No. _____

# In the Supreme Court of the United States

SARAH R. LEE, PETITIONER

*v.*

OHIO EDUCATION ASSOCIATION, ET AL., RESPONDENTS

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

*Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), held that the Constitution forbids public-sector unions to take "fair-share fees" from non-union members, and its holding is retroactive. Petitioner Sarah R. Lee is seeking a refund of the "fair-share fees" that the Ohio Education Association diverted from her wages before *Janus*. The Sixth Circuit rejected her claim after holding that 42 U.S.C. § 1983 establishes a "good-faith defense" for private defendants that resembles the qualified immunity available to government officers. Pet. App. 6a–12a. Ms. Lee's petition presents two questions:

1. In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court held that qualified immunity is categorically unavailable to private entities who violate 42 U.S.C. § 1983. *See id.* at 167 ("[Q]ualified immunity for public officials [is] not applicable to private parties."). In response to *Wyatt*, several courts of appeals have allowed private entities to assert a "good-faith defense" in lieu of qualified immunity when they are sued under 42 U.S.C. § 1983, which allows private defendants to escape liability if they violate another's constitutional rights before the courts have clearly established the illegality of their conduct. Other decisions from courts of appeals, however, reject the idea of a "good-faith defense" and hold private parties liable whenever they violate 42 U.S.C. § 1983—regardless of whether the violation occurred in good faith.

The question presented is:

> Does 42 U.S.C. § 1983 provide a "good-faith defense" to private entities who violate another's constitutional rights before the courts have

clearly established the illegality of their conduct?

2. Assuming that 42 U.S.C. § 1983 establishes a "good-faith defense" for private defendants, the parties disagree over its scope. The union believes that its good-faith reliance on pre-*Janus* statutes and court rulings should shield it not only from liability for damages, but also from restitutionary remedies that merely require the return of property that was taken in good faith but in violation of another's constitutional rights. Ms. Lee acknowledges that defenses such as qualified immunity or "good faith" can shield a defendant from liability for damages, but these defenses never allow defendants to enrich themselves by *keeping* money or property that they took in violation of the Constitution. The issue presented is:

> Do the defenses of qualified immunity or "good faith" allow a defendant who takes another person's money or property in violation of the Constitution—but in reliance on a statute or court ruling that purported to authorize its conduct and is only later declared unconstitutional—to *keep* that money or property when the owner sues for its return?

## PARTIES TO THE PROCEEDING

Petitioner Sarah R. Lee was the plaintiff-appellant in the court of appeals.

Respondents Ohio Education Association, Avon Lake Education Association, and the National Education Association were defendants-appellees in the court of appeals.

A corporate disclosure statement is not required because Ms. Lee is not a corporation. *See* Sup. Ct. R. 29.6.

## STATEMENT OF RELATED CASES

Counsel is unaware of any directly related proceedings arising from the same trial court case as this case other than those proceedings appealed here. Those proceedings are:

- *Lee v. Ohio Education Ass'n, et al.*, No. 1:18-cv-01420-JRA, U.S. District Court for the Northern District of Ohio. Judgment entered March 25, 2019.
- *Lee v. Ohio Education Ass'n, et al.*, No. 19-3250, U.S. Court of Appeals for the Sixth Circuit. Judgment entered February 24, 2020.

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OHIO EDUCATION ASSOCIATION, ET AL., RESPONDENTS

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## PETITION FOR A WRIT OF CERTIORARI

This petition presents two issues that have divided the lower courts and that urgently call for this Court's resolution.

The first issue is whether 42 U.S.C. § 1983 allows private defendants to assert a "good-faith defense" if they violate someone's constitutional rights before the courts have clearly established the illegality of their conduct. This Court has long held that government *officers* are entitled to qualified immunity unless they violate a clearly established federal right. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). But this Court has never recognized such a defense for private defendants, and the Court has held that private defendants are ineligible for qualified-immunity defenses when sued under 42 U.S.C. § 1983. *See Wyatt v. Cole*, 504 U.S. 158, 167 (1992)

("[Q]ualified immunity for public officials [is] not applicable to private parties."). *Wyatt*, however, refused to resolve whether 42 U.S.C. § 1983 might allow private defendants to assert a "good-faith defense" that resembles qualified immunity, and decisions from the courts of appeals look both ways on this question.

Rulings from the Second,[1] Third,[2] Fifth,[3] Sixth,[4] and Seventh Circuits[5]—and recent decisions from the Ninth Circuit[6]—have held that 42 U.S.C. § 1983 allows private defendants to assert a "good-faith defense," and that private defendants should escape liability if they violate another's constitutional rights before the courts have clearly established the illegality of their conduct. But decisions from the First Circuit[7]—as well as an earlier de-

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1. *See Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996).
2. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275–78 (3d Cir. 1994).
3. *See Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993).
4. *See Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996).
5. *See Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 942 F.3d 352, 361–64 (7th Cir. 2019).
6. *See Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Danielson v. Inslee*, 945 F.3d 1096, 1099–1100 (9th Cir. 2019).
7. *See Downs v. Sawtelle*, 574 F.2d 1, 15–16 (1st Cir. 1978) ("Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights. Consequently, we hold that the Wood defense is not available to Roberta Sawtelle and that her liability is to be determined by the jury without regard to

(continued…)

cision from the Ninth Circuit[8]—have categorically rejected the notion that private defendants may assert a "good-faith defense" under 42 U.S.C. § 1983.

This Court has never ruled on whether a "good-faith defense" is available for private defendants in 42 U.S.C. § 1983 litigation, even though the issue has been percolating in the lower courts for decades. But the time has come for this Court to weigh in, because the existence and scope of the "good-faith defense" will determine the outcome of scores of refund lawsuits brought against public-sector unions in the wake of this Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Petitioner Sarah R. Lee is among the hundreds of public-sector employees throughout the United States who are seeking to recover the "fair-share fees" that were diverted from their wages in violation of their constitutional rights, and the lower courts in every circuit are attempting to resolve these claims without any guidance from this Court on whether a good-faith defense exists.

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any claim of good faith."); *Lovell v. One Bancorp*, 878 F.2d 10, 13 (1st Cir. 1989) ("[E]xtending to private 'state actors' a qualified immunity from damages similar to that enjoyed by government officials . . . would require us to distinguish or modify our decision in *Downs v. Sawtelle,* 574 F.2d 1 (1st Cir.), *cert. denied,* 439 U.S. 910 (1978).").

8. *See Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983) ("[T]here is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights.").

The second question concerns what the *scope* of this purported good-faith defense should be. Ms. Lee acknowledges that a qualified-immunity defense—and any "good-faith defense" that might exist under 42 U.S.C. § 1983—should shield a defendant from liability for *damages* if it acted in reliance on a statute or court ruling that is only later declared unconstitutional. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993) (recognizing a similar defense for private parties who violate 42 U.S.C. § 1983). But neither qualified immunity nor good faith will ever allow a defendant to escape *restitution* of the money or property that it took in good faith but in violation of another's constitutional rights. Taxes, criminal fines, victim's restitution, and private property that are seized in good faith—and in reliance on statutes or court rulings that are only later pronounced unconstitutional—must be restored when the victim demands their return, regardless of whether the defendant acted in good faith, and regardless of whether the defendant acted before the courts had clearly established the illegality of its conduct. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 753, 775 (2013) (taxes); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (fines);[9] *United States v.*

9. *See also DeCecco v. United States*, 485 F.2d 372, 372–73 (1st Cir. (continued…)

*Venneri*, 782 F. Supp. 1091, 1092 (D. Md. 1991) (victim's restitution); *Wyatt v. Cole*, 994 F.2d 1113, 1115 (5th Cir. 1993) (property seized pursuant to an unconstitutional replevin statute); *United States v. Rayburn House Office Building Room 2113 Washington DC 20515*, 497 F.3d 654, 656, 665 (D.C. Cir. 2007) (property seized pursuant to an unconstitutional search warrant). Good faith can provide an immunity from damages if the victim sues over the collateral harms (such as emotional distress or economic loss) caused by the unconstitutional seizure of her property. But it will never allow someone who takes another's money or property in violation of the Constitution to *keep* that property if the plaintiff sues for its return.

The Sixth Circuit held that the union's good faith should not only confer an immunity from *damages*, but should also allow the union to escape *restitution* of the money that it took from Ms. Lee in violation of her constitutional rights. The Sixth Circuit's ruling on this point—and the similar pronouncements that the Seventh[10] and Ninth[11] Circuits have issued in post-*Janus* refund lawsuits—are incompatible with the court decisions that uniformly require the return of taxes, criminal fines,

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1973) (fines); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976) (fines); *Pasha v. United States*, 484 F.2d 630, 632–33 (7th Cir. 1973) (fines); *United States v. Summa*, 362 F. Supp. 1177, 1181 (D. Conn. 1972) (fines).

10. *See Mooney v. Illinois Education Ass'n*, 942 F.3d 368, 370–71 (7th Cir. 2019).

11. *See Danielson v. Inslee*, 945 F.3d 1096, 1098–1105 (9th Cir. 2019).

victim's restitution, and private property that a defendant seizes in violation of another's constitutional rights, but in good-faith reliance on statutes or court rulings that are only later pronounced unconstitutional.[12] More importantly, they are incompatible with the other circuit-court rulings that recognize and enforce a "good-faith defense" for private defendants under 42 U.S.C. § 1983,[13] because none of those rulings allowed a defendant to *keep* the money or property that it seized in violation of another's constitutional rights, even as they allowed the defendant to escape liability for *damages* on account of its good faith. The Court should grant certiorari to resolve this division of authority—and to ensure that public-sector unions are subject to the same rules that govern other defendants who take money and property in violation of the Constitution but in reliance on statutes or court rulings that puported to authorize their unconstitutional conduct.

## OPINIONS BELOW

The opinion of the court of appeals is available at 951 F.3d 386, and it is reproduced at Pet. App. 1a–14a. The order denying rehearing en banc is reproduced at 21a–

12. *See* note 9, *supra*, and accompanying text.

13. *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); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993); *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).

22a. The district court's opinion is available at 366 F. Supp.3d 980, and it is reproduced at 15a–20a.

## JURISDICTION

The court of appeals entered its judgment on February 24, 2020. Pet. App. 1a. The court of appeals denied rehearing en banc on April 29, 2020. Pet. App. 67a. Ms. Lee timely filed this petition for a writ of certiorari on September 28, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in relevant part:

> 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 . . .

## STATEMENT

Sarah R. Lee is a public-school teacher in the Avon Lake City Schools. Before the Supreme Court's ruling in *Janus*, Ms. Lee worked in an "agency shop," where she was compelled to either join the Ohio Education Association or pay "fair-share fees" to the union as a condition of employment. Ms. Lee refused to join the OEA because she disapproves of its political advocacy. But because she

worked in an agency shop, Ms. Lee was compelled to pay "fair-share fees" to the OEA and its affiliates against her wishes.

On June 27, 2018, this Court announced its ruling in *Janus*, which held that public-sector agency shops violate the constitutional rights of public employees. *See Janus*, 138 S. Ct. at 2478. The Court further held that the Constitution forbids public-sector unions to take money from the paychecks of non-union members unless those employees "clearly and affirmatively consent before any money is taken." *Id.* at 2486. The union stopped diverting fair-share fees from Ms. Lee's wages in response to *Janus*.

On December 6, 2018, Ms. Lee sued the Ohio Education Association, the Avon Lake Education Association, and the National Education Association (collectively, "the union"), and requested a refund of the "fair-share fees" that the defendants had unconstitutionally taken from her wages. The union moved to dismiss and argued that it should not be compelled to return the "fair-share fees" that it had taken before *Janus*—even though it had taken these fees in violation of Ms. Lee's constitutional rights.[14] The union claimed that it had relied on Ohio statutes and pre-*Janus* court rulings that purported to authorize these unconstitutional exactions from Ms. Lee's wages.[15] And the union argued that its reliance on

14. *See* Union Defs.' Mem. in Support of Mot. to Dismiss (ECF No. 37-1).

15. *See id.* at 13–16 (citing Ohio Rev. Code § 4117.09(C) and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)).

these pre-*Janus* authorities should immunize it from refund lawsuits—even though the text of 42 U.S.C. § 1983 requires the repayment of money that is taken under color of state law and in violation of another's constitutional rights.[16]

The district court agreed with the union and held that the "good-faith defense" should preclude Ms. Lee from recovering the fair-share fees that were taken in violation of her constitutional rights. Pet. App. 15a–20a. Ms. Lee appealed, and the Sixth Circuit affirmed. Pet. App. 1a–14a. The Sixth Circuit assumed for the sake of argument that *Janus* is retroactive. Pet. App. 5a–6a. But the Sixth Circuit held that private defendants who violate 42 U.S.C. § 1983 should be entitled to a good-faith defense if their unconstitutional conduct was "authorized by Ohio law and binding Supreme Court precedent" existing at the time of their actions. Pet. App. 9a.

Ms. Lee, however, had argued that a "good-faith defense"—even if one assumes its existence—will never shield a defendant from a restitutionary remedy that seeks only the return of property or money that was taken in good faith but in violation of another's constitutional rights. Ms. Lee acknowledged that qualified immunity and good faith can confer an immunity from damages if a victim sues over collateral harms (such as emotional distress or economic loss) that result from the unconstitutional seizure of her property. But no one ever gets to *keep* the property that they take in violation of another's constitutional rights—even if the property was taken in

16. *See id.* at 10–16.

the utmost good faith.[17] The Sixth Circuit did not reject the premise of Ms. Lee's argument. But it held that Ms. Lee was asserting a "legal" claim for "damages" rather than an "equitable" claim for "restitution," and it denied her request for a refund on that basis. Pet. App. 10a.

## REASONS FOR GRANTING THE PETITION

This Court has never resolved whether a "good-faith defense" exists for private defendants under 42 U.S.C. § 1983—and it has never ruled on what the scope of this defense should be. Each of these issues is ripe for the Court's consideration. The courts of appeals have issued contradictory and irreconcilable opinions on each of these matters, and the need for this Court's resolution is especially urgent in light of the scores of agency-fee refund lawsuits that public employees have brought in the aftermath of *Janus*.

### I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER 42 U.S.C. § 1983 ESTABLISHES A "GOOD-FAITH DEFENSE" FOR PRIVATE DEFENDANTS

The issues surrounding the existence of a "good-faith defense" have been percolating in the federal appellate courts for more than 40 years. The First Circuit was the first appellate court to weigh in on this matter, and it categorically rejected the notion of a "good-faith defense" for private defendants in *Downs v. Sawtelle*, 574 F.2d 1, 15–16 (1st Cir. 1978):

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17. *See* note 9, *supra*, and accompanying text.

In the case of public officials, the [Supreme] Court has reasoned that a "good faith" qualified immunity is an integral part of this background. *Pierson v. Ray*, 386 U.S. at 556-57, 87 S. Ct. 1213, and that certain officials are therefore entitled to rely upon such an immunity. But the Court has never held that private individuals are in any way shielded from damage liability in a comparable fashion. To the contrary, the Court in *Adickes* recognized the plaintiff's right to proceed solely against the private defendant, despite the fact that three years earlier the Court had sanctioned a qualified immunity for the police officers with whom the defendant allegedly had conspired. *See Pierson v. Ray*, *supra*. To place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties afforded by the statute. Private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing police officers, governors and other public officials. Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights. Consequently, we hold that the Wood defense is not available to Roberta Sawtelle

> and that her liability is to be determined by the jury *without regard to any claim of good faith*.

*Downs v. Sawtelle*, 574 F.2d 1, 15–16 (1st Cir. 1978) (emphasis added). Five years later, the Ninth Circuit also rejected the existence of a "good-faith defense" for private defendants in 42 U.S.C. § 1983 litigation:

> [T]here is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights.

*Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983). And when the First Circuit revisited this matter in *Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989), it refused to reconsider its earlier ruling that had denied the existence of a "good-faith defense"—or any other defense for private defendants "similar to" the qualified immunity available to government officials. *See id.* at 13 ("[E]xtending to private 'state actors' a qualified immunity from damages similar to that enjoyed by government officials . . . would require us to distinguish or modify our decision in *Downs v. Sawtelle,* 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978)").

The more recent decisions from the federal courts of appeals, by contrast, have recognized the existence of a "good-faith defense" for private defendants in 42 U.S.C. § 1983 litigation. All of these appellate-court decisions post-date this Court's ruling in *Wyatt v. Cole*, 504 U.S. 158, 167 (1992), which rejected qualified immunity for

private defendants[18] but left open the possibility that private defendants might be allowed to assert a "good-faith defense" instead.[19]

The first appellate-court decision to recognize a "good-faith defense" for private defendants was the Fifth Circuit's ruling in *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993), which was decided on remand from the Supreme Court's ruling in *Wyatt*. The defendant in *Wyatt* had seized the plaintiff's cattle and tractor in reliance on a state replevin statute that was later declared unconstitutional. When the plaintiff sued for damages under 42 U.S.C. § 1983, the Fifth Circuit held that the defendant's good-faith reliance on the unconstitutional statute shielded him from liability:

> [W]e think that private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity.

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18. *See Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("[Q]ualified immunity for public officials [is] not applicable to private parties.").

19. *See id.* at 169 ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), 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. Because those issues are not fairly before us, however, we leave them for another day.").

*Id.* 994 F.2d at 1120. Since *Wyatt*, the Second,[20] Third,[21] Sixth,[22] and Seventh[23] Circuits have joined the Fifth Circuit in recognizing the existence of a good-faith defense for private defendants under 42 U.S.C. § 1983.

The Ninth Circuit has also issued an opinion that purports to recognize a "good-faith defense" under 42 U.S.C. § 1983—despite its earlier holding in *Howerton v. Gabica* that categorically rejects this idea.[24] In *Clement*

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20. *Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996) ("[I]t is objectively reasonable to act on the basis of a statute not yet held invalid. . . . The case would be different, however, if those who act in reliance on a statute can be 'shown to know that such [statute] was unconstitutional and would be declared so.'" (citation omitted));

21. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994) ("'[P]rivate defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity.' *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993). We are in basic agreement, but we believe 'malice' in this context means a creditor's subjective appreciation that its act deprives the debtor of his constitutional right to due process.").

22. *See Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996) ("[T]he Fifth Circuit on remand, that court held that private persons who act under color of law may assert a good faith defense. *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993). The Third Circuit has agreed. *Jordan*, 20 F.3d at 1276–77. Now, so do we.").

23. See *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 942 F.3d 352, 361–64 (7th Cir. 2019); *see also* Pet. App. 23a–28a.

24. *See Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983) ("[T]here is no good faith immunity under section 1983 for pri-

(continued…)

*v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008), the Ninth Circuit allowed a private towing company to assert a "good-faith defense" under section 1983 without mentioning or discussing *Howerton*. But Ninth Circuit panels are forbidden to overrule or disregard the rulings of a prior panel, and *Clement* had no authority to depart from *Howerton*'s rejection of the "good-faith defense." *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court. [A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court."). So the Ninth Circuit has come down on both sides of this issue: It rejected the existence of a good-faith defense in *Howerton*, only to endorse the defense in *Clement* without any mention of its earlier ruling.

When the Ninth Circuit was confronted with these inconsistent rulings in *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), it tried to recharacterize *Howerton* as a ruling that denied only *qualified immunity* to private defendants. *See id.* at 1099 ("*Howerton* stands for the unremarkable proposition that private parties cannot avail themselves of *qualified immunity* to a section 1983

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vate parties who act under color of state law to deprive an individual of his or her constitutional rights.").

lawsuit." (emphasis in original)). That is not what *Howerton* says or holds. *Howerton* imposed section 1983 liability on a private landlord who had tried to evict a tenant with the assistance of police—and it rejected *any* defense that might have been based on the landlords' beliefs that they were acting within their rights. The Court wrote:

> We realize the Gabicas may have believed they were acting within their rights. But there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights. *See Lugar,* 102 S. Ct. at 2757 n. 23 (suggesting that compliance with statute might be raised as an affirmative defense); *Stypmann v. City and Cty. of San Francisco,* 557 F.2d 1338, 1341–44 (9th Cir. 1977) (private towing company held liable under section 1983 although it worked only at direction of police pursuant to municipal ordinance).

*Howerton*, 708 F.2d at 385 n.10. That is not a rejection of qualified immunity; it is a holding that forecloses the landlords from asserting *any* defense based on *any* belief that they were acting within their rights. *See id.* If the district court in *Howerton* had allowed the landlords to assert a "good-faith defense" on remand in response to this opinion, it would have been defying the instructions of its superiors and subjecting itself to summary reversal.

The *Danielson* opinion, however, claims that *Howerton* would have *allowed* the landlords to assert a good-

faith defense on remand—but only if they called their good-faith arguments an "affirmative defense" rather than an "immunity." *See Danielson*, 945 F.3d at 1100 ("Although *Howerton* used the somewhat less precise language of a 'good faith immunity,' 708 F.2d at 385 n.10, we do not read the decision to foreclose a good faith *affirmative defense*."); *id.* ("Thus, the *Clement* court acted well within its authority to find that, while private parties cannot assert an immunity to suit under section 1983, they can invoke a good faith defense."). In other words, *Howerton* forecloses private defendants from asserting good-faith *immunity* in 42 U.S.C. § 1983 litigation, but it leaves the door open for them to assert good faith as an *affirmative defense*.

*Danielson*'s attempted recharacterization of *Howerton* is untenable. Immunities *are* affirmative defenses,[25] so there is no conceivable distinction that can be drawn between good-faith "immunity" and good faith as an "affirmative defense." Immunities may differ from garden-variety affirmative defenses because they sometimes permit interlocutory appeals[26] or have jurisdictional im-

25. *See Crawford-El v. Britton*, 523 U.S. 574, 587 (1998) ("[Q]ualified immunity is an affirmative defense"); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) (noting "the Court's willingness to recognize certain traditional immunities *as affirmative defenses*" in section 1983 litigation); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 579 (1976) ("A claim of immunity or exemption is in the nature of an affirmative defense to conduct which is otherwise assumed to be unlawful.").

26. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (allowing interlocutory appeals of orders denying qualified immunity).

plications.[27] But *Howerton*'s rejection of "good faith immunity" was not rejecting the special features of immunity defenses; it was preventing the landlords from asserting *any* defense based on their belief in the legality of their conduct. *See Howerton*, 708 F.2d at 385 n.10.

The more serious problem is that the content of a "good-faith defense" will be no different from the content of the "good-faith immunity" that *Howerton* rejected. In both situations, a defendant will escape liability under 42 U.S.C. § 1983 if it reasonably believed that its conduct was lawful—even if its conduct turned out to be unconstitutional. But if litigants and courts are allowed to evade the precedential force of an earlier decision by placing a new label on a previously rejected idea, then that is the end of stare decisis. This Court would never tolerate litigants or lower courts evading its precedents through this type of wordplay.

The Ninth Circuit should be viewed as having rulings on both sides of the circuit split: *Howerton*, which aligns with the First Circuit in rejecting a "good-faith defense" for private defendants in 42 U.S.C. § 1983 litigation; and *Clement* and *Danielson*, which align with the Second, Third, Fifth, Sixth, and Seventh Circuits in allowing private defendants to assert this defense. The most accurate head count would produce a 5½ to 1½ circuit split in favor of the good-faith defense—although anyone who

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27. *See, e.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq* (giving foreign sovereigns immunity from the jurisdiction of U.S. courts, with limited exceptions); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (recognizing state sovereign immunity as a jurisdictional defense).

credits *Danielson*'s recharacterization of *Howerton* may choose put the score at 6–1 instead. But no matter how one chooses to characterize the Ninth Circuit's "position," its intra-circuit confusion only amplifies the need for a definitive ruling from this Court on whether the good-faith defense exists.

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

An equally certworthy issue is the scope of this purported "good-faith defense." Ms. Lee has acknowledged throughout this litigation that defenses such as qualified immunity and good faith can shield a defendant from liability for *damages*. But these defenses will never permit a defendant to escape *restitution* of wrongfully taken property, and they will never allow a defendant to enrich itself by *keeping* the property that it took in violation of another's constitutional rights. That remains the case even if the defendant took the property at a time when its actions were authorized by a statute or court decision that is later declared unconstitutional.

This principle is ubiquitous in American law. Taxes that are collected under a statute that is later declared unconstitutional must be returned, even if the taxing authorities relied in good faith on that statute before it was pronounced unconstitutional. *See United States v. Windsor*, 570 U.S. 744, 753, 775 (2013). Criminal fines imposed under an unconstitutional statute must be returned, even if the fines were collected in good faith and before the statute was pronounced unconstitutional. *See, e.g.*, *Pasha v. United States*, 484 F.2d 630, 632–33 (7th Cir. 1973);

*United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976); *DeCecco v. United States*, 485 F.2d 372, 372–73 (1st Cir. 1973); *United States v. Summa*, 362 F. Supp. 1177, 1181 (D. Conn. 1972). Even victim-restitution awards must be returned if the statute on which the conviction is based is later declared unconstitutional. *See United States v. Venneri*, 782 F. Supp. 1091, 1092 (D. Md. 1991); *Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017). And property seized in reliance on a replevin statute that is later declared unconstitutional must be returned—even if the defendant took the property in good faith and before the judicial pronouncement of unconstitutionality. *See Wyatt v. Cole*, 994 F.2d 1113, 1115 (5th Cir. 1993).[28]

In all of these cases, a defendant's good faith will provide a defense if a victim sues over collateral harms inflicted by the unconstitutional interference with his property. The tax collectors in *Windsor*, for example, will have qualified immunity if a taxpayer sues to recover damages for emotional distress or economic losses caused by the unconstitutional tax. Prosecutors and jailers will have immunity if a convict sues for reputational harm or wrongful imprisonment caused by their enforcement of a criminal statute that is later declared un-

28. The same principle applies under the common law: A person who takes another's property in "good faith" and without fault must nevertheless return that property or pay its replacement value in an action for conversion, as conversion is a strict-liability tort and is unconcerned with questions of fault or the defendant's state of mind. *See* Richard A. Epstein, *Torts* § 1.12.1 at 32 (1999).

constitutional. And a person who seizes another's property under an unconstitutional replevin statute will have a "good faith" defense if the victim seeks to recover damages beyond the mere return of his property. *See Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993). But the wrongfully taken property *still* must be returned—even when the defendant has a qualified-immunity or a good-faith defense against claims for damages that arise from the unconstitutional seizure of property. No one gets to *keep* money or property that is taken in good faith but in violation of another's constitutional rights.

The Sixth Circuit rejected this argument because it concluded that Ms. Lee's claim for restitution was "legal" rather than "equitable." Pet. App. 10a.[29] But that is a non sequitur. Ms. Lee's claim is that property or money that is taken in violation of another's constitutional rights *must* be restored, even when the defendant asserts a qualified-immunity or good-faith defense that shields it from liability for damages, and the defendant must restore this property or money regardless of whether the plaintiff seeks recovery from a specifically identifiable fund or from the defendant's general asserts.

More importantly, the Sixth Circuit's conclusion is incompatible with each of the five circuit-court rulings that has recognized a good-faith defense outside the context of union-refund lawsuits. *See Pinsky v. Duncan*, 79 F.3d

29. The Ninth Circuit's opinion in *Danielson* and the Seventh Circuit's opinion in *Mooney* rejected this argument for similar reasons. *See Danielson v. Inslee*, 945 F.3d 1096, 1102–03 (9th Cir. 2019); *Mooney v. Illinois Education Ass'n*, 942 F.3d 368, 370–71 (7th Cir. 2019).

306 (2d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692 (6th Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008). Each of those court decisions protected the defendants only from liability for *damages* that arose from their unconstitutional interference with another's property—and in each of these cases it would have been absurd to allow the defendants to *keep* the property interests that they had taken in good faith but in violation of the plaintiff's constitutional rights.

In *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993), for example, the defendants had seized the plaintiff's cattle and tractor in good-faith reliance on a replevin statute that was later pronounced unconstitutional. *See id.* at 1115. When the plaintiff sued for damages, the Fifth Circuit held that the defendants' "good faith" shielded them from liability for damages that were inflicted by the seizure, but the defendants *still had to return* the cattle and the tractor that they had unconstitutionally taken. *See id.* at 1115 (noting that the state courts had "ordered" the defendants to "return the property" that they had seized). In *Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008), a towing company had towed the plaintiff's car in good faith but in violation of her constitutional rights. The "good faith" defense shielded the towing company from liability for damages inflicted by the towing, but it did *not* allow the towing company to keep the plaintiff's car. *See id.* at 1096–97.

*Pinsky v. Duncan*, 79 F.3d 306 (2d Cir. 1996), shielded a defendant from liability for damages inflicted by his good-faith (but unconstitutional) attachment of the plaintiff's real estate. The court did not, however, allow the defendant to retain the unconstitutional attachment that he had imposed on the plaintiff's property. *See id.* at 311–13. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), protected a defendant from liability for damages inflicted by its good-faith (but unconstitutional) garnishment of the plaintiff's checking account, but the defendant *still* had to relinquish the unconstitutional garnishment that it had obtained. *See id.* at 1258 (noting that the state courts had "vacated the attachment of [the plaintiff's] checking account"). And *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692 (6th Cir. 1996), allowed a defendant to escape damages for its good-faith (but unlawful) impoundment of the plaintiff's property, but it did not permit the defendant to *keep* the property that it had unlawfully impounded. *See id.* at 696 (noting that the defendant had "held the seized material in trust for eight days" until the district court took custody of the materials, which the courts were required to return to the plaintiff after the impoundment order had been vacated).

It would have been demonstrably untenable—even absurd—for any of those circuit-court decisions to extend the "good-faith defense" as far as the Sixth Circuit did, to the point where a defendant is not only shielded from damages but is allowed to enrich itself by *keeping* the money or property that it took in violation of the Constitution. And in no other area of law is a defendant

allowed to *keep* money or property that it takes in good faith but in violation of another's constitutional rights. Consider the following examples:

1. When this Court declared the Defense of Marriage Act unconstitutional, it compelled the IRS to return the $363,053 in estate taxes that it had collected from the plaintiff in reliance on this unconstitutional statute. *See United States v. Windsor*, 570 U.S. 744, 753, 775 (2013). The Court ordered the IRS to refund these taxes even though the taxes had been collected in good-faith reliance on the Defense of Marriage Act, and even though the taxes had been collected four years *before* the Supreme Court's pronouncement of unconstitutionality. *See id.* at 753. The defenses of qualified immunity or good faith would have shielded government officials if a same-sex couple had sought damages for collateral harms that arose from these unconstitutional tax assessments, such as emotional distress or economic loss. But neither qualified immunity nor good faith will protect defendants from *restitution* of the money or property that they took in violation of the Constitution.

2. When the government collects fines pursuant to a statute that is later declared unconstitutional, it must return those fines—even if the government collected the fines in good faith and in reliance on a statute that was believed to be constitutional at the time. *See Pasha v. United States*, 484 F.2d 630, 632–33 (7th Cir. 1973) (fines collected pursuant to a statute that is subsequently determined to be unconstitutional must be repaid when suit is brought to recover them); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (same); *Neely v. United*

*States*, 546 F.2d 1059, 1061 (3d Cir. 1976) (same); *DeCecco v. United States*, 485 F.2d 372, 372–73 (1st Cir. 1973) (same); *United States v. Summa*, 362 F. Supp. 1177, 1181 (D. Conn. 1972) (same). Even crime victims who receive restitution from a convict must return that money if the statute on which the conviction was based is later declared unconstitutional. *See United States v. Venneri*, 782 F. Supp. 1091, 1092 (D. Md. 1991) (ordering a putative crime victim to repay restitution that it had obtained nine years earlier, because the conviction had been "based upon an unconstitutional statute"); *see also Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017) ("When a criminal conviction is invalidated by a reviewing court and no retrial will occur, . . . the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant"). That the fines or restitution were imposed in "good faith" can provide a defense if the convict sues over the collateral harms imposed by his wrongful conviction. The prosecutor, for example, would have immunity if he were sued for harming the convict's reputation, and the jailer would have immunity if he were sued for wrongful imprisonment. But there is no "good faith" defense when the victim of a wrongful conviction demands a return of his money that was taken in good faith but in violation of his constitutional rights. *See United States v. Holmes*, 822 F.2d 481, 500 (5th Cir. 1987) ("[A criminal] defendant can recover a fine imposed under an unconstitutional statute."); *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973) ("Fairness and equity compel [a return of fines collected under an unconstitutional statute], *notwithstand-*

*ing the fact that the government and the court were proceeding in good faith* at the time of prosecution." (emphasis added)); *Venneri*, 782 F. Supp. at 1093 ("The interests of justice make it *imperative* that the petitioner receive a refund of his restitution." (emphasis added)).

3. When law-enforcement officers seize property in violation of the Constitution but in good-faith reliance on a search warrant that is later declared invalid, they cannot keep the unconstitutionally seized property if the owner sues for its return.[30] In *United States v. Rayburn House Office Building Room 2113 Washington DC 20515*, 497 F.3d 654, 656, 665 (D.C. Cir. 2007), the FBI was compelled to return documents that it seized from Congressman William Jefferson's office in violation of the Speech and Debate clause, even though the officers had relied in good faith on a court-approved search warrant that was believed to be constitutional at the time. *See id.* at 664 ("There is no indication that the Executive did not act based on a good faith interpretation of the law, as reflected in the district court's prior approval and later defense of the special procedures set forth in the warrant affidavit."). The officers' good faith would shield them from lawsuits for damages that were caused by their unconstitutional seizure. *See, e.g.*, *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). But under no circumstance would the officers' "good faith" allow them to deprive Congressman Jefferson of the documents that they had seized in violation of his constitutional rights.

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30. Unless, of course, the seized property is contraband. *See Gates v. City of Chicago*, 623 F.3d 389, 406 (7th Cir. 2010).

4. If a state confiscates property in violation of the Excessive Fines clause, it must return that property even if the seizure occurred before the Supreme Court declared the Excessive Fines clause applicable to the States. *See Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (declaring, for the first time, that "[t]he Excessive Fines Clause is . . . incorporated by the Due Process Clause of the Fourteenth Amendment."). Defenses of qualified immunity or good faith would shield individual officers from personal monetary liability if they acted in accordance with Supreme Court doctrine existing at that time. But those defenses cannot be used to prevent a plaintiff from recovering his property that was confiscated in violation of the Excessive Fines clause—even if the seizure occurred before the Supreme Court's pronouncement of incorporation.

If the Court allows the circuit-court rulings in *Lee*, *Janus*, *Mooney*, and *Danielson* to stand, then public-sector unions will be the *only* entities in the United States that are allowed to keep the property that they take in good faith but in violation of another's constitutional rights. The Court should grant certiorari to resolve the scope of the good-faith defense—and to bring these rulings into line with the decisions that require a return of unconstitutionally taken property. No one gets a windfall for violating another person's constitutional rights, even if the violation occurred in the utmost good faith.

## III. EACH OF THE QUESTIONS PRESENTED IS AN ISSUE OF EXCEPTIONAL IMPORTANCE GIVEN THE LARGE NUMBER OF AGENCY-FEE REFUND LAWSUITS THAT ARE PENDING IN RESPONSE TO *JANUS*

The need for this Court to decide whether a good-faith defense exists under 42 U.S.C. § 1983—and what the scope of that defense should be—is especially urgent given the spate of agency-fee refund lawsuits that have been triggered by *Janus*. Dozens of refund lawsuits similar to Ms. Lee's are pending in district and circuit courts throughout the county,[31] and courts are deciding

31. *See, e.g.*, *See Janus v. American Federation of State, County, and Muncipal Employees, Council 31*, 942 F.3d 352 (7th Cir. 2019) (petition for certiorari pending); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019) (petition for certiorari pending); *Babb v. California Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019), appeal pending 19-55692; *Cook v. Brown*, 364 F. Supp. 3d 1184 (D. Oregon 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), appeal pending 19-35299; *Carey v. Inslee*, No. 3:18-cv-05208-RBL (W.D. Wash.), appeal pending 19-35290; *Akers v. Maryland State Education Ass'n*, No. 1:18-cv-1797-RDB (D. Md.), appeal pending 19-1524; *Hough v. SEIU Local 521*, 2019 WL 1274528 (N.D. Cal.); *Bermudez v. Service Employees Int'l Union, Local 521*, 2019 WL 1615414 (N.D. Cal.); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021 (D. Conn.); *Hernandez v. AFSCME California*, 2019 WL 2546195 (E.D. Cal.), appeal pending 20-15076; *Cooley v. California Statewide Law Enforcement Ass'n*, 385 F. Supp. 3d 1077 (E.D. Cal. 2019), appeal pending No. 19-16498; *Allen v. Santa Clara County Correctional Peace Officers Ass'n*, 400 F. Supp. 3d 998 (E.D. Cal. 2019), appeal pending No. 19-17217; *Aliser v. SEIU California*, No. 3:19-cv-00426-VC (N.D. Cal); *Campos v. Fresno Deputy Sheriff's Ass'n*, No. 1:18-cv-01660-AWI-EPG (E.D. Cal.); *Hoekman v. Education Minnesota*, No. 0:18-cv-01686-

(continued…)

these cases without any guidance from this Court on whether a good-faith defense even exists—let alone what the scope of that defense should be.

The Court's reluctance to wade into these issues in *Wyatt*[32] and *Richardson v. McKnight*, 521 U.S. 399, 414 (1997),[33] was understandable at a time when so few private defendants were being sued under 42 U.S.C. § 1983 and even fewer lower-court opinions had acknowledged or discussed the issues. But the issues have fully percolated since *Wyatt* and are meet for this Court's decision.

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SRN-ECW (D. Minn.); *Piekarski v. AFSCME Council No. 5*, No. 0:18-cv-02384-SRN-ECW (D. Minn.); *Littler v. Ohio Association of Public School Employees*, No. 2:18-cv-01745-GCS-CMV (S.D. Ohio); *Ocol v. Chicago Teachers Union*, No. 1:18-cv-08038-HDL (N.D. Ill.).

32. *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982), 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. Because those issues are not fairly before us, however, we leave them for another day.").

33. *Richardson v. McKnight*, 521 U.S. 399, 414 (1997) ("*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. . . . Like the Court in *Wyatt,* and the Court of Appeals in this case, we do not express a view on this last-mentioned question.").

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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