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 REPLY BRIEF

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

Jeffrey M. Schwab
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
(312) 263-7668
jschwab@libertyjusticecenter.org

Counsel for the Appellant

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES PAGE

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

AFSCME agrees that Janus' jurisdictional statement is complete and correct. The State does not agree, but does not explain why. Instead, it provides a case history similar to that which Janus provided. Opening Br. 2-4. All parties agree the Court has jurisdiction over Janus' timely appeal of the district court's final judgment.

SUMMARY OF ARGUMENT

AFSCME and Illinois turn Section 1983 on its head by arguing that every private defendant that reasonably relies on a state statute when depriving others of their constitutional rights should not be liable for damages. State Br. 14; AFSCME Br. 4. The statute requires the opposite result: that "every person" who acts "under color of any statute" when depriving others of their constitutional rights "*shall be liable* to the party injured in an action at law." 42 U.S.C. § 1983 (emphasis added). Appellees' statutory reliance defense is incompatible with Section 1983.

AFSCME claims (at 17) that fairness and equality justify not enforcing Section 1983 against private defendants that act under then-valid statutes. Courts cannot refuse to enforce unambiguous federal statutes on such policy grounds. Even if they could, there is nothing fair about making Janus pay for AFSCME's and Illinois' unconstitutional conduct. Equity favors enforcing Section 1983 so that Janus and other victims of constitutional deprivations are made whole their injuries. *See Owen v. City of Indep.*, 445 U.S. 622, 654-56 (1980).

The State argues (at 7) that *Wyatt v. Cole*, 504 U.S. 158 (1992) found malice and lack of probable cause to be material to Section 1983 claims analogous to the torts of

malicious prosecution and abuse of process. Janus agrees. Opening Br. 16-17. This is why the Second, Third, Fifth, and Sixth Circuits held malice and lack of probable cause are elements to Section 1983 due process claims that arise from abuses of judicial processes. *Id.* at 15-18.

Janus disagrees, however, with the State's assertion (at 13-14) that *all* Section 1983 claims against private defendants are like abuse of process. That tort concerns only misuse of the *judicial* process, not of any state law or process. In particular, Janus' First Amendment claim is nothing like an abuse of a process tort. It makes no sense to import that tort's malice and probable cause elements into Janus' compelled speech claim. To do so would defy the Supreme Court's holding that this First Amendment deprivation requires only that union fees be seized from employees without consent. *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2486 (2018).

AFSCME and Illinois unquestionably deprived Janus of his First Amendment rights by seizing agency fees from him without his consent. That AFSCME did so when acting "under color" of Illinois' agency fee statute is a reason why AFSCME is "liable to the party injured in an action at law" under Section 1983. It is not a reason for exempting AFSCME from damages liability, as the Appellees would have it. The Court should enforce Section 1983 as it is written and require AFSCME to repay to Janus the monies it wrongfully seized from him.

ARGUMENT

I. There Is No Statutory Reliance Defense to Section 1983 Liability.

It is a misnomer to say that Illinois and AFSCME seek a "good faith" defense to Section 1983. The defense they seek is unlike the good faith defense other appellate courts recognized to claims for abuse of court processes. *See infra* 10-13. Indeed, AFSCME argues (at 22) against a state of mind defense.

Illinois and AFSCME ask the Court to hold that private defendants are not liable for damages under Section 1983 if they "reasonably rely on existing state laws," State Br. 14; *see id.* at 4, 9, 10 (same or similar) or "acted in reliance on a presumptively valid statute," AFSCME Br. 7; *see id.* at 14, 15, 19, 26, 27, 28, 37 (same or similar). The Appellees' slightly different phraseology means the same thing, given existing state laws are presumptively valid. Accurately described, the Appellees seek a "statutory reliance" defense to Section 1983.

A. A statutory reliance defense conflicts with Section 1983's text.

1. AFSCME and the State do not point to anything in Section 1983's text that supports the defense they seek. Nor could they. The proposition that every private person who relies on existing state law to deprive others of their constitutional rights is *not* liable to injured parties in an action for damages conflicts with Section 1983's requirement that "every person" who acts under color of state law to deprive others of their constitutional rights "*shall be* liable to the party injured in an action at law." 42 U.S.C. § 1983 (emphasis added).

Appellees' statutory reliance defense is especially incompatible with Section 1983's requirement that defendants act "under color of any statute, ordinance, regulation, custom, or usage, of any State." *Id.* There is little to no difference between a defendant acting "under color of any statute," *id.*, and "rely[ing] on existing state statutes," State Br. 9. The Appellees thus want to effectively make a statutory *element* of Section 1983 an affirmative *defense* to Section 1983.

A defendant acting under a state statute cannot be both an element of and a defense to Section 1983. That makes no sense as a matter of statutory interpretation, and would render the statute self-defeating. Private defendants that act "under color of any statute," as required by Section 1983, would be shielded from liability *because* they acted under color of a state statute. The Appellees' statutory reliance defense cannot be reconciled with Section 1983's color-of-state-law element.

2. The State exaggerates Janus' statutory argument, claiming (at 11) it permits no immunities or defenses. That is not so. Janus identified the statutory basis for immunities in his opening brief. They are accorded when 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." Opening Br. 7 (quoting *Richardson v. McKnight*, 521 U.S. 399, 403 (1997)). That cannot serve as the basis for a statutory

reliance defense. Appellees cite no evidence that such a defense was firmly established before 1871. *See* Opening Br. 9. Private defendants generally lack qualified immunity. *Id*. at 7-8. AFSCME concedes (at 18) it lacks immunity.[1]

Legitimate defenses also have a statutory basis. The statute of limitations defense to Section 1983 is based on 42 U.S.C. § 1988, which "endorses the borrowing of state-law limitations provisions where doing so is consistent with federal law." *Owens v. Okure*, 488 U.S. 235, 239 (1989). Other defenses are based on the elements of the constitutional "deprivation" being alleged under Section 1983. *See* Opening Br. 17-18. For example, malice and lack of probable cause are material to due process claims analogous to malicious prosecution and abuse of process. *See Wyatt,* 504 U.S. at 164-65. A defendant's state-of-mind, however, is not a defense to a First Amendment, compelled speech deprivation under *Janus*. *See* Opening Br. 14-15.

AFSCME argues (at 22 n.7) that affirmative defenses often are not mentioned in a statute's text. That is true as far as it goes. But the proposition does not mean courts are free to create affirmative defenses to federal statutes. As the Supreme Court held in *Rehberg v. Paulk*, courts "do 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." 566 U.S. 356, 363 (2012).

---

[1] AFSCME counter-intuitively argues (at 17) that its lack of immunity is a reason to grant it a defense similar to qualified immunity. That gets things backwards. It makes little sense to find defendants not entitled to qualified immunity nonetheless entitled to substantively the same thing, but under a different name. That would render the qualified immunity analysis largely superfluous. AFSCME's lack of immunity to Section 1983 damages liability is reason to find AFSCME liable for damages under the statute.

The same is true of affirmative defenses to Section 1983. They cannot be created from the ether, but must have a statutory basis. A statutory reliance defense not only lacks such a basis, but conflicts with the statute's mandate that "'[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.'" *Id.* at 361 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

B. A statutory reliance defense is inconsistent with equitable principles that injured parties be compensated for their losses.

1. AFSCME argues (at 17) that fairness to defendants who rely on existing laws justifies recognizing a statutory reliance defense to Section 1983. That rationale is inadequate on its own terms. "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

Lemon v. Kutzman, 411 U.S. 192 (1973) does not support a contrary conclusion. That case concerned a court's discretion to shape an appropriate equitable remedy. *Id.* at 200. To state the obvious, equitable interests influence the scope of equitable remedies. Equity generally, however, cannot justify refusing to enforce an unambiguous statutory command, such as that stated in Section 1983.

2. In any case, it is not fair to have Janus pay for AFSCME's and Illinois' unconstitutional conduct. Nor is it equitable to deprive victims of constitutional violations relief for their injuries. In *Owen*, the Supreme Court held it would be an "injustice" to extend good-faith immunity to municipalities for this reason: because "many victims of municipal malfeasance would be left remediless if the city were also allowed

to assert a good faith defense." 445 U.S. at 651. AFSCME and the State have no answer to *Owen's* holding on this point.

In fact, AFSCME ignores victims' interests entirely. It never mentions the inequity of innocent parties having to bear losses caused by another party's unconstitutional conduct. The interests of injured parties count for nothing in AFSCME's one-sided analysis, even though Section 1983 exists to vindicate their interests.

AFSCME decries only that it is unfair to require it and other defendants to compensate parties they injured when using existing statutes. But that is not unfair even taken in isolation. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 654. And it is especially not unfair here given that AFSCME knowingly acted at its own risk. AFSCME knew the constitutionality of Illinois' agency fee statute had been called into question, yet it persisted in seizing fees from Janus and his co-workers. *See* Opening Br. 21-22.

When both Janus' and AFSCME's interests are weighed together, the balance of equities overwhelmingly favors requiring AFSCME to return to Janus the monies it unconstitutionally seized from him. *Owen* is again on point. There, the Supreme Court held that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm rather "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 654. The same is true here.

3. AFSCME's contention (at 17) that it violates principles of equality to hold private actors liable for damages, that public actors avoid because of immunities, was refuted in the opening brief (at 12). As discussed, an organization like AFSCME is unlike an individual public official who has qualified immunity. AFSCME is most like local governmental organizations (municipalities) that lack qualified immunity and are liable for damages under Section 1983. *Owen*, 445 U.S. at 654. AFSCME does not dispute this point, but avers "that the policy reasons for granting qualified immunity to public officials but denying it to municipalities . . . are specific to the qualified immunity issue" AFSCME Br. 21 n.6. Even if true, the point remains that holding AFSCME liable for damages would treat it the same as its most analogous government counterpart. Principles of equality favor enforcing Section 1983.

4. The State offers another policy argument for a statutory reliance defense: "'encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity.'" State Br. 10 (quoting *Wyatt*, 504 U.S. at 179-80 (Rehnquist, C.J., dissenting)). But the defense would not have that effect. Individuals will not worry about relying on a law if they have no reason to doubt its validity. Individuals will worry about relying on a law only if they realize it is likely unconstitutional.

The actual effect of a statutory reliance defense will be to encourage parties to engage in potentially unconstitutional conduct by diminishing their liability for so doing. Here, AFSCME's belief that its defense would shield it from paying damages to employees likely led it to spurn a proposal to place disputed agency fees in escrow

and to keep seizing fees from Janus and his co-workers until the day of the Supreme Court's decision. *See* Opening Br. 2, 11.

Section 1983 must be construed to deter constitutional violations, not to encourage them. As the Court stated in *Owen*, "[t]he 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." 445 U.S. at 651–52. Private defendants should face the same incentive.

C. A statutory reliance defense to Section 1983 would undermine the statute's remedial purposes.

1. The defense the Appellees want this Court to recognize is sweeping in nature. It would be available to all "private-party defendants," AFSCME Br. 7, and logically also to municipalities.[2] The defense could be raised against any constitutional claim brought under Section 1983 for damages, from racial discrimination claims to First Amendment claims. The defense is broad in scope: defendants that reasonably rely on existing state laws do not have to pay damages to any parties they injure.

This statutory reliance exemption to Section 1983 liability would largely swallow the statutory rule because an element of Section 1983 is that defendants must act under color of state law. *See infra* 4. Nearly all defendants who act under color of

[2] There is no reason why municipalities could not raise the defense, if it existed. Cities and counties can rely on existing state statutes just like a private party.

state law will be relying "on existing state law." State Br. 14. Appellees' statutory reliance defense would render Section 1983 self-defeating.

The statutory reliance defense the Appellees want this Court to adopt is unlike the "good faith" defense that appellate courts recognized to due process claims analogous to malicious prosecution and abuse of process. Those courts found that malice and lack of probable cause were elements to those types of claims. *See Duncan v. Peck*, 844 F.2d 1261, 1266-67 (6th Cir. 1988); *Wyatt v. Cole*, 994 F.2d 1113, 1119–21 (5th Cir. 1993); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996). These two elements, in whole or in part, on a defendant's *subjective* state of mind. *See Duncan*, 844 F.2d at 1266; *Wyatt*, 994 F.2d at 1120; *Jordan*, 20 F.3d at 1277; *Pinsky*, 79 F.3d at 312–13; *see also Wyatt*, 504 U.S. at 172, 174 (Kennedy, J., concurring).

AFSCME and the State do not seek a defense only to claims arising from abuse of judicial processes, but a defense to all Section 1983 claims. Their defense does not turn on subjective state of mind, but solely on whether a defendant objectively relied on a statute. *See* AFSCME Br. 23, 28. In other words, Appellees seek the functional equivalent of qualified immunity. That is not the defense the Justices in *Wyatt* suggested or that Second, Third, Fifth, and Sixth Circuits recognized. Indeed, the Sixth Circuit found it would "be significantly distorting the common law defenses to malicious prosecution and wrongful attachment torts by substituting an objective test for good faith for the common law's subjective standard." *Duncan*, 844 F.2d at 1267.

The broad defense the Appellees seek to Section 1983 would undermine the statute's remedial purposes and deprive countless victims of constitutional violations relief for their injuries. The Court should decline to recognize the defense. Rather, it should enforce Section 1983's statutory requirement that every person who acts under color of state law to deprive others of their constitutional rights—which here means AFSCME—is liable to the injured party in an action for damages.

II. No Circuit Court Has Recognized a Statutory Reliance Defense to Section 1983 Damages Claims.

A. Justices in *Wyatt* and several circuit courts found malice and lack of probable cause to be material to Section 1983 claims for malicious prosecution and abuse of process.

AFSCME concedes (at 14) that the Supreme Court has never recognized a good faith defense to Section 1983. Indeed, "*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense." *Richardson*, 521 U.S. at 413. The State appears to agree with Janus that the Justices in *Wyatt* found malice and lack of probable cause to be material to Section 1983 claims analogous to the torts of malicious prosecution and abuse of process. *Compare* State Br. 7-8 & Opening Br. 16-18. That, however, is where the parties' agreement ends.

AFSCME and the State assert that, in the wake of *Wyatt*, several appellate courts pronounced that all private defendants can assert a statutory reliance defense to any Section 1983 claim. AFSCME Br. 16; State Br. 9. That is simply not so. Even a cursory review of those decisions reveals that, with one exception, the courts held that malice

and lack of probable cause are elements to due process deprivations arising from malicious prosecution or abuses of court processes. *See Duncan*, 844 F.2d at 1267 (recognizing a "common law good faith defense to malicious prosecution and wrongful attachment cases" under which "a plaintiff must show, among other things, that the defendant abused the judicial process by pursuing the case with malice and without probable cause"); *Wyatt*, 994 F.2d at 1119–20 (holding that "those invoking ex parte prejudgment statutes, should not be held liable . . . absent a showing of malice and that they either knew or should have known of the statute's constitutional infirmary" because the Supreme Court "identified malicious prosecution and abuse of process as the common-law causes of action most analogous to Wyatt's claim"); *Jordan,* 20 F.3d at 1276 (agreeing with the Fifth Circuit's decision in *Wyatt* and clarifying that "subjective" malice must be shown); *Pinsky*, 79 F.3d at 312–13 (holding that because the plaintiff's claim "falls within the definition of malicious prosecution" the plaintiff must "demonstrate want of probable cause, malice and damages."); *but see Clement v. City of Glendale*, 518 F.3d 1090, 1297 (9th Cir. 2008) (not specifying the scope of, or the prerequisites for, a good faith defense).[3] Not one of these courts recognized a blanket, statutory reliance defense to all Section 1983 claims.

[3] *Clement* held a towing company that towed a vehicle pursuant to police instructions could assert a good faith defense because it was following police instructions and had no way to know the police did not provide notice to the vehicle's owner. 518 F.3d at 1097. The Ninth Circuit did not identify its basis for recognizing the defense. The court also did not identify the defense's scope or its prerequisites. *Clement* is too ambiguous to support the sweeping proposition that the Ninth Circuit recognized a statutory reliance defense to all Section 1983 claims.

In fact, these courts did not recognize a "defense" of any sort. The courts held malice and lack of probable cause are *elements* of due process deprivations arising from abuses of judicial processes that *plaintiffs* bear the burden of proving. *See Duncan*, 844 F.2d at 1267; *Wyatt*, 994 F.2d at 1119–20; *Jordan*, 20 F.3d at 1277; *Pinsky*, 79 F.3d at 312. The Justices in *Wyatt* also all "agreed that plaintiffs, not defendants, bore the burden of proof on the questions of malice and probable cause." *Wyatt*, 994 F.2d at 1119. As Justice Kennedy stated, "it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." *Wyatt*, 504 U.S. at 172 (Kennedy, J., concurring) (emphasis in original).[4] Chief Justice Rehnquist agreed, and explained that "[r]eferring to the defendant as having a good-faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id.* at 176 n.1 (Rehnquist, C.J., dissenting).

The Justices in *Wyatt* and the courts in *Pinsky*, *Jordan*, *Wyatt*, *Duncan*, and *Clement* did not find that every private defendant that relies on a state statute is exempt

[4] AFSCME makes much of Justice Kennedy's citation to *Birdsall v. Smith*, 122 N.W. 626 (Mich. 1909). But it supports Janus' position. *Birdsall* upheld a decision finding that a plaintiff alleging *malicious prosecution* failed to prove the prosecution lacked probable cause. *Id.* at 627. Justice Kennedy cited to *Birdsall* to support the proposition that, often, "lack of probable cause can *only* be shown through proof of subjective bad faith." *Wyatt*, 504 U.S. at 174 (emphasis in original). This shows that Justice Kennedy was discussing the particular elements of malicious prosecution and abuse of process claims in his concurring opinion. Justice Kennedy was not arguing for a statutory reliance defense to all Section 1983 claims.

from paying damages under Section 1983, as the Appellees would have it. The *Wyatt* Justices and Second, Third, Fifth, and Sixth Circuits found only that malice and lack of probable cause are elements to Section 1983 claims arising from malicious prosecution and abuse of judicial processes, and nothing more.

B. A First Amendment compelled speech claim is not analogous to the torts of malicious prosecution or abuse of process.

The State argues that those decisions nevertheless support its statutory reliance defense because, according to the State, "[a]ny Section 1983 claim alleging a misuse of government processes will be analogous to malicious prosecution and abuse of process for the reasons given in *Wyatt*." State Br. 13; *see* AFSCME Br. 25-26 (similar). The contention fails both generally and as applied to First Amendment claims.

First, all constitutional deprivations inflicted by private parties are not analogous to abuse of process. "The tort of abuse of process requires misuse of the *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (emphasis added). That means an action literally taken by a court. *See Rubloff Development Grp. Inc., v. SuperValu, Inc.*, 863 F. Supp. 2d 732 (N.D. Ill. 2012).

The abuse of process tort does not extend to misuses of any other government processes. For example, "[m]isuse of an administrative proceeding—even one that is quasi-judicial—does not support a claim for abuse of process." *Tucker*, 515 F.3d at 1037; *see Kirchner v. Greene*, 691 N.E.2d 107, 117 (Ill. App. 1998) (holding an abuse of process claim cannot be raised against conduct related to administrative law procedures "for the simple reason that no court process is involved and, thus, it is axiomatic that there can be no abuse of process."). Use of a grievance procedure also does

not support an abuse of process claim. *Haynes v. Dart*, 2009 WL 590684, at **4-5 (N.D. Ill. Mar. 6, 2009). Only misuse of the judicial process gives rise to the tort.

It is likely for this reason that *Wyatt* and almost all appellate decisions that recognized a so-called good faith defense concerned uses of court processes. *See Wyatt*, 504 U.S. at 160 (state court complaint in replevin); *Duncan*, 844 F.2d at 1267 (state court prejudgment attachment order); *Jordan*, 20 F.3d at 1276–77 (state court judgment and garnishment process); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996) (federal court ex parte seizure order); *Pinsky*, 79 F.3d at 312–13 (state court prejudgment attachment procedure). A private defendant unlawful use of any state process is not analogous to an abuse of process tort.

Second, Janus' First Amendment claim bears no relation to an abuse of process, and not only because it does not involve a court process. The wrongs the claims redress are completely different. The tort of abuse of process exists to protect the integrity of the judicial process and to protect litigants from harassment. *See* 8 Am. Law of Torts § 28:32 (2019). Compelled speech violates the First Amendment because it offends individual autonomy and distorts the marketplace of ideas. *See Janus*, 138 S. Ct. at 2464.

The elements of the two claims also are distinct. A First Amendment claim for compelled subsidization of union speech requires establishing that a state deducted and a union collected dues or fees from individuals without their consent. *Id.* at 2486. "Under Illinois law, a plaintiff pleading abuse of process must establish the existence of both 'an ulterior purpose or motive for the use of regular court process,' and 'an act

in the use of process not proper in the regular prosecution of a suit.'" *Evans v. West*, 935 F.2d 922 (7th Cir. 1991) (quoting *McGrew v. Heinhold Commodities, Inc.*, 147 Ill. App. 3d 104, 111 (1986)). Stated in other words, a plaintiff must show malice and lack of probable cause. *See Wyatt*, 504 U.S. at 172 (Kennedy, J. concurring).

There is no justification for importing this tort's elements into Janus' First Amendment claim. In fact, there is no justification for importing the elements of or defenses to any common law tort into Janus' claim because, as explained in the opening brief (at 19-20), a deprivation of First Amendment rights caused by compelled subsidization of speech has no common law analogue.

C. The district court opinions AFSCME cites identified no cognizable basis for a statutory reliance defense to Section 1983.

AFSCME cites (at 12 n.1) a string of district court decisions holding that unions have a good faith defense to Section 1983 damages liability. What most of those decisions have in common is that they do not identify any statutory basis for the ostensible defense. The courts tersely declare the defense to exist because other courts (supposedly) said it exists, and proceed from there. The few decisions that cite a rationale for the defense cite to one already refuted here.[5] These district court decisions have little to no persuasive value on the threshold question before this Court: is relying on state law a defense to Section 1983 liability?

[5] For example, *Mooney v. Illinois Edu. Ass'n*, 372 F. Supp. 3d 690, 699 (C.D. Ill. 2019) stated it would be anomalous to grant public actors immunities while denying private actors a defense. Among other things, the rationale ignores that government actors analogous to unions have no immunity to liability. *See* Opening Br. 12.

It is not for the reasons discussed. A defendant acting under color of state law *establishes* liability under Section 1983. It is not a defense to liability. Here, that AFSCME acted under Illinois' agency fee statute when it deprived Janus of his First Amendment rights is reason why AFSCME is "liable to the party injured in an action at law," i.e., to Janus. 42 U.S.C. § 1983. It is not a reason to excuse AFSCME from compensating Janus for his losses. The Court should reject Appellees' statutory reliance defense as incompatible with Section 1983.

III. It Was Unreasonable for AFSCME to Rely on Illinois' Agency Statute Because AFSCME Knew or Should Have Known That a Supreme Court Decision Holding It Invalid Would Be Retroactive.

In the alternative, if a statutory reliance defense to Section 1983 did exist, AFSCME would find no shelter beneath it. *See* Opening Br. 21-24. Supreme Court decisions are retroactive. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Consequently, it was not reasonable for AFSCME to believe that relying on Illinois' agency statute to take fees from Janus would allow AFSCME to *keep* those fees if the statute were held unconstitutional. AFSCME should have known that it would have to repay those fees if the Supreme Court ruled in Janus' favor.

In response, AFSCME contends (at 36) that Supreme Court precedent "do[es] not determine whether a new rule articulated by the Court . . . is to be applied 'retroactively' to conduct that occurred under the old rule." AFSCME Br. 36. To the contrary, "*Harper* . . . held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive' applying it, for example, to all pending cases,

whether or not those cases involve predecision events." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995).[6]

The Supreme Court in *Reynoldsville Casket* not only reiterated that its decisions must be applied retroactively, but further held that courts cannot avoid retroactive application by fashioning contrary equitable remedies based on a party's reliance on overruled law. *Id*. at 753-54. That is what AFSCME seeks from this Court to circumvent *Janus'* retroactive effect: an equitable defense under which reliance on an invalidated statute and overruled case law is a bar to damages.

AFSCME's argues (at 37) that *Reynoldsville Casket* "does not preclude the application of some 'independent legal basis . . . for denying relief.'" AFSCME Br. 37 (quoting *Reynoldsville Casket*, 514 U.S. at 759). AFSCME omits part of the quote. The full quote is that courts can find "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief." *Reynoldsville Casket*, 514 U.S. at 759. AFSCME's defense is predicated on defying retroactivity. According to AFSCME, the Supreme Court's decision holding its fee seizures to be unconstitutional does not render AFSCME liable for damages because its fee seizures were lawful before *Janus* was decided. This is the same thing as saying that *Janus* does not retroactively apply to AFSCME's fee seizures, but under the guise of a remedy. *Reynoldsville Casket* precludes this type of end-run around retroactivity.

---

[6] Indeed, "retroactivity [i]s an inherent characteristic of the judicial power." *Harper*, 509 U.S. at 107 (Scalia, J., concurring). It is "the province and duty of the judicial department to say what the law *is*," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), not what the law will be going forward.

Given the retroactive nature of Supreme Court decisions, AFSCME had no reasonable basis for believing it could keep the fees it was seizing from Janus if the Supreme Court held those fee seizures to be unconstitutional. AFSCME does not dispute the principle that wrongfully seized property must be returned to its rightful owner, but contends (at 27 n.9) that there "exists no chattel to be returned" because Janus seeks "not an equitable remedy requiring return of property, but rather damages."

The argument is galling, because AFSCME refused to place disputed agency fees into escrow accounts while this litigation was pending. Opening Br. 2. AFSCME is relying on its own deliberate choice to seize and to spend Janus' money during the pendency of this litigation to justify not having to repay him.

AFSCME's attempt to distinguish legal and equitable remedies also is remarkable given its statutory reliance defense to paying damages supposedly is based on fairness and equity. If equity justifies recognizing such a defense to Section 1983 (which it does not), then equity also controls its parameters. And equity favors requiring that AFSCME pay back the monies it wrongfully took from Janus.

Courts often require that defendants repay monies illegally seized from individuals, such as wrongfully assessed taxes and fines. *See Harper*, 509 U.S. at 98-99; *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).[7] AFSCME contends (at 21 and 27 n.9) it should not have to repay Janus because it provided him with bargaining services in exchange for the fees it seized. The Supreme Court rejected that rationale for compulsory union fees in *Janus*, 138 S. Ct. at 2466-67. Under *Janus*, AFSCME was not entitled to any of Janus' earned wages. AFSCME should have to repay all the monies it unconstitutionally seized from him.

CONCLUSION

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

Dated: July 3, 2019

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

Jeffrey M. Schwab
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
(312) 263-7668
jschwab@libertyjusticecenter.org

Counsel for the Appellant

[7] AFSCME asserts (at 36-37) that the Supreme Court did not expressly state Janus should be awarded damages. The Court reversed a judgment dismissing Janus' complaint and "remanded [the case] for further proceedings consistent with this opinion." *Janus*, 138 S. Ct. at 2486. A district court judgment granting Janus legal relief to which he is entitled under Section 1983 is consistent with the opinion.

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 5,095 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 July 3, 2019, I electronically filed Appellants' Reply 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