19-1553

United States Court of Appeals
for the Seventh Circuit

MARK JANUS,

Plaintiff-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31; and JANEL L. FORDE, in her official capacity as Director of Illinois Department of Central Management Services,

Defendants-Appellees,

KWAME RAOUL, Attorney General of the State of Illinois,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 15-CV-01235
Honorable Robert Gettleman

APPELLANT'S BRIEF AND SHORT APPENDIX

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DISCLOSURE STATEMENT

1. The full name of every party the undersigned attorney represents in the case: Appellant Mark Janus.

2. The name of all law firms whose partners or associates have appeared on behalf of the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court: the National Right to Work Legal Defense Foundation, Winston & Strawn LLP, and the Liberty Justice Center.[1]

3. If the party or amicus is a corporation: not applicable.

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[1] The National Right to Work Legal Defense Foundation and Liberty Justice Center are technically not law firms, but legal aid foundations.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the United States Constitution, and pursuant to 28 U.S.C. § 1343, because relief is sought under 42 U.S.C. § 1983. On March 27, 2019, Plaintiff-Appellant Mark Janus filed a timely notice of appeal of the district court's March 18, 2019 Judgment (Short Appendix ("S.A." 1)), granting judgment to the Defendants. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Section 1983 provides 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. The question presented is whether, under Section 1983, a person who deprives others of their constitutional rights is *not* liable to the party injured in an action at law if that person acted with a mistaken, but good faith, belief that its conduct was lawful.

STANDARD OF REVIEW

This appeal concerns a question of law, namely statutory interpretation. This court reviews a grant of summary judgment de novo, with factual inferences construed in favor of the non-moving party. *Mazzei v. Rock-N-Around Trucking, Inc.*, 246 F.3d 956, 959 (7th Cir. 2001).

STATEMENT OF THE CASE

In June 2014, the Supreme Court in *Harris v. Quinn*, 573 U.S. 616 (2014) held it violated the First Amendment for Illinois to seize union agency fees from personal

assistants who provide services to Medicaid recipients. *Harris* also suggested that Illinois and other states were violating the First Amendment by seizing union agency fees from public employees. The Court sharply criticized its precedent that permitted such seizures, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), for being "questionable on several grounds." 573 U.S. at 635.

In response to *Harris*, in February 2015, Illinois Governor Bruce Rauner issued an executive order calling for agency fees Illinois seized from State employees' paychecks to be placed in escrow until the constitutionality of those fees is resolved in court. *See* Ill. Executive Order 15-13, § II(3) (S.A. 11). Appellee AFSCME Council 31 refused to escrow agency fees while their constitutionality was adjudicated. AFSCME instead sued Illinois in state court to compel the State to keep seizing agency fees from employees and remitting those fees to the union. *See* Complaint in *Illinois AFL-CIO, et al. v. Bruce Rauner, Governor of the State of Ill., et al.*, St. Clair County, Ill., Case No. 2015 CH 171 [ECF 54].

On the same day he issued the executive order, Governor Rauner also filed a lawsuit in district court that sought to resolve the constitutionality of the State's agency fee requirement. [ECF 1]. In May 2015, the district court permitted Appellant Mark Janus and two other employees (who have since left the case) to file a complaint in intervention, while simultaneously dismissing Governor Rauner as a plaintiff on standing grounds. *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2462-63 (2018).

Mark Janus was a child support specialist who was forced to pay agency fees to AFSCME against his will. *Id.* at 2461. Janus alleges that Illinois and AFSCME deprived him of his First Amendment rights, in violation of Section 1983, by seizing agency fees from him. Second Am. Compl. ¶ 70 [ECF 145]. Janus' complaint requests, along with injunctive and declaratory relief, compensatory damages for all agency fees seized from him. *Id.* at Prayer for Relief ¶ C.

In June 2018, the United States Supreme Court held it violates the First Amendment for Illinois and AFSCME to seize agency fees from Janus and other state employees. *Janus*, 138 S. Ct. at 2486. The Court recognized that, since 2012, "any public sector union seeking an agency fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.* at 2485. The Court also lamented the "considerable windfall" of compulsory fees unions seized during prior decades, remarking that "[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.*

On remand to the district court, Janus moved for summary judgment to recoup from AFSCME the fees it unlawfully seized from him. [ECF 177]. Janus relied on Section 1983's mandate that defendants who deprive others of their constitutional rights "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. AFSCME also moved for summary judgment, arguing it is not liable for damages because it had a good faith belief, at the time, that it was constitutional to take fees

from Janus. AFSCME Mem. in Supp. of S.J., 1 [ECF 175]. AFSCME argued that equity and fairness justify recognizing such a "good faith defense" to Section 1983 liability. *Id*. at 7-10.

The district court correctly recognized that the "Seventh Circuit has not yet addressed the issue," but then incorrectly concluded that every other federal court that addressed the issue held that private defendants can raise a good faith defense to Section 1983. Mem. Op. & Order, 4 (S.A. 4). The lower court "conclude[d] that the good defense applies, and plaintiff is not entitled to any damages" because AFSCME's agency fee seizures "were in accord with a constitutionally valid state statute." *Id*. at 6. The district court, however, did not identify any statutory basis for a good faith defense to Section 1983 liability.

SUMMARY OF ARGUMENT

There is no good faith defense to Section 1983 liability. The ostensible defense is: (1) incompatible with the statute's text, which mandates that "[e]very person" who deprives others of their constitutional rights "shall be liable to the party injured in an action at law," 42 U.S.C. § 1983; (2) incompatible with the statutory basis for immunities and AFSCME's lack of immunity; and (3) incompatible with "[e]lemental notions of fairness [that] dictate that one who causes a loss should bear the loss," *Owen v. City of Indep*., 445 U.S. 622, 654 (1980). Moreover, creating this sweeping mistake-of-law defense would undermine Section 1983's remedial purposes and burden the courts with having to evaluate defendants' motives for depriving others of their constitutional rights.

Other appellate courts have not recognized an across-the-board good faith defense to Section 1983 claims. Rather, the courts found that good faith was a defense to particular constitutional deprivation, namely a seizure of property without due of process of law. *See supra* Section II(A). Whatever the merits of that view, state of mind is not a defense to a First Amendment compelled-speech deprivation.

Even if good faith were a defense to Section 1983 liability, which it is not, AFSCME could not avail itself of that defense. Irrespective of whether AFSCME had reasonable grounds for believing it was constitutional to *take* Janus' money, it had no reasonable grounds for believing it could *keep* his money if the Supreme Court ruled in his favor. AFSCME knew that Supreme Court decisions are retroactive. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993). AFSCME also should have known that it would have to return to Janus the fees it seized from him if the Supreme Court held it was unconstitutional for AFSCME to seize those fees.

The district court's judgment must be reversed.

ARGUMENT

I. There is No Good Faith Defense to Section 1983 Liability.

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

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Section 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.

42 U.S.C. § 1983. Section 1983 means what it says: "[u]nder 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)) (emphasis added).

A good faith defense to Section 1983 cannot be reconciled with the statute's mandate that "every person"—not some persons, but "every person"—who deprives a party of constitutional rights "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 The term "shall" is not a permissive term, but a mandatory one.[4] The statute's plain language requires that AFSCME be held liable to Janus for damages for depriving him of his First Amendment rights.

The district court's contrary conclusion, that defendants that deprive others of their constitutional rights are *not* "liable to the party injured in an action at law," if they act in good faith, contradicts Section 1983's statutory command. It also contradicts the Supreme Court's recognition that Section 1983 "contains no independent

[4] The mandatory nature of this statutory command is confirmed by the statute's inclusion of an express exception for "any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity." This statutory exception implies that other unwritten exceptions were not intended by Congress. *See Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992).

state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Section 1983 thereby 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," *unless* they acted with a particular state of mind. That interpretation defies the statute's terms, defies *Daniels*, and requires the court to pencil into Section 1983 a state-of-mind requirement absent from its text. There is no statutory basis for a good faith defense to Section 1983 liability.

B. A good faith defense is incompatible with the statutory basis for qualified immunity and AFSCME's lack of that immunity.

1. Section 1983 "on its face does not provide for *any* immunities." *Malley v. Briggs,* 475 U.S. 335, 342 (1986). Thus, courts can "not simply make [their] 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. Rather, courts only can "accord[] immunity where 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 v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992)). These policy reasons are "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 566 U.S. 377, 389–90 (2012) (citing *Richardson*, 521 U.S. at 409–11). Defendants are not entitled to qualified immunity to Section 1983 damages

claims unless these exacting strictures are satisfied. *See, e.g., Owen,* 445 U.S. at 657 (holding municipalities lack qualified immunity).

Private defendants usually are not entitled to qualified immunity. *See Richardson*, 521 U.S. at 409–11; *Wyatt*, 504 U.S. at 164–65; *Malinowski v. DeLuca*, 177 F.3d 623, 627 (7th Cir. 1999). A narrow exception to that rule is for private individuals who "perform[ ] duties [for the government] that would otherwise have to be performed by a public official who would clearly have qualified immunity." *Williams v. O'Leary*, 55 F.3d 320, 324 (7th Cir. 1995) (citation omitted) (private physician contracted to provide medical services at state prison); *see, e.g., Filarsky*, 566 U.S. at 393–94 (holding private attorney retained by a city to conduct an official investigation entitled to qualified immunity).

AFSCME has never claimed qualified immunity to Section 1983 liability, nor could it. There is no history of unions enjoying immunity before Section 1983's enactment in 1871. Public-sector unions did not exist at that time. The government's interest in ensuring that public servants are not cowed by threats of personal liability has no application to AFSCME.

2. The relevance of the foregoing is three-fold. *First*, qualified immunity law shows that exemptions to Section 1983 liability cannot be created out of whole cloth. Immunities are based on the statutory interpretation that Section 1983 did not abrogate entrenched, pre-existing immunities. *See Filarsky*, 566 U.S. at 389–90. The good faith defense to Section 1983 AFSCME argues for, by contrast, is based on nothing more than (misguided) notions of equity and fairness. 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 do not have license to create equivalent defenses to Section 1983 liability based on policy reasons.

Second, unlike with recognized immunities, there is no common law history prior to 1871 of private parties enjoying a good faith defense to constitutional claims. As one scholar recently noted: "[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." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 49 (2018); *see Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (Justice Marshall rejecting a good faith defense; "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."); *Anderson v. Myers*, 238 U.S. 368, 378 (1915) (rejecting good faith defense).

Finally, it is anomalous to grant defendants that lack qualified immunity the functional equivalent of an immunity under the guise of a "defense." Yet that is what the district court did here. Qualified immunity bars a damages claim 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). That accurately describes the ostensible "defense" the district court accepted below: one under which liability "depends on whether the defendant knew or should have known that the statute on which the defendant relied was

unconstitutional." Mem. Op. & Order, 5 (S.A. 5). It makes little sense to find defendants that are not entitled to qualified immunity to Section 1983 damages liability are nonetheless entitled to substantively the same thing, but under a different name.

C. A good faith defense to Section 1983 is inconsistent with equitable principles that injured parties be compensated for their losses.

1. "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). That especially is true here. There is nothing equitable about depriving victims of constitutional deprivations relief for their injuries. Nor is there anything equitable about letting wrongdoers, like AFSCME, keep ill-gotten gains. Equity cannot justify writing into Section 1983 a state-of-mind defense found nowhere in its text.

If anything, equity favors enforcing Section 1983 as written, for "elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 654. The Supreme Court in *Owen* wrote those words when holding municipalities are not entitled to a good-faith immunity to Section 1983. The Court's two equitable justifications for so holding are equally applicable here.

The *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id.* at 651. That injustice also should not be tolerated here. Countless victims of constitutional deprivations will be left remediless if defendants to Section 1983 suits can escape liability by showing they had a good faith,

but mistaken, belief their conduct was lawful. Those victims include not just Mark Janus and other employees who had agency fees seized from them. Under the district court's opinion, *every* defendant to *every* Section 1983 damages claim can assert a good faith defense. For example, the municipalities that the Supreme Court in *Owen* held not entitled to a good-faith immunity could raise an equivalent good faith defense, leading to the very injustice the Court sought to avoid.

The *Owen* Court further recognized that Section "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Id.* at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, *whether committed in good faith or not*, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52 (emphasis added). The same rationale weighs against creating a good faith defense to Section 1983.

AFSCME's conduct illustrates the point. Rather than choose to "err on the side of protecting citizens' constitutional rights," *id.*, AFSCME chose to seize agency fees from Janus and his co-workers after the constitutionality of those seizures was very much in doubt. AFSCME even rejected a plan to place disputed fees in escrow, so it could squeeze out every last dollar from employees before the Supreme Court stopped its unconstitutional practice. AFSCME apparently believed it could get away with this by asserting a good faith defense to liability, as it later did. AFSCME's conduct

vividly shows why creating a good defense to Section 1983 liability will only encourage municipal and private parties to infringe on constitutional rights—i.e., because the parties may not be held liable for the injuries they inflict.

2. In the court below, AFSCME argued it is unfair to hold private actors liable for damages that state actors avoid because of qualified immunity. AFSCME Mem. in Supp. of S.J., 9. It is not unfair because public servants enjoy qualified immunity for reasons not applicable to AFSCME and most other private entities: to ensure that the threat of personal liability does not dissuade individuals from acting as public servants. *See Wyatt*, 504 U.S. at 168. If those interests apply to private persons, they are entitled to immunity. *See Filarsky*, 566 U.S. at 389–90. Thus, "[f]airness alone is not . . . a sufficient reason for the immunity defense, and thus does not justify its extension to private parties." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998).

Moreover, a large organization like AFSCME is nothing like individual persons who enjoy qualified immunity. AFSCME is most akin to government bodies that lack qualified immunity, namely municipalities. "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." *Owen*, 445 U.S. at 654. Nor is it unjust to require other organizations to compensate citizens for violating their constitutional rights.

D. Recognizing a good faith defense to Section 1983 will undermine the statute's remedial purposes.

The district court not only failed to evaluate whether a good faith defense has any basis in Section 1983's text, but also failed to consider the implications of recognizing

this sweeping defense. Under the district court's ruling, every defendant that deprives any person of any constitutional right can escape damages liability by claiming it had a good faith, but mistaken, belief its conduct was lawful.

This ostensible defense would be available not just to unions, but to all defendants sued for damages under Section 1983. Of course, individuals with qualified immunity would have little reason to raise the defense, since their immunity is similar. But defendants who lack immunity, such as private parties and municipal governments, would gain the functional equivalent of a qualified immunity.

Those defendants could raise a good faith defense not just to First Amendment compelled-speech claims, but against any constitutional or statutory claim brought under Section 1983 for damages. This includes claims alleging discrimination based on race, sex, or political affiliation.

A good faith defense is broad. It shields defendants from liability if they had a reasonable basis for believing their unlawful conduct was lawful. In the context of this case, that meant "whether the defendant knew or should have known that the statute on which the defendant relied was unconstitutional." Mem. Op. & Order 5 (S.A. 5). In effect, a reasonable mistake of law would become a cognizable defense to depriving citizens of their constitutional rights.

This defense would deny citizens compensation for their injuries and encourage potentially unconstitutional behavior, *see supra* 10-11, as well as burden the courts with having to adjudicate whether defendants acted in good faith. Courts in Section 1983 cases would have to determine both if a defendant violated the constitution and

weigh the reasonableness of their subjective motives for so doing. Even if Section 1983's text did not preclude courts from refusing to hold defendants that act in good faith liable to injured parties in actions at law—which it does—practical concerns justify not creating this exemption to Section 1983 liability.

II. Other Circuit Courts Recognized a Good Faith Defense Not to All Section 1983 Claims, But Only to Certain Constitutional Deprivations.

A. Several circuit courts found malice and lack of probable cause to be elements of certain Fourteenth Amendment due process claims.

The district court believed that several other circuit courts found that private defendants have a good faith defense to Section 1983 damages liability. Mem. Op. & Order 4. A close reading of the published cases, however, reveals that the courts did not recognize a defense to Section 1983 writ large, but found that good faith was a defense to a particular due process deprivation actionable under 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 and defenses material to different constitutional and statutory deprivations vary considerably. For example, the elements of a Fourteenth Amendment due process deprivation are different from those of a Fourth Amendment search and seizure violation. Most importantly here, state of mind is material to some constitutional deprivations, but not others. For instance, a specific intent is required 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 v. Ray*, 699

F.3d 1053, 1074 (9th Cir. 2012). In contrast, "free speech violations do not require specific intent." *Id.*

A chronological review of the case law reveals that the published appellate decisions finding defendants can raise a good faith defense did so because bad faith and lack of probable cause were material to the Fourteenth Amendment due process deprivations at issue in those cases. The Sixth Circuit 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. *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988). The court did so because malice and lack of probable cause are elements of those types of due process deprivations. *Id.*

At the time, *Duncan*'s holding conflicted with other appellate decisions holding that private parties enjoy good faith immunity to Section 1983 liability. *See id.* at 1265. A "defense" and an "immunity" are different things: a defense rebuts the alleged deprivation of rights, while an immunity is an exemption from Section 1983 liability, even if there is a deprivation. *See Richardson*, 521 U.S. at 403. "As the *Wyatt* concurrence pointed out, 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." *Id.* (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* resolved the circuit split and held that private parties seldom enjoy good faith immunity to Section 1983 liability. 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. The Court determined 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 (first emphasis added). The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167.

The *Wyatt* Court left open the question of whether the defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69. As the Supreme Court later explained in *Richardson*, "*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." 521 U.S. at 413. The Court in *Richardson*, "[l]ike the Court in *Wyatt*," also "[did] not express a view on this last-mentioned question." *Id.* at 414. The Supreme Court has yet to resolve the question.

On remand in *Wyatt v. Cole*, the Fifth Circuit held the defendants could raise this defense because malice and lack of probable cause are elements of the due process claim. 994 F.2d 1113, 1119–21 (5th Cir. 1993). The Fifth Circuit recognized that the Supreme Court "focused its inquiry *on the elements of these torts*," and found "that plaintiffs *seeking to recover on these theories* were required to prove that defendants acted with malice and without probable cause." *Id.* at 1119 (first emphasis added).[5]

Three other circuits later followed the Sixth and Fifth Circuits' lead and recognized that good faith is a defense to a due process deprivation arising from a private party's ex parte seizure of property. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008). The Second Circuit in *Pinsky* required proof of "malice" and "want of probable cause" because "malicious prosecution is the most closely analogous tort and look[ed] to it for the elements that must be established in order for [the plaintiff] to prevail on his § 1983 damages claim." 79 F.3d at 312–13. The Third Circuit in *Jordan* required proof of "malice" for the same reason, recognizing that while "section 1983 does not include any *mens rea* requirement in its text, . . . the Supreme Court has plainly read into it

[5] The Fifth Circuit's observation is correct. Justice O'Connor's majority opinion in *Wyatt* focused on the fact "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." *Wyatt*, 504 U.S. at 165. Justice Kennedy's concurrence similarly focused on the analogous elements of a common law malicious prosecution claim, under which "a plaintiff was required to prove that a reasonable person, knowing what the defendant did, would not have believed the prosecution or the suit was well grounded." *Id.* at 172 (Kennedy. J., concurring).

a state of mind requirement *specific to the particular federal right* underlying a § 1983 claim." 20 F.3d at 1277 (emphasis added).

This line of published appellate decisions recognized only a "rule to govern damage claims for due process violations under § 1983 where the violation arises from a private party's invocation of a state's statutory remedy." *Pinsky*, 79 F.3d at 313. The cases did not hold that all deprivations of all constitutional rights and statutory rights actionable under Section 1983 require proof of malice and lack of probable cause. Such a holding would be absurd. Nor did the cases hold good faith to be a blanket defense to Section 1983 liability itself—i.e., find it an immunity. In fact, the Supreme Court in *Wyatt* rejected the proposition that private parties generally enjoy immunity to Section 1983 liability. 504 U.S. at 159.

B. State of mind is not an element or defense to a First Amendment compelled speech violation.

Malice and lack of probable cause are not elements of, or a defense to, the First Amendment deprivation in this case. In general, "free speech violations do not require specific intent." *OSU Student Alliance*, 699 F.3d at 1074. In particular, a compelled speech violation does not require any specific intent. Under *Janus*, it violates the First Amendment for a union to take monies from public employees without their affirmative consent. 138 S. Ct. at 2486. Whether AFSCME acted in good faith or in bad faith when it took Janus' money with his consent is irrelevant. Either way, the action deprived Janus of his First Amendment rights.

Irrespective of whether other circuit courts are correct that malice and lack of probable cause are defenses to seizures of property without due process of law, neither that intent nor any other state of mind is material to the First Amendment deprivation at issue. There is no good faith defense to AFSCME's violation of Janus' First Amendment right to free speech and association.

C. Common law analogies hold little relevance because Janus' First Amendment claim likely lacks any common law analogue.

In the proceedings below, AFSCME misunderstood Janus' position to be that the availability of a good faith defense turns on whether intent is an element of the common law tort most analogous to a First Amendment deprivation. AFSCME Reply 6-7 [ECF 184]. Several district courts have similarly characterized the argument before them in this way, and evaluated which common law tort a compelled speech violation most resembles. *See, e.g.*, *Carey v. Inslee*, No. 3:18-cv-05208-RBL (W.D. Wash.), ECF No. 62. AFSCME and those district courts have lost sight of the limited relevance of common law analogies.

Common law analogies are relevant only if they show state of mind is an element or defense to the constitutional deprivation at issue.[6] For example, common law analogy was a primary reason the courts in *Duncan*, *Wyatt*, *Pinsky*, and *Jordan* found malice and lack of probable cause to be elements of due process deprivations arising from seizures of property. *See supra* 16-18. But if state of mind is not an element or

[6] Of course, common law history is relevant to whether a defendant is entitled to qualified immunity to Section 1983. *See Filarsky*, 566 U.S. at 384-88. But AFSCME does not claim qualified immunity. So that is not an issue here.

defense to a constitutional deprivation, then it makes no difference what common law tort may be most analogous to it.

State of mind is not an element or defense to a First Amendment compelled subsidization of speech violation. *Janus* requires only that a state and union seize union fees from employees without their prior consent. 138 S. Ct. at 2486. It is therefore irrelevant what common law tort may be most like this deprivation of First Amendment rights. Identifying the most analogous tort does not affect the relevant question—i.e., whether good faith is an element or defense to a deprivation of First Amendment rights under *Janus*.

That especially is true given that Janus' First Amendment compelled-speech claim has no common law analog. Section 1983 is not "simply a federalized amalgamation of pre-existing common-law claims," but "is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Rehberg*, 566 U.S. at 366. That includes First Amendment compelled speech violations. The Supreme Court explained that "[c]ompelling 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.[7]

[7] If it is relevant, Janus' claim is most like the tort of conversion because the union wrongfully took his property. Good faith is not a defense to conversion, a strict liability tort. *See Morisette v. United States*, 342 U.S. 246, 253-54 (1952); Richard A. Epstein, *Torts*, § 1.12.1 at 32 (1999).

The bottom line is that good faith is not a defense to a deprivation of First Amendment rights under *Janus*. As discussed in Section I, good faith also is not a defense to Section 1983 damages liability. AFSCME thus lacks a cognizable basis for asserting a good faith defense.

III. AFSCME Did Not Act in Good Faith.

A. AFSCME knew or should have known a Supreme Court decision would be retroactive.

Even if a good faith defense could be carved into Section 1983, which it cannot, AFSCME would find no shelter under it. In 2015, after this litigation started, AFSCME spurned efforts to have agency fees placed in escrow while their constitutionality was determined. Instead, it seized agency fees from Janus and other employees up until the day of the Supreme Court's decision. *See supra* 2. During that time, AFSCME had no reasonable basis for believing it could keep Janus' money if the Supreme Court ruled in his favor.

AFSCME knew or should have known that a Supreme Court decision holding agency fee seizures unconstitutional would be retroactive. That has been the law since 1993, when the Supreme Court in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), announced that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." AFSCME thus knew or should have known that a Supreme Court decision holding agency fee seizures unconstitutional would apply to the fees it insisted on seizing

from Janus before that decision.

AFSCME also should have known that monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id. at* 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

Even in the circuit court decisions finding good faith to be a defense to a prejudgment replevin or attachment of property without due process of law, the defendant had to return the property at issue. In *Wyatt*, the defendants seized the plaintiff's cattle and tractor based on a replevin statute later held unconstitutional on due process grounds. 994 F.2d at 1115. While a good faith defense shielded the defendants from liability from incidental damages, they had to return the cattle and tractor. *Id.* In *Pinsky*, where a defendant attained an unconstitutional attachment on plaintiff's real property, the defendant did not retain that property. 79 F.3d at 311-13. In *Jordan*, where the defendant attained an unconstitutional attachment on plaintiff's checking account, the state courts "vacated the attachment of [plaintiff's] checking

account." 20 F.3d at 1258.

Under *Harper* and these precedents, AFSCME could not have a good faith belief it would get to keep the monies it seized from Janus' wages before the Supreme Court put an end to this unconstitutional practice. AFSCME should have known it would have to return to Janus the monies that are rightfully his.

B. AFSCME had no expectation it could keep Janus' money if the Supreme Court ruled in his favor.

1. The district court held AFSCME acted in good faith because its "action[s] were in accord with a constitutionally valid state statute" and AFSCME "could not reasonably anticipate that the law would change." Mem. Or. & Op. 6 (S.A. 6). The latter statement is inaccurate. The Supreme Court in *Janus* found that "unions have been on notice for years regarding this Court's misgivings about *Abood*" and that, since 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." 138 S. Ct. at 2484. More importantly, the district court's rationales are beside the point. Irrespective of whether AFSCME had a good faith belief it could *take* fees from Janus prior to the Supreme Court's decision, AFSCME could not have a good faith belief it could *keep* his money if the Supreme Court ruled in Janus' favor. And that is the issue here: does AFSCME have a good faith basis for not returning to Janus the monies it unconstitutionally seized from him?

A hypothetical further illustrates the point. Assume that Party A and Party J dispute who is the rightful owner of certain property. Party A takes possession of the disputed property while its ownership is being adjudicated. If the court finds Party J

to be the rightful owner, does Party A get to keep the property if it had reasonable grounds for taking possession of it in the interim? Of course, not. Even if Party A had a legitimate reason for taking possession of the disputed property, Party A could not reasonably believe it could keep the property if the court rules for Party J. Physical possession does not trump legal ownership.

The facts here mirror the hypothetical. Janus and AFSCME disputed whether AFSCME was lawfully entitled to a portion of Janus' wages. While this litigation progressed, AFSCME took possession of the disputed monies by seizing fees from Janus' wages, and spurned a plan to place the disputed fees in escrow. *See supra* 2. The Supreme Court ultimately held AFSCME had no lawful right to take Janus' money to subsidize its speech. 138 S. Ct. at 2486. Even if AFSCME had a good faith belief it could lawfully take Janus' money prior to the Supreme Court's decision (which it did not), AFSCME could not reasonably believe it could keep Janus' money following that decision. AFSCME knew or should have known that the Court's decision would be retroactive under *Harper*, and that AFSCME would liable for making Janus whole for all monies it unconstitutionally seized from him.

In short, AFSCME acted at its own risk by seizing agency fees from Janus and other employees prior to Supreme Court's ruling. The Court ruled against AFSCME and in favor of Janus. AFSCME should be required to return to Janus the monies it unconstitutionally took from him.

CONCLUSION

The district court's judgment should be reversed and the case remanded with instructions to enter judgment for Janus.

Dated: May 6, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 6,429 words in 12-point proportionately-spaced Century Schoolbook font.

/s/ William L. Messenger
William L. Messenger

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I electronically filed the foregoing Appellants' Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ William L. Messenger
William L. Messenger

Counsel for Appellant

REQUIRED SHORT APPENDIX

Contents

Certificate

Pursuant to Circuit Rule 30(d), I hereby certify that this short appendix includes all the materials required by Circuit Rules 30(a) and (b).

/s/ William L. Messenger
William L. Messenger

Counsel for appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARK JANUS, Plaintiff, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO, et al., Defendants, LISA MADIGAN, Attorney General of the State of ILLINOIS, Intervenor-Defendant.	)	Case No. 15 C 1235 Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiffs Mark Janus and Brian Trygg brought a second amended complaint against defendants American Federal of State, County and Municipal Employees, Council 31 ("AFSCME"), the General Teamsters/Professional & Technical Employees Local Union 916 ("Local 916"), and Michael Hoffman in his official capacity as Director of the Illinois Department of Central Management Services, alleging that plaintiffs were unconstitutionally being forced to pay compulsory union fees ("fair-share fees") to the defendant Unions as a condition of their employment pursuant to Illinois' Public Labor Relations Act ("IPLRA"), 5 ILCS 315/6. They sought a declaratory judgment against the Director of Central Management Services and the Unions declaring that forcing plaintiffs to pay fair-share fees violates the First Amendment; an injunction prohibiting defendants from collecting such fees in the future; and damages from the Unions for the fees wrongfully collected.

This court granted defendants' motion to dismiss, concluding that the Supreme Court had held that such fees were lawful in Abood v. Detroit Board of Education, 431 U.S. 209 (1977). Plaintiffs had argued that Abood was wrongfully decided but recognized that it was the current law and controlling on this court. The Seventh Circuit affirmed as to Janus, agreeing that the case was controlled by Abood, which only the Supreme Court could overrule. Janus v. AFSCME Council 31, 851 F.3d 746, 747 (7th Cir. 2017). As to plaintiff Trygg, the court affirmed on a separate ground on claim preclusion. Id. at 748. Janus (but not Trygg) sought certiorari, asking the Supreme Court to overrule Abood. In a 5 to 4 decision, the Court did just that, holding that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." Janus v. AFSCME Council 31, __ U.S. __, 138 S.Ct. 2448, 2486 (2018). The Court did not order any specific relief, instead remanding for further proceedings consistent with its opinion. Id. Immediately after that decision was issued, AFCME stopped collecting fair-share fees; and at this time Janus is no longer employed by the State of Illinois.

The parties agree that the lone issue remaining before this court is whether plaintiff Janus can collect damages from AFSCME in the amount of the fair-share fees he had paid prior to the Court's decision. The material facts are not in dispute and the parties have filed cross-motions for summary judgment. For the reasons discussed below, defendant AFSCME's motion [Doc. 175] is granted and plaintiff's motion [Doc. 177] is denied.

DISCUSSION

Defendant AFSCME argues that plaintiff's claim for retrospective damages under 42 U.S.C. § 1983 fails as a matter of law because defendant has a "good-faith" defense for the fees it collected prior to the Supreme Court's decision in the instant case. There can be no doubt that

for the 41 years prior to the Court's decision, unions such as defendant were permitted to collect fair-share fees. See Abood, 431 U.S. 209. Based on Abood, Illinois enacted the IPLRA which authorized the collection of such fees. Defendant AFSCME entered into a collective bargaining agreement ("CBA") with the Department of Central Management Services pursuant to this valid statue and collected the fees at issue. In contrast, plaintiff claims that "good-faith" is not a defense to a deprivation of First Amendment rights or to liability under § 1983.

Plaintiffs' § 1983 claims is brought in accord with Lugar v. Admondson Oil Co. Inc., 457 U.S. 922, 932-37 (1982), in which the Supreme Court held that private defendants invoking a state-created attachment statute act under color of law within the meaning of § 1983 if their actions are fairly attributable to the State. To satisfy this requirement, two conditions must be met. First, the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." Id. at 937. "Second, the private party must have 'acted together with or . . . obtain significant aid from State officials' or engaged in conduct 'otherwise chargeable to the State.'" Wyatt v. Cole, 504 U.S. 158, 162 (1992) (quoting Lugar, 457 U.S. at 937). Lugar specifically left open the question whether private defendants charged with § 1983 liability for invoking a state statute later declared unconstitutional are entitled to qualified immunity. Lugar, 457 U.S. at 942, n. 23.

In Wyatt, the Court answered that question in the negative, holding that qualified immunity "acts to safeguard government, and thereby protects the public at large, not to benefit its agents," rationales that "are not transferable to private parties." Wyatt, 504 U.S. at 168. The Wyatt court specifically noted, however, that the issued before it was very narrow: "whether private persons,

who conspire with state officials to violate constitutional rights, have available the good-faith immunity applicable to public officials." Id. at 168. The Court specifically noted that "[i]n so holding, however, 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 or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." Id. at 169.

On remand, the Fifth Circuit noted that the five concurring and dissenting justices in Wyatt all indicated "support for a standard that would relieve private parties who reasonably relied on a state's statute of liability." Wyatt v. Cole, 994 F.3d 1113, 1118 (5th Cir. 1993). It thus held that "private defendants sued on the basis of Lugar may be held liable for damages for under § 1983 only if they fail to act in good-faith in invoking the unconstitutional state procedure, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." Id.

The Fifth Circuit is not alone. Indeed, as Judge Shah of this district noted in a case almost identical to the instant case, although the Seventh Circuit has not yet addressed the issue, "[e]very federal appellate court that has considered the good-faith defense, though, has found that it exists for private parties." Winner v. Rauner, 2016 WL 7374258, *5 (N.D. Ill. Sept. 20, 2016) (citing Pinsky v. Duncan, 79 F.3d 306, 311-12 (2d Cir. 1996); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1275-78 (3d Cir. 1994); Wyatt, 994 F.2d 1118-21; Vector Research, Inc. v. Howard & Howard Attorneys, P.C., 76 F.3d 692, 698-99 (6th Cir. 1996); Clemente v. City of Glendale, 518 F.3d 1090, 1096-97 (9th Cir. 2008)).

Plaintiff argues that even if a good-faith defense applies, it is available only if state of mind could be an element of defense to the alleged deprivation of constitutional rights. And, according to plaintiff, no such state of mind is required to establish that defendant deprived plaintiff of his First Amendment rights.

The court disagrees. As defendants argue, the relevant question for a good-faith defense is not the nature of the particular statute on which the defendant relied, but whether that reliance was in good faith. As the Fifth Circuit held, that depends on whether the defendant knew or should have known that the statute on which the defendant relied was unconstitutional. Wyatt, 994 F.3d at 1118.

In the instant case, the statute on which defendant relied had been considered constitutional for 41 years. It is true, as plaintiff argues, that in Harris v. Quinn, 134 S.Ct. 2618 (2014), the Court found that collection of compulsory fair-share fees from in-home-care personal assistants who were not full-fledged public employees, was unconstitutional, but left for another day whether Abood remained good law. Plaintiffs argue that, as the Janus court stated, "unions have been on notice for years regarding this Court's misgivings about [Abood]," and that "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.

Despite these statements in Janus, prior to the instant case Abood remained the law of the land. And, despite these statements, there was no way for defendant to predict the resolution of this case. Indeed, had the general and/or presidential election resulted differently, the composition of the Supreme Court that decided the case may well have been different, leading to a different result. As Judge Shah noted in Winner, "`even the clarity of hindsight is not

persuasive that the constitutional resolution [. . .] could be predicted with assurance sufficient to undermine [. . .] reliance on [the challenged law].'" Winner, 2016 WL 7374258 at *5 (quoting Lemon v. Kurtzman, 411 U.S. 192, 207 (1973)). Defendants' action were in accord with a constitutionally valid state statute. Nothing presented by plaintiff prevents application of that defense to defendant AFSCME. Defendant AFSCME followed the law and could not reasonably anticipate that the law would change. Consequently, the court concludes that the good faith defense applies, and plaintiff is not entitled to any damages. See Danielson v. AFSCME Council 28, 340 F.Supp.3d 1083, 1087 (W.D. Wash. 2018); Cook v. Brown, 2019 WL 982384 (D. Or. Feb 28, 2019); Carey v. Inslee, 2019 WL 1115259 (W.D. Wash. Mar. 11, 2019).

CONCLUSION

For the reasons described above, defendant's motion for summary judgment [Doc. 175] is granted. Plaintiff's motion for summary judgment [Doc. 177] is denied.

ENTER: March 18, 2019

Robert W. Gettleman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

MARK JANUS,

Plaintiff(s),

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.

Defendant(s).

Case No. 15 cv 1235
Judge Robert W. Gettleman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31
and against plaintiff(s) MARK JANUS,

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Robert W. Gettleman on a motion

Date: 3/18/2019

Thomas G. Bruton, Clerk of Court

Claire E. Newman, Deputy Clerk

STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

EXECUTIVE ORDER **15-13**

EXECUTIVE ORDER RESPECTING STATE EMPLOYEES' FREEDOM OF SPEECH

WHEREAS, the First Amendment to the United States Constitution protects the freedom of speech and association; and

WHEREAS, on numerous occasions, most recently in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), in enforcing the First Amendment's rights, the United States Supreme Court recognized a "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support," because "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech"; and

WHEREAS, together with the people of this State and throughout the nation, every state employee enjoys the freedoms of speech and association enshrined in the Constitutions of the United States and the State of Illinois; and

WHEREAS, the Governor of the State of Illinois has a duty under Article V, Section 8 and Article XIII, Section 3 of the Illinois Constitution, and upon taking office swears an oath, to "support the Constitution of the United States, and the Constitution of the State of Illinois," including those provisions that protect speech and association; and

WHEREAS, under Article VI, Clause 2 of the United States Constitution (the "Supremacy Clause"), the Constitution "shall be the supreme law of the land," preempting "anything in the Constitution or laws of any State to the contrary"; and

WHEREAS, consistent with the Supremacy Clause, the Governor of the State of Illinois must exercise his executive powers under Article V, Section 8 of the Illinois Constitution by resolving all conflicts between the United States Constitution and state law in favor of the Constitution; and

WHEREAS, employees of the State of Illinois must not be forced, against their will, to participate in or fund public sector labor union activities to which they object; and

WHEREAS, collective bargaining agreements, to which the State of Illinois is a party, currently compel some state employees to subsidize the political speech of public sector labor unions of which they have chosen to not be members; and

WHEREAS, under the Illinois Public Labor Relations Act ("Illinois Labor Act"), 5 ILCS 315/6, a public sector labor union unilaterally determines the so-called "fair share" fees to be paid by those who choose not to be members of the union; and

WHEREAS, by requiring non-union members to pay "fair share" fees to unions by imposing automatic paycheck deductions without any regard to whether an employee objects to the views and actions of public labor unions' representatives, the collective bargaining agreements force some employees to subsidize and enable union activities that they do not support; and

WHEREAS, the State engages in this practice through actions of Executive Branch agencies, under the direction of the Governor, pursuant to collective bargaining agreements negotiated under the Illinois Labor Act; and

WHEREAS, one of those executive agencies, the Illinois Department of Central Management Services ("CMS"), has entered into collective bargaining agreements that contain provisions requiring CMS, pursuant to the Illinois Labor Act, to deduct "fair share" fees from state employees' paychecks and deliver those deductions to the contracting unions ("Fair Share Contract Provisions"); and

WHEREAS, the United States Supreme Court first addressed such "fair share" arrangements for state government employees in the case of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); and

WHEREAS, since its decision in *Abood*, the Supreme Court has repeatedly acknowledged that compelling state employees to financially support public sector unions seriously impinges upon free speech and association interests protected by the United States Constitution; and

WHEREAS, in *Harris v. Quinn*, the Supreme Court held that "fair share" provisions, which required nonmember Medicaid-funded home-care personal assistants to pay "fair share" fees to the union, violated the First Amendment; and

WHEREAS, the Supreme Court in *Harris* ruled that such "fair share" provisions served no compelling state interest; and

WHEREAS, in *Harris*, a majority of the Supreme Court also questioned the legal and factual bases of *Abood*'s ruling that public sector employees may be compelled to pay "fair share" fees, calling the analysis in *Abood* "questionable on several grounds" and labeling the decision "an anomaly"; and

WHEREAS, the aforementioned criticisms of *Abood* and the present facts and circumstances of Illinois public sector collective bargaining leave no doubt that the Fair Share Contract Provisions, as permitted by the Illinois Labor Act, violate Illinois state employees' freedoms of speech and association; and

WHEREAS, for instance, Illinois state employee unions are using compelled "fair share" fees to fund inherently political activities to influence the outcome of core public sector issues, such as wages, pensions, and benefits, that are all currently mandatory subjects of collective bargaining under the Illinois Labor Act; and

WHEREAS, the negotiation of these core public sector issues has a direct impact on the level of public services, priorities within the state budget, creation of bond indebtedness, and tax rates, among other things, thereby influencing the debate over these political issues of paramount importance; and

WHEREAS, at least in part because of the cost of wage, benefits, and pension packages obtained by state employee unions in previous administrations with the use of compelled "fair share" fees, the State of Illinois currently has a staggering structural budget deficit and unfunded pension liability of $111 billion, the largest such deficit as a percentage of state revenue in the country; and

WHEREAS, these dire financial conditions are likely to usher in a bleak future of emergency measures that could include reduced or eliminated state services, increased taxes, insolvent public entities, and empty pension accounts; and

WHEREAS, the significant impact that Illinois public sector labor costs have imposed and will continue to impose on the State's financial condition demonstrates the degree to which Illinois state employee collective bargaining is an inherently political activity; and

WHEREAS, in light of the foregoing facts and circumstances and insofar as constitutionally-protected freedoms of speech and association are concerned, there is no reasonable basis for distinguishing Illinois public sector collective bargaining activities from Illinois public sector union political activities; and

WHEREAS, in order to preserve employees' fundamental rights of speech and association, and to avoid violations of the First Amendment of the United States Constitution and Article I, Sections 4 and 5 of the Illinois Constitution; and

WHEREAS, the Supremacy Clause prohibits the Governor of the State of Illinois from enforcing state law and contractual agreements that violate the First Amendment of the United States Constitution;

THEREFORE, I, Bruce Rauner, Governor of Illinois, pursuant to the executive authority vested in me by Section 8 of Article V of the Constitution of the State of Illinois, and faithfully supporting the freedoms protected by the United States and Illinois Constitutions, hereby order as follows:

I. DEFINITIONS

As used in this Executive Order:

"**CMS**" means the Illinois Department of Central Management Services.

"**Fair Share Contract Provisions**" means provisions in collective bargaining agreements that require a State Agency, pursuant to the Illinois Labor Act, to deduct "fair share" fees from state employees' paychecks and deliver those deductions to the contracting unions.

"**Illinois Labor Act**" means the Illinois Public Labor Relations Act, 5 ILCS 315/6.

"**State Agency**" means any officer, department, agency, board, commission, or authority of the Executive Branch of the State of Illinois under the jurisdiction of the Governor.

"**State Employee**" means any State Agency employee covered by a collective bargaining agreement.

II. PROHIBITION AGAINST STATE AGENCIES EXACTING FAIR SHARE FEES FROM STATE EMPLOYEES

1. CMS is hereby directed to immediately cease enforcement of the Fair Share Contract Provisions.
2. All other State Agencies are hereby prohibited from enforcing such Fair Share Contract Provisions.

3. CMS and all other State Agencies are directed to place all "fair share" deductions in an escrow account for as long as any contracting union's collective bargaining agreement requires such deductions and to maintain an accounting of the amount deducted from each State Employee's wages for each contracting union, so that each such State Employee will receive the amount deducted from his or her wages upon the determination by any court of competent jurisdiction that the Fair Share Contract Provisions are unconstitutional.

III. PRIOR EXECUTIVE ORDERS

This Executive Order supersedes any contrary provision of any prior Executive Order.

IV. SAVINGS CLAUSE

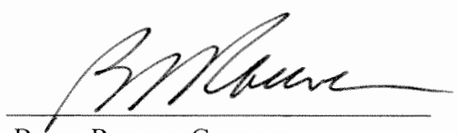
Nothing in this Executive Order shall be construed to contravene any state or federal law. Nothing in this Executive Order shall affect or alter the existing statutory powers of any State Agency or be construed as a reassignment or reorganization of any State Agency. This Savings Clause shall not apply to parts of the Illinois Labor Act that enable the Fair Share Contract Provisions, or to collective bargaining agreements containing such provisions, as the Illinois Labor Act and the collective bargaining agreements are invalid under the United States and Illinois Constitutions.

V. SEVERABILITY

If any provision of this Executive Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

VI. EFFECTIVE DATE

This Executive Order shall take effect immediately upon filing with the Secretary of State.



Bruce Rauner, Governor

Issued by Governor: February 9, 2015
Filed with Secretary of State: February 9, 2015