No. 20-1534

IN THE
Supreme Court of the United States

PATRICK DOUGHTY, ET AL.,
Petitioners,

v.

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU LOCAL 1984, CTW, CLC,
Respondent.

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

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-controlling Supreme Court precedent.

CORPORATE DISCLOSURE STATEMENT

Respondent State Employees' Association of New Hampshire, SEIU Local 1984 is an unincorporated association.

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INTRODUCTION

The lower courts, including the court below, have unanimously and correctly held that unions are not subject to retrospective monetary liability in suits under 42 U.S.C. § 1983 for having collected agency fees prior to *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in accordance with state law and this Court's then-controlling precedent. Since January of this year, this Court has denied seven petitions for certiorari that raised the same question presented here,[1] and there have been no developments in the short time since those denials that would make the question worthy of this Court's review. This petition should also be denied.

STATEMENT OF THE CASE

A. New Hampshire, like many other states, allows public employees to organize and bargain collectively with their employer, through a representative organization of their choosing, over the terms and conditions of their employment. Respondent State Employees' Association of New Hampshire, SEIU Local 1984, CTW, CLC ("Union") has been chosen and recognized as the exclusive bargaining representative for a unit of state employees in New Hampshire that includes Petitioners. That status

[1] *Wholean v. CSEA SEIU Local* 2001, _ S. Ct. _, 2021 WL 1163740 (Mar. 29, 2021); *Janus v. AFSCME Council 31*, 141 S. Ct. 1282 (2021); *Mooney v. Ill. Educ. Ass'n*, 141 S. Ct. 1283 (2021); *Danielson v. Inslee*, 141 S. Ct. 1265 (2021); *Casanova v. Machinists Local 701*, 141 S. Ct. 1283 (2021); *Lee v. Ohio Educ. Ass'n*, 141 S. Ct. 1264 (2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 141 S. Ct. 1265 (2021).

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, New Hampshire law authorized unions and public employers to negotiate, as part of their collective bargaining agreements, an agency-fee clause requiring nonmembers to pay unions a fee covering their portion of the cost of collective bargaining. *See Nashua Tchrs. Union v. Nashua Sch. Dist.*, 707 A.2d 448, 450 (N.H. 1998) (citing N.H. Rev. Stat. Ann. § 273-A:3). Consistent with New Hampshire law and this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had upheld the constitutionality of such agency-fee requirements in the public sector, the Union entered into a collective bargaining agreement with the state requiring that members of the bargaining unit who declined to join the union would have an agency fee deducted from their paychecks to help defray the costs of collective bargaining and contract enforcement undertaken for the benefit of all employees, 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), which overruled *Abood* and held that agency-fee requirements "cannot be allowed to continue." *Id.* at 2486. Following *Janus*, the Union recognized that the statutory and contractual provisions authorizing agency fees were no longer enforceable, and they immediately terminated the deduction of agency fees

from the paychecks of nonmembers, including Petitioners.

More than six months after *Janus* was decided, Petitioners Patrick Doughty and Randy Severance filed a putative class action under 42 U.S.C. § 1983 against the Union. Petitioners did not allege that the Union was continuing to collect agency fees from them in violation of the *Janus* decision—and indeed it is undisputed that neither they nor anyone else in the bargaining unit represented by the Union was required to pay any such fees after *Janus* was decided. Rather, Petitioners claimed that the agency fees they had paid *before* June 27, 2018—at a time when New Hampshire law authorized agency fees, and the *Abood* decision upholding the constitutionality of such statutes was the law of the land—must be paid back by the Union.

The district court (Hon. Paul J. Barbadoro) granted the Union's motion to dismiss, holding that the Union could assert the good-faith defense available to private parties sued for monetary relief under 42 U.S.C. § 1983 because the Union had relied on state law and then-controlling Supreme Court precedent. Pet. App. 42–46.

The First Circuit agreed that unions are not liable for pre-*Janus* agency fees, thereby "aligning . . . with every circuit to have addressed whether such a backward-looking, *Janus*-based claim is cognizable under § 1983." Pet. App. 3 & n.1 (citing decisions from the First, Second, Third, Seventh, and Ninth Circuits rejecting indistinguishable claims). The court began its analysis by observing that, under this Court's precedents, "the text of § 1983 should be read . . . with an understanding that the common law's rules 'defining

the elements of damages and the prerequisites for their recovery[] provide the appropriate starting point for the inquiry under § 1983.'" Pet. App. 10 (quoting *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978)). It then compared Petitioners' damages claim to the common-law torts of abuse of process and malicious prosecution, which required a plaintiff to prove that the defendant acted in bad faith (*i.e.*, with malice or lack of probable cause). Pet. App. 11. The court held that Petitioners' claim "is similar to claims for those common-law torts in that it seeks to compensate [Petitioners] for a private party having used a lawful-when-invoked, state-backed process to acquire their property, even though that process was subsequently held to be unlawful due to a change in the law." Pet. App. 14–15 (citing *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794, 797 (6th Cir. 2020) (Sutton, J.)).

On the basis of this analogy, the First Circuit affirmed the district court's decision, because the Petitioners had not alleged—and could not allege—that the Union did not act in good faith when it collected and expended agency fees pursuant to New Hampshire law and this Court's *Abood* precedent. Pet. App. 17.

REASONS FOR DENYING THE WRIT

This petition presents the narrow question of whether unions that received and spent agency fees prior to *Janus* in accordance with state law and this Court's then-controlling precedent are liable for retrospective monetary relief under 42 U.S.C. § 1983. Since *Janus*, seven courts of appeals and more than 30 district courts—including the First Circuit in the

decision Petitioners ask this Court to review—have unanimously answered that question in the negative. The courts of appeals are thus in complete agreement with respect to the question presented.

Nor is there any disagreement among the circuits about the broader question of whether, as a general matter, private parties are entitled to assert a good-faith defense to Section 1983 claims for monetary liability. In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court held that private-party defendants sued for monetary relief under Section 1983 are not entitled to 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 169. Since *Wyatt*, every circuit court to consider the question has recognized this good-faith defense. And *no* court has held that a private party is liable for monetary relief under Section 1983 simply for following then-valid state law.

Further, the unique circumstances that gave rise to post-*Janus* Section 1983 claims 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.

This Court has recently denied seven petitions for certiorari that raised the same question presented here. *See supra* at 1. All seven of those petitions, several of which were filed by the same advocacy organization that represents Petitioners here, made the same arguments in support of review. Given the continued, unbroken consensus in the lower courts, there remains no reason for this Court to intervene.

I. The lower courts unanimously have held that unions are not subject to retrospective monetary liability under Section 1983 for having collected pre-Janus agency fees.

There is total unanimity in the lower courts as to the availability of the good-faith defense to private parties sued under § 1983 for having acted in accordance with presumptively-valid state statutes. That is true generally, as well as specifically with respect to the post-*Janus* suits against labor organizations based on their receipt of agency fees prior to this Court's decision in *Janus* to overrule its existing precedent and hold public-sector agency-fee requirements unconstitutional.

The fountainhead of this unbroken line of authority is this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). In *Lugar*, the 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 monetary relief "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 v. Cole*, 504 U.S. 158 (1992), held that private-party defendants in Section 1983 litigation are not entitled to the same form of

immediately-appealable qualified immunity that is 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 the Court 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.

Since *Wyatt*, the eight 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 squarely considered the issue on remand from this Court in *Wyatt*, holding 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.), *cert. denied*, 510 U.S. 977 (1993). In *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994), the Third Circuit expressed its agreement with the Fifth Circuit's holding, and the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits all have reached the same conclusion. *See* Pet. App. 10–18; *Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Att'ys, 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) ("*Janus II*"); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 379–80 (4th Cir. 2021).

This consensus extends to the specific claim for pre-*Janus* agency fees being pursued by Petitioners. Numerous lawsuits similar to Petitioners' were filed throughout the country following issuance of the *Janus* decision. The outcome of each of those lawsuits has been the same: Every court has concluded that unions' reliance on then-valid state laws and then-binding precedent of this Court precludes monetary relief under Section 1983. That consensus includes nine decisions from seven different courts of appeals.[2] It also includes more than 30 district court decisions.[3]

Contrary to Petitioners' contention, this consensus in the lower courts is entirely consistent with this Court's analysis of reliance interests in *Janus*. There, this Court considered whether reliance interests justified retaining *Abood* as matter of stare decisis, 138 S. Ct. at 2478–86, and acknowledged that unions had entered into existing collective bargaining agreements with the understanding that agency fees would help pay for collective bargaining representation, *id.*

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[2] Pet. App. 2–20; *Akers*, 990 F.3d 375 (4th Cir. 2021); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), *petition for cert. filed*, No. 20-1383 (Mar. 29, 2021); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 1163740 (Mar. 29, 2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1265 (2021)); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1264 (2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1265 (2021); *Janus II*, 942 F.3d 352 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1282 (2021); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1283 (2021).

[3] *See Mattos v. AFSCME Council 3*, Civil Action No. GLR-19-2539, 2020 WL 2027365, at *2 n.3 (D. Md. Apr. 27, 2020) (citing most of these cases).

at 2484. But the Court concluded that unions' reliance interests in the continued enforcement of those agreements were not sufficiently weighty to justify retaining *Abood*. *Id.* at 2484–85. In reaching that conclusion, the Court never suggested nor considered that its decision would expose public employee unions to massive retrospective monetary liability for having followed then-governing precedent. *See id.* at 2486.

In light of the lower courts' unanimous agreement that claims for pre-*Janus* agency fees are not viable under Section 1983, there is no reason for this Court to grant review in this case.

II. Petitioners' merits arguments have already been found insufficient to justify granting review.

This Court generally does not grant review solely to correct purported errors in a decision below. Nonetheless, Petitioners devote the bulk of their petition to arguing that the First Circuit erred on the merits by rejecting their Section 1983 claim. Petition at 11–20. Counsel for Petitioners raised these same merits arguments in several petitions filed earlier this Term, including in *Ogle v. Ohio Civil Service Employees Ass'n*, No. 20-486; those arguments are fully addressed by the brief in opposition to certiorari in *Ogle.*[4] This Court denied those petitions on January 25, 2021, and there have been no relevant legal

[4] In particular, pages 17–21 of the *Ogle* brief in opposition address Petitioners' argument that the good-faith defense to claims for monetary relief under Section 1983 cannot apply to an alleged First Amendment violation. *See also* Pet. App. 13–15 (rejecting same argument).

developments since that time that would support a different outcome here.

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

Petitioners contend that review of the decision below is justified because the First Circuit's ruling "will have severe consequences for civil rights plaintiffs." Petition at 22. But the court below, along with the other courts of appeals that have affirmed the dismissal of Section 1983 claims for pre-*Janus* agency fees, held only that the claim failed because the defendant union had received and expended agency fees "during a period of time in which the nation's highest court had expressly held that the requirement did *not* give rise to the First Amendment violation on which their damages claim under § 1983 now depends." Pet. App. 10. These circumstances—where a private party relied on a state statute that indisputably was constitutional under this Court's precedent at the time the private party acted—are "most unusual." Pet. App. 17; *see also Janus II*, 942 F.3d at 367.

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, the unique circumstances of a claim for pre-*Janus* agency fees 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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