No. 20-___

IN THE
# Supreme Court of the United States

NATHANIEL OGLE,
*Petitioner,*

v.

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
AFSCME LOCAL 11, AFL-CIO
*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

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

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, a Plaintiff-Appellant in the court below, is Nathaniel Ogle.

Respondent, Defendant-Appellee in the court below, is the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO.

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

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ..... ii
TABLE OF AUTHORITIES ..... vi
OPINIONS BELOW ..... 1
JURISDICTION ..... 1
STATUTES INVOLVED ..... 1
STATEMENT OF THE CASE ..... 2
REASONS FOR GRANTING THE PETITION ..... 5
A. The *Wyatt* Court Did Not Suggest That a Defendant's Reliance on a Statute Should Be an Affirmative Defense to Section 1983 ..... 7
B. A Good Faith Defense Conflicts with Section 1983's Text and Retroactivity Law ..... 11
1. A Good Faith Defense Conflicts with Section 1983's Text ..... 11
2. A Good Faith Defense Conflicts with This Court's Retroactivity Doctrine ..... 14
C. Circuit Courts Disagree on Whether There Is A Good Faith Defense and the Justifications For That Defense ..... 15
1. Policy Interests in Fairness and Equality Do Not Justify a Good Faith Defense ..... 18
2. An Analogy to Abuse of Process Does Not Justify Creating a Good Faith Defense ..... 21

**TABLE OF CONTENTS—Continued**

Page

D. It Is Important That the Court Finally Resolve Whether Congress Provided a Good Faith Defense to Section 1983 ..... 22

CONCLUSION ..... 24

APPENDIX

Opinion of the U.S. Court of Appeals for the Sixth Circuit, 951 F.3d 794 (Mar. 5, 2020) ..... 1a

Opinion and Order of the U.S. District Court for the Southern District of Ohio, 397 F. Supp. 3d 1076 (July 17, 2019) ..... 6a

Order of the U.S. Court of Appeals for the Sixth Circuit Denying Rehearing En Banc (May 13, 2020) ..... 33a

## TABLE OF AUTHORITIES

Page(s)

**CASES**

*Abood v. Detroit Bd. of Educ.*,
431 U.S. 209 (1977).....2

*Anderson v. Myers*,
182 F. 223 (C.C.D. Md. 1910).....13

*Danielson v. Inslee*,
945 F.3d 1096 (9th Cir. 2019) .....*passim*

*Diamond v. Pa. State Educ. Ass'n,*
972 F.3d 262 (3d Cir. 2020).....*passim*

*Guidry v. Sheet Metal Workers Nat'l Pension Fund*,
493 U.S. 365 (1990).....18

*Guinn v. United States*,
238 U.S. 347 (1915).....12

*Harper v. Va. Dep't of Tax'n*,
509 U.S. 86 (1993).....14

*Imbler v. Pachtman*,
424 U.S. 409 (1976).....12

*Janus v. AFSCME, Council 31*,
138 S. Ct. 2448 (2018).....*passim*

*Janus v. AFSCME, Council 31*,
942 F.3d 352 (7th Cir. 2019) .....*passim*

*Jordan v. Fox, Rothschild, O'Brien & Frankel*,
20 F.3d 1250 (3d Cir. 1994).....10

**TABLE OF AUTHORITIES—Continued**

Page(s)

*Lee v. Ohio Educ. Ass'n*,
951 F.3d 386 (6th Cir. 2020) .....3, 4

*Lugar v. Edmondson Oil Co.*,
457 U.S. 922 (1982).....5

*Manuel v. City of Joliet*,
137 S. Ct. 911 (2017).....7, 21, 22

*Myers v. Anderson*,
238 U.S. 368 (1915).....12

*Owen v. City of Indep.*,
445 U.S. 622 (1980).....19, 20

*Pinsky v. Duncan*,
79 F.3d 306 (2d Cir. 1996) .....10

*Rehberg v. Paulk*,
566 U.S. 356 (2012).....12, 13, 21

*Reynoldsville Casket Co. v. Hyde*,
514 U.S. 749 (1995).....6, 14, 15

*Richardson v. McKnight*,
521 U.S. 399 (1997).....5, 13

*Thomas v. Collins*,
323 U.S. 516 (1945).....22

*Tower v. Glover*,
467 U.S. 914 (1984).....18

*Tucker v. Interscope Records Inc.*,
515 F.3d 1019 (9th Cir. 2008) .....22

**TABLE OF AUTHORITIES—Continued**

Page(s)

*Wholean v. CSEA*,
955 F.3d 332 (2d Cir. 2020) ..... 4, 11, 17

*Wyatt v. Cole*,
504 U.S. 158 (1992) ..... *passim*

*Wyatt v. Cole*,
994 F.2d 1113 (5th Cir. 1993) ..... 10, 11

**Constitution & Statutes**

U.S. Const.
amend. I ..... *passim*

Federal Statutes

28 U.S.C. § 1254(1) ..... 1
42 U.S.C. § 1983 ..... *passim*

**Other Authorities**

8 Am. Law of Torts § 28:32 (2019) ..... 22

William Baude, *Is Qualified Immunity Unlawful?*,
106 Cal. L. Rev. 45 (2018) ..... 14

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 951 F.3d 794 and reproduced at Pet.App. 1a. The Sixth Circuit order denying rehearing en banc is reproduced at Pet.App. 33a. The Sixth Circuit affirmed an order and opinion by the United States District Court for the Southern District of Ohio, reported at 397 F. Supp. 3d 1076 and reproduced at Pet.App. 6a, that dismissed the Petitioner's complaint.

## JURISDICTION

The Sixth Circuit denied a petition for rehearing en banc on May 13, 2020. Pet.App. 33a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

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

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable.

## STATEMENT OF THE CASE

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

Petitioner Nathaniel Ogle is one such employee whose First Amendment rights were violated. Ogle is an employee of the Ohio Department of Taxation who was compelled to pay agency fees to Ohio Civil Service Employees Association, AFSCME Local 11 ("OCSEA")

for several years before this Court's decision in *Janus*. Pet. App. 1a.

Shortly after *Janus* was decided, Ogle filed suit and sought damages from OCSEA for agency fees it unconstitutionally seized from him and a class of similarly situated state employees. *Id.* at 2a. Ogle did so under Section 1983, which provides that "[e]very person who, under color of any statute" deprives citizens of their constitutional rights "shall be liable to the party injured in an action at law[.]" 42 U.S.C. § 1983.

The district court, however, held that a so-called "good faith defense" renders defendants who act under color of presumptively valid statutes *not* liable to injured parties in an action at law. Pet.App. 20a-21a. According to the district court, this "good faith defense is based on equality and fairness." *Id.* at 20a. The court concluded that this ostensible defense shields OCSEA from liability because it "collected fees under a presumptively valid statute and pursuant to then-valid Supreme Court precedent." *Id.* at 21a.

Ogle appealed to the Sixth Circuit. While his appeal was pending, another panel of the Sixth Circuit issued a ruling in *Lee v. Ohio Education Association*, 951 F.3d 386 (6th Cir. 2020). The *Lee* panel held that a good faith defense exempts unions from having to compensate the victims of its agency fee seizures. *Id.* at 391.

The *Ogle* panel later concluded that "[b]ecause we have no license to overrule another panel of this court, we too must recognize the union's good-faith defense."

Pet.App. 2a-3a. The panel, however, also sought to identify a basis for this defense. Unlike the district court, the panel did not find the defense to be equitable in nature. The *Ogle* panel held the defense could be justified by an analogy to the common law tort of abuse of process. *Id.* at 4a. According to the *Ogle* panel, "this offers the best explanation for *Lee* and the best way to reconcile it with our precedent and U.S. Supreme Court precedent." *Id.* at 5a.

Three other circuit courts have also held that there is a good faith defense to Section 1983 that shields unions that acted under agency fee statutes before they were held unconstitutional from paying damages to employees. *Wholean v. CSEA*, 955 F.3d 332 (2d Cir. 2020); *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"), *petition for cert. filed* No. 19-1104 (U.S. Mar. 9, 2020); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *petition for cert. filed* No. 19-1130 (U.S. Mar. 12, 2020). The courts, however, cite different rationales for a good faith defense. While the Sixth Circuit found the defense to be predicated on a common law analogy, the Second and Ninth Circuits—like the district court here—found the defense to be rooted in concerns about equality and fairness. *See Wholean*, 955 F.3d at 334; *Danielson*, 945 F.3d. at 1101.

The Third Circuit rejected the good faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020). There were three separate opinions in *Diamond*. Judge Rendell

accepted the good faith defense other circuits had recognized. 972 F.3d at 269. Judge Fisher did not, finding it "beyond our remit to invent defenses to § 1983 liability based on our views of sound policy." *Id.* at 274 (Fisher, J., concurring in the judgment). Judge Fisher, however, found an alternative limit to retroactive liability under Section 1983 based on pre-1871 common law history. *Id.* at 278. Judge Phipps rejected both a good faith defense and Judge Fisher's alternative limit on Section 1983's scope. *Id.* at 285 (Phipps, J., dissenting). Judge Phipps found that "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id.* at 289. Taking the opinions together, a majority of the Third Circuit panel in *Diamond* held there is no affirmative good faith defense to Section 1983.

## REASONS FOR GRANTING THE PETITION

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

That defense is not the defense members of this Court suggested in *Wyatt*. Several Justices in that

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

A majority of the Third Circuit panel in *Diamond* recognized as much, and rejected the good faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits. 972 F.3d at 274 (Fisher, J., concurring in the judgment); *id.* at 289-90 (Phipps, J., dissenting). The Court should resolve this disagreement amongst circuit courts over the existence of this defense.

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

The different rationales cited for a good faith defense—either equitable principles or an analogy to an abuse-of-process tort—are both untenable. Courts cannot create equitable exemptions to congressionally enacted statutes like Section 1983. And even if they could, fairness to victims of constitutional deprivations supports enforcing the statute as written. As for

common law analogies, a First Amendment claim for compelled subsidization of speech is not so akin to an abuse of a judicial process as to justify importing that tort's malice and probable cause elements into a First Amendment speech claim.

The Court should reject the proposition that a defendant relying on a state law before it is invalidated exempts the defendant from compensating injured parties under Section 1983. It is important that the Court do so. Unless corrected, the lower courts' misapprehension of *Wyatt* will cause tens of thousands of victims of agency fee seizures to go uncompensated for their injuries. It will also result in victims of other constitutional deprivations not being made whole for their injuries. The petition should be granted.

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

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

The claim in *Wyatt* was that a private defendant deprived the plaintiff of due process of law when seizing his property under an *ex parte* replevin statute. 504

U.S. at 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 good faith defense suggested in *Wyatt* was *not* a broad statutory reliance defense to all Section 1983 damages claims, as some courts have concluded. *See, e.g., Janus II*, 942 F.3d at 366. Rather, several Justices suggested a defense to Section 1983 claims in which malice and lack of probable cause are 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 v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 & n.31 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

More recently, Judge Fisher of the Third Circuit recognized that the defense discussed in *Wyatt* is "whether the defendant acted with malice and without probable cause." *Diamond*, 972 F.3d at 278-79 (Fisher, J., concurring in the judgment). Judge Fisher recognized that this defense does not "appl[y] categorically to all cases involving private-party defendants," but rather depends on the claim at issue. *Id.* at 279. Judge Phipps similarly recognized that Chief Justice

Rehnquist's discussion of a good faith defense "actually referred to elements of the common-law torts of malicious prosecution and abuse of process," and that he "identified no authority for the proposition that good faith functions as transsubstantive affirmative defense–applicable across a broad class of claims . . ." *Id*. at 287 (Phipps, J., dissenting).

The Second, Sixth, Seventh, and Ninth Circuits erred in interpreting *Wyatt* to signal that it should become an affirmative defense to Section 1983 for a defendant to rely on a statute before it is held unconstitutional. *See Wholean*, 955 F.3d at 334-35; Pet.App. 3a; *Janus II*, 942 F.3d at 366; *Danielson*, 945 F.3d at 1101-02. The Court in *Wyatt* was suggesting nothing of the sort. Indeed, such a statutory reliance defense would conflict with both Section 1983's plain language and this Court's retroactivity doctrine.

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

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

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

constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

It turns Section 1983 on its head to conclude that persons who act under the color of state laws that are later held unconstitutional are *not* liable to the injured parties in a suit for damages. The proposition effectively makes a statutory *element* of Section 1983—that defendants must act under color of state law—a *defense* to Section 1983.[1] An affirmative defense predicated on a defendant's reliance on a state law cannot be reconciled with Section 1983's plain language.

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

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[1] 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.

U.S. 347 (1915) and "*the very terms*" of the statute. *Id.* at 379 (emphasis added).[2]

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

To the contrary, th Court has held that "[w]e do not simply make our own judgment about the need for immunity," and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. The Court accords an immunity only when a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine' when it enacted Section 1983." *Richardson*, 521 U.S.

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[2] 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).

at 403 (quoting *Wyatt*, 504 U.S. at 164). Unlike with immunities, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364; *see Diamond*, 972 F.3d at 288 (finding "[a] good faith defense is inconsistent with the history of the Civil Rights Act of 1871") (Phipps, J., dissenting); William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 55 (2018) (finding "[t]here was no well-established, good faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."). Thus, unlike with immunities, there is no justification for deviating from Section 1983's mandate that "[e]very person who, under color of any statute" deprives a citizen of a constitutional right "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983.

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

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

*Reynoldsville Casket* concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at

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

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

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

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

*see id.* at 284,[3] the relevant point here is that the circuit courts disagree on whether there exists an affirmative good faith defense to Section 1983. The Court should resolve that disagreement.

Even the circuit courts that have recognized a good faith defense disagree on the basis for that defense. The Sixth Circuit held that it "looks to the most closely analogous tort at common law in deciding whether private defendants may assert a good-faith defense to certain § 1983 claims." Pet.App. 4a. The Court concluded that OCSEA could assert the defense because "abuse of process is the most plausible common-law tort analogue to employees' post-*Janus* First Amendment claims." *Id.*

The Seventh Circuit in *Janus II* stated that the "search for the best [tort] analogy is a fool's errand." 942 F.3d at 365. The court found "reasonable argu-

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[3] Judge Fisher's limit on retroactive liability under Section 1983 and a good faith defense have different elements and rationales. The latter is purported to be an affirmative defense that applies when a defendant relies in good faith on presumptively valid law, *see* Pet.App. 4a, and is based on equitable interests or a tort analogy, *see infra* 17-18. Judge Fisher found, based on pre-1871 common law history, that a court decision that invalidates a statute or overrules a decision does not generate Section 1983 liability "except where duress or fraud was present." *Diamond*, 972 F.3d at 284. Judge Fisher's proffered limit on Section 1983's 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.

ments for several different torts," though it was "inclined to agree . . . that abuse of process comes closest." *Id*. Ultimately, the Seventh Circuit chose to "leave common-law analogies behind." *Id*. at 366.

The Ninth Circuit in *Danielson* also held a good faith defense is not rooted in common law. 945 F.3d at 1101. The court held "the availability of the defense arises out of general principles of equality and fairness—values that are inconsistent with rigid adherence to the oft-arbitrary elements of common law torts as they stood in 1871." *Id*.[4] According to the Ninth Circuit, "[i]t would be an odd result for an affirmative defense grounded in concerns for equality and fairness to hinge upon historical idiosyncrasies and strained legal analogies for causes of action with no clear parallel in nineteenth century tort law." *Id*. However, the Court alternatively held that, if common law analogies mattered, "abuse of process provides the best analogy to Plaintiffs' claim." *Id*. at 1102.

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

In *Diamond*, Judge Fisher recognized that courts cannot just "invent defenses to § 1983 liability based on our views of sound policy." 972 F.3d at 274 (Fisher,

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[4] The Second Circuit also cited equality and fairness as a justification for a good faith defense. *Wholean*, 955 F.3d at 335.

J., concurring in the judgment). He also found "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to a First Amendment compelled speech claim. *Id.* at 280. Judge Phipps rejected both rationales for a good faith defense. 972 F.3d at 288-90 (Phipps, J., dissenting). As discussed below, Judge Phipps was right. Neither equity nor a tort analogy can justify creating this new affirmative defense to Section 1983.

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

a. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so. "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990). "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984). The "fairness" rationale for a good faith defense to Section 1983 is inadequate on its own terms.

In any event, fairness to *victims* of constitutional deprivations requires enforcing Section 1983's text as written. It is not fair to make employees pay for unconstitutional union conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss

should bear the loss." *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980).

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

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

*Second*, the Court recognized that Congress enacted Section 1983 to "serve as a deterrent against future constitutional deprivations." *Id.* "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52. This deterrence interest also weighs against a reliance defense, which will encourage defendants to risk infringing on constitutional rights by limiting their exposure for so doing.

*Third*, the *Owen* Court reasoned that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate

any resulting financial loss" to the entity that caused the harm "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id*. at 655. So too here. It is not fair to have Ogle pay for OCSEA's unconstitutional conduct. Equity favors requiring OCSEA to return the monies it unconstitutionally seized from him.

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

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

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

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

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

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

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

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

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

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

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

Section 1983 is the nation's preeminent civil rights statute and is often used by citizens to protect their constitutional rights. It is no small matter when lower

courts create a new affirmative defense to Section 1983 liability.

Several circuit courts have now done just that based largely on the misconception that this Court in *Wyatt* signaled that private defendants should be granted a defense to Section 1983 liability akin to qualified immunity. Yet *Wyatt* did not suggest such a defense, but only suggested that reliance on a statute could defeat the malice and lack-of-probable cause elements of certain due process claims. *See supra* 7-11. The Court should clarify what it meant in *Wyatt*.

It is important the Court act quickly because whether tens of thousands of victims of agency fee seizures can receive compensation hangs in the balance. Over 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 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. 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 seizures to victims of other constitutional deprivations. The Sixth Circuit acknowledged that its decision could shield from liability defendants that invoke state law processes to discriminate against individuals on the basis of race, gender, or faith. Pet.App. 5a.

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 Diamond*, 972 F.3d at 288-89 (Phipps, J., dissenting). A good faith defense is inconsistent with that purpose. *Id*. The Court should grant review to repudiate this ostensible new defense to Section 1983.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

OCTOBER 8, 2020

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 19-3701

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Nathaniel Ogle,

*Plaintiff-Appellant*,

v.

Ohio Civil Service Employees Association,
AFSCME Local 11, AFL-CIO

*Defendant-Appellee*.

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Appeal from the United States District Court for the
Southern District of Ohio.
No. 2:18-cv-01227 – George C. Smith, District Judge

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Argued: January 30, 2020
Decided and Filed: March 5, 2020

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Before: SUTTON, BUSH, and READLER, Circuit Judges.

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OPINION

PER CURIAM

Nathaniel Ogle works for the Ohio Department of Taxation. He is not a member of the Ohio Civil Service Employees Association, the union that represents the Department's employees in collective bargaining with

the State of Ohio. Under state law, the union may require non-members like Ogle to pay "fair share" fees to defray the cost of collective-bargaining activities. Ohio Rev. Code Ann. § 4117.09(C).

Between July 2015 and February 2018, the State deducted these fees from his pay without consent. In July 2018, the Supreme Court held that compulsory "fair share" fees violate the First (and Fourteenth) Amendment free-speech rights of public employees. *Janus v. AFSCME, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2486, 201 L.Ed.2d 924 (2018). In the process, the Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), which had authorized such fees.

A few months later, Ogle filed this § 1983 action against the union on free speech grounds. Through this class-action lawsuit, he seeks a refund of the fees he and others paid from 2015 through 2018.

The union moved to dismiss the lawsuit on the ground that it relied on *Abood* in good faith when it collected the fees. The district court granted the union's motion to dismiss. Ogle appealed.

In a separate appeal from a separate case, our court recently joined two other circuits in holding that public-sector unions that collected "fair share" fees in reliance on *Abood* may assert a good-faith defense to § 1983 lawsuits that seek the return of those fees. *Lee v. Ohio Educ. Ass'n*, No. 19-3250, 951 F.3d 386, 387–88, 2020 WL 881265, at *1 (6th Cir. Feb. 24, 2020); *see Janus v. AFSCME, Council 31*, 942 F.3d 352, 364–66 (7th Cir. 2019); *Danielson v. Inslee*, 945 F.3d 1096, 1098–99 (9th Cir. 2019).

Because we have no license to overrule another

panel of this court, we too must recognize the union's good-faith defense. One feature of today's case, however, requires a brief addendum. The claimant in *Lee* conceded the existence of a good-faith defense. 951 F.3d at 391–92, 2020 WL 881265, at *4. Ogle does not. He objects to its validity. Up-front challenges to the good-faith defense and arguments about its scope have plenty of overlap to be sure. But Ogle raises a point not squarely addressed in *Lee*. That prompts a few words about the basis for the defense and its application here.

Ogle's objection runs up against the reality that this circuit has long recognized a good-faith defense to certain § 1983 claims. *See Duncan v. Peck*, 844 F.2d 1261, 1266–67 (6th Cir. 1988). So have members of the Supreme Court. In *Wyatt v. Cole*, five justices agreed that private parties may assert a good-faith defense or good-faith immunity to some § 1983 lawsuits—there, a due process claim challenging the seizure of disputed property. *See* 504 U.S. 158, 170, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (Kennedy, J., concurring, joined by Scalia, J.); *id.* at 176–77, 112 S.Ct. 1827 (Rehnquist, C.J., dissenting, joined by Souter and Thomas, J.J.).

The defense emerges from an interpretation of § 1983. The statute's silence about defenses or immunities requires an inquiry into the historical context from which the statute emerged, including the limitations on comparable actions that existed at common law. *Wyatt*, 504 U.S. at 170–72, 112 S.Ct. 1827 (Kennedy, J., concurring); *Pierson v. Ray*, 386 U.S. 547, 554–57, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Congress enacted the 1871 law against the backdrop of "common-law principles, including defenses previously recognized in ordinary tort litigation." *City of*

*Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). That is why the Court "look[s] to the common law for guidance" to decide when a public official enjoys immunity from lawsuits under § 1983, not to "freewheeling policy choice[s]." *Malley v. Briggs*, 475 U.S. 335, 340, 342, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). And that is why this circuit looks to the most closely analogous tort at common law in deciding whether private defendants may assert a good-faith defense to certain § 1983 claims. *Duncan*, 844 F.2d at 1263–64, 1266–68.

*Lee* explained that abuse of process is the most plausible common-law tort analogue to employees' post-*Janus* First Amendment claims. 951 F.3d at 392 n.2, 2020 WL 881265, at *4 n.2. The Seventh and Ninth Circuits agree. *Danielson*, 945 F.3d at 1102; *Janus*, 942 F.3d at 365. Under that analogy, the union may avoid liability by showing good-faith reliance on *Abood* and the Ohio law that permitted the collection of these fees. *See Duncan*, 844 F.2d at 1267–68. Think about the problem this way. Public-sector unions may enlist the State's help (and its ability to coerce unwilling employees) to carry out everyday functions. But a union that misuses this help, say because the state-assisted action would violate the U.S. Constitution, may face liability under § 1983. *See Danielson*, 945 F.3d at 1102; *cf.* Thomas Cooley, *A Treatise on the Law of Torts* 189 (1879) (defining abuse of process at common law as the "willful[ ]" use of process "for a purpose not justified by the law"). A narrow good-faith defense protects those who unwittingly cross that line in reliance on a presumptively valid state law—those who had good cause in other words to call on the governmental process in the first instance. *Wyatt*, 504 U.S. at 176 & n.1, 112 S.Ct. 1827. Unions that used the

States' authority to extract "fair share" fees from nonmembers may in retrospect have crossed into forbidden territory, 138 S. Ct. at 2486, but if they did so before *Janus* they may invoke the good-faith defense because *Abood* and state law told them they were in the clear. All of this offers the best explanation for *Lee* and the best way to reconcile it with our precedent and U.S. Supreme Court precedent.

Any other approach runs the risk of sweeping in more than necessary. How else to distinguish cases in which a State discriminated in other ways—say based on race, gender, or faith rather than political perspective? In these other settings, we can't imagine that a court would hesitate to award damages to the claimants in the amount of a discriminatory charge even if the entity relied on a 40-year-old Supreme Court precedent and a state law, and even if the request went back several years. *Cf. NLRB v. Actors' Equity Ass'n*, 644 F.2d 939, 943 (2d Cir. 1981) (permitting the recoupment of five years' worth of fees that discriminated based on nationality and that violated the National Labor Relations Act). Most claims for discrimination on the basis of race, gender, or faith do not depend on the use or misuse of state-law process but on other grounds of state action. That said, the hard question left by this case is what would happen if the discrimination involved state-law process and turned on these other forms of discrimination. What's good for one, it would seem, ought to be good for the other.

We affirm.

## APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

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No. 2:18-cv-1227

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Nathaniel Ogle,

*Plaintiff*,

v.

Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO

*Defendant*.

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Judge George C. Smith

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OPINION AND ORDER

This matter is before the Court upon Defendant's Motion to Dismiss (the "Motion") (Doc. 12). The motion is fully briefed and ripe for disposition. For the following reasons, the Motion is GRANTED.

### I. BACKGROUND

Nathaniel Ogle has been employed by the Ohio Department of Taxation since 2011. (Doc. 1, Compl. ¶ 13). Since the beginning of his employment, Ogle has been subject to the exclusive representation of the Ohio Civil Service Employees Association, AFSCME, Local 11 ("OCSEA") and the terms of the collective bargaining agreements OCSEA enters into with the

State of Ohio. (*Id.* at ¶ 6). Ogle is not, and never has been, a member of the OCSEA. (*Id.* at ¶ 7). Ohio's Public Employees' Collective Bargaining Act (the "Act"), Ohio Revised Code § 4117, authorizes exclusive representatives and public employers to enter into agency fee provisions that require, as a condition of employment, "that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee." Ohio Rev. Code § 4117.09(C). (*Id.* at ¶ 8). The Act further provides that "[t]he deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee." *Id.* OCSEA's collective bargaining agreements with the State of Ohio for the term of July 1, 2015 to February 28, 2018, which governs Ogle's employment, contains a compulsory fee clause that dictates:

> Any bargaining unit employee who has served an initial sixty (60) days and who has not submitted a voluntary membership dues deduction authorization form to the Employer shall, tender to the Union a representation service fee beginning in the pay period that includes the 61st day. The amount shall not exceed the dues paid by similarly situated members of the employee organization who are in the bargaining unit. The Union shall continue to provide an internal rebate procedure which provides for a rebate of expenditures in support of partisan politics or ideological causes not germane to the work of employee organizations in the realm of collective bargaining. When an employee enters the bargaining unit for any reason, the Employer shall notify

> the employee of this Article and provide the employee the appropriate deduction forms. Fair share fee deductions shall begin after sixty (60) days of service. The Employer shall tender to the Union a representation service fee beginning in the pay period that includes the 61st day.

(*Id.* at ¶ 9). Ogle was compelled to pay fair share fees to OCSEA pursuant this clause, which were automatically deducted from his paycheck. (*Id.* at ¶ 10). OCSEA's collective bargaining agreements with other public employers in Ohio also contain forced fee clauses that compel nonmembers of the union to pay fees to the union as a condition of their employment. (*Id.* at ¶ 11). On June 27, 2018, the Supreme Court held forced fee requirements to be unconstitutional under the First Amendment and that unions could not constitutionally collect union dues or fees from public employees without their affirmative consent. (*Id.* at ¶ 12); *Janus v. AFSCME, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2486, 201 L.Ed.2d 924 (2018).

Following *Janus*, OSCEA ceased the collection of mandatory fair share fees and has indicated that it has no intention to re-instate the collection of such fees in the future. (Doc. 12-2, Ex. 1, Letter to David Blair at 1); (Doc. 12-2, Decl. of Christopher Mabe at 3).

## II. STANDARDS OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal when the court lacks subject matter jurisdiction. Without subject matter jurisdiction, a federal court lacks authority to hear a case. *Thornton v. Sw. Detroit Hosp.,* 895 F.2d 1131, 1133 (6th Cir. 1990). Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks. *United States v. Ritchie,* 15 F.3d 592, 598

(6th Cir. 1994). A facial attack under Rule 12(b)(1) "questions merely the sufficiency of the pleading," and the trial court therefore takes the allegations of the complaint as true. *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 816 (6th Cir. 2017) (quoting *Ohio Nat'l Life Ins. Co. v. United States,* 922 F.2d 320, 325 (6th Cir. 1990)). To survive a facial attack, the complaint must contain a short and plain statement of the grounds for jurisdiction. *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016).

A factual attack is a challenge to the factual existence of subject matter jurisdiction. No presumptive truthfulness applies to the factual allegations. *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015). When examining a factual attack under Rule 12(b)(1), "the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction." *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015) (quoting *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012)). The plaintiff has the burden of establishing jurisdiction in order to survive the motion to dismiss. *DLX, Inc. v. Kentucky,* 381 F.3d 511, 516 (6th Cir. 2004); *Moir v. Greater Cleveland Regional Transit Auth.,* 895 F.2d 266, 269 (6th Cir. 1990).

Defendant also brings their motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, alleging that Plaintiff has failed to state a claim upon which relief can be granted.

Under the Federal Rules, any pleading that states a claim for relief must contain a "short and plain statement of the claim" showing that the pleader is entitled to such relief. Fed. R. Civ. P. 8(a)(2). To meet this standard, a party must allege sufficient facts to state

a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim will be considered "plausible on its face" when a plaintiff sets forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Rule 12(b)(6) allows parties to challenge the sufficiency of a complaint under the foregoing standards. In considering whether a complaint fails to state a claim upon which relief can be granted, the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 835 (6th Cir. 2012) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). However, "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 663, 129 S.Ct. 1937. Thus, while a court is to afford plaintiff every inference, the pleading must still contain facts sufficient to "provide a plausible basis for the claims in the complaint"; a recitation of facts intimating the "mere possibility of misconduct" will not suffice. *Flex Homes, Inc. v. Ritz-Craft Corp of Mich., Inc.*, 491 F. App'x 628, 632 (6th Cir. 2012); *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

## III. DISCUSSION

In the Complaint, Ogle prays for prospective relief in the form of an injunction preventing OCSEA from collecting mandatory fair share fees and a declaration that the Act is unconstitutional. (Doc. 1, Compl. ¶¶

26(b)–(d)). Ogle also prays for retroactive damages in the form of a refund of the fees collected by OCSEA before *Janus* was decided. (*Id.* at ¶ 26(e)). Ogle additionally prays for nominal damages. (*Id.* at ¶ 26(f))

In the Motion, OCSEA challenges Ogle's subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing with regards to the requests for prospective relief. (Doc. 12, Def.'s Mot. at 5). OCSEA challenges Ogle's claims for damages pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (*Id.* at 10). This Court will address each of these arguments in turn.

**A. Plaintiff Lacks Standing to Seek Prospective Relief**

OCSEA argues that Ogle lacks standing for prospective relief because OCSEA no longer collects mandatory fair share fees and therefore it is not likely that OCSEA will harm him in the future. Ogle counters that, because the Act is still in effect, he has standing. This Court agrees with OCSEA.

The jurisdiction of the federal courts is limited. Article III § 2 of the United States Constitution grants the federal courts jurisdiction only over specified "cases" or "controversies." Absent a live "case or controversy," a federal court has no subject matter jurisdiction and the case must be dismissed. This "case or controversy" requirement gives rise to the concept of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In order to establish constitutional standing, a plaintiff must demonstrate the following: (a) that it has suffered an "injury in fact," a harm that is "concrete and particularized" and "actual or imminent, not

conjectural or hypothetical;" (b) a causal connection between the injury and the challenged conduct; and (c) that a favorable court decision is likely to redress or remedy the injury. *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co.*, 532 U.S. at 103–104, 121 S.Ct. 1281.

At its core, the doctrine of standing requires the plaintiff to allege "a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The injury must be particularized to the plaintiff and concrete, not abstract, conjectural, or hypothetical. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). When seeking prospective relief, evidence of past injury alone is insufficient to establish standing. *Crawford v. United States Dep't of Treasury*, 868 F.3d 438, 455 (6th Cir. 2017), *cert. denied sub nom. Crawford v. Dep't of Treasury*, —— U.S. ——, 138 S. Ct. 1441, 200 L.Ed.2d 717 (2018). An individual requesting prospective relief must show that there is a future threat of suffering harm that is "real and immediate and not premised upon the existence of past injuries alone." *Gaylor v. Hamilton Crossing CMBS*, 582 F. App'x 576, 579 (6th Cir. 2014) (citing *Lyons*, 461 U.S. at 102-03, 103 S.Ct. 1660).

An illustrative example is the Sixth Circuit's decision in *Sumpter v. Wayne Cty*, 868 F.3d 473 (6th Cir. 2017). In *Sumpter*, the plaintiff requested injunctive and declaratory relief pursuant to a county jail's strip

search policy. *Sumpter*, 868 F.3d at 490. The Sixth Circuit found that the plaintiff did not have standing for two reasons: 1) the plaintiff had left jail and could not prove there was a likelihood she would return ("she left the jail in November 2012, and we can only speculate as to whether she will ever return"), and 2) the jail had since changed its policy regarding strip searches ("[t]he likelihood of future injury is further diminished by the fact that defendants have changed their official policy to prohibit group strip searches"). *Id.* at 491. The Sixth Circuit emphasized that in the context of injunctive or declaratory relief, " '[P]ast exposure to illegal conduct ... unaccompanied by any continuing, present adverse effects,' will not suffice to establish 'a present case or controversy.' " *Id.* at 491 (quoting *Lyons*, 461 U.S. at 102, 103 S.Ct. 1660). The Court found that past exposure to illegal conduct "is precisely what the plaintiff alleges[.]" *Id.*

The case at hand is analogous to *Sumpter* because OCSEA has changed its mandatory fee collection policy in light of *Janus* and is no longer collecting mandatory fair share fees. Ogle cites no evidence that there is a likelihood of OCSEA collecting mandatory fair share fees again. Rather, Ogle only argues that OCSEA "could" reinstate their former policy. (Doc. 13, Resp. at 1) ("The argument fails because the statute remains in existence and OCSEA could resume its fee seizures pursuant to the statute."). Like in *Sumpter*, this fear of further injury is speculative at best. Also like *Sumpter*, OCSEA has officially changed its policy and has stopped collecting mandatory fair share fees. (Doc. 12-2, Ex. 1, Letter to David Blair at 1) ("we are hereby requesting that the Employer cease collecting Fair Share Fees as of June 27, 2018 to be in compliance with the Court's decision in *Janus*."). Further,

OCSEA issued a statement that they have no intention of collecting such fees in the future in light of *Janus*. (Doc. 12-2, Decl. of Christopher Mabe at 3) ("OCSEA understands that, as the Supreme Court has ruled in *Janus*, fair share requirements in public sector employment are now unconstitutional. OCSEA will fully comply with the Court's decision, and understands that any provisions of state law or of collective bargaining agreements that purport to authorize such fair share fees in the public sector are no longer enforceable."). *Id.* Finally, as OCSEA points out, the state's cooperation is needed for the collection of mandatory fair share fees. (Doc. 12, Def.'s Mot. at 7–8). In other words, the state would have to be complicit in ignoring the law set forth in *Janus*. This further decreases the chance that OCSEA will violate Ogle's First Amendment rights again.

This Court is not the first to consider the issue of whether plaintiffs can sue for prospective relief after *Janus*. In *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980 (N.D. Ohio 2019) the court found that the plaintiff's "request for injunctive relief is moot." *Id.* at 981. In reaching this conclusion, the court stepped in line with other district courts and stated " 'the Supreme Court's new and controlling precedent ... announced a broad rule invalidating every state law permitting agency fees to be withheld.' " *Id.* at 982 (quoting *Lamberty v. Connecticut State Police Union*, No. 3:15-cv-378, 2018 WL 5115559, at *9 (D. Conn. Oct 19, 2018)).[1]

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[1] The Northern District of Ohio is not the only district court to have considered this issue. A plethora of district courts have addressed this issue and have found that the plaintiffs either lacked standing or the case

While *Lee* held that the plaintiff's claims were moot, here, Ogle lacks standing. However, because "mootness is just standing set in a time frame,' " the logic of *Lee* is useful here. *Sumpter*, 868 F.3d at 490 (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)). In other words, a case becomes moot when an actual controversy existed when a plaintiff brought suit but later ceased to exist; a case lacks standing when no controversy exists when the plaintiff brings suit. *Id.* Because Ogle brought this case post *Janus*, no controversy existed when Ogle sued. Thus, Ogle lacks standing.

Ogle contends that he does have standing and relies on a line of cases following the Supreme Court's decision in *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). (Doc. 13, Response at 2). In these cases, various courts issued injunctions that prevented states from enforcing restrictive marriage laws following *Obergefell*. Ogle argues that the current situation following *Janus* is similar to the cases following *Obergefell*. However, OCSEA counters that the *Obergefell* comparisons are not appropriate. This Court agrees with OCSEA.

First, the *Obergefell* line of cases addressed issues ancillary to the heart of the *Obergefell* decision. For example, while *Obergefell* invalidated marriage laws

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became moot post *Janus*. *See Babb v. California Teachers Association*, No. 218CV06793JLSDFM, 2019 WL 2022222 (C.D. Cal. May 8, 2019); *Sweeney v. Madigan*, 359 F. Supp. 3d 585 (N.D. Ill. 2019); *Hartnett v. Pennsylvania State Education Association*, No. 1:17-cv-100, 390 F.Supp.3d 592, 2019 WL 2160404 (M.D. Penn. 2019).

of four states, one of the cases that Ogle cites involved name changes on same-sex couples driver's licenses. *Rosenbrahn v. Daugaard*, 799 F.3d 918, 922 (8th Cir. 2015) ("the [Supreme] Court did not determine all issues raised by Plaintiffs here (for example, name-changes on driver's licenses)"). The remaining cases Ogle cites to support the *Obergefell* comparison have similar problems—they address issues that are ancillary to the *Obergefell* decision. This differs from the case at hand because *Janus* prohibits the exact behavior that Ogle seeks to enjoin. Ogle requests declaratory and injunctive relief from the collection of mandatory fair share fees; that is precisely what *Janus* prohibits.

Second, the language in *Obergefell* specifically invalidated laws in four states, but not other states' marriage laws. *Rosenbrahn*, 799 F.3d at 922 ("The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee—not South Dakota."). However, the language in *Janus* places no such limitations on its holding. *Janus*, 138 S. Ct. at 2486 ("States and public-sector unions may no longer extract agency fees from nonconsenting employees"). This Court agrees that "cases survived post-*Obergefell* because courts concluded that specific, state statutes had not been the subject of the decision by the Court in *Obergefell*. The same cannot be said here." *Lee*, 366 F. Supp. 3d at 982.

Finally, Ogle argues that an injunction is proper in the case at hand because the *Janus* decision imposes no legal obligation directly on OCSEA. (Doc. 13, Response at 2). While the Supreme Court's decision does not bind OCSEA specifically, it broadly prohibits unions from collecting mandatory fair share fees, which encompasses OCSEA's activity. Further, this argu-

ment is unpersuasive because the lack of a binding legal obligation on one party does not establish standing for the other party.

For the above reasons, Ogle "has not shown that he 'has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and [that] the injury or threat of injury [is] both real and immediate, not conjectural or hypothetical.' " *Bailey v. City of Howell*, 643 F. App'x 589, 602 (6th Cir. 2016) (quoting *Lyons*, 461 U.S. at 101–02, 103 S.Ct. 1660). Therefore, Ogle lacks standing for injunctive or declaratory relief and the Motion, as it relates to those claims, is GRANTED.

**B. Plaintiff Cannot Establish Defendant's Liability for Retroactive Relief**

Ogle brings claims pursuant to § 1983 of Title 42 of the United States Code for OCSEA to repay fees attributable to the time prior to the *Janus* decision. OCSEA argues that it is entitled to a good faith defense and thus, Ogle has failed to state a claim upon which relief can be granted. (Doc. 12, Def's. Mot. at 10). Ogle counters that the good faith defense is not applicable in this case, but even if it is, OCSEA has not acted in good faith. (Doc. 13, Response at 3–18).

§ 1983 of Title 42 of the United States Code imposes civil liability on individuals who act under the color of state law and deprive a citizen of their constitutional rights. *See Brosseau v. Haugen*, 543 U.S. 194, 197–98, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). For a plaintiff to state a claim under § 1983, they must show: 1) their constitutional right(s) have been violated and 2) a person acting under the color of state law caused the violation. *Baynes v. Cleland*, 799 F.3d 600, 607 (6th Cir. 2015). OCSEA does not dispute either prong of this

analysis—that Ogle's constitutional rights were violated or that OCSEA acted under the color of state law. However, OCSEA does assert a good faith defense.

In *Lugar v. Edmondson Oil Co*. the Supreme Court held that private actors could be sued under § 1983. 457 U.S. 922, 942, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). However, the Court did not address whether private parties, like their government counterparts, are entitled to qualified immunity. *Id.* at 942, 102 S.Ct. 2744 n.23 ("We need not reach the question of the availability of such a defense to private individuals at this point."). Ten years later, in *Wyatt v. Cole*, the Supreme Court held that qualified immunity is not available to private actors sued under § 1983. 504 U.S. at 168–69, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) ("The precise issue encompassed in this question ... is whether qualified immunity, as enunciated in *Harlow [v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ], is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute. That answer is no."). However, in dicta the Court indicated that a "good faith" defense *may* be available to private actors. *Id.* at 169, 112 S.Ct. 1827 ("we do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar*, could be entitled to an affirmative defense based on good faith and/or probable cause"). The Supreme Court reasoned that while the rationales underlying qualified immunity do not extend to private parties, it may be unfair for a government actor to have access to qualified immunity while private parties have no protection from liability for following the law. *Id.* at 168, 112 S.Ct. 1827.

On remand, the Fifth Circuit found that private parties do have such a good faith defense. *Wyatt v. Cole*, 994 F.2d 1113, 1115 (5th Cir. 1993) ("we now hold that plaintiffs seeking to hold private actors liable under *Lugar*, must demonstrate that defendants failed to act in good faith ...").

Even without the Supreme Court's explicit endorsement, the Sixth Circuit adopted the good faith defense. *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996) ("[the Fifth Circuit] held that private persons who act under color of law may assert a good faith defense. The Third Circuit has agreed. Now, so do we.") (internal citations omitted). However, the Sixth Circuit has not supplied further guidance on the specific contours of the defense. Without further guidance from the Sixth Circuit, and because the Sixth Circuit cited *Wyatt* in adopting the defense, this Court looks to the Fifth Circuit and other courts' interpretations to determine the contours and rationale supporting the good faith defense.

The Fifth Circuit, drawing from the Supreme Court's decision in *Wyatt*, found that "principles of equality and fairness" support the idea that "private defendants 'should have some protection for liability.' " *Wyatt*, 994 F.2d at 1118 (quoting *Wyatt*, 504 U.S. at 168, 112 S.Ct. 1827). *See also Babb v. California Teachers Association*, No. 2:18CV06793, 2019 WL 2022222 at *7 (C.D. Cal. May 8, 2019) (stating that *Wyatt* based the good faith defense on principles of equity and fairness). Similarly, other courts have acknowledged that equality and fairness are the pillars of the good faith defense. *See Danielson v. AFSCME, Council 28, AFL-CIO*, 340 F. Supp. 3d 1083,

1085 (W.D. Wash. 2018) ("Although the precise contours of the defense have not been clearly defined by the Supreme Court, circuit courts, including the Ninth Circuit, have acknowledged its general contours of equity [sic] and fairness."); *Mooney v. Illinois Education Association*, 372 F. Supp. 3d 690, 703 (C.D. Ill. 2019) ("The principles of fairness and equality underlying the good-faith defense in the § 1983 context ..."). Relying on these principles, the Fifth Circuit held: "private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Wyatt*, 994 F.2d at 1118.

Thus, in the wake of *Wyatt*, it is clear that the good faith defense and qualified immunity are not based on similar rationales. Qualified immunity is supported by " 'a tradition of immunity [omitted] so firmly rooted in the common law and [omitted] supported by such strong policy reasons ...' " whereas the good faith defense is based on equality and fairness. *Wyatt*, 504 U.S. at 164, 112 S.Ct. 1827 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)); *see also Richardson v. McKnight*, 521 U.S. 399, 403-04, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997) (discussing the rationales supporting qualified immunity).

In the case at hand, the good faith defense protects OCSEA. OCSEA collected mandatory fair share fees pursuant to a presumptively valid Ohio statute. Further, OCSEA was entitled to rely upon the findings of the Supreme Court in *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). *Abood* held that unions could collect mandatory fair share

fees. *See* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). Because OCSEA collected fees under a presumptively valid statute and pursuant to then-valid Supreme Court precedent, there is no way that OCSEA "knew or should have known that the statute upon which they relied was unconstitutional." *Wyatt*, 994 F.2d at 1118. Put another way—OCSEA was simply following presumptively valid law.

When a government official acts pursuant to a presumptively valid law that later becomes unconstitutional, qualified immunity offers them protection because it is objectively reasonable to follow the law. *See Leonard v. Robinson*, 477 F.3d 347, 366 (6th Cir. 2007) ("the Sixth Circuit has resisted imposing liability on police officers and other officials who fail to anticipate each twist and turn of judicial review."). The principles of equality and fairness, upon which the good faith defense is premised, demand that some protection be afforded to private actors in such a scenario. Therefore, this is precisely the type of case the Supreme Court and the Fifth Circuit had in mind when establishing the good faith defense; the defense protects OCSEA in this case.

This Court is not alone in addressing this issue. Similarly situated plaintiffs have filed suit in other courts and this Court's colleagues have ruled that the good faith defense is available to unions who collected mandatory fair share fees prior to *Janus*. *See e.g., Lee v. Ohio Education Association*, 366 F. Supp. 3d 980 (N.D. Ohio 2019); *Danielson v. AFSCME, Council 28, AFL-CIO*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018); *Mooney*, 372 F. Supp. 3d 690; *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019). This Court can find no reason to depart from these courts on this issue.

Ogle advances several arguments against the availability of the good faith defense. Ogle argues: 1) the good faith defense does not apply in First Amendment cases, 2) OCSEA is not entitled to qualified immunity, 3) OCSEA tries to mask qualified immunity as a good faith defense, and 4) OCSEA is not entitled to a good faith defense because it is an entity and municipalities are not entitled to qualified immunity. Finally, Ogle argues that even if the good faith defense applies, OCSEA did not act in good faith and he is entitled to discovery on OCSEA's subjective state of mind. (Doc. 13, Response at 3-18). This Court does not find any of Ogle's arguments persuasive.

First, Ogle argues that the good faith defense is not available here because OCSEA's subjective state of mind is irrelevant when determining if they committed a First Amendment violation. (Doc. 13, Response at 5). In other words, because a First Amendment violation does not require specific intent, whether OCSEA acted in good faith or bad faith is irrelevant. Ogle's argument is premised on the idea that the good faith defense is only available in cases where the underlying violation has a subjective component. This Court disagrees with that interpretation of the good faith defense.

Ogle pulls his argument from a discussion in *Duncan* and *Wyatt* where the courts analyze the good faith defenses available to parties at common law. (Doc. 13, Response at 8) ("*Duncan* and subsequent cases recognized only 'a common law good faith defense to malicious prosecution and wrongful attachment cases' ") (quoting *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988)). The availability of qualified immunity is partly based on whether parties were immune from suit at common law before Congress enacted § 1983,

and in *Duncan* and *Wyatt* the courts discussed these common law defenses to determine if the parties had qualified immunity. *Duncan*, 844 F.2d at 1264 ("Thus the Supreme Court has adopted a two-part test to determine whether a particular immunity is consistent with the intent of § 1983. The first part requires the party claiming immunity to show that the immunity was recognized at common law ..."); *Carey v. Inslee*, 364 F. Supp.3d 1220, 1229 (W.D. Wash. 2019) ("while the Court did discuss common law analogues in dicta, that discussion was largely in reference to the history of qualified immunity."). The courts found that even though private parties had a defense at common law that would negate subjective components of the tort, private parties were not entitled to qualified immunity because the policy rationales underlying qualified immunity did not apply to private parties. *Wyatt*, 504 U.S. at 167, 112 S.Ct. 1827 ("the reasons for recognizing such an immunity were based not simply on the existence of a good faith defense at common law, but on the special policy concerns involved in suing government officials ... the rationales mandating qualified immunity for public officials are not applicable to private parties.") (internal citations omitted). After this discussion about qualified immunity, the *Wyatt* court then stated that the absence of qualified immunity for private parties did not preclude the availability of a separate good faith defense. *Id.* at 169, 112 S.Ct. 1827. The Fifth Circuit, on remand, then made clear that the good faith defense was available based on equality and fairness. *Wyatt*, 994 F.2d at 1118. Thus, the discussions of good faith defenses at common law and the current availability of the good faith defense to § 1983 claims were separate from one another and must be viewed as such. For this reason, Ogle's claim

that the First Amendment is not subject to the good faith defense is misguided. Put simply, Ogle misconstrues a discussion on qualified immunity to apply to the good faith defense.

Further, the Fifth Circuit announced a broad rule in *Wyatt*—it did not limit the defense to claims that had a subjective component or common law tort analogue with subjective component. *Carey*, 364 F. Supp.3d at 1229 ("*Wyatt* did not clearly limit the good faith defense to § 1983 claims with specific common law analogues."). Requiring a subjective component for the good faith defense to apply would only undercut the purpose of the defense. *See Mooney*, 372 F. Supp.3d at 703 ("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."). Because the good faith defense is based on the principles of equality and fairness, this Court can think of no reason why it should be limited to certain types of claims.

This Court is not alone in taking this approach. Other similarly situated plaintiffs have argued that courts must look to the most closely analogous common law tort to determine if a good faith defense applied at common law, and only if so could the defendant exercise a good faith defense to a § 1983 claim. *See Danielson*, 340 F. Supp.3d 1083; *Babb*, No. 2:18CV06793, 2019 WL 2022222; *Mooney*, 372 F. Supp. 3d 690; *Nemo v. City of Portland*, 910 F. Supp 491 (D. Ore. 1995). Those plaintiffs invoke the same rationale that Ogle does: good faith can only negate a subjective component of the claim, and if the underlying common law tort did not allow for a good faith defense, then a constitutional tort should not offer a good faith defense either. However, those plaintiffs are

similarly misguided because the analysis of common law tort analogues was a part of the qualified immunity analysis, not the good faith analysis.[2] The qualified immunity analysis and good faith defense are separate; attempting to find a good faith defense rooted in a qualified immunity analysis is contrived. Qualified immunity is rooted in common law tort and policy rationales. *Duncan*, 844 F.2d at 1264. The good faith defense is derived from equality and fairness. *Wyatt*, 504 U.S. at 168, 112 S.Ct. 1827.

For these reasons, it is irrelevant that the First Amendment violation lacks a subjective component. It would be manifestly unfair to grant qualified immunity to a public official who, following a state statute, violates a citizens' First Amendment rights when a similarly situated private actor would be exposed to liability. *See Nemo*, 910 F. Supp. at 499 (analyzing a private actor as "stepping into the shoes of a government agent" when relying upon a First Amendment ordinance). Thus, the equality and fairness rationales that underly the purpose of the good faith defense are at play here and, despite Ogle's claims to the contrary, the defense applies.

As for Ogle's second argument, this Court agrees

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[2] It is worth noting that even if this Court were required to draw a common law analogy, the good faith defense would still be available. The closest common law tort would be one with a dignitary component, such as abuse of process or defamation. See *Carey*, 364 F. Supp. 3d at 1230; *Danielson*, 340 F. Supp. 3d at 1086. Therefore, the good faith reliance by OCSEA on a state statute would negate the underlying subjective component of the tort.

with him that OCSEA, as a private entity, is not entitled to qualified immunity. *See Vector*, 76 F.3d 692 (1996). However, the unavailability of qualified immunity has no effect on the availability of OCSEA's good faith defense. *Nemo*, 910 F. Supp. at 498 ("private defendants might be entitled to a defense of good faith reliance upon a statute, even though such defendants cannot assert qualified immunity.").

Third, Ogle argues that OCSEA is masking qualified immunity as a good faith defense because OCSEA is asking that the good faith defense apply as a matter of law. In other words, Ogle argues that OCSEA is asking for an objective analysis which is reserved for qualified immunity and unavailable to OCSEA.

Just because the good faith defense applies here as a matter of law does not change the fact that OCSEA's defense is rooted in good faith not qualified immunity. Ogle's argument ignores the reality that the two doctrines perform different functions: qualified immunity is immunity from suit, the good faith defense is a defense to liability. *See Wyatt*, 504 U.S. at 166, 112 S.Ct. 1827 ("*Harlow* established an '*immunity from suit* rather than a mere defense to liability' ") (emphasis in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). OCSEA is not asking for immunity from suit, they are using a defense to protect them against liability. This Court is *not* performing a qualified immunity analysis rooted in traditional common law and the policy rationales for qualified immunity; nor is this Court granting OCSEA immunity from suit. Thus, Ogle's attempt to paint OCSEA's good faith defense as qualified immunity falters.

Fourth, Ogle argues that the good faith defense is not available to OCSEA because it is an entity, and if

drawing a comparison to qualified immunity, qualified immunity is not available to municipalities. (Doc. 13, Response at 12–13). This argument is unpersuasive because, once again, Ogle confuses qualified immunity with the good faith defense. Had the Supreme Court found that private actors are entitled to qualified immunity then his argument would hold more weight. However, the Supreme Court found that qualified immunity is not available to private actors, but a good faith defense might be. The underlying rationales for qualified immunity and the good faith defense are not the same. *Wyatt* 504 U.S. at 168, 112 S.Ct. 1827 ("[Qualified immunity] rationales are not transferable to private parties. Although principles of equality and fairness may suggest, as respondents argue, that private citizens ... should have some protection from liability, as do their government counterparts"). Because the good faith defense and qualified immunity are based on fundamentally different principles, comparing the availability of the good faith defense to the availability of qualified immunity is an exercise in futility. *See Mooney*, 372 F. Supp. 3d at 704-705 (discussing why the policy rationales underlying the unavailability of qualified immunity for municipalities are not applicable to the good faith defense for private entities). The principles that support the good faith defense for private individuals are equally applicable to private institutions. Thus, private entities that rely upon a presumptively valid state statute have protection from liability should that statute later turn out to be unconstitutional.[3]

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[3] For argument purposes, even if the good faith defense was not available to private entities, the end result would not change. Municipalities can only be held

Finally, Ogle argues that, even if a good faith defense is available, OCSEA was not acting in good faith because the Supreme Court hinted that it would overturn *Abood*, and OCSEA should have known that their conduct was unconstitutional from these overtures. (Doc. 13, Response at 13-18). Ogle's argument is problematic because it would require private parties to "[read] the tea leaves of Supreme Court dicta" and that "has never been a precondition to good faith reliance on governing law." *Cook v. Brown*, 364 F. Supp. 3d 1184, 1192 (D. Ore. 2019). As another court stated: "Any subjective belief [the union] could have had that [*Abood*] was wrongly decided and should be overturned would have amounted to telepathy." *Winner v. Rauner*, No. 15 CV 7213, 2016 WL 7374258 *5 (N.D. Ill. 2016). In short, it is patently unfair to expect private actors to be able to predict the future of constitutional law. *See Danielson*, 340 F. Supp.3d at 1086 ("the Union Defendant should not be expected to have known that *Abood* was unconstitutional, because the Supreme Court had not yet so decided.").

There are other concerns with Ogle's position. Notably, this Court believes that it would have a chilling

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liable if they are "deliberately indifferent" to the constitutional rights of its citizens. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). If a private entity is acting pursuant to a presumptively valid state statute, it cannot be said that they are deliberately indifferent to the constitutional rights of citizens. For that reason, even accepting Ogle's argument that a good faith defense is not available to an entity, this Court could not say that OCSEA was deliberately indifferent because they were acting pursuant to a valid state statute.

effect on private actors. For if private actors can be liable for relying on then constitutionally valid state statutes, they may, due to a fear of future liability, refrain from acting. Even with some sign or hint from the Supreme Court that the state of constitutional law may change, it could have an adverse effect on the actions of private parties. For example, if OCSEA had stopped collecting fair share fees based on the Supreme Court's warnings, and the Supreme Court never returned to the issue, then OCSEA would have forgone constitutionally proper conduct out of a fear that constitutional law may change. This cannot be the rule.

Lastly, Ogle's position would undermine the role of the judiciary and place the burden of constitutional interpretation on private parties. *Carey*, 364 F. Supp. 3d at 1231 ("Plaintiff's approach would have the practical effect of destabilizing the role of the judiciary"). It is the judiciary's role to determine what is, and what is not, constitutional. *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803). If OCSEA can be liable based on its own interpretation of the constitution, then this Court is essentially asking OCSEA to "become constitutional scholars tasked with deciding if they truly agree with the Supreme Court's reasoning to avoid future liability." *Carey*, 364 F. Supp. 3d at 1231. Again, this cannot be the rule.

Finally, Ogle argues that, even if the good faith defense applies in this case, Ogle is entitled to discovery because the OCSEA has provided no evidence of its state of mind showing good faith. OCSEA counters that reliance on a statute establishes good faith as a matter of law. This Court agrees with OCSEA.

Some support for Ogle's argument is found in caselaw because, typically, subjective states of mind

are shown through discovery. *Vector*, 76 F.3d at 699 ("Any good faith defense must, however, be resolved on remand and not on this Rule 12 motion to dismiss."). *See also Duncan*, 844 F.2d at 1266 ("A good faith defense, on the other hand, is likely to be based in large part on the facts of the case, with the suit only being dismissed after trial, or on summary judgment if the defendant can show that there is no material dispute as to the facts"). However, it is, as a matter of law, reasonable to rely on a presumptively valid statute. *Wyatt*, 504 U.S. 158, 174, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (J. Kennedy, concurring) ("there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law"). It would be unreasonable to expose OCSEA to discovery when discovery would not change the fact that OCSEA was simply following the existing law. As the court in *Danielson* stated:

> the Union Defendant should not be expected to have known that *Abood* was unconstitutional, because the Supreme Court had not yet so decided. Inviting discovery on the subjective anticipation of an unpredictable shift in the law undermines the importance of observing existing precedent and ignores the possibility that prevailing jurisprudential winds may shift. This is not a practical, sustainable or desirable model. The good faith defense should apply here as a matter of law.

340 F. Supp.3d at 1086. For these reasons, "no amount of discovery could show that the Union Defendant knew or should have known something that was not true." *Id.* at 1086-87.

For the reasons discussed above, this Court finds

that the good faith defense for private actors is available to OCSEA as a matter of law in this case. Because OCSEA is entitled to the good faith defense, the Defendant's Motion as it relates to the claims for prospective relief is GRANTED.

**C. Plaintiff is Not Entitled to Nominal Damages**

Lastly, Ogle argues that if he is not entitled to compensatory damages, then he is at least entitled to nominal damages so that his constitutional rights are observed. (Doc. 13, Response at 18). OCSEA counters that the good faith defense is a defense to liability and that they know of no similar case where nominal damages have been awarded in the absence of compensatory damages. (Doc. 14, Reply at 5-6 n.2). This Court agrees with OCSEA.

This Court also can find no case dealing with nominal damages pursuant to a non-union members' First Amendment rights following *Janus*. However, examining the principles underlying nominal damages leads this Court to the necessary outcome.

Nominal damages are awarded when a defendant is liable for some harm but the plaintiff cannot prove an actual injury. *See Farrar v. Hobby*, 506 U.S. 103, 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) ("petitioners were entitled to nominal damages under *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) because they were able to establish Hobby's liability for denial of procedural due process, but could not prove the actual injury necessary for a compensatory damages award."). Thus, for nominal damages to be available, a plaintiff must establish the defendant's liability. In the case at hand, there is no such finding of liability because the good faith defense acts to protect OCSEA from liability. *Wyatt*, 994 F.2d

at 1118 ("private defendants sued on the basis of Lugar may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional."). Because OCSEA neither "knew [n]or should have known that the statute upon which they relied was unconstitutional" this Court cannot say that they are liable to Ogle. Thus, nominal damages are unavailable.

It is undisputed that OCSEA's prior practice of collecting mandatory fair share fees violated Ogle's First Amendment rights. Thus, it may seem contradictory that this Court will not recognize that violation through the award of nominal damages. However, nominal damages are not merely symbolic—they carry with them real implications. A party who is awarded nominal damages is considered a "prevailing party" under the law. *See Farrar*, 506 U.S. at 103, 113 S.Ct. 566. This designation comes with repercussions (for example, the availability of attorney's fees). *Id.* Thus, any vindication for the violation of Ogle's constitutional rights is not properly before this Court.

**IV. CONCLUSION**

For the foregoing reasons, the Motion is GRANTED**.** The Clerk shall remove Document 12 from the Court's pending motions list. The Clerk shall enter final judgment in favor of Defendants and REMOVE this case from the Court's pending cases list.

**IT IS SO ORDERED.**

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

**APPENDIX X**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 19-3701

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Nathaniel Ogle,

*Plaintiff-Appellant*,

v.

Ohio Civil Service Employees Association,
AFSCME Local 11, AFL-CIO

*Defendant-Appellee*.

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Filed: May 13, 2020

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Before: SUTTON, BUSH, and READLER, Circuit Judges.

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ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Entered By Order of the Court