No. 20-1531

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Gary Mattos, Doris Beegle, Vickie Boggs, Bradley French, Carla Gurganus, Steven Hale, John Hill, Benjamin Ickes, Michelle Lambert, Jessica Merritt, John Meyers, Carole Miller, Melissa Potter, Jim Rieman, Laurie Rubin, Joyce Stoner, Russell Stott, and Larry Teets, on behalf of themselves and all those similarly situated,
Plaintiffs-Appellants,

v.

American Federation of State, County, and Municipal Employees, AFL-CIO, Council 3,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
No. 1:19-2539
Hon. George L. Russell, III

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Since Appellants (the "Workers") filed their Opening Brief, a panel majority of the Third Circuit rejected the argument AFSCME presents to this Court. *See Diamond v. Pa. State Educ. Ass'n*, Nos. 19-2812, 19-3906, 2020 U.S. App. LEXIS 27475 (3d Cir. Aug. 28, 2020). In dissent, Judge Phipps rejected the existence of a "good faith" defense under 42 U.S.C. § 1983. *Id.* at *46. In concurrence, Judge Fisher found no categorial statutory reliance defense to Section 1983. *Id.* at *33–34. He also recognized that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to a Frist Amendment compelled speech claim. *Id.* at *36. This Court should adopt the opinion of Judge Phipps from the Third Circuit and reject the "good faith" defense.

ARGUMENT

I. This Court should join the Third Circuit in rejecting AFSCME's proffered basis for a "good faith" defense.

A. In a recent decision, a majority of the Third Circuit rejected AFSCME's defense.

Appellee, American Federation of State, County, and Municipal Employees, AFL-CIO, Council 3 ("AFSCME" or the "Union"), makes much of the several circuit courts that have recently agreed with its position that a statutory reliance defense exists to § 1983. AFSCME Br. at 11-12. But AFSCME does not acknowledge that a

majority of a panel on the Third Circuit declined to adopt AFSCME's defense. *Diamond*, 2020 U.S. App. LEXIS 27475. Since this Court has never ruled on the issue, it should look to the opinions in *Diamond* for persuasive guidance.

Like this case, *Diamond* concerned the question of whether public sector unions were liable for fees they collected from non-members prior to *Janus*. *See Id.* at *9-12. Judge Rendell, writing only for herself, recognized the affirmative "good faith" defense that AFSCME asks this Court to recognize. *Id*. at *20. According to Judge Rendell, this affirmative defense was earlier recognized by the Third Circuit in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994) and is predicated on policy interests in equality and fairness or, alternatively, on an analogy to the common law tort of abuse of process. *Id.* at *15, and n. 3–4. In this Circuit, however, there are no earlier precedents suggesting the existence of a "good faith" defense to a § 1983 claim.

Judge Fisher, concurring in the judgment, disagreed that *Jordan* controlled and rejected the categorical "good faith" defense that Judge Rendell recognized. *Id.* at *34–35. Judge Fisher found that policy interests in fairness or equality could not justify creating this defense. *Id*. at *30. 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 *37. In these findings, Judge Fisher declined to adopt AFSCME's stated defense. *Id.* at *30, *35-36. The "general view"

prior to the enactment of §1983 in 1871, was that an unconstitutional law was no law at all, and he agreed that this view comports with the Workers' characterization of recent U.S. Supreme Court law on the retroactivity of its constitutional pronouncements. *Id.* at *37. While he declined to adopt a "good-faith" reliance defense, Judge Fisher did find an alternative limit to § 1983 liability based on an exception to the general rule on retroactivity. Under the pre-1871 common-law, according to Judge Fisher, "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 *22. Judge Fisher then noted that an exception to that exception existed for payments made involuntarily. *Id.* at *41. But, remarkably, he found that the payments taken out of the workers' paychecks against their will were somehow made voluntarily. *Id.* at *45.

Judge Phipps, dissenting, agreed with Judge Fisher that there is no "good faith" defense to § 1983, *id.* at *47, and that principles of equality and fairness could not justify such a defense. *Id.* at *56. 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 *57.

However, contrary to Judge Fisher, Judge Phipps found it "immaterial that no

pre-1871 cause of action permitted recovery for voluntary payments that were subsequently declared unconstitutional" because "the Civil Rights Act of 1871 established a new cause of action in part to provide 'a remedy where state law was inadequate.'" *Id.* at *52 (quoting *Monroe v. Pape*, 365 U.S. 167, 173 (1961), overruled on other grounds by *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1977)). Moreover, contrary to Judge Fisher, Judge Phipps recognized that "the agency fee payments at issue here were not voluntary—they were wage garnishments that were paid to unions." *Id*. Thus, Judge Phipps did "not see the common law as limiting the scope of a § 1983 claim for compelled speech — either through a good faith affirmative defense or through a separate limitation on the statutory cause of action." *Id.* at *52.

Judge Phipps' and Fisher's opinions persuasively repudiate the purported grounds for carving a "good faith" defense into § 1983. Policy interests in equality and fairness cannot justify creating a defense to § 1983's statutory mandate. *Id*. *30 (Fisher, J., concurring in the judgment); *id.* at *56 (Phipps, J., dissenting). Nor do analogies to common law torts, for "no party identifies a pre-1871 case recognizing a common-law good faith affirmative defense—either as a general matter or in the context of any particular cause of action." *Id.* at *50 (J. Phipps, dissenting); *id.* at *37 (J. Fisher) (finding "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to First Amendment claims for compelled speech).

Judges Phipps and Fisher also cogently explained why neither *Wyatt v. Cole*, 504 U.S. 158 (1992) nor cases following support recognizing a categorical "good faith" defense to § 1983. *Wyatt* and *Jordan* merely found that good faith reliance on a statute could defeat the malice and probable cause elements of a due process claim arising from a use of judicial process. See *Id.* at *56 (J. Phipps, dissenting); *Id.* at *33 (J. Fisher, concurring in the judgment). This Court should reject AFSCME's argument for the reasons stated in the opinions of Judge Phipps and Judge Fisher.

B. There is no pre-1871 common law basis for a defense to monetary liability when the state involuntarily garnishes wages from employees.

Invoking Judge Fisher's alternative theory, AFSCME attempts to escape liability by claiming that the Workers' payments were voluntary. AFSCME Br. at 30-31. But, as Judge Phipps recognized, the agency fees that were taken from employees were involuntary as "they were wage garnishments." *Diamond*, 2020 U.S. App. LEXIS 27475 at *50. Both Judges Fisher and Phipps recognized that under the pre-1871 common law, defendants were liable for payments that had been involuntary. *See Baltimore v. Lefferman*, 4 Gill 425 (Md. 1846) (noting that if a payment is made by "compulsion" it "may be recovered back").

The payments in this case were involuntary because the state authorized deductions from nonmembers without their express consent. Indeed, the Workers pled from the beginning of this lawsuit that the payments were involuntary. *See, e.g.*

Complaint, JA 9-17 (Dkt. 14-2) at ¶ 29 ("Plaintiffs[] were forced to pay agency fees to AFSCME as a condition of their employment."), ¶ 30 (the State "deducted agency fees from Plaintiffs' and other nonmembers' wages without their consent…"), ¶ 39 (AFSCME "compelled Plaintiffs and class members to pay agency fees…").

C. This Court should join Judge Phipps in rejecting AFSCME's argument.

Judge Phipps was correct in finding "[a] good faith affirmative defense was not firmly rooted in the common law in 1871 when § 1983 was enacted, and nothing else compels recognition of such a defense today." *Diamond,* 2020 U.S. App. LEXIS 27475 at *46-47. AFSCME attempts to waive these arguments away by claiming Phipps' opinion looks only to whether there was a formal affirmative defense. AFSCME Br. at 32, n.9.

But Judge Phipps' reasoning is not so limited. He finds nothing in the federal rules, but he also examines the history of the common law and goes on to explain that "even supposing that the common law did recognize good faith as an affirmative defense in 1871, more would be required" since "a common-law defense will not be read into § 1983 when it is inconsistent with the history or the purpose of § 1983." *Diamond,* 2020 U.S. App. LEXIS 27475 at *52-53. As he states, "the history behind the Civil Rights Act . . . demonstrates the need to remedy actions taken *in accordance with state law*." *Id.* at *53 (emphasis in original). Since the purpose of the statute was to provide a federal remedy to citizens who could not depend on their state

to protect them, "state law would be the last place to look for limitations on the redress § 1983 allows—the whole point of the statute was to overcome the limitations of state law." *Id.* at *54. This is the proper framework through which to understand this case.

II. The text and purpose of § 1983 support the Workers' view that there is no "good faith" defense to First Amendment liability.

AFSCME claims it can rely on a non-textual defense to § 1983 because "doctrines of privilege and immunity may limit the relief available in § 1983 litigation." ASFCME Br. at 21 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). But those doctrines do not help AFSCME because the Supreme Court explicitly held they do not apply to private parties. *Wyatt*, 504 U.S. at 168. The question is whether a "good-faith" reliance defense is compatible with the statute. And this is a high bar to clear since "[a]s 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).

AFSCME then tries to argue around the text of § 1983 by saying that "a private party could falsely claim the mantle of legitimate statutory authority for an action harmful to another" and, therefore, be acting "under the color" of state law but in bad faith. AFSCME Br. at 24. This is a radical narrowing of § 1983, which is not limited to those who scheme in bad faith. Congress' goal was 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*." *Monroe*, 365 U.S. at 172 (emphasis added). Bad faith is not an element in the statute. Acting pursuant to state law is.

AFSCME contends that *Wyatt* and *Lugar* left open the possibility of a "good faith" defense. AFSCME Br. at 25. This is true as far as it goes, but in neither case did the Court answer the question, and in both cases the Court ruled in favor of liability for private parties. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997) ("*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert . . . a special 'good faith' defense."). Before last year, no circuit court had recognized such a universal "good faith" defense, and most importantly, this circuit has never done so. *See* Opening Br. at 12-17.

AFSCME argues its defense should not be limited to procedural due process claims. AFSCME Br. at 26. But of course the Workers' argument is not that the "good faith" defense applies only to procedural due process claims but that it applies only to claims where state of mind is an element of the cause of action. That situation is properly understood not as a defense but as a failure to prove liability. The Supreme Court's decision in *Wyatt* is clear on this point. The majority opinion stated:

> One 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). Justice Kennedy, concurring, reached the same conclusion and found "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." *Id.* at 172. Chief Justice Rehnquist, dissenting, 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." 504 U.S. at 176 n.1.

AFSCME admits that there is no such state of mind requirement for a First Amendment claim such as Appellants'. AFSCME Br. at 27. ASFCME's response to this is that there are other cases in which the Supreme Court decided a procedural due process claim and required property to be returned without considering state of mind. *Id.* (citing *Connecticut v. Doehr*, 501 U.S. 1 (1991)). But the court in such cases did not consider subjective state of mind because they were dealing simply with an attachment of property, and wrongdoers cannot keep the property they took in violation of due process. AFSCME's error is that malice and lack of probable cause are elements for proving *damages* in a due process violation case rather than the simple lack of appropriate process. Where damages were not at issue, the courts did not address the state of mind element.

III. Principle of equity support returning the money that was taken from the Workers.

AFSCME is correct that other circuit courts have recently found, like Judge Rendell's opinion in *Diamond*, that "fairness" to defendants that rely on laws later held invalid justifies recognizing a "good faith" defense. *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Janus v. AFSCME, Council 31*, 942 F.3d 365 (7th Cir. Nov. 5, 2019) ("Janus II"); *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 (2d Cir. 2020). As both Judge Fisher and Judge Phipps explained, that rationale is inadequate on its own terms. *Diamond,* 2020 U.S. App. LEXIS 27475 at *30 (Fisher, J., concurring in the judgment), *56 (Phipps, J., dissenting). Courts cannot refuse to enforce federal statutes because they believe it unfair to do so.

AFSCME argues it would be unjust to make it return the money because the money was expended. AFSCME Br. at 34. But AFSCME has never taken the position that it *cannot* pay back the Workers. As the Supreme Court stated in *Owen v. Independence*, 445 U.S. 622, 654 (1980), "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." It is far more unjust to keep ill-gotten gain than to return it.

AFSCME's analogy to *Lemon v. Kurtzman*, 411 U.S. 192 (1973) falls short.

AFSCME Br. at 34-35. *Lemon* was about whether the *government* should reimburse private parties for services already rendered. The equities in the case of a small religious school which properly performed its end of a contract with the state are simply not the same as the equities in the case of one of the country's largest labor unions that illegally took money from individual workers without their consent. Another case cited by AFSCME, *Americans United v. Prison Fellowship Ministries, Inc*., 509 F.3d 406, 426-28 (8th Cir. 2007), likewise deals with a small service provider and whether the government should perform on the promise the government made to it. Appellants are not the government; they are individual working and middle class citizens, and whereas the government made a promise in *Lemon* and *American's United* that it was required to fulfill, Appellants made no such promise to ASFCME—indeed, they had no say in the matter.

IV. The "good faith" defense would run counter to the Supreme Court's retroactivity cases.

AFSCME's arguments about *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) and retroactivity return to the idea that there are reliance and policy interests in "principles of equity and fairness" that justify ignoring Supreme Court precedent and not applying *Janus* to their conduct. AFSCME Br. at 39. This is the same argument that Judges Phipps and Fisher of the Third Circuit warned against. Arguments of equity may be proper in a common law case, but this is a statutory case applying the law of §1983. Equity does not justify ignoring the statute, and it does not justify

ignoring *Reynoldsville Casket*.

It is true, as ASFCME argues, that in *Davis v. United States*, 564 U.S. 229, 243 (2011) the Court made a distinction between retroactivity and remedy. AFSCME Br. at 40. But *Davis* applied an already established good faith exception to an established equitable remedy—the exclusionary rule. *Davis*, 564 U.S. at 248-249. The officer in *Davis* was not asking the Court to retroactively create a new defense to liability; rather, it was the defendant in *Davis* who was asking the Court to impose a new equitable remedy on prior conduct. *Id.* The good faith exception to a Fourth Amendment violation is recognized only for the same limited reason that the Workers acknowledge is acceptable: because an officer's state of mind is the relevant focus of analysis for the deterrence sought by the exclusionary rule. However, when the defendant's state of mind is irrelevant to the constitutional analysis, as it is in *Janus* and in this case, there can be no "good faith" defense.

CONCLUSION

The District Court's judgment should be reversed and this case remanded for further proceedings to decide the award of damages and certification of a class.

In their Opening Brief, Appellants requested that this Court hear oral argument in this case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(g)

This brief contains 3,063 words, excluding the items exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Brian K. Kelsey
Brian K. Kelsey
October 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically filed the forgoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Fourth 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/ Brian K. Kelsey
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October 5, 2020