No. 20-486

IN THE
Supreme Court of the United States

NATHANIEL OGLE,
Petitioner,

v.

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11, AFL-CIO
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, as this Court twice has suggested, and all seven 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 a presumptively-valid state statute; and whether such a defense shields Respondent Ohio Civil Service Employees Association from damages in the amount of agency fees that were remitted to it in accordance with state law and this Court's then-controlling precedent.

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STATEMENT

A. Ohio, like many other states, allows public employees to organize and bargain collectively with their employer, through a representative organization of their choosing, over the terms and conditions of their employment. Respondent Ohio Civil Service Employees Association ("OCSEA") was chosen and recognized as the exclusive bargaining representative for a unit of state employees that includes Petitioner Nathaniel Ogle. That recognition brought with it the legal duty for the union, in collective bargaining and grievance administration, to represent equally all members of the bargaining unit, whether union members or not.

Recognizing that the imposition of this "duty of fair representation" with respect to non-dues-paying members of the bargaining unit was not cost-free, Ohio law authorized unions and public employers to negotiate, as part of their collective bargaining agreements, a "fair share" (or "agency fee") clause:

> The agreement may contain a provision that requires as a condition of employment … that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee …. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic….

Ohio Rev. Code Ann. § 4117.09(C). This statute was passed by the Ohio General Assembly in 1984, following the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which this

Court explicitly upheld the constitutionality of such agency-fee requirements in the public sector.

Consistent with Ohio law, the collective bargaining agreement between OCSEA and the State of Ohio included a requirement that members of the bargaining unit who declined to join the union would have an agency fee deducted from their paychecks to help defray the costs of collective bargaining and contract enforcement undertaken for the benefit of all employees, union members and nonmembers alike.

B. On June 27, 2018, this Court issued its decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in which the Court overruled *Abood* and held for the first time that public employees could not constitutionally be required to pay agency fees. Following *Janus*, OCSEA and the State of Ohio recognized that the statutory and contractual provisions authorizing agency fees were no longer enforceable, and they immediately terminated the deduction of agency fees from the paychecks of nonmembers, including Petitioner.

Several months after this Court's decision in *Janus*, Petitioner brought the instant class-action lawsuit against OCSEA under 42 U.S.C. § 1983. Petitioner did not allege that OCSEA 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 units represented by OCSEA was required to pay any such fees after *Janus* was decided. Rather, Petitioner claimed that the agency fees he had paid *before* June 27, 2018—at a time when Ohio law explicitly authorized agency fees, and the *Abood* decision upholding the constitutionality of such statutes was the law of the land—must be

paid back by the union. Petitioner also sought declaratory and injunctive relief.

The district court granted OCSEA's motion to dismiss. The court first held that Petitioner lacked standing to seek declaratory or injunctive relief because OCSEA had stopped collecting agency fees immediately after *Janus* in compliance with that decision. Pet. App. 11a–17a. The court then dismissed Petitioner's claim for damages in the amount of pre-*Janus* agency fees remitted to OCSEA, holding that OCSEA could assert the good-faith defense available to private parties sued under § 1983. Pet. App. 17a–32a.

Petitioner appealed only the district court's disposition of his damages claim. On March 5, 2020, the Sixth Circuit affirmed in a per curiam opinion authored by Judge Sutton.[1] The court of appeals first noted that a different panel of the court, in *Lee v. Ohio Education Ass'n*, 951 F.3d 386 (6th Cir. 2020), recently had "joined two other circuits in holding that public-sector unions that collected 'fair share' fees in reliance on *Abood* may assert a good-faith defense to § 1983 lawsuits that seek the return of those fees." Pet. App. 2a. The court acknowledged, however, that while the plaintiff in *Lee* had "conceded the existence of a good-faith defense," Petitioner "objects to its validity," thus raising an argument "not squarely addressed in *Lee*." Pet. App. 3a.

Because Petitioner (unlike the plaintiff in *Lee*) argued that there was no good-faith defense available to

[1] Judge Sutton is identified as the author of the per curiam opinion in the Sixth Circuit's docket notice accompanying the opinion.

private parties sued for monetary relief under § 1983, the court of appeals went on to address—and reject—this new argument. The court observed that Petitioner's argument could not be squared with longstanding Sixth Circuit precedent or with this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992), where "five justices agreed that private parties may assert a good-faith defense or good-faith immunity to some § 1983 lawsuits." Pet. App. 3a (citing *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring, joined by Scalia, J.), 176–77 (Rehnquist, C.J., dissenting, joined by Souter and Thomas, JJ.)).

The court explained that this good-faith defense stemmed from an interpretation of § 1983, given that Congress had enacted the statute "against the backdrop of 'common-law principles, including defenses previously recognized in ordinary tort litigation.'" *Id.* (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)).

For this reason, the court of appeals considered which common-law tort was most analogous to Petitioner's § 1983 claim for monetary relief. It concluded that abuse of process was the most analogous common-law tort and that, under this analogy, unions' reliance on state law and this Court's *Abood* precedent shielded them from § 1983 claims for the repayment of pre-*Janus* agency fees:

> 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 § 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. Unions that used the States' authority to extract "fair share" fees from non-members may in retrospect have crossed into forbidden territory, but if they did so before *Janus* they may invoke the good-faith defense because *Abood* and state law told them they were in the clear.

Pet. App. 4a–5a (citations omitted). On this basis, the court of appeals held that unions could assert the good-faith defense against § 1983 claims seeking the repayment of pre-*Janus* agency fees.

The Sixth Circuit denied Petitioner's petition for rehearing en banc, with no judge calling for a vote on the petition. Pet. App. 33a.

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 a precedent of this Court that (although subsequently overruled) was controlling at the time of the challenged conduct.

While this Court has not squarely held that such a good-faith defense exists, the Court nonetheless has strongly suggested that it does—both in the course of holding, in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), that private parties could be sued under

§ 1983 for invoking a state statute to seek governmental assistance 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 courts of appeals that has confronted the issue has held that a § 1983 good-faith defense shields private parties from monetary liability for following the law as it existed at the time of their actions. Six courts of appeals, and more than 30 district courts, have so held in the specific context presented here, *i.e.*, claims by public employees seeking to recover agency fees deducted from their paychecks pursuant to state law and this Court's then-controlling *Abood* precedent, prior to the decision in *Janus*. And *no* court has held that the good-faith defense does not exist or has refused to apply it in a circumstance where, as here, a private party was sued under § 1983 simply for following then-valid state law.

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. To the contrary, the question Petitioner asks the Court to consider is well settled among the federal courts—both generally and in the specific context of pre-*Janus* agency fees. There is, accordingly, no need for the Court to address this issue, and the Petition 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 seven circuits—in a total of 15 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. In each of these opinions, the court of appeals held that there is such a defense and applied it on the facts of the case before the court.

Initially, the issue arose in a number of cases not involving agency 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. *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).[2] Similarly, numerous district courts, without exception, have recognized the good-faith defense in addressing a variety of constitutional claims under § 1983.[3]

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[2] 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. Petition at 10. That characterization is misguided for the reasons discussed in Part II.B below. In all events, 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 between these and the more recent agency-fee decisions.

[3] 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 under § 1983, addressing a variety of constitutional claims unrelated to the instant issue of agency fees. A representative sample includes the following: *Franklin v. Fox*, 2001 WL 114438, at *3–7 (N.D. Cal. Jan. 22, 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

In the context of agency 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 and child-care workers. In addressing § 1983 claims requesting that unions repay agency fees collected from such employees, pursuant to state law, 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 monetary liability. *See Jarvis v. Cuomo*, 660 F. App'x 72, 75–76 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *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 overruling *Abood*. In these cases, plaintiffs sought to hold the defendant unions liable for agency fees they had received and expended, pursuant to state law, prior to the *Janus* decision—in other words, at a time

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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) (Fourteenth Amendment due process violation).

when this Court's controlling precedent held agency-fee requirements in public-sector employment to be constitutionally permissible. To date, more than 30 of these cases from across the country have been decided in the federal district courts. Without exception, every district court has applied the good-faith defense, holding that it precludes plaintiffs' attempts to hold the defendant unions liable for following state law and this Court's precedent as it existed at the time of their actions. *See Mattos v. AFSCME Council 3*, 2020 WL 2027365, at *2 n.3 (D. Md. Apr. 27, 2020) (citing most of these cases).

Most of these decisions have been appealed, and the issue has now been decided in published opinions by the First, Second, Third, Sixth, Seventh, and Ninth Circuits. All six circuits, in agreement with the district courts, have concluded that union defendants are shielded from monetary liability under § 1983 for having acted in accordance with state law and this Court's then-governing precedent. Pet. App. 1a–5a; *Doughty v. State Emps.' Ass'n of N.H.*, --- F.3d ---, 2020 WL 7021600 (1st Cir. Nov. 30, 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020); *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); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019).[4]

[4] Petitions for certiorari are currently pending in *Janus* (No. 19-1104), *Mooney* (No. 19-1126), *Danielson* (No. 19-1130), *Lee* (No. 20-422), and *Wholean* (No. 20-605), as well as in *Casanova v. Machinists Local 701* (No. 20-20), a Seventh Circuit summary decision that followed *Janus* and *Mooney*.

There is no authority to the contrary. We are aware of no case—whether in the context of post-*Janus* agency-fee litigation or otherwise—that has denied the availability to private-party defendants of a good-faith defense for § 1983 claims arising from the defendant's actions in undisputed conformity with the law as it existed at the time. The lower courts are, in short, unanimous on the issue presented by the Petition.[5]

B. Petitioner attempts to manufacture a cert-worthy issue by claiming that the Third Circuit's decision in *Diamond*—one of the circuit-court decisions holding that unions are *not* liable in damages for pre-

[5] The unanimous result in the lower courts rejecting claims to repay agency fees collected and expended prior to this Court's decision in *Janus* is consistent with what the Court appears to have contemplated in *Janus* itself. There, after the Court determined that *Abood* was wrongly decided, it considered whether reliance interests nonetheless justified retaining *Abood* under principles 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 it concluded that the reliance interest in the continued enforcement of those agreements was not weighty. *Id.* at 2484–85. In assessing these reliance interests, the Court did not remotely suggest that overruling *Abood* also would expose public-employee unions to massive retrospective monetary liability for relying on this Court's then-governing precedent. *Cf. Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) (reliance interests did not weigh in favor of retaining past precedent because overruling that precedent "will not expose … new liability"). On the contrary, the Court in *Janus* framed its holding in prospective language. *See* 138 S. Ct. 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).

Janus agency fees—has created a "disagreement" among the circuits that this Court should resolve. Petition at 4–5, 15–16. But the supposed disagreement Petitioner identifies merely reflects the reliance by Judge Fisher, in his concurring opinion, on a distinct body of common-law authority to reach the same result as the other courts of appeals. As this Court has often stated, it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam). The fact that judges have taken somewhat different paths to reach a uniform result does not amount to a conflict warranting a grant of certiorari.[6]

In *Diamond*, two separate opinions supported the Third Circuit's holding that unions are not liable under § 1983 for damages in the amount of pre-*Janus* agency fees. Judge Rendell relied on the Third Circuit's prior opinion in *Jordan*, which had held, in the wake of this Court's *Wyatt* decision, that "private 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." *Diamond*, 972 F.3d at 270 (quoting *Jordan*, 20 F.3d at 1276). Judge Rendell also concluded, in the alternative, that an analogy to the common-law tort of abuse of process supported the unions' defense. *Id.* at 272 n.4 (citing Pet. App. 4a–5a; *Lee*, 951 F.3d at 392 n.2; *Janus Remand*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1102).

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[6] *See generally* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.3, at 4-11 (11th ed. 2019) ("A genuine conflict … arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

Judge Fisher concurred in the Court's judgment. While Judge Fisher disagreed that the Third Circuit's *Jordan* decision was controlling, *id.* at 279–80, he concluded that unions could assert a defense to a § 1983 claim for monetary relief in this circumstance because, in 1871, "it was well established at both law and equity that court decisions that invalidated a statute or overruled a prior decision, and thereby affected transactional relationships … established in reliance on that statute or decision, did not generate civil liability for repayment" except in circumstances not applicable here. *Id.* at 284. Because this robust body of common-law authority amply supported a defense to the plaintiffs' § 1983 claims for monetary relief, Judge Fisher found it "unnecessary" to decide whether the common-law tort of abuse of process also could serve as the basis for the unions' defense. *Id.* at 281.

In sum, the Third Circuit—in accord with every federal court to address a § 1983 claim seeking the repayment of pre-*Janus* agency fees—has held that unions have a defense to such claims. While Judge Fisher did not use the term "good-faith defense" to describe the common-law doctrine that supported the unions' defense to monetary liability, this Court surely does not sit to resolve differences in nomenclature among lower-court judges. The dispositive point is that the result reached by Judge Fisher is, on the facts presented by this and the other post-*Janus* cases, no different from the result reached by all of the other courts of appeals in allowing a defense to § 1983 claims for monetary liability based on the defendant's reliance on state law and this Court's directly-on-point precedent that was controlling at the time of its actions. That Judge Fisher invoked a harmonious but distinct body of common-law authority to reach the

same result does not require this Court's intervention. To the contrary, Judge Fisher's analysis simply identifies an additional rationale for the uniform result reached by the lower courts.[7]

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

A. The adoption of the good-faith defense by the lower courts did not emerge in a vacuum but instead followed from this Court's two leading cases 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

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[7] As for the dissent in *Diamond*, on which Petitioner heavily relies, its reasoning misses the mark by narrowly framing the question as whether there was an *affirmative defense* of good faith available to defendants at common law. See 972 F.3d at 285–86 (Phipps, J., dissenting) (relying, inter alia, on fact that "good faith" does not appear in the (non-exhaustive) list of affirmative defenses enumerated in Fed. R. Civ. P. 8(c)). The pertinent question is not whether good faith was technically considered an affirmative defense at common law, but rather, as a more general matter, whether "parties [like the union] were shielded from tort liability when Congress enacted the Civil Rights Act of 1871." *Wyatt*, 504 U.S. at 164. As every court of appeals to address this properly-framed question has held, including the Sixth Circuit below, the answer is "yes." *See* Pet. App. 4a–5a. On this point, the *Diamond* dissent did not even consider whether, as the Sixth, Seventh, and Ninth Circuits already had held, an analogy to the common-law tort of abuse of process could serve as the basis for the unions' defense. *See infra* Part II.B.

force of the four dissenters' concern that imposing liability on private defendants for "mak[ing] use of seemingly valid state laws" would create a "problem," 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 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 the full panoply of advantages that come from 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 so doing, the *Wyatt* Court specifically emphasized the distinction between a "defense" and an "immunity," *id.* at 165, and 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, as the Sixth Circuit pointed out below, five Justices in *Wyatt* joined separate opinions that "recognized a good-faith defense to certain § 1983 claims." Pet. App. 3a. 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." 504 U.S. 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.

This Court's opinions in *Wyatt* thus "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 a 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*.

B. Petitioner argues, nonetheless, that the Sixth Circuit and 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 good-faith defense to the "malice and probable cause elements of certain constitutional claims." Petition at 6 (emphasis omitted). This reading of *Wyatt* is untenable.

Petitioner's entire argument on this score is that "malice and lack of probable cause are not elements of a First Amendment claim under *Janus*." *Id.* at 22. 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. The purported distinction that Petitioner attempts to draw between First Amendment claims and procedural due process claims is therefore illusory.

Not only was there no scienter element in the due-process claim in *Wyatt*, there was no scienter element in the underlying constitutional claims in *Pinsky* or in any of the other cases in which the courts of appeals have applied the good-faith defense to preclude the recovery of monetary relief under § 1983 for procedural

due process violations. Thus, when the *Pinsky* case was before this Court on the merits of the constitutional claim, the Court held that the defendant's use of a Connecticut attachment statute violated the plaintiff's procedural due process rights without giving any consideration to the defendant's state of mind. *Connecticut v. Doehr*, 501 U.S. 1 (1991).[8] The Second Circuit, on remand from that decision, then applied the good-faith defense to preclude a recovery of monetary relief for that violation. *Pinsky*, 79 F.3d at 311–12.

Application of the good-faith defense in *Wyatt, Pinsky,* and similar cases therefore could not have been justified by a state-of-mind element of the constitutional claim itself, for no such element existed. Rather, *Wyatt* suggested that a § 1983 good-faith defense could be warranted because a plaintiff seeking monetary relief against a private defendant who had invoked a state procedure that harmed the plaintiff would, at common law, have needed to bring a tort claim sounding in malicious prosecution or abuse of process—and consequently would have had to show that the defendant acted with malice and want of probable cause. As a result, 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 …

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[8] *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.").

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* analogous to an abuse-of-process tort claim at common law, as each of the courts of appeals to address this issue have held. *See* Pet. App. 4a–5a; *Doughty*, 2020 WL 7021600, at *4–5; *Janus Remand*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1102. At common law, as this Court explained in *Wyatt*, that 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.

Here, Petitioner's complaint is that OCSEA asked the State of Ohio to deduct agency fees from his paychecks and send those fees to the union under the applicable provisions of state law and the collective bargaining agreement between the union and the State. 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, Petition at 2, but even if it had, it could not have been acting under color of state law such that it could have violated Petitioner's constitutional rights. It is precisely this alleged misuse of governmental processes that caused the constitutional injury that Petitioner seeks to remedy in this lawsuit, as Judge Sutton persuasively explained in his opinion below. Pet. App. 4a–5a. *See also Doughty*, 2020 WL 7021600, at *5 (holding that both procedural-due-process claims and agency-fee-refund claims "seek[ ] to compensate [plaintiffs] for a private party having used a

lawful-when-invoked, state-backed process to acquire their property, even though that process was subsequently held to be unlawful due to a change in the law").

In sum, Petitioner's claim based on OCSEA's use of Ohio's agency-fee statute (subsequently held unconstitutional) is on all fours with the claims based on the defendants' use of state replevin statutes (subsequently held unconstitutional) in *Wyatt*, *Pinsky*, and similar cases.

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").

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." Petition at 12.[9] Not only are claims against private parties a small fraction of all § 1983

[9] The good-faith defense, like qualified immunity, of course has no application to § 1983 claims for injunctions or other nonmonetary 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 an unconstitutional state statute, the plaintiff can secure an injunction requiring the defendant to desist from the conduct; the defendant would lack any good-faith defense to such a remedy.

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 own 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.[10]

[10] There is no merit to Petitioner's claim that this Court "rejected a comparable defense" in *Myers v. Anderson*, 238 U.S. 368 (1915). Petition at 12. *Myers*—a case in which the defendants were public election officials, not private parties—did not even address whether a defendant's good faith is a potential defense to a § 1983 claim, let alone did the Court reject such a good-faith defense. In all events, Petitioner's strained reading of *Myers* would prove far too much. Not only would the asserted holding in *Myers* be irreconcilable with the fact that this Court expressly suggested the existence of a good-faith defense in *Lugar* and *Wyatt*, but it would have foreclosed any type of qualified immunity for government officials as well.

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 Sixth Circuit and its sister circuits does not "[c]onflict[]" with this Court's cases on the retroactive application of its decisions. Petition at 14–15.

As the Sixth Circuit recognized, the question of whether the new rule of law set forth by this Court in *Janus* was to be applied retroactively was a potentially difficult one. *Lee*, 951 F.3d at 389. The Sixth 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.*; Pet. App. 3a–5a. The other courts of appeals have taken the same approach. *See Doughty*, 2020 WL 7021600, at *6; *Wholean*, 955 F.3d at 336; *Diamond*, 972 F.3d at 268 n.1; *Janus Remand*, 942 F.3d at 359–60; *Danielson*, 945 F.3d at 1099.

These courts have recognized 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 relief where there is "a previously existing, independent legal basis (having nothing to

do with retroactivity) for denying relief." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995).

Indeed, recently this Court again illustrated the importance of distinguishing between retroactivity and remedy in observing—in a case in which it struck down part of a federal statute held to violate the First Amendment—that "no one should be penalized or held liable" for acting in accordance with the statute prior to the Court's decision. *Barr v. Am. Ass'n of Pol. 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 this Court's retroactivity doctrine focuses entirely 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 bona fide remedial matter, but in the same breath it made clear the limits 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" because the particular remedy sought is unavailable. *Id.* at 758–59. The Court cited,

as one such instance, the circumstance where qualified immunity is invoked to preclude a monetary remedy. *Id.*

Just as qualified immunity is an independent remedial doctrine that can shield public officials from damages under § 1983, the good-faith defense is an independent remedial doctrine that can shield private parties from damages under § 1983. Indeed, in *Lugar*, this Court, in identifying the "problem" of imposing monetary liability on private-party defendants for "mak[ing] use of seemingly valid state laws," stated that this problem presented a "*remedial issue*[]" that "should be dealt with … by establishing an affirmative defense." 457 U.S. at 942 n.23 (emphasis added and citation omitted). The reasoning of *Reynoldsville Casket* thus supports the uniform view of the courts of appeals that the availability of the good-faith defense to preclude the remedy of damages in certain § 1983 suits against private defendants is entirely consistent with this Court's retroactivity jurisprudence.

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 potentially 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 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 applied this principle on remand 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. 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 OCSEA's receipt of agency fees prior to this Court's decision in *Janus* was its reliance not only on a presumptively-valid state statute, but also on the then-controlling precedent of this Court upholding the constitutionality of such agency-fee laws.

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,

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