

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 27 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JUSTIN CAREY; et al.,

No. 19-35290

Plaintiffs-Appellants,

D.C. No. 3:18-cv-05208-RBL

v.

MEMORANDUM*

WASHINGTON EDUCATION
ASSOCIATION,

Defendant-Appellee,

and

JAY ROBERT INSLEE, in his official
capacity of Governor of the State of
Washington; DAVID SCHUMACHER, in
his official capacity as Director of
Washington State Office of Financial
Management,

Defendants.

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Submitted April 20, 2021**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Appellants' request for oral argument, set forth in the opening brief, is denied.

Before: THOMAS, Chief Judge, TASHIMA and SILVERMAN, Circuit Judges.

Justin Carey, JoBeth Deibel, David Gaston, Roger Kinney, and Keith Sanborn appeal from the district court’s summary judgment in their 42 U.S.C. § 1983 putative class action alleging a First Amendment claim arising out of compulsory agency fees (also known as fair share fees) paid to Washington Education Association. We have jurisdiction under 28 U.S.C. § 1291. We review *de novo*. *Danielson v. Inslee*, 945 F.3d 1096, 1098 (9th Cir. 2019), *cert. denied*, No. 19-1130, 2021 WL 231555 (Jan. 25, 2021). We affirm.

The district court properly granted summary judgment because a public sector union can, as a matter of law, “invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected” prior to the Supreme Court’s decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). *Danielson*, 945 F.3d at 1097-99 (“[P]rivate parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. § 1983, where they acted in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law.”); *see also id.* at 1102-03 (finding plaintiffs’ claim for monetary relief as damages, not restitution; “Even accepting Plaintiffs’ restitutionary premise, the equities do not weigh in favor of requiring a refund of all agency fees collected pre-*Janus*.”).

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.