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

REPLY TO BRIEF IN OPPOSITION

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OCSEA acknowledges that this Court raised, but did not decide, the question of whether there exists a "good faith defense" to Section 1983 in *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). *See* OCSEA Br. 5-6. The Court should finally resolve that question to disabuse lower courts of the growing misconception that a private defendant acting under color of a state law is a defense to Section 1983 damages liability.

This statutory reliance defense is not the defense discussed in *Wyatt*. Indeed, the ostensible defense is incompatible with Section 1983's text and with this Court's retroactivity doctrine. *See* Pet. 7-13. Neither of the two different rationales cited by lower courts for this new defense, fairness or an analogy to an abuse-of-process tort, justify its creation. *Id*. at 18-22. There is no valid basis for recognizing an affirmative good faith defense to Section 1983.

A majority of a Third Circuit panel in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020) recognized as much, and rejected the good faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits. *Id*. at 274 (Fisher, J., concurring in the judgment); *id*. at 289-90 (Phipps, J., dissenting). As Judge Phipps explained, "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id*. at 289. The Court should take this case and reach the same conclusion as Judge Phipps: that a defendant acting under color of a state law before it is held unconstitutional is not an affirmative defense to Section 1983 damages liability.

A. The *Wyatt* Court Did Not Suggest That Relying on a Statute Should Become an Affirmative Defense to Section 1983.

Like the lower courts that have recognized a categorical good faith defense, OCSEA claims (at 17) this defense flows from this Court's analysis in *Wyatt*. To the contrary, the defense discussed in *Wyatt* was a defense to the malice and probable cause elements that several Justices thought should be elements for establishing damages in a Section 1983 due process claim that arose from the use of a judicial process. *See* 504 U.S. at 172 (Kennedy J., concurring); *id*. at 176 n.1 (Rehnquist C.J., dissenting); *id*. at 166 n.2 (discussing dissenting opinion). These Justices supported making malice and lack of probable elements for such a damages claim because the cause of action was analogous to the torts of malicious prosecution and abuse of process. *Id*. As then Chief Justice Rehnquist explained: "Referring to the defendant as having a good faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id*. at 176 n.1 (citation omitted).

Not one of the three opinions in *Wyatt* suggested that it should become an affirmative defense to all Section 1983 damages claims for a private defendant to have relied on a state law before it was held unconstitutional. *See* Pet. 7-11. Nor did the opinions suggest

that malice and lack of probable should be elements for every Section 1983 claim for damages.

OCSEA argues (at 19-20) that most, if not all, Section 1983 claims against private defendants are analogous to malicious prosecution and abuse of process because such defendants must invoke state processes for there to be state action under Section 1983.[1] To the contrary, "the torts of abuse of process and malicious prosecution provide at best attenuated analogies." *Diamond*, 972 F.3d at 280 (Fisher J., concurring). "The tort of abuse of process requires misuse of the *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (emphasis added). So does the tort of malicious prosecution. *See* J. Bishop, *Commentaries on Non-Contract Law* § 224 at 90 (1889) (stating that "[t]he [common] law has provided the action of malicious prosecution as a remedy for private injuries from abuse of the process of the courts."). All Section 1983 claims arising from a private defendant's use of state power to deprive citizens of their constitutional rights are not akin to those torts.

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[1] OCSEA also tries to create a disagreement where none exists by arguing (at 17-19) that Justices in *Wyatt* found malice and lack of probable cause to be elements not for proving a due process violation, but for establishing *damages liability* for that violation. That is also Ogle's position. The parties differ in that Ogle submits that malice and lack of probable cause are not elements for establishing damages liability in a First Amendment suit or in every Section 1983 suit against a private defendant.

Most importantly, the alleged analogy is not close enough to justify making malice and lack of probable cause *elements* of every Section 1983 claim made against a private defendant for damages. And that is the only relevance of tort analogies—to determine whether to import a tort's elements into a particular Section 1983 claim. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 920-21 (2017). If the analogy is not close enough to justify that result, then the analogy is immaterial.

Tort analogies are immaterial to this case and to other claims brought under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) because a First Amendment claim for compelled subsidization of speech has no common law equivalent. *See* Pet. 21-22. Malice and lack of probable cause are not elements of such claims. *Id*. Consequently, the limited good faith defense to those elements that the Court discussed in *Wyatt* has no applicability here.[2]

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[2] *Lugar* offers even less support to OCSEA's position than *Wyatt*. In *Lugar*, the Court speculated in a footnote that perhaps a defense should be established for private defendants who invoke "seemingly valid state laws." 457 U.S. at 942 n.23. The Court stated that "[w]e need not reach the question of the availability of such a defense to private individuals at this juncture" and that "'[w]e intimate no views concerning the relief that might be appropriate if a violation is shown.'" *Id*. (quoting *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 174 n.44 (1970)).

B. No Valid Basis Exists for Creating A Good Faith Defense to Section 1983.

1. Section 1983 mandates that "[e]very person who, *under color of any statute*, ordinance, regulation, custom, or usage, of any State" deprives a citizen of a constitutional right "*shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (emphasis added). OCSEA has failed to identify any valid justification for courts to turn Section 1983's mandate on its head and hold that defendants who act under color of any statute yet to be held unconstitutional shall not be liable to injured parties in actions at law.

Specifically, OCSEA cannot square a good faith defense with Section 1983's language—i.e., explain how acting "under color of any statute" can be both an element and a defense to Section 1983 damages liability. *See* Pet. 11-13. OCSEA only attempts to minimize the self-defeating statutory interpretation its defense requires by asserting (at 20-21) that a defendant's reliance on state law is a defense only to claims for damages, but not to claims for injunctive relief. That assertion requires an even more absurd interpretation of Section 1983. Again, Section 1983 provides that persons who act "under color of any statute" to deprive others of a constitutional right "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Under OCSEA's position, a person acting under color of a then-valid statute renders that person liable in a "suit in equity," but *not* liable "in an action at law."

The statutory interpretation a good faith defense requires makes no sense.

OCSEA also identifies nothing in Section 1983's legislative purpose or in pre-1871 common law doctrine that justifies recognizing a good faith defense. If anything, the ostensible defense runs contrary to Section 1983's purpose, which "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt*, 504 U.S. at 161; *see Diamond*, 972 F.3d at 287 (explaining that "[b]oth the history and the purpose of § 1983 counsel against recognition of a good faith affirmative defense") (Phipps, J., dissenting).

As for the two justifications sometimes cited by lower courts for a good faith defense—a tort analogy and equitable interests—the first has already been discussed and shown to be inadequate. All Section 1983 claims against private defendants for damages are not so analogous to the torts of malicious prosecution and abuse of process to justify importing those torts' malice and probable cause elements into those Section 1983 claims. Pet. 21-22; *supra* at 3-4. This especially is true of First Amendment claims for compelled subsidization of speech, which have no common law analogue.

OCSEA does not attempt to defend the second rationale cited for a good faith defense: policy interests in equality and fairness. *See* Pet.App. 20a; *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019). This is

likely because that justification is indefensible. *See* Pet. 18-21. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so. Even if they could, it would be unfair to victims of constitutional deprivations, such employees who had agency fees seized from them, to not enforce Section 1983 and deprive them of relief for their injuries. Equitable interests weigh against creating a good faith defense to Section 1983 liability. *Cf. Owen v. City of Independence*, 445 U.S. 622, 654 (1980) (finding that Section 1983's equitable purposes did not justify a good faith immunity for municipalities because "elemental notions of fairness dictate that one who causes a loss should bear the loss.").

OCSEA does, however, argue (at 15-17) that courts should recognize a good faith defense to solve the purported "problem" of private defendants being held liable for damages under Section 1983. This is circular reasoning because it assumes that such liability is a problem. It is not, but rather is what Congress intended when it enacted a statute that provides that "*every person*" who acts under color of state law to deprive a citizen of a constitutional right "shall be liable to the party injured in an action at law . . ." 42 U.S.C. § 1983 (emphasis added). By its terms, Section 1983 provides a remedy for damages against private parties that act under color of state law. *See Wyatt,* 504 U.S. at 161-62; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970). For OCSEA to argue this statutory remedy is a problem that courts should eliminate by recognizing a good faith defense is to ask the courts to

frustrate the will of Congress. *Cf. Tanzin v. Tanvir*, ___ S. Ct. ___, 2020 WL 7250100, at *5 (Dec. 10, 2020) (noting the Court is "not at liberty" to "create a new policy based presumption against damages" because "Congress is best suited to create such a policy.").

2. If this were not enough to warrant rejecting a good faith defense (and it is), yet another reason exists: the ostensible defense conflicts with this Court's retroactivity doctrine. *See* Pet. 14-15. The Court has held that the retroactive effect of its constitutional jurisprudence precludes lower courts from fashioning a remedy based on a party's reliance on a statute that is later held unconstitutional. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995). A good faith defense is just such a remedy.

OCSEA asserts that "even if a newly recognized legal principle applies retroactively, that rule will not dictate the outcome of a claim for monetary relief where there is 'a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief.'" OCSEA Br. 22-23 (quoting *Reynoldsville Casket*, 514 U.S. at 759). That is true, but it cannot be said that a good faith defense has "'nothing to do with retroactivity.'" The ostensible defense is predicated on the notion that private defendants should not be liable for injuries they caused when relying on a statute later declared unconstitutional. *See* OCSEA Br. 15-16; Pet. App. 4a-5a; *Danielson*, 945 F.3d at 1101. The defense turns on whether the defendant reasonably relied on such a statute. A good faith defense has everything to do with avoiding the

retroactive effect of court decisions holding state statutes unconstitutional. The defense is incognizable under *Reynoldsville Casket*.

C. The Question Presented Is Important

OCSEA does not dispute the importance of the question presented. Nor could it. There are at least thirty-seven (37) class action lawsuits pending that seek refunds from unions for agency fees they seized from workers in violation of their First Amendment rights. *See* Amicus Br. of Goldwater Inst. et al., 4 in *Janus v. AFSCME*, No. 19-1104. The vast majority of these workers will be denied relief for their injuries if this Court does not repudiate the good faith defense that several circuit courts have now recognized.

The creation of a good faith defense to Section 1983 also will harm victims of other constitutional deprivations. According to OCSEA, the defense can be raised against "a variety of constitutional claims," OCSEA Br. 8, and even when the legality of the state law the defendant relied upon was uncertain, *id.* at 25. A broad affirmative defense to Section 1983 will come into existence absent review by this Court.

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

The Court should take this case to resolve whether there exists a good faith defense to Section 1983 because the situation here—a union claiming this ostensible defense shields it from compensating victims of its unconstitutional agency fee seizures—is the same situation presented in over three dozen other cases.

The Court's decision in this case would largely determine the outcome of those similar cases. It is a fitting vehicle to resolve the question presented.

OCSEA argues (at 25-26) the Court should determine the scope of a good faith defense in a case where a defendant relies on a state law whose constitutionality was uncertain at the time. On its own terms, that is no reason to avoid determining, in this case, if a good faith defense even exists. In any event, such uncertainty exists here. In *Janus*, the Court recognized that "unions have been on notice for years regarding this Court's misgiving about *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]" and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Janus*, 138 S. Ct. 2485.

OCSEA also argues (at 25-26) the Court should wait for a case that does not involve union agency fee seizures. Doing so would allow unions to escape having to compensate tens of thousands of victims of their agency fee seizures (which, of course, is why the OCSEA suggests that course of action). The Court should not countenance such an inequity. In *Janus*, the Court recognized the "considerable windfall" unions wrongfully received, and found it "hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." 138 S. Ct.

at 2486. The Court should permit nonmembers to recover a portion of the monies unconstitutionally seized from them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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