No. 19-1130

In the Supreme Court of the United States

DALE DANIELSON, ET AL., PETITIONERS

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

TALCOTT J. FRANKLIN
Talcott Franklin PC
1920 McKinney Avenue
7th Floor
Dallas, Texas 75201
(214) 736-8730
tal@talcottfranklin.com

[Additional counsel listed on inside cover]

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Petitioners

ERIC STAHLFELD
Freedom Foundation
P.O. Box 552
Olympia, Washington 98507
(360) 956-3482
estahlfeld@freedomfoundation.org

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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 re-

turn 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 7–12. It also claims that the petitioners have "waived" the issue by failing to contest the existence of a good-faith defense in the Ninth Circuit. *See id.* at 4, 6. 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 8. 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 "merely summarized the court's holding about 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 Petitioners Have Fully Preserved Their Challenge To The Existence Of A Good-Faith Defense

The union's claim that the petitioners have "waived" this issue is demonstrably untrue. The petitioners' Ninth Circuit brief specifically argued that *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), prevents the union from

asserting *any* good-faith defense under 42 U.S.C. § 1983. *See* Br. of Appellants (9th Cir. Doc. 16) at 32 ("The Ninth Circuit's Ruling In *Howerton v. Gabica* Precludes A 'Good Faith' Defense For Private Parties In Section 1983 Litigation"). The petitioners wrote:

> There is a separate and independent obstacle to the union's good-faith defense: It is foreclosed by this Court's binding pronouncement in *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). *Howerton* held that a private landlord had acted "under color of state law" when it attempted to evict a tenant with the assistance of police. *See id.* at 328–85. And *Howerton* denied the landlord a "good faith" defense because it ruled that good-faith defenses are categorically inapplicable to private parties who violate section 1983. *See id.* at 385 n.10 (9th Cir. 1983) ("[T]here 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.").

Br. of Appellants (9th Cir. Doc. 16) at 32–33. In a footnote, the petitioners also cited *Downs v. Sawtelle*, 574 F.2d 1, 15–16 (1st Cir. 1978), and *Lovell v. One Bancorp*, 878 F.2d 10, 13 (1st Cir. 1989), and observed that "*Howerton* is not the only court to reject a 'good faith' defense for private defendants who violate 42 U.S.C. § 1983." *Id.* at 33 n.14.

The petitioners clearly and unequivocally argued that there is *no* good-faith defense—of any scope—available to private parties under 42 U.S.C. § 1983, and they have

fully preserved their challenge to the existence of a good-faith defense. It is hard to fathom how the union can claim waiver in the face of these passages from the petitioners' Ninth Circuit brief. To be sure, the petitioners *also* challenged the district court's conception of the *scope* of the good-faith defense, and they denied that a "good-faith defense" 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. *Id.* at 13–32. But that does not waive the petitioners' separate and independent challenge to the *existence* of the good-faith defense. Litigants are permitted to make arguments in the alternative, and they do not "waive" an argument by offering a separate argument that may seem inconsistent or logically incompatible with the other. *See* Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."). A plaintiff that challenges the existence of qualified immunity does not "waive" that claim by arguing in the alternative that qualified immunity has not been established on the facts of his case.

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

The union attempts to defeat the petitioners' circuit split by looking only to cases involving post-*Janus* (or post-*Harris*) refund lawsuits brought against public-sector unions. *See* Union's Br. in Opp. at 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.[1] But the petitioners are not alleging that the lower courts disagree on whether public-sector unions must return agency fees that they collected before *Janus*. The petitioners' 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 split that the petitioners have alleged, and the union does not refute the petitioners' argument by noting the absence of a circuit conflict on a different and more narrow legal issue.

The union criticizes the petitioners for relying on cases that do not involve section 1983. *See* Union's Br. in Opp. at 17. But courts cannot recognize or create nontextual 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

1. *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)

(1992). *Wyatt* recognized 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 omitted). But *Wyatt* nevertheless held 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 unwill-

ingness 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 unconstitutionally 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.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

TALCOTT J. FRANKLIN
Talcott Franklin PC
1920 McKinney Avenue
7th Floor
Dallas, Texas 75201
(214) 736-8730
tal@talcottfranklin.com

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

ERIC STAHLFELD
Freedom Foundation
P.O. Box 552
Olympia, Washington 98507
(360) 956-3482
estahlfeld@freedomfoundation.org

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