No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR DIAMOND et al.,
Petitioners,
v.
PENNSYLVANIA STATE EDUCATION ASSOCIATION et al.,
Respondents,
and
JANINE WENZIG et al.,
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

2. Are employees who had compulsory union fees seized from them in violation of their First Amendment rights prior to *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), entitled to damages or restitution for their injuries?

PARTIES TO THE PROCEEDING

Petitioners Arthur Diamond, Jeffrey Schawarts, Sandra H. Ziegler, Matthew Shively, Matthew Simkins, Douglas R. Kase, Justin Barry, Janine Wenzig, and Catherine Kioussis are natural persons and citizens of the Commonwealth of Pennsylvania.

Respondents Josh Shapiro, James M. Darby, Albert Mezzaroba, Robert H. Shoop, Jr., and Lesley Childer-Potts are natural persons and citizens of the Commonwealth of Pennsylvania.

Respondents Pennsylvania State Education Association, Chestnut Ridge Education Association, National Education Association, and Service Employees International Union Local 668 (collectively "Respondent Unions") are unions that represent public employees in the Commonwealth of Pennsylvania.

RULE 29 STATEMENT

As Petitioners are all natural persons, no corporate disclosure is required under Rule 29.6.

STATEMENT OF RELATED CASES

The list of proceedings in other courts that are directly related to this case is:

- *Diamond v. Pa. State Educ. Ass'n*, No. 19-2812, United States Court of Appeals for the Third Circuit. Judgement entered on August 28, 2020.
- *Wenzig v. SEIU Local 668*, No. 19-3906, United States Court of Appeals for the Third Circuit. Judgement entered on August 28, 2020.
- *Diamond v. Pa. State Educ. Ass'n*, No. 3:18-cv-128, United States District

Court for the Western District of Pennsylvania. Judgement entered on July 8, 2019.

- *Wenzig v. SEIU Local 668*, No. 1:19-cv-1367, United States District Court for the Middle District of Pennsylvania. Judgement entered on December 10, 2019.

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INTRODUCTION

Three times this Court has raised, but then not decided, the important question of whether there exists a good-faith defense to 42 U.S.C. § 1983 ("Section 1983") that exempts defendants from paying damages if they acted under color of a state law before it was held unconstitutional. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt v. Cole*, 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). The Third Circuit below issued a fractured decision in which Judge Rendell found such a good-faith defense to exist, Judge Fisher rejected a good-faith defense but found an alternative limit to Section 1983 liability, and Judge Phipps, dissenting, rejected both defenses. *See* App. A at 23, 45, 56. Taking Judges Fisher's and Phipps's opinions together, a majority of the Third Circuit rejected the good-faith defense now recognized by several other circuit courts. *See* App. A at 45, 56.

The Court should clear up this confusion and finally resolve whether there is a good-faith defense to Section 1983. It is important that the Court do so now because, absent this Court's review, thousands of employees who had compulsory union fees seized from them in violation of their First Amendment rights will be denied compensation for their injuries. Therefore, the Court should take this case and reject the good-faith defense for the reasons found by Judge Phipps: "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." App. A at 56 (Phipps, J., dissenting).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), and reproduced at App. A. The Third Circuit Order denying rehearing en banc is reproduced at App. D.

The Third Circuit in *Diamond* affirmed two separate district court decisions, which the appellate court consolidated for disposition purposes: (1) the opinion of the United States District Court for the Western District of Pennsylvania in *Diamond v. Pa. State Educ. Ass'n,* reported at 399 F. Supp. 3d 361 (W.D. Pa. 2019), and reproduced at App. C, and (2) the opinion of the United States District Court for the Middle District of Pennsylvania in *Wenzig v. SEIU Local 668*, reported at 426 F. Supp. 3d 88 (M.D. Pa. 2019), and reproduced at App. B.

JURISDICTION

The Third Circuit entered judgment on August 28, 2020. App. A. It denied a petition for rehearing en banc on October 30, 2020. App. D.

On March 19, 2020, in light of the COVID-19 pandemic, this Court extended the deadline to file petitions for certiorari to 150 days from the date of the denial of rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

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

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

In June 2018, the Court in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and held that unions violate employees' First Amendment rights by seizing dues or fees from them without their consent. 138 S. Ct. at 2486. The Court explained that "unions have been on notice for years regarding this Court's misgiving about *Abood*" and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was un-certain." *Id*. at 2484-85. The Court also lamented the "considerable windfall" that unions wrongfully received from employees during prior decades, finding, "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*. at 2486.

Petitioners are nonmember employees who had agency fees seized from them in violation of their First Amendment rights prior to *Janus*. Specifically, the *Diamond* Petitioners are Pennsylvania educators who were compelled to pay agency fees to Respondent Pennsylvania State Education Association and its affiliates. App. A at 11. The *Wenzig* Petitioners are Pennsylvania employees who were compelled to pay

agency fees to Respondent Service Employees International Union, Local 668. App. A at 12.

In separate lawsuits, the *Diamond* and *Wenzig* Petitioners (collectively the "Employee Petitioners") sought damages or restitution from the Respondent Unions for the compulsory fees the union unconstitutionality seized from them and putative classes of similarly situated employees. App. A at 6. The Employee Petitioners sought this relief under Section 1983, which provides that "[e]very person who, under color of any statute" deprives citizens of their constitutional rights "*shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress [.]" 42 U.S.C. § 1983 (emphasis added).

Notwithstanding Section 1983's text, the district courts in both *Diamond* and *Wenzig* held the Respondent Unions *not* liable to the injured parties in actions at law or at equity because the defendants relied in good faith on Pennsylvania's agency-fee statute and court precedents when violating the Employee Petitioners' First Amendment rights. App. B at 24, C at 66. The Employee Petitioners filed separate appeals to the Third Circuit, which were later consolidated for disposition purposes.

On August 28, 2020, the Third Circuit released a decision consisting of three separate and inconsistent opinions. Judge Rendell, writing for herself, recognized the affirmative good-faith defense that several other circuit courts had recently adopted. App. A at 14. This defense exempts from liability a defendant that relies on a statute and judicial decisions that are later overruled if "the court finds no 'malice' and no

'evidence that [the defendant] either knew or should have known of the statute's constitutional infirmity.'" *Id.* at 14 (quoting *Jordan v. Fox, Rothschild, O'Brien*, & *Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994). According to Judge Rendell, this affirmative defense is predicated on policy interests in equality and fairness or, alternatively, on an analogy to the common law tort of abuse of process. *Id.* at 19.

Judge Fisher, concurring in the judgment, rejected the categorical good-faith defense that Judge Rendell and some other circuits had recognized. *Id.* at 25. Judge Fisher found that policy interests in fairness or equality could not justify creating this defense. *Id.* at 45. He also found that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to First Amendment claims for compelled speech. *Id.* at 36. While he rejected a good-faith defense, Judge Fisher found an alternative limit to Section 1983 liability. According to Judge Fisher, prior to 1871, "[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision." *Id.* at 25. Judge Fisher concluded that Section 1983 incorporates this ostensible liability exception. *Id.* at 44.

Judge Phipps, dissenting, agreed with Judge Fisher that there is no good-faith defense to Section 1983. *Id.* at 47. According to Judge Phipps, "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id.* at 56. Judge Phipps continued, "Nor does our precedent or even principles of equality and fairness favor

recognition of good faith as an affirmative defense to a compelled speech claim for wage garnishments." *Id*.

However, contrary to Judge Fisher, Judge Phipps found it "immaterial that no pre-1871 cause of action permitted recovery for voluntary payments that were subsequently declared unconstitutional" because "the Civil Rights Act of 1871 established a new cause of action in part to provide 'a remedy where state law was inadequate.'" *Id.* at 51 (quoting *Monroe v. Pape*, 365 U.S. 167, 173 (1961), overruled on other grounds by *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1977)). Moreover, "the agency fee payments at issue here were not voluntary—they were wage garnishments that were paid to unions." *Id*. Thus, Judge Phipps did "not see the common law as limiting the scope of a § 1983 claim for compelled speech—either through a good faith affirmative defense or through a separate limitation on the statutory cause of action." *Id*.

Taking the three opinions together, a majority of the court rejected the good-faith defense recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. *See Doughty v. State Emples. Ass'n of N.H.*, 981 F.3d 128 (1st Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *Akers v. Md. State Educ. Ass'n*, No. 19-1524, 2021 U.S. App. LEXIS 6851 (4th Cir. Mar. 8, 2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Janus v. AFSCME, Council 31*, 942 F.3d 365 (7th Cir. Nov. 5, 2019) ("*Janus II*"); *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019). However, a different majority of the *Diamond* opinions affirmed, on different grounds, the lower court's judgment for the Respondent Unions.

Employee Petitioners timely filed a petition for rehearing en banc, which the Third Circuit denied on October 30, 2020. App. D at 2.

REASONS FOR GRANTING THE PETITION

The Court should finally resolve the question it raised, but did not decide, in *Richardson*, 521 U.S. at 413, *Wyatt*, 504 U.S. at 169, and *Lugar*, 457 U.S. at 942 n.23: is there a good-faith defense to Section 1983? The Third Circuit's fractured decision, in which two opinions cogently rejected the good-faith defense recognized by several other circuits, makes clear this Court's guidance is needed.

The Court should reject the proposition that a defendant acting under color of a statute before it is held unconstitutional is an affirmative defense to Section 1983. That defense cannot be reconciled with Section 1983's text, which makes acting "under color of any statute" an element of the statute that renders defendants "liable to the party injured in an action at law." 42 U.S.C. § 1983. Nor can the defense be reconciled with this Court's retroactivity doctrine. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995).

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

to be invalidated should be an affirmative defense to *all* Section 1983 claims, including a First Amendment claim arising from compelled subsidization of speech.

The two different rationales often cited for a good-faith defense—either equitable principles or an analogy to an abuse-of-process tort—are both untenable. Courts cannot create equitable exemptions to federal statutes like Section 1983. And even if they could, fairness to victims of constitutional deprivations supports enforcing Section 1983 as written. As for common-law analogies, not every Section 1983 claim for damages or restitution against an otherwise private defendant is closely akin to an abuse of a process tort. Most importantly here, a First Amendment claim for compelled subsidization of speech is not so akin to an abuse of process as to justify importing that tort's malice and probable cause elements into that First Amendment claim.

The Court should reject the proposition that a defendant acting under color of a state law before it is invalidated is an affirmative defense to Section 1983. It is important that the Court do so. Absent this Court's review, tens of thousands of victims of union agency fee seizures will be deprived compensation for their injuries. The Respondent Unions, and others like them, should have to return to dissenting employees some of the windfall of monies the unions unlawfully seized from them in violation of their First Amendment rights. The petition should be granted.

I. The Court should finally determine whether there exists a good-faith defense to section 1983.

A. The Court should resolve the conflict between the Third Circuit and several other Circuit Courts.

A majority of the opinions in *Diamond* rejected the good-faith defense now recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. *See* App. A at 45 (J. Fisher, concurring in the judgment); *id*. at 56 (J. Phipps, dissenting); *see supra* at 6 (citing cases). The Court should resolve this conflict.

The alternative limit to Section 1983 liability found by Judge Fisher is not the same as a good-faith defense, as this ostensible limit has different elements and a different basis. Judge Fisher found, based on pre-1871 common law, that defendants who rely on invalidated statutes or overruled decisions should be exempt from Section 1983 liability "except where duress or fraud was present." App. A at 44.[1] The good-faith defense, by contrast, exempts defendants that rely on a state statute from damages liability unless there is evidence of "malice" or evidence the defendants "either knew or should have known of the statute's constitutional infirmity.'" *Id*. at 18 (quoting *Jordan*, 20 F.3d at 1276) (Judge Rendell). This defense supposedly is based on either policy interests in equality and fairness or a tort analogy. *Id.* at 19 (Judge Rendell). Judge Fisher rejected this first rationale for recognizing a defense to Section 1983, *see* App. A at 26, and found the second rationale to be highly attenuated, *id*. at 33.

The Third Circuit's fractured opinion is illustrative of the broader doctrinal confusion that exists on this issue. Even the circuit courts that recognize a good-faith defense disagree on its ostensible basis. The Second and Ninth Circuits found it is an

[1] Judge Fisher's proffered limit on Section 1983's scope is untenable for the reasons stated by Judge Phipps in his dissent in *Diamond*, 972 F.3d at 287-88, and because it conflicts with this Court's retroactivity doctrine.

equitable defense rooted in concerns about equality and fairness. *See Wholean*, 955 F.3d at 334; *Danielson*, 945 F.3d. at 1101. The First and Sixth Circuits held the defense exists because claims against private defendants that use state law procedures are analogous to an abuse of process tort, and good-faith reliance on state law is a defense to that tort. *Doughty*, 981 F.3d at 135; *Ogle v. Ohio Civil Serv. Emples. Ass'n*, 951 F.3d 794, 797 (6th Cir. 2020). The Seventh Circuit also found this to be the most closely analogous tort but believed the "search for the best [tort] analogy is a fool's errand" and chose to "leave common-law analogies behind." *Janus II*, 942 F.3d at 365-66. The Ninth Circuit similarly found, "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." *Danielson*, 945 F.3d at 1101.

The fact that circuit courts disagree on both whether there exists a good-faith defense to Section 1983 and what the legal basis is for this ostensible defense is reason for the Court to grant review. This is especially true given that a good-faith defense lacks any cognizable legal basis, as Judges Fisher and Phipps recognized.

B. A good-faith defense to Section 1983 conflicts with the statute's text and lacks any cognizable legal basis.

Judges Phipps's and Fisher's opinions persuasively repudiate the three purported grounds cited by other courts for creating a good-faith defense to Section 1983: it is not the defense suggested by members of this Court in *Wyatt*; the defense cannot be judicially created from equitable interests; and the defense cannot be justified by a strained analogy to an abuse-of-process tort. App. A at 24 (Fisher, J., concurring in

the judgment); *id.* at 46 (Phipps, J., dissenting). A good-faith defense also cannot be reconciled with Section 1983's text, which courts that have recognized the ostensible defense have generally ignored as if it were irrelevant. But "[s]tatutory interpretation . . . begins with the text," *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Consequently, an analysis of the good-faith defense also must begin with Section 1983's text.

1. A good-faith defense conflicts with Section 1983's text.

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

It turns Section 1983 on its head to conclude that persons who act under the color of state laws that are later held unconstitutional are *not* liable to the injured parties in a suit for damages. The proposition effectively makes a statutory *element* of Section 1983—that defendants must act under color of state law—a *defense* to Section 1983.[2] An affirmative defense predicated on a defendant's reliance on a state law cannot be reconciled with Section 1983's plain language.

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

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

It is telling that circuit courts that have recognized a good-faith defense make no attempt to square it with the fact that a defendant acting under color of state law establishes liability under Section 1983's text. In fact, the Seventh Circuit's only response to the argument was to claim this Court "abandoned" strictly following Section 1983's language when recognizing immunities. *Janus II*, 942 F.3d at 362.

To the contrary, this Court has held that "[w]e do not simply make our own judgment about the need for immunity," and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. The Court accords an immunity only when a "tradition of immunity was so firmly rooted in the common

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

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

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

law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine' when it enacted Section 1983." *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164). Unlike with immunities, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364; *see* App. A at 52 (finding "[a] good faith defense is inconsistent with the history of the Civil Rights Act of 1871") (Phipps, J., dissenting); William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 55 (2018) (finding "[t]here was no well-established, good faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."). Thus, unlike with immunities, there is no justification for deviating from Section 1983's mandate that "[e]very person who, under color of any statute" deprives a citizen of a constitutional right "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983.

2. The *Wyatt* Court did not suggest that a defendant's reliance on a statute should be an affirmative defense to Section 1983.

Among the circuit courts that found that a good-faith defense excuses unions from having to compensate victims of their compulsory fee seizures, they claim this Court in *Wyatt* suggested, though did not decide, that private defendants in Section 1983 actions should be entitled to an affirmative good-faith defense. *See, e.g., Janus II*, 942 F.3d at 366. Those courts misread *Wyatt*, as Judges Fisher and Phipps concluded. Judge Fisher recognized that the defense discussed in *Wyatt* is "whether the defendant acted with malice and without probable cause" and that this defense does not

"appl[y] categorically to all cases involving private-party defendants," but rather depends on the claim at issue. App. A at 33. Judge Phipps similarly recognized that Chief Justice Rehnquist's discussion of a good-faith defense in *Wyatt* "actually referred to elements of the common-law torts of malicious prosecution and abuse of process," and he "identified no authority for the proposition that good faith functions as transsubstantive affirmative defense–applicable across a broad class of claims . . ." *Id*. at 50. Judges Fisher and Phipps are correct.

In *Wyatt* the plaintiff claimed a private defendant deprived him of due process of law by seizing his property under an *ex parte* replevin statute. 504 U.S. at 161. The Court found the plaintiff's due process claims analogous to "malicious prosecution and abuse of process," and recognized that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id*. at 164–65; *see id*. at 172–73 (Kennedy, J., concurring) (similar). The Court in *Wyatt* held that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id*. at 165. The reason was the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167. *Wyatt* left open whether Section 1983 defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id*. at 168–69.

The defense "based on good faith and/or probable cause" suggested in *Wyatt* was

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

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

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

faith." *Id*. at 174.

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

On remand in *Wyatt*, the Fifth Circuit recognized that this Court "focused its inquiry on the elements of these torts." *Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993). It, therefore, found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause." *Id*. The Third and Second Circuits followed suit in cases also arising from abuses of judicial processes and held the defendants could defeat the malice and probable cause elements of those claims by showing good-faith reliance on a statute. *See Jordan*, 20 F.3d at 1276 & n.31; *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

The limited, claim-dependent defense members of this Court suggested in *Wyatt* offers no protection to unions that compelled employees to subsidize union speech in violation of the First Amendment. The reason is straightforward: malice and lack of probable cause are not elements of a First Amendment claim under *Janus*, which held that unions violate employees' First Amendment rights by taking their money

without affirmative consent. 138 S. Ct. at 2486.

The First, Second, Fourth, Sixth, Seventh, and Ninth Circuits erred in interpreting *Wyatt* to signal that it should become an affirmative defense to Section 1983 for a defendant to rely on a statute before it is held unconstitutional. *See Doughty*, 981 F.3d at 135; *Wholean*, 955 F.3d at 334-35; *Akers*, 2021 U.S. App. LEXIS 6851 at *10; *Janus II*, 942 F.3d at 366; *Danielson*, 945 F.3d at 1101-02. The Court in *Wyatt* was suggesting nothing of the sort. The Court should grant review in this case to clarify that *Wyatt* did not create the sort of free standing affirmative defense some circuits have recognized.

3. Policy interests in fairness and equality do not support a good-faith defense but weigh against recognizing the defense.

(a). The Second and Ninth Circuits, like Judge Rendell in this case, assert that policy concerns about equality and fairness justify recognizing a good-faith defense to Section 1983. *See Wholean*, 955 F.3d at 334; *Danielson*, 945 F.3d. at 1101. But courts cannot just "invent defenses to § 1983 liability based on our views of sound policy." App. A at 24 (Fisher, J., concurring in the judgment). "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. Pension Fund*, 493 U.S. 365, 376 (1990).

Congress mandated in Section 1983 that "every person who, under color of any statute" deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. "Shall" is a mandatory term, not a

permissive one. Courts cannot refuse to enforce that Section 1983's statutory command against defendants who act under color of then-valid statutes because courts believe that would be unfair to those defendants. "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). The "fairness" rationale for a good faith defense is inadequate on its own terms. Cf. *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998) (finding that "[f]airness alone is not . . . a sufficient reason for the immunity defense, and thus does not justify its extension to private parties.").

If anything, fairness to *victims* of constitutional deprivations supports rejecting a good-faith defense and enforcing Section 1983 as written. It is not fair to deprive victims of constitutional deprivations of relief for their injuries. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. Independence*, 445 U.S. 622, 654 (1980).

The Court in *Owen* wrote those words when holding that municipalities are not entitled to a good-faith immunity to Section 1983. *Owen*'s equitable justifications for so holding are equally applicable here.

First, the *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id.* at 651. That injustice also should not be tolerated here. Countless victims of constitutional deprivations will be left remediless

if defendants to Section 1983 suits can escape liability by showing they had a good-faith, but mistaken, belief their conduct was lawful. Those victims include not just Petitioners and other employees who had agency fees seized from them. Under the theory some circuits have adopted, every defendant to a Section 1983 damages claim could assert a good-faith defense. For example, the municipalities that this Court in *Owen* held not to be entitled to a good-faith immunity could raise an equivalent good-faith defense, leading to the very injustice this Court sought to avoid.

Second, the *Owen* Court further recognized that Section "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "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 (emphasis added). The same rationale weighs against a good-faith defense to Section 1983.

Third, the *Owen* Court found that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm rather "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 654. So too here, when the employees' and unions' interests are weighed together, the balance of equities overwhelmingly favors requiring the unions to return the money it unconstitutionally seized from workers who affirmatively chose not to join

the union. Fairness should reward the victims of the constitutional deprivation and not the perpetrator.

(b). As for the proposition accepted by some courts that principles of "equality" justify extending to private defendants a defense similar to the immunity enjoyed by some public officials,[4] that proposition makes little sense. Public officials enjoy qualified immunity for reasons not applicable to unions and most other private entities: to ensure that the threat of personal liability does not dissuade individuals from acting as public servants. *See Wyatt*, 504 U.S. at 168. That unions are not entitled to an immunity is no reason to create a similar defense for them. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for an immunity.

Even if principles of equality required treating unions like their closest government counterpart, that still would not entitle them to an immunity-like defense. Large organizations like the Respondent Unions are nothing like individual government workers who enjoy qualified immunity. Unions are most like a type of governmental body that lacks qualified immunity—a municipality. *Owen*, 445 U.S. at 654. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby." *Id*. Nor is it unjust to require large organizations like the Respondent Unions to compensate citizens for violating their constitutional rights.

Neither fairness nor equality justifies recognizing a good-faith defense to Section

[4] *See Danielson*, 945 F.3d, 1101; *Janus II*, 942 F.3d at 366; *Lee*, 951 F.3d at 392 n.2; *Wholean*, 955 F.3d at 333.

1983. Rather, both principles weigh against carving this exemption into Section 1983's remedial framework.

4. An analogy to abuse of process does not justify creating a good-faith defense to Section 1983.

Several circuit courts that recognized a good-faith defense justified their decision by claiming abuse of process is the most closely analogous tort to a Section 1983 claim against a private defendant. *See, e.g. Danielson,* 945 F.3d at 1102; *Janus II,* 942 F.3d at 366; *Lee,* 951 F.3d at 392 n.2; *Wholean*, 955 F.3d at 335. However, "the torts of abuse of process and malicious prosecution provide at best attenuated analogies." App. A at 36 (Judge Fisher, concurring in the judgment). Most importantly here, the torts certainly are not so analogous to justify importing their malice and probable cause elements into a First Amendment claim for compelled subsidization of speech.

"Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017). "Sometimes . . . [a] review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. But not always." *Id*. at 920-21. Some Section 1983 claims have no common law equivalent. "[Section] 1983 is not simply a federalized amalgamation of pre-existing common-law claims.'" *Id*. at 921 (quoting *Rehberg*, 566 U.S. at 366). Section 1983 "reaches constitutional and statutory violations that do not correspond to any previously known tort." *Rehberg*, 566 U.S. at 366.

A First Amendment claim for compelled subsidization of speech has no common law equivalent. "Compelling a person to subsidize the speech of other private speakers" violates the First Amendment because it undermines "our democratic form of

government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common-law torts. It is peculiar to the First Amendment.

A violation of First Amendment speech rights is nothing like an abuse of process tort. "[T]he tort of abuse of process requires misuse of a *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008). The tort exists to protect the integrity of the judicial process and to protect litigants from harassment. *See* 8 Am. Law of Torts § 28:32 (2019). The tort does not exist, as the First Amendment does, "to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Most importantly, abuse of process is certainly not so similar to a compelled subsidization of speech claim to justify making malice and lack of probable cause *elements* of that constitutional claim. And that is the only potential relevance of common law analogies—to determine whether to import a tort's elements into a particular Section 1983 claim. *See Manuel*, 137 S. Ct. at 920-21. Given that malice and lack of probable cause are not elements of a First Amendment claim under *Janus*, the limited good-faith defense suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights under *Janus*.

5. A good-faith defense conflicts with this Court's retroactivity doctrine.

Janus has retroactive effect under the rule this Court announced in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). The good-faith defense

Judge Rendell and several courts have fashioned to defeat *Janus'* retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

Reynoldsville Casket concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at 751. This Court had earlier held the statute unconstitutional. *Id*. An Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed under the statute before this Court invalidated it. *Id*. at 751-52. The plaintiff asserted this was a permissible, equitable remedy because she relied on the statute before it was held unconstitutional. *Id*. at 753 (describing the state court's remedy "as a state law 'equitable' device [based] on reasons of reliance and fairness"). This Court rejected that contention, holding the state court could not do an end run around retroactivity by creating an equitable remedy based on a party's reliance on a statute later held unconstitutional by this Court. *Id*. at 759.

The good-faith defense constitutes just such an end run around this Court's retroactivity doctrine. The defense is predicated on a defendant's reliance on a statute before it was effectively deemed unconstitutional by a decision of this Court. Therefore, a good-faith reliance defense is incompatible with *Reynoldsville Casket*.

C. It is important that the Court finally resolve whether Congress provided a good-faith defense to section 1983.

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

Several circuit courts have now done just that, based largely on the misconception that this Court in *Wyatt* signaled that private defendants should be granted a defense to Section 1983 liability akin to qualified immunity. Yet *Wyatt* did not suggest such a defense, but only suggested that reliance on a statute could defeat the malice and lack-of-probable cause elements of certain due process claims. *See supra* 13-16. The Court should clarify what it meant in *Wyatt*.

It is important that the Court act quickly because whether tens of thousands of victims of agency fee seizures can receive compensation hangs in the balance. Over thirty-seven (37) class action lawsuits are pending that seek refunds from unions for agency fees they seized from workers in violation of their First Amendment rights. *See* Amicus Br. of Goldwater Inst. et al., 4, *Janus v. AFSCME, Council 31*, No. 19-1104 (Apr. 9, 2020). The vast majority of these cases are in or from the First, Second, Sixth, Seventh, and Ninth Circuits, which have accepted a good-faith defense. *Id.* at 1a-6a (listing cases). Most individual actions seeking a return of agency fees also are in these circuits. *See id.* at 7a-9a. The employees in these suits should be permitted to recover a portion of the "windfall," *Janus*, 138 S. Ct. at 2486, of compulsory fees unions wrongfully seized from them.[5] But without this Court's review, these employees will likely be denied relief.

The importance of the question presented extends beyond victims of agency fee

[5] Recovery in these suits is limited to fees taken within the statute of limitations of a Section 1983 claim, which varies by state. *See Wilson v. Garcia*, 471 U.S. 261, 272-76 (1985)

seizures to victims of other constitutional deprivations. The good-faith defense several circuits have now recognized could shield from liability defendants that invoke state law processes to discriminate against individuals on the basis of race, gender, or faith.

The purpose of Section 1983 is to provide a remedy to citizens whose constitutional rights are violated by actions taken under color of state law. *See* App. A at 52 (Phipps, J., dissenting). A good-faith defense is inconsistent with that purpose. *Id*. The Court should repudiate this ostensible new defense to Section 1983.

II. Victims of union agency fee seizures are entitled to damages or restitution for their injuries under section 1983.

The second question presented is, "Are employees who had compulsory union fees seized from them in violation of their First Amendment rights prior to *Janus* entitled to damages or restitution for their injuries?" The answer to that question is readily apparent if the Court resolves the first question by holding there is no good-faith defense to Section 1983 damages claims for compelled subsidization of speech. However, if the Court were to decide the first question differently, that would not necessarily decide the second question for two reasons.

First, this Court recognized in *Janus* that "unions have been on notice for years regarding this Court's misgiving about *Abood*" and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." 138 S. Ct. at 2484-85 (referencing this Court's holdings in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) and *Harris v. Quinn*, 573 U.S. 616 (2014)). Unions

also were on notice that any decision of this Court holding agency fee laws unconstitutional would apply retroactively. *See Harper*, 509 U.S. at 97. Consequently, even if a good-faith defense existed (which it does not), it would not provide safe harbor to the Respondent Unions because they "should have known of the statute's constitutional infirmity.'" App. A at 18. (quoting *Jordan*, 20 F.3d at 1276 (Judge Rendell).

Second, even if a good-faith defense exists under section 1983, that defense can shield a defendant only from liability for *damages* if it acted in reliance on a statute or court ruling that is only later declared unconstitutional. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Neither qualified immunity nor good faith will ever allow a defendant to escape *restitution* of the money or property that it took in good faith but in violation of another's constitutional rights. Taxes, criminal fines, victim's restitution, and private property that are seized in good faith—and in reliance on statutes or court rulings that are only later pronounced unconstitutional—must be restored when the victim demands their return, regardless of whether the defendant acted in good faith, and regardless of whether the defendant acted before the courts had clearly established the illegality of its conduct. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 753, 775 (2013) (taxes); *United States v. Lewis*, 478 F.2d 835, 836 (5th

Cir. 1973) (fines);[6] *United States v. Venneri*, 782 F. Supp. 1091, 1092 (D. Md. 1991) (victim's restitution); *Wyatt v. Cole*, 994 F.2d 1113, 1115 (5th Cir. 1993) (property seized pursuant to an unconstitutional replevin statute); *United States v. Rayburn House Office Building Room 2113 Washington DC 20515*, 497 F.3d 654, 656, 665 (D.C. Cir. 2007) (property seized pursuant to an unconstitutional search warrant). Good faith can provide an immunity from damages if the victim sues over the collateral harms (such as emotional distress or economic loss) caused by the unconstitutional seizure of her property. But it will never allow someone who takes another's money or property in violation of the Constitution to *keep* that property if the plaintiff sues for its return.

The Third Circuit's ruling not only allows the unions' good faith to confer an immunity from *damages*, but it also allows the unions to escape *restitution* of the money that they took from the plaintiffs in violation of their constitutional rights. The Third Circuit's ruling on this point—and the similar pronouncements that the Sixth,[7] Seventh[8] and Ninth[9] Circuits have issued in post-*Janus* refund lawsuits—are incompatible with the court decisions that uniformly require the return of taxes, criminal fines, victim's restitution, and private property that a defendant seizes in violation of another's constitutional rights but in good-faith reliance on statutes or court rulings

[6] *See also DeCecco v. United States*, 485 F.2d 372, 372–73 (1st Cir. 1973) (fines); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976) (fines); *Pasha v. United States*, 484 F.2d 630, 632–33 (7th Cir. 1973) (fines); *United States v. Summa*, 362 F. Supp. 1177, 1181 (D. Conn. 1972) (fines).
[7] See *Lee*, 951 F.3d at 389–92.
[8] *See Mooney v. Illinois Education Ass'n*, 942 F.3d 368, 370–71 (7th Cir. 2019).
[9] *See Danielson*, 945 F.3d at 1098–1105.

that are only later pronounced unconstitutional. More importantly, they are incompatible with the other circuit court rulings that recognize and enforce a "good-faith defense" for private defendants under 42 U.S.C. § 1983,[10] because none of those rulings allowed a defendant to *keep* the money or property that it seized in violation of another's constitutional rights, even as they allowed the defendant to escape liability for *damages* on account of its good faith. The Court should grant certiorari to resolve this division of authority—and to ensure that public-sector unions are subject to the same rules that govern other defendants who take money and property in violation of the Constitution but in reliance on statutes or court rulings that purported to authorize their unconstitutional conduct.

CONCLUSION

For the forgoing reasons, the petition should be granted.

Dated: March 29, 2021 Respectfully Submitted,

[10] *See Pinsky v. Duncan*, 79 F.3d at 311–12; *Jordan*, 20 F.3d at 1275–78; *Wyatt*, 994 F.2d at 1118; *Vector Research*, 76 F.3d at 698–99; *Clement*, 518 F.3d at 1096–97.

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APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 19-2812 and 19-3906

_____

ARTHUR DIAMOND, on behalf of himself and others similarly situated;
JEFFREY SCHAWARTZ; SANDRA H. ZIEGLER, on behalf of themselves
others similar situated; MATTHEW SHIVELY; MATTHEW SIMKINS;
DOUGLAS R. KASE; JUSTIN BARRY,

Appellants in case no. 19-2812

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION;
CHESTNUT RIDGE EDUCATION ASSOCIATION,
as representative of the class of all chapters and affiliates of the Pennsylvania State Education Association;
NATIONAL EDUCATION ASSOCIATION; JOSH SHAPIRO,
in his official capacity as Attorney General of Pennsylvania;
JAMES M. DARBY; ALBERT MEZZAROBA; ROBERT H. SHOOP, JR.,
in their official capacities as chairman and members of the Pennsylvania
Labor Relations Board; LESLEY CHILDER-POTTS, in her

official capacity
as district attorney of Bedford County, and as representative
of the class
of all district attorneys in Pennsylvania with the authority to
prosecute violations
of 71 Pa. Stat. 575

JANINE WENZIG and CATHERINE KIOUSSIS,

Appellants in case no. 19-3906

v.

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 668

On Appeal from the United States District Court
for the Western District of Pennsylvania and the Middle
District of Pennsylvania
(District Court Nos.: 3-18-cv-00128 and 1-19-cv-01367)
District Judges: Honorable Kim Gibson and Honorable
Malachy E. Mannion

Argued April 24, 2020

(Opinion Filed: August 28, 2020)

Before: PHIPPS, RENDELL, and FISHER, Circuit Judges

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O P I N I O N

RENDELL, Circuit Judge:

In reliance on a Pennsylvania statute and the Supreme Court's decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), Appellee Unions, the Service Employees International

Union Local 668 and the Pennsylvania State Education Association, collected "fair-share fees" from Appellants over Appellants' objections. But the Supreme Court overruled *Abood* in *Janus v. AFSCME Council 31*, holding that state legislation condoning public-sector fair-share fees was unconstitutional. 138 S. Ct. 2448 (2018) ("*Janus I*"). Now, Appellants bring these § 1983 lawsuits seeking reimbursement of the sums they were required to pay. The District Courts, joining a consensus of federal courts across the country, dismissed Appellants' claims for monetary relief, ruling that because the Unions collected the fair-share fees in good faith reliance on a governing state statute and Supreme Court precedent, they are entitled to, and have successfully made out, a good faith defense to monetary liability under § 1983. We will affirm.

I

A. Legal background

Labor laws in the United States have long authorized employers and labor organizations to bargain for an "agency shop," an arrangement in which one union is allowed to exclusively represent an entity's employees on the condition that the union represent *all* the entity's employees—even those who do not join the union. *See, e.g.*, *Janus I*, 138 S. Ct. at 2460; 45 U.S.C. § 152 (Railway Labor Act); 29 U.S.C. § 159 (National Labor Relations Act). Agency shop arrangements are intended to promote uniform bargaining, streamlined administration, and other interests, but they also create an incentive for employees to decline to join their union (and therefore avoid paying dues) while still accruing the benefits of union representation. *See, e.g.*, *Janus I*, 138 S. Ct. at 2465-69 (describing the intended purpose of agency shops to create

"labor peace" and describing the hypothetical potential for "free rider" problems in agency shop arrangements). To address this incentive, Congress often allowed unions and employers who opt for an agency shop arrangement to require all employees either to join the union and pay dues or, if an employee does not join the union, to nonetheless contribute to the costs of representation, bargaining, and administration of bargaining agreements. This requirement that non-members pay some form of union dues is often referred to as a "fair-share" fee, and is present in various pieces of federal legislation, including, for instance, the Railway Labor Act, 45 U.S.C. § 152, and the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(3).

The Supreme Court has upheld the constitutionality of these agency shop arrangements, including fair-share fees. For instance, in *Railway Employees' Dep't v. Hanson*, the Supreme Court ruled that the Railway Labor Act's provisions allowing agency shop arrangements and fair-share fees did not violate the First Amendment. 351 U.S. 225, 236-38 (1956). Although the employees in that case argued that the agency shop "agreement forces men into ide[o]logical and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights," *id.* at 236, the Court "h[e]ld that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate" the First Amendment, *id.* at 238. The Supreme Court later reaffirmed this ruling. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (affirming the constitutionality of the Railway Labor Act's agency shop and fair-share provisions).

Eventually, state legislatures across the country passed laws authorizing public-sector unions to collect fair-share fees and bargain for agency shop arrangements with state government employers. In *Abood*, the Supreme Court affirmed the constitutionality of one such law, a Michigan statute permitting state employers to negotiate for agency shop arrangements and fair-share fees with the public-sector unions that represented their employees. 431 U.S. at 224-26. The *Abood* Court ruled that the important government interests in creating functional and peaceful labor relations and preventing the free rider problem "support the impingement upon associational freedom created by the agency shop." *Id.* at 225. Although the Court recognized that the "government may not require an individual to relinquish rights guaranteed [] by the First Amendment as a condition of public employment," *id.* at 234, the Court held that there was no reason to distinguish *Abood* from cases like *Hanson* that had upheld agency shop arrangements in the private sector, *id.* at 232 (holding that the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights").

But the *Abood* Court also ruled that—as in the private sector—non-members' fair-share fees could only be used to pay for union activities that were "germane to [the union's] duties as collective-bargaining representative," but not the union's political or other work. *Id.* at 235. In the *Abood* Court's view, this limitation struck an appropriate balance between the non-members' speech rights under the First Amendment and the government's interests in regulating labor relations. *Id.* at 237 (describing the Court's ruling as "preventing compulsory subsidization of ideological activity by employees who object . . . without restricting the [u]nion's

ability to require every employee to contribute to the cost of collective-bargaining activities"). Over the course of the following four decades, the Supreme Court affirmed its holding in *Abood* against similar challenges to the constitutionality of state laws allowing for agency shop arrangements between public-sector employers and public-sector unions. *See, e.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Locke v. Karass*, 555 U.S. 207 (2009); *Friedrichs v. Cal. Tchrs. Ass'n*, 136 S. Ct. 1083 (2016) (per curiam) (equally divided Court affirming without opinion).

In light of *Abood*, Pennsylvania enacted a law allowing public-sector agency shop arrangements and authorizing unions that serve as exclusive representatives to collect fair-share fees. *See* 71 Pa. Stat. and Cons. Stat. Ann. § 575 (West 2020). Under section 575(b), "[i]f the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a [fair-share] fee." Fair-share fees could consist of normal dues minus "the cost for the previous fiscal year of [the union's] activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe[e] organization as exclusive representative." *Id.* § 575(a). The law also set forth the procedure by which fair-share fees would be deducted from non-member employees' paychecks, *see id.* § 575(c), and a procedure through which non-member employees could obtain information about how their fees were used, *see* § 575(d). If this information reflected any improper uses, non-members could challenge the fair-share fees. *See id.* § 575(e).

In 2018, the Supreme Court "overruled" *Abood*. *Janus I*, 138 S. Ct. at 2460. Holding that *Abood* "was poorly reasoned" and led to "practical problems and abuse," the Court

ruled that *Abood* was "inconsistent with other First Amendment cases" and was not entitled to continued precedential status. *Id.* The *Janus I* Court held that *Abood* had mischaracterized the government's interests in promoting "labor peace" and preventing "free-riders." *Id.* at 2465-70. Whereas the *Abood* Court had decided that those interests justified the fair-share fee laws' impingement on the union non-members' speech rights, the Court in *Janus I* stated that, instead, "'labor peace' can readily be achieved through means significantly less restrictive of associational freedoms," and that "avoiding free riders is not a compelling interest." *Id.* at 2466 (internal quotation marks and citations omitted).

Accordingly, "the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Id.* at 2467. State legislation allowing public-sector employers and public-sector unions to collect fair-share fees unconstitutionally forced non-members "to subsidize a union, even if they choose not to join and strongly object to positions the union takes in collective bargaining and related activities," and thereby compelled non-members "to subsidize private speech on matters of substantial public concern." *Id.* at 2459-60. On this basis, the Court ruled that "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486. Therefore, under *Janus I*, Pennsylvania's public sector agency shop law was no longer constitutional.[1]

[1] We assume without deciding that the right announced by the Supreme Court in *Janus I* is retroactive. *Janus v. AFSCME, Council 31*, 942 F.3d 352, 360 (7th Cir. 2019) ("*Janus II*")

B. Factual background

1. *Diamond* facts

Plaintiff Arthur Diamond and his six co-plaintiffs (the "Diamond Plaintiffs") are current or former teachers in Pennsylvania public schools. They were not members of the Pennsylvania State Education Association ("PSEA"), the union that exclusively represented their bargaining unit. But PSEA's collective bargaining agreement contained a fair-share clause that required they pay fair-share fees to either the union or to a union-approved nonreligious charity. *See* Diamond Appellants' Br. at 5 (citing D.A. 73-74). Only Diamond paid his fair-share fee to PSEA. *Id.* at 6. The other six Plaintiffs directed their fees to be diverted to nonreligious charities, though Sandra H. Ziegler did not identify a charity. *Id.* at 5-6. The fair-share fees were no longer collected after June 27,

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("Rather than wrestle the retroactivity question to the ground, we think it prudent to assume for the sake of argument that the *right* recognized" by the Supreme Court in *Janus I* is retroactive.); *Danielson v. Inslee*, 945 F.3d 1096, 1099 (9th Cir. 2019) ("[W]e will assume that the right delineated in [*Janus I*] applies retroactively and proceed to a review of available remedies."); *Lee v. Oh. Educ. Ass'n*, 951 F.3d 386, 389 (6th Cir. 2020) ("[T]he most prudent course of action is to assume without deciding that the right recognized in [*Janus I*] has retroactive application."). Even if *Janus I* is retroactive, the good faith defense may constitute a "previously existing, independent legal basis" for denying the Appellants' claims. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995).

2018, the date that the Supreme Court issued its decision in *Janus I*. A. 74, 93-96.

The Diamond Plaintiffs originally sued PSEA on the same theory as the plaintiffs in *Janus I*, but once the Supreme Court ruled in that case, the Diamond Plaintiffs amended their Complaint to seek repayment of the fair-share fees they had previously paid to their union. *See* Diamond Appellants' Br. at 6. PSEA moved to dismiss the amended complaint, arguing that because it had collected the fees in good faith reliance on a Pennsylvania statute and pre-*Janus I* Supreme Court precedent authorizing fair-share fees, they could not be held liable for monetary damages. *Id.* at 7. The District Court granted the motion to dismiss, ruling that because PSEA had relied on a prevailing state statute and federal caselaw, they were entitled to a good faith defense to § 1983 liability that barred the Diamond Plaintiffs' claims. D.A. 50-51. The Diamond Plaintiffs timely appealed. D.A. 1.

2. *Wenzig* facts

Janine Wenzig and Catherine Kioussis (the "Wenzig Plaintiffs") work for the Commonwealth of Pennsylvania. W.A. 8. Like the Diamond Plaintiffs, they were forced to pay fair-share fees to their union, the Service Employees International Union Local 668, without their consent. ***Id.*** Their bargaining unit's CBA contained the following provision:

> The Employer further agrees to deduct a [fair-share] fee from all compensation paid to all employees in the bargaining unit who are not members of the Union. Authorization from non-members to deduct [fair-share] fees shall not be

> required. The amounts to be deducted shall be certified to the Employer by the Union and the aggregate deductions of all employees shall be remitted together with an itemized statement to the Union by the last day of the succeeding month after such deductions are made.

Wenzig App. 42.

More than a year after *Janus I* was issued, the Wenzig Plaintiffs filed suit on behalf of themselves and a putative class of similarly situated employees to recover damages under § 1983 for the fair-share fees that they had paid to their union. *See* Wenzig Appellants' Br. at 3. They sought a declaratory judgment that the union's pre-*Janus I* collection of fair-share fees violated the First Amendment and repayment of all fair-share fees that were collected. W.S.A. 9.

The SEIU filed a motion to dismiss their claims, which the District Court granted. The District Court ruled the good faith defense shielded the union from monetary liability for collecting fair-share fees in good faith reliance on then-prevailing Supreme Court precedent. W.A. 16. The Wenzig Plaintiffs timely appealed, and their case was consolidated for argument and opinion with the Diamond Plaintiffs' case. W.A.1.

II

The District Courts had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291. We review the District Courts' judgments granting the Defendants' motions to dismiss *de novo. See, e.g.*,

Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 154 n.1 (3d Cir. 2014).

III

We are not the first court of appeals to rule on this question, and we join a growing consensus of our sister circuits who, in virtually identical cases, have held that because the unions collected the fair-share fees in good faith reliance on a governing state statute and Supreme Court precedent, they are entitled to a good faith defense that bars Appellants' claims for monetary liability under § 1983. *See Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019); *Lee v. Oh. Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020); *Ogle v. Ohio Civil Serv. Emps. Ass'n, AFSCME Local 11*, 951 F.3d 794 (6th Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020).

A. Private parties may assert a good faith defense to § 1983 liability.

42 U.S.C. § 1983 creates a cause of action for plaintiffs who are injured by a person who, acting "under color of any statute . . . of any State," causes the plaintiff to suffer "the deprivation of any rights, privileges, or immunities secured by the Constitution." Appellants assert that the Unions—acting under color of a Pennsylvania statute—caused them to be deprived of their First Amendment rights when the Unions collected fair-share fees from Appellants' paychecks.

In *Lugar v. Edmondson Oil Co.*, the Supreme Court held that § 1983 allows suits against private parties acting under

color of state law. 457 U.S. 922, 941 (1982). Under *Lugar*, a private party may be liable under § 1983 when the private-party defendant deprived the plaintiff of a constitutional right by exercising "a right or privilege having its source in state authority" and where the private-party defendant may be "appropriately characterized as [a] 'state actor[].'" *Id.* at 939.[2] But while the *Lugar* Court confirmed that private-party defendants may be subject to suit under § 1983, the Court also recognized a "concern" that its ruling could unfairly subject these private entities to liability even though the private parties had "innocently [made] use of seemingly valid state laws." *Id.* at 942 n.23.

Despite voicing this "concern," the Court in *Lugar* left open the question of whether private parties may avail themselves of immunity to suit. *Id.* In *Wyatt v. Cole*, the Supreme Court answered this question, ruling that immunity is reserved for governmental entities, not private parties subject to suit under § 1983. 504 U.S. 158, 168 (1992). The Court nonetheless noted—without explicitly ruling—that "principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability." *Id.* But the Court left the question of whether private-party defendants are entitled to a "defense based on good faith" for "another day." *Id.* at 169. Later, the

[2] Under *Lugar*, a private party may be appropriately characterized as a state actor where the private party "is a state official, . . . has acted together with or has obtained significant aid from state officials, or [where its] conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. Appellants do not challenge the Unions' statuses as state actors.

Supreme Court again alluded to, without adopting, this good faith defense. *See Richardson v. McKnight*, 521 U.S. 399, 414 (1997) ("Like the Court in *Wyatt*, . . . we do not express a view on [the good faith defense].").

We addressed this open question shortly after *Wyatt* was issued. In *Jordan v. Fox, Rothschild, O'Brien & Frankel*, we held that a "good faith defense is available" to private parties who act under color of state law and are sued for monetary liability under § 1983. 20 F.3d 1250, 1277 (3d Cir. 1994). We stated our "basic agreement" that "private defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." *Id.* at 1276 (citations omitted). We noted that good faith gives private defendants "a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity." *Id.* at 1277.[3]

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[3] In his concurrence, JUDGE FISHER suggests that a historical approach to the issue of good faith requires a complex analysis based on common law. He asserts that the various opinions in *Wyatt* imply "that any limitation on private-party liability must be grounded in the common-law approach." Fisher Op. at I.C. JUDGE PHIPPS similarly urges that the good faith defense should be available if and only if a "deeply rooted common-law tradition exists" to support it. *See* Phipps Op.

I can find no such implication, let alone any directive to that effect. Indeed, the point—the very narrow ruling—of the majority in *Wyatt* is that qualified immunity is uniquely a creature of common law to which private parties are not entitled. And the *Wyatt* concurrence's statement (which Judge Fisher quotes as the basis for this implication), that "[w]e may

not transform what existed at common law based on our notions of policy or efficiency," 504 U.S. at 171-72, did no more than provide support for the majority's reasoning rejecting an expansion of the concept of qualified immunity, and speaks not at all to the issue of the good faith defense or its contours.

JUDGE FISHER also suggests that my reading of *Jordan* is "expansive[]," Fisher Op. at II.B., and JUDGE PHIPPS "does not see a valid basis for recognizing such a defense," Phipps Op., but urges that, instead, our adoption of the good faith defense in *Jordan* was a "misnomer," *id.*

I disagree. In *Jordan*, we embraced the good faith defense and opined on the contours of its relatively modest requirements. 20 F.3d at 1275-77. We concluded that good faith gives private actors a defense that depends on their "subjective state of mind," *id*. at 1277, and looked to whether the private party acted with "malice" or "either knew or should have known of the statute's constitutional infirmity," *id*. at 1276. And I note that, importantly, in *Jordan*, we made no mention of the common-law approach. *Jordan* is controlling precedent as to the legal standard that we apply in this case.

And let us be clear: we are not talking about an across-the-board good faith defense to a § 1983 action that is inconsistent with the common law. Instead, we are talking about prohibiting monetary liability when a private-party defendant acted in good faith reliance on a statute enacted in accordance with binding Supreme Court precedent in a situation that has no exact analogue at common law. Doesn't the analogy to abuse of process in note 4 below—or, in its own way, JUDGE FISHER's intensive historical analysis—make that very point? *See also, e.g.*, *Janus II*, 942 F.3d at 365 (noting that no common law tort "is a perfect fit").

B. Appellants' § 1983 claims are barred by the Unions' good faith defense.

Jordan therefore established that the good faith defense is available to a private-party defendant in a § 1983 case if, after considering the defendant's "subjective state of mind," *id.* at 1277, the court finds no "malice" and no "evidence that [the defendant] either knew or should have known of the statute's constitutional infirmity," *id.* at 1276.

There was no such finding of malice or knowledge in *Jordan*, and, similarly here, Appellants have not asserted that either of these disqualifying factors is implicated. Indeed, as noted above, the Unions' collection of fair-share fees was authorized by over four decades of Supreme Court precedent and a Pennsylvania statute, 71 Pa. Stat. and Cons. Stat. Ann. § 575 (West 2020), that explicitly authorized fair-share fees for public-sector unions like the Unions. Accordingly, in this case, Appellants cannot possibly make any "showing of malice" or demonstrate that the Unions "either knew or should have known of [§ 575]'s constitutional infirmity." *Jordan*, 20 F.3d at 1276 (citation omitted). The Unions are therefore entitled to the good faith defense under *Jordan*.

This is not the huge jurisprudential leap that my colleagues urge. This is a reasonable way to afford private parties some of the protection that government actors are afforded when they act in a situation in which the existing state and federal law explicitly condoned their behavior. Do we need to chart a complex path to ensure that this underlying principle is recognized? We did not in *Jordan*, and we do not need to do so here.

Moreover, "principles of equality and fairness," *Wyatt*, 504 U.S. at 168, independently weigh in favor of the Unions being protected from suit. It is fair—and crucial to the principle of rule of law more generally—that private parties like the Unions should be able to rely on statutory and judicial authorization of their actions without hesitation or fear of future monetary liability. *Janus II*, 942 F.3d at 366 ("The Rule of Law requires that parties abide by, and be able to rely on, what the law *is* . . . ."); *Danielson*, 945 F.3d at 1105 (finding that the defendant unions did "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"); *Wholean*, 955 F.3d at 336 (noting that unions "cannot reasonably be deemed to have forecasted whether, when, and how *Abood* might be overruled" and holding that they "were entitled to rely on directly controlling Supreme Court precedent").

Appellants present numerous arguments that the good faith defense should not bar their claims against the Unions. First, Appellants urge us to rule that the good faith defense only applies to § 1983 suits that allege theories of liability for which the most analogous common law tort requires malice or probable cause. We decline to do so for several reasons. First, *Wyatt* applied this most analogous tort concept in considering the way courts have analyzed immunity from suit under § 1983. The *Wyatt* Court did not mention this concept in relation to the good faith defense and there is no reason to think that it would apply a historical immunity analysis to what it obviously considered to be a distinct good faith analysis. *See Wyatt*, 504 U.S. at 168. Other courts have concurred in this view. *See Danielson*, 945 F.3d at 1101 (observing that *Wyatt*'s discussion of the most closely analogous common law tort

"applies only to . . . qualified immunity" and not to the good faith defense); *Janus II*, 942 F.3d at 365 ("[T]he Supreme Court in *Wyatt* [] 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."); *Lee*, 951 F.3d at 392. In any event, because the legal basis for § 1983 immunity is distinct from the legal basis for the good faith defense, we see no independent reason to adopt the most analogous common law tort inquiry here. *See Danielson*, 945 F.3d at 1101 ("The rationales behind [immunity and the good faith defense], and their limitations, are not interchangeable."). Instead, as noted above, our decision is based on the "principles of equality and fairness" identified in *Wyatt*. 504 U.S. at 168.[4]

[4] We note that the Appellants did not urge (or even suggest) that we delve into the historical "common-law approach" with the level of historical detail and specificity that JUDGE FISHER's concurrence would require, so we need not consider it. Our sister circuits have construed what JUDGE FISHER refers to broadly as the "common-law approach" as a narrower most analogous common law tort approach, and, although they ultimately reject the idea that this approach should be incorporated into our analysis, they have uniformly determined that, even if we were to adopt this mode of analysis, abuse of process is the most analogous common law tort on these facts. *See Janus II*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1102; *Lee*, 951 F.3d at 392 n.2; *cf. Ogle*, 951 F.3d at 797. Abuse of process, which provides a "cause[] of action against private defendants for unjustified harm arising out of the misuse of governmental processes," *Wyatt*, 504 U.S. at 164, corresponds to the Unions' use of a Pennsylvania statute to collect fair-share

Next, Appellants cite numerous cases in which defendants who have taken money or property in violation of a plaintiff's constitutional rights have been required to disgorge or return the money or property. First, most of these cases involved government defendants, not private parties. But in addition, one of the main considerations in *Abood* was the benefit conferred on plaintiffs by the union activities. This has no role in the various cases cited by Appellants. But it does play a role when we are considering fairness because Appellants benefitted from the fair-share fees they paid. Thus, we are not disputing that a cause of action for return of money or property exists for Appellants. We are merely saying that principles of fairness make this situation different.

Third, Appellants urge that the good faith defense does not apply to claims for restitution, which they allegedly seek. But contrary to their urging, Appellants' claims do not constitute claims for restitution. "[R]estitution in equity typically involved enforcement of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016)

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fees through government employer payroll withholding. Abuse of process also requires a showing of malice and probable cause, which would support the availability of the good faith defense here. *Id*.; *see also Jordan*, 20 F.3d at 1275-77. So, although JUDGE FISHER's opinion goes well beyond an analogy to abuse of process in its "common-law approach," *see* Fisher Op. at II.B.-III.B., I would not go so far, even if I were to look to the common law for guidance on this issue.

(quotation marks and citation omitted). In contrast, where a plaintiff pursues a "personal claim against the defendant's general assets," then that plaintiff is seeking "a *legal* remedy, not an equitable one." *Id.* at 658. Appellants have not demonstrated that their lawsuit seeks recovery from anything more specific than the Unions' general assets, and therefore they fail to persuade us that they are suing for restitution. *See also Mooney*, 942 F.3d at 371 (finding that the plaintiff's claim was "[i]n substance . . . one for damages"); *Danielson*, 945 F.3d at 1102-03; *Lee*, 951 F.3d at 391.

Appellants next theorize that the Unions can only avoid liability—even if there is a good faith defense—if they acted appropriately to benefit Appellants as *Abood* reasoned. Thus, they urge that the District Courts should not have dismissed their claims without allowing discovery as to whether the Unions' conduct was consistent with what *Abood* required. But because Appellants have pled an entitlement to return of their money based on *Janus I*, not on the Unions' conduct, this argument falls flat. *See Danielson*, 945 F.3d at 1105 (noting that because plaintiffs' "claims arise from the [u]nion's reliance on *Abood*, not allegations that the [u]nion flouted that authority, the [u]nion need not show compliance with *Abood*'s strictures to assert successfully a good faith defense"); *Lee*, 951 F.3d at 392 ("[I]f Defendants improperly spent the fair-share fees, Plaintiff would have an independent *Abood* claim but it would not render the exaction of the fee an act in bad faith." (citation omitted)).

Finally, Appellants argue that an "entity"—as opposed to an "individual"—cannot invoke the good faith defense. But this argument is plainly contradicted by our ruling in *Jordan*, which made the good faith defense available to a law firm. *Jordan*, 20 F.3d at 1277; *see also Danielson*, 945 F.3d at 1100

(rejecting argument that only individuals may invoke the good faith defense). Appellants' argument that the good faith defense is incompatible with the text of § 1983 falls flat for the same reason: *Jordan* involved a § 1983 cause of action. *Jordan*, 20 F.3d at 1277.

IV

As Judge Wood noted in *Janus II*, the good faith defense to section 1983 liability is "narrow" and "only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute *and* unambiguous Supreme Court precedent validating that statute." 942 F.3d at 367. In this unique circumstance, the good faith defense applies here to protect the Unions from monetary liability under § 1983. Accordingly, we will affirm the District Courts' judgments.

Diamond v. Pa. State Educ. Ass'n, No. 19-2812
Wenzig v. Serv. Emps. Int'l, No. 19-3906

FISHER, *Circuit Judge*, concurring in the judgment.

In April 1871, Congress passed, and President Grant signed, an extraordinary act, variously called the Ku Klux Klan Act, Third Force Act, or Civil Rights Act of 1871. On its face, the first section of that act—what we now know as 42 U.S.C. § 1983—provided its violators no immunities from or defenses to liability. *See* Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13. Of course, the Supreme Court has since read immunities and defenses into § 1983, but it has done so principally on the conceit that they were available at common law in 1871, and implicitly incorporated into the statute. While this approach certainly limits the scope of liability, it also constrains judges from straying too far from the statutory text. In only one context has the Court invented a freestanding defense: the qualified immunity of certain state officials. Whatever might be said for that doctrine—and it is increasingly under scrutiny—I believe that the precedent of neither the Supreme Court nor our own Court warrants another divergence from the common-law approach in the present context. And however strongly considerations of equality and fairness might recommend such action, it is beyond our remit to invent defenses to § 1983 liability based on our views of sound policy. I must, therefore, respectfully disagree with the reasoning of JUDGE RENDELL's opinion announcing the Court's judgment.

Nevertheless, I concur in the affirmance of the District Courts' orders. There was available in 1871, in both law and equity, a well-established defense to liability substantially similar to the liability the unions face here. Courts consistently

held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision. Because this defense comports with the history and purposes of § 1983, I conclude that it is available to the unions here and supports the dismissal of the plaintiffs' complaints.

I

A

Section 1983 "cannot be understood in a historical vacuum." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Despite the statute's "general language," *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), creating a form of liability in law and equity that seemingly "admits no immunities," *Tower v. Glover*, 467 U.S. 914, 920 (1984), the Supreme Court has consistently construed § 1983 "in the light of common-law principles that were well settled at the time of its enactment," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Those principles "provide the appropriate starting point" for "defining the elements of damages [under § 1983] and the prerequisites for their recovery," *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978), including any available immunities and defenses, *see Pulliam v. Allen*, 466 U.S. 522, 529 (1984).

The paradigm application of this common-law approach has been the absolute immunity of legislators, judges, and certain other state officials. Congress, the Supreme Court has said, gave "no clear indication" in passing § 1983 that it "meant to abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *see also Bauers v. Heisel*, 361 F.2d 581, 587-88 (3d Cir. 1966) (en banc). As a result, when an official asserts absolute immunity, the Court has demanded "a

considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). This inquiry involves "consult[ing] the common law to identify those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed." *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012); *see also Burns v. Reed*, 500 U.S. 478, 484-86 (1991); *Imbler*, 424 U.S. at 422-24; *Pierson*, 386 U.S. at 553-54; *Tenney*, 341 U.S. at 376. While the scope of immunity at common law in 1871 does not exclusively define its scope under § 1983—the statute is not "simply a federalized amalgamation of pre-existing common-law claims," *Rehberg*, 566 U.S. at 366—the inquiry nevertheless remains grounded in historical analogy. Judges "do not have a license to create immunities based solely on [their] view of sound policy." *Id.* at 363.

Even when absolute immunity does not apply, the Court has still employed the common law approach. To "defin[e] the contours and prerequisites of a § 1983 claim," *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017), it has read the statute "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986). In particular, the Court has looked to "[t]he common-law cause of action . . . [that] provides the closest analogy to claims of the type considered" pursuant to § 1983. *Heck v. Humphrey*, 512 U.S. 477, 484 (1994); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). Yet here too, the elements and limitations of a § 1983 claim will not necessarily be co-extensive with the most analogous common-law cause of action. "Common-law principles are meant to guide rather than to control the

definition of § 1983 claims," and so "[i]n applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

B

The singular exception to this practice is the doctrine of qualified immunity. Early on, the Court did refer to the common law. In *Pierson*, which concerned common-law and § 1983 claims against police officers, the Court held that because "the defense of good faith and probable cause" was "[p]art of the background of tort liability[] in the case of police officers making an arrest," it was available to the officers in the § 1983 action as well as the common-law action. 386 U.S. at 556-57 (citing *Monroe*, 365 U.S. at 187). Soon, however, as it confronted cases involving other executive officials, the Court generalized this defense without regard to its common-law moorings. "[T]he relevant question" became "whether [the official] 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [the plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [the plaintiff].'" *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)); *see also Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

This drift culminated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), where "the Court completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson v. Creighton*, 483 U.S. 635, 645

(1987).[1] The Court abandoned any reference to a subjective good-faith standard, noting that such "[i]nquiries . . . can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. Instead, the question was now purely one of objective reasonableness, and it would apply "across the board," *id.* at 821 (Brennan, J., concurring) (citation omitted), to all "government officials performing discretionary functions," *id.* at 818 (majority opinion).

Yet even as it departed from the common-law model, the Court indicated its unwillingness to extend *Harlow*'s policy-based rationale to other contexts. "We reemphasize," it said in 1986, "that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition." *Malley v. Briggs*, 475 U.S. 335, 342 (1986); *see also Filarsky v. Delia*, 566 U.S. 377, 389 (2012) ("Nothing about the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule."). Outside of qualified immunity, the "general approach" remained the same: a court first determines "whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts"; if a sufficiently analogous counterpart exists, the court is then to "consider[] whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Malley*, 475 U.S. at 339-40 (citation omitted).

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[1] Although *Harlow* arose under the cause of action created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court saw no reason to distinguish between that context and § 1983, *see Harlow*, 457 U.S. at 818 n.30.

C

This background informs the context we confront in these cases—the far less developed area of private-party liability under § 1983. Any limitation on such liability should, as with official liability, "be dealt with . . . by establishing an affirmative defense." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 174 n.44 (1970) (citing *Pierson*, 386 U.S. 547). The Supreme Court has not, however, definitively stated what such a defense might be. Rather, in *Wyatt v. Cole*, 504 U.S. 158 (1992), it refused to apply *Harlow*-style qualified immunity to private parties sued under § 1983 for invoking a state replevin statute later declared unconstitutional. And that is where the doctrine remains. JUDGE RENDELL's opinion suggests that in rejecting the application of qualified immunity, *Wyatt* opened the door to another freestanding, judge-made defense. In my view, however, *Wyatt* stands for the proposition that the common-law approach must guide any limitation on private-party liability under § 1983.

The *Wyatt* defendants were private parties who invoked a Mississippi statutory procedure that obliged state officials, solely upon the declaration of the applicant, "to issue a writ of replevin for the seizure of the property described in [the] declaration." *Wyatt v. Cole*, 710 F. Supp. 180, 182 (S.D. Miss. 1989). The plaintiff, whose property had been seized, filed an action under § 1983 seeking damages and a declaratory judgment on the statute's constitutionality. The district court declared the statute unconstitutional but declined to hold the private defendants monetarily liable. *Id.* at 183. The Fifth Circuit affirmed, finding the defendants entitled to qualified immunity. *Wyatt v. Cole*, 928 F.2d 718, 721-22 (5th Cir. 1991) (per curiam).

In reversing, the Supreme Court distinguished between post-*Harlow* qualified immunity and a good-faith defense. The basic approach, the Court said, is the one grounded in the common law: whether the "parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871"; and, if so, whether "§ 1983's history or purpose counsel against applying [the immunity] in § 1983 actions." *Wyatt*, 504 U.S. at 164. The defendants in fact argued along these lines, claiming a defense under *Pierson* because they acted without malice and with probable cause. *Id.* at 165. The Court's response was telling: "Even if there were sufficient common law support to conclude that [the defendants] . . . should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified *immunity* from suit accorded government officials under *Harlow*." *Id.* As to that issue, the Court concluded that the "special policy concerns," articulated in *Harlow*, that "mandat[e] qualified immunity for public officials are not applicable to private parties." *Id.* at 167.

For present purposes, this holding has two relevant implications. First, contrary to what some of our sister circuits have said, the Court in *Wyatt* made no suggestion that the common-law approach applies only in the context of immunity and not in the context of a good-faith defense. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 365-66 (7th Cir. 2019) (*Janus II*); *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 391-92 (6th Cir. 2020). In fact, the implication was precisely the opposite: "we do not foreclose the possibility," the Court wrote, "that private defendants . . . could be entitled to an affirmative defense based on good faith and/or probable cause." *Wyatt*, 504 U.S. at 169. That is the same defense *Pierson* recognized, explicitly deriving it by analogy from the

common law. It was also the argument that the defendants in *Wyatt* made before the Court, but which was "of no avail" because it was neither sought nor ruled upon in the lower courts. *Id.* at 165. And, accordingly, it was the basis of the Fifth Circuit's recognition of a good-faith defense on remand. *See Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993) (*Wyatt II*).[2]

Second, in declining to extend qualified immunity to private-party defendants, the Court did not imply, as today's opinion announcing our judgment holds, *see* Rendell Op. at III.B, that alternative policy grounds might supply an affirmative defense.

> Although principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion.

Wyatt, 504 U.S. at 168. Rather than open the door to an independent defense based on "principles of equality and fairness," this statement asserts that, at least in the context of private-party § 1983 defendants, equality and fairness

[2] Moreover, the distinction between immunities and defenses is potentially misleading because qualified immunity is itself "an affirmative defense that must be pleaded by a defendant official." *Harlow*, 457 U.S. at 815 (citing *Gomez v. Toledo*, 446 U.S. 635 (1980)). As I note above, the relevant distinction in *Wyatt* is between *Harlow*-style qualified immunity and a good-faith defense based on the common-law approach.

considerations are not significant enough in themselves to warrant divergence from the common-law model in the manner of *Harlow*. Those concerns "may be well founded," but courts "do not have a license to establish immunities from § 1983 actions in the interests of what [they] judge to be sound public policy." *Tower*, 467 U.S. at 922-23.

Justice Kennedy's concurrence in *Wyatt*, joined by Justice Scalia, underlines both of these points. "Our immunity doctrine," he wrote, "is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choices.'" *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring) (alteration omitted) (quoting *Malley*, 475 U.S. at 342). Although *Harlow* "depart[ed] from history in the name of public policy," Justice Kennedy joined the Court's opinion in resisting "exten[sion] [of] that approach to other contexts." *Id.* at 171. "[W]e may not transform what existed at common law based on our notions of policy or efficiency." *Id.* at 171-72. The implication is that any limitation on private-party liability must be grounded in the common-law approach.

Justice Kennedy then went further than the Court in laying out what such an inquiry, at least on the *Wyatt* facts, should look like. All of the Justices, including those in dissent, accepted that at common law in 1871 the tort actions "most closely analogous" to the *Wyatt* action were "malicious prosecution and abuse of process." *Id.* at 164 (majority opinion); *see id.* at 172 (Kennedy, J., concurring); *id.* at 176 (Rehnquist, C.J., dissenting). Both torts required the plaintiff to prove that the defendant acted with malice and without probable cause. *Id.* at 166 n.2 (majority opinion); *id.* at 172 (Kennedy, J., concurring); *id.* at 176 n.1 (Rehnquist, C.J., dissenting). For Justice Kennedy, proof of "subjective bad faith on the part of the defendant"—rather than an objective standard—went "far towards proving" both elements. *Id.* at

173 (Kennedy, J., concurring). "[T]here is support in the common law," he observed, "for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; and therefore under the circumstances of this case, lack of probable cause can *only* be shown through proof of subjective bad faith." *Id.* at 174 (citing *Birdsall v. Smith*, 122 N.W. 626, 627 (Mich. 1909)). Further, five Justices agreed that a "good-faith defense" in this context represented both the plaintiff's burden to prove the elements of the offense and, relatedly, the defendant's opportunity to avoid liability by showing good faith. *See id.* at 175; *id.* at 176 n.1 (Rehnquist, C.J., dissenting).

II

Under *Wyatt*, then, any defense to private-party liability under § 1983 must derive from the common-law approach and may not rest on freestanding policy grounds. The next question is whether the defense suggested there—whether the defendant acted with malice and without probable cause—is context dependent or applies categorically to all cases involving private-party defendants. Only the former view is faithful to the common-law approach; the latter, like the Supreme Court's qualified-immunity standard in cases such as *Procunier*, *O'Connor*, and *Wood*, generalizes a subjective good-faith defense, unmooring it from its common-law origins. JUDGE RENDELL's opinion, in addition to its policy-based holding, takes this latter view, relying upon our decision in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994). *See* Rendell Op. at III.A-B. On my reading, however, *Jordan* did not announce a categorical rule, and so we must conduct an independent inquiry based on the common-law approach. And on that score, I think that instead of determining whether a pre-1871 tort is sufficiently analogous, resolution on

an alternative ground, also based in the common-law approach, is preferable.

A

Lugar and *Wyatt* both concerned "private defendants charged with 42 U.S.C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional." *Wyatt*, 504 U.S. at 159. So too did *Jordan*. Pursuant to a cognovit clause in a commercial real estate lease, the defendants obtained and executed a confessed judgment against the plaintiffs in state court. *Jordan*, 20 F.3d at 1258. Along with their complaint, the defendants invoked a Pennsylvania procedure that required the prothonotary of the court to issue a writ ordering the court's sheriff to garnish the plaintiffs' bank account. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 787 F. Supp. 471, 473-74 (E.D. Pa. 1992) (*Fox Rothschild*). The law required neither pre-deprivation notice nor issuance of a writ of service, and indeed the plaintiffs received notice only after the seizure. *Id.* Unsurprisingly aggrieved, the plaintiffs thereafter sought, among other things, a declaratory judgment that the Pennsylvania procedure was unconstitutional and damages under § 1983.

The district court held that the post-judgment garnishment phase of the procedure violated due process, *id.* at 477-78, but it dismissed the § 1983 action, determining that the defendants were entitled to qualified immunity, *id.* at 479-80. While the case was pending on appeal, however, the Supreme Court decided *Wyatt*. Our question, then, was whether the defendants were entitled to a good-faith defense. *Jordan*, 20 F.3d at 1276. We held that they were, declaring ourselves "in basic agreement" with the Fifth Circuit's holding on remand in *Wyatt* that "[p]rivate defendants should not be held liable under § 1983 absent a showing of malice and evidence that they

either knew or should have known of the statute's constitutional infirmity." *Id.* (quoting *Wyatt II*, 994 F.2d at 1120).

In my view, *Jordan*'s holding is best read as limited to the context before it. Immediately after announcing our agreement with the Fifth Circuit, we clarified that by "malice" we had in mind "a creditor's subjective appreciation that its act deprives the debtor of his constitutional right to due process." *Id.* To support this standard, we cited Justice Kennedy's reference, in his *Wyatt* concurrence, to *Birdsall v. Smith*. *Id.* at 1276 n.30. That case concerned a malicious-prosecution action brought by a milk vendor who had been charged, solely on the basis of a report filed with state officials, under a state statute later declared unconstitutional. *See* 122 N.W. at 626-27. We also referred to "Pennsylvania cases that place state law limitations on the use of judgment by confession" because we thought they may "sometimes be relevant on the good faith issue." *Jordan*, 20 F.3d at 1277. This all suggests that we had in mind the factual circumstances of the immediate case—circumstances essentially similar to those of *Lugar* and *Wyatt*.

B

Because *Jordan* cannot be read as expansively as JUDGE RENDELL's opinion suggests, the proper question is whether the abuse-of-process and malicious-prosecution torts, from which the *Wyatt* defense is derived, are sufficiently analogous to the present action, such that our recognition of that defense in *Jordan* is applicable here. For their part, our sister circuits that have confronted the question have so far uniformly concluded that those torts do provide the best analogy. *See, e.g.*, *Janus II*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1102; *Lee*, 951 F.3d at 392 n.2. I think that view is worth questioning,

at least to the extent that it supplies the unions a good-faith defense here.

In both *Wyatt* and *Jordan*, the private-party defendants invoked a generally available state procedure. Upon the defendants' independent initiative, state officials were compelled to seize or garnish property of the plaintiffs. That mandate was what rendered the state laws unconstitutional in each case. *See Fox Rothschild*, 787 F. Supp. at 477-78; *Cole*, 710 F. Supp. at 183. Here, Pennsylvania law required the public employer to deduct the fair-share fee from the nonmembers' paychecks, if the collective-bargaining agreement so provided. Yet (and this is the key difference) the agreements triggering collection of the fees were not the fruit of the unions' independent initiative—the relevant public employer was a party to them and necessarily had to agree to them. *See* 71 Pa. Stat. § 575(b)-(c); *see also* 43 Pa. Stat. § 1101.901 (the collective-bargaining agreement is "between the representatives of the public employes and the public employer"). And the collection of the fees—the compelled subsidization of speech—was the constitutional violation. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464, 2478 (2018).

Thus, the relevant state action in our cases stems not merely from the involvement of state officials in unconstitutional conduct, *see Lugar*, 457 U.S. at 941, but also, to some extent, from the command or express authorization of the state to engage in that conduct, *see Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). From this perspective, the torts of abuse of process and malicious prosecution provide at best attenuated analogies. It seems apparent that we are not dealing here simply with a civil "process . . . willfully made use of for a purpose not justified by the law," Thomas M. Cooley, *A Treatise on the Law of Torts* 189 (1876), let alone "the

malicious institution of a civil suit," *id.* at 187. Insofar as the state establishes a law's justified purposes, we confront the use of a procedure for a purpose that the state in part set.[3]

It may be, as the Seventh Circuit observed in *Janus II*, that abuse of process and malicious prosecution are the *most* analogous torts, however imperfect the analogy. *See* 942 F.3d at 365. But it does not necessarily follow that they therefore supply the basis of a defense. By that logic, a defense is potentially always available, no matter how attenuated the connection between the common-law cause of action and the injury alleged. We must remember that "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims." *Manuel*, 137 S. Ct. at 921. True commitment to the common-law approach may eventually require deciding where to draw the line between analogous and non-analogous causes of action. But at least in this case, I find it unnecessary to do so.

In what follows, I describe an alternative basis for a defense, well established at both common law and equity in 1871, and providing a closer similarity to the facts that we confront. Resolving these cases on this ground would both avoid the knotty problems raised by a most-analogous-tort test and preserve the notion, accepted by six Justices in *Wyatt*, that *Harlow* was an exception that should not swallow the common-law rule. Indeed, in my view, that latter benefit is especially compelling, given the recent cogent critiques of

[3] It follows from this argument that the parties' other proposed torts—conversion, defamation, tortious interference with contract, and intentional infliction of emotional distress—are also insufficiently analogous. Their elements are even further afield than those of abuse of process and malicious prosecution.

qualified immunity as incongruent with the principles of statutory interpretation. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018).

III

"An unconstitutional act is not a law; . . . it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). Derived from the common law, *see Robinson v. Neil*, 409 U.S. 505, 507 (1973), this principle from the late nineteenth century was premised on the then-prevalent legal theory that judges "find" or "declare" rather than "make" law, *see Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370 (1910) (Holmes, J., dissenting). That theory fell out of fashion in the early twentieth century, but the *Norton* principle nevertheless proved remarkably influential. *See, e.g.*, *Ex Parte Young*, 209 U.S. 123, 159 (1908). Most notably, it underlies the Supreme Court's more recent retroactivity jurisprudence—and thus the plaintiffs' theory of liability in the present cases. *See Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 95-97 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (opinion of Souter, J.); *Griffith v. Kentucky*, 479 U.S. 314, 326-29 (1987).

Yet there was a contemporaneous exception to this general view, in which a judicial decision either voiding a statute or overruling a prior decision does not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision. *See, e.g.*,

Benjamin N. Cardozo, *The Nature of the Judicial Process* 146-47 (1921); Oliver P. Field, *The Effect of an Unconstitutional Statute* 221-28 (1935); Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 Harv. L. Rev. 1403 (1934). An assessment of the cases applying this exception demonstrates its applicability in the present context.

The exception appears to have developed as a sort of corollary to originally English legal and equitable doctrines. One such doctrine is that voluntary payments made upon an illegal demand are not recoverable except where the payments were made under an immediate and urgent necessity. *See, e.g.*, Valpy v. Manley (1845), 135 Eng. Rep. 673, 677; 1 C. B. 594, 602-03 (Tindal, C.J.) (citing and quoting Fulham v. Down (1798), 170 Eng. Rep. 820 n.; 6 Esp. 26 n. (Kenyon, C.J.)); Brisbane v. Dacres (1813), 128 Eng. Rep. 641, 645; 5 Taunt. 143, 152 (Gibbs, J.). Another is that money paid pursuant to a contract may not be recovered if the contract was formed under a mutual mistake of law. *See, e.g.*, Bilbie v. Lumley (1802) 102 Eng. Rep. 448, 449-50; 2 East 469, 472. Although nineteenth-century American courts straightforwardly applied these doctrines in the contexts in which they originated, *see, e.g.*, *Bank of U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 55-56 (1838); *Hunt v. Rhodes*, 26 U.S. (1 Pet.) 1, 15 (1828); *Sprague v. Birdsall*, 2 Cow. 419, 421 (N.Y. Sup. Ct. 1823), they also invoked them when confronting the effects of the practice of judicial review. Two lines of cases—one at law, the other in equity—are especially notable.

A

At common law, money extracted illegally by taxes or fees could be recovered through an action of assumpsit. *See, e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* *158-59 (describing as a form of assumpsit an action

to recover tax or fee payments to a government or other body of which one is a member).[4] As noted, in *Janus* the unconstitutional act was the compelled subsidization of speech through the payment of the fair-share fees. The plaintiffs here seek a repayment of the fees they paid prior to *Janus* and whose extraction only became illegal as a result of that decision. Several pre-1871 state cases address a similar situation, where repayment of a tax, fee, or other expenditure is sought when the law or court decision under which it was made is declared unconstitutional or overruled. The courts in these cases developed a limitation on such liability, uniformly barring repayment where the initial expenditure was made voluntarily and without duress.

The most succinct formulation of this doctrine came in an 1846 decision of the Maryland high court:

> It is now established, by an unbroken series of adjudications in the *English* and *American*

[4] Although the Supreme Court has often referred specifically to tort law when enunciating the common-law approach to § 1983 immunities and defenses, it has never suggested that application of that approach is limited to tort, rather than contract, law where the latter is most applicable. Moreover, the assumpsit action was in fact a form of the writ of trespass on the case—the fountainhead of modern tort law—that officially came to supplant actions in debt due to the institutional rivalry of the Courts of Common Pleas and King's Bench. *See* David Ibbetson, *Sixteenth Century Contract Law:* Slade's Case *in Context*, 4 Oxford J. Legal Stud. 295 (1984). Assumpsit treats misperformance or nonperformance of an implied agreement as a tort-like wrong. *See* John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 252 (2009).

> courts, that where money is voluntarily and fairly paid, with a full knowledge of the facts and circumstances under which it is demanded, it cannot be recovered back in a court of law, upon the ground, that the payment was made under a misapprehension of the legal rights and obligations of the party.

City of Baltimore v. Lefferman, 4 Gill 425, 431 (Md. 1846). The operative legal fiction—consistent with the Supreme Court's later statement in *Norton*—is that a statute or ordinance subsequently declared unconstitutional is void even at the time the money is transacted pursuant to it, thus creating the "misapprehension." The burden, however, is on the *payor* to establish more than mere reliance on the law's presumptive validity. As the California Supreme Court put it: "The illegality of the demand paid constitutes of itself no ground for relief. There must be in addition some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment." *Brumagim v. Tillinghast*, 18 Cal. 265, 266 (1861). The payment, according to the Ohio Supreme Court, "can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it." *Mays v. City of Cincinnati*, 1 Ohio St. 268, 278 (1853). Simply because the law was assumed valid at the time of the payment, and therefore that non-payment might result in legal enforcement proceedings, was not enough. *See Town Council of Cahaba v. Burnett*, 34 Ala. 400, 404 (1859); *see also Town of Ligonier v. Ackerman*, 46 Ind. 552, 559 (1874), *overruled in part on other grounds by Jennings v. Fisher*, 2 N.E. 285, 288 (Ind. 1885).

The Pennsylvania Supreme Court at midcentury also adopted this general doctrine. *See Taylor v. Phila. Bd. of Health*, 31 Pa. 73, 75 (1855); *Borough of Allentown v. Saeger*, 20 Pa. 421 (1853). In *Saeger*, the Court stated in dictum that "[i]f [the money] had been paid under protest, that is, with notice that [the payor] would claim it back, this would repel the implication of an assent, and give rise to the right of reclamation." 20 Pa. at 421. It is unclear, however, if this standard required the payor actually to bring the threatened legal action. Other courts were more explicit in imposing this requirement. *See, e.g.*, *Burnett*, 34 Ala. at 405 ("[T]he case is not altered by the fact, that the party so paying protests that he is not answerable, and gives a notice that he shall bring an action to recover the money back. *He has an opportunity in the first instance to contest th[e] claim at law*." (quoting *Benson v. Monroe*, 61 Mass. (7 Cush.) 125, 131 (1851))).[5]

Finally, although the United States Supreme Court did not, during this period, have a factually similar case, it did approvingly recite this doctrine in analogous situations. For example, in an 1877 case involving payments to Confederate

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[5] The Alabama Supreme Court's adoption of *Benson*'s language is significant. *Benson*, also an assumpsit action, more nearly approximates abuse of process because the plaintiffs, who were ship owners, only paid after their vessel was attached. Nevertheless, the Massachusetts Supreme Judicial Court still denied recovery. The plaintiffs had the choice of either paying or litigating. *Benson*, 61 Mass. at 131. *Burnett*'s importation of *Benson*'s standard suggests the similarity between the sort of cases described here and abuse-of-process situations (though still litigated in assumpsit). It suggests the closeness of this rule to the one *Wyatt* suggested and our Court adopted in *Jordan*.

officials for the right to export cotton, the Court said that to "justify an action against [the payees], either for the return of the money paid . . . or for damages of any kind," "the doctrine established by the authorities is[] that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.'" *Radich v. Hutchins*, 95 U.S. 210, 212-13 (1877) (quoting *Lefferman*, 4 Gill. at 436, and citing *Brumagim*, 18 Cal. at 265; and *Mays*, 1 Ohio St. at 268); *see also Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 153-55 (1836). This voluntariness rule remains the applicable standard. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 38 n.21 (1990).

B

The doctrine was also applied in equitable actions, usually involving not the payment of a tax or fee, but rather a financial transaction between private parties. Its most well-known enunciation was by Chancellor Kent in 1815: "A subsequent decision of a higher Court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and overturn such settlement." *Lyon v. Richmond*, 2 Johns. Ch. 51, 60 (N.Y. Ch. 1815), *rev'd on other grounds*, *Lyon v. Tallmadge*, 14 Johns. 501 (N.Y. 1817). In addition to general policy grounds, the key principle was, again, that parties may not be relieved of "acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law." *Id.*; *see also Shotwell v. Murray*, 1 Johns. Ch. 512, 515-16 (N.Y. Ch. 1815). Later state equity courts adopted or followed this doctrine, *see, e.g.*, *Doll v. Earle*, 59 N.Y. 638, 638 (1874); *Hardigree v. Mitchum*, 51 Ala. 151, 155-56 (1874); *Harris v. Jex*, 55 N.Y. 421, 424 (1874); *Kenyon v. Welty*, 20 Cal. 637, 642 (1862), as did at least one

federal court, *see In re Dunham*, 8 F. Cas. 37, 38-39 (D.N.J. 1872).

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When Congress in 1871 enacted the law that became § 1983, it was well established at both law and equity that court decisions that invalidated a statute or overruled a prior decision, and thereby affected transactional relationships—between private parties and government officials or representatives, or between private parties alone—established in reliance on that statute or decision, did not generate civil liability for repayment except where duress or fraud was present. Whatever the nature of the state action in the present cases—whether the state "act[ed] jointly with" the unions or "compel[led] the [unions] to" collect the fees, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019)—the factual circumstances underlying this doctrine bear a substantial similarity to those we confront here. Therefore, in my view the doctrine constitutes "a previously existing, independent legal basis" sufficient to limit the unions' liability under § 1983. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995).[6] I know of no authority on "§ 1983's history or purposes" that might "counsel against" recognition of this defense, *Tower*, 467 U.S. at 920, and the consistency of its application in law and equity safely permits the conclusion that Congress did not wish to "impinge" on it "by covert inclusion

[6] The *Diamond* appellants argue strenuously that this is a case of restitution. Even if it is, every case upon which they rely can be explained according this doctrine. Moreover, they cite cases only from the mid-twentieth century or later. There is no suggestion that the principle they claim was established in 1871. The reverse, in fact, seems to be the case.

in the general language" of § 1983, *Tenney*, 341 U.S. at 376.

IV

It may be tempting, in cases like the present, to read precedent broadly, or appeal to freestanding principles such as the rule of law and basic notions of fairness. But we must interpret and apply § 1983 as we would any other statute, always prepared for the faithful execution of that duty to result in a seemingly extreme outcome. For even when that does not occur, there is value in adhering to the well-established principles of interpretation.

Because the plaintiffs in these cases have not pleaded any facts, suggesting that their payments were either sufficiently involuntary or exacted on a fraudulent basis,[7] to permit a reasonable person to infer that the unions might be liable, I concur in the affirmance of the orders granting the unions' motions to dismiss.

[7] JUDGE PHIPPS asserts that, even accepting the standard I adopt here, the plaintiffs' payments were not voluntary. I think it apparent that none of the plaintiffs have pleaded anything approaching the kind of involuntariness or duress articulated in the cases I discuss.

Diamond v. Pa. State Educ. Ass'n, No. 19-2812
Wenzig v. Serv. Emps. Int'l, No. 19-3906

PHIPPS, *Circuit Judge*, dissenting.

The central question presented in these consolidated cases, which seek recovery of agency fees garnished from the wages of non-union members, is whether a good faith affirmative defense exists to a First Amendment compelled speech claim under 42 U.S.C. § 1983. I do not see a valid basis for recognizing such a defense. A good faith affirmative defense was not firmly rooted in the common law in 1871 when § 1983 was enacted, and nothing else compels recognition of such a defense today. For that reason, I would reverse the orders dismissing these cases and remand them for further proceedings.

My colleagues see it differently. Judge Rendell recognizes such a defense from precedent and out of consideration of "principles of equality and fairness." Rendell Op. at III.B. In concurring in the judgment only, Judge Fisher does not rely on a good faith defense. Instead, from an examination of pre-1871 common law, he identifies another limitation on the § 1983 cause of action: it may not be used to collect voluntary payments. *See* Fisher Op. at III.A. I disagree with these perspectives and respectfully dissent.

The Supreme Court has articulated standards for supplementing the plain text of § 1983, which itself identifies no immunities or defenses. Such supplementation requires a tradition "so firmly rooted in the common law and . . . supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the

doctrine.'" *Owen v. City of Independence*, 445 U.S. 622, 637 (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). Even if such a deeply rooted common-law tradition exists, that will still not permit supplementation of § 1983 in a manner inconsistent with the statute's history or purpose. *See Wyatt v. Cole*, 504 U.S. 158, 164 (1992) ("[I]rrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions.").

I. A GOOD FAITH DEFENSE WAS NOT FIRMLY ROOTED IN THE COMMON LAW IN 1871 WHEN CONGRESS ENACTED § 1983.

The specific inquiry here focuses on whether a good faith defense was firmly rooted in the common law in 1871. But as an initial point of reference, the good faith affirmative defense is not firmly rooted in the common law today – either generally or for any specific cause of action.

In articulating 18 affirmative defenses that must be raised in a responsive pleading, Rule 8(c) of the Federal Rules of Civil Procedure does not include good faith. *See* Fed. R. Civ. P. 8(c). The rule's listing is not exhaustive, and leading treatises supplement those 18 listed defenses, but those treatises do not identify a common-law good faith affirmative defense. *See, e.g.*, Arthur R. Miller et al., Federal Practice and Procedure § 1271 (3d ed., Apr. 2020 Update) (recognizing no common-law good faith affirmative defense); 2 Jeffrey A. Parness, Moore's Federal Practice § 8.08 (3d ed. 2020) (listing affirmative defenses, such as immunities, but not including good faith). If a good faith affirmative defense were deeply rooted in the common law, such as defenses like statute of

limitations, laches, or accord and satisfaction, then one would expect to find it listed in Rule 8(c) – or at least to make a showing in a leading treatise.

Similarly, a review of other statutory causes of action reveals that Congress has not understood good faith to be so deeply rooted as to go unspoken. Rather, when Congress wants to include good faith as an affirmative defense, it does so expressly.[1] And that begs the question: if the good faith defense were so well established that it could be assumed "that Congress [in enacting § 1983] would have specifically so provided had it wished to abolish the doctrine," then why did Congress find the need to expressly provide for the defense in many other statutes but not in § 1983? *Pierson*, 386 U.S. at 555.

In sum, the *absence* of a good faith affirmative defense from Rule 8(c) along with its *presence* as a defense in other federal statutes suggests that today the good faith affirmative defense is not firmly rooted in the common law.

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[1] *See, e.g.*, 15 U.S.C. § 78r (providing a good faith defense to securities fraud); 15 U.S.C. § 1115(b) (providing a good faith defense to trademark infringement); 15 U.S.C. §§ 1640, 1691e(e), 1692k(e), 1693m(d) (providing a good faith defense to claims related to consumer credit protection); 16 U.S.C § 1540(a)(3), (c)(3) (providing a good faith defense to certain claims under the Endangered Species Act); 29 U.S.C. § 259(a) (providing a good faith defense to certain claims under the Fair Labors Standards Act); 29 U.S.C. § 2617(a)(1)(iii) (providing a good faith defense to a liquidated damages claim under the Family Medical Leave Act).

That conclusion, of course, is not dispositive – it could be that a good faith affirmative defense was deeply entrenched in the common law in 1871 but has lost traction over time. *But cf*. Fed. R. Civ. P. 8(c) (continuing to identify the virtually obsolete affirmative defense of injury to fellow servant). To make such a showing would require proof similar to that adduced in *Tenney v. Brandhove*, 341 U.S. 367 (1951), wherein the Supreme Court determined that legislative immunity applied to § 1983 claims. *See id.* at 377-78. In reaching that conclusion, the Supreme Court relied on evidence of that immunity dating back to sixteenth and seventeenth century English law, provisions of the Articles of Confederation and the Constitution, as well as protections specifically articulated in 41 of the then 48 admitted States. *See id*. at 372-76.

By contrast no such evidence is present here. No party identifies a pre-1871 case recognizing a common-law good faith affirmative defense – either as a general matter or in the context of any particular cause of action. Judge Rendell's opinion does not identify any common-law basis for such a defense. Nor do any of the other courts applying a good faith defense to agency fee cases identify any grounding in common law for such an affirmative defense.[2]

[2] *See Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 334-36 (2d Cir. 2020); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Ogle v. Ohio Civil Serv. Emps. Ass'n, AFSCME Local 11*, 951 F.3d 794, 797 (6th Cir. 2020) (per curiam); *Danielson v. Inslee*, 945 F.3d 1096, 1102 (9th Cir. 2019); *Janus v. Am. Fed. of State, Cty. & Mun. Emps., Council 31*, 942 F.3d 352, 364 (7th Cir. 2019) (finding "no common-

The strongest case for such a defense comes from Chief Justice Rehnquist's dissenting opinion in *Wyatt v. Cole*. There, he viewed the good faith defense as "something of a misnomer" because it actually referred to elements of the common-law torts of malicious prosecution and abuse of process. 504 U.S. 158, 176 & n.1. That perspective is telling. Chief Justice Rehnquist identified no authority for the proposition that good faith functions as a transsubstantive affirmative defense – applicable across a broad class of claims, such as the defenses of accord and satisfaction, laches, and res judicata. *See id.* at 175-80. Nor did his dissenting opinion recognize good faith as a claim-specific affirmative defense, such as the defenses of assumption of risk, contributory negligence, or duress. *See id.* At most, Chief Justice Rehnquist determined that the elements of two common-law tort claims could be defeated by proof of subjective good faith. *See id.* at 176 & n.1.

Judge Fisher picks up on that theme. From an examination of the common law, he concludes that in 1871 no cause of action allowed for later recovery of voluntary payments. *See* Fisher Op. at III.A. But unlike the cases he relies upon, the agency fee payments at issue here were not voluntary – they were wage garnishments that were paid to unions.[3] More fundamentally, Judge Fisher's approach is

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law history before 1871 of private parties enjoying a good-faith defense to constitutional claims").

[3] *See* 71 Pa. Stat. and Cons. Stat. Ann. § 575(c) (West 1988) (requiring employers to garnish wages for fair-share agency fees for transmittal to unions); *see also* Wenzig Compl. ¶¶ 9-10 (Wenzig App. 42) (alleging that non-union members were

analogous to the one that the Supreme Court did not adopt in *Wyatt* – which prompted Chief Justice Rehnquist's dissent. Section 1983 created a new statutory cause of action, not one pre-defined by the common law. Thus, it is immaterial that no pre-1871 cause of action permitted recovery for voluntary payments that were subsequently declared unconstitutional: the Civil Rights Act of 1871 established a new cause of action in part to provide "a remedy where state law was inadequate." *Monroe v. Pape*, 365 U.S. 167, 173 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1977).

For these reasons, I do not see the common law as limiting the scope of a § 1983 claim for compelled speech – either through a good faith affirmative defense or through a separate limitation on the statutory cause of action.

II. BOTH THE HISTORY AND THE PURPOSE OF § 1983 COUNSEL AGAINST RECOGNITION OF A GOOD FAITH AFFIRMATIVE DEFENSE.

For completeness, even supposing that the common law did recognize good faith as an affirmative defense in 1871, more would be required. Before a deeply rooted affirmative

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"forced to pay" fair-share agency fees and that those fees were deducted from nonmembers' wages "without their consent"); Diamond Second Am. Compl. ¶ 24 (Diamond App. 74) (alleging that the class representatives were "compelled . . . to pay a financial penalty for exercising their constitutional right to not join a union"), ¶ 39 (Diamond App. 77) (defining the putative class as persons who were "compelled to pay money . . . as a condition of employment").

defense can apply to a § 1983 action, it must also be "supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Owen*, 445 U.S. at 637 (internal quotation marks omitted). Put differently, a common-law defense will not be read into § 1983 when it is inconsistent with the history or the purpose of § 1983. *See Wyatt*, 504 U.S. at 164. And neither the history nor the purpose of § 1983 supports the recognition of good faith as an affirmative defense for violations of every constitutional right.

A good faith defense is inconsistent with the history of the Civil Rights Act of 1871. As the Supreme Court has explained, that statute is predicated on the understanding that "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, *whether they act in accordance with their authority* or misuse it." *Monroe*, 365 U.S. at 171-72 (emphasis added). As this statement makes clear, the history behind the Civil Rights Act, which Congress enacted pursuant to the Enabling Clause of the Fourteenth Amendment,[4] demonstrates the need to remedy actions taken *in accordance with state law*. And thus a good faith affirmative defense – that a state actor was merely following state law – is an especially bad fit as an atextual addition to § 1983.

[4] *See* Civil Rights Act of 1871, Pub. L. 42-22, 17 Stat. 13, 13 (Apr. 20, 1871) (entitling the legislation as "[a]n Act to enforce the [p]rovisions of the Fourteenth Amendment . . . and for other [p]urposes").

Nor can a good faith affirmative defense be reconciled with the purpose of the Civil Rights Act of 1871. The Supreme Court has identified "three main aims" for § 1983. *Monroe*, 365 U.S. at 173. Those were (i) "to override certain kinds of state laws"; (ii) to provide "a remedy where state law was inadequate"; and (iii) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id*. at 173-74. Each of those purposes reflects a dissatisfaction with the redress provided by state law for constitutional violations. It would seem, then, that state law would be the last place to look for limitations on the redress § 1983 allows – the whole point of the statute was to overcome the limitations of state law. Thus, absent some foundation in federal law, incorporating a defense rooted only in state common law into § 1983 is inconsistent with the purpose of that statute.

The later enactment of § 1988 also supports this conclusion. There, Congress allowed for consideration of state common law, but only to *supplement* "deficienc[ies] in the provisions necessary to furnish suitable remedies and punish offenses against law." 42 U.S.C. § 1988. That is quite different than looking to state common law to *limit* the remedies permitted by § 1983.

Thus, even if it were firmly entrenched in the common law, a good faith affirmative defense should not be grafted onto the text of § 1983 – either as a transsubstantive defense (such as accord and satisfaction or res judicata) or a cause-of-action specific defense (such as assumption of the risk or duress).

III. THE ROLE OF GOOD FAITH IN § 1983 LITIGATION DOES NOT RISE TO THE LEVEL OF AN AFFIRMATIVE DEFENSE.

Although good faith does not operate as an affirmative defense, it still may have a role in § 1983 litigation. As this Circuit recognized, proof of good faith may negate an element of a § 1983 claim. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277-78 (3d Cir. 1994). Specifically, the gross negligence mental state element required for a procedural due process claim can be rebutted by a showing of subjective good faith through adherence to then-existing law. *See id.* at 1278. That holding was context specific, and it recognized good faith as a means to disprove a mental state requirement. *See id.* at 1277-78. Consistent with Chief Justice Rehnquist's observation, the *Jordan* decision used the term 'good faith defense' as a misnomer – it was actually applying good faith to negate a specific element of a cause of action, as opposed to asserting it as an affirmative defense. *See id.*; *see generally Affirmative Defense*, Black's Law Dictionary (11th ed. 2019) ("A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."). Thus, I do not read our precedent as recognizing good faith as an across-the-board affirmative defense, or even as cause-of-action specific affirmative defense. 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. *See Jordan*, 20 F.3d at 1277-78. But that is of no moment here because a claim for compelled speech does not have a *mens rea* requirement. *See Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) ("[T]he compelled subsidization of private speech seriously

impinges on First Amendment rights[.]"); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 408, 416 (2001); *Wooley v Maynard*, 430 U.S. 705, 717 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Beyond *Jordan*, Judge Rendell relies on "principles of equality and fairness" to justify a good faith defense. Rendell Op. at III.B. But in full context, the Supreme Court made clear that "principles of equality and fairness" were insufficient to establish immunity:

> Although principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion.

Wyatt, 504 U.S. at 168. Nothing about that quotation validates "principles of equality and fairness" as standards for evaluating potential affirmative defenses. As explained above, the appropriate inquiry looks instead to the common law.

But even still, principles of equality and fairness would not carry the day here. 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; *see also*

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). 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.

* * *

Good faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983. Nor does our precedent or even principles of equality and fairness favor recognition of good faith as an affirmative defense to a compelled speech claim for wage garnishments. I respectfully dissent and vote to reverse the orders dismissing the complaints and to remand these cases.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JANINE WENZIG and CATHERINE KIOUSSIS,	:	
	:	
Plaintiffs,	:	**CIVIL ACTION NO. 1:19-1367**
v.	:	**(JUDGE MANNION)**
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668,	:	
	:	
Defendant	:	

MEMORANDUM

Pending before the court is the motion to dismiss the first amended complaint ("FAC"), (Doc. 19), of plaintiffs Janine Wenzig and Catherine Kioussis filed by defendant Service Employees International Union Local 668 ("SEIU"), (Doc. 25). Defendant's motion seeks dismissal of this case for failure to state a claim upon which relief may be granted pursuant to Fed.R.Civ.P. 12(b)(6). SEIU contends that plaintiffs' First Amendment claims against it, in this putative class action, for retrospective monetary relief under 42 U.S.C. §1983 should be dismissed since it relied in good faith on the formerly valid Pennsylvania law and longstanding United States Supreme Court precedent that allowed it to collect fair-share fees from public-sector employees who were not members of the union. For the reasons that follow, SEIU's motion to dismiss under Rule 12(b)(6) will be **GRANTED** and, plaintiffs' federal claims against SEIU will be **DISMISSED WITH PREJUDICE**.

I. BACKGROUND

Plaintiffs bring this civil rights action pursuant to 42 U.S.C. §1983.[1] Plaintiffs are both employed by the Commonwealth of Pennsylvania. Wenzig is employed by the Department of Human Services as a Licensing Supervisor and Kioussis is an Income Maintenance Supervisor. SEIU is a labor union with its headquarters in Harrisburg, Pennsylvania, and it is the exclusive representative for several bargaining units in the state, including plaintiffs' bargaining unit. As members of the bargaining unit represented by SEIU, plaintiffs received the benefits of the Collective Bargaining Agreement ("CBA") between SEIU and Pennsylvania. However, even though plaintiffs were not members of SEIU, they allege that the union was legally allowed to collect fair share fees from them under Pennsylvania's Public Employee Fair Share Fee Law, "43 Pa.Stat.Ann. §1102.3", since it represented them in collective bargaining.[2] Under state law, SEIU negotiated with the state for the collection

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[1]The facts alleged in plaintiffs' FAC must be accepted as true in considering defendant SEIU's motion to dismiss. *See* Dieffenbach v. Dept. of Revenue, 490 Fed.Appx. 433, 435 (3d Cir. 2012); Evancho v. Evans, 423 F.3d 347, 350 (3d Cir. 2005).

Also, since the legal standard to state a claim under §1983 is correctly stated in the briefs of the parties, the court will not repeat it herein. *See also* Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996) (To state an actionable claim under §1983, a plaintiff must prove that someone deprived her of a constitutional right while acting under the color of state law.).

[2]SEIU notes that since plaintiffs were public employees employed by Pennsylvania, they were subject to its "agency-shop statute" [i.e., the fair share fee law], namely, 71 Pa.Stat.Ann. §575. *See also* Diamond v. Pennsylvania State Education Association, 399 F.Supp.3d 361, 371 (W.D.Pa. July 8, 2019).

The court also notes that the Public Employee Relations Act ("PERA"),

of fair share fees from nonmembers, including plaintiffs.

In particular, Article 3, Section 3 of the CBA, which was effective from July 1, 2016 through June 30, 2019, provided:

> The Employer further agrees to deduct a fair share fee from all compensation paid to all employees in the bargaining unit who are not members of the Union. Authorization from non-members to deduct fair share fees shall not be required. The amounts to be deducted shall be certified to the Employer by the Union and the aggregate deductions of all employees shall be remitted together with an itemized statement to the Union by the last day of the succeeding month after such deductions are made.

Thus, under the CBA, prior to June 27, 2018, all employees in the collective bargaining units who were represented by SEIU and who were not union members, such as plaintiffs, were forced to pay "fair-share fees" to SEIU as a condition of their public employment. Plaintiffs further allege that before June 27, 2018, government employers covered by the CBA "deducted fair share fees from Plaintiffs' and other nonmembers' wages without their consent and, ..., transferred those funds to SEIU, which collected those funds." Plaintiffs also allege that "[a]s of 2018, agency fees were assessed by SEIU at 0.85% of an employee's gross income; union member paid dues of 1.39% of gross income."

As such, plaintiffs aver that "SEIU should have known that its seizure of fair share fees from non-consenting employees likely violated the First

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43 Pa.Stat.Ann. §§1101.101 *et seq*., "delineates the [Pennsylvania Labor Relations Board's] authority with regard to public employers", such as the Commonwealth, but the PERA does not contain any provision that gives the PLRB authority to enforce 71 Pa.Stat.Ann. §575. *Id*. at 382 (citation omitted).

Amendment."

Plaintiffs also seek to bring this case as a class action under Fed.R.Civ.P. 23(b)(3) for themselves and for all others similarly situated. They define the proposed class as "all current and former employees from whom SEIU collected fair share fees pursuant to its collective bargaining agreement with the Commonwealth of Pennsylvania."

Plaintiffs raise one claim in their FAC, namely, a First Amendment claim. Specifically, plaintiffs allege that "SEIU violated [their] and class members' First Amendment rights to free speech and association, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983, by requiring the payment of fair share fees as a condition of employment and by collecting such fees."

As relief, plaintiffs request declaratory judgment, pursuant to 28 U.S.C. §2201(a), "declaring that SEIU violated Plaintiffs' and class members' constitutional rights by compelling them to pay fair share fees as a condition of their employment and by collecting fair-share fees from them without consent." Additionally, plaintiffs seek monetary damages "in the full amount of fair share fees and assessments seized from their wages", as well as costs and attorneys' fees under 42 U.S.C. §1988.

Plaintiffs are proceeding on her FAC filed on October 28, 2019. (Doc. 19). On November 5, 2019, SEIU filed its motion to dismiss plaintiffs' FAC, (Doc. 25), and its brief in support, (Doc. 26). On November 19, 2019, plaintiffs filed their brief in opposition. (Doc. 31). SEIU filed its reply brief on December

3, 2019. (Doc. 32).

The court has jurisdiction over this case pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a) because plaintiffs aver a violation of their rights under the U.S. Constitution. Venue is appropriate in this court since the parties are located in this district and the alleged constitutional violations occurred in this district. *See* 28 U.S.C. §1391.

II. DISCUSSION

Plaintiffs instituted this case after the Supreme Court decided Janus.[3] Plaintiffs are state employees who, before Janus, were required to pay fair-share fees to SEIU for collective bargaining representation.[4] Specifically, the CBA contained a fair share fee provision which required plaintiffs to pay fair-fair share fees to SEIU. However, after the Janus decision SEIU stopped receiving fair-share fees from non-members, including plaintiffs. In this action, plaintiffs seek SEIU to repay themselves, as well as a putative class of all non-union state employees, all the fair-share fees that the union received prior to Janus.

As a backdrop, prior to Janus, unions representing government employees could use "agency shop" clauses in collective bargaining

[3]Janus v. American Federation of State, County, and Municipal Employees, Council 31, — U.S. —, 138 S. Ct. 2448 (2018).

[4]Fair share fees are charges non-union member employees had to pay unions prior to Janus to finance the union's collective bargaining activities. *See* Diamond, 399 F.Supp.3d at 370.

agreements "which required every employee represented by a union, even those who declined to become union members for political or religious reasons, to pay union dues." Diamond, 399 F.Supp.3d at 370-71. In Abood v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782 (1977), the Supreme Court "held that the charges were constitutional to the extent they were used to finance the union's collective-bargaining, contract-administration, and grievance activities." *Id*. at 370. "[T]he Court [in Abood] also concluded that the agency-shop clause and fees were unconstitutional insofar as the clause compelled non-member teachers to pay fees to the union that supported the union's political activities." *Id.*

> In accordance with Abood, Pennsylvania enacted its own agency-shop statute for public employees in 1988, 71 Pa. Stat. §575. According to Section 575, if mandated by the provisions of a collective-bargaining agreement, non-members of public-employee unions must pay fair-share fees to the unions. *Id*. §575(b). These fees consist of the regular union-membership dues less "the cost for the previous fiscal year of [the unions'] activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employee organization as exclusive representative." *Id*. §575(a).

Id. at 371.

Thus, prior to Janus, Pennsylvania law expressly allowed a labor union which was the representative of a bargaining unit of public employees to collect fair share fees from the employees who were members of the bargaining unit but who did not join the union, as a condition of their employment. *See* 71 P.S.A. §575; 43 P.S.A. §1102.3. Further, based on Abood, "the general propriety of the fair-share fees permitted under Section

575 withstood constitutional scrutiny for many years." Diamond, 399 F.Supp.3d at 370. *Id*. (string citations omitted).

In Janus, the Supreme Court overruled Abood, and held that "a state law requiring non-union-member public employees to pay fees to the union to compensate the union for costs incurred in the collective-bargaining process" was unconstitutional. *Id*. at 372. Thus, the Court in Janus, 138 S. Ct. at 2486, held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id*. Further, the Court held that "[n]either an agency fee nor any other payment to the union may be deducted from a non[-]member's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id. See also* Babb v. California Teachers Association, 378 F.Supp.3d 857, 867 (C.D.Ca. 2019) (In Janus, the Supreme Court "overruled Abood [ ] and its progeny, holding that no form of payment to a union, including agency fees, can be deducted or attempted to be collected from an employee without the employee's affirmative consent.") (citing Janus, 138 S.Ct. at 2486).

Additionally, the Supreme Court in Janus, 138 S.Ct. at 2459, 2486, held that it was a violation of the First Amendment for public sector unions to require non-members to pay fair share fees as a condition of public employment. Following Janus, Pennsylvania's statute allowing the collection of "fair share" fees from non-members by unions is no longer enforceable. *See* Hartnett v. Pennsylvania State Education Association, 390 F.Supp.3d 600 (M.D.Pa. May 17, 2019). In Diamond, 399 F.Supp.3d at 385, the court

held that the issue of "whether Union Defendants could constitutionally collect fair-share fees from Plaintiffs pursuant to Section 575" "was mooted by the intervening Janus decision, which held that fair-share fees are unconstitutional."

Plaintiffs essentially argue that they suffered injury from the pre-Janus agency-shop arrangements because they were forced to pay SEIU fair-share fees as a condition of their employment with the state even though they declined union membership. They basically contend that their constitutional right to withhold money from the union was violated and that this inflicted an injury upon them that can be redressed under §1983 by an award of money damages for the violation of their First Amendment rights to free speech and association by forcing them to pay SEIU fair-share fees as a condition of their employment.

Plaintiffs strenuously assert that the good faith defense should not apply to their claim for damages under §1983 since they contend it is contrary to the statute and is incompatible with the statutory basis for qualified immunity.

SEIU contends that it is entitled to assert a good faith defense to plaintiffs' §1983 claim seeking retrospective monetary relief for their payments of the fair-share fees based on "Pennsylvania statute and then-controlling and directly on-point United States Supreme Court precedent that expressly authorized fair-share fees."[5] There is no dispute that before Janus the

[5]In their FAC, plaintiffs allege that SEIU "acted under color of state law and in concert with [Pennsylvania] when it compelled [them] to pay fair share

collection of fair-share fees by SEIU was permitted by Pennsylvania law as well as by the Supreme Court which repeatedly held that fair-share fees were constitutional and that public employees who were non-union members could be compelled to pay such fees that financed the union's collective bargaining activities. Abood, 431 U.S. at 225. Thus, requiring non-union member public employees to pay fair-share fees as a condition of their public employment was undoubtedly deemed constitutional in Abood, 431 U.S. at 232. As such, SEIU contends that since it acted "in good-faith reliance on presumptively valid state laws [in collecting pre-Janus fair-share fees], [it] ha[s] a complete defense to §1983 liability" and cannot be held retrospectively liable to plaintiffs in this case.

SEIU points out that "[n]ineteen district courts, including this Court, and

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fees." Although SEIU does not argue in this case that it was not acting under "color of state law", since plaintiffs are proceeding under §1983, SEIU must be considered a state actor. In Oliver v. Service Employees International Union Local 668, — F.Supp.3d —, 2019 WL 5964778, *4-5 (E.D.Pa. Nov. 12, 2019), the court found that SEIU Local 668 is not a "state actor" for the purposes of §1983 since it "is not an actor controlled by the state, is not performing a function delegated by the state, and is not entwined with government policies or management." However, in Janus v. AFSCME, 942 F.3d 352, 2019 WL 5704367 (7th Cir. Nov. 5, 2019), the Seventh Circuit found that union's conduct amounted to state action and union was a proper defendant under §1983 since "[the union] was a joint participant with the state in the agency-fee arrangement", and the state human resources department "deducted fair-share fees from the employees' paychecks and transferred that money to the union." Also, in LaSpina v. SEIU Pennsylvania State Counsel, 2019 WL 4750423 (M.D.Pa. Sept. 30, 2019), this court found that the plaintiff sufficiently alleged that SEIU was a state actor. (citing Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 942 n.23, 102 S.Ct. 2744 (1982) ("the Supreme Court held that private parties using a process established by state statute can be considered state actors for purposes of §1983.")). As such, the court finds that for purposes of the instant motion SEIU is a state actor.

the Seventh Circuit have already rejected the same §1983 claim Plaintiffs bring here" based on the good-faith defense.[6] Despite plaintiffs' arguments in their brief in opposition as to why the good faith defense should not bar their suit for damages under §1983, the court finds the many cases to which SEIU cites persuasive and concurs with their conclusion that the good faith defense shields the union from liability with respect to plaintiffs' post-Janus claims for damages under §1983.

In fact, this court noted in LaSpina, 2019 WL 4750423, at *6 n.7[7]:

> [A]lthough "statutory and contractual provisions authorizing fair-share requirements are no longer enforceable after Janus", *see* Diamond, [399 F.Supp.3d 361] 2019 WL 2929875, at *14, the good-faith defense would apply to relieve SPL and [SEIU] from liability under §1983 since they reasonably relied on the constitutionality of Pennsylvania's fair-share fee law, §575, and the Supreme Court's decision in Abood which permitted such fees. *See id.* at *25-29 (citing, in part, Akers, 376 F.Supp.3d at 571-72 ("explaining that the plaintiffs could assert a good-faith defense because they complied with and relied on presumptively-valid state law and controlling Supreme Court precedent"; Crockett v. NEA-Alaska, 367 F. Supp. 3d 996, 1006 (D. Alaska) ("discussing the inequity of holding the union defendants liable for pre-Janus fair-share fees when they collected the fees in accordance with state law and then-binding Supreme Court precedent"); Akers v. Maryland State Educ. Assoc., 376 F.Supp. 3d 563 (D.Md. 2019).

As this court noted in LaSpina, and based on the numerous cases cited

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[6]Since SEIU correctly cites to the cases in its brief, (Doc. 26 at 11 n. 4), which have held that the good-faith defense precluded recovery in §1983 actions similar to the instant case, the court does not re-cite all of the applicable cases. *See also* note 9 below.

[7]The plaintiff in LaSpina filed an appeal to the Third Circuit which is currently pending.

herein, the court finds that SEIU can raise the good-faith defense with respect to plaintiffs' First Amendment claim under §1983 for the repayment of the fair-share fees that they paid the union. As SEIU states, "Plaintiffs' §1983 claim seeks a retrospective refund of fair-share fees collected before Janus issued, at a time when Pennsylvania statutes and controlling U.S. Supreme Court precedent expressly allowed the collection of such fees." (Doc. 26 at 14-15) (citing Otto v. Pennsylvania State Educ. Association-NEA, 330 F.3d 125 (3d Cir. 2003) ("upholding statutory fair-share fee system and collective bargaining agreement incorporating fair share fee requirement")).

In Wyatt v. Cole, 504 U.S. 158, 159, 168, 112 S.Ct. 1827 (1992), "[t]he Court determined that private individuals threatened with liability under §1983 cannot take advantage of the qualified immunity that protects government officials", but "explained that 'principles of equality and fairness may suggest ... that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability [under §1983], as do their government counterparts.'" Diamond, 399 F.Supp.3d at 395. Subsequently, "the Third Circuit adopted the good-faith defense for private parties [facing §1983 liability] in Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994). *Id*. at 396. In Jordan, 20 F.3d at 1276, the Third Circuit held that "[p]rivate defendants should not be held liable under §1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." *Id*. (citation omitted). Thus, despite plaintiffs'

contentions, the court finds that SEIU can assert a good-faith defense in this case in which plaintiffs seek to impose liability against it for violations of their First Amendment rights under §1983.

After examining the good-faith defense in detail, the court in Diamond then concluded that "it was objectively reasonable for Union Defendants to rely on Section 575 and Abood [when collecting fair-share fees from Plaintiffs] before the Supreme Court's decision in Janus", *id*. at 398, and, thus found that "the good-faith defense applies to Plaintiffs' claims [under §1983] for repayment of previously paid fair-share fees as a matter of law." *Id*. at 398-99.[8]

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[8]The court notes that plaintiffs also address the argument raised in some cases that, based on Wyatt, "the good-faith defense only applies if the most analogous common-law tort would have conferred similar immunities when §1983 was enacted." Diamond, 399 F.Supp. 3d at 397-98. Plaintiffs contend that while the good faith defense has been held to "defeat the malice and probable cause elements of a constitutional claim arising from an abuse of judicial process", "[the] cases did not recognize an across-the-board good faith defense—i.e., that any defendant that relies on a statute is exempt from paying damages under Section 1983." Plaintiffs state that since malice and probable cause are not elements of or defenses to their claim, i.e., "a First Amendment compelled speech violation", "it is irrelevant which common law tort may be most analogous to such [a] claim[]." As such, plaintiffs contend that their First Amendment compelled-speech claim has no common law analogue", and that SEIU should not be allowed to assert the good faith defense to their claim.

Since this court, as did the court in Diamond, 399 F.Supp. 3d at 398, "agrees with the opinions of various district courts that have determined — when presented with indistinguishable facts — that the applicability of the good-faith defense does not require analyzing the most analogous common-law tort", it does not conduct such an analysis herein. (string citations omitted). In fact, "when the Third Circuit adopted the good-faith defense in Jordan, the Third Circuit did not indicate whether the application of the good-faith defense depends on an analogous common-law tort", "[a]nd district court cases applying Jordan have not relied on common-law-tort

More recently, in Oliver v. Service Employees International Union Local 668, — F.Supp.3d —, 2019 WL 5964778 (E.D.Pa. Nov. 12, 2019), the court considered a case similar to the present case. In Oliver, plaintiff was an employee of the Pennsylvania Department of Human Services working as an Income Maintenance Caseworker and she was represented in collective bargaining by SEIU Local 668. When plaintiff's was hired, there existed a CBA between Local 668 and the Commonwealth. Plaintiff was told that she could "either enroll in Local 668 as a member and have full membership dues deducted regularly from her pay, or decline membership and contribute a reduced amount in the form of agency fees." *Id*. at *2. Given this choice, plaintiff joined as a member in Local 668 and dues were deducted from her pay. After Janus, plaintiff Oliver resigned from Local 668 and requested that deductions from her pay for union dues cease. The deductions were then stopped. Plaintiff then filed an action for damages against SEIU under §1983 for the dues she paid to SEIU from the beginning of her employment through her resignation. Plaintiff also sought "a declaratory judgment that certain provisions of Pennsylvania's Public Employee Relations Act (PERA) are unconstitutional as applied to her." *Id*. at *1.

The court in Oliver, *id*. at *4, found that "Local 668 is not a 'state actor' for the purposes of §1983", and that "[e]ven if there were sufficient state action to permit a §1983 suit against the Union to proceed, Local 668 would nonetheless prevail based upon its good-faith belief that it was complying with

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analogs." *Id*. (string citations omitted).

statutory and constitutional law prior to Janus." *Id.* at *7. The court indicated that "[n]umerous federal courts have held that good-faith reliance on prior precedent defeats refund claims brought in the aftermath of Janus." *Id*.[9]

The court in Oliver, *id*. at *7, then explained that "[t]he Third Circuit, ..., has found that 'private defendants should not be held liable under §1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity.'" (citing Jordan, 20 F.3d at 1274 n. 29). Thus, the court in Oliver, *id*., concluded that since "Plaintiff would need to prove that [SEIU] had a 'subjective' understanding that it was violating her rights or displayed 'gross negligence' in maintaining a belief that

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[9]The court in Oliver, 2019 WL 5964778, *7 n. 13, cited to the following cases to support its finding that the good faith defense precluded plaintiff's §1983 case against SEIU:

> Janus v. AFSCME, 942 F.3d 352 (7th Cir. Nov. 5, 2019); Danielson v. AFSCME Council 28, 340 F. Supp. 3d 1083, 1086 (W.D. Wash. 2018); Carey v. Inslee, 364 F. Supp. 3d 1220, 1232 (W.D. Wash. 2019); Cook v. Brown, 364 F. Supp. 3d 1184, 1193 (D. Or. 2019); Crockett v. NEA-Alaska, 367 F. Supp. 3d 996, 1006 (D. Alaska 2019); Hough v. SEIU Local 521, 2019 WL 1274528 at *1 (N.D. Cal. Mar. 20, 2019), amended, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019); Lee v. Ohio Educ. Ass'n, 366 F. Supp. 3d 980, 981 (N.D. Ohio 2019); Mooney v. Illinois Educ. Ass'n, 372 F. Supp. 3d 690, 706 (C.D. Ill. 2019); Bermudez v. SEIU Local 521, 2019 WL 1615414 at *1 (N.D. Cal. Apr. 16, 2019); Akers v. Maryland Educ. Ass'n, 376 F. Supp. 3d 563, 572 (D. Md. 2019); Wholean v. CSEA SEIU Local 2001, 2019 WL 1873021 at *3 (D. Conn. Apr. 26, 2019); Babb, 378 F. Supp. 3d at 870; Hernandez v. AFSCME Cal., 386 F. Supp. 3d 1300, 1304 (E.D. Cal. 2019) (since unions had authorization from the Supreme Court and state statute, the unions that followed the previously valid law were "entitled to the good-faith defense as a matter of law."); Diamond v. Pa. State Educ. Ass'n, 399 F.Supp.3d 361, ——, 2019 WL 2929875 at *29 (W.D. Pa. 2019); Ogle v. Ohio Civil Svc. Employees Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1087-88 (S.D. Ohio 2019).

its conduct was lawful", "Plaintiff will not be able to do so" because "[t]he CBA's agency shop provisions were lawful under PERA, and ..., were sanctioned by the Supreme Court in Abood." (internal citations omitted). The court also noted that since the CBA's agency shop provisions "had been considered and upheld by the Supreme Court multiple times after Abood, including most recently in Harris v. Quinn, 573 U.S. 616, 134 S.Ct. 2618 (2014)", and since "Janus was decided by a five-to-four majority, with a powerful dissent grounded in the doctrine of *stare decisis*", "it would be unreasonable to hold that [SEIU] should have known of the constitutional infirmity of agency shop provisions."

In the instant case, although plaintiffs allege in their FAC that "SEIU should have known that its seizure of fair share fees from non-consenting employees likely violated the First Amendment", (Doc. 19 at ¶13), pre-Janus, the law was clear that "[t]he CBA's agency shop provisions were lawful under PERA", and were authorized by Abood. Oliver, *id*. at *7. As such, under the Third Circuit's standard, plaintiffs cannot defeat SEIU's good faith defense in this case.

In fact, plaintiffs recognize that very recently the Seventh Circuit in Janus v. AFSCME, 942 F.3d 352, 2019 WL 5704367 (7th Cir. Nov. 5, 2019) ("Janus III"), issued the first appellate opinion on point with their case, i.e., to decide "whether a union may raise [the good faith defense] against its liability for the fair-share fees it collected before Janus []." In Janus III, plaintiff was an Illinois State employee who was not a member of the union and he filed a

§1983 action, after the Supreme Court decided his previous case in Janus, against the union seeking to recover the fair-share fees he was required to pay to the union. The Seventh Circuit found that the good faith defense precluded the state employee's claim for monetary damages for alleged past violations of his First Amendment rights. The Seventh Circuit stated that "every federal appellate court to have decided the question has held that, while a private party acting under color of state law does not enjoy qualified immunity from suit, it is entitled to raise a good-faith defense to liability under section 1983." Janus III, 942 F.3d at 362 (citations omitted). The Seventh Circuit included the Third Circuit's decision in Jordan, 20 F.3d at 1275-78, as a case that supported the union's ability to assert a good-faith defense to §1983 liability.

After the Seventh Circuit "recogniz[ed] that, under appropriate circumstances, a private party that acts under color of law for purposes of section 1983 may defend on the ground that it proceeded in good faith", the court then considered the question of whether the good faith defense was available to the union with respect to plaintiff's First Amendment claim seeking to hold it liable for the fair-share fees the union collected from him before Janus. The Seventh Circuit recognized "a good-faith defense in section 1983 actions when the defendant reasonably relies on established law."Janus III, 942 F.3d at 366. The Court then held that although "the good-faith defense to section 1983 liability is narrow", "[u]ntil [the Supreme Court in Janus] said otherwise, [the union] had a legal right to receive and spend fair-share fees

collected from nonmembers as long as it complied with state law and the Abood line of cases." *Id*. The Court also found that "the union did not demonstrate bad faith when it followed these rules." *Id.*

This court finds the Seventh Circuit's decision in Janus III compelling and concurs with it. As such, since SEIU "relied substantially and in good faith on both a [PA] state statute *and* unambiguous Supreme Court precedent [Abood] validating that statute", *id*. at 367(emphasis original), SEIU can assert the good faith defense to plaintiffs' First Amendment claim seeking to hold it liable under §1983.

Plaintiffs also argue that the Supreme Court's decision in Janus is retroactive under Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993), and Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995), and that the good faith defense is incompatible with the retroactivity principles under Reynoldsville Casket. Plaintiffs further contend that even if SEIU could raise the good faith defense to their claims under §1983, SEIU knew or should have known, based on Harper, that a later Supreme Court decision holding the collection of agency fees to be unconstitutional would be retroactive and thus, SEIU had no reasonable basis for believing it could keep their money if the Supreme Court held those fees to be unconstitutional.

No doubt that "when the Supreme Court applies a new rule of federal law to the parties before it, other courts must apply that decision retroactively." Diamond 399 F.Supp. 3d at 395 (citing Harper v. Va. Dep't of Taxation, 509 U.S. 86, 90, 97, 113 S.Ct. 2510 (1993)). In Diamond, *id*. at 396,

the court found that "Harper's retroactivity rule applies to Janus" since "Janus overruled 'clear past precedent' (Abood), announced a new rule regarding the unconstitutionality of fair-share fees, and applied that rule to the case by reversing the Seventh Circuit's dismissal of the plaintiffs' complaint." (citing Janus, 138 S.Ct. at 2460, 2462). The court in Diamond, *id*. at 396, then concluded that since "a court may find 'a previously existing, independent legal basis (having nothing to do with retroactivity) for denying [retroactive] relief', "there is an independent legal basis in this case for otherwise denying retroactive relief: the good-faith defense available to private parties [i.e., the state teacher's union] who are sued under §1983." (citing Jordan, 20 F.3d at 1276).

In the instant case, the court concurs with the rationale and conclusion in Diamond, *id*. at 395-96, and finds that although "Harper's retroactivity rule applies to Janus", "the good-faith defense to §1983 liability for damages provides an independent legal basis" for precluding plaintiffs' claim for retroactive relief from SEIU.

Moreover, in Janus III, 942 F.3d at 359, the Seventh Circuit considered the retroactivity argument and pointed out that if Janus is not retroactive, "that is the end of the line for [plaintiff], because the union's collection of fair-share fees was expressly permitted by state law and Supreme Court precedent from the time he started his covered work until the Court's decision [in Janus]." In Janus III, *id*., the Seventh Circuit also stated that "the Supreme Court's opinion [in Janus] did not address retroactivity in so many words." The

Seventh Circuit further noted that in decisions after Reynoldsville Casket and Harper, the Supreme Court "has stated that the 'general practice is to apply the rule of law we announce in a case to the parties before us ... even when we overrule a case.'" *Id*. at 360 (citing Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997 (1997). The Seventh Circuit, also recognized that "retroactivity and remedy are distinct questions" and, that "the Supreme Court has acknowledged that the retroactive application of a new rule of law does not 'deprive[ ] respondents of their opportunity to raise ... reliance interests entitled to consideration in determining the nature of the remedy that must be provided.'" *Id*. at 362 (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544, 111 S.Ct. 2439 (1991)).

In any event, since it is not clear if the Supreme Court's decision in Janus is to be applied retroactively, as in Janus III, the court finds that the retroactivity issue does not need to be decided in this case. Rather, similar to Janus III, the court has addressed the "broader question whether [plaintiffs] [are] entitled to the remedy [they] seek[]", and whether the union can assert the good-faith defense to §1983 liability in this case. *Id*. at 360-61.

Another recent case also supports SEIU's assertion of the good-faith defense to plaintiffs' claims under §1983. In Hamidi v. Service Employees International Union Local 1000, 2019 WL 5536324, *2 (E.D.Cal. Oct. 25, 2019), the court stated that "[t]he Supreme Court in Janus 'itself did not specify whether the plaintiff was entitled to retrospective monetary relief for conduct the Supreme Court had authorized for the previous forty years.'"

(citing Cooley v. California Statewide Law Enf't Ass'n, 385 F. Supp. 3d 1077, 1081 (E.D.Cal. 2019) (citing Janus, 138 S. Ct. at 2486)). However, the court in Hamidi noted that "the controlling law in the Ninth Circuit", similar to the controlling law in the Third Circuit, *see* Jordan, 20 F.3d at 1275-78, "recognizes a good faith defense in shielding private defendants from liability in §1983 actions." *Id*. The court in Hamidi, *id*. at *3, then concurred with "every district court to consider whether unions that collected agency fees prior to Janus have a good-faith defense to §1983 liability [that] have answered in the affirmative", and stated the standard was, "in the agency fee context, a union's compliance with then-existing law indeed suffices to find good faith." Thus, the court held that since the union's "compliance with what was then the law is sufficient for a finding of good faith", the union could avail itself of the good faith defense to §1983 liability for fair share fees collected before the Supreme Court's decision in Janus. *Id.* at *4.

In short, this court concurs with the numerous cases which have found that unions, such as SEIU, that collected fair-share fees from nonmembers prior to Janus, and pursuant to state law and Abood, can assert the good-faith defense to §1983 liability for the First Amendment claims raised by plaintiffs.

Thus, the court will grant SEIU's motion and dismiss with prejudice plaintiffs' First Amendment claims seeking to hold the union retrospectively liable under §1983. Based on the foregoing, the court finds futility in allowing plaintiffs leave to file a second amended complaint. *See* Janus, III, supra; Diamond, supra; Babb, 378 F.Supp. 3d at 872 ("[E]very district court to

consider whether unions that collected agency fees prior to Janus have a good-faith defense to §1983 liability [has] answered in the affirmative.") (citations omitted).

Plaintiffs next contend that even if SEIU acted in good faith in receiving fair-share fees, it could not have a good faith belief that if Abood was overruled, it could keep the fair-share fees that it previously collected. Thus, plaintiffs assert that they have an equitable claim for the return of the fair-share fees SEIU collected from them before Janus. SEIU counters that plaintiffs have no equitable claim for the return of the fees they paid prior to Janus.

Last month, the Seventh Circuit in Mooney v. Illinois Education Association, 942 F.3d 368, 370-71 (7th Cir. 2019), considered a similar contention and stated:

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

In explaining that although §1983 allows for remedies at law or in equity and that "the district court has discretion to tailor an appropriate remedy for the constitutional violation", the Seventh Circuit in Mooney, *id*. at 370, found that plaintiff's claim was a legal claim and not an equitable claim. In Mooney, *id*., the union argued that plaintiff's suit was "one for damages flowing from a

First Amendment violation", and that "[t]he gravamen of [plaintiff's] complaint is that her First Amendment rights were violated by the fair-share requirement because she was compelled to furnish financial support to union activities with which she disagreed." The Seventh Circuit in Mooney agreed with the analysis of the district court which found that "Plaintiff's claim lies in law rather than equity, and there is consequently no reason to consider whether the good-faith defense applies where the claim is for equitable restitution." *Id*. The Seventh Circuit then stated that since plaintiff failed to "point to an identifiable fund and show that her fees specifically are still in the union's possession", '[h]er claim is against the general assets of the union, held in its treasury, and can only be characterized as legal." *Id*. at 371.

SEIU points out that in the present case, "plaintiffs do not have a viable claim for equitable relief because fair-share fees already paid for collective bargaining representation that Local 668 provided to the entire unit." (citing Babb v. California Teachers Ass'n, 378 F. Supp. 3d 857 (C.D.Cal. 2019). SEIU also states that plaintiffs have already received benefits from their collective bargaining representation which was paid for by the fair-share fees they paid and that "it would be inequitable for force [it] to repay plaintiffs' agency fees." (quoting Babb, 378 F.Supp.3d at 876).

As in Mooney, 942 F.3d at 371, the plaintiffs' claim in this case is one for damages and is "against the general assets of the union, held in its treasury", and thus, "can only be characterized as legal." (citing Montanile v. Bd. of Trustees of Nat. Elevator Indust. Health Benefit Plan, —— U.S. ——,

136 S. Ct. 651, 658 (2016) ("Where a plaintiff seeks 'recovery from the beneficiaries' assets generally' because her specific property has dissipated or is otherwise no longer traceable, the claim 'is a *legal* remedy, not an equitable one.'") (emphasis in original) (internal quotation marks omitted)).

Finally, in Diamond, 399 F.Supp. 3d at 385, 389, the court also held that plaintiffs' claims for declarative and injunctive relief with respect to fair-share fees were moot based on the Janus decision and union defendants' compliance with it. (citing collection of cases). *See also* Hartnett, 390 F.Supp.3d at 600-02 (court found claims for declaratory and injunctive relief moot post-Janus since "[p]laintiffs face no realistic possibility that they will be subject to the unlawful collection of 'fair share' fees"). Declaratory judgment is not meant to adjudicate alleged past unlawful activity. There is no question that a plaintiff can request declaratory relief to remedy alleged ongoing violations of her constitutional rights. *See* Blakeney v. Marsico, 340 Fed.Appx. 778, 780 (3d Cir. 2009)(Third Circuit held that to satisfy the standing requirement of Article III, a party seeking declaratory relief must allege that there is a substantial likelihood that he will suffer harm in the future)(citations omitted).

The court concurs with the courts in Diamond and Hartnett, and holds that our plaintiffs' claim for declarative judgment is moot based on Janus and, based on the undisputed fact that SEIU stopped collecting fair-share fees from state non-union member employees, including plaintiffs, following the Janus decision. *See also* Oliver, 2019 WL 5964778, *7 (holding "Plaintiff's

claims for declaratory and injunctive relief regarding the application of 43 P.S. §§1101.301(18), 1101.401, and 1101.705 suffers from lack of standing and mootness.").

Also, as in Diamond, 399 F.Supp. 3d at 391-93, the court find that the voluntary-cessation exception to the mootness doctrine does not apply in this case since "[t]he circumstances of this case make it clear that the undisputedly wrongful behavior — the collection of fair-share fees — is not reasonably likely to recur [after Janus's changing of the law and the reason that SEIU stopped collecting fair-share fees from public employees in Pennsylvania]." Indeed, "[c]omplying with a Supreme Court decision cannot be considered 'voluntary cessation.'" *Id*. (citing Lamberty v. Conn. State Police Union, 2018 WL 5115559, at *9 (D.Conn. Oct. 19, 2018) ("explaining that there was 'nothing voluntary' about the union's decision to comply with Janus, as Janus 'announced a broad rule invalidating every state law permitting agency fees to be withheld'"). As such, "compliance with an intervening Supreme Court decision does not implicate the voluntary-cessation exception to the mootness doctrine." *Id.,* at 392.

Thus, the court will grant SEIU's motion and dismiss with prejudice plaintiffs' request for declaratory judgment under 28 U.S.C. §2201.

III. CONCLUSION

Based on the foregoing reasons, the court will **GRANT** the Rule 12(b)(6)

motion to dismiss plaintiffs' FAC, (Doc. 19), filed by SEIU, (Doc. 25), and plaintiffs' First Amendment claims and request for declaratory judgment shall be **DISMISSED WITH PREJUDICE**. Further, this case will be **CLOSED**. An appropriate order shall issue.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Date: December 10, 2019

19-1367-01.wpd

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ARTHUR DIAMOND, *on behalf of himself and others similarly situated,* et al.,	)	Case No. 3:18-cv-128
Plaintiffs,	)	JUDGE KIM R. GIBSON
v.	)	
PENNSYLVANIA STATE EDUCATION ASSOCIATION, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

I. Introduction

Plaintiffs Arthur Diamond, Justin Barry, Douglas R. Kase, Jeffrey Schwartz, Matthew Shively, Matthew Simkins, and Sandra H. Ziegler (collectively, "Plaintiffs") bring this purported class-action lawsuit against the Pennsylvania State Education Association, the Chestnut Ridge Education Association, and the National Education Association (collectively, "Union Defendants"), as well as Pennsylvania Attorney General Josh Shapiro, Chairman of the Pennsylvania Labor Relations Board James M. Darby, Members of the Pennsylvania Labor Relations Board Albert Mezzaroba and Robert H. Shoop, Jr., and Bedford County, Pennsylvania, District Attorney Lesley Childers-Potts (collectively, "Commonwealth Defendants"). Plaintiffs, who are all current or retired Pennsylvania public-school teachers, allege that Union Defendants violated Plaintiffs' constitutional rights by forcing Plaintiffs to pay fees to unions as a condition of their employment ("fair-share fees") under 71 Pa. Stat. § 575 ("Section 575"), even though Plaintiffs chose not to join the Pennsylvania State Education Association or its affiliate unions.

Plaintiffs also claim that Commonwealth Defendants, who are charged in various ways with enforcing Pennsylvania's laws, must be enjoined from enforcing Section 575 in an unconstitutional manner. The outcome of this case turns in significant part on the application of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), which was decided by the Supreme Court on June 27, 2018, less than two weeks after Plaintiffs filed their original Complaint in this matter. (*See* ECF No. 1.)

Pending before the Court are two Motions to Dismiss filed by Commonwealth Defendants and Union Defendants. (ECF Nos. 38, 40.) These Motions have been fully briefed (ECF Nos. 38, 39, 40, 41, 48, 51) and are now ripe for disposition.

For the reasons that follow, this Court will **GRANT** Defendants' Motions to Dismiss (ECF Nos. 38, 40).

II. Venue[1]

Because a substantial part of the events giving rise to Plaintiffs' claims occurred in the Western District of Pennsylvania, venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2).

III. Background

A. Background on the Constitutionality of Fair-Share Fees

Before discussing Plaintiffs' claims, the Court will briefly describe the law on the constitutionality of fair-share fees.

[1] Issues with subject-matter jurisdiction are discussed in Section V.

1. *Abood v. Detroit Board of Education*

In 1977, the Supreme Court issued a decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Court confronted a Michigan statute that allowed unions representing local-government employees to utilize "agency-shop" clauses in collective-bargaining agreements. *Id.* at 211. These clauses required every employee represented by a union, even those who declined to become union members for political or religious reasons, to pay union dues. *Id.* at 212. Pursuant to this statute, a union that represented teachers employed by the Detroit Board of Education (the "Board") entered into a collective-bargaining agreement with the Board that required non-union-member teachers to pay a charge to the union equal to the regular dues paid by union members. *Id.* The non-member teachers sued, alleging that the charges paid under the agency-shop clause were used to support political activities, as opposed to simply being used to defray the costs of the union's collective-bargaining activities, and that the clause thus violated the teachers' First Amendment rights. *Id.* at 213.

The Court held that the charges were constitutional to the extent they were used to finance the union's collective-bargaining, contract-administration, and grievance activities. *Id.* at 225. The Court explained:

> A union-shop arrangement has been thought to distribute fairly the cost of [collective-bargaining] activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Id. at 221-22. Furthermore, the Court reasoned that agency-shop arrangements promote what later case law has dubbed "labor peace." *Janus*, 138 S. Ct. at 2465. The Court explained that designating one union as the exclusive representative of a group of employees "frees the

employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 221.

However, the Court also concluded that the agency-shop clause and fees were unconstitutional insofar as the clause compelled non-member teachers to pay fees to the union that supported the union's political activities. *Id.* at 234-36. Writing for the majority, Justice Stewart explained that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience, rather than coerced by the State." *Id.* at 234-35. Based on these First Amendment principles, the Court held that the Constitution prohibited the union from requiring a non-member "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. The Court elaborated:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36.

2. 71 Pa. Stat. § 575

In accordance with *Abood*, Pennsylvania enacted its own agency-shop statute for public employees in 1988, 71 Pa. Stat. § 575. According to Section 575, if mandated by the provisions of a collective-bargaining agreement, non-members of public-employee unions must pay fair-share fees to the unions. *Id.* § 575(b). These fees consist of the regular union-membership dues less "the

cost for the previous fiscal year of [the unions'] activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative." *Id.* § 575(a).

Section 575 also contains provisions (1) indicating how the public employer is to deduct the fair-share fees from non-members' paychecks, (2) describing union notice obligations to non-members, and (3) providing procedures for non-members to challenge the propriety of fair-share fees or the payment of fair-share fees on religious grounds. *Id.* § 575(c)-(h). In the event of a challenge on religious grounds, the non-member objector must pay the equivalent of the fair-share fee. *Id.* § 575(h). However, the union does not receive that payment—the fee goes "to a nonreligious charity agreed upon by the non[-]member and the [union]." *Id.*

Finally, Section 575 contains penalty provisions. Particularly, "[a]ny employe organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall be subject to a fine of not more than two thousand dollars ($2,000)." *Id.* § 575(*l*). In addition, "[a]ny person who willfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall be fined not more than one thousand dollars ($1,000) or undergo imprisonment for not more than thirty (30) days, or both." *Id.* § 575(m).

Consistent with *Abood*, the general propriety of the fair-share fees permitted under Section 575 withstood constitutional scrutiny for many years. *See Hohe v. Casey*, 740 F. Supp. 1092, 1094 (M.D. Pa. 1989) ("It is beyond doubt that agency shop fair-share fees, accompanied by appropriate procedural safeguards, are constitutional." (citing *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984); *Abood*, 431 U.S. at 209)), *vacated in part on*

other grounds, 956 F.2d 399 (3d Cir. 1992). However, the Supreme Court slowly began to question its holding in *Abood*. *See Harris v. Quinn*, 134 S. Ct. 2618, 2627, 2632-38 (2014); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012) ("Acceptance of the free-rider argument as a justification for compelling non[-]members to pay a portion of union dues represents something of an anomaly . . . ."). Then, the Court overruled *Abood* in June 2018 in *Janus*. *See Janus*, 138 S. Ct. at 2460. Based on *Janus*, the constitutionality of Section 575 is now challenged.

3. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*

In *Janus*, the Court dealt again with a state law requiring non-union-member public employees to pay fees to the union to compensate the union for costs incurred in the collective-bargaining process. *See id.* at 2460-61. The Court held that the state law was unconstitutional. *Id.* at 2478, 2486.

The Court rejected the rationale in *Abood* because, among other reasons, *Abood*'s free-rider justification did not support upholding the fees. *Id.* at 2469. Specifically, the Court explained:

> In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.

Id. at 2467.

Moreover, the Court rejected *Abood*'s "labor peace" argument. *Id.* at 2465-66. The Court explained that the *Abood* Court falsely assumed a close relationship between the designation of a union as the exclusive representative of a group of employees and the fees. *Id.* The Court noted that today, there are groups of public employees who are exclusively represented by one union but who are not compelled to pay such fees. *Id.* at 2466. "It is [thus] now undeniable that 'labor

peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." *Id.*

After concluding that the doctrine of *stare decisis* did not prohibit overruling *Abood*, the Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486. "Neither an agency fee nor any other payment to the union may be deducted from a non[-]member's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.*

Plaintiffs bring the present claims within this context.

B. Factual and Procedural Background[2]

Plaintiffs Arthur Diamond, Justin Barry, Douglas R. Kase, Jeffrey Schwartz, Matthew Shively, and Matthew Simkins are public-school teachers in various Pennsylvania school districts. (ECF No. 62 ¶¶ 17-22.) Plaintiff Sandra H. Ziegler is a retired public-school teacher who taught in a Pennsylvania school district for 24 years. (*Id.* ¶ 23.) Plaintiffs represent two distinct classes: the "agency-fee payers" and the "religious objectors," described below. (*Id.* at 2.)

Plaintiffs bring this purported class-action lawsuit against the following Defendants: the Pennsylvania State Education Association (the "PSEA"), a labor union; the Chestnut Ridge Education Association (the "CREA"), a local union chapter affiliated with the PSEA; the National Education Association (the "NEA"), a labor union affiliated with the PSEA; Josh Shapiro, the attorney general of Pennsylvania, in his official capacity; James M. Darby, the chairman of the Pennsylvania Labor Relations Board (the "PLRB"), in his official capacity; Albert Mezzaroba and

[2] The factual allegations are taken from Plaintiffs' Second Amended Complaint. (ECF No. 62.)

Robert H. Shoop, Jr., members of the PLRB, in their official capacities; and Lesley Childers-Potts, the district attorney of Bedford County, Pennsylvania, in her official capacity and as a representative of the class of all district attorneys in Pennsylvania with the authority to prosecute violations of Section 575. (*Id.* ¶¶ 11-16.)

Mr. Diamond, who represents the agency-fee-payer class, refuses to join the PSEA or its affiliates because he disapproves of their political advocacy and the salaries paid to their members. (*Id.* ¶ 17.) However, the collective-bargaining agreements negotiated by the PSEA compelled Mr. Diamond and others like him to pay a fair-share fee to the PSEA and its affiliates as a condition of their employment. (*Id.* ¶¶ 24-25.) Pennsylvania law authorized the PSEA and its affiliates to extract these fair-share fees. (*Id.* ¶ 31); *see* 71 Pa. Stat. § 575.

Mr. Barry, Mr. Kase, Mr. Schwartz, Mr. Shively, Mr. Simkins, and Ms. Ziegler[3] represent the second class of Plaintiffs—the religious objectors. (ECF No. 62 at 2.) These Plaintiffs refuse to join the PSEA or its affiliates because the union advocates for policies that contradict their religious beliefs. (*Id.* ¶¶ 18-23.) The collective-bargaining agreements negotiated by the PSEA compelled Plaintiffs and their fellow religious objectors to pay a fee for choosing not to join the union. (*Id.* ¶ 24.) Specifically, the religious-objector Plaintiffs paid the equivalent of a fair-share fee to nonreligious charities approved by the union. (*Id.*) This option was available only to those who objected to the union's activities on "bona fide religious grounds" and is also authorized by Pennsylvania law. (*Id.* ¶¶ 24, 31); *see* 71 Pa. Stat. § 575.

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[3] Ms. Ziegler differs slightly from the other religious objectors. When she became subject to fair-share fees and chose to be treated as a religious objector, Ms. Ziegler refused to specify a charity to which her fees would be donated and refused to authorize the union to release the fees it had taken from her paycheck. (ECF No. 62 ¶ 27.) Shortly before her retirement, Ms. Ziegler received a letter from the union informing her that her previously paid fair-share fees were in an account waiting to be donated. (*Id.*)

Plaintiffs claim that Union Defendants' "compelled extraction of money from the representative plaintiffs and their fellow class members violated their constitutional rights—regardless of whether the union kept the money for themselves or directed it toward a union-approved charity." (ECF No. 62 ¶ 28.) Plaintiffs bring this class-action lawsuit under 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201. (*Id.* ¶ 53.) Plaintiffs also bring state-law causes of action against Union Defendants, including conversion, trespass to chattels, replevin, unjust enrichment, and restitution. (*Id.* ¶ 54.) Plaintiffs request that this Court:

(1) Certify plaintiff classes of agency-fee payers and religious objectors and defendant classes of all chapters and affiliates of the PSEA and of all district attorneys in Pennsylvania with the authority to prosecute violations of Section 575 (*id.* ¶ 55(a)-(d));

(2) Declare that Plaintiffs have a constitutional right to decline to join or financially support a public-employee union and that they cannot be penalized or forced to pay money to a union or third-party entity as a consequence of exercising this constitutional right (*id.* ¶ 55(e));

(3) Declare that all collective-bargaining agreements that compel non-union members to pay fair-share fees violate Plaintiffs' constitutional rights (*id.* ¶ 55(o));

(4) Declare Section 575 unconstitutional to the extent it allows public-employee unions to extract fair-share fees from non-members' salaries without first securing their consent (*id.* ¶ 55(g)-(h)) and to the extent it delineates punishments for those who refuse to join or financially support a public-employee union or pay money to a union-approved charity (*id.* ¶ 55(n));

(5) Declare Section 575 unconstitutional because it forces religious objectors to pay fees to union-approved charities and penalizes them for exercising their constitutional right not to join or financially support a union, and also because it disqualifies religious charities from receiving a non-union member's fair-share fees (*id.* ¶ 55(*l*)-(m));

(6) Declare the objection and arbitration provisions of Section 575 unconstitutional (*id.* ¶ 55(i)-(k));

(7) Enjoin the PSEA and its affiliates from enrolling Plaintiffs in union membership unless the union informs them of their constitutional rights and secures a waiver of those rights (*id.* ¶ 55(q));

(8) Enjoin the PSEA from entering into collective-bargaining agreements that compel employees to pay money to a union as a condition of employment, compel employees who decline union membership to pay money to third-party entities, or allow a union to enroll employees in union membership without informing them of their constitutional rights and securing a waiver (*id.* ¶ 55(r));

(9) Enjoin Defendants from enforcing provisions of collective-bargaining agreements that require payment as a consequence of exercising one's constitutional right not to join or financially support a public-employee union (*id.* ¶ 55(s));

(10) Enjoin Commonwealth Defendants from enforcing Section 575 in an unconstitutional manner (*id.* ¶ 55(g)-(n), (s));

(11) Order the PSEA, NEA, and their affiliates and chapters to repay all fair-share fees they extracted from Plaintiffs, regardless of whether Union Defendants kept those funds for themselves or diverted them to charities (*id.* ¶ 55(p)); and

(12) Award costs and attorneys' fees (*id.* ¶ 55(t)).

Plaintiffs initiated this lawsuit on June 15, 2018, by filing their Class Action Complaint. (ECF No. 1.) On August 20, 2018, Commonwealth Defendants and Union Defendants filed separate Motions to Dismiss with accompanying briefs. (ECF Nos. 30, 31, 32, 33.) In response, Plaintiffs filed a First Amended Complaint. (ECF No. 37.) Commonwealth Defendants and Union Defendants filed new Motions to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and briefs in support on September 19, 2018.[4] (ECF Nos. 38, 39, 40, 41.) Plaintiffs responded with their Brief in Opposition to the Defendants' Motions to Dismiss First Amended Complaint (ECF No. 48) on October 10, 2018. After receiving leave of court (*see* ECF No. 50), Union Defendants filed a Reply Brief in Support of Motion to Dismiss First Amended Complaint

[4] Upon receipt of the new Motions to Dismiss, the Court denied the original Motions to Dismiss as moot. (*See* ECF No. 42.)

(ECF No. 51) on October 30, 2018. Union Defendants also submitted two Notices of Supplemental Authority (ECF Nos. 52, 53), directing this Court's attention to relevant cases that were decided after Union Defendants submitted their Reply Brief.

On January 7, 2019, Plaintiffs filed a Motion for Leave to File a Second Amended Class-Action Complaint (ECF No. 58) and brief in support (ECF No. 59). After Union Defendants opposed the Motion (ECF No. 60), the Court granted in part and denied in part Plaintiffs' Motion on January 31, 2019. (*See* ECF No. 61.) Plaintiffs then filed their Second Amended Complaint (ECF No. 62) on February 5, 2019. Per the Court's January 31, 2019, Memorandum Order, the Court treats the Motions to Dismiss Plaintiffs' First Amended Complaint (ECF Nos. 38, 40) as Motions to Dismiss Plaintiffs' Second Amended Complaint. (*See* ECF No. 61 at 5.) Since the filing of the Second Amended Complaint, Union Defendants have filed ten Notices of Supplemental Authority (ECF Nos. 63, 64, 65, 66, 67, 68, 69, 70, 71, 72) identifying new decisions that purportedly support Union Defendants' position in this matter.

IV. Standard of Review

A. Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), under which a complaint may be dismissed for lack of subject-matter jurisdiction, puts the court's "very power to hear the case" at issue. *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). There are two types of Rule 12(b)(1) challenges: facial and factual. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 632-33 (3d Cir. 2017); *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 268 (3d Cir. 2016).

A facial challenge "attacks the complaint on its face without contesting its alleged facts." *Hartig*, 836 F.3d at 268. This type of challenge is treated like a Rule 12(b)(6) motion, discussed *infra*, in that the court must assume that the complaint's well-pleaded factual allegations are true. *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016); *Hartig*, 836 F.3d at 268. Facial challenges address issues such as whether the complaint presents a question of federal law or pleads diversity jurisdiction, and such attacks can occur before the moving party has filed an answer. *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014).

In contract, a factual attack "is an argument that there is no subject matter jurisdiction because the facts of the case . . . do not support the asserted jurisdiction." *Id.* This challenge "allows the defendant to present competing facts," *id.*; *see Davis*, 824 F.3d at 346, and the court does not assume that the plaintiff's allegations are true. *Davis*, 824 F.3d at 346. For example, "while diversity of citizenship might have been adequately pleaded by the plaintiff, the defendant can submit proof that, in fact, diversity is lacking." *Constitution Party*, 757 F.3d at 358.

In order to tell the difference between a facial and factual attack, the court looks to the stage of the proceedings: if a complaint is challenged under Rule 12(b)(1) before the defendant answered the complaint or otherwise presented competing facts, it is a facial attack. *Id; Davis*, 824 F.3d at 2016.

Here, Commonwealth Defendants have not yet filed an answer or presented competing facts; therefore, their Motion to Dismiss, to the extent it is based on Rule 12(b)(1), must be treated as a facial attack on this Court's subject-matter jurisdiction, a conclusion with which they agree. (*See* ECF No. 39 at 3.)

In contrast, in support of their Motion to Dismiss, Union Defendants submitted various sworn declarations. (ECF Nos. 41-1, 41-2, 41-3, 41-4, 41-5, 41-6, 41-7.) Union Defendants seem to assert that based on the submission of these declarations, their Motion to Dismiss under Rule 12(b)(1) must be treated as a factual attack on this Court's subject matter jurisdiction. (*See* ECF No. 41 at 10 n.1 (citing *Gould Elecs. v. United States*, 220 F.3d 169, 176-77 (3d Cir. 2000), which discussed treating a 12(b)(1) motion as a factual attack).) And Plaintiffs do not challenge this assertion. Therefore, when evaluating Union Defendants' 12(b)(1) grounds for dismissal, the Court may consider Union Defendants' affidavits.

B. Federal Rule of Civil Procedure 12(b)(6)

A complaint may be dismissed under Federal Rule of Civil Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016). But detailed pleading is not generally required. *Id.* The Rules demand only "a short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)).

Under the pleading regime established by *Twombly* and *Iqbal*, a court reviewing the sufficiency of a complaint must take three steps.[5] First, the court must "tak[e] note of the elements [the] plaintiff must plead to state a claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Second, the court should identify allegations that, "because they are no more than conclusions, are not

[5] Although the Supreme Court described the process as a "two-pronged approach," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), the Court noted the elements of the pertinent claim before proceeding with that approach, *id.* at 675–79. Thus, the Third Circuit has described the process as a three-step approach. *See Connelly*, 809 F.3d at 787; *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 n.4 (3d Cir. 2011) (citing *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010)).

entitled to the assumption of truth." *Id.* at 679; *see also Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 224 (3d Cir. 2011) ("Mere restatements of the elements of a claim are not entitled to the assumption of truth." (citation omitted)). Finally, "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Connelly*, 809 F.3d at 786. Ultimately, the plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

V. Discussion

A. Commonwealth Defendants' Motion to Dismiss is granted.

In Commonwealth Defendants' Motion to Dismiss Amended Complaint (ECF No. 38) and brief in support thereof (ECF No. 39), Commonwealth Defendant move to dismiss Plaintiffs' Second Amended Complaint because (1) Plaintiffs' § 1983 claim fails to specify which constitutional rights are at issue, (2) Plaintiffs' claims against Commonwealth Defendants are barred by the Eleventh Amendment, and (3) the chairman and members of the PLRB and Attorney General Shapiro are not appropriate defendants to this action. (*Id.*)

1. Plaintiffs' § 1983 claim states a claim even though it does not explicitly state which constitutional rights are at issue.

As an initial matter, the Court rejects Commonwealth Defendants' assertion that Plaintiffs' failure to specify the constitutional rights at issue is fatal to Plaintiffs' § 1983 claim. The Federal Rules of Civil Procedure require only that a complaint state "a short and plain statement

of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required—the complaint must simply contain enough information to give the defendants fair notice of the claim and the facts upon which the claim is based. *Twombly*, 550 U.S. at 555. Plaintiffs' Second Amended Complaint clearly gives notice of the constitutional rights at issue through its factual allegations and its reliance on *Janus*. The cases to which Commonwealth Defendants cite are inapposite, as they involved factual allegations that were not clear enough to implicate specific constitutional rights. *See, e.g., Culver v. Pennsylvania*, Civil No. 3:10-CV-382, 2010 WL 11531289, at *4 (M.D. Pa. May 19, 2010) ("Culver's claims against the Commonwealth of Pennsylvania do not allege in an intelligible fashion any cognizable violation of specific rights guaranteed by the Constitution or laws of the United States upon which relief can be granted."), *report and recommendation adopted by* 2010 WL 11537607 (M.D. Pa. July 28, 2010). Therefore, based on the Court's experience and common sense, *Iqbal*, 556 U.S. at 679, the Court declines to dismiss Plaintiffs' § 1983 claim as to Commonwealth Defendants for failure to specify the constitutional rights on which the claim is based.

2. Based on Eleventh Amendment immunity, Plaintiffs' claims against Commonwealth Defendants are dismissed.

Commonwealth Defendants next move to dismiss Plaintiffs' claims against them because they are barred by the Eleventh Amendment. (ECF No. 39 at 6.) Commonwealth Defendants explain that the Eleventh Amendment protects Commonwealth Defendants from this lawsuit and that no exception to Eleventh Amendment immunity applies. (*Id.* at 8-10.)

In response, Plaintiffs do not dispute that Eleventh Amendment immunity generally applies to Commonwealth Defendants. Instead, Plaintiffs assert that their claims against

Commonwealth Defendants fall within the *Ex parte Young* exception to Eleventh Amendment immunity because Plaintiffs seek prospective relief to enjoin violations of federal law. (ECF No. 48 at 29.)

a. The Eleventh Amendment

The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[6] U.S. Const. amend. XI. The Supreme Court "has long 'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (citations omitted) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)). This presupposition is that "the States entered the federal system with their sovereignty intact [and] that the judicial authority in Article III is limited by this sovereignty." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991) (citing *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 472 (1987)). "Accordingly, for over a century now, [the Supreme Court has] made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Kimel*, 528 U.S. at 73 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669–70 (1999)).

But "a state's Eleventh Amendment protection from federal suits—whether brought by

[6] The Supreme the Court has long held that "the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890)). Furthermore, courts have also extended Eleventh Amendment protection to state agencies, departments, and officials when the state is the real party in interest. *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002).

citizens of their state or another—is not absolute." *Koslow v. Pennsylvania*, 302 F.3d 161, 168 (3d Cir. 2002). Federal courts recognize three exceptions to Eleventh Amendment sovereign immunity: (1) congressional abrogation, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); (2) waiver by the state, *Koslow*, 302 F.3d at 168 (citing *Coll. Sav. Bank*, 527 U.S. at 670); and (3) "suits against individual state officers for prospective injunctive and declaratory relief to end an ongoing violation of federal law," which is the doctrine of *Ex parte Young*, 209 U.S. 123 (1908),[7] *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002); *see Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (explaining that "official-capacity actions for prospective relief are not treated as actions against the State"); *see also Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (holding that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief").

Here, Commonwealth Defendants assert that Congress did not abrogate states' immunity for the claims in this case and that the Commonwealth of Pennsylvania has not consented to suit. (ECF No. 39 at 8-9.) Plaintiffs do not contest these assertions. (ECF No. 48 at 29.) Therefore, the only dispute between Plaintiffs and Commonwealth Defendants is whether the *Ex parte Young* exception to sovereign immunity permits Plaintiffs to seek prospective relief from Commonwealth Defendants under the circumstances of this case.

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[7] As the Supreme Court has noted, *Ex Parte Young* rests on the "obvious fiction" that an official-capacity suit seeking prospective injunctive relief "is not really against the State, but rather against an individual who has been 'stripped of his official representative character' because of his unlawful conduct." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 267 (2011) (quoting *Ex Parte Young*, 209 U.S. at 159-60.) Thus, "*Ex parte Young* also rests on the 'well-recognized irony that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment.'" *Stewart*, 563 U.S. at 272 (quotation marks omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)).

"In determining whether the *Ex Parte Young* doctrine avoids an Eleventh Amendment bar, the Supreme Court has made it quite clear that 'a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."'" *Hess*, 297 F.3d at 324 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

b. Plaintiffs do not allege an ongoing violation of federal law with respect to Commonwealth Defendants.

Commonwealth Defendants argue that Plaintiffs fail to allege an ongoing violation of federal law with respect to Commonwealth Defendants. (ECF No. 39 at 10.) They contend that "[t]here is no claim that the Attorney General or any member of the PLRB has done or is doing anything to violate Plaintiffs' federal constitutional rights." (*Id.*) Plaintiffs do not directly respond to this argument, except to note that "[P]laintiffs' claims falls [sic] squarely within the *Ex parte Young* exception to sovereign immunity, as they seek prospective relief to enjoin violations of federal law." (ECF No. 48 at 30.)

The Court agrees with Commonwealth Defendants. Plaintiffs have not alleged any ongoing violations of federal law with respect to Commonwealth Defendants in the Second Amended Complaint. For example, Plaintiffs have not alleged that Commonwealth Defendants have enforced or continue to enforce Section 575 in an unconstitutional manner. *See Burns v. Alexander*, 776 F. Supp. 2d 57, 74 (W.D. Pa. 2011) (describing ongoing violations of federal law as "the *continued enforcement* of statutory provisions alleged to be unconstitutional"); *Haagensen v. Pa. State Police*, Civil Action No. 08-727, 2009 WL 3834007, at *14 (W.D. Pa. Oct. 22, 2009) ("The complaint does not in fact allege an ongoing violation; rather, it contains only Plaintiff's opinion

that the statute as written could be applied to her again (and to others) in the manner in which it was applied to her."), *report and recommendation adopted in relevant part by* 2009 WL 3834004, at *3 (Nov. 16, 2009) (finding that the plaintiff "has not established an *ex parte Young* exception to the immunity because she has not pointed to any ongoing violations" but instead "relies only on the actions underlying her own case, which occurred in 2001"). The Second Amended Complaint simply claims that Commonwealth Defendants are charged with enforcing Section 575 (ECF No. 62 ¶¶ 14-16) which does not implicate the *Ex parte Young* exception to Eleventh Amendment immunity.

Because Plaintiffs sue Commonwealth Defendants without alleging that those Defendants continue to enforce an unconstitutional Pennsylvania statute, the Second Amended Complaint "is nominally against individual officers, [but] the state is the real, substantial party in interest and the suit in fact is against the state." *Hess*, 297 F.3d at 324. Therefore, this Court must dismiss Plaintiffs' claims against Commonwealth Defendants because there is no allegation of an ongoing violation of federal law, and the Eleventh Amendment thus bars suit against Commonwealth Defendants. *See Christ the King Manor, Inc. v. Sec'y U.S. Dept. of Health & Human Servs.*, 730 F.3d 291, 319 (3d Cir. 2013) (affirming the district court's grant of summary judgment to the state defendants because the plaintiffs did "not identify any ongoing conduct by the Secretary of DPW that must be enjoined to ensure the supremacy of federal law").

Accordingly, the Court will dismiss Plaintiffs' claims against Commonwealth Defendants.

3. Plaintiffs' claims against Attorney General Shapiro and the members and chairman of the PLRB are also dismissed because these state officials are inappropriate defendants.

Commonwealth Defendants also argue that the members and chairman of the PLRB and

Attorney General Shapiro must be dismissed from the lawsuit because they are not appropriate defendants in Plaintiffs' challenge to Section 575. (ECF No. 39 at 10.) Commonwealth Defendants assert that Section 575 does not impose any specific enforcement obligations on Attorney General Shapiro or the PLRB. (*Id.*) Moreover, if Plaintiffs seek relief against Attorney General Shapiro and the members and chairman of the PLRB's general enforcement powers, Commonwealth Defendants contend that (1) the PLRB and attorney general are not authorized to initiate criminal prosecutions under Section 575, and (2) there are no allegations attributing any specific conduct to Commonwealth Defendants with regard to the enforcement of Section 575. (*Id.* at 11-12.) Therefore, Commonwealth Defendants claim that Plaintiffs cannot seek injunctive and declaratory relief against them because there is no "close official connection" between the attorney general and PLRB and the enforcement of Section 575.[8] (*Id.* at 13-17.)

Plaintiffs disagree, claiming that "[t]he PLRB defendants enforce the State's collective bargaining laws, which include the agency shop provisions that the plaintiffs have challenged, and the attorney general is charged with enforcing all of the State's laws as the State's chief law enforcement officer." (ECF No. 48 at 30.)

According to *Ex parte Young*:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

[8] The Court notes that Commonwealth Defendants do not appear to seek dismissal of the claims against Ms. Childer-Potts, the district attorney of Bedford County, Pennsylvania, on these bases. (*See* ECF No. 39 at 17 (arguing that the claims against the members of the PLRB and the attorney general must be dismissed).) Therefore, the Court will not address whether Ms. Childer-Potts is an appropriate defendant in this case.

> It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed . . . , but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

Ex parte Young, 209 U.S. at 157.

The Third Circuit has elaborated that, in order for a state officer to have "some connection with the enforcement of the act," there must be "realistic potential" that the officer's "general power to enforce the laws of the state would have been applied" against the plaintiffs. *See Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988). Specifically, "[a] plaintiff challenging the validity of a state statute may bring suit against the official who is charged with the statute's enforcement only if the official has either enforced, or threatened to enforce, the statute against the plaintiffs." *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993). "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Id.*

Attorney General Shapiro has no connection with the enforcement of Section 575.

There is no enforcement role for the attorney general in the penalty provisions of Section 575. *See* 71 Pa. Stat. § 575(*l*) ("Any employe organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall be subject to a fine of not more than two thousand dollars ($2,000)."); *id.* § 575(m) ("Any person who willfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall be fined not more than one thousand dollars ($1,000) or undergo imprisonment for not more than thirty (30) days, or both. Each individual

required to sign affidavits or reports under this section shall be personally responsible for filing such report or affidavit and for any statement contained therein he knows to be false.").

Under *Ex parte Young*, a state official's enforcement role need not be set out in the statute itself—the connection to enforcement may come from a different source, including "the general law." *See Ex parte Young*, 209 U.S. at 157. Yet, in this case, the attorney general's general authority to enforce the laws of the Commonwealth does not extend to Section 575. The attorney general's power comes from the Commonwealth Attorneys Act, 71 Pa. Stat. §§ 732-301 *et seq.* *See* 71 Pa. Stat. § 732-201(a) ("The Attorney General shall exercise such powers and perform such duties as are hereinafter set forth."); *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986) (quoting 71 Pa. Stat. § 732-201(a) and explaining that "[t]his provision expressly states that the powers of the Attorney General are those which are set forth in the [Commonwealth Attorneys] Act itself"). No provisions of this Act would give the attorney general the authority to enforce Section 575 under the circumstances of this case.

For example, the attorney general's authority to initiate criminal prosecutions is governed by 71 Pa. Stat. § 732-205. *See Carsia*, 517 A.2d at 958 (explaining that 71 Pa. Stat. § 732-205 delineates the kinds of cases over which the attorney general has prosecutorial authority). But none of the provisions of 71 Pa. Stat. § 732-205 give the attorney general the power to initiate a prosecution based on Section 575's penalty provisions, at least without a request from a district attorney or permission from a court. *See* 71 Pa. Stat. § 732-205. And Plaintiffs do not point to any provision of 71 Pa. Stat. § 732-205, the Commonwealth Attorneys Act in general, or other law that would give the attorney general an enforcement role in Section 575.

Moreover, even assuming that the attorney general would have general enforcement

authority over violations of Section 575, Plaintiffs do not allege that the attorney general has enforced or threatened to enforce Section 575 against Plaintiffs. Without plausible allegations of enforcement or threat thereof, the attorney general is not an appropriate defendant in this matter. *See 1st Westco Corp.*, 6 F.3d at 113 (explaining that "[a] plaintiff challenging the validity of a state statute may bring suit against the official who is charged with the statute's enforcement only if the official has either enforced, or threatened to enforce, the statute against the plaintiffs").

Plaintiffs argue—with no citations to authority—that the attorney general is charged with enforcing all of the Commonwealth of Pennsylvania's laws. (ECF No. 48 at 30.) They assert that the attorney general's general enforcement powers make the attorney general an appropriate defendant, at least at the motion-to-dismiss stage. (ECF No. 48 at 30.)

The Court disagrees. As explained above, Plaintiffs have failed to identify any connection between the attorney general and the enforcement of Section 575. The conclusory allegation that the attorney general is charged with enforcing Section 575 is insufficient to survive a motion to dismiss. Without factual allegations that the attorney general has enforced or threatened to enforce Section 575 or citations that show that the attorney general has some connection to the enforcement of Section 575, this suit is simply another case of "a high policy official with a general duty to uphold the law [that] has been made a party to a suit where there is little likelihood that he actually would have enforced the particular statute at issue." *1st Westco Corp.*, 6. F.3d at 115.

In sum, the claims for declaratory and injunctive relief against Attorney General Shapiro must be dismissed because the attorney general is not an appropriate defendant in this challenge.

The Court also finds that Mr. Darby, the chairman of the PLRB, and Mr. Mezzaroba and Mr. Shoop, members of the PLRB, must be dismissed as defendants for similar reasons. Section

575 does not provide any role for the PLRB, its chairman, or its members in enforcing its provisions. *See* 71 Pa. Stat. § 575. Moreover, the PLRB does not have the power to enforce Section 575 pursuant to any other statutory provision. The Public Employe Relations Act (the "PERA"),[9] 43 Pa. Stat. §§ 1101.101 *et seq.*, which delineates the PLRB's authority with regard to public employers, specifies that the PLRB "shall exercise those powers and perform those duties which are specifically provided for in this act." *Id.* § 1101.501. The Court cannot locate any PERA provision that would give the PLRB authority to enforce Section 575, nor have the parties identified any such provision. *See Lutz v. Morrisville Educ. Assoc.*, 31 PPER ¶ 31003 (P.L.R.B. 1999) (dismissing a charge of unfair practices filed with the PLRB alleging violations of Section 575 because "[n]othing in [Section 575] or in PERA vests the Board with jurisdiction to enforce the various provisions of the fair share fee legislation"). Further, Plaintiffs failed to plausibly allege that the PLRB chairman or its members have enforced or threatened to enforce Section 575 against Plaintiffs. *See 1st Westco Corp.*, 6 F.3d at 113. Therefore, the members and chairman of the PLRB are not appropriate defendants in this action, as they lack "some connection" with the enforcement of Section 575.

In summary, beyond Commonwealth Defendants' immunity, the claims against Attorney

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[9] While Commonwealth Defendants cite to the Pennsylvania Labor Relations Act (the "PLRA"), 43 Pa. Stat. §§ 211.1 *et seq.*, as delineating the PLRB's authority in this case, the PLRA applies to private employers, not public employers. *See id.* § 211.3(c) (defining "employer" but excluding "the Commonwealth, or any political subdivision thereof, or any municipal authority" from the definition). The PERA specifies the PLRB's authority in the context of public employers. *See* 43 Pa. Stat. § 1101.301(1); *Lutz v. Morrisville Educ. Assoc.*, 31 PPER ¶ 31003 (P.L.R.B. 1999) (discussing the application of the PERA in the context of a public-school union). However, even if the PLRA applies to the PLRB in this case, the PLRB still does not have the authority to enforce Section 575. Under the PLRA, the PLRB is empowered "to prevent any person from engaging in any unfair labor practice." 43 Pa. Stat. § 211.8(a). "Unfair labor practice[s]" are defined by Section 211.6, and none of this Section's provisions relate to the collection of fair-share fees under Section 575. *See id.* § 211.6.

General Shapiro, Mr. Darby, Mr. Mezzaroba, and Mr. Shoop must be dismissed because these individuals are inappropriate defendants to this action.

B. Union Defendants' Motion to Dismiss is granted.

Union Defendants move to dismiss Plaintiffs' claims for declaratory and injunctive relief due to mootness and lack of standing. (ECF No. 41 at 12-18.) Furthermore, Union Defendants seek dismissal of Plaintiffs' request for reimbursement of pre-*Janus* fair-share fees based on the good-faith defense to liability. (*Id.* at 18-25.) Union Defendants also request dismissal of Plaintiffs' state-tort-law claims because the Second Amended Complaint fails to state a claim in tort and the claims are barred by the good-faith defense. Finally, Union Defendants argue that Ms. Ziegler lacks standing to bring any claims and must be dismissed.

1. Plaintiffs' claims for declaratory and injunctive relief are moot and the demands for relief in paragraphs 55(q) and 55(r)(iii) of the Second Amended Complaint are dismissed for lack of standing.

Under Article III of the U.S. Constitution, federal court jurisdiction extends only to "cases" and "controversies." U.S. Const. art. III, § 2; *see Susan B. Anthony v. Driehaus*, 134 S. Ct. 2334, 2341 (2014); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *N.J. Turnpike Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 30 (3d Cir. 1985). "In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." *Already*, 568 U.S. at 90. This "case or controversy" requirement encompasses, *inter alia*, two doctrines that are relevant to the present dispute: mootness and standing. *See Susan B. Anthony*, 134 S. Ct. at 2341; *Friends of the Earth*, 528 U.S. at 180; *Arizonans for Official English*, 520 U.S. at 64, 67; *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67,

70 (1983).

Union Defendants argue that Plaintiffs' claims for declaratory and injunctive relief with respect to the constitutionality of fair-share fees are moot because of the Supreme Court's decision in *Janus*. (ECF No. 41 at 12-17.) Furthermore, Union Defendants contend that Plaintiffs have no standing to seek to impose conditions on the enrollment of union members. (*Id.* at 17-18.) The Court will thus address the doctrines of mootness and standing, in turn.

a. Plaintiffs' claims for declaratory and injunctive relief are moot due to the Supreme Court's decision in *Janus* and Union Defendants' compliance with that decision.

Union Defendants argue that Plaintiffs' claims for declaratory and injunctive relief (ECF No. 62 ¶ 55(e)-(o), (r), (s)) are moot because of *Janus*. (ECF No. 41 at 6.) Union Defendants explain that they immediately acted to conform with *Janus* following the Supreme Court's decision.[10] (*Id.* at 7.)

On the day of the *Janus* decision, the PSEA notified every school employer with which a PSEA affiliate had a contractual fair-share clause of the *Janus* decision and instructed them to immediately cease deducting fair-share fees from their employees' paychecks. (ECF No. 41-1 ¶ 5(a).) Where school employers had already deducted and transmitted the portions of their employees' fees attributable to the period after the *Janus* decision, or were unable to modify a post-*Janus* payroll, the PSEA established a procedure to refund the fees to the non-member

[10] The following facts are taken from the affidavits submitted with the Brief in Support of Union Defendants' Motion to Dismiss First Amended Complaint (ECF No. 41). The Court may consider these affidavits pursuant to the rules regarding factual challenges under Federal Rule of Civil Procedure 12(b)(1), discussed *supra*. The Court notes that Plaintiffs do not contest the accuracy of the affidavits. (*See, e.g.*, ECF No. 48 at 7 ("The union defendants were enforcing an unconstitutional agency shop when the plaintiffs sued, and they stopped while the litigation was ongoing."); *id.* at 8 ("The unions chose to conform their conduct to *Janus* to avoid these post-*Janus* lawsuits.").)

feepayers (including religious objectors) with interest. (*Id.* ¶ 5(b)-(c).)

On July 2, 2018, the PSEA sent a letter to every fair-share feepayer explaining the *Janus* decision. (*Id.* ¶ 5(d); *id.* at 7-8.) The letter informed them that the PSEA had asked employers to immediately stop fair-share-fee payroll deductions and that any fees that had been paid for the period after June 27, 2018, would be promptly refunded. (*Id.* ¶ 5(d); *id.* at 7-8.) Letters went to all Plaintiffs except Ms. Ziegler, who retired in 2013 and has not paid fair-share fees since then. (ECF No. 41-2 ¶¶ 5-7.) Plaintiffs were sent checks refunding the fair-share fees that had been deducted and transmitted by their school-district employers prior to June 27, 2018, but that were attributable to the period from June 27 to August 31, 2018. (ECF No. 41-1 ¶¶ 6-11.)

The school employers have recognized that statutory and contractual provisions authorizing fair-share requirements are no longer enforceable after *Janus*. (ECF No. 41-3 ¶ 3; ECF No. 41-4 ¶ 3; ECF No. 41-5 ¶ 3; ECF No. 41-6 ¶ 3; ECF No. 41-7 ¶ 3.) Representatives of the school districts that employ or employed plaintiffs have provided affidavits attesting that, as a result of the *Janus* decision, they have ceased deducting and transmitting fair-share fees and will not deduct and transmit such fees in the future. (ECF No. 41-3 ¶¶ 5-6; ECF No. 41-4 ¶¶ 5-6; ECF No. 41-5 ¶¶ 5-6; ECF No. 41-6 ¶¶ 5-6; ECF No. 41-7 ¶¶ 5-6.)

Union Defendants argue that Plaintiffs' claims for declaratory and injunctive relief are moot based on this response to *Janus* and the Supreme Court's determination in *Janus* that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Janus*, 138 S. Ct. at 2486. Union Defendants assert that they and the school-district employers agree that the collection of fair-share fees by public-sector unions is unconstitutional. (ECF No. 41 at 13.) Further, Union Defendants assert that the voluntary-cessation exception to the

mootness doctrine does not apply because Union Defendants did not voluntarily stop collecting fair-share fees in order to circumvent this Court's jurisdiction in the present lawsuit—they stopped collecting the fees in order to comply with the intervening Supreme Court decision in *Janus*. (*Id.* at 14.)

In response, Plaintiffs argue that Union Defendants' conduct post-*Janus* was voluntary and does not moot Plaintiffs' claims for injunctive and declaratory relief. (ECF No. 48 at 7.) Plaintiffs contend that Union Defendants' response was voluntary because (1) court rulings do not impose legal obligations on non-parties (*id.* at 8), (2) *Janus* did not change the law (*id.* at 9-13), and (3) *Janus* did not explicitly resolve the constitutionality of Union Defendants' treatment of religious objectors (*id.* at 13-15).

The Court agrees with Union Defendants and finds that Plaintiffs' claims for declaratory and injunctive relief are moot due to the Supreme Court's decision in *Janus* and Union Defendants' undisputed compliance therewith.

i. Legal Standard

"To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English*, 520 U.S. at 67 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); *see Already*, 568 U.S. at 90-91. An actual controversy does not exist, rendering a case moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already*, 568 U.S. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)); *N.J. Turnpike Auth.*, 772 F.2d at 31. A live controversy exists "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation." *Knox*, 567 U.S. at 307-08 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 442

(1984)).

However, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see Already*, 568 U.S. at 91 ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued."); *Knox*, 567 U.S. at 307; *Friends of the Earth*, 528 U.S. at 174, 189; *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 (1982). This exception to the mootness doctrine exists because, in its absence, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already*, 565 U.S. at 91; *see Knox*, 567 U.S. at 307; *Friends of the Earth*, 528 U.S. at 189; *see also Aladdin's Castle*, 455 U.S. at 289.

The Supreme Court has announced the following standard for determining whether a case is moot due to the defendant's voluntary conduct: "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Exp. Assoc.*, 393 U.S. 199, 203 (1968)); *see W.T. Grant Co.*, 345 U.S. at 633; *N.J. Turnpike Auth.*, 772 F.2d at 31. The burden on the defendant in this circumstance "is a heavy one." *W.T. Grant Co.*, 345 U.S. at 633; *see Already*, 565 U.S. at 91 (describing the "formidable burden" on a defendant to show that the wrongful behavior will not recur).

ii. Discussion

Here, there is no longer a controversy that needs adjudication. When the original Complaint was filed, there was a live controversy—whether Union Defendants could constitutionally collect fair-share fees from Plaintiffs pursuant to Section 575. However, this

controversy was mooted by the intervening *Janus* decision, which held that fair-share fees are unconstitutional, and Union Defendants' undisputed compliance therewith. *See Janus*, 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to the union may be deducted from a non[-]member's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."). Based on *Janus* and Union Defendants' conduct, there is simply no live controversy regarding the constitutionality of collecting fair-share fees. In other words, there is no continuing conduct for this Court to enjoin or declare unconstitutional. Thus, Plaintiffs' claims for declaratory and injunctive relief are moot. *See Hartnett v. Pa. State Educ. Ass'n*, No. 1:17-cv-100, 2019 WL 2160404, at *6-7 (M.D. Pa. May 17, 2019) (finding comparable claims for declaratory and injunctive relief moot post-*Janus* because the "[p]laintiffs face no realistic possibility that they will be subject to the unlawful collection of 'fair share' fees"); *Cook v. Brown*, 364 F. Supp. 3d 1184, 1189 (D. Or. 2019) (finding a request for injunctive relief post-*Janus* moot because the union had already stopped collecting fair-share fees and thus there was "no live controversy . . . necessitating injunctive relief"); *Lamberty v. Conn. State Police Union*, No. 3:15-cv-378, 2018 WL 5115559, at *9 (D. Conn. Oct. 19, 2018) (explaining that *Janus* mooted a challenge to the constitutionality of agency fees because "there is nothing for [the court] to order [the d]efendants to do now"); *Yohn v. Cal. Teachers Ass'n*, Case No. SACV 17-202-JLS-DFM, 2018 WL 5264076 (C.D. Cal. Sept. 28, 2018) (granting the union's motion to dismiss on mootness grounds after the union complied with *Janus*); *Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1339-40 (W.D. Wash. 2018) (finding that *Janus* mooted a controversy when the State of Washington stopped collecting agency fees post-*Janus*); *see also Grutzmacher v. Howard Cty.*, 851 F.3d 332, 349 (4th Cir. 2017) (finding a controversy regarding challenged policies moot based on a policy change and an

affidavit indicating that the defendant would not revert to the challenged policies); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365-66 (7th Cir. 1988) (explaining that a policy of non-enforcement of a statute based on Supreme Court precedent moots a statutory challenge, as "[f]ederal courts do not, as a rule, enjoin conduct which has been discontinued with no real prospect that it will be repeated"); *Smith v. Bieker*, Case No. 18-cv-05472-VC, 2019 WL 2576679, at *1 (N.D. Cal. June 13, 2019) (finding similar claims moot because the State did not plan to enforce the unconstitutional statute in light of *Janus*).

Plaintiffs argue that Defendants' choice to stop collecting fair-share fees does not moot Plaintiffs' claims because of the voluntary-cessation exception to the mootness doctrine. (ECF No. 48 at 7.) However, the voluntary-cessation exception does not apply here. The circumstances of this case make it clear that the undisputedly wrongful behavior—the collection of fair-share fees—is not reasonably likely to recur. *Friends of the Earth*, 528 U.S. at 189. In particular, the Court finds the following circumstances significant: (1) *Janus*'s changing of the law; (2) the timing of and reason for Union Defendants' choice to stop collecting fair-share fees; and (3) the absence of any reason to think Union Defendants will resume collecting fair-share fees.

First, *Janus* clearly changed the law of the land. In the pre-*Janus* era, the Supreme Court's decision in *Abood* established the constitutionality of collecting fair-share fees. The Court held in *Abood* that dues paid pursuant to agency-shop clauses were constitutional if they were used to finance unions' collective-bargaining, contract-administration, and grievance activities. *See Abood*, 431 U.S. at 225. Although *Abood* was called into question over the past few years, *Janus* nevertheless represents a significant legal shift because it explicitly overruled *Abood* and held that the collection of fair-share fees was unconstitutional. *Janus*, 138 S. Ct. at 2486. "The law of the

land thus has changed and there no longer is a legal dispute as to whether public sector unions can collect agency fees." *Lamberty*, 2018 WL 5115559, at *9. Complying with a Supreme Court decision cannot be considered "voluntary cessation."[11] *See id.* at *9 (explaining that there was "nothing voluntary" about the union's decision to comply with *Janus*, as *Janus* "announced a broad rule invalidating every state law permitting agency fees to be withheld"); *Cook*, 364 F. Supp. 3d at 1189 ("[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."); *see also Christian Coal. of Ala. v. Cole*, 355 F.3d 1288, 1292 (11th Cir. 2004) (finding a controversy moot because an intervening Supreme Court decision "changed the legal landscape" on which the defendants based their initial position).

Plaintiffs object that "[c]ourts do not make or change laws; they interpret and discover the meaning of laws enacted by others." (ECF No. 48 at 9.) Plaintiffs claim that "[a]n actual change in the law—such as a constitutional amendment outlawing public-sector agency shops or a repeal of the statutes that authorize this practice—would moot the plaintiffs' claims for injunctive relief,"

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[11] Along similar lines, Plaintiffs argue that because "[n]one of those unions were parties to the *Janus* litigation, . . . they had no formal legal obligation to obey a court judgment that was entered in a case that they were not involved in." (ECF No. 48 at 8.) The Court generally agrees that Union Defendants were not parties to *Janus* and that "[i]t would have been legal for the [U]nion [D]efendants to continue enforcing their agency shops after *Janus* until a litigant sued them to enjoin the practice." (*Id.*) However, while legal, "[i]t is unreasonable to think that the Union would resort to conduct that it had admitted in writing was constitutionally deficient and had attempted to correct," particularly when resuming the unconstitutional conduct would "subject it[] to future litigation that it would clearly lose." *Carlson v. United Academics*, 265 F.3d 778, 786-87 (9th Cir. 2001). Moreover, the existence or non-existence of "formal legal obligation[s]" is not the test for mootness. The test is whether subsequent events have made it absolutely clear that Union Defendants could not reasonably be expected to resume collection of fair-share fees. *See Friends of the Earth*, 528 U.S. at 189. As discussed in this subsection, the Court concludes that this standard is met in this case, and the Court declines to entertain Plaintiffs' plea for a new mootness standard that depends on "formal legal obligation[s] to obey a court judgment" (ECF No. 48 at 8) and would render the mootness standard nearly impossible to meet.

but "voluntary cessation in response to a Supreme Court opinion does not moot ongoing litigation." (*Id.*)

In support of this claim, Plaintiffs cite to the line of cases that followed the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). These cases held that state compliance with *Obergefell* did not moot ongoing challenges to state marriage laws. *See, e.g., Jernigan v. Crane*, 796 F.3d 976, 979 (8th Cir. 2015); *Rosenbrahn v. Daugaard*, 799 F.3d 918, 922 (8th Cir. 2015); *Waters v. Ricketts*, 798 F.3d 682, 686 (8th Cir. 2015); *Waters v. Ricketts*, 159 F. Supp. 3d 992, 999-1000 (D. Neb. 2016); *Strawser v. Strange*, 190 F. Supp. 3d 1078, 1081 (S.D. Ala. 2016).

These cases are similar in that the post-*Obergefell* defendants did not dispute the merits of the plaintiffs' constitutional challenges, like Defendants here do not dispute that the collection of fair-share fees is unconstitutional. *See, e.g., Jernigan*, 796 F.3d at 979 ("Arkansas no longer disputes the merits of the district court's ruling. The challenged laws are unconstitutional."). However, these cases are distinguishable from the present case in three notable respects.

First, the courts in these cases found that *Obergefell* was written very narrowly. *See Obergefell*, 135 S. Ct. at 2605 ("[T]he *State laws challenged by Petitioners in these cases* are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." (emphasis added)). In contrast, *Janus* broadly overruled *Abood* and determined that fair-share fees for public employees are unconstitutional. *See Janus*, 138 S. Ct. at 2486; *see also Lamberty*, 2018 WL 5115559, at *9 (describing the "broad rule" announced by *Janus*); *Danielson*, 345 F. Supp. 3d 1336 at 1340 ("*Janus* utilizes broad language in a lengthy discussion overturning precedent . . . ."); *Lee v. Ohio Educ. Assoc.*, 366 F. Supp. 3d 980, 982 (N.D. Ohio 2019) ("*Janus* . . . used broad language that immediately made it unconstitutional for unions

to extract agency fees from nonconsenting employees."). *Janus*'s broad language may moot controversies in ways *Obergefell*'s narrow holding did not.

Second, some of the post-*Obergefell* cases noted that the Supreme Court did not rule on all the issues raised by the plaintiffs in those cases. *See, e.g., Rosenbrahn*, 799 F.3d at 922 (describing issues such as name-changes on driver's licenses that *Obergefell* did not resolve). Here, *Janus*'s broad holding regarding the unconstitutionality of fair-share fees clearly resolves all of Plaintiffs' requests for declarative and injunctive relief. As was explained previously, post-*Janus*, there is simply nothing left for this Court to declare or enjoin regarding fair-share fees in Pennsylvania.[12]

Third, some of the post-*Obergefell* cases were not moot because courts had concerns about continued compliance with *Obergefell*. *See, e.g., Waters*, 159 F. Supp. 3d at 1000 ("Defendants' position regarding birth certificates does give plaintiffs cause to be concerned about other protections available to same-sex couples related to the right to marry . . . ."); *Strawser*, 190 F. Supp. 3d at 1081-82 ("Given the actions by Alabama state and local officials, both before and after the Supreme Court decided *Obergefell*, it cannot be said with assurance that there is no reasonable expectation that Alabama's unconstitutional marriage laws will not again be enforced."). In this

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[12] Plaintiffs argue that *Janus* does not moot the present case because "*Janus* never explicitly rule[d] on the constitutionality of Pennsylvania's treatment of religious objectors." (ECF No. 48 at 13.) While it is true that the facts of *Janus* did not present the Supreme Court with an opportunity to rule explicitly on the constitutionality of Section 575's religious-objector provisions, *Janus* nevertheless resolves this issue with its broad holding that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Janus*, 138 S. Ct. at 1486. Now that Section 575's fair-share fees are clearly unconstitutional, objecting on religious grounds to those fees is unnecessary and any attempt to force religious objectors to pay the equivalent of a fair-share fee would be unconstitutional under *Janus*. Although Plaintiffs claim that "it is *possible* to argue that Pennsylvania's religious-objector regime can survive *Janus*" (ECF No. 48 at 14 (emphasis added)), Plaintiffs also recognize that "any effort to impose a financial penalty on employees who decline union membership is unconstitutional, regardless of whether the money is remitted to a union or a charity." (*Id.*) Thus, the status of religious objectors after *Janus* is distinguishable from the issues remaining for litigants after *Obergefell*, and the Court is not persuaded that the status of religious objectors in this case presents a live controversy.

case, however, Union Defendants have established that they will continue to comply with *Janus* even if Plaintiffs' claims for declaratory and injunctive relief are declared moot. *See Danielson*, 345 F. Supp. 3d at 1340 (distinguishing the post-*Obergefell* cases from a post-*Janus* case because "in the aftermath of *Obergefell*, there was reason to believe that some states would ignore the Supreme Court's binding precedent, unlike in this case").

Thus, this Court joins numerous courts in finding that the post-*Obergefell* cases are unpersuasive in the present dispute. *See Hartnett*, 2019 WL 2160404, at *6; *Danielson*, 345 F. Supp. 3d at 1340; *Yohn*, 2018 WL 5264076, at *6; *Ladley v. Pa. State Educ. Ass'n*, No. CIL14-08552, at *19-20 (Pa. Ct. C.P. Lancaster Cty. Oct. 29, 2018). In contrast to the unique circumstances surrounding *Obergefell*, in the instant case, compliance with an intervening Supreme Court decision does not implicate the voluntary-cessation exception to the mootness doctrine.

Instead of relying on the post-*Obergefell* cases, this Court finds a 2004 Eleventh Circuit decision, *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288 (11th Cir. 2004), to be more persuasive under the present circumstances. In *Christian Coalition*, a few months before a general election, the Christian Coalition of Alabama (the "CCA") distributed questionnaires to Alabama judicial candidates asking for the candidates' opinions on numerous social and political issues. *Id.* at 1289-90. Two sitting judges who were running for reelection sought an opinion from the Alabama Judicial Inquiry Commission (the "JIC") as to whether responding to the questionnaires would comport with ethics rules. *Id.* at 1290. In an advisory opinion, the JIC indicated that judges would violate the Alabama Canons of Judicial Ethics by answering some of the questions on the questionnaires. *Id.* The CCA and three judicial candidates sued members of the JIC in federal court on First Amendment grounds. *Id.*

Before the district court made a decision on the merits, the Supreme Court decided *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), in which the Court held that "[t]he Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment." *Id.* at 788. Based on this decision, the JIC withdrew its advisory opinion and filed a motion to dismiss the lawsuit on mootness grounds. *Christian Coal.*, 355 F.3d at 1290. The district court granted the motion to dismiss due to mootness, which the Eleventh Circuit affirmed. *Id.* at 1290, 1293.

The Eleventh Circuit relied in part on the JIC's intention, which was stated in the pleadings, that the JIC would not file charges against a judge for responding to the CCA questionnaire. *Id.* at 1292. The Eleventh Circuit found the JIC's assertion to be particularly persuasive because it was clearly not made to avoid a ruling by the district court in the present case. *Id.* "[T]he JIC's withdrawal of its [a]dvisory [o]pinion and its representation to the district court are a result of *subsequent events out of the JIC's control that effected a change in its position* regarding the propriety of answering the CCA questionnaire." *Id.* (emphasis added). These "subsequent events" included the Supreme Court's intervening decision in *White* and the Alabama Supreme Court's Committee on the Canons' decision to modify the Canons based on *White*. *Id.* The Eleventh Circuit found that these two events "changed the legal landscape on which the JIC initially based its Advisory Opinion." *Id.* "Thus, the CCA ha[d] every reason to believe that the JIC's representation [was] genuine, and [could] reasonably expect that the JIC [would] not issue another opinion preventing judges from answering the questionnaire at issue . . ." *Id.* at 1292-93.

The reasoning of *Christian Coalition* is persuasive when applied to the circumstances of this case. In response to a Supreme Court decision that "changed the legal landscape," Union Defendants ceased collecting fair-share fees, much like the JIC in *Christian Coalition* withdrew its advisory opinion based on *White*. The decision to stop collecting fair-share fees in this case was not voluntary because it was made based on intervening circumstances out of Union Defendants' control—namely, a Supreme Court decision—which the Eleventh Circuit found to be sufficient to moot the case in *Christian Coalition*. Based on Union Defendants' cessation of the offensive conduct and the Supreme Court's decision in *Janus* prohibiting that conduct, Plaintiffs now have every reason to believe Union Defendants' declarations that they will not resume the collection of fair-share fees. Thus, the Eleventh Circuit's decision in *Christian Coalition* supports this Court's conclusion that the present controversy is moot because complying with a Supreme Court decision cannot be considered "voluntary cessation" such that Plaintiffs can circumvent the mootness doctrine.

Plaintiffs claim that *Christian Coalition* is inapposite because "[it] was the Supreme Court's ruling in *White—combined with* the Alabama Supreme Court's decision to revise the judicial canons that undergirded the advisory opinion—that led the Eleventh Circuit to conclude that the Judicial Inquiry Commission's withdrawal of its opinion was not 'voluntary cessation.'" (ECF No. 48 at 12.) Plaintiffs argue that "neither *Christian Coalition*—nor any other case of which we are aware—allows the mere compliance with an intervening Supreme Court ruling to moot a case." (*Id.*) While Plaintiffs are correct that *Christian Coalition* is factually distinguishable, the

differences between the circumstances in *Christian Coalition* and the present case do not change the Court's conclusion that the reasoning of *Christian Coalition* is persuasive.[13]

In sum, *Janus* changed the law of the land by overruling *Abood* and declaring the collection of fair-share fees to be unconstitutional. By complying with this change in the law, Defendants were not acting "voluntarily" for purposes of the voluntary-cessation exception to mootness—they were compelled to change their conduct based on a decision of our nation's highest court. It is therefore "absolutely clear" that Union Defendants' wrongful behavior "could not reasonably be expected to recur." *See Friends of the Earth*, 528 U.S. at 189.

The Court finds the voluntary-cessation exception to mootness inapplicable for a second reason: the timing of and reason for Union Defendants' cessation of fair-share-fee collection make it clear that Union Defendants did not cease the challenged conduct due to this litigation.

Union Defendants' undisputed account of its post-*Janus* actions indicates that on the day the Supreme Court announced its decision in *Janus*, the PSEA contacted affected employers and told them to stop deducting fair-share fees. (ECF No. 41-1 ¶ 5(a).) A few days later, the PSEA notified every fair-share feepayer of the *Janus* decision and told the feepayers that they were no

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[13] Plaintiffs also argue that *Christian Coalition* is distinguishable because the defendants in that case were state officials and were thus presumed to act in good faith when they ceased the offensive conduct and represented that they would not file charges against a judge for responding to the CCA questionnaire. (ECF No. 48 at 12.) In contrast, Plaintiffs assert, "labor unions get no such indulgence from the courts, and they cannot moot a case without showing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur.'" (*Id.* at 13.) While the Court agrees with Plaintiffs' articulation of the mootness standard that applies to Union Defendants in this case, the Court finds this distinction between *Christian Coalition* and the present case to be unpersuasive. First, it is not clear that the court in *Christian Coalition* based its opinion on the presumption that state officials act in good faith. Second, even if this presumption did form the basis for the Eleventh Circuit's decision, this Court still concludes that this case meets the more stringent mootness standard articulated by Plaintiffs, as explained throughout this subsection.

longer required to pay fair-share fees. (*Id.* ¶ 5(d); *id.* at 7-8.) The timing of and reason for these actions make clear that Union Defendants did not cease the unconstitutional conduct in order to circumvent this Court's jurisdiction in the present case. Instead, Union Defendants acted to comply with *Janus*.[14]

The voluntary-cessation exception to the mootness doctrine exists so that a defendant cannot "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already*, 565 U.S. at 91; *see Knox*, 567 U.S. at 307. Here, because Union Defendants acted to comply with *Janus* as opposed to acting to avoid an undesirable decision by this Court, the purpose of the voluntary-cessation exception would not be served by applying the exception to this case. *See Lamberty*, 2018 WL 5115559, at *9 (finding the case moot and explaining that the defendants complied with *Janus* "not because they wanted to evade the Court's jurisdiction, . . . but because the Supreme Court's new and controlling precedent not only affected the rights of the parties immediately before it (the state of Illinois) but also announced a broad rule invalidating every state law permitting agency fees to be withheld"); *Yohn*, 2018 WL 5264076, at *5 ("Defendants are obviously changing their behavior because of the holding in *Janus* and not because of this lawsuit."); *Danielson*, 345 F. Supp. 3d at 1339 ("[T]here can be no serious doubt that the policy change was made because of *Janus*, not because of this lawsuit, given the timing of the policy change and

[14] Plaintiffs, while claiming that the voluntary-cessation exception applies to the facts of this case, repeatedly refer to Union Defendants' "response to *Janus*" (*see* ECF No. 48 at 7-9) and recognize that Union Defendants stopped collecting fair-share fees "in response to a Supreme Court opinion" (*id.* at 9). Plaintiffs thus seemingly recognize that Union Defendants' actions post-*Janus* were not done to circumvent this Court's jurisdiction, but were instead done to comply with new law.

direct reliance on *Janus* as the stated basis for the change."); *see also Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (dismissing a case as moot because, in part, there was no indication that the relevant regulatory change "was adopted to avoid an adverse judgment in this case and [would] be abandoned once [the] case [became] final"); *Christian Coal.*, 355 F.3d at 1292 (acknowledging that the defendant ceased the conduct at issue because of an intervening Supreme Court decision); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1194 (5th Cir. 2000) (finding an issue moot because the relevant policy was clearly changed due to a change in the law and not due to the pending litigation); *Ragsdale*, 841 F.2d at 1365-66 ("We believe that the defendants' now public policy of non-enforcement of the hospitalization requirement, particularly in view of the reasons therefor (*i.e.*, that enforcement is barred by clear Supreme Court precedent), moots any challenge to that requirement."). Therefore, the Court will not apply the voluntary-cessation exception here. *See Friends of the Earth*, 528 U.S. at 189.

Finally, the voluntary-cessation exception to mootness does not apply to this case because there is no other reason for this Court to believe that Union Defendants will resume collecting fair-share fees. For example, Union Defendants do not continue to defend fair-share-fee collection on the merits. *See Knox*, 567 U.S. at 307 (declining to dismiss a case as moot because the union defendant continued to defend the legality of the at-issue fee). Nor have Plaintiffs alleged that Union Defendants attempted to collect fair-share fees since the *Janus* decision or that Union Defendants will resume the collection of fair-share fees. Instead, Union Defendants have admitted numerous times before this Court that the collection of fair-share fees is unconstitutional. (*See* ECF No. 41 at 16; ECF No. 51 at 5.) The Court finds that "[i]t is unreasonable to think that [Union Defendants] would resort to conduct that [they have] admitted

in writing [is] constitutionally deficient," particularly when doing so would "subject [Union Defendants] to future litigation that [they] would clearly lose."[15] *Carlson v. United Academics*, 265 F.3d 778, 786-87 (9th Cir. 2001); *see Cook*, 364 F. Supp. 3d at 1189 (explaining that the voluntary-cessation exception did not apply and the case was moot because the Court saw "no reason to assume, without evidence, [the union's] willingness to flagrantly violate the law"). Therefore, the voluntary-cessation exception to the mootness doctrine does not apply in this case. Other courts have reached the same conclusion in similar cases. *See Yohn*, 2018 WL 5264076, at *3 (explaining that the case was moot because there was no evidence that the defendants attempted to collect fair-share fees in violation of *Janus*); *Danielson*, 345 F. Supp. 3d at 1339 (dismissing a case as moot and noting that "there is no evidence that the State has equivocated in its policy change to discontinue collecting agency fees"); *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1227 (W.D. Wash. 2019) (finding that a post-*Janus* policy change rendered claims for injunctive relief moot because

[15] Furthermore, in order to resume the collection of fair-share fees, Union Defendants would need the assistance of Plaintiffs' public-school employers to deduct the fees from non-members' paychecks. However, these employers have declared that they have stopped collecting fair-share fees and that they will not deduct or transmit fair-share fees in the future. (*See* ECF Nos. 41-3, 41-4, 41-5, 41-6, 41-7.) "Government officials are presumed to act in good faith." *Bridge v. U.S. Parole Comm'n*, 981 F.3d 97, 106 (3d Cir. 1992). The employers' changed behavior, their representations that they will not resume the unconstitutional collection of fair-share fees, and the presumption that they act in good faith—all combined with the lack of any allegation that the employers are acting in bad faith—make it unreasonable to expect that the employers will collect fair-share fees in violation of *Janus* in the future. *See Marcavage*, 666 F.3d at 861. Because Union Defendants seemingly cannot collect fair-share fees without the employers' assistance, the employers' declarations support the conclusion that there is no reason to expect Union Defendants to resume fair-share-fee collection. And while the employers are not foreclosed from collecting fair-share fees based on their declarations, as Plaintiffs argue (*see* ECF No. 48 at 15), Plaintiffs fail to acknowledge the good-faith presumption and the fact that Plaintiffs have not alleged that the employers are acting in bad faith and that they will resume collecting fair-share fees. Moreover, Plaintiffs do not explain how Union Defendants could collect fair-share fees without the employers' assistance. Finally, Plaintiffs offer no other compelling reason why the good-faith presumption should not apply to the employers in this case. Thus, the Court finds Plaintiffs' contention that Union Defendants "cannot piggyback off the good-faith presumption that attaches when government officials cease their unlawful conduct in the midst of a lawsuit" unpersuasive. (*Id.*)

there was no evidence that the union had deviated from its new policy, and "it would be highly illogical for [the union] to revert its practices back to their pre-*Janus* state unless the Supreme Court again changed course" because such a reversion "would be inviting litigation by directly violating a constitutional decree"); *see also Grutzmacher*, 851 F.3d at 349 (finding a claim moot after "discern[ing] 'no hint'" that the defendant would reinstitute the challenged policy).

In sum, Plaintiffs' claims seeking declaratory and injunctive relief (ECF No. 62 ¶ 55(e)-(o), (r), (s)) are moot as a result of the Supreme Court's decision in *Janus* and Union Defendants' undisputed compliance therewith.[16] The voluntary-cessation exception to the mootness doctrine does not save these claims from dismissal because (1) *Janus* changed of the law of the land, (2) Union Defendants complied with that change in the law, and (3) Plaintiffs have not alleged that Defendants will resume collecting fair-share fees in the future.

By finding Plaintiffs' claims for declarative and injunctive relief moot, this Court agrees with various courts around the county who have dealt with this issue in the aftermath of *Janus*. These courts have concluded that the lawsuits are moot and that the voluntary-cessation exception to the mootness doctrine does not apply. *See Hartnett*, 2019 WL 2160404, at *6-7; *Babb v. Cal. Teachers Ass'n*, No. 8:18-cv-00994-JLS-DFM, 2019 WL 2022222, at *4 (C.D. Cal. May 8, 2019); *Wholean v. CSEA SEIU Local 2001*, 3:18-cv-1008(WWE), 2019 WL 1873021, at *3 (D. Conn. Apr. 26, 2019) (finding similar case moot because "a defendant cannot reasonably be expected to resume

[16] Moreover, the Court agrees with Union Defendants that even if constitutional mootness does not apply to this case, "dismissal of the requests for injunctive and declaratory relief on ground of prudential mootness [is] warranted." *Marcavage*, 666 F.3d at 862 n.1; (*see* ECF No. 41 at 16 n.2). The Supreme Court's decision in *Janus* and Union Defendants' cessation of the collection of fair-share fees in compliance with that decision has "forestalled any occasion for meaningful [declaratory and injunctive] relief." *Int'l Bhd. Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers v. Kelly*, 815 F.2d 912 (3d Cir. 1987) (quoting *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 39 (3d Cir. 1985)).

conduct that it acknowledges is contrary to binding precedent" (citation omitted)); *Akers v. Md. State Educ. Assoc.*, Civil Action No. RDB-18-1797, 2019 WL 1745980, at *5 (D. Md. Apr. 18, 2019) ("[The p]laintiffs' request for injunctive relief is moot because the union's communications are reliable evidence of a permanent shift in policy and the challenged conduct cannot be reasonably expected to recur, and declaratory relief is moot because there is no immediate legal controversy."); *Bermudez v. Serv. Emps. Int'l Union, Local 521*, Case No. 18-cv-04312-VC, 2019 WL 1615414, at *1 (N.D. Cal. Apr. 16, 2019); *Carey*, 364 F. Supp. 3d at 1225-27; *Lee*, 366 F. Supp. 3d at 981-82 (quoting *Lamberty*, 2018 WL 5115559, at *9); *Crockett v. NEW-Alaska*, 267 F. Supp. 3d 996, 1002 (D. Alaska 2019) ("Given that it is undisputed that the collection of fair-share fees ceased immediately after *Janus*, there is no actual, live controversy sufficient to establish this court's jurisdiction over [p]laintiffs' claims for prospective relief with respect to fair-share fees."); *Cook*, 364 F. Supp. 3d at 1188-90 (finding post-*Janus* claims for declaratory and injunctive relief against a public-sector union to be moot in light of *Janus* and the union's compliance with the mandates of *Janus*); *Danielson v. Am. Fed'n of State, Cty., and Mun. Emps., Council 28*, 340 F. Supp. 3d 1083, 1084 (W.D. Wash. 2018) (dismissing the plaintiffs' claims for declaratory and injunctive relief as moot because "there is no reasonable likelihood that agency fees will be used and collected from [the p]laintiffs"); *Lamberty*, 2018 WL 5115559, at *9 (explaining that *Janus* mooted a challenge to the constitutionality of agency fees because "there is nothing for [the court] to order [the d]efendants to do now"); *Yohn*, 2018 WL 5264076, at *4 (granting the union's motion to dismiss on mootness grounds after the union complied with *Janus*); *Danielson*, 345 F. Supp. 3d at 1340 (finding that *Janus* mooted a controversy when the State of Washington stopped collecting agency fees post-*Janus*); *Ladley*, No. CIL14-08552, at *20-21, *24 (dismissing a post-*Janus* challenge as moot

and rejecting the application of the voluntary-cessation exception).

Plaintiffs' claims seeking declaratory and injunctive relief (ECF No. 62 ¶ 55(e)-(o), (r), (s)) will therefore be **DISMISSED**.

b. The demands for relief in paragraphs 55(q) and 55(r)(iii) of the Second Amended Complaint are dismissed for lack of standing.

Plaintiffs and Union Defendants agree that Plaintiffs do not have standing to seek the relief requested in paragraphs 55(q) and 55(r)(iii) of the Second Amended Complaint. (ECF No. 41 at 17-18; ECF No. 48 at 16.) The Court concurs and thus will **DISMISS** these requests for relief.

2. Plaintiffs' claim for repayment of previously paid fair-share fees is dismissed based on the good-faith defense.

In addition to declaratory and injunctive relief, Plaintiffs request that this Court order the NEA, the PSEA, and all of the PSEA's chapters and affiliates to repay the fair-share fees that Union Defendants extracted from Plaintiffs and their class members' paychecks, along with pre- and post-judgment interest. (ECF No. 62 ¶ 55(p).)

Union Defendants seek to dismiss this request for relief. (ECF No. 41 at 18.) Union Defendants argue that any fair-share fees that they extracted after the *Janus* decision have already been repaid with interest, and thus, to the extent Plaintiffs demand reimbursement for post-*Janus* extraction, their request is moot. (*Id.*) Plaintiffs do not appear to challenge this claim of mootness. The Court agrees that Plaintiffs' claims for post-*Janus* fair-share-fee reimbursement are moot, as these fees have undisputedly been repaid (ECF No. 41-1 ¶¶ 5(b)-(c), 6-11).

In addition, Union Defendants seek to dismiss Plaintiffs' request for repayment of pre-*Janus* fair-share fees. (ECF No. 41 at 18.) Union Defendants contend that the *Janus* decision is not

retroactive because they collected the pre-*Janus* fees in good-faith reliance on *Abood* and Section 575. (*Id.* at 18-25.)

In response, Plaintiffs argue that when a defendant asserts a good-faith defense, courts are required to look to the common-law tort that is most analogous to the situation. (ECF No. 48 at 17.) If, when § 1983 was enacted, the analogous tort allowed for a similar defense, the court may recognize that defense to a claim for damages under § 1983. (*Id.*) Plaintiffs claim that the most analogous common-law tort in this case is conversion, which never incorporated a good-faith defense. (*Id.* at 18.) Thus, according to Plaintiffs, Union Defendants are foreclosed from asserting a good-faith defense to § 1983 liability.

Plaintiffs also assert that even if the good-faith defense applies in this case, Union Defendants cannot establish that they reasonably relied on Section 575 and *Abood*. (*Id.* at 21-24.) Nor have Union Defendants proven that they complied with *Abood* prior to the issuance of the *Janus* decision. (*Id.* at 24-25.)

Finally, Plaintiffs claim that their demand for a refund of previously paid fair-share fees can be characterized as an equitable claim for restitution or unjust enrichment, as opposed to a legal claim for damages. (*Id.* at 25.) According to Plaintiffs, "the union defendants cite no authority suggesting that their supposed 'good faith' defense should extend to an equitable demand for restitution." (*Id.*)

Union Defendants filed a reply brief (ECF No. 51), in which they assert that (1) the application of the good-faith defense does not turn on the nature of an analogous common-law tort; (2) if it does, the most analogous common-law torts are abuse of process and interference with contract, both of which would allow for the assertion of a good-faith defense; and (3)

Plaintiffs cannot escape the application of the good-faith defense by attempting to characterize their demand for relief as equitable. (*Id.* at 7-15.)

a. Legal Standard

Retroactive application of a Supreme Court decision is the general rule: when the Supreme Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Reasonable reliance on previously controlling law is not sufficient to overcome this rule of retroactive application. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753 (1995).

However, "as courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case." *Id.* at 758-59. For example, a court may find "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying [retroactive] relief." *Id.* at 759.

In this case, Plaintiffs and Union Defendants dispute whether the good-faith defense to § 1983 liability for damages provides an independent legal basis. The Supreme Court first suggested that this defense might exist for private actors sued under § 1983 in the 1982 decision of *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), in which the Court stated:

> Justice POWELL is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however,

> this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. . . . We need not reach the question of the availability of such a defense to private individuals at this juncture.

Id. at 942 n.23.

The Supreme Court then elaborated on this potential defense in *Wyatt v. Cole*, 504 U.S. 158 (1992). The Court determined that private individuals threatened with liability under § 1983 cannot take advantage of the qualified immunity that protects government officials. *Id.* at 159. However, the Court explained that "principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability [under § 1983], as do their government counterparts." *Id.* at 168. While declining to reach the issue of the existence of such a good-faith defense because it was not before the Court, the Court also declined to "foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause." *Id.* at 169; *see also Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) (declining to express a view on the availability of a good-faith defense to liability for private defendants sued under § 1983).

Although the Supreme Court has never confirmed the existence of a good-faith defense, numerous circuit courts, applying *Lugar* and its progeny, have adopted some version of a good-faith defense for private parties facing § 1983 liability. *See Jarvis v. Cuomo*, 660 F. App'x 72, 75-76 (2d Cir. 2016); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008); *Vector Research, Inc. v. Howard & Howard Att'ys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993); *Duncan v. Peck*, 844 F.2d 1261, 1266-68 (6th Cir. 1988).

Most importantly for purposes of the present case, the Third Circuit adopted the good-faith defense for private parties in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994). In *Jordan*, the Third Circuit generally approved of the Fifth Circuit's conclusion that "[p]rivate defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." *Id.* at 1276 (quoting *Wyatt*, 994 F.2d at 1120). However, the Third Circuit added that "'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity." *Id.* at 1277.

b. Discussion

Here, Union Defendants argue in a footnote that it is not clear that *Janus* would apply retroactively based on *Harper* because "the *Janus* decision did no more than overrule *Abood*, reverse the lower courts' order dismissing the complaint, and remand for further proceedings." (ECF No. 51 at 8.) The Court disagrees. According to *Harper*, when the Supreme Court applies a new rule of federal law to the parties before it, other courts must apply that decision retroactively. *Harper*, 509 U.S. at 90, 97. The Court in *Harper* did not explicitly define the circumstances in which it "applies a rule of federal law to the parties before it," but the Court has explained in other decisions that a new principle of law is established "either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil v. Huson*, 404 U.S. 97, 106 (1971) (citations omitted);[17] *see Reynoldsville Casket*, 514 U.S. at 762 (Kennedy, J., concurring in the judgment). Based on this

[17] Although various parts of *Chevron Oil* are no longer followed, this Court has no reason to question this definition of a "new principle of law."

definition, *Janus* announced a new principle of law. *Janus* overruled "clear past precedent" (*Abood*), announced a new rule regarding the unconstitutionality of fair-share fees, and applied that rule to the case by reversing the Seventh Circuit's dismissal of the plaintiffs' complaint. *See Janus*, 138 S. Ct. at 2460, 2462. Therefore, *Haper*'s retroactivity rule applies to *Janus*.

However, there is an independent legal basis in this case for otherwise denying retroactive relief: the good-faith defense available to private parties who are sued under § 1983. *See Jordan*, 20 F.3d at 1276. Plaintiffs offer numerous arguments against the applicability of the good-faith defense. The Court addresses each argument in turn.

i. The Court rejects Plaintiffs' most-analogous-common-law-tort argument.

Plaintiffs first argue, citing to the Supreme Court's decision in *Wyatt*, that the good-faith defense only applies if the most analogous common-law tort would have conferred similar immunities when § 1983 was enacted. (ECF No. 48 at 17.) Plaintiffs assert that the most analogous common-law tort in this case is conversion, a strict-liability tort that does not provide for a good-faith defense. (*Id.* at 18.)

The Court rejects Plaintiffs' most-analogous-tort argument because (1) *Wyatt* and *Jordan* do not require comparison to the most analogous common-law tort and (2) the most analogous common-law tort in this case would allow for a good-faith defense.

First, *Wyatt* does not require looking to the most analogous common-law tort when determining whether the good-faith defense applies. In fact, as Plaintiffs point out (*see* ECF No. 48 at 19), *Wyatt* did not conclusively resolve the issue of whether a good-faith defense to § 1983 liability exists at all. Instead, *Wyatt*'s articulation of the most-analogous-common-law-tort rule

dealt with qualified immunity. *Wyatt*, 504 U.S. at 164; *see Carey*, 364 F.Supp.3d at 1229; *Babb*, 2019 WL 2022222, at *6. The *Wyatt* court made clear that its holding was limited to the "very narrow" question of whether private persons can be protected from § 1983 liability based on qualified immunity. *Wyatt*, 504 U.S. at 168; *see also Mooney v. Ill. Educ. Assoc.*, 372 F. Supp. 3d 690, 702 (C.D. Ill. 2019) ("The Supreme Court was clear that 'the precise issue' decided in *Wyatt* was 'whether qualified immunity . . . is available for private defendants faced with § 1983 liability under *Lugar*. The Supreme Court answered in the negative but refused to 'foreclose the possibility that private defendants . . . could be entitled to an affirmative defense based on good faith.' Therefore, all that *Wyatt* says about the good-faith defense is dicta." (citations omitted)); *Carey*, 364 F.Supp.3d at 1229 ("The Court's holding in *Wyatt* was far narrower, and the dicta far murkier, than Plaintiffs present it. Justice O'Connor made clear the Court's ruling was limited to the 'very narrow' question of whether a private defendant could be shielded by qualified immunity.").

Furthermore, when the *Wyatt* Court suggests that a good-faith defense may be available to private parties exposed to § 1983 liability, the Court did not refer to analogous common-law torts. Instead, the Court discussed the "principles of equality and fairness" that may necessitate protecting private parties from § 1983 liability. *See Wyatt*, 504 U.S. at 168. Recent cases have persuasively discussed how these principles require that private individuals exposed to § 1983 liability be permitted to assert a good-faith defense, regardless of the common-law tort that is most analogous to the action. *See Mooney*, 372 F. Supp. 3d at 703 ("The principles of fairness and equality underlying the good-faith defense in the § 1983 context demand a private defendant relying in good faith on a presumptively constitutional statute not be abandoned and exposed when the law is subsequently held unconstitutional, while the State remains cloaked in sovereign

immunity and its officials are shielded by the veil of qualified immunity. Quibbles over which tort as it existed at common law in 1871 is most analogous to the harm wrought by the statute in question would only undercut these purposes."); *Crockett*, 367 F. Supp. 3d at 1005 ("[T]he approach propounded by [the p]laintiffs 'would increase the potential for unfairness by permitting some defendants that rely on presumptively valid state laws to assert the [good-faith] defense while other could not, based solely on the elements of various nineteenth-century common law torts.'").

Moreover, when the Third Circuit adopted the good-faith defense in *Jordan*, the Third Circuit did not indicate whether the application of the good-faith defense depends on an analogous common-law tort. And district court cases applying *Jordan* have not relied on common-law-tort analogs. *See, e.g., Egervary v. Rooney*, No. CIV. A. 96-3039, 2000 WL 1160720, at *6 (E.D. Pa. Aug. 15, 2000); *Foster v. City of Phila.*, Civil Action No. 12-5851, 2014 WL 5821278, at *21 (E.D. Pa. Nov. 10, 2014).

Therefore, this Court disagrees with Plaintiffs' assertion that "*Wyatt* compels courts to look to the most analogous common-law tort, and it allows courts to recognize a defense only if that tort would have conferred similar immunities when [§] 1983 was enacted." (ECF No. 48 at 17.) The Court agrees with the opinions of various district courts that have determined—when presented with indistinguishable facts—that the applicability of the good-faith defense does not require analyzing the most analogous common-law tort. *See Mooney*, 372 F. Supp. 3d at 703 & n.5; *Babb*, 2019 WL 2022222, at *6; *Carey*, 364 F.Supp.3d at 1229; *Crockett*, 367 F. Supp. 3d at 1004-5; *Danielson*, 340 F. Supp. 3d at 1086.

Second, even if this Court were required to look to the most analogous common-law tort when determining whether the good-faith defense applies, conversion is not the most analogous tort. This is not a case in which "someone . . . walk[ed] off with another's property." (ECF No. 48 at 18.) Instead, this case involved Union Defendants compelling Plaintiffs to support particular speech through the state-created processes found in Section 575. (ECF No. 51 at 12.) Moreover, it involved Union Defendants' interference with Plaintiffs' contractual right to receive certain wages from their employers. (*Id.* at 13.) Therefore, as many district courts have found, the most analogous common-law tort here is either abuse of process, *see Wyatt*, 504 U.S. at 164, or tortious interference with contract. *See Crockett*, 367 F. Supp. 3d at 1005-6; *Carey*, 364 F. Supp. 3d at 1230; *Mooney*, 372 F. Supp. 3d at 703 n.5; *Babb*, 2019 WL 2022222, at *6; *Cook*, 364 F. Supp. 3d at 1191-92; *Danielson*, 340 F. Supp. 3d at 1086. Both of these torts would allow for a good-faith defense under Plaintiffs' most-analogous-tort approach. *See Crockett*, 367 F. Supp. 3d at 1005-6; *Carey*, 364 F. Supp. 3d at 1230; *Mooney*, 372 F. Supp. 3d at 703 n.5; *Babb*, 2019 WL 2022222, at *6; *Cook*, 364 F. Supp. 3d at 1191-92; *Danielson*, 340 F. Supp. 3d at 1086.

ii. Union Defendants objectively reasonably relied on Section 575 and *Abood*.

Plaintiffs next assert that even if the Court recognizes the applicability of a good-faith defense, Union Defendants cannot contend that they reasonably relied on Section 575's constitutionality and the Supreme Court's decision in *Abood* because "[t]he Supreme Court had repeatedly warned the union defendants that it had grave misgivings about the constitutionality

of public-sector agency shops long before declaring them unconstitutional in *Janus*." (ECF No. 48 at 21.)

The Court disagrees. It is objectively reasonable to rely on a state statute that is valid under controlling Supreme Court precedent. Regardless of how many times the Supreme Court questioned its holding in *Abood*, *Abood* was the law of the land until it was overturned in *Janus*. *See Janus v. Am. Fed'n of State, Cty. and Mun. Emps., Council 31*, Case No. 15 C 1235, 2019 WL 1239780, at *3 (N.D. Ill. Mar. 18, 2019) ("Despite these statements in *Janus* [explaining that unions have been on notice that the constitutionality of fair-share fees was being questioned], prior to the instant case *Abood* remained the law of the land."). By relying on this law, Union Defendants acted in good faith and are entitled to the protection of the good-faith defense as a matter of law. *See Janus*, 2019 WL 1239780, at *3; *Lee*, 366 F. Supp. 3d at 983 ("The facts are undisputed that [the union] collected fees under the binding precedent of *Abood* and the subsequent state statutes it spawned. As a matter of law, therefore, those collections efforts were done in good faith that they did not violate the United States Constitution."); *Carey*, 364 F. Supp. 3d at 1232 ("It . . . does not matter how many 'warnings' the Court has given about its intention to overrule *Abood*. Until it actually did so, *Abood* was the law of the land and [the union's] conscious compliance with that ruling can establish its good faith as a matter of law."); *Akers*, 2019 WL 1745980, at *5 (explaining that the plaintiffs could assert a good-faith defense because they complied with and relied on presumptively-valid state law and controlling Supreme Court precedent); *Wholean*, 2019 WL 1873021, at *3; *Mooney*, 372 F. Supp. 3d at 706; *Bermudez*, 2019 WL 1615414; *Hough v. SEIU Local 521*, Case No. 18-cv-04902-VC, 2019 WL 1785414, at *1 (N.D. Cal. Apr. 16, 2019); *Crockett*, 367 F. Supp. 3d at 1006-7.

To conclude otherwise would undermine the equitable foundation of the good-faith defense. *See Wyatt*, 504 U.S. at 168 (explaining that "principles of equality and fairness" may suggest the existence of a good-faith defense for private parties facing liability under § 1983); *see also Cook*, 364 F. Supp. 3d at 1192 (explaining that holding a union liable for damages "because certain Justices had expressed doubt about *Abood*'s reasoning would be unworkable and highly inequitable"); *Babb*, 2019 WL 2022222, at *7 ("[I]n the qualified immunity context, state officials are entitled to rely on Supreme Court precedent even if the precedent's reasoning has been questioned; applying a higher standard to private individuals would be inequitable."); *Crockett*, 367 F. Supp. 3d at 1006 (discussing the inequity of holding the union defendants liable for pre-*Janus* fair-share fees when they collected the fees in accordance with state law and then-binding Supreme Court precedent).

Furthermore, Plaintiffs allege that Union Defendants expected the Supreme Court to overrule *Abood* in *Janus*. (ECF No. 62 ¶ 33.) But, as one court has explained, "such an expectation cannot produce subjective belief in unconstitutionality when the defendant is also aware that the prior holding has not been overruled." *Carey*, 364 F. Supp. 3d at 1229; *see Babb*, 2019 WL 2022222, at *7.[18] Assuming this allegation is true, it does not change the reasonableness of relying on Section 575 and *Abood*—the law as it existed when Union Defendants collected the fair-share fees—rather than any individuals' subjective beliefs about how the law might change in the future. *See Lee*, 366 F. Supp. 3d at 982-83 ("Even if an employee strongly belied that *Abood* was

[18] Other courts have discussed various problems with Plaintiffs' argument which this Court will not repeat but incorporates herein. *See Danielson*, 340 F. Supp. 3d at 1086-8; *Carey*, 364 F. Supp. 3d at 1231; *Cook*, 364 F. Supp. 3d at 1192-93; *Babb*, 2019 WL 2022222, at *7; *Mooney*, 372 F. Supp. 3d at 706; *Crockett*, 367 F. Supp. 3d at 1007; *Janus*, 2019 WL 1239780, at *3.

wrongly decided, it would not make reliance on that decision any less good-faith reliance. Rather, regardless of personal opinions, individuals are entitled to rely upon binding United States Supreme Court precedent.").

Thus, it was objectively reasonable for Union Defendants to rely on Section 575 and *Abood* before the Supreme Court's decision in *Janus*.

iii. Union Defendants need not prove that they complied with *Abood*.

Plaintiffs next assert that, in order to establish their good-faith defense, Union Defendants must prove that they complied with *Abood* in terms of how they spent the collected fair-share fees prior to *Janus*. (ECF No. 48 at 24-25.) Plaintiffs claim that compliance with *Abood* is a factual question that cannot be resolved on a Rule 12(b)(6) motion.

The Court rejects this argument. Union Defendants' good-faith defense depends on whether the unconstitutional conduct alleged in the Second Amended Complaint—the collection of fair-share fees—was done in good faith. *See Mooney*, 372 F. Supp. 3d at 706. It does not depend on whether Union Defendants' other actions—including the spending of the collected fees—were done in good faith. *See id.* The Court will not allow the Second Amended Complaint to survive a motion to dismiss so Plaintiffs can establish facts that are unrelated to Union Defendants' good-faith defense. Other district courts have reached the same conclusion in indistinguishable cases. *See, e.g.*, *Babb*, 2019 WL 2022222, at *7-8; *Carey*, 364 F. Supp. 3d at 1232; *Mooney*, 372 F. Supp. 3d at 705-6; *Lee*, 366 F. Supp. 3d at 983; *Crockett*, 367 F. Supp. 3d at 1007.

iv. The relief Plaintiffs seek sounds in law, not equity.

Finally, Plaintiffs argue that the relief they seek can be characterized as equitable and that the good-faith defense does not apply to claims seeking relief in equity. (ECF No. 48 at 25-26.) In response, Union Defendants assert that Plaintiffs do not allege that the previously collected fair-share fees were kept in a specific fund against which a constructive lien could be enforced. (ECF No. 51 at 14-15.) Thus, Union Defendants explain that if Plaintiffs have a claim for the repayment of fair-share fees, that claim is a personal claim against Union Defendants' general assets which sounds in law instead of in equity. (*Id.*)

As the Supreme Court has explained, a plaintiff's claim sounds in law if he seeks to impose personal liability on a defendant to pay a sum of money. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). In contrast, a claim sounds in equity "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* "But where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'" *Id.* (alterations in original) (citation omitted). Moreover, restitution claims seeking money are generally legal claims. *See Knudson*, 534 U.S. at 210; *Gidley v. Reinhart Foodservice, L.L.C.*, No. 4:14-cv-0800, 2015 WL 1136447, at *5 (M.D. Pa. Mar. 12, 2015) ("Plaintiff requests only monetary relief, which is clearly not equitable in nature . . . ."); *Dastgheib v. Genentech, Inc.*, 457 F. Supp. 2d 536, 544 (E.D. Pa. 2006).

The Court finds that Plaintiffs seek a legal remedy as opposed to an equitable remedy.

Plaintiffs' claim for the repayment of previously paid fair-share fees seeks monetary relief, which sounds in law unless that money can be clearly traced to particular funds or property possessed by Union Defendants. *See Knudson*, 534 U.S. at 210; *Dastgheib*, 457 F. Supp. 2d at 544. The face of Plaintiffs' Second Amended Complaint makes clear that Plaintiffs seek the repayment of previously paid fair-share fees not from "particular funds or property in the defendant's possession," *Knudson*, 534 U.S. at 213, but from Union Defendants' general assets. Specifically, Plaintiffs fail to allege that the fair-share fees they paid are being held by Union Defendants in a specific fund. Also, Plaintiffs seek to have Union Defendants repay the fair-share fees that were paid directly to the Union *and* fees that were directed *to union-approved charities*. (ECF No. 62 ¶¶ 24, 26, 55(p).) Union Defendants either never possessed the fees that were directed to charities or they possessed those fees originally but now no longer have them in their possession. Because Plaintiffs seek recovery of funds that Union Defendants no longer have in their possession, Plaintiffs seek recovery from Union Defendants' general assets.

Moreover, as district courts have explained in comparable cases, the crux of Plaintiffs' Second Amended Complaint is that Union Defendants used collected fees to fund union activities pursuant to Section 575 and thus that Plaintiffs could not recover the specific funds that they paid to Union Defendants. *See Mooney*, 372 F. Supp. 3d at 700 (noting "the presupposition in cases like the one at hand" that "all identifiable money was used to fund union activities and, consequently, has already been dissipated"); *Carey*, 364 F. Supp. 3d at 1232-33 ("Here, Plaintiffs' entire case is premised on [the union] taking their money and using it to fund union activities. This presupposes that Plaintiffs' money could not 'clearly be traced,' meaning restitution cannot 'lie in equity.'" (citation omitted)); *Crockett*, 367 F. Supp. 3d at 1006 (finding, at the motion-to-dismiss

stage, that the fair-share fees at issue "paid for ongoing costs of representation the Union Defendants provided on [the plaintiffs'] behalf" and that "[t]here is no segregated fund to which Plaintiffs' payments can now be traced, and therefore any relief would be paid from the Union Defendants' general assets"); *Babb*, 2019 WL 2022222, at *8 (same).

Therefore, regardless of Plaintiffs' attempt to characterize its claim as equitable, Plaintiffs' claim for the repayment of previously paid fair-share fees is a claim for legal relief. *See Carey*, 364 F. Supp. 3d at 1232 ("A plaintiff may not circumvent qualified immunity or the good faith defense simply by labeling a claim for legal damages as one for equitable restitution."). Thus, the Court rejects Plaintiffs' argument that the good-faith defense cannot apply because Plaintiffs' claim can be characterized as equitable. This conclusion comports with various district-court decisions on this issue. *See Carey*, 364 F. Supp. 3d at 1232-33; *Mooney*, 372 F. Supp. 3d at 700-1; *Babb*, 2019 WL 2022222, at *8, *Crockett*, 367 F. Supp. 3d at 1006.

v. Union Defendants are entitled to assert the good-faith defense as a matter of law.

After rejecting Plaintiffs' various arguments against Union Defendants' good-faith defense, the Court finds that the good-faith defense applies to Plaintiffs' claims for repayment of previously paid fair-share fees as a matter of law.

In *Jordan*, the Third Circuit explained that "'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding standard of reasonable belief that governs qualified immunity." *Jordan*, 20 F.3d at 1277.

Here, it was objectively reasonable for Union Defendants to rely on a state statute that was constitutional under controlling Supreme Court precedent when collecting fair-share fees from

Plaintiffs. By establishing objective reasonableness as a matter of law, Union Defendants have met the less demanding subjective standard articulated by the Third Circuit in *Jordan*. Union Defendants are therefore entitled to the dismissal of Plaintiffs' § 1983 claim to the extent Plaintiffs seek repayment of pre-*Janus* fair-share fees.

3. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state-law claims.

Plaintiffs bring state-law tort claims against Defendants, including for conversion, trespass to chattels, replevin, unjust enrichment, and restitution. (ECF No. 62 ¶ 54.) Plaintiffs urge this Court to exercise supplemental jurisdiction over these state-law claims. (*Id.*)

"In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). However, "district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if— . . . the district court has dismissed all claims over which it has original jurisdiction." *Id.* § 1367(c)(3). "If it appears that the federal claim is subject to dismissal under F.R.Civ.P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R.Civ.P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances." *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3d Cir. 1976).

As explained previously, this Court will dismiss Plaintiffs' claims under 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Therefore, all the claims over which this Court has original jurisdiction will be dismissed. And the Court finds no "extraordinary circumstances" in this case that justify

exercising supplemental jurisdiction over the remaining state-law claims. This Court thus declines to exercise supplemental jurisdiction over Plaintiffs' state-law claims, and these claims will be dismissed. *See Mooney*, 372 F. Supp. 3d at 708-9 (declining, in comparable case, to exercise supplemental jurisdiction over state-law claims after all federal claims were dismissed); *Akers*, 2019 WL 1745980, at *8 (same); *Wholean*, 2019 WL 1873021, at *4 (same).

Because the Court declines to exercise supplemental jurisdiction over these claims, the Court will not address Defendants' various arguments as to why the state-law claims should be dismissed under Rule 12(b)(6). (*See* ECF No. 41 at 30.)

4. The Court will dismiss Ms. Ziegler and CREA.

Finally, Union Defendants claim that Ms. Ziegler retired from teaching on June 5, 2013. (*Id.*) Thus, she has not paid any fair-share fees since 2013. (*Id.*) According to Union Defendants, Ms. Ziegler has no standing to seek prospective or retrospective relief because (1) she is not threatened with any injury that the Second Amended Complaint seeks to enjoin, and (2) any fees she previously paid were paid beyond the two-year statute of limitations period applicable to the § 1983 and tort claims. (*Id.* at 31.) Moreover, Union Defendants argue that Defendant CREA must be dismissed because only Ms. Ziegler alleged claims against it. (*Id.*)

In response, Plaintiffs claim that issues regarding the statute of limitations go to the merits as opposed to a plaintiff's standing. (ECF No. 48 at 28.) And while Plaintiffs do not dispute that Ms. Ziegler retired in 2013, Plaintiffs explain that Ms. Ziegler was recently notified by the union that her previously paid fair-share fees were sitting in an account waiting to be donated. (*Id.* at 28-29.) According to Plaintiffs, Ms. Ziegler wants to ensure that if those funds cannot be recovered, they are sent to a charity of her choice. (*Id.* at 29.) Plaintiffs further assert that CREA

should not be dismissed because Plaintiffs sue CREA as a representative of the PSEA's local chapters and affiliates. (*Id.*)

Even if the Court had not already dismissed Plaintiffs' claims against Union Defendants on mootness and good-faith grounds, the Court would still dismiss Ms. Ziegler's claims. Ms. Ziegler has no standing to seek declaratory and injunctive relief, and the two-year statute of limitations bars her claim for damages.

"Standing is a jurisdictional matter." *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016). "Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006) (citing *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003)).

As the Third Circuit recently noted,

> The Supreme Court's well-known standing test sets forth an "irreducible constitutional minimum" of three elements that a plaintiff must satisfy: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court[,]" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Manuel v. NRA Grp. LLC, 722 F. App'x 141, 145 (3d Cir. 2018) (alteration in original).

Here, Ms. Ziegler seeks declaratory and injunctive relief and the repayment of previously paid fair-share fees.

With regard to Ms. Ziegler's claims for declaratory and injunctive relief, Plaintiffs do not

contest that Ms. Ziegler lacks standing to pursue these claims. Nor could they. It is undisputed that Ms. Ziegler is no longer a public-school teacher and that she has not been required to pay fair-share fees since 2013.[19] (ECF No. 62 ¶¶ 23, 27; ECF No. 41-2 ¶¶ 5-7; ECF No. ECF No. 48 at 28.) Thus, there is no imminent, concrete threat that Ms. Ziegler will be subjected to the unconstitutional collection of fair-share fees. *See McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 223 (3d Cir. 2012) ("When . . . prospective relief is sought, the plaintiff must show that he is 'likely to suffer future injury' from the defendant's conduct."); *Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 193-94 (3d Cir. 2004) (explaining that when pursuing a declaratory judgment, "a plaintiff has Article III standing if 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'" (quoting *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 240 (3d Cir. 2000))). Because Ms. Ziegler is not facing any imminent injury, declaring fair-share fees to be unconstitutional or enjoining Union Defendants from collecting those fees from Ms. Ziegler would not redress anything.

Next, with regard to the repayment of previously paid fair-share fees, Ms. Ziegler has standing to assert such a claim. According to the Second Amended Complaint, she suffered a concrete injury—fair-share fees were deducted from her paycheck due to Union Defendants' conduct. If the Court were to order Union Defendants to repay those fees to Ms. Ziegler, her injury would be redressed. Thus, she has standing to assert the § 1983 claim to the extent she seeks the repayment of previously paid fair-share fees.

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[19] Because standing is a jurisdictional issue that is raised pursuant to a Rule 12(b)(1) motion, the Court may consider the Declaration of Nadine Glass (ECF No. 41-2) as part of Union Defendants' factual challenge to Ms. Ziegler's standing. *See supra* note 10.

Union Defendants argue that Ms. Ziegler does not have standing to seek repayment of previously paid fees because those fees were collected beyond the applicable two-year statute-of-limitations period. (ECF No. 41 at 31.) However, standing and the statute of limitations are two distinct concepts that must be raised in different ways. While standing is a jurisdictional matter than can be raised through a Rule 12(b)(1) motion, the statute of limitations is an affirmative defense that is generally raised in the defendant's answer. *Compare* Fed. R. Civ. P. 12(b)(1) (allowing a party to assert lack of subject-matter jurisdiction by motion), *with* Fed. R. Civ. P. 8(c) (stating that a party must state a statute-of-limitations defense in his responsive pleading), *and Robinson v. Johnson*, 313 F.3d 128, 134-35 (3d Cir. 2002) (explaining that the defendant must generally assert available affirmative defenses, including the statute of limitations, in his answer). Thus, to the extent Union Defendants attempt to use Rule 12(b)(1) to preemptively raise a statute-of-limitations defense, the Court rejects this approach.

Union Defendants then imply that if the statute-of-limitations defense is not considered under Rule 12(b)(1), the Court may consider the issue under Rule 12(b)(6). Generally, a defense based on the statute of limitations cannot be raised with a Rule 12(b)(6) motion unless the face of the complaint reveals that the applicable statute of limitations would bar the claims. *Webb v. Susquehanna Twp. Sch. Dist.*, 93 F. Supp. 3d 343, 349 (M.D. Pa. 2015) (citing *Robinson*, 313 F.3d at 135; *Frasier-Kane v. City of Phila.*, 517 F. App'x 104, 107 n.1 (3d Cir. 2013)). Here, the Second Amended Complaint simply indicates that Ms. Ziegler is retired—it does not say when she retired. Thus, this Court cannot conclusively determine that the applicable two-year statute of limitations would bar Ms. Ziegler's claim for repayment of fair-share fees based on the face of the Second Amended Complaint.

In seeming anticipation of this conclusion, Union Defendants suggest that the Court treat Union Defendants' Motion to Dismiss as a motion for summary judgment and consider a declaration filed by Union Defendants. (ECF No. 41 at 31 n.8.) The declaration indicates that Ms. Ziegler retired on June 5, 2013, and that she has not been required to pay fair-share fees since her retirement. (ECF No. 41-2 ¶¶ 6-7.)

Plaintiffs do not contest the facts in the declaration. (ECF No. 48 at 28.) However, Plaintiffs oppose summary judgment against Ms. Ziegler because she was "recently" notified by the union that her fair-share fees were sitting in an account waiting to be donated. (*Id.* at 28-29.) According to Plaintiffs, Ms. Ziegler wants to ensure that those funds are at least sent to a charity she chooses instead of being diverted to the union. (*Id.* at 29.) "[P]laintiffs believe it would be premature to dismiss Ms. Ziegler from the case, even if the Court concludes that she cannot recover damages or restitution from the union given the statute of limitations." (*Id.*)

The Court agrees with Union Defendants. Rule 12(d) allows a court to treat a motion under Rule 12(b)(6) as a motion for summary judgment if matters outside the pleadings are presented to and not excluded by the court. *See* Fed. R. Civ. P. 12(d). Although this kind of treatment is generally not warranted if the parties have not yet conducted discovery, *see Black v. N. Hills Sch. Dist.*, Civil Action No. 06-807, 2007 WL 2728601, at *1 (W.D. Pa. Sept. 17, 2007), the Court finds that treating Union Defendants' Motion to Dismiss as a motion for summary judgment as to the discrete issue of whether the statute-of-limitations defense bars Ms. Ziegler's claim for damages is appropriate under the particular circumstances of this case because (1) Plaintiffs explicitly state that they do not contest the outside evidence introduced by Union

Defendants, and (2) Plaintiffs do not oppose treating Union Defendants' Motion to Dismiss as a motion for summary judgment as to this issue.[20] (*See* ECF No. 48 at 28.)

The Court finds that summary judgment is warranted on Ms. Ziegler's claim for monetary damages. The parties do not dispute the applicability of a two-year statute of limitations. And, based on the undisputed facts that Ms. Ziegler retired on June 5, 2013, and did not pay fair-share fees after that date (ECF No. 41-2 ¶¶ 6-7; ECF No. 48 at 28), the statute of limitations required Ms. Ziegler to bring her claim for monetary damages before June 5, 2015. The present lawsuit was filed on June 15, 2018. (*See* ECF No. 1.) Ms. Ziegler's claim for repayment of previously paid fair-share fees is thus barred by the statute of limitations, and Union Defendants are entitled to judgment as a matter of law on Ms. Ziegler's claim for repayment of previously paid fair-share fees. *See* Fed. R. Civ. P. 56 (explaining that a court shall grant 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).

Plaintiffs do not seem to contest the foregoing analysis. Instead, Plaintiffs simply oppose summary judgment because Ms. Ziegler wants to ensure that her previously paid fair-share fees are sent to the charity of her choice. (ECF No. 48 at 29.) Plaintiffs thus "believe it would be premature to dismiss Ms. Ziegler from the case, even if the Court concludes that she cannot

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[20] Moreover, although notice to the parties is generally required before the Court may exercise its discretion and treat a motion to dismiss as a motion for summary judgment, *see* Fed. R. Civ. P. 12(d); *Black*, 2007 WL 2728601, at *2 n.2, a review of Union Defendants' request that this Court convert the Motion to Dismiss into a motion for summary judgment (ECF No. 41 at 31 n.8) and Plaintiffs' acknowledgement of and response to this request (ECF No. 48 at 28-29) convinces this Court that Plaintiffs have been given a "reasonable opportunity to present all the material that is pertinent to the motion," Fed. R. Civ. P. 12(d), and have declined to present such material. *See PAPCO, Inc. v. United States*, 814 F. Supp. 2d 477, 483 (W.D. Pa. 2011); *Kurta v. Borough of Glassport*, Civil Action No. 10-195, 2010 WL 1664907, at *2 (W.D. Pa. Apr. 23, 2010).

recover damages or restitution from the union given the statute of limitations." (*Id.*)

The Court disagrees. Because Ms. Ziegler's claims for declaratory and injunctive relief must be dismissed, and because Union Defendants are entitled to summary judgment on Ms. Ziegler's claims for monetary damages, it is not premature to dismiss Ms. Ziegler from this lawsuit. Ms. Ziegler can utilize the procedures the union has to donate her previously paid fair-share fees to the charity of her choice.

Because Ms. Ziegler is the only Plaintiff to assert claims against CREA, dismissal of Ms. Ziegler's claims mandates that CREA be dismissed as well.

VI. Conclusion

In summary, Commonwealth Defendants and Union Defendants' Motions to Dismiss will be **GRANTED**. All claims in Plaintiffs' Second Amended Complaint will be **DISMISSED WITHOUT PREJUDICE** excluding Plaintiffs' claims for the repayment of previously-paid fair-share fees. Those claims will be **DISMISSED WITH PREJUDICE** because amendment of those claims would not cure the aforementioned deficiencies.

An appropriate order follows.

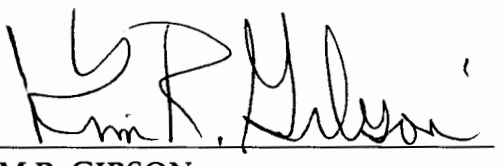
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ARTHUR DIAMOND, ***on behalf of himself and others similarly situated,*** **et al.,**	)	**Case No. 3:18-cv-128**
Plaintiffs,	)	**JUDGE KIM R. GIBSON**
v.	)	
PENNSYLVANIA STATE EDUCATION ASSOCIATION, et al.,	)	
Defendants.	)	

ORDER

NOW, this 8th day of July, 2019, upon consideration of Union Defendants' Motion to Dismiss (ECF No. 40) and Commonwealth Defendants' Motion to Dismiss (ECF No. 38), and for the reasons set forth in the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED** that Union Defendants' Motion to Dismiss is **GRANTED** and Commonwealth Defendants' Motion to Dismiss is **GRANTED.** Plaintiffs' Second Amended Complaint (ECF No. 62) is **DISMISSED WITHOUT PREJUDICE**, excluding Plaintiffs' claims for the repayment of previously paid fair-share fees, which are **DISMISSED WITH PREJUDICE**.

BY THE COURT



KIM R. GIBSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-2812 and 19-3906

ARTHUR DIAMOND, on behalf of himself and others similarly situated; JEFFREY SCHAWARTZ; SANDRA H. ZIEGLER, on behalf of themselves others similar situated; MATTHEW SHIVELY; MATTHEW SIMKINS; DOUGLAS R. KASE; JUSTIN BARRY,

Appellants in case no. 19-2812

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; CHESTNUT RIDGE EDUCATION ASSOCIATION, as representative of the class of all chapters and affiliates of the Pennsylvania State Education Association; NATIONAL EDUCATION ASSOCIATION; JOSH SHAPIRO, in his official capacity as Attorney General of Pennsylvania; JAMES M. DARBY; ALBERT MEZZAROBA; ROBERT H. SHOOP, JR., in their official capacities as chairman and members of the Pennsylvania Labor Relations Board; LESLEY CHILDER-POTTS, in her official capacity as district attorney of Bedford County, and as representative of the class of all district attorneys in Pennsylvania with the authority to prosecute violations of 71 Pa. Stat. 575

JANINE WENZIG and CATHERINE KIOUSSIS,

Appellants in case no. 19-3906

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668

(D.C. Nos.: 3:18-cv-00128 and 1:19-cv-01367)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, RENDELL,* and FISHER*,† Circuit Judges

The Joint Petition for Rehearing En Banc filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Marjorie O. Rendell
Circuit Judge

Dated: October 30, 2020
Lmr/cc: All Counsel of Record

* The vote for Senior Judge Rendell is limited to panel rehearing only.
† The vote for Senior Judge Fisher is limited to panel rehearing only.