UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Nathaniel Ogle, on behalf of himself and a class similarly situated, Plaintiff v. Ohio Civil Service Employees Association, AFSCME, Local 11. Defendant	Case No. 2:18-cv-1227 Judge George C. Smith Magistrate Judge Chelsey M. Vascura

MOTION TO DISMISS OF DEFENDANT
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11

Defendant Ohio Civil Service Employees Association, AFSCME, Local 11 ("OCSEA") respectfully moves the Court, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint in its entirety. As grounds for its motion, OCSEA states as follows:

1. Plaintiff lacks standing to pursue claims for prospective relief with respect to the assessment of fair share fees from non-union members because, before Plaintiff filed his Complaint, the Supreme Court had decided the issue in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), and OCSEA and Plaintiff's public employer had ceased the collection of such fees. These claims therefore must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

2. Plaintiff's demand that OCSEA repay fair share fees attributable to the time prior to the *Janus* decision, when such fee requirements were authorized by state statutes and upheld by controlling decisions of the Supreme Court, must be dismissed under Rule 12(b)(6) for failure

to state a claim, as it is barred by the good-faith defense to liability for damages that is available to nongovernmental parties sued under 42 U.S.C. § 1983 when they acted in reliance on existing, presumptively valid statutes and judicial precedent.

3. The grounds for this motion are more fully set forth in the accompanying Memorandum in Support of Defendant OCSEA's Motion to Dismiss.

For these reasons, OCSEA's motion should be granted and the Complaint dismissed in its entirety.

Respectfully submitted,

/s/ Richard F. Griffin, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2018, a copy of the foregoing Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties via operation of the Court's electronic filing system.

By /s/ Richard F. Griffin, Jr.
Richard F. Griffin, Jr.

Counsel for Defendant

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MEMORANDUM IN SUPPORT OF DEFENDANT OCSEA'S MOTION TO DISMISS

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INTRODUCTION

This lawsuit was brought several months after the decision of the United States Supreme Court in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (June 27, 2018). In *Janus*, the Supreme Court overruled its 40-year-old precedent in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court had held that public employees who declined to become dues-paying members of the union that represents their bargaining unit could, consistent with the First Amendment, be required as a condition of employment to contribute their proportionate share of the union's costs of collective bargaining and contract administration. *Janus* established the rule that such "fair share" fee requirements are unconstitutional in the public sector.

Plaintiff's Complaint seeks two principal forms of relief. First, the Complaint demands that fair share requirements be declared unconstitutional and their enforcement enjoined—an issue all parties agree that the Supreme Court settled in *Janus*. Second, Plaintiff asks that Ohio Civil Service Employees Association ("OCSEA") be required to pay back fair share fees it received that were attributable to the time prior to the *Janus* decision, which were assessed and collected pursuant to Ohio statute and in reliance on *Abood.* Defendant OCSEA respectfully asks the Court, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, to dismiss the lawsuit in its entirety. Because OCSEA has not collected any fair share fees attributable to the period after the *Janus* decision and acknowledges that it cannot do so, Plaintiff lacks standing with respect to his demand for declaratory and injunctive relief. And the demand for repayment of fair share fees attributable the period before the *Janus* decision—when such fees were authorized and deemed constitutional under controlling law—fails to state a claim for relief in light of the good-faith defense to liability for damages available to private parties sued under 42 U.S.C. § 1983.

BACKGROUND

Since 1984, Ohio law has provided that a labor union certified as the exclusive representative of a bargaining unit of public employees may enter into an agreement with the public employer whereby any members of the bargaining unit who choose not to become dues-paying union members can be required, as a condition of employment, to pay a "fair share fee" (sometimes called an "agency fee"), equivalent to the portion of union dues that goes toward the union's costs of negotiating and enforcing the collective bargaining agreement. *See* Ohio Rev. Code § 4117.09(C). In authorizing such fair share requirements, Ohio law followed many other states, as well as (with respect to the private sector) the National Labor Relations Act, *see* 29 U.S.C. § 158(a)(3), in recognizing that—where the union had a legal duty "to 'represen[t] the interests of all public employees in the unit,' whether or not they are union members," *Janus*, 138 S. Ct. at 2467—it was fair to require those who declined to join the union to help pay the costs of collective bargaining and contract administration that benefited both members and nonmembers alike. In 1977, the Supreme Court upheld the constitutionality of such requirements, explaining that as long as the fee was limited to the costs of collective bargaining and contract administration, to the exclusion of political or ideological activities, requiring non-union employees to pay their share of those costs did not violate their First Amendment rights to freedom of speech and association. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

On June 27, 2018, the Supreme Court issued its decision in *Janus*, overruling *Abood* and holding that public employees could not constitutionally be required to pay fair share fees. This lawsuit against OCSEA was brought nearly four months later, on October 15, 2018. Complaint p.1; *id.* ¶ 12. Plaintiff Ogle, who is employed by the Ohio Department of Taxation, alleges that

as a union nonmember he was required to pay fair share fees to OCSEA and its affiliates. *Id.* ¶¶ 5-10.

The Ohio statute that authorized the deduction of fair share fees from the paychecks of nonmembers such as Plaintiff provided that any fair share requirement in a collective bargaining agreement would be implemented by automatic deduction of the fees from employees' paychecks and their transmission to the union. Ohio Rev. Code § 4117.09(C). In light of the *Janus* decision, OCSEA recognized that the Ohio statute authorizing fair share fees had become unenforceable and immediately took steps to end collection of such fees. *See* Declaration of Christopher Mabe, ¶¶3-6.[1]

Prior to June 27, 2018, OCSEA contacted all public employers that had fair share provisions in their collective bargaining agreements with OCSEA, requesting contact information for the person to whom OCSEA could send letters informing the public employers to cease collecting any fair share fees on behalf of OCSEA in the event that the Supreme Court determined that such fees were unconstitutional in *Janus*. *Id.* ¶ 3. Two days after the *Janus* decision, OCSEA contacted every public employer with which OCSEA had a contractual fair share clause, notifying them of the *Janus* decision and instructing them immediately to cease deducting fair share fees. *Id.* ¶¶ 4-5 & Exh. 1 & 2. OCSEA was able to work with all of the

[1] The declarations and exhibits cited herein are proffered solely in support of the argument in Part I that Plaintiff lacks standing as to his claims for prospective relief, and that those claims should be dismissed under Rule 12(b)(1) for lack of jurisdiction. The Court is permitted to consider evidence outside the pleadings in ruling on 12(b)(1) motions. *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015).

public employers having fair share provisions in their collective bargaining agreements to ensure that the collection of fair share fees was discontinued and that OCSEA did not receive any fair share fees attributable to any date after *Janus* was decided. *Id*. ¶ 6. The State of Ohio Office of Collective Bargaining advised OCSEA that it would cease fair share deductions effective as of the date *Janus* was decided, and it has. *Id.*

SUMMARY OF THE ARGUMENT

Plaintiff's Complaint seeks both prospective and retrospective relief. As to the prospective relief claims, which seek a declaratory judgment and an injunction against the collection of fair share fees, the Complaint must be dismissed for lack of standing because, before this lawsuit was filed, the *Janus* decision had already settled the matter of the constitutionality of such fees, and OCSEA and Plaintiff's public employer had ceased all such fee assessments in compliance with *Janus*. Plaintiff therefore will not suffer the "injury in fact" that Article III requires of private party litigants seeking prospective relief, and the declaratory and injunctive relief claims must accordingly be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction (Part I). Plaintiff's claim for retrospective relief also fails, for a different reason. Plaintiff demands that OCSEA repay fair share fees that were assessed and collected (and, indeed, expended for the benefit of the entire bargaining unit, including nonmembers such as Plaintiff) prior to the *Janus* decision, at a time when controlling law authorized such fees. That claim must be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. That is because private parties sued under 42 U.S.C. § 1983 are entitled to invoke a good-faith defense to liability for damages when they acted in reliance on existing, presumptively valid statutes and judicial precedent (Part II).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

Article III of the United States Constitution contains important safeguards designed to preserve the separation of powers by "prevent[ing] the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Thus, the Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

As the Supreme Court has held, "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," without which the federal courts lack jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must show that (1) he has "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized … and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,'" (2) there is "a causal connection between the injury and the conduct complained of," and (3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-61 (citations omitted). A plaintiff lacks standing to seek prospective relief where the alleged future injury could occur only due to a "highly attenuated chain of possibilities," and thus is not "certainly impending." *Clapper*, 568 U.S. at 410.

A plaintiff's standing "must [be] demonstrate[d] … separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000). Here,

with the exception of the demand for repayment of pre-*Janus* fees, *see* Demand for Relief ¶¶ e-f (which we address in Part II), Plaintiff's claims are for declaratory and injunctive relief with respect to the lawfulness of fair share fees; he asks the Court to declare Ohio Rev. Code § 4117.09(C) and the clauses in OCSEA's contracts implementing it unconstitutional and to enjoin OCSEA from requiring the payment of fair share fees as a condition of employment. Plaintiff lacks standing to bring all such claims for prospective relief because, more than three months before he filed this Complaint, the Supreme Court resolved the constitutionality of fair share fees in *Janus*, and OCSEA and Ohio public officials promptly complied with that decision. Plaintiff therefore cannot be injured by the now-defunct fair-share fee requirements. [2]

In *Janus*, the Court overruled its *Abood* precedent and held that the First Amendment prohibited any requirement that public employees pay fair share fees: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486. As explained above, OCSEA immediately took steps following the *Janus* decision to terminate the collection of fair share fees by all Ohio public employers that had fair

[2] The fact that Plaintiff has brought his claim as a putative class action does not change the analysis. "That a suit may be a class action…adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976)) (internal quotation marks omitted).

share provisions in their collective bargaining agreements with OCSEA. As a result, OCSEA received no fair share fees—from any employee, including Plaintiff Ogle—attributable to the time after *Janus* was decided. Moreover, OCSEA has stated its intention to comply fully with the *Janus* decision and accordingly not give further effect to contract provisions allowing fair share fees, which OCSEA recognized were unenforceable after *Janus*. Mabe Decl. ¶¶ 6-8.

When Plaintiff filed his Complaint, the Supreme Court in *Janus* had already resolved the question on which Plaintiff seeks declaratory and injunctive relief, and both OCSEA and Plaintiff's public employer had immediately and unconditionally implemented that decision by ceasing the deduction of fair share fees from Plaintiff's paycheck. No such fees have been deducted on Plaintiff's behalf since well before Plaintiff filed suit. As a result, with respect to his claims for prospective relief, Plaintiff cannot show that he will suffer an injury in fact that is actual or imminent rather than speculative. *Cf. Clapper*, 568 U.S. at 410-14. There is no indication that Plaintiff's public employer and OCSEA will resume collecting fair share fees in defiance of *Janus*. Given that all parties agree that *Janus* prohibits fair share fees in the public sector, that immediately following *Janus* OCSEA took all necessary steps to ensure that deduction and transmission of fair share fees were halted at once, and that OCSEA has acknowledged that fair share requirements under *Janus* are unconstitutional, "[i]t is unreasonable to think that the Union would resort to conduct"—even assuming that it had the power to do so unilaterally—"that it had admitted in writing was constitutionally deficient and had attempted to correct." *Carlson v. United Academics*, 265 F.3d 778, 786 (9th Cir. 2001).

Furthermore, OCSEA could not singlehandedly resume collecting fair share fees even if it wanted to do so. OCSEA can collect fair share fees only with the active assistance of the public employers in deducting such fees from nonmembers' paychecks and transmitting them to

OCSEA. Governmental agencies are presumed to follow the law. *See, e.g.*, *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004). Accordingly, "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties" in the context of determining whether a case is moot due to a governmental policy change, *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990)—an inquiry which addresses case-or-controversy concerns similar to those present when a plaintiff lacks standing, *see infra* p. 10. After *Janus*, the law prohibits deduction and transmission of fair share fees—and it is evident that Plaintiff Ogle's public employer will indeed follow the law as enunciated in *Janus*, for it has ceased deducting and transmitting fair share fees. Mabe Decl., ¶ 6. That being so, there is nothing for this Court to enjoin, and Plaintiff lacks standing on his request for declaratory and injunctive relief.

That Plaintiff *previously* paid fair share fees is not enough to establish Article III jurisdiction over his claims for *prospective* relief. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 98-99 (1983), for example, the plaintiff alleged that he was the past victim of an unconstitutional chokehold, and that the police department's unconstitutional chokehold policy still existed and could be enforced. The city acknowledged that the policy could be enforced in the future. *Id.* at 101. Even so, the Supreme Court concluded that Plaintiff lacked standing to assert a claim for prospective relief against the policy because he could not show a real risk of being personally subject to the policy in the future. *Id.* at 111. The plaintiff's claim for equitable relief was of a "speculative nature," such that he was "no more entitled to an injunction than any other citizen." *Id.* Here, Plaintiff's lack of standing is even more apparent, where the public employer and OCSEA have ceased and will not resume the challenged practice of fair share fee collections.

Plaintiff challenges statutory and collective bargaining agreement provisions that, in light of the short time since the *Janus* decision, have not been repealed, but that does not change the analysis. It is settled law that "[t]he mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue." *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006) (case was moot where prosecutors acknowledged that a Supreme Court decision made the state statute unconstitutional); *see also, e.g., Wisconsin Right to Life v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004) ("[A] case is moot when a state agency acknowledges that it will not enforce a statute because it is plainly unconstitutional, in spite of the failure of the legislature to remove the statute from the books."); *Brown v. Buhman*, 822 F.3d 1151, 1168 (10th Cir. 2016) (same). The mere fact that Plaintiff challenges the statutes and collective bargaining agreements authorizing fair share fees thus is insufficient to establish jurisdiction here.

Indeed, three courts considering challenges to fair share fee provisions have already held that, where fair share fee deductions ceased as a result of the *Janus* decision, there is no jurisdiction over claims for a declaratory judgment that such fees are unconstitutional, or for injunctive relief against the collection of such fees. *See Danielson v. Inslee*, No. 3:18-cv-05206-RJB, 2018 WL 3917937, at *2-3 (W.D. Wash. Aug. 16, 2018) (holding plaintiff's claims for declaratory and injunctive relief with respect to agency fee requirements were moot after *Janus* and the cessation of fee collections); *Yohn v. California Teachers Ass'n*, No. 8:17- cv-00202-JLS-DFM, 2018 WL 5264076, at *3-4 (C.D. Cal. Sept. 28, 2018); *Lamberty v. Conn. St. Police Union*, No. 3:15-cv-00378-VAB, 2018 WL 5115559, at *8-9 (D. Conn. Oct. 19, 2018). Those cases involved challenges to fair share fees brought *prior* to the Supreme Court's decision in *Janus*, when fair share fees were still being deducted. *Danielson*, 2018 WL 3917937, at *1;

Yohn, 2018 WL 5264076, at *1; *Lamberty*, 2018 WL 5115559, at *1. The courts therefore held that the claims for prospective relief became moot when the law changed in *Janus* and the collection of fair share fees ceased. In the present case, the Court lacks jurisdiction for the same reasons—and for the additional reason that no live controversy existed even when the Complaint was filed, so Plaintiff never had standing. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)") (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)). In sum, the Court should dismiss Plaintiff's claims for declaratory and injunctive relief for lack of jurisdiction.

II. PLAINTIFF'S DEMAND FOR REPAYMENT OF FAIR SHARE FEES COLLECTED PRIOR TO *JANUS* IS BARRED BY THE § 1983 GOOD-FAITH DEFENSE TO LIABILITY FOR DAMAGES

Beyond his demand for declaratory and injunctive relief, Plaintiff also asks that the Court order OCSEA "to refund with interest all fair share fees that were unconstitutionally extracted from Ogle and his fellow class members," Demand for Relief ¶ e. OCSEA did not collect any such fair share fees attributable to the period after June 27, 2018, the date of the *Janus* decision, *see* Mabe Decl. ¶ 6, so there is no standing for this demand to the extent it is for repayment of post-*Janus* fees. The Complaint, however, also appears to seek repayment of fees attributable to the time period *before* the *Janus* decision—when the Supreme Court's 1977 *Abood* decision upholding fair share requirements in the public sector was still the law of the land.

It might seem self-evident that, because fair-share payments made during the years prior to the Supreme Court's *Janus* decision were indisputably lawful at the time they were made,

there would be no basis for holding OCSEA liable in damages for having lawfully collected such fees. In alleging claims for pre-*Janus* fees, Plaintiff apparently plans to invoke a line of decisions from the early 1990s culminating in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), in which the Supreme Court adopted what it characterized as "choice of law" rules governing the retroactive application of its decisions. The argument is, apparently, that—under these rules—the *Janus* decision retroactively transformed what at the time were fully lawful acts into unconstitutional actions giving rise to substantial liability for damages.

Any such argument would reflect a too superficial understanding of the Supreme Court's retroactivity cases, which in fact contemplate that the "retroactive" application of a newly enunciated constitutional rule does not necessarily determine the outcome of the case or, more specifically, the relief to which the plaintiff is entitled. While it is correct that in the *Harper* line of cases the Court rejected its prior multi-factor approach to retroactive application of its decisions, as reflected in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)—holding instead that "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law," *Harper*, 509 U.S. at 96—it also made clear that this was not the end of the matter. Rather, the Court repeatedly emphasized that its holding with regard to the retroactivity of its decisions was a choice of law rule that did not necessarily determine the appropriate remedy in any particular case.

In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)—the case that immediately preceded *Harper* in this series of decisions—the Court described the retroactivity issue as a question of "whether the court should apply the old rule or the new one," and thus "as a matter of choice of law." *Id.* at 534-35 (plurality op.). Making such a choice was necessary "when a court expressly overrules a precedent upon which the contest would otherwise be

decided differently and by which the parties may previously have regulated their conduct." *Id.* at 534. Crucially, however, the Court recognized that this choice of law issue was only the initial question, not the final word on the outcome of the case:

> Once a rule is found to apply "backward," there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.

Id. at 535 (citation omitted). The Court recognized that a holding that a new rule "should apply retroactively to claims arising on facts antedating that decision," *id.* at 532, was "confined entirely to an issue of choice of law," *id.* at 544, and it emphasized that "[n]othing we say here deprives respondents of their opportunity to … demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided." *Id.*

And the Court has made clear that the retroactivity principles enunciated in the *Harper* line of cases do not "determine the outcome of the case" when, among other considerations, there is "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-59 (1995). Here, there is indeed such a basis for denying the damages remedy Plaintiff seeks, one that appropriately takes account of OCSEA's reliance on a presumptively valid state statute and controlling decisions of the Supreme Court. As we next explain, the courts uniformly have recognized that, under such circumstances, a nongovernmental defendant sued under 42 U.S.C. § 1983 is entitled to invoke a good-faith defense to liability for damages. It is this principle—which is fully consistent with the Court's retroactivity jurisprudence—that is dispositive in considering Plaintiff's claim for damages.

A. The Courts—Including the Sixth Circuit—Have Uniformly Recognized the Availability to Private Parties Sued Under § 1983 of a Good-Faith Defense to Liability for Damages

The widespread adoption of the good-faith defense to § 1983 damages actions grew out of two leading Supreme Court decisions addressing the scope of liability for nongovernmental actors under that statute. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Wyatt v. Cole*, 504 U.S. 158 (1992). When, in *Lugar*, the Supreme Court initially determined that private actors could, under certain circumstances, be held liable along with their governmental counterparts for violations of § 1983, and when it subsequently held in *Wyatt* that such private defendants could not invoke the doctrine of qualified immunity available to their governmental co-defendants in § 1983 damages actions, the Court recognized that "principles of equality and fairness may suggest … that private citizens … should have some protection from liability, as do their government counterparts," when the private actions held to be unconstitutional had been undertaken pursuant to presumptively valid existing law. *Wyatt*, 504 U.S. at 168. Thus, although not called upon to decide the question in the cases before it, the Court suggested in both *Lugar* and *Wyatt*—in dicta and in separate opinions joined by five members of the Court—the availability of a good-faith defense for nongovernmental defendants sued for damages under § 1983. *Id.* at 168-69; *id.* at 169 (Kennedy, J., joined by Scalia, J., concurring); *id.* at 175 (Rehnquist, C.J., joined by Souter and Thomas, JJ., dissenting); *see also Lugar*, 457 U.S. at 942 n.23. The Court subsequently reiterated this view in *Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997).

That judgment, accepted without dissent by all members of the *Wyatt* Court, has subsequently been adopted by every lower court that has ever considered the issue. Thus, on

remand from the Supreme Court in *Wyatt*, the Fifth Circuit squarely addressed and decided the question of the good-faith defense, which it found "largely answered by the[] separate opinions" of Justice Kennedy and Chief Justice Rehnquist. The court held:

> that 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 v. Cole, 994 F.2d 1113, 1118 (5th Cir. 1993).

In the quarter-century since that decision, four other courts of appeals have considered the issue, and all have reached the same result—including the Sixth Circuit, *see Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996), which had indeed anticipated *Wyatt* and accepted the good-faith defense several years earlier, in *Duncan v. Peck*, 844 F.2d 1261, 1267-68 (6th Cir. 1988). *See also Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275-78 (3d Cir. 1994); *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008); *Pinsky v. Duncan*, 79 F.3d 306, 311-12 (2d Cir. 1996); *Jarvis v. Cuomo*, 660 F. App'x 72, 75-76 (2d Cir. 2016), *cert denied*, 137 S. Ct. 1204 (2017).

And that is for good reason. Even though nonbinding, the Supreme Court's discussion of the issue in its dicta and separate opinions in *Wyatt*, *Lugar*, and *Richardson* makes clear the compelling rationale for the good-faith defense, which has been succinctly summarized by one court as follows:

> It would be manifestly unfair to hold that the state actor – whose participation is required for there to be a section 1983 violation at all – is entitled to qualified immunity, but hold the private actor, who did not subjectively believe that he was acting unconstitutionally, liable for the plaintiff's damages.

Franklin v. Fox, No. C 97-2443, 2001 WL 114438, at *5 (N.D. Cal. Jan. 22, 2001) (Ch. Breyer., J.). Thus, "the Justices who speak of this good faith defense, as well as the circuits that have

applied it, were, and are, concerned with the unfairness of imposing damages liability on private defendants whose honest and reasonable belief in the constitutionality of their conduct turns out later to have been mistaken." Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 Cardozo L. Rev. 81, 91 (2004).

It is, in sum, now well settled that nongovernmental actors sued under § 1983—while not immune from suit entirely as are government officials under the doctrine of qualified immunity—are entitled to invoke a good-faith defense that shields them from claims for damages.

B. Reliance on Presumptively Valid State Law and Controlling Supreme Court Precedent in Receiving Fair Share Fees Prior to *Janus* Was Objectively Reasonable and Thus in Good Faith

The good-faith defense precludes Plaintiff's demand for repayment of fair share fees attributable to the time period prior to June 27, 2018, when the Supreme Court announced its decision in *Janus*. There is no dispute that those fees were assessed and received pursuant to state law specifically authorizing their assessment. *See* Ohio Rev. Code § 4117.09(C). That statute was, as a matter of law, entitled to a presumption of validity. As the Second Circuit has put it, "it is objectively reasonable to act on the basis of a statute not yet held invalid." *Pinsky*, 79 F.3d at 313. The court cited in this connection the venerable holding of *Birdsall v. Smith*, 122 N.W. 626, 627 (Mich. 1909), that under the common law "[e]very statute should be considered valid until there is a judicial determination to the contrary." *Pinsky*, 79 F.3d at 313. Similarly, Justice Kennedy cited *Birdsall* in his *Wyatt* opinion 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*." 504 U.S. at 174 (Kennedy, J., concurring) (emphasis added).

In this case, moreover, there is far more than a presumption of statutory validity. There is, in the *Abood* decision, a controlling Supreme Court precedent dating back over 40 years that explicitly held fair share statutes to be constitutional under the First Amendment—a precedent that was followed and re-affirmed many times. *See, e.g.*, *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Locke v. Karass*, 555 U.S. 207 (2009).

Because the presumption of statutory validity is sufficient "to allow a defendant to argue that he acted in subjective good faith," *Wyatt*, 504 U.S. at 174 (Kennedy, J., concurring), OCSEA's reliance on Ohio's statutory authorization of fair share fees, and on controlling Supreme Court precedent upholding such authorization "prior to [the *Janus*] determination of unconstitutionality," was reasonable and constituted good-faith reliance "as a matter of law." *Id.*

In light of this presumption of statutory validity, moreover, it is simply irrelevant whether, as may be argued, it became foreseeable in the wake of nonbinding dicta in *Knox v. SEIU*, 567 U.S. 298 (2012), that *Abood* might be overruled. "Questioning the continuing viability of a precedent is a far cry from implicitly overruling it," *United States v. Burwell*, 690 F.3d 500, 510 (D.C. Cir. 2012) (en banc), and *Abood* was not, in fact, overruled in *Knox.* Neither was it overruled in *Harris v. Quinn*, 134 S. Ct. 2618 (2014); indeed, there the Court specifically *declined* to overrule *Abood*, even though that was the principal question briefed by the parties, *see id.* at 2645 (Kagan, J., dissenting). Nor was *Abood* overruled in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016), notwithstanding that the Court granted certiorari specifically to consider "[w]hether *Abood* … should be overruled and public-sector 'agency

shop' arrangements invalidated under the First Amendment." Petition for Writ of Certiorari, *Friedrichs v. California Teachers Association*, No. 14-915, 2015 WL 393856 (U.S. Jan. 26, 2015), at *i.

Thus, even to the extent that, since *Knox*, "public-sector unions have been on notice … regarding [the Supreme] Court's misgivings about *Abood*," *Janus*, 138 S. Ct. at 2484, the dispositive fact is that at all times prior to June 27, 2018 it was *Abood* that was the law of the land, and not any nonbinding commentary on *Abood*. That is clear from *Janus* itself, for the Court there took care to state that the district court in that case had "correctly" dismissed the complaint because it was "foreclosed by *Abood*." 138 S. Ct. at 2462.

The reason why the district court in *Janus* acted "correctly" in following *Abood* is directly pertinent to why OCSEA acted in good faith reliance on *Abood* here: "[T]he Supreme Court has specifically stated that the lower courts are to treat its prior cases as controlling until the Supreme Court itself specifically overrules them." *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 408-09 (6th Cir. 2002) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)); *see also Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Private parties, obviously, should not be held to a higher standard of prescience than the federal courts.

Indeed, accepting the notion that a private party that acted in reliance on a state statute held valid under binding Supreme Court precedent of long standing should be liable for damages—merely because nonbinding dicta in a more recent case suggested that the Court might in the future reconsider that precedent—would threaten to undermine the rule of law. Unable to

leave to the Supreme Court the prerogative of overruling its own precedents, private citizens would be compelled, at the risk of massive liability, to order their affairs not according to the law as it existed but rather based on their best guesses about what the Supreme Court might decide next. The leavening effect of the good-faith defense thus not only shields private parties from liability incurred by their reliance on existing law, but protects the rule of law itself, on which a democratic society depends.

For these reasons, it should come as no surprise that the first district court to reach the issue after *Janus* has held that the good-faith defense applies to shield the union from monetary liability for fair share fees collected prior to that decision. *Danielson v. AFSCME Council 28*, No. 3:18-cv-05206, 2018 WL 6520729, at *2-3 (W.D. Wash. Nov. 28, 2018). As the court in *Danielson* soundly concluded, "[t]he constitutional defect—compelling collection of agency fees used for political or ideological activities and contrary to Plaintiffs' beliefs—could not have been identified by the Union Defendant, because although the Supreme Court hinted at overruling *Abood*, it did not explicitly do so until *Janus*." *Id.*[3] In so holding, the *Danielson* court joined a

[3] It is true that, as the Sixth Circuit has noted, a good-faith defense (unlike qualified immunity) will often involve subjective factors, *Duncan*, 844 F.2d at 1266, and to the extent that is so may not be amenable to resolution on a motion to dismiss. *Vector Research*, 76 F.3d at 699. Here, however, no subjective factors are relevant, as the dispositive question is simply whether, as a matter of law, OCSEA was entitled to rely on a presumptively valid statute authorizing fair share fees and on existing Supreme Court precedent upholding the constitutionality of such statutes. Indeed, as one district court recently noted in holding that the good-faith defense applies to a claim for pre-*Janus* fees as a matter of law, "[i]nviting discovery on the subjective

series of cases litigated after the Supreme Court's 2014 decision in *Harris v. Quinn* prohibiting fair share requirements for state-compensated home-care workers, in which the courts similarly rejected claims for repayment of pre-*Harris* fair share fees, concluding that the unions acted in good faith in relying on statutes authorizing those fees. *See Jarvis*, 660 F. App'x at 75-76; *Winner v. Rauner*, No. 15 CV 7213, 2016 WL 7374258, at *5-6 (N.D. Ill. Dec. 20, 2016); *Hoffman v. Inslee*, No. 14-CV-200 (MJP), 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016). Here, *a fortiori*, OCSEA's reliance on a presumptively valid statute was bolstered by squarely controlling Supreme Court precedent and thus was objectively reasonable as a matter of law. The good-faith defense thus precludes the § 1983 claim for damages in the form of repayment of fees paid prior to *Janus*. The Court should therefore dismiss Plaintiff's damages claims for repayment of fair share fees attributable to the time period before *Janus* for failure to state a claim under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed in its entirety.

Respectfully submitted,

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anticipation of an unpredictable shift in the law undermines the importance of observing existing precedent." *Danielson*, 2018 WL 6520729, at *3.

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