No. 19-1130

In the Supreme Court of the United States

DALE DANIELSON, BENJAMIN RAST, AND TAMARA ROBERSON,

PETITIONERS,

v.

JAY ROBERT INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON; DAVID SCHUMACHER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT; AND THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 28, AFL-CIO,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF WASHINGTON'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a private entity that acted in accordance with state law and then-binding Supreme Court precedent be entitled to a good faith defense when sued for monetary relief premised on a later change in Supreme Court precedent?

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INTRODUCTION

The State of Washington joins the arguments against granting certiorari offered by the Washington Federation of State Employees, AFSCME Council 28 (WFSE). There is no conflict in the circuit courts of appeal, and the lower courts' rulings that WFSE is entitled to a good faith defense from monetary liability under 42 U.S.C. § 1983 for its actions taken in compliance with state law and this Court's precedent follow controlling law.

The State provides a separate Brief in Opposition to emphasize two important policies underlying the uniform rulings of lower courts on these issues. First, the good faith defense encourages private parties to follow presumptively valid law and partner with government—something government has good reason to encourage. Second, the good faith defense affirms the principle that parties and lower courts should follow this Court's precedent unless and until the Court overrules that precedent.

Conversely, denying a good faith defense under these circumstances will discourage private entities from partnering with the government. It will also erode respect for the judicial decisionmaking process, instead encouraging parties and lower courts to attempt to predict, potentially incorrectly, whether this Court will overrule its precedent. For these reasons, and the additional reasons set forth in WFSE's Brief in Opposition, the petition should be denied.

OPINIONS BELOW

The district court's order granting WFSE's Motion for Judgment on the Pleadings is available at 340 F. Supp. 3d 1083 (W.D. Wash. 2018), and reproduced at Pet. App. 24a-32a. The Court of Appeals decision affirming the district court is reported at 945 F.3d 1096 (9th Cir. 2019), and reproduced at Pet. App. 1a-23a.

JURISDICTION

Dale Danielson, Benjamin Rast, and Tamara Roberson (collectively, Danielson) invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Because the State is joining WFSE's Brief in Opposition, the State adopts WFSE's detailed Statement of the Case. The State provides an abbreviated factual summary here as context for its additional argument in opposition.

A. Factual and Legal Background

For over forty years, this Court's precedent clearly established that public sector employers and unions could constitutionally require non-union members to pay a service charge intended to help defray the expenses that unions incurred in collective bargaining and other representational activities conducted on behalf of both union members and non-union members. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); Pet. App. 5a. Consistent with that authority, the Washington state legislature enacted a statute authorizing the State and the

unions representing state employees to enter into agreements requiring these fees. 2002 Wash. Sess. Laws, ch. 354, § 311(1) (codified as Former Wash. Rev. Code § 41.80.100(1) (2018)). On June 27, 2018, this Court reversed course, overruled *Abood*, and held that continuing to require the payment of such service charges violates the First Amendment. *Janus v. AFSCME, Council 31* (*Janus I*), 138 S. Ct. 2448 (2018); Pet. App. at 5a. The State and WFSE immediately terminated the fees in response. Pet. App. at 6a.

Specifically in response to this Court's decision in *Janus I*, the Washington legislature enacted laws to clearly protect parties from liability who, prior to *Janus I*, followed state laws in good faith. *See* 2019 Wash. Sess. Laws, ch. 230, § 1 (Substitute House Bill (SHB) 1575). Through SHB 1575, the state legislature expressly declared that unions "who relied on, and abided by, state law and supreme court precedent" in accepting representation fees should not be "liable to refund them" under state law. 2019 Wash. Sess. Laws, ch. 230, § 1(1).

B. Proceedings Below

Danielson is a Washington state employee who works within a WFSE-represented bargaining unit. He is not a WFSE member, and he was required to pay representation fees prior to *Janus I*. He filed this lawsuit against the State and WFSE just before this Court decided *Janus I*. His fees were terminated in response to *Janus I*. Danielson sought prospective relief against both WFSE and the State, and retrospective monetary relief against WFSE in the

amount of the representation fees he paid prior to *Janus I*. Pet. 7-8.

The district court dismissed Danielson's claims for prospective relief as moot. Pet. 9. Because the State and WFSE immediately complied with the *Janus I* decision and stopped requiring representation fees, the court decided the challenged behavior could not reasonably be expected to recur. Pet. 9; Pet. App. 7a. Danielson has not appealed the decision to deny prospective relief. Pet. 9.

The district court also granted WFSE's motion for judgment on the pleadings regarding Danielson's retrospective claim for monetary relief. Pet. App. 32a. It decided that WFSE had a good faith defense to that claim because WFSE's actions "were authorized by the law and the State of Washington," and WFSE "should not be expected to have known that *Abood* was unconstitutional, because the Supreme Court had not yet so decided." Pet. App. 31a-32a.

Danielson appealed only the dismissal of his retrospective monetary claim against WFSE. Pet. App. 7a-8a. The court of appeals affirmed the district court. Pet. App. 5a.

REASONS FOR DENYING THE PETITION

A. The Lower Courts Have Correctly and Unanimously Concluded that a Good Faith Defense Is Available to Private Parties Who, Like WFSE, Followed Presumptively Valid State Law and Supreme Court Precedent

As set forth in WFSE's Brief in Opposition, the good faith defense was properly applied below and is

consistent with this Court's precedent and that of all of the circuits to address the issue, regardless of whether Danielson characterizes his claim as one for restitution or one for damages. The State joins WFSE's arguments in that regard.

B. There are Good Reasons Why All of the Courts That Have Addressed the Issue Have Recognized a Good Faith Defense

Not only is application of the good faith defense legally correct in this case, it also serves objectives critical to a well-functioning society: public trust in state and federal law and deference to and respect for this Court's authority to say what the law is.

1. The good faith defense encourages private parties to engage with government and follow existing law

Washington, like every other state and the federal government, has a critical interest in encouraging its residents to act in accordance with existing laws. Among other things, those laws create rights and provide mechanisms to vindicate those rights. They also provide means for the private sector to partner with government. But public trust in those laws will be substantially eroded if residents are penalized for acting in good faith based on those laws. This Court and many other court have therefore recognized strong policy reasons why a good faith defense should be available in the context of monetary liability claims based on actions taken pursuant to presumptively valid laws.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that a private creditor that invoked the aid of state officials to take advantage of state-created attachment procedures could be liable under § 1983. *Id.* at 940-41. However, as the Court acknowledged, treating such conduct as state action could unfairly subject private parties who "innocently" make use of "seemingly valid state laws" to liability just because those laws are "subsequently held to be unconstitutional[.]" *Id.* at 942 n.23. The Court suggested addressing this problem with the establishment of an affirmative defense. *Id.*

In *Wyatt v. Cole*, 504 U.S. 158, 168 (1992), the Court further recognized 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, as do their government counterparts[.]" There, the state replevin procedures invoked by one of the parties were later deemed unconstitutional, and the question was whether that party was entitled to assert qualified immunity. *Id.* at 160. A majority of the justices opined that either a good faith defense or qualified immunity should be available for private parties. *Id.* at 172-73 (Kennedy, J., concurring, joined by Scalia, J.), 176-77 (Rehnquist, C.J., dissenting, joined by Souter, J., and Thomas, J.). Ultimately, the majority opinion rejected the application of qualified immunity to private parties, but did not decide or "foreclose the possibility that private defendants . . . could be entitled to an affirmative defense based on good faith[.]" *Id.* at 169.

On remand, the Fifth Circuit Court of Appeals concluded that the question left open by the majority opinion in *Wyatt* was "largely answered" by the dissenting and concurring opinions, and, accordingly, expressly recognized and applied this good faith defense. *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993). The court there held that "private [parties] sued" for state action "may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures[.]" *Id.* Thus, "private defendants . . . should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." *Id.* at 1120. This Court denied certiorari. *Wyatt v. Cole*, 510 U.S. 977 (1993).

For similar reasons, numerous other courts have authorized a good faith defense for private parties who act in good faith reliance on presumptively valid laws. *See, e.g.*, *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020) ; *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *Janus v. AFSCME Council 31* (*Janus II*), 942 F.3d 352, 364 (7th Cir. 2019), *petition for cert. filed*; *Jarvis v. Cuomo*, 660 F. App'x 72, 75 (2d Cir. 2016); *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008); *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, 311-13 (2d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275-78 (3d Cir. 1994); *see also Danielson*, 945 F.3d at 1104 & n.7 (listing cases forming a "growing consensus of courts across the nation" to find the good faith defense available in this context). As the Sixth

Circuit Court of Appeals recently affirmed, the good faith defense "protects those who unwittingly" rely "on a presumptively valid state law—those who had good cause in other words to call on the governmental process in the first instance." *Ogle v. Ohio Civil Serv. Emps.*, 951 F.3d 794, 797 (6th Cir. 2020). Under circumstances similar to those present here, that court concluded that the union "may invoke the good-faith defense because *Abood* and state law told them they were in the clear." *Id.*

Danielson's position that private parties should be financially liable for following presumptively valid state law stands in stark contrast to the rationale expressed in this consensus of precedent. Danielson does not argue to this Court that it was unreasonable for WFSE to rely on state law and *Abood*. Instead, he argues that the good faith defense is categorically unavailable to WFSE. But imposing liability on private parties who reasonably rely on the validity of existing state laws, as Danielson proposes, would diminish public confidence in government and specifically the legal system. If private citizens will be financially liable for following state laws in good faith, simply because those laws are later invalidated, they have little reason to trust those laws in the first place. It is, therefore, detrimental for a democratic society to deny to "those who act in accordance with its laws and its accepted procedures protection from . . . damage suits resting on the alleged constitutional invalidity of such laws and procedures." *Williams v. Johnson*, 386 F. Supp. 280, 288-89 (D. Md. 1974).

Moreover, like every other state and the federal government, Washington has an interest in encouraging its residents to cooperate and engage with government in activities specifically authorized by its laws. Danielson's position that the good faith defense is completely unavailable has the potential to impact a variety of cases in which private entities face potential liability under § 1983 for contracting with the government. For example, private doctors may be found to act under color of law for purposes of § 1983 when they contract with a state to provide medical care to prisoners. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 54-57 (1988) (holding private doctor under contract with a state prison to provide medical care to prisoners acted under color of state law when he treated inmate). Yet under Danielson's theory, such a doctor could later be held liable even for actions that were entirely consistent with state law and this Court's precedent, if this Court were to later reconsider its precedent. This kind of outcome will severely discourage public-private cooperation.

Parties who avail themselves of presumptively valid procedures and do business with the government should not be deterred from doing so out of fear that they could be financially liable if their actions—while currently authorized—are later deemed unconstitutional. As this Court noted in a case affording qualified immunity to a government contractor, "any private individual with a choice might think twice before accepting a government assignment" if working alongside government could leave them "holding the bag—facing full liability for

actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky v. Delia*, 566 U.S. 377, 391 (2012). The same reason supports application of a good faith defense here.

Holding individuals or entities like WFSE liable for actions taken in reasonable reliance on state statutes and this Court's precedent is likely to weaken public confidence in the validity of laws and deter the public from utilizing government processes or cooperating with the government in the future. Conversely, continuing to afford them a good faith defense will strengthen public confidence and reliance on existing law.

2. The good faith defense promotes respect for our system of judicial decision making

A good faith defense is particularly appropriate where, as here, parties rely in good faith not only on state laws, but controlling Supreme Court precedent. It is undisputed that *Abood* directly controlled the issue of whether representation fees could be constitutionally imposed during all times in which Plaintiffs paid these fees. *See Janus I*, 138 S. Ct. at 2462 (recognizing that earlier challenges to agency fees in the lower courts were "foreclosed by *Abood*"). Thus, while Danielson does not (and cannot) contend that it was unreasonable for WFSE to rely on *Abood* before *Janus I*, he still seeks to impose monetary liability in light of *Janus I*. Danielson's theory undermines the rule that lower courts and parties

alike should follow this Court's precedent unless and until this Court modifies such precedent, and jeopardizes the system of precedent on which public and private parties rely in ordering their affairs.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Accordingly, this Court's interpretation of the Constitution "can be altered only by constitutional amendment or by overruling [its] prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). This Court has cautioned against lower courts concluding that a recent case has, "by implication, overruled an earlier precedent." *Id.* at 237-38. Instead, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237-38 (alteration in *Agostini*) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

If lower courts are precluded from concluding that this Court has overruled earlier precedent by implication, then private and public parties certainly cannot be expected to do so. "The Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future." *Janus II*, 942 F.3d at 366. Good faith must be presumed, therefore, where the challenged action occurs

pursuant to a valid state statute that is constitutional at the time under then-binding Supreme Court precedent. It would, conversely, "imperil the rule of law" to require defendants to predict a change in Supreme Court precedent, by "reading the tea leaves of Supreme Court dicta[.]" *Cook v. Brown*, 364 F. Supp. 3d 1184, 1192-93 (D. Or. 2019); *see also Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1006 (D. Alaska 2019) (agreeing with and quoting *Cook*). It could further undercut public confidence in the Court's authority and decision making to put the burden on private parties to predict when the Court's constitutional jurisprudence might shift, particularly where parties could guess incorrectly.

Consistent with the rule that parties can reasonably rely on this Court's precedent unless it is overruled, this Court in *Janus* did not hold that the union was monetarily liable for past representation fees received. *See Janus I*, 138 S. Ct. at 2486. Rather, the Court concluded that "States and public-sector unions may no longer extract agency fees from nonconsenting employees," and reversed and remanded for further proceedings. *Id*. On remand, the Seventh Circuit Court of Appeals concluded that Janus was not "entitled to a refund of some or all" of the money he paid in representation fees prior to this Court's decision, and applied the good faith defense. *Janus II*, 942 F.3d at 354.

Where this Court has stated "what the law is" in any given area, it must be reasonable to follow that law. Applying a good faith defense to situations like this one respects the authority of this Court to

definitively say what the law is and discourages public and private parties from acting on guesses as to what the law might become.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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