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

REPLY BRIEF FOR THE PETITIONER

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The courts of appeals are divided on whether a good-faith defense exists for private defendants who are sued under 42 U.S.C. § 1983. The courts of appeals also disagree on what the scope of a good-faith defense should be. The union attempts to defeat certiorari by denying or downplaying these disagreements among the lower courts. But none of its arguments should prevent this Court from granting certiorari to finally weigh in on whether a "good-faith defense" exists for private defendants under section 1983—and whether qualified immunity or "good faith" can shield a defendant from a restitutionary remedy that requires nothing more than the return of money or property that was taken in good faith but in violation of another's constitutional rights.

I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER 42 U.S.C. § 1983 ESTABLISHES A "GOOD-FAITH DEFENSE" FOR PRIVATE DEFENDANTS

The union contends that the lower courts have unanimously recognized the existence of a good-faith defense for private parties who are sued under 42 U.S.C. § 1983. *See* Union's Br. in Opp. at 5–12. It also claims that the petitioner has "waived" the issue by failing to contest the existence of a good-faith defense in the Seventh Circuit. *See id.* at 16–17. The union is wrong on both counts.

A. The Ninth Circuit's Decision in *Howerton v. Gabica* And The First Circuit's Ruling In *Downs v. Sawtelle* Reject The Existence Of A Good-Faith Defense For Private Parties In Section 1983 Litigation

The union denies a circuit split by claiming that *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), and *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), hold only that private defendants are ineligible for qualified immunity under 42 U.S.C. § 1983. *See* Union's Br. in Opp. at 9–12. But the language in each opinion makes abundantly clear that the Court was rejecting *any* type of defense that rests on a private defendant's supposed "good faith." Consider the following passage from *Downs*:

> To place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties afforded by the statute. Private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant

> threat of liability facing police officers, governors and other public officials. Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights. Consequently, we hold that the Wood defense is not available to Roberta Sawtelle and that her liability is to be determined by the jury without regard to any claim of good faith.

Downs, 574 F.2d at 15–16. This is not merely a rejection of qualified immunity, but a rejection of *any* type of good-faith defense for private defendants who violate section 1983. The union tries to get around this passage in *Downs* by claiming that the final sentence is "part and parcel of the court's holding that the defendant was not entitled to invoke qualified immunity." Union's Br. in Opp. at 10. But the court's opinion leaves no room for the jury to consider a "good-faith defense" on remand that might differ in some way from "qualified immunity," and any district court that instructed the jury to consider a so-called "good-faith defense" on remand would be acting in direct defiance of the First Circuit's ruling in *Downs*.

The Ninth Circuit's opinion in *Howerton* is even more explicit on this point. The Court held:

> 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.

Howerton, 708 F.2d at 385 n.10 (emphasis added). And the Ninth Circuit's opinion in *Howerton* postdates *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which defined qualified immunity as an objective standard that has nothing to do with an officer's subjective "good faith." *See id.* at 818 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). So *Howerton* could not possibly have been using "good faith immunity" as a synonym for "qualified immunity," as the union claims.

More importantly, *Howerton* held the private defendants liable despite acknowledging that they "may have believed they were acting within their rights." *Howerton*, 708 F.2d at 385 n.10 ("We realize the Gabicas may have believed they were acting within their rights."). That necessarily forecloses the existence of a "good-faith defense," because the court admitted that the defendants might have acted in good faith yet held them liable regardless.

B. The Petitioner Has Fully Preserved Her Challenge To The Existence Of A Good-Faith Defense

The union claims that Ms. Mooney has "waived" this issue by contesting the scope and not the existence of a good-faith defense in her Seventh Circuit briefing. *See* Union's Br. in Opp. at 16–17. But Ms. Mooney had moved to consolidate her appeal with the appeal in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 942 F.3d 352 (7th Cir. 2019)

(*Janus II*), and the Seventh Circuit responded by ordering that the appeals be argued on the same day and before the same panel. *See* Motion of Plaintiff-Appellant Stacey Mooney to Consolidate Appeals for Argument (ECF No. 14); Order (ECF No. 16). More importantly, the opinion below "passed upon" the existence of a good-faith defense by explicitly incorporating its discussion from *Janus II* on this issue. Pet. App. 3a ("We now affirm the judgment of the district court, largely for the reasons set forth in our opinion of today's date in *Janus v. AFSCME*, No. 19-1553."); *see also* Pet. App. 23a–28a (*Janus II* opinion) (rejecting arguments against the existence of a good-faith defense and holding that "under appropriate circumstances, a private party that acts under color of law for purposes of section 1983 may defend on the ground that it proceeded in good faith."). A petitioner may challenge any issue that was "passed upon" in the court of appeals, regardless of whether the petitioner "pressed" the arguments that the court of appeals rejected. *See Lebron v. National Railroad Passenger Corporation,* 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon. . . .'" (quoting *United States v. Williams,* 504 U.S. 36, 41 (1992); first alteration in original)); *Citizens United v. FEC*, 558 U.S. 310, 323 (2010) ("Citizens United raises this issue for the first time before us, but we consider the issue because 'it was addressed by the court below.'" (citation omitted)).[1]

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1. *See also Holguin-Hernandez v. United States*, 140 S. Ct. 762, 767 (2020) ("We shall not consider these matters, however, for (continued…)

The union is also wrong to insist that a challenge to the existence of a good-faith defense is a separate "claim" from the arguments that Ms. Mooney is asserting about its scope. Ms. Mooney's "claim" is that the assertion of a "good-faith defense" should not allow the union to *keep* the money or property that it took in violation of her constitutional rights—regardless of whether good faith might shield a defendant from money damages or remedies that extend beyond a mere requirement to return the money or property that was innocently but unconstitutionally taken. A challenge to the existence of a good-faith defense is an argument in support of that claim rather a distinct "claim." *See Yee v. Escondido,* 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). *Citizens United*, for example, rejected the notion that a facial challenge to 52 U.S.C. § 30118 was a separate "claim" from an as-applied challenge that the petitioners had fully preserved. *See Citizens United*, 558 U.S. at 330–31. The Court explained:

> [T]hroughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the

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the Court of Appeals has not considered them.").

> precise arguments they made below.'" Citizens United's argument that *Austin* should be overruled is "not a new claim." Rather, it is—at most—"a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment."

Id. at 330–31 (citations omitted). So too here. The challenge to the existence of a good-faith defense—which can be regarded as a "facial" challenge to the union's efforts to invoke good faith—is a mere argument in support of the "claim" that Ms. Mooney has asserted throughout this litigation: That the union's supposed good faith cannot allow it to *keep* the money that it took from Ms. Mooney in violation of her constitutional rights.

II. THE COURTS OF APPEALS ARE DIVIDED ON WHAT THE SCOPE OF THIS "GOOD-FAITH DEFENSE" SHOULD BE

The union attempts to defeat the petitioner's circuit split by looking only to cases involving post-*Janus* (and post-*Harris*) refund lawsuits brought against public-sector unions. *See* Union's Br. in Opp. at 12–13. And the union is correct to observe that the Second, Sixth, Seventh, and Ninth Circuits have all agreed that the good-faith defense should allow public-sector unions to keep the agency fees that they collected in violation of the Constitution but in good-faith reliance on pre-*Janus*

statutes and court decisions.[2] But the petitioner is not alleging that the lower courts disagree on whether public-sector unions must return agency fees that they collected before *Janus*. The petitioner's claim is that the rulings allowing unions to *keep* the money that they took in good faith but in violation of another's constitutional rights are incompatible with court decisions that refuse to allow a defendant's "good faith" to shield it from a purely restitutionary remedy—even when good faith or qualified immunity will shield the defendant from money damages for his constitutional violations. *That* is the circuit conflict that the petitioner has alleged, and the union does not refute the petitioner's argument by noting the absence of a circuit split on a different and more narrow legal issue.

The union criticizes the petitioner for relying on cases that do not involve section 1983. *See* Union's Br. in Opp. at 15. But courts cannot recognize or create non-textual defenses to 42 U.S.C. § 1983 unless the defense was well-established when Congress enacted the Civil Rights Act of 1871. *See Wyatt v. Cole*, 504 U.S. 158, 164 (1992). *Wyatt* recognizes that the text of 42 U.S.C. § 1983 "'creates a species of tort liability that on its face admits of *no* immunities.'" *Id.* at 163 (emphasis added) (citation

2. *See Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 334–36 (2d Cir. 2020); *Lee v. Ohio Education Ass'n*, 951 F.3d 386, 389–92 (6th Cir. 2020); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 942 F.3d 352 (7th Cir. 2019); *Mooney v. Illinois Education Ass'n*, 942 F.3d 368 (7th Cir. 2019); *Danielson v. Inslee*, 945 F.3d 1096, 1098–1105 (9th Cir. 2019)

omitted). But *Wyatt* nevertheless holds that courts might recognize non-textual defenses to section 1983 if—and only if—the defense "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." *Id.* at 164 (citation and internal quotation marks omitted). The Court went on to say:

> If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871—§ 1 of which is codified at 42 U.S.C. § 1983—we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law.

Id. at 164. So any "good-faith defense" proposed by the union must also exist *outside* the context of 42 U.S.C. § 1983—and it must be sufficiently ubiquitious that a legislature would be expected to explicitly negate that defense in order to prevent a court from reading that defense into a statute that is otherwise silent on the question. *See* Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 Harv. L. Rev. 1876, 1913–14 (1999) (applying a necessity defense to a murder statute that makes no textual allowance for it, because "[f]or thousands of years, and in many jurisdictions, criminal statutes have been understood to operate only when the acts were unjustified."). The persistent unwillingness of courts to allow a defendant's good faith to shield it from a restitutionary remedy—which requires nothing more than the return of innocently but unconsti-

tutionally taken property—is incompatible with the Second, Sixth, Seventh, and Ninth Circuit's efforts to incorporate a "good-faith defense" of that scope into section 1983 when resolving post-*Janus* refund lawsuits.

Finally, the union observes that cases such as *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993), did not *order* the return of property that had been innocently but unconstitutionally taken, because the property had already been returned to its rightful owner before the court of appeals' decision. *See* Union's Br. in Opp. at 14; *see also id.* (making similar claims of *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994), and *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996)). But Ms. Mooney acknowledged this in her petition for certiorari. *See* Pet. at 23–24 (discussing the cases). None of that defeats a circuit conflict because: (1) The court decisions that apply the "good-faith defense" outside the context of union-refund lawsuits have all stopped short of allowing private defendants to *keep* the money or property that they take in good faith but in violation of another's constitutional rights; and (2) It would have been absurd for any of those circuit-court rulings to extend the "good-faith defense" as far as the Seventh Circuit did, to the point where a defendant is not only shielded from damages but is allowed to enrich itself by *keeping* the money or property that it took in violation of the Constitution. The scope of the good-faith defense that the Seventh Circuit adopted—and that other courts have adopted in these post-*Janus* refund lawsuits—will enable defendants to keep money or property that they seize in violation of

another's constitutional rights, and that cannot be reconciled with the court decisions that endorse a narrower scope for the good-faith defense in section 1983 lawsuits that do not involve public-sector unions.

As for the union's "waiver" argument: One needs only to read the petitioner's appellate brief to see that Ms. Mooney presented these *exact* arguments to the Seventh Circuit. *See* Br. of Appellants (7th Cir. Doc. 19) at 10–33. Ms. Mooney did not hinge her entire case on the distinction between legal and equitable remedies, as the union claims. *See* Union's Br. in Opp. at 17–18. Although Ms. Mooney did argue that qualified-immunity and good-faith defenses are inapplicable to equitable remedies,[3] that was merely one of many arguments that Ms. Mooney offered for why the "good-faith defense" should not shield the union from restitutionary remedies that require nothing more than the return of money or property that was innocently (but unconstitutionally) taken. This was clearly explained in Ms. Mooney's appellate brief:

> There are *three separate and independent reasons why* the union's alleged good faith cannot shield it from Ms. Mooney's claim for restitution. First, the courts have repeatedly and consistently required the return of property and money that was taken in good faith but in violation of another's constitutional rights—even when qualified immunity or good faith would

3. *See* Br. of Appellants (7th Cir. Doc. 19) at 29–33; *id.* at 29 ("Neither Qualified Immunity Nor Good Faith Provides A Defense Against Equitable Claims").

> have shielded the defendants from liability that extends beyond mere return of the innocently taken property. . . . Second, the Supreme Court's opinion in *Wyatt v. Cole*, 504 U.S. 158 (1992), prevents defendants from asserting non-textual defenses such as "good faith" unless the most analogous common-law tort would have recognized a good-faith defense at the time that 42 U.S.C. § 1983 was enacted. *Id.* at 164. . . . Third, the defenses of qualified immunity and good faith are categorically inapplicable to claims for equitable relief, and Ms. Mooney is asserting an equitable claim for restitution of her "fair-share fees." *See* Part I.C, *infra*. Each of these three arguments undergirds the same overarching principle: Property that is taken in good faith—but in violation of another's constitutional rights—must be restored when the plaintiff demands its return.

See Br. of Appellants (7th Cir. Doc. 19) at 10–11 (emphasis added). The court of appeals' opinion might lead one to believe that Ms. Mooney had pinned her entire case on the distinction between legal and equitable remedies, because the court of appeals never addressed (let alone refuted) the remaining arguments that appear in Ms. Mooney's appellate brief. *See* Br. of Appellants (7th Cir. Doc. 19) at 10–29. But the union cannot pretend that Ms. Mooney never made these arguments simply because the Seventh Circuit chose to ignore them.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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