No. _____

IN THE

Supreme Court of the United States

BLAKE LEITCH, SHERI LASH, BETH POLLO, HEIDI PARENT, JIM SODARO, TONI HEAD, CONNIE AMETER, TAIRANCE MCGEE, AND JACK DEHEVE,

PETITIONERS,

V.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 6, 2021

QUESTION PRESENTED

Section 1983 provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives a citizen of a constitutional right "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.

Petitioners are current and former employees of the State of Illinois who were compelled to pay agency fees to AFSCME Council 31, under color of Illinois state law, in violation of their First Amendment rights under *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

The question presented is whether there is a "good faith defense" to 42 U.S.C. § 1983 that shields a defendant from damages liability for depriving citizens of their constitutional rights if the defendant acted under color of a law before it was held unconstitutional?

PARTIES TO THE PROCEEDING

Petitioners Blake Leitch, Sheri Lash, Beth Pollo, Heidi Parent, Jim Sodaro, Toni Head, Connie Ameter, Tairance McGee, and Jack DeHeve are natural persons and citizens of the State of Illinois. They are, or at one time were, employees of the State of Illinois.

Respondent AFSCME Council 31 is a union representing public employees of the State of Illinois.

RULE 29.6 STATEMENT

As Petitioners are natural persons, no corporate disclosure is required under Rule 29.6.

STATEMENT OF RELATED CASES

The proceedings in other courts that are directly related to this case are:

- *Leitch v AFSCME Council 31,* No. 20-1379, United States Court of Appeals for the Seventh Circuit. Judgment entered February 3, 2021.
- *Leitch v AFSCME Council 31,* No. 19-cv-02921, United States District Court for the Northern District of Illinois. Judgment entered January 30, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS BELOW

The United States District Court for the Northern District of Illinois' unreported order of January 30, 2020, dismissing Petitioners' complaint is reproduced at App. 3–4. The United States Court of Appeals for the Seventh Circuit summarily affirmed the lower court's judgment on February 3, 2021, in an unreported order reproduced at App. 1–2.

JURISDICTION

The Seventh Circuit issued its summary affirmance on February 3, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

Section 1983, 42 U.S.C. § 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.

STATEMENT OF THE CASE

Petitioners are or were Illinois state employees who were forced to pay agency fees to AFSCME Council 31 against their will. App. 5–7. On June 27, 2018, this Court in *Janus v. AFSCME Council 31*, held these fee seizures violated employees' First Amendment rights. 138 S. Ct. 2448, 2486 (2018). The Court overruled its precedent that allowed unions to seize agency fees from employees—*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—and found Illinois' agency fee statute unconstitutional. *Janus*, 138 S. Ct. at 2486. The Courts also lamented the "considerable windfall that unions have received under *Abood*." 138 S. Ct. at 2486.

Petitioners, individually and on behalf a class of employees forced to pay agency fees to AFSCME Council 31, filed this action under 42 U.S.C. § 1983 seeking the return of the monies that was seized from them in violation of their First Amendment rights. App. 5. While the Petitioners' case was pending in the district court, the Seventh Circuit issued its decision in *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus* II"), cert. denied 19-1104 (Jan. 25, 2021). In that case, the Seventh Circuit found that a "good faith defense" to Section 1983 shielded AFSCME Council 31 from paying damages to Mark Janus for depriving him of his constitutional rights.

AFSCME Council 31 thereafter moved to dismiss the Petitioners' complaint on the grounds that the Sev-

enth Circuit's decision in *Janus II* controlled the outcome of the case. *Leitch v AFSCME, Council 31*, No. 19-cv-02921, Mot. to Lift Stay and Dismiss, Dkt. #21 (filed Jan. 7, 2020). On January 30, 2020, the district court granted AFSCME Council 31's motion to dismiss. App. 3–4. On February 3, 2021, the Seventh Circuit affirmed that decision, stating that "the district court correctly dismissed the case in light of this court's decision in [*Janus* II]." App. 1–2. The Seventh Circuit court acknowledged that "Appellants have preserved their position for review by the Supreme Court." *Id*. Petitioners now seek the Court's review.

REASONS FOR GRANTING THE PETITION

This case is one of many in which employees who had agency fees seized from them in violation of their First Amendment rights seek damages for their injuries. Yet, a number of lower courts have now denied victims of agency fees seizures relief for their injuries on the grounds that there exists a general good faith defense to Section 1983 liability.

This Court has never recognized a good faith defense to Section 1983. However, three times this Court has raised, but then not decided, the question of whether there exists such a defense. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt v. Cole,* 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 n.23 (1982). The Court should finally resolve this important question to disabuse the lower courts of the rapidly spreading notion that a defendant acting under color of a statute before it is held unconstitutional is a defense to Section 1983.

I. A categorical "good faith" defense is not the claim-specific defense suggested by this Court in *Wyatt v. Cole*.

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 of different constitutional deprivations vary considerably. "In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). "Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id*. "But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Id*. at 921.

The issue in *Wyatt* was whether a private defendant who used an *ex parte* replevin statute to seize the plaintiff's property without due process of law was entitled to qualified immunity in a Section 1983 claim. 504 U.S. at 161. The Court recognized that the plaintiffs' claims were analogous to "malicious prosecution and abuse of process," and 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." *Id*. at 164–65; *see id*. at 172–73 (Kennedy, J., concurring) (similar). The *Wyatt* 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 . . . ." 504 U.S. at 165.

This was so because the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167.

Wyatt 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. But, contrary to the conclusions of the Seventh Circuit and a growing number of lower courts, this potential defense was not a categorical defense to all Section 1983 damages claims. Rather, the good faith defense to which the *Wyatt* Court was referring was a defense to the malice and probable elements of the specific due process claim at issue in that case. This is clear from all three opinions in *Wyatt*.

First, Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it was a "misnomer" to even call it a defense because "under the common law, it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice and without probable cause." 504 U.S. at 176 n.1 (Rehnquist, C.J., dissenting). "Referring 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*.

Second, Justice Kennedy, in his concurring opinion joined by Justice Scalia, agreed that "it is something of a misnomer to describe the common law as creating a good faith defense; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." 504 U.S. at 172. Justice Kennedy further explained that "if the plaintiff could prove subjective bad faith on the part of the defendant, he had gone far

towards proving both malice and lack of probable cause." *Id*. at 173. Indeed, often "lack of probable cause can *only* be shown through proof of subjective bad faith." Id. at 174 (emphasis in original) (citing *Birdsall v. Smith*, 122 N.W. 626 (Mich. 1909) (holding that a plaintiff alleging malicious prosecution failed to prove the prosecution lacked probable cause)).

Third, Justice O'Connor's majority opinion in *Wyatt* recognized that the dissenting and concurring opinions were referring to a defense to the malice and probable cause elements of claims analogous to malicious prosecution cases. The majority opinion found that "[o]ne could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs *bringing an analogous suit* under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action." 504 U.S. at 167 n.2 (emphasis added).

In short, the *Wyatt* Court suggested that there may be a *claim-specific* "good faith" defense to Section 1983 actions in which malice and lack of probable cause are elements of the alleged constitutional deprivation. Contrary to the Seventh Circuit and other lower courts, the *Wyatt* Court was not suggesting that there exists a *categorical* "good faith" defense in which a defendant's good faith reliance on state law is a defense to all constitutional claims for damages brought under Section 1983. There is no basis for such a sweeping defense to Section 1983.

The claim-specific "good faith" defense suggested in *Wyatt* is no bar to Petitioners' cause of action because, quite simply, malice and lack of probable cause are not

elements of, or a defense to, a First Amendment deprivation. In general, "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). 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. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that Section 1983 "contains no independent state-of-mind requirement.")

The limited good faith defense members of this Court actually suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights by seizing agency fees from them. The Court should grant review to clarify what it intended in *Wyatt*.

II. A categorical "good faith" defense conflicts with the text and purpose of Section 1983.

Section 1983 states, in relevant part, that "*[e]very* person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives a citizen of a constitutional right "*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 (emphasis added). Section 1983 means what it says: "Under the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

The proposition that a defendant's good faith reliance on a state statute exempts it from Section 1983 damages liability has no basis in Section 1983's text. In fact, the proposition conflicts with the statute in at least two ways. First, it cannot be reconciled with the statute's mandate that "every person"—not some persons, or persons who acted in bad faith, but "every person"—who deprives a party of constitutional rights under color of law "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.

Second, an element of Section 1983 is that a defendant must act "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. The Seventh Circuit and other lower courts have turned Section 1983 on its head by holding that persons who act under color of a not yet invalidated state law to deprive others of a constitutional right are *not* liable to the injured parties in an action for damages. *Janus II*, 942 F.3d at 362. The courts have effectively declared a statutory *element* of Section 1983—that defendants must act under color of state law—to be a *defense* to Section 1983. Under the decisions of the Seventh Circuit and other lower courts, acting under color of a state law yet to be held unconstitutional is now a potential defense to all Section 1983 damages claims.

But a defendant acting under color of a state statute cannot be both an element of and a defense to Section 1983. That would render the statute self-defeating: any private defendant that acted "under color of any statute," as Section 1983 requires, would be shielded from liability because it acted under color of a state statute.

Here, the fact that AFSCME Council 31 acted under color of Illinois' agency fee law when it deprived Petitioners of their constitutional rights is not exculpatory, but a reason why the unions are liable for damages under Section 1983. This conclusion is consistent with the purpose of Section 1983, which is to provide a federal remedy to persons deprived of constitutional rights by parties that act under color of state law. *See Owen v. United States*, 445 U.S. 622, 650–51 (1980). "By creating an express federal remedy, Congress sought to 'enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" *Id*. (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). The proposition that a defendant acting under authority of an existing state law is exculpatory under Section 1983 inverts the purposes of the statute. *See Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262, 288–89 (3d Cir. 2020) (Phipps, J., dissenting)

The lack of any basis in Section 1983's text and history for a good faith defense distinguishes it from other recognized immunities or defenses to Section 1983, which have a statutory basis. Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg,* 566 U.S. at 363. Courts accord an immunity only 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." *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (cleaned up).

Unlike with immunities, "there is no common-law history before 1871 of private parties enjoying a good-

faith defense to constitutional claims." *Janus II*, 942 F.3d at 364; *see Diamond*, 972 F.3d at 288 (finding "[a] good faith defense is inconsistent with the history of the Civil Rights Act of 1871") (Phipps, J., dissenting); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018) (finding "[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."). The policy justifications for immunities generally are not applicable to private defendants. *Wyatt*, 504 U.S. at 164–167. Thus, unlike with recognized immunities, there is no justification for recognizing a good faith defense that defies Section 1983's statutory mandate that "[e]very person who, under color of any statute" deprives a citizen of a constitutional right "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983.

III. Policy interests in fairness and equality do not support a "good faith" defense, but weigh against recognizing it.

A. Courts cannot create defenses to Section 1983 based on policy interests in fairness and equality.

1. Most circuit courts that have recognized a categorical good faith defense to Section 1983 assert that policy interests in equality and fairness justify recognizing this defense. *See Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Janus II*, 942 F.3d at 366; *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 333 (2d Cir. 2020). This rationale is inadequate, even on its own terms, because courts cannot create defenses to federal statutes when they believe it is unfair to enforce the statute.

"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. Pension Fund*, 493 U.S. 365, 376 (1990). Statutes must be enforced as Congress wrote them. "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

This principle applies to Section 1983. "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). Thus, courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg,* 566 U.S. at 363. So too with the "fairness" justification for a "good faith" defense: courts cannot just invent defenses to § 1983 liability based on our views of sound policy.

Even if a policy interest in fairness could justify creating a defense to a federal statute like Section 1983—which it cannot—fairness to *victims* of constitutional deprivations would require enforcing Section 1983 as written. It is not fair to make victims of constitutional deprivations pay for the unions' unconstitutional conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental 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 that municipalities are not entitled to a

good faith immunity to Section 1983. The Court's equitable justifications for so holding are equally applicable here.

First, 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—not just Petitioners and other employees who had agency fees seized from them—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.

Second, the *Owen* Court 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." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, *whether committed in good faith or not*, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52 (emphasis added). The same rationale weighs against a "good faith" defense to Section 1983.

Third, the *Owen* 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." *Id.* at 654. So too here, when Petitioners' and

AFSCME Council 31's interests are weighed together, the balance of equities favors requiring the unions to return the monies they unconstitutionally seized from workers who chose not to join the union.

2. The same reasoning applies to the notion that principles of "equality" justify creating a defense for private defendants that is similar to the immunities enjoyed by some public defendants. *Danielson*, 945 F.3d, 1101; *see also Janus II*, 942 F.3d at 366; *Lee*, 951 F.3d at 392 n.2; *Wholean*, 955 F.3d at 333. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for qualified immunity.

Individual public servants enjoy qualified immunity for reasons not applicable to the unions 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. The fact that this interest does not apply to the unions is not grounds for creating an equivalent defense for them. "Fairness 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).

Neither fairness nor equality justify the reliance defense the Seventh Circuit and other lower courts have recognized. Rather, both principles weigh against carving out this exemption in Section 1983's remedial framework.

B. The reliance defense adopted by the Seventh Circuit and other lower courts conflicts with *Reynoldsville Casket*.

This Court's retroactivity jurisprudence makes clear that *Janus* has retroactive effect, and under-

mines the unions' asserted good faith defense. The reliance defense the Seventh Circuit and other lower courts have fashioned to defeat *Janus'* retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), the Court held that its decisions in civil cases were presumptively retroactive unless the Court specifically states that its decision is not to be applied retroactively. Nothing in *Janus* specifically states that the decision is not retroactive.

Two years later, in *Reynoldsville Casket Co. v. Hyde*, the Court held that courts cannot create equitable remedies based on a party's reliance on a statute before it was held unconstitutional by the Supreme Court. 514 U.S. 749, 759 (1995). *Reynoldsville Casket* concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at 751. This Court had earlier held the statute unconstitutional. *Id.* The Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed under the statute before the Court invalidated it. *Id.* at 751–52. The plaintiff asserted this was a permissible equitable remedy because she relied on the statute before it was held constitutional. *Id.* at 753 (describing the state court's remedy "as a state law 'equitable' device [based] on reasons of reliance and fairness."). The Court rejected that contention, holding the state court could not do an end run around retroactivity by creating an equitable remedy based on a party's reliance on a statute before it was held unconstitutional. 514 U.S. at 759.

The Seventh Circuit and other lower courts have engaged in just such an end run. They created an equitable defense based on a defendant's reliance on a statute this Court later deemed unconstitutional. The reliance defense the Seventh Circuit created conflicts with this Court's *Reynoldsville Casket* precedent.[1]

IV. The Court should resolve the conflict between the Third Circuit and several other Circuit Courts.

A majority of a Third Circuit panel in *Diamond v. Pennsylvania State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020) rejected the good faith defense now recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. There were three separate opinions in

[1] A "good faith" defense is unlike an immunity, which does not conflict with this Court's retroactivity doctrine because an immunity is a well-established legal rule grounded in "special federal policy considerations." *Reynoldsville Casket*, 514 U.S. at 759. A categorical good faith defense to Section 1983 is not well established. This Court has never recognized such a defense. Moreover, the good faith defense is an equitable defense predicated on a defendants' reliance interests. The equitable remedy at issue in *Reynoldsville Casket* was similarly based on "a concern about reliance [that] alone has led the Ohio court to create to what amounts to an ad hoc exemption to retroactivity." *Id*. This Court rejected that equitable remedy as inconsistent with its retroactivity doctrine.

Diamond. Judge Rendell, writing only for herself, recognized the affirmative good faith defense that several other circuit courts had recently adopted. *Id.* at 271.

Judge Fisher, concurring in the judgment, rejected the categorical good faith defense that Judge Rendell and some other circuits had recognized. *Id.* at 274 (Fisher, J., concurring in the judgment). Judge Fisher found that policy interests in fairness or equality could not justify creating this defense. *Id*. He also found that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to First Amendment claims for compelled speech. *Id.* at 280.[2]

Judge Phipps, dissenting, agreed with Judge Fisher that there is no good faith defense to Section 1983. *Id.* at 285 (Phipps, J. dissenting). According to Judge Phipps, "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id.* at 289. Judge Phipps continued, "Nor does our precedent or even principles of equality and fairness favor recognition of good faith as

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[2] While he rejected a good faith defense, Judge Fisher found an alternative limit to Section 1983 liability. According to Judge Fisher, prior to 1871, "[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision." *Id.* at 281. Judge Fisher concluded that Section 1983 incorporates this ostensible liability exception. *Id.* at 284. Judge Fisher's view is idiosyncratic. To Petitioners' knowledge, no court has adopted it.

an affirmative defense to a compelled speech claim for wage garnishments." *Id.*

Taking the three opinions together, a majority of the Third Circuit rejected the good faith defense recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. *See Doughty v. State Emples. Ass'n of N.H.*, 981 F.3d 128 (1st Cir. 2020); *Wholean*, 955 F.3d 332 (2d Cir. 2020); *Akers v. Md. State Educ. Ass'n*, No. 19-1524, 2021 U.S. App. LEXIS 6851 (4th Cir. Mar. 8, 2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Janus II*, 942 F.3d 365 (7th Cir. Nov. 5, 2019); *Danielson*, 945 F.3d 1096, 1101 (9th Cir. 2019). The Court should resolve this conflict amongst the circuit courts. This is especially true given that a good faith defense lacks any cognizable legal basis, just as Judges Fisher and Phipps recognized.

V. It is important that the Court finally resolve whether Congress provided a good faith defense to Section 1983.

In at least three prior cases the Court questioned, but then opted not to decide, whether Congress has provided private defendants with a good faith defense. *See Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at 169; *Lugar*, 457 U.S. at 942 n.23. It is time for the Court to finally resolve the matter.

The Court should end the growing misconception among lower courts that this Court in *Wyatt* signaled that private defendants should be granted a broad reliance defense to Section 1983 liability akin to qualified immunity. In the wake of *Janus*, a chorus of lower courts have interpreted *Wyatt* in that way. *See Danielson*, 945 F.3d at 1104 n.7 (collecting most cases). Yet *Wyatt* did not suggest such a defense, but merely sug-

gested that reliance on a statute could defeat the malice and lack-of-probable cause elements of claims analogous to malicious prosecution and abuse of process claims. *See supra* 4–7. The Court should explain what it meant in *Wyatt*.

It is important that the Court do so quickly because whether tens of thousands of victims of agency fee seizures can receive compensation hangs in the balance. District courts in roughly two dozen cases, most of which were filed as class actions, have held that a good faith defense exempts unions from having to pay damages to employees whose First Amendment rights the unions violated. *See Danielson*, 945 F.3d at 1104 n.7 (collecting most cases). Without this Court's review, such cases are likely doomed to failure and employees will be left without a remedy. The Court should grant review so the employees in these suits can recover a portion of the "windfall," *Janus*, 138 S. Ct. at 2486, of compulsory fees unions wrongfully seized from them.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. Unless rejected by this Court, defendants could raise a good faith defense against any constitutional claim actionable under Section 1983, including discrimination based on race, faith, or political affiliation. Courts would have to adjudicate this defense. More importantly, plaintiffs who would otherwise receive damages for their injuries will be remediless unless this Court rejects this new judicially created defense to Section 1983 liability.

The Court should grant review to clarify that immunities and defenses to Section 1983 must rest on a firm statutory basis, and that the new reliance defense recognized below lacks any such basis.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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