No. 19-___

IN THE
Supreme Court of the United States

BENITO CASANOVA,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL 701,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is there a "good faith defense" to 42 U.S.C. § 1983 that shields a defendant from damages liability for depriving citizens of their constitutional rights if the defendant acted under color of a law before it was held unconstitutional?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, a Plaintiff-Appellant in the court below, is Benito Casanova.

Respondent, Defendant-Appellee in the court below, is the International Association of Machinists, Local 701.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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The order of the United States Court of Appeals for the Seventh Circuit review of which is sought is reproduced at Pet.App. 1a. The Seventh Circuit's order affirmed the United States District Court for the Northern District of Illinois' unreported order dismissing Casanova's complaint. Pet.App. 3a.

JURISDICTION

The Seventh Circuit entered judgment on February 11, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1983, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officers judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Petitioner Benito Casanova is a public employee in the state of Illinois. Employed by the Chicago Transit

Authority, he was required to pay agency fees to the International Association of Machinists, Local 701 ("IAM"). Pet. App. 2a.

On June 27, 2018, this Court in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) held agency fees violated First Amendment rights. *Id.* at 2486. The Court overruled its precedent that allowed unions to seize agency fees from employees—*Abood v. Detroit Board of Education,* 431 U.S. 209 (1977)—and found Illinois' agency fee statute unconstitutional. 138 S. Ct. at 2486.

In *Janus*, this Court recognized that "unions have been on notice for years regarding this Court's misgiving about *Abood"* and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.* at 2485. The Court also lamented the "considerable windfall" that unions wrongfully received from employees during prior decades: "[i]t is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Id.* at 2486.

Shortly after *Janus* was decided, Casanova filed suit and sought damages from IAM for agency fees it unconstitutionally seized from him and a class of similarly situated employees. Pet. App. 3a. Casanova did so under Section 1983, which provides that "[e]very

person who, under color of any statute" deprives citizens of their constitutional rights "shall be liable to the party injured in an action at law[.]" 42 U.S.C. § 1983.

The district court, however, held that a so-called "good-faith defense" renders defendants who acted under color of a then thought valid statute *not* liable to injured parties in an action at law. Pet.App. 4a. The court found that, because IAM "collected fees in accordance with Illinois's laws," it was not liable for damages and dismissed Casanova's complaint. *Id*. Casanova appealed to the Seventh Circuit.

While the appeal was pending, the Seventh Circuit issued its ruling in *Janus v. AFSCME, Coucil 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*). There, the court held 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." *Id*. at 364. More specifically, the court "recognize[d] a good-faith defense in section 1983 actions when the defendant reasonably relies on established law." *Id*. at 366. The Seventh Circuit also found that the union's reliance on Illinois' agency fee statute and *Abood*, when seizing agency fees from Janus, relieved the union from having to return Janus' monies to him. *Id*. at 366-67.

The Seventh Circuit identified no basis in Section 1983's text for its new reliance-on-established-law defense. The court claimed the "Supreme Court abandoned . . . long ago" the proposition that courts must

strictly abide by Section 1983's text "when [the Court] recognized that liability under section 1983 is subject to common-law immunities that apply to all manner of defendants." *Id.* at 362.

Nor did the Seventh Circuit identify any historical common law basis for its reliance defense, claiming that inquiry to be a "fool's errand." *Id.* at 365. The court acknowledged "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Id.* at 364.

The Seventh Circuit instead found a good faith defense to Section 1983 because it believed that this Court's decisions in *Wyatt v. Cole*, 504 U.S. 158 (1992) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) were "a strong signal that the Court intended (when the time was right) to recognize a good faith defense in section 1983 actions when the defendant reasonably relies on established law." *Janus*, 942 F.3d at 366. The Seventh Circuit also believed that other courts recognized a good faith defense for this reason. *Id.* at 363-64.

Those conclusions are incorrect in many respects. *See infra* 7-11. However, the Seventh Circuit was correct in observing that, in the wake of *Janus*, many district courts have held "there is a good-faith defense to liability for payments [unions] collected before *Janus II*." 942 F.3d at 364.

After the Seventh Circuit's decision, the Ninth Circuit similarly held that a reliance defense shields unions from compensating victims of their fee seizures.

Danielson v. Inslee, 945 F.3d 1096, 1101 (9th Cir. 2019). Like the Seventh Circuit, the Ninth Circuit believed that this Court's decision in *Wyatt* suggested the lower courts should recognize that defense to Section 1983. *Id.* The Sixth and Second Circuits later followed suit. *See 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).

The Seventh Circuit's decision in *Janus II* controlled the outcome of Casanova's appeal before that court. Accordingly, Casanova moved the Seventh Circuit to grant summary affirmance to the IAM so that he could seek review with this Court. Pet. App. 1a. On February 11, the Seventh Circuit granted summary affirmance to IAM on the grounds that *Janus II* was controlling circuit precedent on the question presented. Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

Three times this Court has raised, but then not decided, the question of whether there exists a good faith defense to Section 1983. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt*, 504 U.S. at 169; *Lugar*, 457 U.S. at 942 n.23. The Court should now resolve this important question to disabuse the lower courts of the rapidly spreading notion that a defendant acting under color of a statute before it is held unconstitutional is a defense to Section 1983.

This defense is not the defense members of this Court suggested in *Wyatt*. Several Justices in that case wrote that good faith reliance on a statute could

defeat the *malice and probable cause elements* of a Section 1983 claim arising from malicious prosecution or an abuse of a judicial process. 504 U.S. at 167 n.2 (majority opinion); *id*. at 172 (Kennedy J., concurring); *id*. at 176 n.1 (Rehnquist C.J., dissenting). Those Justices, however, were not suggesting that a defendant relying on a not yet invalidated statute is a defense to *all* Section 1983 claims for damages.

There is no statutory basis for such a reliance defense. It cannot be reconciled with Section 1983's text, which makes acting "under color of any statute" an element of the statute that renders defendants "liable to the party injured in an action at law." 42 U.S.C. § 1983. Nor can a reliance defense be reconciled with *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995), which held that lower courts cannot frustrate the retroactive effect of this Court's decisions by creating remedies based on a defendant's reliance on a statute before it was held unconstitutional.

The Ninth Circuit in *Danielson* claimed that equity—"principles of equality and fairness," 945 F.3d. at 1101—justifies a reliance defense. But courts cannot create equitable exemptions to congressionally enacted statutes like Section 1983. Even if they could, fairness to victims of constitutional deprivations supports enforcing the statute as written.

The Court should reject the proposition that a defendant relying on a law before it is invalidated exempts a defendant from compensating injured parties under Section 1983. It is important that the Court do

so. Unless corrected, the lower courts' misapprehension of *Wyatt* will cause tens of thousands of victims of agency fee seizures to go uncompensated for their injuries. It will also result in victims of other constitutional deprivations not being made whole for their injuries. The petition should be granted.

A. The Seventh Circuit Misconstrues This Court's Decision in *Wyatt*.

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The elements of different constitutional deprivations vary considerably. "In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). "Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id.* "But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Id.* at 921.

The claim in *Wyatt* was that a private defendant deprived the plaintiff of due process of law when seizing his property under an *ex parte* replevin statute. 504 U.S. at 161. The Court found the plaintiff's due process claims analogous to "malicious prosecution and abuse of process," and recognized that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without

malice and with probable cause." *Id.* at 164–65; *see id.* at 172–73 (Kennedy. J., concurring) (similar).

The Court in *Wyatt* held that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith *defense*, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id.* at 165. The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. *Wyatt* left open whether Section 1983 defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.

The Court has yet to resolve that question. As the Court later explained in *Richardson*, where the Court again declined to decide that question, "*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense." 521 U.S. at 413.

Contrary to the conclusions of the Seventh Circuit and other courts, the good faith defense suggested in *Wyatt* was *not* a broad statutory reliance defense to all Section 1983 damages claims. Rather, several Justices suggested a defense to the malice and probable cause elements of Section 1983 claims that are analogous to malicious prosecution and abuse of process claims. This is clear from all three opinions in *Wyatt*.

First, Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it is a "misnomer" to use the term good faith "defense" because "under the common law, it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice and without probable cause." 504 U.S. at 176 n.1. "Referring to the defendant as having a good faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id.*

Second, Justice Kennedy, in his concurring opinion joined by Justice Scalia, agreed that "it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." *Id.* at 172. Justice Kennedy explained that "the common-law tort actions most analogous to the action commenced here are malicious prosecution and abuse of process," and that in both actions "it was essential for the plaintiff to prove the wrongdoer acted with malice and without probable cause." *Id.* Justice Kennedy found that because "a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law . . . lack of probable cause can *only* be shown through proof of subjective bad faith." *Id.* at 174.

Third, Justice O'Connor's majority opinion in *Wyatt* recognized that the good faith defense discussed in the

dissenting and concurring opinions was in reality the malice and probable cause elements of claims analogous to malicious prosecution. *Id*. at 166 n.2. The majority opinion found that "[o]ne could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs bringing an analogous suit under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action." *Id*.

On remand in *Wyatt*, the Fifth Circuit recognized that this Court "focused its inquiry on the *elements* of these torts." *Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993). It therefore found "that Appellants seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause." *Id*. The Third and Second Circuits followed suit in cases also arising from abuses of judicial processes and held the defendants could defeat the malice and probable cause elements of those claims by showing good faith reliance on a statute. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 & n.31 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

The Seventh Circuit was wrong in interpreting *Wyatt* to be "a strong signal that the Court intended (when the time was right) to recognize a good faith defense in section 1983 actions when the defendant reasonably relies on established law." *Janus*, 942 F.3d at 366. The Seventh Circuit was also wrong in believing the Fifth and Third had recognized such a defense. *Id*.

at 363. *Wyatt* merely suggested, and those appellate courts later only found, that good faith reliance on existing law can defeat the malice and probable cause elements of certain Section 1983 claims.

That limited defense does not help IAM because malice and lack of probable cause are not elements of a First Amendment claim under *Janus*. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial. The limited good faith defense members of this Court actually suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights by seizing agency fees from them. The Court should grant review to clarify what it intended in *Wyatt*.

B. The Seventh Circuit's Reliance Defense Conflicts with This Court's Precedents, Section 1983's Text, Retroactivity Law, and Equitable Principles.

1. A Statutory Reliance Defense Is Incompatible with *Anderson v. Myers*.

Over one-hundred years ago, this Court in *Anderson v. Myers*, 238 U.S. 368 (1915) rejected the notion that there is a good-faith-reliance-on-law defense to Section 1983. There, the Court held that a statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983, because they acted on a good-

faith belief that the statute was constitutional. The Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument." *Id.* at 378. The Court rejected the contention for being contrary to its decision in *Guinn v. United States*, 238 U.S. 347 (1915) and "the very terms" of the statute. *Id.* at 379.

The lower court, whose judgment this Court affirmed, was more explicit in its reasoning:

> [A]ny state law commanding such deprivation or abridgement is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). This rejection of a general good-faith defense further undermines the Seventh Circuit's reasoning.

2. A Statutory Reliance Defense Is Incompatible with Section 1983's Text and History.

The Seventh Circuits' new defense to Section 1983 not only conflicts with this Court's precedents, it conflicts with the statute's text. Section 1983 states, in relevant part, that "*[e]very* person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives a citizen of a constitutional right "*shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (emphasis added). Section

1983 means what it says. "Under the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

The Seventh Circuit turned Section 1983 on its head by holding that persons who act under color of a not yet invalidated state law to deprive others of a constitutional right are *not* liable to the injured parties in an action for damages. The court effectively declared a statutory *element* of Section 1983—that defendants must act under color of state law—to be a *defense* to Section 1983. Given that defendants generally cannot invoke state laws already declared unconstitutional, defendants in Section 1983 actions will almost always act under color of state laws that had not been held invalid at the time. Under the Seventh Circuit's decisions, acting under color of a state law yet to be held unconstitutional is now a potential defense to *all* Section 1983 damages claims.

It is telling that the Seventh Circuit makes no attempt to square their defense with Section 1983's text. The Seventh Circuit claims this Court "abandoned" strictly following Section 1983's language when recognizing immunities. *Janus*, 942 F.3d at 362. To the contrary, the Court has held that "[w]e do not simply make our own judgment about the need for immunity," and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. The Court accords an immunity only

when a "'tradition of immunity 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' when it enacted Section 1983.'" *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164).

Unlike with qualified immunities, which this Court has found have a statutory basis, there is no statutory basis for the Seventh and Ninth Circuits' reliance defense. "[T]here is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus*, 942 F.3d at 364. *See also* William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 49 (2018) ("[t]here was no well-established, good faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment.").

There is nothing in Section 1983's text, or in common-law history, that supports the reliance defense created by the Seventh and Ninth Circuits.

3. The Seventh Circuit's Reliance Defense Conflicts with *Reynoldsville Casket*.

This Court's decision in *Janus* is retroactive under the rule announced in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). The reliance defense the Seventh and Ninth Circuits fashioned to defeat *Janus'* retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

Reynoldsville Casket concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at 751. This Court had earlier held the statute unconstitutional. *Id*. An Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed under the statute before this Court invalidated it. *Id*. at 751-52. The plaintiff asserted this was a permissible, equitable remedy because she relied on the statute before it was held unconstitutional. *Id*. at 753 (describing the state court's remedy "as a state law 'equitable' device [based] on reasons of reliance and fairness"). This Court rejected that contention, holding the state court could not do an end run around retroactivity by creating an equitable remedy based on a party's reliance on a statute later held unconstitutional by this Court. *Id*. at 759.

The Seventh Circuit engaged in just such an end run. It created an equitable defense based on a defendant's reliance on a statute this Court later deemed unconstitutional. The reliance defense the Seventh Circuit created conflicts with this Court's *Reynoldsville Casket* precedent.

4. The Seventh Circuit's Reliance Defense Is Inequitable and Inconsistent with Section 1983's Legislative Purposes.

The Seventh Circuit identified no statutory basis for the reliance defense it created. The Ninth Circuit and other courts, however, assert the defense is equitable

in nature, and is grounded in "principles of equality and fairness." *Danielson*, 945 F.3d. at 1101.

a. This "fairness" rationale is inadequate on its own terms. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so. "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990). "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984).

In any event, fairness to *victims* of constitutional deprivations requires enforcing Section 1983's text as written. It is not fair to make Casanova and other employees pay for the IAM's unconstitutional conduct. Nor is it fair to let wrongdoers like the IAM keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980).

The Court wrote those words in *Owen* when holding that Section 1983's legislative purposes did not justify extending good-faith immunity to municipalities. The Court's reasons for so holding apply here.

First, the Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be

tolerated." *Id.* at 651. So too here. It would be an injustice to leave innocent victims of agency fee seizures and other constitutional violations remediless for their injuries.

Second, the Court recognized that Congress enacted Section 1983 to "serve as a deterrent against future constitutional deprivations." *Id.* at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52. This deterrence interest also weighs against a reliance defense, which will encourage defendants to risk infringing on constitutional rights by limiting their exposure for so doing.

Third, the *Owen* Court reasoned that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 654. So too here. It is not fair to have Casanova pay for the IAM's unconstitutional conduct. Equity favors requiring the IAM to return the monies it unconstitutionally seized from him.

b. As for the Ninth Circuit's conclusion that principles of "equality" justify extending to private defendants a defense similar to the immunity enjoyed by some public defendants, *Danielson*, 945 F.3d. at 1101,

that proposition makes little sense. That IAM is not entitled to qualified immunity is not reason to create a similar defense for it. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for an immunity.

Even if principles of equality required treating the IAM like its closest government counterpart, that still would not entitle it to an immunity-like defense. A large organization like the IAM is nothing like individual persons who enjoy qualified immunity. The IAM is most like a governmental body that lacks qualified immunity—a municipality. *Owen*, 445 U.S. at 654. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby." *Id*. Nor is it unjust to require a large organization, like the IAM, to compensate citizens for violating their constitutional rights.

Neither fairness nor equality justify the reliance defense the Seventh and Ninth Circuits recognized. Rather, both principles weigh against carving out this exemption in Section 1983's remedial framework.

C. It Is Important That the Court Finally Resolve Whether Congress Provided a Good Faith Defense to Section 1983.

In at least three prior cases the Court questioned, but then opted not to decide, whether Congress has provided private defendants with a good faith defense. *See Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at

169; *Lugar*, 457 U.S. at 942 n.23. It is time for the Court to finally resolve the matter.

The Court should end the growing misconception among lower courts that this Court in *Wyatt* signaled that private defendants should be granted a broad reliance defense to Section 1983 liability akin to qualified immunity. In the wake of *Janus*, a chorus of district courts have interpreted *Wyatt* in that way. *See Janus*, 942 F.3d at 364 n.1. Yet *Wyatt* did not suggest such a defense, but merely suggested that reliance on a statute could defeat the malice and lack-of-probable cause elements of claims analogous to malicious prosecution and abuse of process claims. *See supra* 7-11. The Court should explain what it meant in *Wyatt*.

It is important that the Court do so quickly because whether tens of thousands of victims of agency fee seizures can receive compensation hangs in the balance. There are over thirty-seven (37) class action lawsuits pending that seek refunds from unions for agency fees they seized from workers in violation of their First Amendment rights. *See* Amicus Br. of Goldwater Inst. et al., 4, *Janus v. AFSCME Council 31*, No. 19-1104 (Apr. 9, 2020). The vast majority of these cases are in or from the Seventh, Ninth, Sixth, and Second Circuits, which have accepted a statutory reliance defense. *Id*. at 1a-6a (listing cases). Most individual actions seeking a return of agency fees also are in these circuits. *See id*. at 7a-9a. Without this Court's review, the employees in all of these cases will very likely be denied relief. The Court should grant review so the employees in these suits can recover a portion of the

"windfall," *Janus*, 138 S. Ct. at 2486, of compulsory fees unions wrongfully seized from them.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. Under the Seventh ruling, any defendant lacking immunity could assert as a defense to a Section 1983 claim that it relied on established law. This includes not only all private defendants, but also municipalities. Defendants could raise the defense against any constitutional claim actionable under Section 1983, including discrimination based on race, faith, or political affiliation. The courts would have to adjudicate this defense. More importantly, plaintiffs who would otherwise receive damages for their injuries will be remediless unless this Court rejects this new judicially created defense to Section 1983 liability.

Doctrinal reasons also counsel granting review. Members of this Court and legal scholars have raised concerns that the Court's qualified immunity jurisprudence has become unmoored from Section 1983's text and from its historical, common law basis. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–73 (2017) (Thomas, J., concurring); William Baude, *Is Qualified Immunity Unlawful*?, 106 Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018). The Seventh Circuit and other courts are now further stretching that law beyond its breaking point by creating from whole cloth a defense to Section 1983 for defendants who lack qualified immunity.

When announcing their new defense, the courts below have disregarded Section 1983's text as if it were irrelevant. They have shunned the proposition they needed to identify a historical common law basis for their defense. The Seventh Circuit called doing so a "fool's errand," *Janus*, 942 F.3d at 365, and acknowledged "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims," *id.* at 364. The Ninth Circuit asserted that "even qualified immunity law is no longer constrained by a common law tort analogy," and scoffed that "[i]t would be an odd result for an affirmative defense grounded in concerns for equality and fairness to hinge upon historical idiosyncrasies and strained legal analogies for causes of action with no clear parallel in nineteenth century tort law," *Danielson*, 945 F.3d at 1101.

The belief that courts can create defenses to Section 1983 with no basis in its text, its history, or in common law is troubling. "[I]n our constitutional system the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). The Court should grant review to clarify that immunities and defenses to Section 1983 must rest on a firm statutory basis, and that the new reliance defense recognized below lacks any such basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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