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, OCSEA, Local 11. Defendant.	Case No.: 2:18-cv-01227-GCS-CMV Judge George C. Smith Magistrate Judge Chelsey M. Vascura

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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The Supreme Court resolved the merits of this case when it held that unions violate the First Amendment by collecting agency fees from employees without their consent. *Janus v. AFSCME Council 31,* 138 S. Ct. 2448, 2486 (2018). The questions presented in this motion relate to the appropriate relief, and are: (1) does Plaintiff Nathaniel Ogle lack standing to seek injunctive and declaratory relief because Defendant OCSEA ceased collecting agency fees from employees; and (2) does OCSEA have a "good faith defense" to damages liability under 42 U.S.C. § 1983 for depriving Ogle and other employees of their First Amendment rights? The answer to both questions is "no." The motion to dismiss should be denied.

ARGUMENT

I. Plaintiff Has Standing to Seek Declaratory and Injunctive Relief.

Ohio Rev. Code § 4117.09(C) authorizes unions and government employers to deduct agency fees from nonmembers without their written authorization. OCSEA violated the First Amendment rights of Ogle and other nonmembers by seizing agency fees from them pursuant to this statute. *See* Plaintiff's Complaint ¶¶ 8-13, ECF No. 1. That statute remains on the books to this day.

OCSEA argues that Ogle lacks standing to obtain a declaratory judgement that Ohio Rev. Code § 4117.09(C) is unconstitutional, and an injunction that prevents OCSEA from invoking it, because OCSEA stopped seizing agency fees from nonmembers in the wake of *Janus*. The argument fails because the statute remains in existence and OCSEA could resume its fee seizures pursuant to the statute.

The fact that it would certainly be unconstitutional under *Janus* for OCSEA to again enforce Ohio Rev. Code § 4117.09(C) against employees is reason for declaring the statute unconstitutional, and not a reason for leaving it in place. That is especially true given that the Court's ruling in *Janus* did not impose any formal legal obligations on OCSEA or on Ohio public employers. *See Martin v. Wilks*, 490 U.S. 755 (1989) (holding that court rulings bind only the parties to a case). Only a binding ruling by this Court will formally preclude OCSEA from ever again enforcing this unconstitutional statute against employees.

A declaratory judgment that Ohio Rev. Code § 4117.09(C) is unconstitutional under *Janus* would be consistent with recent court decisions holding same-sex marriage statutes unconstitutional under *Obergefell v Hodges*, 135 S. Ct. 2584 (2015), notwithstanding officials' claims that they will no longer enforce such laws. *See Jernigan v. Crane*, 796 F.3d 976, 979 (8th Cir. 2015); *Rosenbrahm v. Daugaard*, 799 F.3d 918, 922 (8th Cir. 2015). For example, in *Watters v. Rickets*, 159 F. Supp. 3d 992 (D. Neb. 2016), the district court refused to find the plaintiffs' constitutional challenge to a Nebraska law moot because "no Court has yet declared Section 29 unconstitutional . . . . While precedent does in fact dictate the result in this case before this Court, Section 29 has not specifically been declared unconstitutional." *Id.* at 999-1000. So too here, while *Janus* dictates the result in this case, Ohio Rev. Code § 4117.09(C) has not yet been declared unconstitutional. Rather, it remains the law in Ohio. The Court should declare the statute unconstitutional and permanently enjoin OCSEA from enforcing it.

II. OCSEA Cannot Invoke a Good Faith Defense and, Even If It Could, OCSEA Did Not Act in Good Faith.

A. Good Faith Is Not a Defense to a Deprivation of First Amendment Rights or to Section 1983 Liability for Causing That Deprivation.

1. *Summary of Argument*

Section 1983 states that "every person" who deprives others of their constitutional rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C § 1983. Notwithstanding this language, OCSEA argues that, if it acted in good faith reliance on existing law when it deprived Ogle and other employees of their First Amendment rights, it is *not* "liable to the party injured in an action at law" for damages. *Id.* OCSEA is mistaken. There is no statutory basis for a good faith defense here, because state of mind is irrelevant to both (1) the deprivation of First Amendment rights, and (2) OCSEA's section 1983 liability for causing that deprivation.

The Supreme Court has never recognized a good faith defense to section 1983. Thus, the starting point for the analysis must be section 1983's text, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 . . . .

Defenses to this statute are not lightly inferred, for "[i]ts language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Indep.*, 445 U.S. 622, 635 (1980).

There are only two possible statutory bases for a good faith defense. First, state of mind may be an element of the alleged "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. For example, malice is required to show that a defendant's ex parte use of an attachment statute deprived a plaintiff of due process. *See Duncan v. Peck,* 844 F.2d 1261, 1267-68 (6th Cir. 1988). But OCSEA does not assert, and nor could it, that unions must have a certain state of mind when seizing agency fees to deprive employees of their First Amendment rights under *Janus*, 138 S. Ct. at 2486.

Second, some defendants enjoy a good faith immunity to section 1983 liability for depriving others of constitutional rights. OCSEA does not claim to be one of those defendants. And for good reason: a private party like OCSEA is not entitled to qualified immunity. *See Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992).

That leaves only OCSEA's extra-statutory argument for a good faith defense: that it would be unfair to hold private defendants liable for damages to which a public defendant would be immune. There are numerous problems with this argument. It defies section 1983's text, which unambiguously commands that defendants "shall be liable to the party injured in an action at law." 42 U.S.C § 1983. It defies the Supreme Court's holding that "principles of equality and fairness . . . are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion" of immunity to private parties. *Wyatt*, 504 U.S. at 168. It ignores that public defendants analogous to OCSEA, namely municipalities, do *not* enjoy qualified immunity. *See Owen*, 445 U.S. at 651-52. Finally, OCSEA's argument ignores

the fact that "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Id*. at 654. The Court should thus reject OCSEA's argument, and hold OCSEA liable to the Plaintiff and other employees under section 1983.

2. *State of Mind is Neither an Element of Nor a Defense to the Deprivation of First Amendment Rights at Issue in This Case.*

OCSEA's state of mind when it seized agency fees from non-consenting employees is immaterial to whether its seizures caused a "deprivation of . . . rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. First Amendment "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1073–75 (9th Cir. 2012); *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding animus not necessary to show that regulation violated the First Amendment). The First Amendment claim here requires only that OCSEA seized agency fees from Ogle without his consent. *Janus*, 138 S. Ct. at 2486. Whether OCSEA acted in good or bad faith when it forced employees to subsidize the union's speech is immaterial under *Janus*.

State of mind, however, is relevant to *other* types of constitutional deprivations. For example, a specific intent must be shown in "due process claims for injuries caused by a high-speed chase," "Eighth Amendment claims for injuries suffered during the response to a prison disturbance," and invidious discrimination claims under the Equal Protection clauses. *OSU Student Alliance*, 699 F.3d at 1074. As discussed below, the Sixth Circuit and other appellate courts that have allowed private par-

ties to raise a good faith defense did so because state of mind was an element of the constitutional deprivation alleged in those cases.

The Sixth Circuit in *Duncan* was the first appellate court to find that private parties can raise a "common law good faith defense to malicious prosecution and wrongful attachment cases" brought under section 1983. 844 F.2d at 1267. The court did so because malice and lack of probable cause are elements of that type of due process claim. *Id*. The Sixth Circuit, however, rejected the proposition that private parties enjoy good faith *immunity* to section 1983 liability. *Id*. A "defense" and an "immunity" are different things: a defense rebuts the alleged deprivation of rights, while an immunity is an exemption from liability even if there is a deprivation. *See Wyatt*, 504 U.S. at 166–67. In other words, "a legal defense may well involve 'the essence of the wrong,' while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson v. McKnight,* 521 U.S. 399, 403 (1997) (quoting *Wyatt*, 504 U.S. at 171–72 (Kennedy, J., concurring)). The Sixth Circuit in *Duncan* believed that "courts who endorsed the concept of good faith immunity for private individuals improperly confused good faith immunity with a good faith defense." 844 F.2d at 1266.

In 1992, the Supreme Court in *Wyatt* adopted the Sixth Circuit's view, and held that private parties generally do *not* enjoy good faith immunity to section 1983. 504 U.S. at 161, 168. *Wyatt* involved "private defendants charged with 42 U.S.C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional" for violating due process guarantees. *Id*. at 159. The claim

was analogous to "malicious prosecution and abuse of process," and 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. Nevertheless, the Supreme Court 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 that the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. The Court concluded that the private defendants did not have a good faith immunity to section 1983 liability, but left open the question of whether they could raise "an affirmative defense based on good faith and/or probable cause . . . ." *Id.* at 168–69.

On remand, the Fifth Circuit held the defendants could raise this defense to the due process claim because "plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice and without probable cause." *Wyatt v. Cole,* 994 F.2d 1113, 1119–21 (5th Cir. 1993). The Second and Third Circuits later joined the Sixth and Fifth Circuits in recognized that malice and lack of probable cause are elements of due process claims arising from a private party's ex parte seizure of property. *See Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien, & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994); *see also Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008).

Duncan and subsequent cases recognized only "a common law good faith defense to malicious prosecution and wrongful attachment cases." *Duncan*, 844 F.2d at 1267. The cases did not recognize a blanket good faith defense to all constitutional claims that can be brought under section 1983, as OCSEA claims. Indeed, the Sixth Circuit in *Duncan*, 844 F.2d at 1267, and Supreme Court in *Wyatt*, 504 U.S. at 167-68, rejected the proposition that private parties are generally immune to section 1983 liability. Here, unlike with the due process claims in *Duncan* and its progeny, malice and lack of probable cause are not elements necessary to show a deprivation of First Amendment rights under *Janus*. Consequently, OCSEA's state of mind when it seized agency fees from employees is irrelevant.

3. *OCSEA Does Not Have Qualified Immunity to Section 1983 Liability.*

a. Given that state of mind is not relevant to the "deprivation" of First Amendment rights OCSEA inflicted, the next question is whether OCSEA is immune to section 1983 "liab[ility] to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. A defendant can claim qualified immunity if they can show that, prior to section 1983's enactment in 1871, the immunity was so well entrenched that Congress would not have intended to abrogate it when it enacted the statute. *See Filarsky v. Delia,* 566 U.S. 377, 389–90 (2012). Private defendants are not usually entitled to immunity. *See Richardson*, 521 U.S. at 409–11; *Wyatt*, 504 U.S. at 168. However, an exception is made for persons who perform public duties that would otherwise be performed by public offi-

cials with qualified immunity. *See Filarsky*, 566 U.S. at 393–94 (extending immunity to a private attorney retained by a city to conduct an official investigation).

OCSEA does not claim it is entitled to qualified immunity, and nor could it. There is no history of unions enjoying immunity to suit prior to 1871. The historical justifications for immunity, such as "avoid[ing] 'unwarranted timidity' in performance of public duties" and "ensuring that talented candidates are not deterred from public service," *Filarsky*, 566 U.S. at 389–90 (citing *Richardson*, 521 U.S. at 409–11), have no application to OCSEA.

OCSEA nevertheless seeks, under the false guise of a "defense," what is effectively qualified immunity to section 1983. Qualified immunity bars damages claims against an individual if his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether the rights at issue are clearly established is determined objectively, as a matter of law, as opposed to being determined by a subjective analysis of the defendant's actual beliefs. *Id*. That is what OCSEA seeks here: to be shielded from section 1983 liability as a *matter of law* if its fee seizures were *objectively* constitutional at the time. OCSEA Br. 16-19.

It makes no sense to say that parties who are not entitled to qualified immunity under *Filarsky* and *Wyatt* are nonetheless entitled to substantively the same thing under a different name. If that were true, there would be no point to the qualified immunity analysis. OCSEA's position concerning the existence of a good faith defense, or at least its contours, simply cannot be correct.

4. *OCSEA Cannot Be Granted Immunity to Section 1983 Liability Under the Guise of a "Defense" Based on Equity and Fairness.*

OCSEA's sole justification for a good faith defense is that it would be unfair to hold private actors liable for damages that an equivalent state actor would escape due to qualified immunity. OCSEA Br. 13-14. This argument fails for several reasons, namely: (1) it defies section 1983's statutory text; (2) it is inconsistent with Supreme Court precedent; (3) the governmental party most analogous to OCSEA lacks qualified immunity, and (4) equity favors redressing the constitutional abuses of wrongdoers, not insulating them from liability.

First, there is no way to carve a good faith element into section 1983's unambiguous mandate that "*any* person" who deprives a citizen of constitutional rights "*shall be liable to* the party injured in an action at law . . . ." 42 U.S.C. § 1983. "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) (alterations in original) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

Section 1983 also "contains no independent state-of-mind requirement." *Daniels v. Williams,* 474 U.S. 327, 328 (1986). Section 1983 cannot be interpreted to mean that persons who deprive others of constitutional rights are *not* "liable to the injured party in an action at law," 42 U.S.C. § 1983, *unless* they acted with a particular state of mind—i.e., in bad faith. The interpretation would defy the statute's terms, defy *Daniels*, and require this court to pencil into section 1983 a state-of-mind requirement absent from its text.

An extra-statutory good faith defense to section 1983 thus cannot be recognized, as the law governing qualified immunities makes clear. The Supreme Court has held that courts do not "make [their] own judgment[s] about the need for immunity." *Rehberg*, 566 U.S. at 363. The "immunity doctrine is rooted in historical analogy, based on the existence of common law rules in 1871, rather than in freewheeling policy choices." *Wyatt*, 504 U.S. at 170 (Kennedy J., concurring). Given that courts "do not have a license to create immunities based on [their] view[s] of sound policy," *Rehberg*, 566 U.S. at 363, it follows that courts also do not have license to create equivalent defenses to section 1983 liability based on mere policy reasons.

Second, if section 1983's language does not resolve this matter, then *Wyatt* does. There, the Supreme Court held that "principles of equality and fairness . . . are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion" of immunity to private parties. *Wyatt*, 504 U.S. at 168. The Court reiterated this point in *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998), stating that "[f]airness alone is not, however, a sufficient reason for the immunity defense, and thus does not justify its extension to private parties." OCSEA's basis for a good faith exemption to section 1983 liability is foreclosed by *Wyatt*.

OCSEA overstates matters when it claims (at 13-14) that the Supreme Court in *Wyatt* and *Richardson* suggested the availability of a good faith defense to private defendants. "*Wyatt* explicitly stated that it *did not decide* whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense." *Richardson*, 521 U.S. at 413 (emphasis added). In *Richardson*, the Court stated that

"[l]ike the Court in *Wyatt*, and the Court of Appeals in this case, *we do not express a view* on this last-mentioned question." 521 U.S. at 414 (emphasis added).[1]

The potential defense discussed in dicta by some Justices in *Wyatt* was a defense to the due process deprivation alleged in that case, and not an effective immunity to all section 1983 claims available to all private defendants. As Justice Kennedy stated, "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." 504 U.S. at 172 (Kennedy, J., concurring). As discussed, *Duncan* and appellate decisions following *Wyatt* found malice and lack of probable cause to be elements of those due process claims. *See supra* at 6-8. The courts did not hold all private parties immune to section 1983 damages liability if they acted in good faith reliance on existing law.

Third, even if the Court could shield a private party from damages liability merely because an analogous public party would be immune—notwithstanding *Wyatt's* contrary conclusion—that would not help OCSEA. A large entity like OCSEA is not akin to an individual public servant whom qualified immunity shields from personal liability. Rather, OCSEA's most analogous government counterpart is an or-

[1] *Lugar v. Edmondson Oil Co.*, 457 U. S. 922 (1982) not only did not decide whether private defendants can raise a good faith defense, but also "left open the question whether private defendants charged with 42 U. S. C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional are entitled to qualified immunity from suit." *Wyatt*, 504 U.S. at 159.

ganization, such as a municipality. Municipalities *lack* qualified immunity, s*ee Owen*, 445 U.S. at 651–56, for "[i]t 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.* at 654. So too here, it is not unjust to require OCSEA to compensate employees for the fees it wrongfully seized from them against their will and in violation of their First Amendment rights.

Finally, there is nothing equitable or fair about depriving victims of constitutional wrongs relief for their injuries. Nor is there anything equitable about letting wrongdoers, like OCSEA, keep ill-gotten gains. The Supreme Court in *Owen* held municipalities not to be immune to section 1983 liability partially for this reason—i.e., because "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense." 445 U.S. at 651. "Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id.* That injustice also should not be tolerated here—Ogle and other employees should be made whole for their injuries. The Court should reject OCSEA's argument that it enjoys a good faith defense to section 1983 damages liability for depriving employees of their First Amendment rights under *Janus*.

B. OCSEA Did Not Act in Good Faith.

Even if a good faith defense for OCSEA could be read into section 1983, it would not justify dismissal of the Complaint. The Sixth Circuit, in cases finding good faith to be a defense to due process deprivations, held that "[a]ny good faith defense must . . . be resolved on remand and not on . . . [a] Rule 12 motion to dismiss." *Vector Re-*

search, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 698–99 (6th Cir. 1996). The reason is that the "underlying torts of malicious prosecution and wrongful attachment allowed a *subjective* defense of good faith," as opposed to the objective analysis that is the hallmark of an immunity. *Duncan*, 844 F.2d at 1266-67 (emphasis added). Courts would "be significantly distorting the common law defenses to malicious prosecution and wrongful attachment torts by substituting an objective test for good faith for the common law's subjective standard." *Id*. at 1267. Thus, "[a] good faith defense . . . 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." *Id*. at 1266.

OCSEA argues (at 16-19), based on district court decisions from other jurisdictions, that the Court should nevertheless use an objective test, and hold OCSEA's reliance on state law and prior precedent to constitute good faith reliance as a matter of law. Whatever its merits in other circuits, the union's argument defies the law of this Circuit, as expressed in *Vector Research*, 76 F.3d at 699, and *Duncan*, 844 F.2d at 1266-68.[2] So, even if it were appropriate to import into this First Amendment case the "common law good faith defense to malicious prosecution and wrongful attachment cases" the Sixth Circuit recognized in *Duncan*¸ *id* at 1267, Plaintiff

[2] OCSEA's position also defies the law of the Third Circuit, which has likewise found that "[g]ood faith gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity." *Jordan*, 20 F.3d at 1277.

is entitled to discovery concerning OCSEA official's subjective beliefs concerning the propriety of their agency fee seizures.

Plaintiff is likely to be able to prove that the union's leadership knew, or at least should have known, that its fee seizures were likely unconstitutional, but chose to continue seizing fees from employees anyway. The Supreme Court in *Janus* recognized that "unions have been on notice for years regarding this Court's misgivings about [*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).]" 138 S. Ct. at 2484. Six years ago, the Court criticized *Abood* as a "First Amendment 'anomaly.'" *Id.* (quoting *Knox v. SEIU Local 1000*, 567 U.S. 310, 311 (2012)). Four years ago, the Court in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), "cataloged *Abood*'s many weaknesses" and almost overruled it. *Id.* Three years ago, the Court granted certiorari in *Friedrichs v. California Teachers Association* on the question of whether to overrule *Abood* and split 4-4 due to the death of Justice Scalia. *Id.* at 2485 (citing *Friedrichs*, 136 S. Ct. 1083 (2016)). And one year ago, the Court granted certiorari in *Janus* solely to consider whether to overrule *Abood* and hold agency fees unconstitutional. "During this period of time, 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.*

Yet, OCSEA continued to seize agency fees from Ogle and other employees right up until the Supreme Court issued its decision in *Janus*. Nothing required that OCSEA take this action. It could have stopped its fee seizures, or placed the monies in escrow, until the constitutionality of the fees was resolved. OCSEA rejected these

alternatives in order to squeeze out every last dollar it could from Ogle and his co-workers before the Supreme Court finally put a stop to its practice.

OCSEA is nothing like the defendants in *Duncan*, *Wyatt*, *Jordan*, and *Pinsky* who innocently used replevin, garnishment, or attachment statutes that violated due process guarantees. The union perpetuated a practice with full knowledge that it likely violated employees' First Amendment rights. Nor is the union anything like the tow truck company in *Clement*, which towed a car based "on instructions from the [police] . . . that specifically called for the tow" and "had no reason to suspect that there would be a constitutional challenge to its actions." 518 F.3d at 1097. The union was not following government orders when it collected agency fees from non-consenting employees. Rather, it was OCSEA that demanded that the government agree to agency fee provisions that required the seizure of union fees from unconsenting employees. *See* Plaintiff's Complaint, ¶¶ 9-11.

Plaintiff also is likely to be able to rebut OCSEA's invocation of a good faith defense for another reason: the union's leadership either knew or should have known it would be liable to pay damages for fees seized prior to a Supreme Court decision invalidating agency fees. It has been the law for over twenty-five years that "a rule of federal law, once announced and applied to the parties in the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993). OCSEA's brief (at 11-12) makes clear it is aware of this law. So when OCSEA seized agency fees from employees prior to June 27—the day *Janus* was decided—OCSEA should have known that

those fee seizures would violate the First Amendment when the Supreme Court overruled *Abood*, and not just fee seizures that occurred afterward.

Put differently, OCSEA's position that it was reasonable to assume its agency fee seizures were lawful until the day they were held unlawful is belied by the law that court decisions are retroactive. Under *Harper*, parties such as OCSEA that utilize legally-suspect laws to deprive others of their constitutional rights act at their own risk and with full knowledge that, if a court later finds that law or action unconstitutional, the party will be liable under section 1983 to those they injure.

It will not "undermine the rule of law," as OCSEA asserts (at 17), to hold a party liable for conduct later held unconstitutional. It will *uphold* the rule of law by vindicating the constitutional rights of those injured by wrongful conduct and by dissuading parties from taking actions that border the line of unconstitutionality. As the Supreme Court stated in *Owen*, section "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id*. at 651–52.

Here, OCSEA deliberately chose *not* "to err on the side of protecting citizens' constitutional rights." *Id*. Even though "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," *Janus*, 138 S. Ct. at 2484, and that a decision striking down agency fee provisions would be retroactive, OCSEA continued to seize agency fees from employees. The Court should not permit OCSEA to profit from its legal brinksmanship, but should require it to return to Ogle and other employees the monies it wrongfully seized from them.

C. In the Alternative, Ogle Is Entitled to Nominal Damages.

In the event OCSEA is not required to compensate Ogle and other employees for depriving them of their First Amendment rights, the employees are at least entitled nominal damages. Nominal damages are awarded to "recognize[] the importance to organized society that [constitutional] rights be scrupulously observed . . . ." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). There is even less basis for recognizing a good faith defense to an award of nominal damages than there is for recognizing such a defense to compensatory damage awards. Even if equity somehow favored depriving victims of compensation for their injuries when a wrongdoer acts in good faith, equity would not favor denying victims nominal damages of $1 to symbolize that their constitutional rights were, in fact, violated.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted January 7, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2019, a copy of the foregoing Plaintiff's Opposition to Defendant OCSEA's 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.

/s/ William L. Messenger
William L. Messenger

An attorney for the Plaintiff