No. 20-20

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

REPLY TO BRIEF IN OPPOSITION

AARON B. SOLEM
Counsel of Record
WILLIAM MESSENGER
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
abs@nrtw.org

Counsel for Petitioner

TABLE OF CONTENTS

Page

A. A Statutory Reliance Defense Has No Basis in *Wyatt*, in Section 1983, or in Equity 2

B. A Statutory Reliance Defense Conflicts with Retroactivity Principles 8

C. The Question Presented Is Important 9

D. This Case Is an Excellent Vehicle to Resolve the Question This Court Left Open in *Wyatt* 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977).....11

Danielson v. Inslee,
945 F.3d 1096 (9th Cir. 2019) 4, 7, 9

Diamond v. Pa. State Educ. Ass'n, ---
F.3d ---, 2020 WL 50884266 (3d. Cir.
Aug. 28, 2020) 1, 2, 6, 7, 8

Janus v. AFSCME, Council 31,
138 S. Ct. 2448 (2018).....11

Jordan v. Fox, Rothschild, O'Brien & Frankel,
20 F.3d 1250 (3d Cir. 1994) 2

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982).....1

Manuel v. City of Joliet,
137 S. Ct. 911 (2017).....4

Owen v. City of Indep.,
445 U.S. 622 (1980).....6

Pinsky v. Duncan,
79 F.3d 306 (2d Cir. 1996) 2

Rehberg v. Paulk,
566 U.S. 356 (2012).....4

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995).....8, 9

TABLE OF AUTHORITIES—Continued

Page(s)

Tucker v. Interscope Records Inc.,
515 F.3d 1019 (9th Cir. 2008) 3

Wyatt v. Cole,
504 U.S. 158 (1992).....1, 2, 6

Wyatt v. Cole,
994 F.2d 1113 (5th Cir. 1993) 2

STATUTES

42 U.S.C. § 1983 .....*passim*

MISCELLANEOUS

J. Bishop, *Commentaries on Non-Contract Law*
(1889) 3

The IAM acknowledges this Court raised, but did not decide, the question of whether there exists a "good faith defense" to Section 1983 damages liability in *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). *See* IAM Br. 5. The IAM also acknowledges a slew of lower courts, in cases dealing with unconstitutional agency fee seizures, have relied on *Wyatt's* dicta to hold that a defendant's reliance on a then-thought valid statute exempts the defendant from paying damages to injured parties under Section 1983. *See id*. at 5-6, 10-11.

The Court should finally resolve the question it left open in *Wyatt* and *Lugar*: to disabuse lower courts of the notion that a defendant acting under color of a state statute is both an element of and a defense to Section 1983. This statutory reliance defense is not the defense suggested in *Wyatt*. Indeed, the defense is incompatible with Section 1983's text, with equitable principles, and with this Court's retroactivity precedents.

After this petition was filed, a majority of a Third Circuit panel rejected the good-faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits. *Diamond v. Pennsylvania State Education Association*, Nos. 19-2812 & 19-3906, 2020 WL 5084266 (3d Cir. Aug. 28, 2020). Judge Fisher, concurring in the judgment, found that this Court's decision in *Wyatt* did not imply "that alternative policy grounds might supply an affirmative defense" to Section 1983. 2020 WL 5084266 at **10-11. Judge Phipps, dissenting, agreed and found that "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id*.

Judge Phipps is correct. The Court should take this case and reach the same conclusion: that a defendant's good faith reliance on a statute is not an affirmative defense to Section 1983.

A. A Statutory Reliance Defense Has No Basis in *Wyatt*, in Section 1983, or in Equity.

1. The good faith defense several Justices supported in *Wyatt* was a defense to the malice and probable cause elements of a Section 1983 due process claim arising from a use 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). As the Chief Justice explained: "[r]eferring 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*. at 176 n.1.

That is how the circuit courts initially interpreted *Wyatt*. *See Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993); *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 new interpretation sweeping through the lower courts—that *Wyatt* suggested a broad statutory reliance defense to all Section 1983 damages claims—has no basis in this Court's decision.

The IAM tries to create a disagreement where none exists by arguing (at 17-19) that Justices in *Wy-*

att found malice and lack of probable cause to be elements not for proving a due process violation, but for establishing *damages liability* for that violation. That is also Casanova's position. The parties differ in that Casanova submits that malice and lack of probable cause are not elements for establishing damages liability in a First Amendment suit or in every Section 1983 suit against a private defendant.

The IAM submits (at 18-21) that most, if not all, Section 1983 claims against private defendants are analogous to malicious prosecution and abuse of process because such defendants must invoke state processes for there to be state action under Section 1983.[1] To the contrary, "[t]he tort of abuse of process requires misuse of the *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (emphasis added); *see* J. Bishop, *Commentaries on Non-Contract Law* § 224 at 90 (1889) (stating that "[t]he [common] law has provided the action of malicious prosecution as a remedy for private injuries from abuse of the process of the courts."). The analogy is not close enough to justify making malice and lack of probable cause elements of a First Amendment compelled subsidization of speech claim or of *every* Section 1983 damages claim against a defendant that relies on a state statute. *See Diamond*, 2020 WL 5084266, slip op. at 13 (Fisher J., concurring) ("the torts of abuse of

---

[1] The IAM's assertion only proves Casanova's point that a statutory reliance defense overlaps with Section 1983's under-color-of-state-law element. *See* Pet. 11-13.

process and malicious prosecution provide at best attenuated analogies.")

Tort analogies are merely a rough guide for determining the elements of Section 1983 claims. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 920-21 (2017). Some Section 1983 claims have no common law equivalent. "[Section] 1983 is not simply a federalized amalgamation of pre-existing common-law claims.'" *Id*. at 921 (quoting *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012)). Here, a First Amendment claim for compelled subsidization of speech has no common law tort equivalent. There is no basis for making malice and lack of probable cause elements for establishing damages liability for these types of First Amendment violations.

Notably, the Seventh Circuit did not base its statutory reliance defense on common law. The court said the "search for the best analogy is a fool's errand." *Janus v. AFSCME, Coucil 31*, 942 F.3d 352, 365 (7th Cir. 2019). The court found "reasonable arguments for several different torts," though it was "inclined to agree . . . that abuse of process comes closest." *Id*. Ultimately, the court chose to "leave common-law analogies behind." *Id*. at 366. And so did the Ninth Circuit in *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019), which found "[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." The fact the IAM cannot defend the Seventh's decision on its own terms is telling.

2. The IAM does not defend any other ostensible basis for a statutory reliance defense. Like the Seventh Circuit, the IAM makes no attempt to square a statutory reliance defense with Section 1983's statutory command: that "[e]very person who, under *color of any statute* . . ." deprives a citizen of a constitutional right "*shall be liable* to the party injured in an action at law . . ." 42 U.S.C. § 1983 (emphasis added). Nor does the IAM attempt to explain how acting "under color of any statute" can be both an *element* and a *defense* to Section 1983 liability. *See* Pet. 11-13.

The IAM only attempts to minimize the self-defeating statutory interpretation its defense requires by asserting (at 22) that claims against private defendants are a small fraction of Section 1983 claims. But that does not refute the point that a statutory reliance defense lacks a statutory basis. And the assertion is small comfort to victims of union agency fee seizures, or victims of other constitutional deprivations, who will not receive just compensation as a result of this new defense.

With respect to the notion that equity justifies a statutory reliance defense, while the IAM says (at 26) that equality and fairness support the defense, the IAM makes no attempt to defend that proposition. It is likely because the proposition is indefensible. *See* Pet. 14-18. Courts cannot just carve equitable exemptions into Section 1983. *See id.* at 15. Even if they could, it would be inequitable to *victims* of constitutional deprivations, such employees who had agency fee seized from them, to deprive them of relief for their

injuries. *See id.* at 15-17. As this Court said in *Owen v. City of Independence*, 445 U.S. 622, 654 (1980), when it held that Section 1983's equitable purposes did not justify a good faith immunity for municipalities, "elemental notions of fairness dictate that one who causes a loss should bear the loss."

3. The Third Circuit's fractured opinion in *Diamond* illustrates the lower courts struggle to identify a cognizable basis for a statutory reliance defense. In that case, Judge Rendell accepted the defense recognized by the Seventh Circuit, and said it is based in policy interests in equality and fairness or, alternatively, on an analogy to the tort of abuse of process. *Diamond*, 2020 WL 5084266 at **4, 6 & n.4.

Judge Fisher, concurring in the judgement, disagreed and found no categorical statutory reliance defense to Section 1983. *Id.* at *8. He recognized that this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992) did not imply "that alternative policy grounds might supply an affirmative defense" to Section 1983. *Diamond*, 2020 WL 5084266 at **10-11. Judge Fisher also recognized that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to a First Amendment compelled speech claim. *Id.* at *13.

Judge Phipps, dissenting, agreed with Judge Fisher that there is no across-the-board good faith defense to Section 1983. *Id.* at *17. He found that "principles of equality and fairness" do not justify such a defense. *Id.* at *21. According to Judge Phipps, "[g]ood

faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id*.

A majority of the Third Circuit panel not only rejected the statutory reliance defense recognized by other several other circuits, but also the two alternative justifications cited for that defense: policy interests in equality and fairness and a common law tort analogy.[2] *See Diamond*, 2020 WL 5084266 at **11-13 (Judge Fisher, concurring in the judgment); *id*. at **17-21 (Judge Phipps, dissenting).

Judge Fisher further added to confusion on this issue by finding an alternative limit to Section 1983 liability with a different basis. According to Judge Fisher, prior to 1871, "[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision." *Id*. at *8. Judge Fisher concluded that Section 1983 incorporates this exception to retroactive liability. *Id*. at *16.

This ostensible limit on retroactive liability under Section 1983 differs from a good faith defense. The former exempts from Section 1983 liability defendants

---

[2] *See Danielson*, 945 F.3d at 1101-02; *Ogle*, 951 F.3d at 797; *Wholean*, 955 F.3d at 334.

who rely on invalidated statutes "except where duress or fraud was present." *Id*. A good faith defense is an affirmative defense to Section 1983 liability that turns on whether the defendant knew or should have known of a statute's constitutional infirmity. *Id* at *6 (Judge Rendell).

The Court should clear up this doctrinal confusion and resolve whether a defendant's reliance on an invalidated statute is a defense to Section 1983 liability. The Court should reject the proposition for the reasons stated in the petition and by Judge Phipps in *Diamond*. His opinion persuasively establishes that neither equitable interests, nor common law analogies or history, justify deviating from Section 1983's statutory mandate that "[e]very person who, under color of any statute . . ." deprives a citizen of a constitutional right "shall be liable to the party injured in an action at law . . ." 42 U.S.C. § 1983.

B. A Statutory Reliance Defense Conflicts with Retroactivity Principles.

This Court has held that the retroactive effect of its constitutional jurisprudence precludes courts from fashioning remedies based on a party's reliance on a statute before it was held unconstitutional. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995). A statutory reliance defense is just such a remedy. *See* Pet. 13-14.

The IAM asserts that "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) for denying relief.'" IAM Br. 25 (quoting *Reynoldsville Casket*, 514 U.S. at 759). That is true, but it cannot be said that a statutory reliance defense has "'nothing to do with retroactivity.'"

The ostensible defense is predicated on the (incorrect) notion that it is inequitable to hold defendants liable for injuries they caused when relying on a statute that has not yet been declared unconstitutional. *See, e.g., Danielson*, 945 F.3d at 1101. The defense turns on whether the defendant reasonably relied on the statute before it was held unconstitutional. A statutory reliance defense has everything to do with avoiding the retroactive effect of court decisions holding state statutes unconstitutional. The defense is incognizable under *Reynoldsville Casket*.

C. The Question Presented Is Important

The IAM does not dispute the importance of the question presented. Nor could it. There are at least 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 in *Janus v. AFSCME*, No. 19-1104. These workers will be denied relief for their injuries if a statutory reliance defense is accepted.

The lower courts' recognition of a statutory reliance also has grave consequences for victims of other

constitutional deprivations. The IAM asserts the defense may be raised against a host of constitutional claims, *see* IAM Br. 8-9, and when the legality of the state law the defendant relied upon is uncertain, *id.* at 28. And there is no reason municipal defendants could not raise this defense in addition to private defendants. A broad defense to Section 1983 will come into existence absent review by this Court.

D. This Case Is an Excellent Vehicle to Resolve the Question This Court Left Open in *Wyatt*.

The Court should take this case to resolve whether there exists a statutory reliance defense to Section 1983 because the situation here—a union claiming this ostensible defense shields it from compensating employees for agency fee seizures—is the same situation presented in over three dozen other cases. The Court's decision in this case would largely determine the outcome of those similar cases. It is a fitting vehicle to resolve the question presented.

The IAM also argues (at 27-29) the Court should wait for a case that does not involve union agency fee seizures. But doing so would mean that unions would escape having to compensate tens of thousands of victims of their agency fee seizures (which, of course, is why the IAM suggests that course of action). The Court should not countenance such an inequity. In *Janus*, the Court recognized the "considerable windfall" unions wrongfully received, and found it "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." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). The Court should permit nonmembers to recover a portion of the monies unconstitutionally seized from them.

Finally, the IAM contends (at 27-29) the Court should wait for a case where a defendant relies on a state law whose constitutionality is uncertain at the time. On its own terms, that is no reason to avoid determining, in this case, if a statutory reliance defense exists. In any event, such uncertainty exists here. In *Janus*, this Court recognized that "unions have been on notice for years regarding this Court's misgiving about *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]" 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*." *Janus*, 138 S. Ct. at 2485.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AARON B. SOLEM
Counsel of Record
WILLIAM MESSENGER
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
abs@nrtw.org

Counsel for Petitioner