No. 20-20

IN THE
Supreme Court of the United States

BENITO CASANOVA,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL 701,

Respondent.

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

BRIEF IN OPPOSITION

RAMYA RAVINDRAN
(*Counsel of Record*)
JOHN M. WEST
BREDHOFF & KAISER,
P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
202.842.2600
rravindran@bredhoff.com

Counsel for Respondent

QUESTION PRESENTED

Whether, as this Court twice has suggested, and all six courts of appeals and all district courts to have considered the issue have held, private parties sued under 42 U.S.C. § 1983 can assert a good-faith defense against claims for monetary relief based on actions taken in reliance on presumptively valid state statutes; and whether such a defense shields Respondent IAM Local 701 from damages in the amount of fees that were remitted to it in accord with state law and this Court's then-controlling precedent.

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STATEMENT

A. Illinois' Public Labor Relations Act, 5 ILCS 315 ("IPLRA"), like the laws of many other states, allows public employees to organize and bargain collectively with their public employer, through a representative organization of their choosing, over the terms and conditions of their employment. Respondent International Association of Machinists Local 701 ("IAM Local 701" or "the Union") was chosen and certified as the exclusive representative of a unit of employees of the Chicago Transit Authority ("CTA") that includes Petitioner Benito Casanova. That certification brought with it the legal duty to represent equally the interests of all employees in the bargaining unit, in collective bargaining and grievance administration, whether they were union members or not. 5 ILCS 315/6(d).

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, the IPLRA further authorized unions and public employers to negotiate, as part of their collective bargaining agreements, a "fair-share" (or "agency fee") clause:

> When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment ….

5 ILCS 315/6(e). The IPLRA, including its agency-fee provisions, was enacted in 1983 following this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had specifically upheld, against a First Amendment challenge, the constitutionality of such agency-fee arrangements in the public sector.

Consistent with these statutory provisions, the collective bargaining agreement negotiated between IAM Local 701 and the CTA included an agency-fee clause, like the one upheld in *Abood*, requiring bargaining-unit members who declined to become dues-paying members of the union to pay a fee to help defray the union's costs of collective bargaining and contract enforcement undertaken for the benefit of 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), in which the Court overruled its 1977 *Abood* precedent and held for the first time that public employees could not constitutionally be required to pay agency fees. Approximately seven months later, Petitioner brought the instant class action lawsuit under 42 U.S.C. § 1983. He did not allege that Respondent was continuing to collect agency fees from him in violation of the *Janus* decision – and indeed it is undisputed that neither he nor anyone else in the bargaining unit was required to pay any such fees after *Janus* was decided. Petitioner accordingly sought no injunctive relief. Rather, he claimed that the fees he had paid *before* June 27, 2018 – at a time when an Illinois statute explicitly authorized agency fees and the *Abood* decision upholding the constitutionality of

such statutes was the law of the land – were "unconstitutionally or unlawfully extracted" and must be paid back.

The district court granted Respondent's motion to dismiss, observing that "[e]very court that has considered this issue has uniformly held that a plaintiff cannot collect damages for fair-share fees collected by a union before the change in Supreme Court precedent where a defendant establishes good-faith reliance as a matter of law." Pet. App. 4a. Adopting that good-faith defense on the basis of this "persuasive" and "factually indistinguishable" body of law and noting that Petitioner acknowledged that Respondent had "collected fees in accordance with Illinois's laws" and that it "ceased collecting the fees once the Supreme Court decided *Janus*," the district court dismissed the complaint with prejudice. *Id.*

Petitioner filed a timely notice of appeal to the Seventh Circuit and then moved to suspend briefing until decisions were issued in *Janus v. AFSCME Council 31* – on remand from this Court – and *Mooney v. Illinois Education Association*, both of which were then pending before the Seventh Circuit. As Petitioner noted, both *Janus* and *Mooney* involved the same issue presented in this case regarding application of the good-faith defense to a Section 1983 claim to recover agency fees collected prior to this Court's *Janus* decision.

On November 5, 2019, the Seventh Circuit issued its decisions in *Janus* and *Mooney*, affirming the judgments entered in favor of the defendant unions. *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus Remand*"); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019). Citing this Court's decisions in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982),

and *Wyatt v. Cole*, 504 U.S. 158 (1992), the Seventh Circuit held that "while a private party acting under color of state law does not enjoy qualified immunity from suit, it is entitled to raise a good-faith defense to liability under section 1983." *Janus Remand*, 942 F.3d at 362. In particular, the court noted the observation in Justice Kennedy's concurring opinion in *Wyatt* that "there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law," *id.* at 363 (quoting 504 U.S. at 174), as well as the Court's explanation in *Lugar* that the "problem" of private individuals being held liable under § 1983 if a law they invoked "is subsequently held to be unconstitutional … should be dealt with … by establishing an affirmative defense." *Id.* (quoting *Lugar*, 457 U.S. at 942 n.23).

Applying that good-faith defense to the cases before it, the court rejected the Section 1983 claim for monetary damages for fees collected prior to this Court's *Janus* decision, finding that until that opinion was issued, the union "had a legal right to receive and spend fair-share fees collected from nonmembers," and thus the union's actions in accordance with existing law "did not demonstrate bad faith." *Id.* at 366. As the court explained, "[t]he 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." *Id.* Petitions for rehearing en banc were denied in both *Janus* and *Mooney*, without any judge calling for a vote in either case.

In light of these decisions by the Seventh Circuit, Petitioner filed a motion for summary affirmance, acknowledging that they controlled the outcome of his appeal. The Seventh Circuit granted the motion and summarily affirmed the dismissal of Petitioner's complaint on the basis of its decisions in *Janus* and *Mooney*.

Petitions for certiorari seeking review of the *Janus Remand* and *Mooney* decisions are currently pending before this Court. *See Janus v. AFSCME Council 31*, No. 19-1104; *Mooney v. Ill. Educ. Ass'n*, No. 19-1126. Those petitions, which are fully briefed, involve the same issue presented here. Another fully briefed petition pending before this Court, *Danielson v. Inslee*, No. 19-1130, also involves the same issue presented here.

REASONS FOR DENYING THE WRIT

This case presents the narrow question of whether a private-party defendant sued under 42 U.S.C. § 1983 can invoke a good-faith defense against a claim for monetary relief – where the claim is based on conduct carried out in accordance with a state statute that had been held constitutional by precedent of this Court that (although subsequently overruled) was controlling at the time of the challenged conduct.

While it is correct that this Court has not squarely held that such a good-faith defense exists, the Court nonetheless has strongly suggested that it does – both when it held, in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), that private parties could be sued under § 1983 simply for invoking a state statute to seek the assistance of a governmental official in achieving a private objective, and subsequently when in *Wyatt v.*

Cole, 504 U.S. 158 (1992), it addressed the availability of qualified immunity to such private-party defendants. Since *Wyatt*, every one of the six courts of appeals, and every one of the dozens of district courts, that have had occasion to confront the issue has held that the § 1983 good-faith defense shields private parties from monetary liability for following the law as it existed at the time of their actions. Five courts of appeals, and thirty district courts, have so held in the specific context presented here, *i.e.*, claims by union nonmembers seeking to recover agency fees withheld from their paychecks pursuant to state law and the then-controlling precedent of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), prior to this Court's decision to overrule *Abood* in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

The remarkable unanimity of the lower courts on this issue – and the consistency of their opinions with the views expressed by this Court in *Lugar* and *Wyatt* – makes clear that this case presents no issue requiring resolution by this Court. The question Petitioner asks the Court to consider is, to the contrary, well settled among the federal courts – both generally and in the specific context of pre-*Janus* union fees. There are, moreover, numerous additional cases raising the identical issue that are percolating in the courts of appeals and district courts, any one of which could serve as a potential vehicle to visit this issue in the future, should a division among the lower courts subsequently materialize. There is, accordingly, no need for the Court to address the issue now, and the Petition therefore should be denied.

I. THERE IS NO DISAGREEMENT AMONG THE LOWER COURTS ON THE QUESTION PRESENTED BY THE PETITION

A. The most striking aspect of the state of the law on the good-faith defense is the lower courts' complete unanimity as to the availability of the 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.

Specifically, among the federal courts of appeals, no fewer than six circuits – in a total of 14 opinions – have had occasion to address the question since this Court, in *Wyatt*, suggested the existence of a good-faith defense for private-party § 1983 defendants. All of these opinions have held that there is such a good-faith defense and have applied it on the facts of the case before the court.

Initially, the issue arose in a number of cases not involving union fees. The Sixth Circuit had already concluded, several years before *Wyatt*, that private-party defendants, while unable to avail themselves of qualified immunity, could invoke a good-faith defense to liability under § 1983. *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988). Following this Court's decision in *Wyatt*, the Fifth Circuit, on remand from this Court, also squarely addressed and decided the question, which it found "largely answered by the[] separate opinions" of Justice Kennedy and Chief Justice Rehnquist, which collectively had been joined by five

members of the Court. *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993). The Fifth Circuit held "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, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Id.* Subsequently, four other courts of appeals considered the issue in a variety of contexts, and all reached the same result. *See Pinsky v. Duncan*, 79 F.3d 306, 311-12 (2d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275-78 (3d Cir. 1994); *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).[1] Similarly, numerous district courts, without exception, recognized the good-faith defense in addressing a variety of constitutional claims under § 1983.[2]

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[1] Without mentioning the decisions of the Sixth and Ninth Circuits, Petitioner attempts to distinguish the decisions of the Second, Third, and Fifth Circuits from the instant case by characterizing the constitutional claims in those decisions as requiring proof of malice and probable cause. Pet. at 10-11. That characterization is misguided for the reasons discussed in Part II.B below. In any event, Petitioner's argument, even on its own terms, suggests only that several cases were decided on the basis of facts somewhat different than those presented here – not that there exists any conflict among these and the more recent post-*Janus* decisions.

[2] We have identified more than 20 such cases from the district courts that have applied the good-faith defense to shield a private-party defendant from monetary liability, addressing a variety of constitutional claims unrelated to the instant issue of union fees. A representative sample includes the following: *Franklin v. Fox*, 2001 WL 114438, at *3-7 (N.D. Cal. Jan. 22,

In the context of union fees, the good-faith defense was initially applied following this Court's decision in *Harris v. Quinn*, 573 U.S. 616 (2014), in which the Court, while declining to overrule *Abood*, held that *Abood*'s approval of agency-fee requirements did not apply to non-full-fledged public employees such as state-compensated home-care or child-care workers. In response to First Amendment claims based on the defendant unions' receipt of agency fees from such employees prior to the *Harris* decision, the Second Circuit and two district courts agreed that the good-faith defense as recognized in the foregoing cases shielded the defendant unions from liability for damages. *See Jarvis v. Cuomo*, 660 F. App'x 72, 75-76 (2d Cir. 2016); *Winner v. Rauner*, 2016 WL 7374258 (N.D. Ill. Dec. 20, 2016); *Hoffman v. Inslee*, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016).

The current series of cases involving the good-faith defense arose out of lawsuits filed against public-sector unions following this Court's 2018 *Janus* decision

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2001) (Sixth Amendment denial of right to counsel); *Lewis v. McCracken*, 782 F. Supp. 2d 702, 714-15 (S.D. Ind. 2011) (First Amendment free speech rights); *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 571-73 (W.D. Va. 2008) (Fourth Amendment illegal search), *rev'd on other grounds*, 570 F.3d 546 (4th Cir. 2009); *Doby v. Decrescenzo*, 1996 WL 510095, at *21 (E.D. Pa. Sept. 9, 1996) (Fourth, Eighth, and Fourteenth Amendment claims), *aff'd*, 171 F.3d 858 (3d Cir. 1999); *Nemo v. City of Portland*, 910 F. Supp. 491, 498-99 (D. Or. 1995) (First Amendment free speech rights); *Goodman v. Las Vegas Metro. Police Dep't*, 2013 WL 819867, at *2 (D. Nev. Mar. 5, 2013) (Fourth Amendment unlawful detention); *Robinson v. San Bernardino Police Dep't*, 992 F. Supp. 1198, 1207-08 (C.D. Cal. 1998) (Fourth, Eighth, Thirteenth, and Fourteenth Amendment claims); *Strickland v. Greene & Cooper, LLP*, 2013 WL 12061876, at *7 (N.D. Ga. Oct. 29, 2013) (due process).

overruling *Abood*, in which plaintiffs sought to hold the defendant unions liable for agency fees they had received, pursuant to state law, prior to the *Janus* decision – in other words, at a time when this Court's controlling precedent held agency-fee requirements in public-sector employment to be constitutionally permissible. To date, some 30 of these cases from across the country have been decided in the federal district courts. Without exception, every one has applied the good-faith defense, holding that it precludes plaintiffs' attempts to hold the defendant unions liable for following the law as it existed at the time of their actions.[3]

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[3] *See Danielson v. AFSCME Council 28*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018), *aff'd*, 945 F.3d 1096 (9th Cir. 2019), *petition for cert. filed*, No. 19-1130 (U.S. Mar. 12, 2020); *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), *petition for cert. filed*, No. 19-1104 (U.S. Mar 9,2020); *Hough v. SEIU Local 521*, 2019 WL 1274528 (N.D. Cal. Mar. 20, 2019), *amended*, 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), *petition for cert. filed*, No. 19-1126 (U.S. Mar. 10, 2020); *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*, No. 1:19-cv-00053 (D.N.H. May 30, 2019), *appeal*

Nearly all of these decisions have been appealed, and (in addition to the instant case) eight of them have now been decided in published opinions by the Second, Third, Sixth, Seventh, and Ninth Circuits. Shortly after the Seventh Circuit issued its decisions in *Janus*

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pending, No. 19-1636 (1st Cir.); *Hernandez v. AFSCME California*, 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), *aff'd*, 2020 WL 5084266 (3d Cir. Aug. 28, 2020); *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.); *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*, 425 F. Supp. 3d 366 (D.N.J. 2019), *appeal pending*, No. 19-3995 (3d Cir.); *Wenzig v. SEIU Local 668*, 426 F. Supp. 3d 88 (M.D. Pa. 2019), *aff'd sub nom. Diamond v. Pa. State Educ. Ass'n*, 2020 WL 5084266 (3d Cir. Aug. 28, 2020); *Seidemann v. Prof'l Staff Cong. Local 2334*, 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. Chicago Teachers Union*, 2020 WL 1467404 (N.D. Ill. Mar. 26, 2020), *appeal pending*, No. 20-1668 (7th Cir.); *Chambers v. AFSCME*, 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), *appeal pending*, No. 20-1531 (4th Cir.); *Pellegrino v. N.Y. State United Teachers*, 2020 WL 2079386 (E.D.N.Y. Apr. 30, 2020), *appeal pending*, No. 20-1705 (2d Cir.); *Gabriele v. SEIU Local 1000*, 2020 WL 3163072 (E.D. Cal. June 12, 2020), *appeal pending*, No. 20-16353 (9th Cir.); *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 2020 WL 4038999 (S.D. Ohio July 17, 2020), *appeal pending*, No. 20-3795 (6th Cir.).

and *Mooney*, the Ninth Circuit decided *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *petition for cert. filed*, No. 19-1130 (U.S. Mar. 12, 2020). Subsequently, two different panels of the Sixth Circuit applied the good-faith defense in deciding *Lee v. Ohio Education Ass'n*, 951 F.3d 386 (6th Cir. 2020), and *Ogle v. Ohio Civil Service Employees Ass'n*, 951 F.3d 794 (6th Cir. 2020), and the Second Circuit reached the same result in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020). Most recently, the Third Circuit decided *Diamond v. Pennsylvania State Education Ass'n* and *Wenzig v. SEIU Local 668* in a consolidated opinion. *Diamond v. Pa. State Educ. Ass'n*, --- F.3d ---, 2020 WL 5084266 (3d Cir. Aug. 28, 2020). All of these decisions, affirming judgments of the respective district courts, held that the good-faith defense shielded the defendant unions from monetary liability for having acted in accordance with state law and this Court's then-governing precedent.

There is no authority to the contrary. We are aware of no case – whether in the context of post-*Janus* union-fee litigation or otherwise – that has denied the availability to private-party defendants of a good-faith defense against § 1983 monetary liability for claims arising from the defendant's actions in conformity with the law as it existed at the time. The lower courts are, in short, unanimous on the issue presented by this Petition.

B. This unanimity of the courts of appeals, and the lower courts more generally, is reason enough for this Court to conclude that there is no need for it to devote plenary review to the question the Petition presents.

A second consideration leads to the same conclusion. Although it seems apparent that the availability

of the § 1983 good-faith defense has been conclusively settled by the lower courts – and, as we show in the next section, settled in a manner entirely consistent with this Court's discussion of the issue in *Lugar* and *Wyatt* – there would be time enough for this Court to consider reviewing the issue if a differing view should subsequently emerge. And there is no shortage of pending cases – in both the courts of appeals and in the district courts – that raise this same issue, which could serve as potential vehicles for this Court's consideration of the question if necessary. *See supra* note 3. These include several appeals currently pending in circuits that have not yet addressed the issue of the good-faith defense.[4]

Not only is there no reason at this point for the Court to grant certiorari to consider an issue on which the lower courts are in unanimous agreement, but doing so now, while the issue continues to percolate in the lower courts, would deprive the Court of those courts' views. If and when a circuit split should materialize at some point, that would be time enough for the Court to consider whether to take up this issue, as to which there currently is no disagreement.

II. THE GOOD-FAITH DEFENSE IS FIRMLY GROUNDED IN THIS COURT'S ANALYSIS IN *LUGAR* AND *WYATT*

A. The widespread adoption of the good-faith defense by the lower courts did not emerge from a vacuum but was rather the direct result of two leading

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[4] *See Doughty v. State Emps.' Ass'n*, No. 19-1636 (1st Cir.) (argued Dec. 2, 2019); *Akers v. Md. State Educ. Ass'n*, No. 19-1524 (4th Cir.); *Mattos v. AFSCME Council 3*, No. 20-1531 (4th Cir.).

cases of this Court addressing the scope of liability for private-party defendants under § 1983. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court ruled that private actors could, under certain circumstances, be held liable along with their governmental counterparts for violations of § 1983. But as part and parcel of that ruling, the *Lugar* Court recognized that a good-faith defense might be the necessary corollary. Acknowledging the "problem" of imposing liability on private defendants for "mak[ing] use of seemingly valid state laws," the Court explained that "this problem should be dealt with … by establishing an affirmative defense," *id.* at 942 n.23 – rather than by rejecting altogether § 1983's application to nongovernmental defendants, as the four *Lugar* dissenters would have done. *See id.* at 943 (Burger, C.J., dissenting); *id.* at 944-56 (Powell, J., dissenting).

In the wake of *Lugar*, several circuits attempted to resolve this "problem" by extending to private defendants the same full-blown qualified immunity as was available to government officials. *See Wyatt*, 504 U.S. at 161 (citing cases). This Court granted certiorari on that issue in *Wyatt*; and while it held that private defendants could not avail themselves of qualified immunity, the Court also observed that "principles of equality and fairness may suggest … that private citizens … should have some protection from liability, as do their government counterparts," when the actions held to be unconstitutional had been undertaken pursuant to presumptively valid existing law. *Id.* at 168.

In arriving at its holding, the *Wyatt* Court specifically emphasized the distinction between a "defense" and an "immunity," *id.* at 165; and it made clear that its refusal to extend to private-party defendants the

"type of objectively determined, immediately appealable immunity" that was available to government officials was because such qualified immunity was "based not simply on the existence of a good faith defense at common law, but on the special policy concerns involved in suing government officials." *Id.* at 166-67. Those "special policy concerns" had previously led the Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to "completely reformulate[] qualified immunity along principles not at all embodied in the common law," 504 U.S. at 166 (quoting *Anderson v. Creighton*, 483 U.S. 635, 645 (1987)); but they were, the Court held, "not transferable to private parties." *Id.* at 168. In the same breath in which it reached that conclusion, however, the Court suggested, without deciding, "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 or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Id.* at 169.

Equally important, five Justices, in two separate opinions, stated even more explicitly their willingness to adopt such a good-faith defense. Justice Kennedy, in his concurring opinion (joined by Justice Scalia), underlined the historical grounding of this good-faith defense, noting the "support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *Id.* at 174. And although Chief Justice Rehnquist in dissent (joined by Justices Souter and Thomas) would have applied full-blown qualified immunity to private parties who acted in reliance on a state statute, he agreed that there was a "good-faith

common-law defense at the time of § 1983's adoption," *id.* at 176, and that "a good-faith defense will be available for respondents to assert on remand." *Id.* at 177. The Chief Justice emphasized, in this regard, the "strong public interest in encouraging private citizens to rely on valid state laws." *Id.* at 179-80.

Thus, as the Seventh Circuit recognized, *Wyatt* "pointed toward the solution to th[e] problem" identified in *Lugar*. *Janus Remand*, 942 F.3d at 363. That solution was to allow private parties sued under § 1983 for acting in reliance on the constitutionality of a state statute to assert an affirmative defense of good faith against claims for monetary liability. The good-faith defense that the lower courts have adopted thus flows directly from what this Court said on the subject in *Lugar* and *Wyatt*.[5]

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[5] This consensus in the lower courts also 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. *Cf. 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") (emphasis added); *see also Wholean*, 955 F.3d at 336 (noting prospective nature of decision's language); *Lee*, 951 F.3d at 389 (same).

B. Petitioner argues, nonetheless, that the Seventh Circuit and all of the other lower courts that have applied the good-faith defense to claims brought against unions in the wake of the *Janus* decision have misconstrued *Wyatt*, which, Petitioner asserts, should be read to permit only "a defense to the malice and probable cause elements of Section 1983 claims that are analogous to malicious prosecution and abuse of process claims." Pet. at 8. This attempt to read *Wyatt* in a way that would restrict the good-faith defense to certain kinds of constitutional claims is untenable.[6]

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[6] As is perhaps most apparent from the Third Circuit's recent decision in *Diamond*, there are some differences among lower-court judges as to whether identifying the common-law tort most analogous to the constitutional claim is a necessary step in applying the good-faith defense. *Compare Diamond*, 2020 WL 5084266, at *6 (opinion of Rendell, J.), with *id.* at *10-17 (opinion of Fisher, J.). For present purposes, the most salient point is that the result is the same in either case. Our analysis below accepts the premise that a common-law analogue should be identified, but the same result follows even if a more complex historical inquiry into common-law precedents is required, as Judge Fisher suggests, or if, on the other hand, the analysis is more straightforwardly grounded in *Wyatt*'s emphasis on "principles of equality and fairness," 504 U.S. at 168, as necessary to vindicating private parties' reliance on the rule of law, as Judge Rendell holds. This Court, of course, "reviews judgments, not opinions," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and in none of the dozens of fee-refund cases litigated in the wake of *Janus* has the particular method for ascertaining the availability of the good-faith defense affected the outcome of the case. The lower courts' differing paths to a uniform result thus do not provide any basis for a grant of certiorari.

There is much that could be said with respect to the dissent filed by Judge Phipps in *Diamond* – the only dissenting view expressed by any of the 18 circuit judges who to date have considered the good-faith defense in the post-*Janus* context. We

The beginning, middle, and end of Petitioner's argument on this score is that "malice and lack of probable cause are not elements of a First Amendment claim under *Janus*." *Id.* at 11. That may well be. But what Petitioner ignores is that malice and lack of probable cause were not elements of the procedural due process claim at issue in *Wyatt* either – nor in cases like *Pinsky* and *Jordan* in which the courts of appeals also applied the good-faith defense in the context of § 1983 procedural due process claims. Although the defendant's state of mind would have been an element of a common-law tort claim of abuse of process or malicious prosecution, it was not an element of the *constitutional* claim that the plaintiff's property had been seized in replevin without due process of law and seeking, under § 1983, to hold the defendant "liable for damages for the deprivation of Wyatt's due process rights." 504 U.S. at 162. In *Wyatt* and the other procedural due process cases, just as in this First Amendment case, the defendant's state of mind was irrelevant to the question of whether the plaintiff's constitutional right was violated.[7]

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note here only that the judge appears to have premised his analysis on the mistaken assumption that he was dealing with an across-the-board affirmative defense like those that are set out in the (non-exhaustive) list of affirmative defenses in Federal Rule of Civil Procedure 8(c), rather than with a narrow remedial issue, in the form of a defense to the imposition of monetary liability under a particular statute.

[7] Thus, for example, when the *Pinsky* case – in which the Second Circuit applied the good-faith defense – was before this Court on the merits of the due process claim, this Court ruled that the plaintiff's constitutional due process rights had been violated by the prejudgment attachment of his property, executed pursuant to a Connecticut statute, without any consideration of the defendant's state of mind. *See Connecticut v. Doehr*, 501 U.S.

Application of the good-faith defense in these cases thus was not justified by a state-of-mind element in the constitutional claim itself. Rather, *Wyatt* suggested that a § 1983 good-faith defense could be warranted because a plaintiff suing to recover damages against a private defendant who had invoked a state procedure that harmed the plaintiff would, at common law, have brought a tort claim sounding in malicious prosecution or abuse of process. Malice and want of probable cause were essential elements of such a common-law tort claim; and therefore, this Court explained, "plaintiffs bringing *an analogous suit* under § 1983 should be required to make a similar showing" – or at least "private parties sued under § 1983 should … be entitled to assert an affirmative defense based on a similar showing of good faith and/or probable cause." 504 U.S. at 166 n.2 (emphasis added).

That analysis applies equally here, for a First Amendment claim under *Janus*, like the procedural due process claim in *Wyatt*, is more analogous to an abuse-of-process claim than to any other kind of tort claim, as the courts of appeals concluded in *Janus Remand*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1102; *Ogle*, 951 F.3d at 797; and *Lee*, 951 F.3d at 392 n.2. At common law, as this Court explained in *Wyatt*, that

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1 (1991). *See also Dodds v. Richardson*, 614 F.3d 1185, 1209 n.2 (10th Cir. 2010) (Tymkovich, J., concurring) ("[P]rocedural due process violations focus on the sufficiency of the procedural protections afforded the plaintiff, not the state of mind of the officials who establish or apply the policies.").

tort provided a "cause[] of action against private defendants for unjustified harm arising out of the misuse of governmental processes." 504 U.S. at 164.[8]

Here, Petitioner's complaint is that the Union asked the State of Illinois to deduct agency fees from his paycheck and send those fees to the Union under the applicable provisions of state law and the collective bargaining agreement between the Union and the public employer. Without this use of governmental processes, there could have been no exaction of agency fees and no issue of § 1983 liability. Not only would the Union have had no way to "seiz[e]" agency fees from Petitioner, Pet. at 2, but even if it had, it would not have been acting under color of state law. It is precisely through this alleged misuse of governmental processes that Petitioner claims he was deprived of his constitutional rights. As Judge Sutton, writing for the Sixth Circuit, has explained:

> Think about the problem this way. Public-sector unions may enlist the State's help (and its ability to coerce unwilling employees) to carry out everyday functions. But a union that misuses this help, say because the state-assisted action would violate the U.S. Constitution, may face liability under

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[8] Consistent with this formulation in *Wyatt*, most authorities reject attempts to confine the tort to abuse of judicial processes. *See, e.g.*, *Danielson*, 945 F.3d at 1102 ("Although the prototypical abuse of process claim involves the abuse of *judicial* process, the tort is not clearly so confined."); *Melvin v. Pence*, 130 F.2d 423, 426 (D.C. Cir. 1942) (applying the tort to administrative proceedings); Joel Bishop, *Commentaries on the Non-Contract Law* § 220, p. 88 (1889) ("unjustifiable employment of the processes of the law"). In any event, the relevant issue is, as the Seventh Circuit put it, identification of "the *most analogous* tort, not the exact-match tort." *Janus Remand*, 942 F.3d at 365.

> § 1983. A narrow good-faith defense protects those who unwittingly cross that line in reliance 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, 951 F.3d at 797 (citations omitted). Petitioner's claim based on the Union's use of the agency-fee statute (subsequently held unconstitutional) is thus on all fours with the claims based on the use of state replevin statutes (subsequently held unconstitutional) in *Wyatt*, *Pinsky*, and *Jordan*.

Indeed, it may well be said that a private party sued under § 1983 pursuant to *Lugar* for invoking a statute to secure the assistance of state officials *necessarily* is being charged with (mis-)use of governmental processes, for without the use of some governmental process there could be no basis for asserting a constitutional tort under § 1983 against the private defendant. *See Lugar*, 457 U.S. at 937 ("the deprivation must be caused by the exercise of some right or privilege created by the State").

Equally to the point, reading *Wyatt* to make the availability of a good-faith defense dependent on the nature of the particular state statute relied upon – whether a Mississippi replevin statute as in *Wyatt*, or an Illinois agency-fee statute as in this case – loses sight of the very reason for this affirmative defense of good faith. Its purpose, as suggested by this Court in both *Lugar* and *Wyatt*, is to protect private citizens from the threat of monetary liability for actions taken in reliance on state law as it existed at the time. There is simply no basis for allowing such a defense with respect to citizens' reliance on certain kinds of state laws but not others.

Nor, we might add, is there any basis for Petitioner's attempt to conflate the good-faith defense with the "under color of law" element of a § 1983 claim, making this a "defense to *all* Section 1983 damages claims." Pet. at 13; *see also id.* at 20. Not only are claims against private parties a small fraction of all § 1983 actions, but the portion of such lawsuits in which the basis for the plaintiff's claim for damages is an after-the-fact judicial determination striking down the statute pursuant to which the private-party defendant acted is even smaller. And that is so *a fortiori* where, as here, the § 1983 claim is based on a decision by this Court overruling its previously existing precedent. As the Seventh Circuit observed, "only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute *and* unambiguous Supreme Court precedent validating that statute." *Janus Remand*, 942 F.3d at 367. In these rare instances, however, the availability of the good-faith defense serves to address the "problem" identified by this Court in *Lugar* of private defendants who make use of seemingly valid state laws being held liable "if the law is subsequently held to be unconstitutional." 457 U.S. at 942 n.23.

Beyond this, the good-faith defense, like qualified immunity, has no application to claims for injunctions or other prospective non-monetary relief. Thus, where the plaintiff can establish the "under color of law" element in a case against a private defendant engaged in ongoing violations of a state statute that the plaintiff can show is unconstitutional, the plaintiff can secure an injunction requiring the defendant to desist from the conduct and an order declaring the statute unconstitutional; the defendant would lack any good-faith defense to those powerful remedies.

C. In the sole new argument added to the otherwise nearly identical Petition previously submitted by the same counsel in the *Janus* case, Petitioner invokes this Court's 1915 decision in *Myers v. Anderson*, 238 U.S. 368 (1915), asserting that the Court therein "rejected the notion that there is a good-faith-reliance-on-law defense to Section 1983." Pet. at 11. In fact, the Court did nothing of the kind. Nowhere in its opinion did the *Myers* Court address – let alone reject – the concept that a defendant's good-faith reliance on existing law could constitute a defense to a Section 1983 claim. And, in any event, Petitioner's argument proves far too much. Not only would the asserted holding in *Myers* have been irreconcilable with what all nine members of the Court said when the issue was squarely considered in *Wyatt*, but – because the defendants in *Myers* were not private-party defendants but state officials – Petitioner's reading of *Myers* would have foreclosed any type of qualified immunity for government officials. Petitioner's newfound citation of *Myers*, in short, adds nothing to the discussion.[9]

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[9] Petitioner's reliance on the circuit court's decision in the *Myers* case is also misplaced. Pet. at 12. That court rested its holding on the ground that "any state law commanding [a constitutional violation] is nugatory ... and any one who does enforce it does so at his known peril." *Anderson v. Myers*, 182 F. 223, 230 (C.C.D. Md. 1910). But this Court subsequently has repudiated the doctrine that a statute, once declared unconstitutional, is retrospectively deemed "nugatory" for all purposes. As the Court explained in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), "[t]he actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored." *Id.* at 374.

III. THE GOOD-FAITH DEFENSE IS NOT IN CONFLICT WITH THIS COURT'S RETROACTIVITY CASES

Notwithstanding Petitioner's argument to the contrary, the good-faith defense as applied by the Seventh Circuit and its sister circuits does not "conflict[]" with this Court's cases on the retroactive application of its decisions. Pet. at 14-15.

As the Seventh Circuit recognized, the question whether the rule of law set forth by this Court in *Janus* was to be applied retroactively, despite the fact that *Janus* squarely overruled this Court's earlier decision in *Abood*, "poses some knotty problems." *Janus Remand*, 942 F.3d at 360. The Seventh Circuit therefore chose to assume *arguendo* that *Janus* applied retroactively and to decide the question before it on the more straightforward ground of whether Petitioner was entitled to the particular remedy he sought. *See id.* at 359-60. The other courts of appeals have taken the same approach. *See Danielson*, 945 F.3d at 1099; *Lee*, 951 F.3d at 389; *Wholean*, 955 F.3d at 336; *Diamond*, 2020 WL 5084266, at *3 n.1.

That approach recognizes that, as this Court has repeatedly made clear, "[r]etroactive application [of a new rule] does not … determine what 'appropriate remedy' (if any) the defendant should obtain…. Remedy is a separate, analytically distinct issue," and "[t]he Court has never equated its retroactivity principles with remedial principles." *Davis v. United States*, 564 U.S. 229, 243 (2011) (quoting *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 189 (1990)). Accordingly, even if a newly recognized legal principle applies retroactively, that rule will not dictate the outcome of a claim for monetary relief where there is "a

previously existing, independent legal basis (having nothing to do with retroactivity) f or denying relief" or, "as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995).

Indeed, this Court only recently illustrated the importance of distinguishing between retroactivity and remedy, in observing – in a case in which it struck down part of a federal statute – that "no one should be penalized or held liable" for acting in accordance with the statute prior to the Court's holding that it was unconstitutional. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2355 n.12 (2020) (plurality op.).

Petitioner's attempt to establish a conflict between the good-faith defense and the Court's retroactivity cases centers on *Reynoldsville Casket*, in which the Court rejected a litigant's attempt to characterize as a remedial issue her argument for avoiding application of a prior decision striking down a state's discriminatory statute of limitations. This Court properly rejected the contention that permitting the plaintiff to proceed with her lawsuit under an unconstitutional statute was a remedial matter, but in the same breath it made clear the fact-specific nature of that holding: "[T]he ordinary application of a new rule of law 'backwards,' say, to pending cases, may *or may not*, involve a further matter of remedies." 514 U.S. at 754. And the Court specifically went on to discuss at length "the unsurprising fact that, as courts apply 'retroactively' a new rule of law to pending cases, they

will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case." *Id.* at 758-59. The Court cited, as one such instance, the circumstance where qualified immunity could be invoked against a claim for monetary relief. In the case before it, the Court found "no such instance"; rather, the litigant's argument consisted of nothing more than "simple reliance" on the statute subsequently held unconstitutional. *Id.* at 759.

Here, by contrast, the basis for applying a good-faith defense to foreclose the monetary remedy Petitioner seeks – much as in the qualified immunity cases the *Reynoldsville Casket* Court cited as an example – "reflects *both* reliance interests and other significant policy justifications," *id.*, including the "principles of equality and fairness" this Court cited in *Wyatt*, 504 U.S. at 168, protection of the rule of law, *see Janus Remand*, 942 F.3d at 366; *Danielson*, 945 F.3d at 1103-04, and indeed vindicating this Court's extension of § 1983 liability to private-party defendants on the understanding that the "problem" of imposing monetary liability on such defendants for "mak[ing] use of seemingly valid state laws" was a "remedial" issue that "should be dealt with … by establishing an affirmative defense." *Lugar*, 457 U.S. at 942 n.23. Nothing in *Reynoldsville Casket* is inconsistent with the good-faith defense for private § 1983 defendants that this Court proposed in *Lugar* and *Wyatt* and that the lower courts uniformly have applied in this and other contexts.

IV. PRESENTING ONLY A NARROW ISSUE AS TO WHICH THE LOWER COURTS ARE IN AGREEMENT, THIS CASE IS NOT A SUITABLE VEHICLE FOR CONSIDERATION OF FURTHER QUESTIONS ABOUT THE ULTIMATE SCOPE OF THE GOOD-FAITH DEFENSE

As discussed above, all of the lower courts that, since *Wyatt*, have considered the issue have concluded that there is indeed a good-faith defense to monetary liability that is available to private-party defendants sued under § 1983, as this Court suggested in *Lugar* and *Wyatt*. Given that unanimity, the issue of whether such a defense exists is not one that requires resolution by this Court.

To the extent, however, that the scope of the good-faith defense, and the circumstances in which it could properly be applied, may not yet be fully settled by the lower courts, that question – even if otherwise worthy of this Court's attention – is not one that could suitably be resolved by this case. That is because this case – and the other cases in which litigants seek a monetary recovery because of defendant unions' receipt of agency fees at a time when the rule of *Abood* remained the law of the land – are the strongest, most straightforward, cases for application of the good-faith defense. In these cases, the state statutes authorizing such fees were not only "presumptively" valid, but also clearly and indisputably constitutional under then-controlling precedent of this Court at the time of the conduct on which liability was predicated.

By contrast, in many of the other good-faith cases not related to *Janus*, the defense was applied even

where, at the time the defendant acted, the constitutionality of the state law upon which the defendant relied had not been determined. In such cases, the defendants were held to have relied in good faith on the constitutionality of the statute based essentially on the common-law principle that "[e]very statute should be considered valid until there is a judicial determination to the contrary." *Pinsky*, 79 F.3d at 313 (quoting *Birdsall v. Smith*, 122 N.W. 626, 627 (Mich. 1909)). Indeed, in *Wyatt* itself the Fifth Circuit on remand applied this principle notwithstanding that the Mississippi replevin statute at issue had been "perhaps placed in 'legal jeopardy'" by an earlier decision of that court, emphasizing instead that the statute "remained good law at the time" it was invoked. 994 F.2d at 1121. *See also Jordan*, 20 F.3d at 1271 (discussing pre-existing precedent suggesting constitutional flaws in state garnishment procedures). And, in yet other cases, courts have invoked the good-faith defense to shield the defendant from damages liability on some basis other than her reliance on the constitutionality of a statute. Thus, for example, in *Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008), the Ninth Circuit applied the good-faith defense based not on the defendant's reliance on a statute's validity but rather on the defendant's reliance on the instructions of a police officer.

Unlike these cases, where application of the good-faith defense could be complicated by questions about an untested statute's constitutionality, or the reasonableness of the defendant's reliance on a public official's instruction, here the justification for the Union's receipt of agency fees prior to June 27, 2018, was not only its reliance on a presumptively valid state statute, but also the controlling precedent of this

Court, upholding the constitutionality of such agency-fee laws, that was unquestionably good law at the time.

If there is any case in which application of the good-faith defense is appropriate, it is in circumstances such as are present here, where the basis for the defendant's alleged liability is this Court's "announce[ment of] a new rule of law" that "overrul[ed] clear past precedent on which litigants may have relied." *Reynoldsville Casket*, 514 U.S. at 762 (Kennedy, J., concurring) (citation omitted). Accordingly, this case would afford the Court no opportunity to consider the outer bounds of the good-faith defense, and it would be an unsuitable vehicle for the Court to resolve any such questions about the scope of that defense.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RAMYA RAVINDRAN
(*Counsel of Record*)
JOHN M. WEST
BREDHOFF & KAISER,
P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
202.842.2600
rravindran@bredhoff.com

Counsel for Respondent

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