private parties should be entitled to rely on binding judicial pronouncements and state law without concern that they will be held retroactively liable for changing precedents. This principle applies equally to a private entity as it does to a private individual.

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[4] *Clement* is not alone in presuming that Ninth Circuit precedent did not foreclose a good faith defense. For example, in *Jensen v. Lane County*, we considered it an open question whether a private party could invoke "an affirmative good faith defense" to section 1983 liability. 222 F.3d 570, 580 n.5 (9th Cir. 2000).

3. The good faith defense is not limited by the availability of a similar defense to the most closely analogous common law tort. But, even if it were, the closest analogue allows a good faith defense.

Plaintiffs contend that any good faith defense must be confined to claims for which the most closely analogous common law tort carried a similar immunity. Plaintiffs argue that conversion is the closest common law analogue to their claim against the Union, that good faith is no defense to conversion, and therefore that good faith can provide no defense to liability here. Plaintiffs derive this argument from the Supreme Court's discussion of the history of qualified immunity in *Wyatt v. Cole*:

> Section 1983 creates a species of tort liability that on its face admits of no immunities. Nonetheless, we have accorded certain government officials either absolute or qualified immunity from suit if the tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine. If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871—§ 1 of which is codified at 42 U.S.C. § 1983—we infer from legislative

> silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law . . . In determining whether there was an immunity at common law that Congress intended to incorporate in the Civil Rights Act, we look to the most closely analogous torts . . . .

504 U.S. 158, 163-64 (1992) (internal citations and quotation marks omitted).

Plaintiffs' argument fails for several reasons. *First*, the above passage applies only to *Wyatt*'s discussion of qualified immunity, not to the good faith affirmative defense on which *Wyatt* expressly reserved judgment. The rationales behind the two doctrines, and their limitations, are not interchangeable. *Accord Janus II*, 942 F.3d at 365 ("As several district courts have commented, the Supreme Court in *Wyatt I* embarked on the search for the most analogous tort only for *immunity* purposes—the Court never said that the same methodology should be used for the good-faith defense.").

Second, even qualified immunity is no longer constrained by a common law tort analogy. *See Wyatt*, 504 U.S. at 166 (noting that "*Harlow* 'completely reformulated qualified immunity along principles not at all embodied in the common law'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 645 (1987))); *see*

also Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., dissenting) (explaining that contemporary courts no longer "ask[] whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983," but "instead grant immunity to any officer whose conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'" (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam))). The Supreme Court itself has emphasized that it "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645.

Third, in *Clement*, we did not limit the applicability of the good faith defense to common law analogues. 518 F.3d at 1096–97 (9th Cir. 2008). Our decision in *Clement* was driven not by the strictures of common law, but rather by principles of equality and fairness—which the Supreme Court likewise indicated could lay the foundation for a good faith defense to section 1983 liability. *See id.* (applying the good faith defense 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," and "the constitutional violation arose from the inactions of the police rather than from any act or omission by the towing company"); *Wyatt*, 504 U.S. at

168 (citing "principles of equality and fairness" as the basis for a potential good faith defense).

Fourth, Plaintiffs' proposed constraints are contrary to the principles underlying the good faith defense. As noted, 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. It 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. We would find it neither "equal" nor "fair" for a private party's entitlement to a good faith defense to turn not on the innocence of its actions but rather on the elements of an 1871 tort that the party is not charged with committing.

Finally, even if we adopted the common-law-analogue rule, Plaintiffs' position would still fail. Contrary to Plaintiffs' contention, conversion is not the closest common law analogue to the First Amendment violation alleged in this case. Plaintiffs' First Amendment claim arises not from the taking of their property, but from their compelled speech on behalf of a cause they do not endorse. The unprivileged confiscation of funds from employees' paychecks, on its own, would yield no cognizable First

Amendment violation. Moreover, unlike in a traditional conversion case, the Union did not collect agency fees in contravention of state law; the key theme underlying Plaintiffs' section 1983 cause of action is that the Union collected agency fees *in accord with* state law. For these reasons, conversion bears little substantive similarity to Plaintiffs' claim.

Rather, we agree with our sister circuit that abuse of process provides the best analogy to Plaintiffs' claim.[5] *Janus II*, 942 F.3d at 365. At common law, abuse of process "provided [a] cause[] of action against private defendants for unjustified harm arising out of the misuse of governmental processes." *Wyatt*, 504 U.S. at 164. Although the prototypical abuse of process claim involves the abuse of *judicial* process, the tort is not clearly so confined. Here, the fundamental premise for section 1983 liability against the Union is its alleged abuse of processes authorized by Washington law—the agency shop regime and its concomitant agency fee collection protocol—toward unconstitutional ends. Indeed, it is the use of governmental processes by the Union that supplies the "color of law" element required to state a claim under section 1983.

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[5] We agree with the Seventh Circuit that "[n]one of these torts is a perfect fit, but they need not be," as the search for a common law analogue is "inherently inexact." *Janus II*, 942 F.3d at 365.

Adopting abuse of process as the appropriate common- law analogue poses no barrier to the Union's invocation of a good faith defense. This is because, at common law, a private party could avoid liability for abuse of process if it acted in good faith. *Id.* at 164; *id.* at 172 (Kennedy, J., concurring); *id.* at 176 (Rehnquist, C.J., dissenting).

4. Plaintiffs' labeling of their claim as restitutionary does not preclude application of the good faith defense.

Plaintiffs argue that any good faith defense is limited to liability for *damages*, whereas they seek *restitution* from the Union for agency fees collected in contravention of *Janus*. They contend that "a defendant's good faith will never allow it to *keep* the property or money that it took in violation of another's constitutional rights," even if good faith might provide a shield to liability for additional damages.

As an initial matter, Plaintiffs' restitutionary premise is flawed. Plaintiffs' constitutionally cognizable injury is the intangible dignitary harm suffered from being compelled to subsidize speech they did not endorse. It is *not* the diminution in their assets from the payment of compulsory agency fees. Accordingly, Plaintiffs seek compensatory damages, not true restitution, when they pray for a monetary award in the amount of the agency fees they paid to the Union. The labeling of the relief sought in

restitutionary terms does not change the underlying nature of Plaintiffs' claim.

Even accepting Plaintiffs' restitutionary premise, the equities do not weigh in favor of requiring a refund of all agency fees collected pre-*Janus*. The Union bears no fault for acting in reliance on state law and Supreme Court precedent. It collected and spent fees under the assumption—sanctioned by the nation's highest court—that its conduct was constitutional. And the Union provided a service to contributing employees in exchange for the agency fees it received. Indeed, under *Abood*, the Union was required to use those fees for collective bargaining activities that inured to the benefit of all employees it represented—an exchange that cannot be unwound. It is true that, under current law, the employees suffered a constitutional wrong for which they may have no viable means of compensation if the good faith defense prevails. Nonetheless, it would not be equitable to order the transfer of funds from one innocent actor to another, particularly where the latter received a benefit from the exchange. *Accord Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 454–55 (1984) (expressing "doubt that the equities call for a refund" of compulsory payments made by employees to their union, even if the practice ran afoul of the law, because objecting employees received a service in exchange for their money); *Janus II*, 942 F.3d at 367 ("[T]hough

[plaintiff] contends that he did not want any of the benefits of [the union's] collective bargaining and other representative activities over the years, he received them. Putting the First Amendment issues . . . to one side, there was no unjust 'windfall' to the union . . . but rather an exchange of money for services."). Under the circumstances here, the most equitable outcome is a prospective change in the Union's policy and practice (which undisputedly occurred), without retrospective monetary liability.

5. The good faith defense applies to the Union as a matter of law, because the Union was not required to anticipate the overturning of then-binding precedent.

The Union's assertion of a good faith affirmative defense is sound, but that does not fully answer the question before this court. We must next determine whether the district court correctly found that the good faith defense shielded the Union from retrospective monetary liability as a matter of law.

In collecting compulsory agency fees, the Union relied on presumptively-valid state law and then-binding Supreme Court precedent. The Union now faces an assertion of monetary liability *not* for flouting that law or misinterpreting its bounds, but for adhering to it. Although some justices had signaled their disagreement with *Abood* in the years leading up to *Janus*, *Abood* remained binding authority until it

was overruled.[6] We agree with our sister circuit that "[t]he Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future." *Janus II*, 942 F.3d at 366.

The Supreme Court has admonished the circuit courts not to presume the overruling of its precedents, irrespective of hints in its decisions that a shift may be on the horizon. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011) ("As a circuit court, even if recent Supreme Court jurisprudence has perhaps called into question the continuing viability of its precedent, we are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court." (internal quotation marks and brackets omitted)). We decline to hold private parties to a different standard. It would be paradoxical for the

[6] Indeed, not long before *Janus*, the Supreme Court affirmed the judgment of this court on the same question presented—albeit by an equally divided court. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016). Although the outcome in *Janus* may have been the writing on the wall, it was not a foregone conclusion.

circuit courts to be *required* to follow *Abood* until its overruling in *Janus*, while private parties incur liability for doing the same.

The ability of the public to rely on the courts' pronouncements of law is integral to the functioning of our judicial system. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If private parties could no longer rely on the pronouncements of even the nation's highest court to steer clear of liability, it could have a destabilizing impact on the judicial system.

Because the Union's action was sanctioned not only by state law, but also by directly on-point Supreme Court precedent, we hold that the good faith defense shields the Union from retrospective monetary liability as a matter of law. In so ruling, we join a growing consensus of courts across the nation.[7]

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[7] *See Janus II*, 942 F.3d 352; *Mooney*, 942 F.3d 368; *Aliser v. SEIU Cal.*, No. 19-CV-00426-VC, 2019 WL 6711470, at *1 (N.D. Cal. Dec. 10, 2019); *Wenzig v. Serv. Emps. Int'l Union Local 668*, No. CV 1:19-1367, 2019 WL 6715741, at *10 (M.D. Pa. Dec. 10, 2019); *Hamidi v. SEIU Local 1000*, No. 2:14-CV-00319, 2019 WL 5536324 (E.D. Cal. Oct. 25, 2019); *LaSpina v. SEIU Pa. State Council*, No. 3:18-2018, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019); *Allen v. Santa Clara Cty. Corr. Peace Officers Ass'n*, No. 18-CV-02230, 2019 WL 4302744 (E.D. Cal. Sept. 11, 2019); *Casanova v. Int'l Ass'n of Machinists, Local 701*, No. 19-CV-00428 (N.D. Ill. Sept. 11, 2019); *Ogle v. Ohio Civil Serv. Emp. Ass'n*, No. 18-CV-1227, 2019 WL 3227936 (S.D. Ohio July 17, 2019), *appeal pending*, No. 19-3701 (6th Cir.); *Diamond v. Pa.*

Finally, we reject Plaintiffs' contention that the Union must prove that it "fully complied with the pre-*Janus* constitutional strictures on agency shops" to avail itself of a good faith defense. Plaintiffs' argument lacks any grounding in the claims presented in this action. Plaintiffs alleged in their complaint only that the Union's collection of compulsory agency fees, as a general matter, violated their rights under the First and Fourteenth Amendments. Plaintiffs did not allege that the Union violated their rights under *Abood* or any similar pre-*Janus* authority. In fact, Plaintiffs

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State Educ. Ass'n, No. 18-CV-128, 2019 WL 2929875 (W.D. Pa. July 8, 2019), *appeal pending*, No. 19-2812 (3d Cir.); *Hernandez v. AFSCME Cal.*, No. 18-CV-2419, 2019 WL 2546195 (E.D. Cal. June 20, 2019); *Doughty v. State Emp. Ass'n of N.H.*, No. 19-CV-53 (D.N.H. May 30, 2019), *appeal pending*, No. 19-1636 (1st Cir.); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019), *appeal pending*, No. 19-55692 (9th Cir.); *Wholean v. CSEA SEIU Local 2001*, No. 18-CV-1008, 2019 WL 1873021 (D. Conn. Apr. 26, 2019), *appeal pending*, No. 19-1563 (2d Cir.); *Akers v. Md. Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019), *appeal pending*, No. 19-1524 (4th Cir.); *Bermudez v. SEIU Local 521*, No. 18-CV-4312, 2019 WL 1615414 (N.D. Cal. Apr. 16, 2019); *Hough v. SEIU Local 521*, No. 18-CV-4902, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), *appeal pending*, No. 19-15792 (9th Cir.); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980 (N.D. Ohio 2019), *appeal pending*, No. 19- 3250 (6th Cir.); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), *appeal pending*, No. 19-35299 (9th Cir.); *Carey v. Inslee*, 364 F. Supp. 3d 1220 (W.D. Wash. 2019), *appeal pending*, No. 19-35290 (9th Cir.); *Cook v. Brown*, 364 F. Supp. 3d 1184 (D. Or. 2019), *appeal pending*, No. 19-35191 (9th Cir.). *See also Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016); *Winner v. Rauner*, No. 15-CV-7213, 2016 WL 7374258 (N.D. Ill. Dec. 20, 2016); *Hoffman v. Inslee*, No. 14-CV-200, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016).

devoted several paragraphs of their complaint to an effort to discredit *Abood* as controlling authority, so that their claims might prevail.

Because Plaintiffs' claims arise from the Union's reliance on *Abood*, not allegations that the Union flouted that authority, the Union need not show compliance with *Abood*'s strictures to assert successfully a good faith defense. Such a requirement would be entirely divorced from the allegations in this action.

IV. CONCLUSION

When the Supreme Court delivered its decision in *Janus*, the Union was required to change its policies to conform to the newly-announced law of the land. And it did. But the shift in precedent only carries the plaintiff employees so far. We hold that the Union is not retrospectively liable for doing exactly what we expect of private parties: adhering to the governing law of its state and deferring to the Supreme Court's interpretations of the Constitution. A contrary result would upend the very principles upon which our legal system depends. The good faith affirmative defense applies as a matter of law, and the district court was right to dismiss Plaintiffs' claim for monetary relief.

AFFIRMED.