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 PETITION FOR REHEARING EN BANC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1553

Short Caption: Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Appellant Mark Janus

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

National Right to Work Legal Defense Foundation

Liberty Justice Center

Winston & Strawn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ William L. Messenger Date: 11/19/2019

Attorney's Printed Name: William L. Messenger

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Aaron B. Solem Date: 11/19/2019

Attorney's Printed Name: Aaron B. Solem

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n/a

Attorney's Signature: s/ Jeffrey M. Schwab Date: 11/19/2019

Attorney's Printed Name: Jeffrey M. Schwab

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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RULE 35 STATEMENT

Petitioner Mark Janus requests rehearing en banc because: (1) the panel incorrectly decided an exceptionally important question by recognizing a reliance defense to 42 U.S.C. § 1983 that is inconsistent with the statute's text and conflicts with the decisions of Second, Third, Fifth, and Sixth Circuits; and (2) the panel's decision conflicts with *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), which held that courts cannot avoid the retroactive effects of Supreme Court decisions by deeming it a defense that a party relied on a statute before it was held unconstitutional.

STATEMENT

In June 2018, the Supreme Court held AFSCME Council 31 and the State of Illinois violated Mark Janus' First Amendment rights by seizing agency fees from him without his consent. *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2486 (2018). The Supreme Court's decision in *Janus* is retroactive under the rule reiterated in *Reynoldsville Casket*: that "when (1) the [Supreme] 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." 514 U.S. at 752 (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)).

Mark Janus seeks damages from AFSCME for the agency fees it unconstitutionally seized from him. Janus submits he is entitled to damages under Section 1983, which states in relevant part that "every person who, under color of any statute, or-

dinance, regulation, custom, or usage, of any State" deprives any citizen of their constitutional rights "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.

The panel held AFSCME not liable to the party injured in an action at law because AFSCME acted under color of a state law that was constitutional at the time. Op. 25-26 (Dkt. 31). Specifically, the panel "recognize[d] a good-faith defense in section 1983 actions when the defendant reasonably relies on established law," *id*. at 24, and found that AFSCME reasonably relied on Illinois' agency fee law before it was declared unconstitutional by the Supreme Court, *id*. at 25-26.

The panel acknowledged that this Court had never before recognized such a defense to Section 1983. Op. 21. The panel did not identify any basis in Section 1983's text for this ostensible defense. Nor did the panel attempt to square its conclusion that reliance on state law is a *defense* to Section 1983 with the panel's conclusion that AFSCME "act[ing] under color of state law" is an *element* of Section 1983. *Id*. at 15.

The panel opinion's only stated basis for recognizing a reliance-on-established-law defense to Section 1983 is that the Supreme Court supposedly hinted at such a defense in *Wyatt v. Cole*, 504 U.S. 158 (1992) and other circuit courts supposedly recognized such a defense. Op. 17-21. As discussed below, the panel was mistaken. No other circuit has held that a defendant acting under color of an established state law is a defense to all Section 1983 claims for damages.

ARGUMENT

I. The Panel Incorrectly Decided An Exceptionally Important Question By Holding Defendants Not Liable for Damages Under Section 1983 If They Act Under Color of Established Law.

A. The panel's reliance defense conflicts with Section 1983's text.

Section 1983 is the nation's preeminent civil rights statute and is often used by citizens to protect their rights under the United States Constitution and federal law. It is no small matter when an appellate court recognizes an unwritten exemption to Section 1983 liability.

The panel's reliance-on-established-law defense conflicts with Section 1983's plain language. The statute mandates that "every person who, *under color of any statute*, ordinance, regulation, custom, or usage, of any State" deprives any citizen of their constitutional rights "*shall be liable* to the party injured in an action at law . . . " 42 U.S.C. § 1983 (emphasis added). It turns Section 1983 on its head to hold, as the panel did, that a defendant acting under color of an established state law renders it *not* liable to the party injured in an action at law.

A defendant acting under color of state law is an element to Section 1983, not a defense to it. The panel's recognition that "AFSCME acted under color of state law" when it deprived Janus of his First Amendment rights, Op. 15, is why AFSCME is liable to Janus for damages under Section 1983. It is not exculpatory.

The panel opinion has no answer to the foregoing and points to nothing in Section 1983's text that justifies a reliance defense. Instead, the panel asserts "that the Supreme Court abandoned . . . long ago" the contention that Section 1983's text permits

no exceptions "when it recognized that liability under section 1983 is subject to common-law immunities that apply to all manner of defendants." Op. 17.

The Supreme Court has not abandoned following Section 1983's text. The Court acknowledges that it cannot "simply make [its] own judgment about the need for immunity" and "do[es] not have a license to create immunities based solely on [the Court's] view of sound policy." *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012). The Court only will "accord[] immunity where a 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine'" when it enacted Section 1983 in 1871. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt*, 504 U.S. at 164–65). Immunities to Section 1983 have a statutory basis. The panel's reliance-on-established-law defense does not.

The panel opinion also admits "there is no common law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." Op. 20-21. The panel's reliance defense not only lacks a basis in Section 1983's text, it also lacks a basis in common law.

B. The panel's reliance defense was not suggested in *Wyatt* and has not been recognized by other circuits.

The panel opinion found that several Justices in *Wyatt* suggested, and several appellate courts later recognized, that good faith reliance on established law is a defense to Section 1983 damages claims. Op. 17-20. That is not accurate. Those courts merely found that good faith reliance on a statute could defeat the malice and probable cause elements of Section 1983 claims arising from abuses of judicial processes.

"'When defining the contours of a claim under § 1983, [the Justices] look to common-law principles that were well settled at the time of its enactment.'" *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019)) (quotation omitted). In *Wyatt*, the Supreme Court found a due process claim arising from a judicial attachment of property analogous to "malicious prosecution and abuse of process." 504 U.S. at 164. The Court recognized 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. The Court majority held 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 [to] government officials . . . ." *Id.* at 165. The *Wyatt* Court left open whether the respondents could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.

All three opinions in *Wyatt* were clear that the "good faith defense" to which the Justices were referring was a defense to the malice and probable cause elements of abuse of process claims. 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." *Id.* at 176 n.1.

On remand, the Fifth Circuit recognized that the Supreme Court "focused its inquiry on the elements of these torts," and found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice and without probable cause." *Wyatt v. Cole,* 994 F.2d 1113, 1119 (5th Cir. 1993). The Second and Third circuits, in cases that also involved claims arising from abuses of judicial processes, later reached the same conclusion. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994); (agreeing with the Fifth Circuit's decision in *Wyatt* and clarifying that "subjective" malice must be shown); *Pinsky v. Duncan,* 79 F.3d 306, 312–13 (2d Cir. 1996) (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."). The Sixth Circuit recognized even prior to *Wyatt* 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." *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988).[1]

[1] The Ninth Circuit in *Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008) found that a towing company that towed a vehicle pursuant to police instructions could assert a good faith defense. *Id.* at 1097. The Ninth Circuit, however, did not

Wyatt and its progeny have no application here. Unlike with abuse of judicial process claims, malice and lack of probable cause are not elements of a First Amendment compelled-speech deprivation. The Supreme held in *Janus* that AFSCME deprived Mark Janus of his First Amendment rights by taking his money for speech without his consent. 138 S. Ct. at 2486. It is irrelevant to Janus' First Amendment claim whether AFSCME acted with malice and without probable cause.[2]

Most importantly, the Justices in *Wyatt*, and the Second, Third, Fifth, and Sixth Circuits did not recognize the reliance defense the panel recognized. No other circuit court has held, in a published opinion, that a defendant is exempt from paying damages under Section 1983 if "the defendant reasonably relies on established law." Op. 24. The panel opinion renders this Court an outlier among appellate courts.

C. It is exceptionally important that the Court vacate the panel's decisions and rehear the case en banc.

This case is worthy of en banc review because the panel opinion recognized a sweeping new defense to the nation's preeminent civil rights statute. The panel's reliance-on-established-law defense could be raised by any defendant that lacks a similar immunity. This includes not only private defendants, but municipal defendants

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identify its basis for recognizing the defense or the defense's scope or prerequisites.

[2] The panel stated in dicta that Janus' First Amendment compelled speech claim is analogous to an abuse of process claim. Op. 24. It is not. 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. The tort does not extend to misuses of any other government processes. *Id.*

that lack qualified immunity. *See Owen v. City of Indep.*, 445 U.S. 622, 654 (1980).

The availability of this defense just to unions is significant. In *Janus*, the Supreme Court lamented the "considerable windfall" of fees that unions seized from employees during prior decades, remarking that "[i]t is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Id.* There are dozens of pending cases by employee plaintiffs against unions that seek a return of these unconstitutionally seized fees. *See e.g.*, Op. 21 n.1 (collecting cases). The reliance-on-established-law defense the panel recognizes serves to frustrate victimized employees' attempts to vindicate their First Amendment rights and to receive back monies that are rightfully theirs.

The panel opinion's reliance defense is broad in scope: relying on a state law that has not been invalidated by a court will exempt a defendant from paying any damages to all parties it injures. As discussed, this defense would largely swallow Section 1983's prohibition because an element of Section 1983 is that defendants must act under color of state law. The panel has carved a massive exemption into Section 1983's remedial framework.

The panel claims its "defense to section 1983 liability is narrow" because "only rarely will a party successfully claim to have relied substantively and in good faith on both a state statute *and* unambiguous Supreme Court decision validating that statute." Op. 28. The panel ignores that "every statute should be considered valid until there is a judicial determination to the contrary." *Pinsky*, 79 F.3d at 313. AFSCME itself makes that point. *See* AFSCME Br. 28 (Dkt. 18). A defendant relying on

any state law yet to be invalidated by a court will constitute a "defendant reasonably [relying] on established law" under the panel opinion. Op. 24.

To the extent that the panel's reliance-on-established-law defense does apply only when a defendant relies on a Supreme Court precedent later reversed, that would be equally problematic. A defense predicated on a defendants' reliance on an overruled Supreme Court decision would run headlong into the law that Supreme Court decisions are retroactive, as discussed below.

II. The Panel's Reliance Defense Conflicts With *Reynoldsville Casket*.

The Supreme Court's decision in *Janus* is retroactive under *Reynoldsville Casket*, 514 U.S. at 752. The panel opinion asserts that retroactivity does not necessarily control the remedy. Op. 12-14. That is true to an extent. 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. The problem here is that panel opinion has everything to do with frustrating retroactivity. The defense the panel recognized is indistinguishable from the reliance defense *Reynoldsville Casket* held invalid.

Reynoldsville Casket concerned an Ohio statute that granted plaintiffs a longer statute of limitations to sue out-of-state defendants. 514 U.S. at 751. The Supreme Court held the statute unconstitutional. *Id*. Like other Supreme Court decisions, the ruling was retroactive. *Id*. at 752. An Ohio court, however, permitted a plaintiff to proceed with a lawsuit filed under the statute before it declared unconstitutional. *Id*. at 751-52. The plaintiff contended this was a permissible equitable remedy based on her reliance on the then-valid statute. *Id*. at 753 (describing this remedy "as a state

law 'equitable' device [based] on reasons of reliance and fairness"). The Supreme Court rejected the contention, and held the state court could not avoid the retroactive effect of a Supreme Court decision by crafting a remedy based on a party's reliance on a law the Supreme Court later held invalid. *Id*. at 759.

The panel crafted just such a remedy here to avoid *Janus'* retroactive effect—a defense based on AFSCME's reliance on a statute later held unconstitutional by the Supreme Court. The panel even questioned the retroactive effect of *Janus*, *see* Op. 11-14, and asserted that "under Illinois law and *Abood* [v. *Detroit Board of Education*, 431 U.S. 209 (1977)], the union had *a right* to the [agency] fees under the collective bargaining agreement with CMS," Op. 23 (emphasis added). The panel's reliance defense conflicts with retroactivity principles reiterated in *Reynoldsville Casket* and with the reliance defense the Supreme Court rejected in that case.

CONCLUSION

The Court should grant the petition for rehearing en banc.

Dated: November 19, 2019

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Counsel for the Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This petition for rehearing or rehearing en banc complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because this petition contains 2,589 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f).

This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this petition has been prepared in a proportionately spaced typeface using Microsoft Word in 12-point Century Schoolbook font.

/s/ William L. Messenger
William L. Messenger

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019, I electronically filed Appellants' Petition for Rehearing En Banc 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