No. 19-1126

IN THE
Supreme Court of the United States

STACEY MOONEY,
Petitioner,

v.

ILLINOIS EDUCATION ASSOCIATION, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff may defeat the good-faith defense under 42 U.S.C. § 1983, which Petitioner conceded below can shield a private-party defendant from liability for money damages, by characterizing the monetary remedy she seeks as restitution of property.

CORPORATE DISCLOSURE STATEMENT

Respondents Illinois Education Association and Congerville-Eureka-Goodfield Education Association are unincorporated associations. Respondent National Education Association is a nonprofit corporation chartered by Act of Congress; it has no parent corporation, and no publicly held company owns any stock in it.

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STATEMENT

A. Illinois' Educational Labor Relations Act, 115 ILCS 5 ("IELRA"), like other Illinois labor relations statutes and the laws of many other states, allows education employees to organize and bargain collectively with their public employer, through a representative organization of their choosing, over the terms and conditions of their employment. Respondent Congerville-Eureka-Goodfield Education Association ("CEGEA") – which is affiliated at the state and national levels with Respondents Illinois Education Association and National Education Association – was chosen and recognized as the exclusive bargaining representative for educational personnel, including Petitioner Stacey Mooney, employed by the Board of Education of Congerville-Eureka-Goodfield C.U.S.D. No. 140 ("School District"). That recognition brought with it the legal duty for the union, in collective bargaining and grievance administration, to represent equally all members of the bargaining unit, whether union members or not.

Recognizing that the imposition of this "duty of fair representation" with respect to non-dues-paying members of the bargaining unit was not cost-free, the IELRA authorized unions and school district employers to negotiate, as part of their collective bargaining agreements, a "fair share" (or "agency fee") clause:

> When a collective bargaining agreement is entered into with an exclusive representative, it may include a provision requiring employees covered by the agreement who are not members of the organization to pay to the organization a

> fair share fee for services rendered …. The fair share fee payment shall be deducted by the employer from the earnings of the non member employees and paid to the exclusive representative.

115 ILCS 5/11. The IELRA, including its fair-share provisions, was enacted in 1983 following the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which this Court explicitly upheld the constitutionality of such agency-fee arrangements in the public sector.

Consistent with these statutory provisions, the collective bargaining agreement between CEGEA and the School District included a requirement that members of the bargaining unit who declined to join the union would be required to pay an agency fee to help defray the costs of collective bargaining and contract enforcement undertaken for the benefit of union members and nonmembers alike.

B. On June 27, 2018, this Court issued its decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in which the Court overruled its 1977 *Abood* precedent and held for the first time that public employees could not constitutionally be required to pay agency fees. Nearly six months later, Petitioner brought the instant class action lawsuit under 42 U.S.C. § 1983. She did not allege that the defendant unions were continuing to collect agency fees from her in violation of the *Janus* decision – and indeed it is undisputed that neither she nor anyone else in the bargaining unit was required to pay any such fees after *Janus* was decided. Petitioner accordingly sought no declaratory or injunctive relief. Rather, asserting that the *Janus* decision had retroactive

effect, she claimed that the fees she had paid *before* June 27, 2018 – at a time when an Illinois statute explicitly authorized agency fees and the *Abood* decision upholding the constitutionality of such statutes was the law of the land – were "unconstitutionally extracted" and must be paid back.

Granting Respondents' motion to dismiss, the district court recognized the "consensus" of the numerous federal district courts that had already addressed the same issue, and it agreed that, in accordance with this Court's dicta and the holdings of five federal courts of appeals, a good-faith defense was available to private-party defendants under § 1983. Pet. App. 43a-46a. The court rejected Petitioner's attempt to avoid the good-faith defense by characterizing her claim as an equitable claim for restitution, explaining that her claim sounded in law, not equity. *Id.* at 47a-51a. Holding that the good-faith defense was appropriately applied in this case, the court explained its reasoning as follows:

> That "*Abood* was wrongly decided," *Janus*, 13[8] S. Ct. at 2486, was a decision only [the Supreme] Court could make. Until it did so, reliance on *Abood* was nothing less than justified reliance on the law of the land. The Court agrees with the other courts to have considered this question and holds Defendants' good faith is established as a matter of law.

Id. at 61a.

On appeal, the Seventh Circuit consolidated for oral argument this case and the appeal in *Janus v. AFSCME Council 31* (*cert. pending*, No. 19-1104), which was on remand from this Court, and decided

the two appeals in separate opinions issued on the same day. The court of appeals recognized the good-faith defense and affirmed the district court's judgment "largely for the reasons set forth in our opinion of today's date in *Janus v. AFSCME* …." Pet. App. 3a; *see id.* at 7a-36a (*Janus* opinion). But it took note of "one difference" in Petitioner's argument: "Mr. Janus sought damages pursuant to 42 U.S.C. § 1983 in the amount of the fair-share fees he had paid prior to *Janus*. Mooney, in contrast, insists that she is *not* seeking damages, but instead that she is entitled to the equitable remedy of restitution under the same statute," *id.* at 3a, and that "an equitable demand for restitution cannot be defeated on good-faith grounds." *Id.* at 4a. Rejecting Petitioner's attempt to cast her claim as a demand for equitable restitution, the court of appeals agreed with the district court – and "all other district courts that have faced this question" – that "Mooney's suit is exactly the same as Mr. Janus's: one for damages flowing from a First Amendment violation." Pet. App. 4a-5a. The court added, as a second reason for its conclusion that Petitioner's claim sounded in law, not equity, that Petitioner was bringing a claim "against the union's treasury generally, not … against an identifiable fund or asset" as to which a constructive trust or equitable lien could be enforced. *Id.* at 5a-6a (citing *Montanile v. Board of Trustees*, 136 S. Ct. 651, 657 (2016)).[1]

[1] Petitioner sought rehearing en banc, which the court of appeals denied without any judge calling for a vote. Pet. App. 67a.

REASONS FOR DENYING THE WRIT

Petitioner asks the Court to grant certiorari because, she claims, the courts of appeals are "divided" on two issues – (a) the existence, and (b) the scope, of the good-faith defense that can be invoked by private parties sued under 42 U.S.C. § 1983. In fact, there is no division of authority on either point. As to the first, Petitioner's attempt to conjure up a circuit split – on an issue on which the courts of appeals, and indeed the lower courts generally, have all reached the same result – rests entirely on her misreading of three pre-1990 cases that do not say what she claims they do. Nor is there any conflict among the courts of appeals on the scope of the good-faith defense. And Petitioner cannot cite a single case that has ever articulated the "ubiquitous" proposition – that funds unconstitutionally received must always be returned – with which she claims the Seventh Circuit's decision (and all of the other recent good-faith cases) are in conflict. Finally, even if the Petition presented an otherwise certworthy question, this would not be the vehicle for the Court to address it, for Petitioner has waived both of the arguments she asks this Court to consider.

I. THERE IS NO DIVISION AMONG THE CIRCUITS ON THE EXISTENCE OF THE GOOD-FAITH DEFENSE

A. The good-faith defense, as it has been widely and unanimously adopted by the lower courts, grew directly out of two seminal decisions of this Court addressing the scope of liability for private-party

defendants sued under 42 U.S.C. § 1983.[2] In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Court ruled that private parties could, under certain circumstances, be held liable along with their governmental counterparts for violations of § 1983. But as part and parcel of that ruling, the *Lugar* Court recognized the "problem" of imposing liability on private defendants for "mak[ing] use of seemingly valid state laws," and explained that "this problem should be dealt with … by establishing an affirmative defense." *Id.* at 942 n.23. Subsequently, when in *Wyatt v. Cole*, 504 U.S. 158 (1992), the Court rejected the extension of qualified immunity to private-party defendants as a potential way to resolve that problem, the Court distinguished *immunities* – meaning "immunity from suit," with its accompanying procedural privileges, such as immediate appealability of interlocutory orders – from *defenses* to monetary liability. *Id.* at 165-66. The Court then added, without having occasion to decide the issue, that "private defendants faced with § 1983 liability under *Lugar* … could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Id.* at 169. Five Justices, in two separate opinions, stated even more explicitly their willingness to adopt such a good-faith defense. *See id.* (Kennedy, J., joined by Scalia, J., concurring); *id.* at

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[2] Undersigned counsel also represent the respondent union in the companion case, *Janus v. AFSCME Council 31*, No. 19-1104. The issues addressed briefly in this section are discussed at greater length in Parts I and II of Respondent AFSCME Council 31's Brief in Opposition in *Janus*.

175 (Rehnquist, C.J., joined by Souter and Thomas, JJ., dissenting).

Following this Court's decision in *Wyatt*, every one of the six courts of appeals, and every one of the several dozen district courts, that have confronted the issue has held, consistent with this Court's guidance in *Lugar* and *Wyatt*, that there is indeed a good-faith defense available to private defendants sued under § 1983 that shields them from liability for having followed the law as it existed at the time of their actions. Five of the courts of appeals so held in the years after *Wyatt*, in cases unrelated to the present issue of pre-*Janus* union fees.[3]

Since this Court's 2018 decision in *Janus*, in which the Court overruled *Abood* and held agency-fee requirements unconstitutional in public-sector employment, the Second, Sixth, Seventh, and Ninth Circuits, in a total of six published decisions, have agreed that the good-faith defense exists and have applied it to shield the defendant unions from liability for agency fees they received prior to the *Janus* decision, at a time when the state statutes authorizing such fee arrangements were indisputably constitutional under this Court's then-controlling precedent. *See* Pet. App. 1a-6a; *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) (Pet. App. 7a-

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[3] *See Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993) (on remand); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275-78 (3d Cir. 1994); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996); *Pinsky v. Duncan*, 79 F.3d 306, 311-12 (2d Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008); *see also Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) (pre-*Wyatt* decision).

36a), *cert. pending*, No. 19-1104; *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. pending*, No. 19-1130; *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020); *Ogle v. Ohio Civil Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *see also Jarvis v. Cuomo*, 660 F. App'x 72, 75-76 (2d Cir. 2016) (deciding the same issue after this Court's decision in *Harris v. Quinn*, 573 U.S. 616 (2014)). No fewer than thirty federal district courts have also reached the same result in post-*Janus* litigation.[4] There are no decisions to the contrary, whether in the district courts or the courts of appeals.

B. In the face of this unanimity of the lower courts in addressing the availability to private § 1983 defendants of the good-faith defense – both in this context of pre-*Janus* union fees and otherwise – Petitioner's assertion that "[t]he courts of appeals have issued contradictory and irreconcilable opinions" on this issue, Petition at 11, rests entirely on her misreading of three cases from the First and Ninth Circuits. All were decided prior to *Wyatt*, and all of them held only – as did this Court subsequently in *Wyatt* – that *qualified immunity* was unavailable to nongovernmental defendants sued under § 1983. *See Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978); *Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). Petitioner's attempt to read these cases as rejecting a good-faith defense of the kind accepted by every federal court after *Wyatt* cannot be squared with the opinions themselves, with the way they have subsequently

[4] *See* Brief in Opposition of Respondent AFSCME Council 31 in *Janus* (No. 19-1104), at n.4.

been read by the very courts that issued them, nor with this Court's own reading of those opinions.

All three opinions were issued at a time when it was unsettled whether private § 1983 defendants could invoke the same qualified immunity – with its accompanying procedural protections – as government officials. That was indeed the question upon which this Court subsequently granted certiorari in *Wyatt,* in order to resolve a division of authority among the circuits. As the Court noted in *Wyatt*, while by 1992 three circuits had held that private parties could invoke qualified immunity, two – the First Circuit in *Downs* and the Ninth Circuit in (*inter alia*) *Howerton* – had held the opposite. *See Wyatt*, 504 U.S. at 161.[5] It was that question – the availability of qualified immunity to private § 1983 defendants – that was addressed in the three opinions upon which Petitioner relies.

That this was what those cases held is also apparent from any fair reading of the opinions. Thus, in *Downs*, after repeatedly referring to the issue before it as "qualified immunity" or "an immunity," 574 F.2d at 15, the First Circuit concluded that "the *Wood* defense is not available to Roberta Sawtelle." *Id.* at 16. The "*Wood* defense," as is apparent from the

[5] Making clear that the qualified immunity rejected by those courts was something different than the good-faith defense at issue here, *Wyatt* also cited the position taken by the Sixth Circuit, which had correctly anticipated not only this Court's holding in *Wyatt*, but also the universal acceptance by the lower courts, after *Wyatt*, of the good-faith defense: "The Sixth Circuit has rejected qualified immunity for private defendants sued under § 1983 but has established a good faith defense." 504 U.S. at 161 (citing *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988)).

court's discussion a few paragraphs earlier, referred to this Court's decision in *Wood v. Strickland*, 420 U.S. 308 (1975), which the First Circuit described as "exhibit[ing] a willingness to make available a qualified immunity 'to avoid discouraging effective official action by public officers charged with a considerable range of responsibility and discretion.'" 574 F.2d at 14 (quoting *Wood*, 420 U.S. at 317-18). The court's concluding comment that the private-party defendant's liability was "to be determined by the jury without regard to any claim of good faith," *id.* at 16, can only be understood as part and parcel of the court's holding that the defendant was not entitled to invoke qualified immunity, which was the only subject addressed by the court to which good faith was relevant. The *Downs* opinion thus contains no discussion whatever of whether an affirmative defense based on good faith, such as this Court subsequently discussed in *Wyatt*, would be available to private parties sued under § 1983.

Indeed, that is exactly how the First Circuit itself read *Downs* in two subsequent opinions. In *Lovell*, upon which Petitioner relies, the court described *Downs* as having "held that a private party … was not entitled to qualified immunity." 878 F.2d at 13 n.5. The First Circuit made the same observation two years later in *Rodriques v. Furtado*, 950 F.2d 805, 814 n.11 (1st Cir. 1991). These opinions eliminate any doubt that the issue decided in *Downs*, as understood by the First Circuit itself, was whether private-party defendants could assert qualified immunity – not whether an affirmative defense of good faith would be available to them.

As to the Ninth Circuit, all Petitioner can point to in *Howerton* is a passing footnote – in an opinion otherwise addressing only the question of whether the defendants had acted under color of state law – in which the court noted that "there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights." 708 F.2d at 385 n.10. That the court was indeed referring to an "immunity" is confirmed not only by the word it used, but also by the immediately following citation to *Lugar*'s "suggesti[on] that compliance with statute might be raised as an *affirmative defense*." *Id.* (emphasis added) (citing 457 U.S. at 942 n.23).

Not only does any fair reading of *Howerton* fail to support Petitioner's attempt to read that case as rejecting the kind of good-faith defense the courts have unanimously accepted after *Wyatt*, but the Ninth Circuit itself has squarely rejected the same argument Petitioner advances here: In *Danielson*, 945 F.3d at 1099-1100, the court explained that "*Howerton* stands for the unremarkable proposition that private parties cannot avail themselves of *qualified immunity* to a section 1983 lawsuit." *Id.* at 1099. Petitioner goes to some length in attempting to convince this Court that *Danielson*'s reading of *Howerton* was wrong. But – even apart from the curious notion that this Court would grant certiorari to correct the Ninth Circuit's reading of its own precedent – Petitioner's attack on *Danielson*'s explanation of the *Howerton* holding has no merit. Petitioner's argument is that the Ninth Circuit's "attempted recharacterization of *Howerton* is untenable" because "[i]mmunities *are* affirmative defenses, so there is no conceivable distinction that can be drawn between good-faith 'immunity' and good

faith as an 'affirmative defense.'" Petition at 18. But on that reasoning, Petitioner would have to argue that this Court got it wrong as well, when in *Wyatt* the Court explicitly distinguished between "a good faith defense" and "the qualified *immunity* from suit accorded to government officials under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)." 504 U.S. at 165.

There is, in short, no division in authority among the circuits (or the district courts) on the existence of the good-faith defense – an issue upon which all of the lower courts to have considered the question are in agreement.

II. THERE IS NO DIVISION AMONG THE CIRCUITS ON THE SCOPE OF THE GOOD-FAITH DEFENSE

In advancing the contention that the courts of appeals are divided on the "scope" of the good-faith defense, Petitioner nowhere cites any case that has declined to apply the defense in a circumstance in which another court has applied it. There are, quite simply, no conflicting decisions among the courts of appeals (or, for that matter, the district courts) about whether the good-faith defense should be applied in the context in which the Seventh Circuit applied it here. To the contrary, as noted above, *all* six of the court of appeals decisions, and indeed all of the 30 district court decisions, that have considered whether the good-faith defense should be applied to preclude plaintiffs' attempts to recover agency fees paid to defendant unions prior to the *Janus* decision have reached the same result. *All* have held that the good-faith defense shields the defendant unions from being required to return agency fees that were received (and

expended for the benefit of the bargaining unit) at a time when *Abood* was the law of the land.

While Petitioner concedes that her claim in this case is "an identical refund claim" to that brought by the petitioner in *Janus*, *see* Petition at 9, the essence of her argument is that she can avoid application of the good-faith defense by characterizing her claim as seeking "return of property" rather than "damages." Her theory is that while the good-faith defense may shield a defendant from liability for damages, it "will never permit a defendant to escape *restitution* of wrongfully taken property." *Id.* at 20. But she points to no case that has ever so held – and certainly none that has ever accepted such a theory as a basis for refusing to apply the good-faith defense under § 1983. To the contrary, all of the cases decided during the past two years involving union nonmembers' attempts to recover fees paid, prior to *Janus*, to the union that represented their bargaining unit have applied the good-faith defense and refused such claims – whether denominated as claims for damages or restitution.[6]

Petitioner's argument about a division of authority on the scope of the good-faith defense rests in part on her claim that the Seventh Circuit's decision in this case is "incompatible," Petition at 22, with the initial appellate decisions applying the good-faith defense in contexts not involving pre-*Janus* union fees. *See id.* at 22-24. But that is simply not correct. It may well be that those cases were decided on somewhat different

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[6] Petitioner's counsel also represented the plaintiffs in the *Danielson* and *Lee* cases, in which the Ninth and Sixth Circuits rejected the same "property" argument that the Seventh Circuit considered and rejected here. *See Danielson*, 945 F.3d at 1102-03; *Lee*, 951 F.3d at 391.

facts than this and the other union-fee cases, but that hardly means that the cases are "incompatible" or in "conflict."

Contrary to the impression Petitioner attempts to create, no issue was presented in the federal courts, in any of the good-faith defense cases on which she relies, concerning entitlement to property that was unconstitutionally taken. For example, in *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993), the Fifth Circuit simply noted that, in an earlier proceeding, the state court had dismissed Cole's complaint in replevin on state-law grounds and had accordingly ordered him to return the seized cattle and tractor – well before the replevin statute was held unconstitutional in federal court. *See id.* at 1115. *See also Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1258 (3d Cir. 1994) (similar); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 696 (6th Cir. 1996) (similar). The other two cases Petitioner cites contain no mention at all of who was entitled to the property in question. *See Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008); *Pinsky v. Duncan*, 79 F.3d 306 (2d Cir. 1996). These courts simply did not address or decide the question on which Petitioner asserts that there is a conflict among the courts of appeals.[7]

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[7] On the other hand, one other early good-faith defense case – one that Petitioner does not even mention – is flatly contrary to her contention that the good-faith defense "will never permit a defendant to escape *restitution* of wrongfully taken property." Petition at 20. In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), the Sixth Circuit applied the good-faith defense to reject the plaintiff's attempt to recover the value of property (shares of stock) that the defendant had seized from him under an Ohio prejudgment attachment statute that subsequently was declared

Petitioner also relies heavily on a potpourri of cases involving issues such as unconstitutional taxes, fines paid to the government, and tangible property seized under unconstitutional warrants, *see* Petition at 20, 24-28, but it is not at all clear how these decisions – most of which involved facts and law specific to the circumstances, and none of which involved claims under § 1983 – create a division among the courts.[8] Here too, as with the first question presented, Petitioner is able to point to no conflict among the courts of appeals, or any courts for that matter, that requires this Court's attention.

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unconstitutional. *See id.* at 1267-68. Thus, the only one of the non-union-fee cases that directly implicated the issue Petitioner raises is fully consistent with the unanimous holdings of the cases involving pre-*Janus* union fees.

[8] Rather than establishing some "ubiquitous" principle, as Petitioner claims, Petition at 20, the cases she cites were decided on their specific facts and the law specifically applicable to those facts. Thus, for example, *United States v. Windsor*, 570 U.S. 744 (2013), was brought pursuant to statutes specifically permitting the recovery of erroneously collected taxes from the United States Treasury in certain circumstances. *See* 26 U.S.C. § 7422; 28 U.S.C. § 1346(a)(1). Petitioner's cases involving repayment of financial penalties accompanying criminal convictions, Petition at 25-26, simply ordered the refund of those penalties once the underlying convictions were vacated. Similarly, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), held no more than that the Eighth Amendment's Excessive Fines clause was incorporated into the Fourteenth Amendment and thus made applicable to the states, while *United States v. Rayburn House Office Building*, 497 F.3d 654 (D.C. Cir. 2007), ordered that privileged materials seized in violation of the Speech and Debate Clause be returned to the Member of Congress from whose office they were taken. *See id.* at 663-66.

III. THIS CASE WOULD NOT BE A SUITABLE VEHICLE FOR CONSIDERATION OF THE EXISTENCE OR SCOPE OF THE GOOD-FAITH DEFENSE BECAUSE PETITIONER HAS WAIVED THE ARGUMENTS SHE NOW SEEKS TO PRESENT

Even if one or the other of the two issues Petitioner asks this Court to address were worthy of the Court's review, this case would not provide an appropriate vehicle for their consideration. In both cases, Petitioner has waived the arguments she now asserts – either by declining to argue the issue below, or by advancing a different argument in support of her position than she asserts in her Petition to this Court.

A. In her first question presented, Petitioner asks the Court to address the existence of the good-faith defense for private parties sued under § 1983. *See* Petition at i-ii; *id.* at 11 ("The courts of appeals are divided on whether 42 U.S.C. § 1983 establishes a 'good-faith defense' for private defendants.") (capitalization deleted). But that is an issue she chose not to contest below – even though no circuit precedent precluded the argument. *See* Pet. App. 23a (observing that the good-faith defense "is a matter of first impression in our circuit"). Indeed, on the very first page of her opening brief in the court of appeals, Petitioner acknowledged that "[w]hen the Supreme Court announces a new constitutional right and makes it retroactive, a defendant's good-faith reliance on earlier statutes or court rulings can confer an immunity from damages," and she cited the Fifth Circuit's decision in *Wyatt* on remand as recognizing such a "defense for private parties who violate 42 U.S.C § 1983 in reliance on a statute that is later

declared unconstitutional." Plaintiff-Appellant's Opening Brief (ECF No. 19) at 1 (emphasis omitted). And in her Reply Brief she stated quite explicitly that "Ms. Mooney is contesting the scope rather than the existence of a good-faith defense." Plaintiff-Appellant's Reply Brief (ECF No. 26) at 3.

Even in her submission to this Court Petitioner makes clear that she has never contested the existence of a good-faith defense under § 1983: "Ms. Mooney has acknowledged throughout this litigation that defenses such as qualified immunity and good faith can shield a defendant from liability for *damages*." Petition at 19-20; *see also id.* at ii (same).

Petitioner has, in short, waived her argument with respect to the existence of the good-faith defense. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (argument waived where litigant stated it "will not challenge, but [is] not conceding" the issue). Even if the existence of the § 1983 good-faith defense were certworthy as an abstract matter – which it is not, given the unanimity of the lower courts – this case, in which the issue has not been argued below, would not be a suitable vehicle for the Court to consider that question.

B. For a somewhat different reason, Petitioner has also waived the argument she asks this Court to consider with regard to the scope of the good-faith defense. She has, to be sure, advanced a "scope" argument throughout the litigation, but the argument she made to the Seventh Circuit was a different one than what appears in her Petition.

In the court of appeals, Petitioner's argument was that the good-faith defense was not available because her claim for repayment of her agency fees sounded in

equity, not law. Thus, she drew a "distinction between claims for damages – which can be subject to qualified-immunity or 'good faith' defenses – and equitable claims for restitution of property (which are *not* subject to these defenses)." Opening Br. at 30. As she explained, her claim for "restitution of money that the union took in violation of her constitutional rights … is a claim for equitable relief rather than a demand for money damages." *Id.* And she doubled down on the point in her reply brief, devoting an entire section to explaining that "Ms. Mooney is seeking equitable restitution rather than money damages," Reply Br. at 6, and that "claims for the equitable return of money taken in violation of the Constitution are not subject to a qualified-immunity or good-faith defense." *Id.* at 10 (capitalization deleted in both).

It was that argument – that her claim sounded in equity rather than in damages – that the court of appeals correctly understood her to be advancing: "Mooney, in contrast [to Janus], insists that she is *not* seeking damages, but instead that she is entitled to the equitable remedy of restitution under the same statute." Pet. App. 3a. And it was that contention that the court considered and rejected. The court cited circuit precedent for the proposition "that a claim for a refund of an agency-fee overcharge under the *Abood* regime was a legal rather than an equitable claim." *Id.* at 5a (citing *Gilpin v. AFSCME*, 875 F.2d 1310, 1314 (7th Cir. 1989)). And, citing this Court's decisions in *Montanile v. Board of Trustees*, 136 S. Ct. 651 (2016), and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the court explained that, because Petitioner's claim was "against the union's treasury generally, not … against an identifiable fund or asset," it was a claim for

damages "and can only be characterized as legal." Pet. App. 5a-6a.

In her Petition to this Court, Petitioner has forsworn any attempt to press the argument that she made below and the Seventh Circuit rejected – that the good-faith defense had no application because the remedy she sought sounded in equity rather than law. Indeed (other than in quotations or in describing the Seventh Circuit's holding), the words "equity" and "equitable" do not appear in her Petition. Rather, her claim at this point is simply that property that is unconstitutionally obtained must always be returned. While she uses the term "restitution" to describe the remedy she seeks,[9] she has abandoned the contention she advanced below, which the Seventh Circuit addressed and rejected, that the availability of the good-faith defense turns on whether the remedy sought is properly characterized as sounding in law or equity.

Having chosen to advance a different argument here than she presented to the court of appeals, Petitioner has waived her argument with regard to the scope of the good-faith defense as well.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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[9] "Restitution" can, of course, be either legal or equitable. *See*, *e.g.*, *Great-West Life*, 534 U.S. at 212-15.

Respectfully submitted,

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