19-3250

United States Court of Appeals for the Sixth Circuit

SARAH LEE, on behalf of herself and others similarly situated,

Plaintiffs-Appellant,

v.

OHIO EDUCATION ASSOCIATION, et al.,

Defendants-Appellees,

On Appeal from the United States District Court
for the Northern District of Ohio
Case No. 18-cv-1420-JRA

AMICUS CURIAE BRIEF OF NATHANIEL OGLE

William L. Messenger
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-3250 Case Name: Lee v. Ohio Educ. Ass'n

Name of counsel: William L. Messenger

Pursuant to 6th Cir. R. 26.1, Nathaniel Ogle
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makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on June 6, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ William L. Messenger
Counsel for Nathaniel Ogle

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF THE AMICUS

Nathaniel Ogle submits this amicus curiae brief with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a)(2).[1]

Mr. Ogle is a State of Ohio employee who had union agency fees unconstitutionally seized from him prior to the Supreme Court's decision in *Janus v. AFSCME, Council* 31, 138 S. Ct. 2448 (2018). Mr. Ogle seeks, in a lawsuit pending in the U.S. District Court for the Southern District of Ohio, to recover the monies wrongfully seized from him and a putative class of similarly situated employees. *See* Complaint, ECF No. 1, *Ogle v. Ohio Civil Service Employees Ass'n*, 18-cv-1227-CMV (S.D. Ohio Oct. 15, 2018). The union defendant, however, asserts that a "good faith defense" shields it from liability. *See* Mot. To Dismiss, ECF No. 12, *Ogle* (S.D. Ohio Dec. 17, 2018).

Mr. Ogle has a direct interest in this case because it concerns whether a good faith defense exempts unions from damages liability under Section 1983, 42 U.S.C. § 1983, for depriving employees of their First Amendment

[1] No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

rights. The Court's ruling will likely control the outcome of Mr. Ogle's case, one way or the other. He thus submits this amicus curiae brief to protect his interests and those of the putative class he seeks to represent.

SUMMARY OF ARGUMENT

There is no good faith defense to Section 1983 liability. The ostensible defense is: (1) incompatible with Section 1983'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; (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); and (4) incompatible with Section 1983's remedial purposes.

This Court has not recognized an across-the-board good faith defense to Section 1983. The Court found good faith to be a defense to particular constitutional deprivation: a seizure of property without due of process of law. *See Duncan v. Peck*, 844 F.2d 1261, 1266-67 (6th Cir. 1988). But the Court did not hold this state of mind is a defense to *all* claims that are brought under Section 1983 for damages. Unlike with certain due process claims, a good faith motive is not a defense to the deprivation of First

Amendment rights recognized in *Janus*, 138 S. Ct. at 2468.

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 conflicts 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. The proposition that defendants that deprive others of their constitutional rights *shall not* be "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 state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Section 1983's language 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.

B. A good faith defense is incompatible with the statutory basis for qualified 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.

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).

Private defendants seldom satisfy the prerequisites for qualified immunity. *See Richardson*, 521 U.S. at 409–11; *Wyatt*, 504 U.S. at 164–65. A narrow exception are private individuals who perform duties for the government that are equivalent to those performed by public officials who have qualified immunity. *See Filarsky*, 566 U.S. at 393–94 (holding private attorney retained by a city to conduct an official investigation entitled to qualified immunity).

Unions do not enjoy qualified immunity to Section 1983 liability. 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 a large public-sector union like the Ohio Education Association ("OEA").

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 the Union Appellees argued for, by contrast, is based on nothing more

than (misguided) notions of equity and fairness. *See* Union Defs.' Mem. in Supp. of Mot. to Dismiss, R. 37-1, Page ID # 367-68. 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. It makes little sense to find defendants that are not entitled to qualified immunity to Section 1983 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. Equity cannot justify writing into Section 1983 a state-of-mind exception found nowhere in its text. "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 the Union Appellees, keep ill-gotten gains.

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 Sarah Lee, Nathaniel Ogle, and other victims of union fee seizures. If a good faith defense to Section 1983 liability were recognized, every defendant to every Section 1983 damages claim could assert it. For example, the municipalities 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 reasoned 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 recognizing a good faith defense to Section 1983.

2. The Union Appellees argued below it would be unfair to hold private actors liable for damages that state actors avoid because of their immunity. *See* Union Defs.' Mem. in Supp. of Mot. to Dismiss, R. 37-1, Page ID # 367-68. It is not unfair because public servants enjoy qualified immunity for reasons not applicable to unions and most other private entities: to ensure that the threat of personal liability does not dissuade individuals from being 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. But "[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 the OEA is nothing like individual persons who enjoy qualified immunity. OEA is most akin to a governmental organization that *lacks* qualified immunity, namely a municipality. "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 unions or other private organizations that violate citizens' constitutional rights to compensate them for their injuries.

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. If accepted by this Court, every defendant that deprives any person of any constitutional right could 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 would deny citizens compensation for their injuries and encourage potentially unconstitutional behavior. *See supra* 9-10. It would also burden the courts with having to adjudicate whether defendants in Section 1983 cases subjectively acted in good faith. Courts 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 warrant not creating this exemption to Section 1983 liability.

II. The Court Recognized a Good Faith Defense Not to All Section 1983 Claims, But Only to Certain Constitutional Deprivations.

A. This Court and other appellate courts found malice and lack of probable cause to be elements of certain Fourteenth Amendment due process claims.

Union Appellees argued below that this Court and other appellate courts found that private defendants generally have a good faith defense to Section 1983 damages liability. Union Defs.' Mem. in Supp. of Mot. to Dismiss, R. 37-1, Page ID # 367. A close reading of the published decisions,[2] 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."

[2] *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) is a non-precedential, unpublished order that does constitute the law of that circuit.

42 U.S.C. § 1983. The elements and defenses material to different constitutional "deprivation[s]" vary considerably. For example, the elements of a Fourteenth Amendment due process violation differ 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. 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, most "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. This Court 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, this Court's holding in *Duncan* 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. 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." *Id.* (quoting *Wyatt*, 504 U.S. at 171-72 (Kennedy, J., concurring)). This Court recognized that distinction in *Duncan*, finding that other "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).

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).

Three other circuits later followed the lead of this Court and the Fifth Circuit and held 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).[3] The Second Circuit in *Pinsky* required proof of "malice" and "want of probable cause" because "[w]e think that malicious prosecution is the most closely analogous tort and look 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 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 cases 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

[3] This Court also later reiterated in *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996) that private defendants could raise a good faith defense to a claim concerning an ex parte seizure of property. *Vector Research* undermines the notion that good faith is a defense to Section 1983 itself because that case did concern Section 1983, but a *Bivens* claim.

at 313. The cases did not hold that *all* deprivations of *all* constitutional rights actionable under Section 1983 require proof of malice and lack of probable cause, which 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. Malice and lack of probable cause were held to be elements of a particular type of due process deprivation.

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 at issue. 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*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial.

Thus, whether the Union Appellees acted in good faith or in bad faith when they seized agency fees from Sarah Lee and other employees without their consent is irrelevant. Either way, the action deprived the employees of their First Amendment rights. Good faith simply is not a defense to a union fee seizure under *Janus*.

C. Common law analogies hold little relevance because a First Amendment compelled speech claims lacks a close common law analog.

Some district courts have misunderstood the foregoing point, and mischaracterized it as being that the availability of a good faith defense turns on what common law tort is most analogous to a First Amendment compelled-speech deprivation. *See Carey v. Inslee*, 364 F. Supp. 3d 1220, 1229-30 (W.D. Wash. 2019); *Crockett v. NEA-Alaska,* 367 F. Supp. 3d 996, 1004 (D. Alaska 2019). Those courts lost sight of the limited relevance of common law analogies.

Common law analogies are relevant to the extent they shed light on the elements or defenses to an alleged deprivation of constitutional rights actionable under Section 1983.[4] For example, this Court and others found malice and lack of probable to be elements of an alleged due process deprivation arising from property seizures because the deprivation is akin to the common law torts of malicious prosecution and abuse process, which include those elements. *See Duncan*, 844 F.2d at 1267; *supra* at 14-18.

[4] Common law history also is relevant to whether a defendant is entitled to qualified immunity to Section 1983. *See Filarsky*, 566 U.S. at 384-88. But the Union Appellees do not claim qualified immunity. So that is not an issue here.

Here, it is already known that state of mind is *not* an element or defense to the First Amendment compelled-speech deprivation recognized in *Janus,* which requires only that a union seize dues or fees from employees without their affirmative consent. 138 S. Ct. at 2486. It is therefore irrelevant what common law tort may be most like this deprivation. Identifying the most analogous tort is a pointless exercise.

That especially is true given that a First Amendment compelled-speech claim has no close common law analog. Section 1983 is not "simply a federalized amalgamation of pre-existing common-law claims." *Rehberg*, 566 U.S. at 366. It "is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Id.* First Amendment compelled-speech violations do not directly correspond to previously known torts. It violates the First Amendment to "[c]ompell[ ] a person to subsidize the speech of other private speakers" because it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. That injury is unlike that caused by common law torts. It is peculiar to the First Amendment.

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. The Union Appellees lack a cognizable basis for asserting a good faith defense.

CONCLUSION

The district court's judgment should be reversed and the case remanded for further proceedings.

Dated: June 6, 2019

/s/ William L. Messenger
William Messenger
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Nathaniel Ogle

CERTIFICATE OF COMPLIANCE
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,320 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: June 6, 2019

/s/ William L. Messenger
William L. Messenger

Counsel for Nathaniel Ogle

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I certify that on June 6, 2019, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Sixth Circuit and served through CM/ECF upon:

John West
Leon Dayan
Jacob Karabell
Adam Bellotti
Bredhoff & Kaiser PLLC
805 15th Street N.W.
Washington, D.C. 20005
(202) 842-2600
jwest@bredhoff.com
ldayan@bredhoff.com
jkarabell@bredhoff.com
ldayan@bredhoff.com

Counsel for Appellees

Timothy Joseph Gallagher
Eben O. McNair IV
Schwarzwald, McNair & Fusco
1215 Superior Avenue, Suite 225
Cleveland, Ohio 44114-3257
(216) 566-1600 (phone)
(216) 566-1814 (fax)
tgallagher@smcnlaw.com
emcnair@smcnlaw.com

Jason Walta
National Education Association
1201 16th Street N.W.
Washington, D.C. 20036
(202) 822-7035 (phone)
(202) 822-7974 (fax)
jwalta@nea.org

/s/ William L. Messenger
William L. Messenger

Counsel for Nathaniel Ogle