No. 19-1130

IN THE
Supreme Court of the United States

DALE DANIELSON, ET AL.,
Petitioners,

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a union can be held liable for retrospective monetary relief under 42 U.S.C. § 1983 for receiving and spending agency fees to pay for collective bargaining representation prior to *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), even though such fees were authorized by state law and constitutional under then-binding Supreme Court precedent.

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Federation of State Employees, AFSCME Council 28, AFL-CIO is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

STATEMENT OF THE CASE

A. Background

Respondent Washington Federation of State Employees, AFSCME Council 28, AFL-CIO ("WFSE") serves as the collective bargaining representative for more than 35,000 employees of the State of Washington and its community colleges. Pet. App. 6a; D. Ct. Doc. 1 ¶ 9. Under Washington law, WFSE has a duty to represent all bargaining unit workers in negotiating and administering its contracts, including workers who are not union members. *Allen v. Seattle Police Officers' Guild*, 100 Wash.2d 361, 371–72 (1983).

Prior to June 27, 2018, the collective bargaining agreements between the State of Washington and WFSE required individuals in those bargaining units who had chosen not to join WFSE to pay "agency fees" to cover their portion of the costs of collective bargaining representation. Pet. App. 6a. At the time, such agency fee provisions were authorized by Washington law, *see* Rev. Code Wash. 41.80.100, and by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that the First Amendment allows public employers to require employees to pay their proportionate share of the costs of union collective bargaining representation, but prohibits requiring nonmembers to pay for a union's political or ideological activities. *Abood*, 431 U.S. at 235–36.

On June 27, 2018, this Court issued its decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). *Janus* considered the same First Amendment challenge to agency fees rejected in *Abood*. *Janus* recognized that the lower court had "correctly"

dismissed that challenge as "foreclosed by *Abood*." *Id.* at 2462. But *Janus* concluded that *Abood* had erred in holding that agency fees are consistent with the First Amendment, and *Janus* concluded that principles of *stare decisis* did not justify retaining *Abood*. *Id.* at 2478–79.

Janus acknowledged that, in determining whether *stare decisis* principles weigh against overruling precedent, "reliance provides a strong reason for adhering to established law." *Id.* at 2484. *Janus* reasoned, however, that unions' reliance interests—which this Court identified as those arising from existing collective-bargaining agreements that had been negotiated with the expectation of receiving ongoing agency fees—were limited, because such agreements were "generally of rather short duration" and would include non-severability provisions if their agency fee provisions were "essential to the overall bargain." *Id.* at 2484–85. This Court did not suggest that overruling *Abood* would expose unions to potentially massive liability for having previously received and spent agency fees in accordance with the Court's then-controlling precedent.

WFSE and the State of Washington immediately complied with the ruling in *Janus* by terminating all collection of agency fees from nonmembers and renegotiating their collective bargaining agreements to eliminate all agency fee provisions. *See* Pet. App. 6a; D. Ct. Doc. 41-1 ¶¶ 3–7.

B. Proceedings below

Petitioners are three workers in WFSE-represented bargaining units who are not WFSE members. Pet. App. 6a. They filed this lawsuit against

Washington state officials and WFSE, asserted a single cause of action under 42 U.S.C. § 1983, and sought two forms of relief. Pet. App. 6a–7a. First, petitioners asked that the Washington statute authorizing the payment of agency fees be declared unconstitutional and the practice enjoined. Pet. App. 7a; D. Ct. Doc. 1, at 9–10. Second, petitioners asked that WFSE be required to repay, to a putative class of all nonmembers, all of the agency fees the union received prior to *Janus* to pay for collective bargaining representation. Pet. App. 6a–7a.

The district court dismissed petitioners' claims for prospective relief as moot, reasoning that the State and WFSE had immediately and unequivocally complied with this Court's decision in *Janus* and that "there is no reasonable likelihood that agency fees will be used and collected" in the future. Pet. App. 26a. The district court also granted WFSE's motion for judgment on the pleadings or summary judgment with respect to petitioners' claim for monetary relief. Pet. App. 24a–32a. The district court held that WFSE has a good faith defense to Section 1983 liability for collecting and spending pre-*Janus* agency fees because WFSE's "actions were authorized by the law and the State of Washington." Pet. App. 32a.

The Ninth Circuit affirmed. Pet. App. 1a–23a. The Ninth Circuit held that WFSE was entitled to "invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for agency fees it collected pre-*Janus*, where its conduct was directly authorized under both state law and decades of Supreme Court jurisprudence." Pet. App. 8a.

In their briefing to the Ninth Circuit, petitioners did not dispute that *some* form of good faith defense is available to private party defendants sued for monetary liability under Section 1983. *See* Brief of Appellants (9th Cir. Doc. 16) at 1 ("When the Supreme Court announces a new constitutional right and makes it retroactive, a defendant's good faith can shield it from liability for damages that result from its inadvertent and unknowing constitutional violations.") (emphasis omitted).[1] Petitioners argued, however, that the good faith defense was unavailable to WFSE because petitioners were seeking equitable "restitution" rather than legal damages. Pet. App. 17a. The Ninth Circuit rejected the argument,

[1] *See also, e.g.*, Brief of Appellants (9th Cir. Doc. 16) at 2 ("'Good faith' can protect the union from liability if the plaintiffs seek to recover damages[.]") (emphasis omitted); *id.* at 3 ("The plaintiffs contend that defenses such as qualified immunity and 'good faith' can provide only an immunity from damages[.]"); *id.* at 8 ("A defendant's 'good faith' can confer immunity if a plaintiff seeks to recover damages[.]"); *id.* at 10 ("[A] defendant's good faith will provide an immunity from damages[.]"); *id.* ("[A] person who seizes another's property under an unconstitutional replevin statute will have a 'good faith' defense if the victim seeks to recover damages[.]"); *id.* at 12–13 ("A … 'good-faith' defense can protect a defendant from liability for damages that arise from his innocent but unconstitutional conduct.") (citing *Wyatt v. Cole*, 994 F.2d 1113, 1115 (5th Cir. 1993), *cert. denied*, 510 U.S. 977 (1993)) (emphasis omitted); *id.* at 16 ("The defendant's 'good faith' reliance on the statute will protect him from paying damages for the collateral harms that resulted from his seizure of the plaintiffs' property.") (citing *Wyatt*, 994 F.2d at 1121); *id.* at 18 ("[A] 'good faith' defense can shield a defendant from personal monetary liability when a plaintiff seeks recovery for the collateral harms that resulted from the unconstitutional seizure of her property."); *id.* at 22 ("The 'good faith' defense can protect a defendant from liability for damages that arise from its innocent but unconstitutional conduct.").

reasoning that, regardless of "[t]he labeling of the relief sought," the "underlying nature" of petitioners' claim was one for compensatory damages, because their "constitutionally cognizable injury is the intangible dignitary harm suffered from being compelled to subsidize speech they did not endorse." *Id.*

The Ninth Circuit further reasoned that, even if petitioners were seeking equitable restitution, "the equities do not weigh in favor of requiring a refund of all agency fees collected pre-*Janus*," because WFSE had "collected and spent fees under the assumption—sanctioned by the nation's highest court—that its conduct was constitutional[, a]nd [WFSE] provided a service to contributing employees in exchange for the agency fees it received." Pet. App. 17a–18a. That exchange "cannot be unwound" and, therefore, "the most equitable outcome is a prospective change in [WFSE's] policy and practice (which undisputedly occurred), without retrospective monetary liability." Pet. App. 18a.

The Ninth Circuit emphasized the narrowness of its decision, stating that the good faith defense was available to WFSE because the union had "relied on presumptively-valid state law and then-binding Supreme Court precedent." Pet. App. 19a. The Ninth Circuit further stated that "[t]he ability of the public to rely on the [Supreme Court's] pronouncements of law is integral to the functioning of our judicial system…. If private parties could no longer rely on the pronouncements of even the nation's highest court to steer clear of liability, it could have a destabilizing impact on the judicial system." Pet. App. 20a.

REASONS FOR DENYING THE PETITION

In *Wyatt v. Cole*, 504 U.S. 158 (1992) ("*Wyatt*"), this Court held that private party defendants sued for monetary relief under Section 1983 cannot assert the same form of qualified immunity available to public officials, but stated that such defendants "could be entitled to an affirmative defense based on good faith …." *Id.* at 168–69. Since *Wyatt*, every circuit court to consider the question has recognized this good faith defense.[2] In the decision below, the Ninth Circuit applied the defense to hold that WFSE was not liable for receiving and spending agency fees prior to *Janus* because the union "acted in direct reliance on then-binding Supreme Court precedent and presumptively valid state law." Pet. App. 5a.

Petitioners provide no good reason for this Court to review the Ninth Circuit's decision. Contrary to petitioners' contention, there is no circuit split with respect to either the existence of the good faith defense (an issue petitioners have waived) or its application to the circumstances presented here. To the contrary, four circuit courts and more than two dozen district courts have all uniformly rejected indistinguishable claims against unions seeking recovery of pre-*Janus*

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[2] *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 510 U.S. 977 (1993); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (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); *Janus v. AFSCME Council 31*, 942 F.3d 352, 367 (7th Cir. 2019) ("*Janus II*").

agency fees. Given this unbroken consensus, there is no reason for this Court to intervene at this time.

Further, the unique circumstances that gave rise to petitioners' Section 1983 claim are unlikely to recur. This Court only rarely overrules its prior precedents, and private parties seldom face monetary claims under Section 1983 for engaging in conduct that was authorized by state law and by directly on-point Supreme Court precedent.

I. The lower courts have unanimously recognized a good faith defense to Section 1983 monetary liability.

Petitioners first contend that this Court should grant their petition in order to resolve a purported circuit split about whether private parties may assert a good faith defense to claims for monetary relief under Section 1983. Pet. at i–ii. But petitioners waived any challenge to the existence of such a defense by conceding in the Ninth Circuit that private party defendants may assert that defense. *See, e.g.*, Brief of Appellants (9th Cir. Doc. 16) at 12–13 ("A … 'good-faith' defense can protect a defendant from liability for damages that arise from his innocent but unconstitutional conduct.") (citing *Wyatt*, 994 F.2d at 1115) (emphasis omitted); *see also supra* note 1 (citing petitioners' concessions); 9th Cir. Oral Argument at 0:33 ("This Court can assume the existence of a good faith defense under Section 1983").[3]

[3] The argument is available at https://cdn.ca9.uscourts.gov/datastore/media/2019/11/06/18-36087.mp3.

Regardless, there is no circuit split to resolve. The six circuit courts to have considered the question all have held that private parties facing claims for monetary relief under Section 1983 may assert a good faith defense. The purportedly contrary authorities cited by petitioners hold only that private parties have no *qualified immunity* to Section 1983 liability—a holding with which this Court subsequently agreed in *Wyatt*.

1. In *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982), this Court held that private parties who invoke state-created laws and processes may, in certain circumstances, be considered state actors subject to liability under Section 1983. *Id.* at 936–37. The Court acknowledged that its construction of Section 1983 created a "problem"—namely, that "private individuals who innocently make use of seemingly valid state laws" could be sued for damages "if the law is subsequently held to be unconstitutional." *Id.* at 942 n.23. The Court suggested that this problem "should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense." *Id.*

Ten years later, *Wyatt* held that private party defendants in Section 1983 litigation cannot assert the same form of "qualified immunity" available to public officials. 504 U.S. at 167. The Court acknowledged, however, that "principles of equality and fairness may suggest … that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability," and explained that its decision did not "foreclose the possibility that private defendants faced with § 1983 liability under *Lugar* … could

be entitled to an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.[4]

Since *Wyatt*, the six courts of appeals to consider the question uniformly have held that private parties may assert a good faith defense to Section 1983 claims for monetary relief. The Fifth Circuit considered the issue on remand from this Court in *Wyatt*, concluding that "private defendants sued on the basis of Lugar may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures[.]" *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 510 U.S. 977 (1993). The Third Circuit expressed its agreement with the Fifth Circuit's holding in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994), and the Second, Sixth, Seventh, and Ninth Circuits all reached the same conclusion. *See Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Janus v. AFSCME Council 31*, 942 F.3d 352, 361–64 (7th Cir. 2019).[5]

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[4] *Wyatt* emphasized that its holding applied only to the "type of objectively determined, immediately appealable immunity" available to certain public officials under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and distinguished that immunity from "an affirmative defense based on … good faith and/or probable cause." *Wyatt*, 504 U.S. at 166 & n.2.

[5] Contrary to petitioners' incorrect suggestion, these circuit court decisions do not apply the same "contrary to clearly established law" standard used in the context of qualified immunity. *See* Pet. at i (contending that the good faith defense "allows private defendants to escape liability if they violate another's

No circuit court has held that private party defendants sued on the basis of *Lugar* are *not* entitled to assert a good faith defense to Section 1983 monetary liability. Indeed, WFSE is not aware of *any* decision by *any* court to that effect.

2. Petitioners do not dispute that all post-*Wyatt* decisions hold that private parties may assert a good faith defense to claims for monetary relief under Section 1983. *See* Pet. at 2–3. They contend, however, that there is a conflict to resolve because three pre-*Wyatt* circuit court decisions "rejected the notion that private defendants may assert a 'good-faith defense' under 42 U.S.C. § 1983." Pet. at 3. As this Court recognized in *Wyatt*, however, those decisions involved *qualified immunity*, not the good faith defense. *See* 504 U.S. at 161. They do not create any split with respect to the existence of a good faith defense.

Petitioners cite the First Circuit's decisions in *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), and *Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989). But *Downs* held only that a private defendant could not "rely upon any type of qualified immunity." *Downs*, 574 F.2d at 15. Petitioner points to the opinion's concluding comment that the private party defendant's liability would be determined "without regard to any claim of good faith," Pet. at 3 n.7 (citing *Downs*, 574 F.2d at 15–16), but that statement merely summarized the court's holding about qualified immunity,

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constitutional rights before the courts have clearly established the illegality of their conduct"). Instead, the good faith defense asks whether the private party defendants "knew or should have known that the statute upon which they relied was unconstitutional." *Wyatt*, 994 F.2d at 1118.

which was the only issue the court addressed in its opinion. *Downs* did not consider whether private party defendants are entitled to the separate and distinct good faith defense. *Lovell* is even further afield, as it merely noted *Downs*'s holding that private party defendants were not entitled to "a *qualified immunity* from damages similar to that enjoyed by government officials," then held that private party defendants had no right to immediately appeal a denial of qualified immunity. *Lovell*, 878 F.2d at 13 (emphasis added).

Moreover, the First Circuit recently heard oral argument in a case squarely presenting the issue whether unions have a good faith defense to Section 1983 liability for having received and spent pre-*Janus* agency fees. *See Doughty v. State Emps. Ass'n of N.H.*, No. 19-1636 (1st Cir.). There is no reason for this Court to grant review now based on petitioners' (erroneous) claim that the First Circuit has rejected the good faith defense, when the First Circuit will soon address that issue.

Petitioners also cite the Ninth Circuit's decision in *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). But *Howerton* held only that private defendants were not entitled to any form of qualified immunity. *Id.* at 385 n.10 (noting lack of "good faith *immunity* under section 1983 for private parties") (emphasis added). Indeed, in the very footnote petitioners cite, the Ninth Circuit referred with approval to *Lugar*'s suggestion "that compliance with [a] statute might be raised as an affirmative defense." *Id.* The Ninth Circuit later explicitly recognized the availability of a good faith defense in *Clement*. *See* 518 F.3d at 1096–97.

In any event, any purported ambiguity regarding the state of the law in the Ninth Circuit was resolved by the decision below, which explained that *Howerton* "stands for the unremarkable proposition that private parties cannot avail themselves of qualified immunity to a section 1983 lawsuit." Pet. App. 10a. Petitioners challenge the manner in which the panel below reconciled the Ninth Circuit's prior precedents, *see* Pet. at 18–20, but petitioners never sought en banc review, and the Ninth Circuit's recognition of a good faith defense is now indisputably consistent with the law of the Second, Third, Sixth, and Seventh Circuits.[6]

Not only are all the lower court decisions in agreement that a good faith defense is available, but the issue is still percolating in the lower courts, including in circuits that have not directly addressed the issue. As petitioners point out, "[d]ozens of refund lawsuits similar to [petitioners' lawsuit] are pending in district and circuit courts throughout the count[r]y." Pet. at 29. This Court should permit those courts to consider the issue in the first instance, instead of granting review at this time to address a non-existent conflict.

Finally, this case would not be an appropriate vehicle to resolve the (nonexistent) circuit split about the existence of a good faith defense both because petitioners waived the issue below, *see supra* at 8, and because

[6] Petitioners contend that "there is no conceivable distinction that can be drawn between good-faith 'immunity' and good faith as an 'affirmative defense," Pet. at 19, but this Court drew that very distinction in *Wyatt*. *See supra* note 4. In any event, petitioners' disagreement with the Ninth Circuit's treatment of its own precedents does not warrant this Court's review.

the petition does not contend that the decisions recognizing such a defense are wrongly decided.

II. The lower courts have unanimously held that the good faith defense bars Section 1983 claims for monetary relief arising from unions' pre-*Janus* receipt of agency fees.

Petitioners also contend that this Court should grant review in order to resolve a purported "division of authority" regarding the "scope" of the good faith defense. Pet. at 4. But no such division of authority exists. Rather, every court to consider Section 1983 claims against unions for their pre-*Janus* receipt and expenditure of agency fees has concluded that the good faith defense bars monetary relief. Petitioners' argument that they can avoid the good faith defense by characterizing their Section 1983 claim as a demand for the restitution of wrongfully taken money has been rejected by every court to consider it. Petitioners do not cite *any* Section 1983 cases, in any context, that support their theory.

1. Lawsuits similar to petitioners' lawsuit were filed throughout the country following issuance of the *Janus* decision. Pet. at 29 & n.37. The outcome of each of those lawsuits has been the same: Every court has concluded that unions' good-faith reliance on then-valid state laws and then-binding precedent of this Court precludes monetary relief under Section 1983. That consensus now includes six decisions from four

different Courts of Appeals, as well as more than two dozen district court decisions.[7]

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[7] *Danielson v. AFSCME Council 28*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018), *aff'd*, 945 F.3d 1096 (9th Cir. 2019); *Cook v. Brown*, 364 F. Supp. 3d 1184 (D. Or. 2019), *appeal pending*, No. 19-35191 (9th Cir.); *Carey v. Inslee*, 364 F. Supp. 3d 1220 (W.D. Wash. 2019), *appeal pending*, No. 19-35290 (9th Cir.); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), *appeal pending*, No. 19-35299 (9th Cir.); *Janus v. AFSCME Council 31*, 2019 WL 1239780 (N.D. Ill. Mar. 18, 2019), *aff'd*, 942 F.3d 352 (7th Cir. 2019); *Hough v. SEIU Local 521*, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), *appeal pending*, No. 19-15792 (9th Cir.); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980 (N.D. Ohio 2019*), aff'd*, 951 F.3d 386 (6th Cir. 2020); *Mooney v. Ill. Educ. Ass'n*, 372 F. Supp. 3d 690 (C.D. Ill.), *aff'd*, 942 F.3d 368 (7th Cir. 2019); *Bermudez v. SEIU Local 521*, 2019 WL 1615414 (N.D. Cal. Apr. 16, 2019); *Akers v. Md. State Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019), *appeal pending*, No. 19-1524 (4th Cir.); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021 (D. Conn. Apr. 26, 2019), *aff'd*, 955 F.3d 332 (2d Cir. 2020); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019), *appeal pending*, No. 19-55692 (9th Cir.); *Doughty v. State Emps. Ass'n of N.H.*, No. 1:19-cv-00053-PB (D.N.H. May 30, 2019), *appeal pending*, No. 19-1636 (1st Cir.); *Hernandez v. AFSCME Cal.*, 386 F. Supp. 3d 1300 (E.D. Cal. 2019), *appeal pending*, No. 20-15076 (9th Cir.); *Imhoff v. Cal. Teachers Ass'n*, No. 2:19-cv-01841 (C.D. Cal. July 1, 2019); *Diamond v. Pa. State Educ. Ass'n*, 399 F. Supp. 3d 361 (W.D. Pa. 2019), *appeal pending*, No. 19-2812 (3d Cir.); *Ogle v. Ohio Civil Serv. Emps. Ass'n*, 397 F. Supp. 3d 1076 (S.D. Ohio 2019), *aff'd*, 951 F.3d 794 (6th Cir. 2020); *Brice v. Cal. Faculty Ass'n*, No. 19-cv-04095 (C.D. Cal. Sept. 10, 2019), *appeal pending*, No. 19-56164 (9th Cir.); *Allen v. Santa Clara Cty. Corr. Peace Officers Ass'n*, 400 F. Supp. 3d 998 (E.D. Cal. 2019), *appeal pending*, No. 19-17217 (9th Cir.); *Casanova v. Machinists Local 701*, No. 1:19-cv-00428 (N.D. Ill. Sept. 11, 2019), *aff'd*, No. 19-2987 (7th Cir. Feb. 11, 2020); *O'Callaghan v. Regents of the Univ. of Cal.*, 2019 WL 6330686 (C.D. Cal. Sept. 30, 2019), *appeal pending*, No. 19-56271 (9th Cir.); *Smith v. N.J. Educ. Ass'n*, 2019 WL 6337991 (D.N.J. Nov. 27, 2019), *appeal pending*, No. 19-3914 (3d Cir.); *Wenzig v. SEIU Local 668*, 2019 WL 6715741 (M.D. Pa. Dec. 10,

This consensus in the lower courts is entirely consistent with what this Court contemplated in *Janus*. In *Janus,* after determining that *Abood* was wrongly decided, this Court considered whether reliance interests nonetheless justified retaining *Abood* as matter of *stare decisis.* 138 S. Ct. at 2478–86. This Court acknowledged that unions had entered into existing collective bargaining agreements with the understanding that agency fees would help pay for collective bargaining representation, but concluded that unions' reliance interests in the continued enforcement of those agreements were not weighty. *Id.* at 2484–85. This Court did not suggest that its holding also would expose public employee unions to massive retrospective monetary liability for having followed this Court's then-governing precedent. *See id.* at 2486 (holding that agency fees "cannot be allowed *to continue*" and that public-sector unions "may *no longer* extract agency fees from nonconsenting employees")

2019), *appeal pending*, No. 19-3906 (3d Cir.); *Seidemann v. Prof'l Staff Cong. Local 2334*, _ F. Supp. 3d _, 2020 WL 127583 (S.D.N.Y. Jan. 10, 2020), *appeal pending*, No. 20-460 (2d Cir.); *Penning v. SEIU Local 1021*, 424 F. Supp. 3d 684 (N.D. Cal. 2020), *appeal pending*, No. 20-15226 (9th Cir.); *Leitch v. AFSCME Council 31*, No. 1:19-cv-02921 (N.D. Ill. Jan. 30, 2020), *appeal pending*, No. 20-1379 (7th Cir.); *Ocol v. Chi. Teachers Union*, 2020 WL 1467404 (N.D. Ill. Mar. 26, 2020); *Chambers v. AFSCME Int'l*, _ F. Supp. 3d _, 2020 WL 1527904 (D. Or. Mar. 31, 2020), *appeal pending*, No. 20-35355 (9th Cir.); *Mattos v. AFSCME Council 3*, 2020 WL 2027365 (D. Md. Apr. 27, 2020).

Courts considering similar claims in the wake of *Harris v. Quinn*, 134 S. Ct. 2618 (2014), also uniformly applied the good faith defense to defeat claims for retrospective liability. *See Jarvis v. Cuomo*, 660 F.App'x 72, 75–76 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Hoffman v. Inslee*, 2016 WL 6126016, at *4 (W.D. Wash. Oct. 20, 2016); *Winner v. Rauner*, 2016 WL 7374258, at *5–6 (N.D. Ill. Dec. 20, 2016).

(emphasis added); *see also Wholean*, 955 F.3d at 336 (noting purely prospective nature of decision's language); *Lee*, 951 F.3d at 389 (same).

2. Petitioners contend that this Court's review is necessary to resolve a "division of authority" regarding whether plaintiffs in Section 1983 cases can avoid the good faith defense by characterizing their claim as one for the restitution of money wrongfully taken. Pet. at 6. But there is no split on that issue. Petitioners' counsel has asserted that same argument in cases around the country, and it has been uniformly rejected.

The Ninth Circuit explained in the decision below, for example, that petitioners' claim that they are seeking the equitable return of money rather than damages is "flawed" because their "constitutionally cognizable injury is the intangible dignitary harm suffered from being compelled to subsidize speech they did not endorse …. *not* the diminution in their assets from the payment of compulsory agency fees." Pet. App. 17a (emphasis in original). The Seventh Circuit likewise held that plaintiffs seeking recovery of pre-*Janus* agency fees are asserting claims for damages, not equitable restitution, because the relief would be enforced "against the union's treasury generally, not … against an identifiable fund or asset." *Mooney*, 942 F.3d at 371 (citing *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016)).

The Sixth Circuit agreed with the reasoning of both the Seventh Circuit and the Ninth Circuit, and further explained that the plaintiffs' theory that they are seeking the "return" of property in the unions'

possession failed because agency fees were expended providing ongoing collective bargaining representation. *Lee*, 951 F.3d at 391. Thus, "'it is not the case that the agency fees remain in a vault, to be returned like a seized automobile.'" *Id.* (citing *Babb*, 378 F. Supp. 3d at 876).

Petitioners nonetheless contend that there is a conflict for this Court to resolve because all these decisions conflict with a "principle … ubiquitous in American law" that money "taken in violation of another's constitutional rights *must* be restored, even when the defendant asserts a qualified-immunity or good-faith defense." Pet. at 21, 23 (emphasis in original). But the decisions upon which petitioners premise their argument do not involve Section 1983, let alone consider what remedies and defenses are available for Section 1983 claims for monetary relief against private parties. They also do not establish the purported "universal" remedial principle that petitioners propose.

Petitioners urge, for example, that "[t]axes that are collected under a statute that is later declared unconstitutional must be returned." Pet. at 21 (citing *United States v. Windsor*, 570 U.S. 744 (2013)). But this Court has held that the invalidation of a tax statute "does *not* necessarily entitle [taxpayers] to a refund." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 100 (1993) (emphasis added). There is *no* support for petitioners' theory that taxpayers who fail to pursue the appropriate statutory process for challenging a tax liability could bring a Section 1983 lawsuit to procure the return of all taxes paid before a tax was declared unconstitutional. *See, e.g.*, 26 U.S.C. § 7422 (setting requirements to pursue civil action for refund of

federal tax payments); *cf., e.g.*, Restatement (3d) of Restitution & Unjust Enrichment § 19, cmt. f & illus. 17 (2011) (recovery of improperly-paid tax will not lie "if the disruption or hardship resulting from an obligation to refund taxes improperly collected would outweigh the equities in favor of the affected taxpayers").

Petitioners also cite the tort of conversion in support of their allegedly "ubiquitous" principle, Pet. at 21–22 n.34, but at common law conversion did not apply to intangible property like money. 18 Am. Jur. 2d Conversion § 7 ("[M]onies are intangible and, therefore, not subject to a claim for conversion[.]"). At common law, a claim for recovery of "money had and received" was based on equitable principles. 42 C.J.S. Implied Contracts § 26. The Ninth Circuit recognized that equitable principles do not support retrospective monetary relief here. *See* Pet. App. 17a–18a; *see also Lemon v. Kurtzman,* 411 U.S. 192, 200–09 (1973) (plurality) (under principles of equity, funds could be paid to religious schools for educational services provided before the funding was held to be unconstitutional).

Many of the other decisions petitioners rely upon do not even consider remedial issues. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (incorporating Excessive Fines Clause against the States); *Windsor*, 570 U.S. at 775 (invalidating Defense of Marriage Act). And while petitioners cite cases involving the return of criminal fines and victim restitution, Pet. at 26–27, those decisions simply recognize that the financial penalties imposed pursuant to a criminal conviction cannot remain in place after the conviction has been vacated.

In short, none of the non-Section 1983 cases petitioners cite either reference or implicitly support their supposedly "ubiquitous" principle about the "return" of money "wrongfully taken." Moreover, as the lower courts have pointed out in rejecting petitioners' argument, agency fees paid for the costs of collective bargaining representation for the entire bargaining unit, so there is no money to "return." *See supra* at 16–17.

Petitioners also contend that the Ninth Circuit's decision "is incompatible with each of the five circuit-court rulings that has recognized a good-faith defense outside the context of union-refund lawsuits." Pet. at 23 (citing *Wyatt*, 994 F.2d 1113 (5th Cir. 1993); *Jordan*, 20 F.3d 1250 (3d Cir. 1994); *Vector Research*, 76 F.3d 692 (6th Cir. 1996); *Pinsky*, 79 F.3d 306 (2d Cir. 1996); *Clement*, 518 F.3d 1090 (9th Cir. 2008)). But those cases recognized and applied the good faith defense without ever suggesting any limitation like the one proposed by petitioners.

To the extent that the plaintiffs in some of the cited cases happened to have recovered their tangible property, that was a function of substantive state or federal law, not Section 1983.[8] And contrary to petitioners' claim, the vehicle in *Clement* "was never returned, but was sold by the towing company." *See*

[8] *See, e.g.*, *Wyatt*, 994 F.2d at 1115 (noting state court's dismissal of complaint in replevin); *Pinsky*, 79 F.3d at 310 (noting release of attachment while appeal from dismissal of Section 1983 claim was pending); *Jordan*, 20 F.3d at 1258 (noting state court's re-opening of judgment and return of escrowed funds); *Vector Research*, 76 F.3d at 696 (impoundment order not authorized by Copyright Act or Rule 65).

Appellant's Brief, *Clement v. City of Glendale*, 9th Cir. No. 05-56692, 2006 WL 2982023 (Feb. 27, 2006); *but see* Pet. at 24 (wrongly contending that towing company was not allowed "to keep the plaintiff's car").

The purported "conflict" petitioners identify thus involves nothing in the actual holdings or text of the cited opinions, but only petitioners' own speculation about how the good faith defense might have been applied to questions that were not presented in those appeals.

In short, petitioners do not demonstrate any division of authority that justifies this Court's review.

III. There is no other justification for this Court's intervention at this time.

Finally, petitioners contend that review of the decision below is justified by the "large number" of pending lawsuits seeking to hold unions monetarily liable for accepting pre-*Janus* agency fees. *See* Pet. 29–31.[9] As stated already, however, every district and circuit court to consider such a claim has held that the good faith defense protects such union defendants from Section 1983 monetary liability. Far from suggesting this Court's guidance is required, this broad consensus that petitioners' claim is meritless demonstrates that this Court's involvement is unnecessary. That other cases are still pending in the lower courts suggests, if anything, that this Court should wait to see whether a conflict develops.

[9] Petitioners' counsel serves as counsel in more than half of the lawsuits cited.

The unique circumstances here also do not present a suitable vehicle for this Court to provide guidance on Section 1983's application in more typical cases. *See* Pet. 30 (arguing that this Court should grant review to consider "what the scope of [the good faith] defense should be"). The Ninth Circuit held only that a good faith defense was available to a private party sued for damages under Section 1983 for "act[ing] in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law." Pet. App. 5a. Such situations are likely to be rare.

Stare decisis is "a 'foundation stone of the rule of law.'" *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). This Court seldom overrules its precedents. Moreover, this Court has held that when a precedent of this Court is directly on point, that precedent is the law of the land binding on all lower courts, even if subsequent decisions have criticized that precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Accordingly, this case—in which a private defendant was acting in accordance with this Court's governing precedent—would not provide a suitable vehicle for this Court to consider the potential application of a good faith defense to more typical situations.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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