No. 20-605

In The
Supreme Court of the United States

KIERNAN J. WHOLEAN
JAMES A. GRILLO,

Petitioners,

v.

CSEA SEIU LOCAL 2001,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

STATE OF CONNECTICUT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state employee union is liable for damages under 42 U.S.C. § 1983 for receiving and spending agency fees prior to *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), even though: (1) The union stopped collecting and spending the fees immediately after the *Janus* decision; (2) The fees were constitutional under directly controlling and then-binding Supreme Court precedent; (3) The fees were approved by Connecticut's appellate court; and (4) The fees were mandated by state law.

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INTRODUCTION

The petition should be denied for all the reasons in CSEA's opposition brief, which the State of Connecticut adopts. Most importantly: There is no conflict for this Court to resolve. Every federal court to consider this issue has recognized that unions are entitled to a good faith defense against repayment of pre-*Janus* agency fees. That is because the unions collected and spent the fees in reliance on state law and then-controlling Supreme Court precedent. The consensus of the lower courts rests firmly on this Court's decisions in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Wyatt v. Cole*, 504 U.S. 158 (1992).

Connecticut writes separately to underscore two points.

First: This case is a poor vehicle for the question petitioners seek to present. CSEA's collection and spending of agency fees prior to *Janus* was not merely allowed by directly controlling Supreme Court precedent and authorized by state law. It was, in fact, mandated by Connecticut law as interpreted by a Connecticut court and the state's attorney general. Even if CSEA had never bargained for it, petitioners would have had to pay agency fees as a condition of their employment.

Second: Connecticut, like its sister states, has a strong interest in the continued recognition of a good faith defense. It needs private actors to rely upon, and to comply with, state law. The states' powerful interest in the good faith defense counsels against

disturbing the status quo reflected by the consensus of circuit courts and this Court's own precedent.

STATEMENT

In 1975, the Connecticut General Assembly enacted a statute requiring state workers, as a condition of their employment, to pay agency fees to the exclusive union representatives for their collective bargaining units. 75 Conn. Acts 266, § 11 (codified at Conn. Gen. Stat. § 5-280).[1]

In 1977, this Court upheld the constitutionality of those fair share agency fees. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Just a few months later, the Connecticut Attorney General issued a formal opinion explaining that Connecticut's agency fee statute was constitutional for the same reason as the Michigan statute upheld in *Abood*. Connecticut A.G. Op. No. ___, 1977 Conn. AG LEXIS 61 (Aug. 3, 1977).

For the next 41 years, unions representing Connecticut state workers collected fair share agency fees via state payroll deductions, in conformity with

[1] The statute provides: "If an exclusive representative has been designated for the employees in an appropriate collective bargaining unit, each employee in such unit who is not a member of the exclusive representative shall be required, as a condition of continued employment, to pay to such organization for the period that it is the exclusive representative, an amount equal to the regular dues, fees and assessments that a member is charged."

Conn. Gen. Stat. § 5-280 and in reliance on *Abood*. Meanwhile, Connecticut's appellate court upheld enforcement of the mandatory statute against a state employee who declined to join a union. *Univ. of Conn. Chapter, Am. Ass'n of Univ. Professors v. Dombrowski*, 458 A.2d 700 (Conn. Ct. App. 1983).

CSEA SEIU Local 2001 was one of the unions that relied on *Abood* and on state law as interpreted and enforced by the state attorney general and the state courts. CSEA is an "exclusive representative" of state bargaining unit workers, with the responsibility "to act for and to negotiate agreements covering all employees in the unit . . . without regard to employee organization membership." Conn. Gen. Stat. § 7-468(c).

Before June 27, 2018, CSEA entered into collective bargaining agreements with Connecticut that incorporated the statutory mandate to collect fair share agency fees from nonmembers. Pet. App. 4a.

On June 27, 2018, this Court decided *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). *Janus* overruled *Abood*, concluding that fair share agency fees are barred by the First Amendment. *Id*. at 2460.

Both CSEA and the State of Connecticut immediately stopped collecting fair share agency fees from nonmembers. *See Lamberty v. Conn. State Police Union*, No. 15-378, 2018 U.S. Dist. LEXIS 179805, at *7 (D. Conn. Oct. 19, 2018) (noting that Connecticut issued a directive on June 29, 2018, ordering officials to "immediately discontinue the collection of agency service fees from non-union members."). Pet. App. 4a.

After *Janus* was decided, and despite Connecticut's immediate compliance, petitioners here—state employees who declined to join CSEA—pressed forward with a suit against the union and several Connecticut officials. They sought declaratory and injunctive relief against the state defendants. Pet. App. 12a. From CSEA, petitioners also sought money damages—repayment of the fair share agency fees they paid prior to *Janus*. *Id.*

The District Court dismissed petitioners' claims. It held that the declaratory and injunctive claims were moot, since state officials had already stopped paycheck deductions of fair share agency fees from petitioners and all other nonmembers. *Id.* at 17a-18a. It also found that CSEA was entitled to a good faith defense to damages liability. *Id.* at 19a.

Petitioners appealed the dismissal of their damages claim. *Id.* at 1a-10a. Like the other five federal circuits that have considered this issue,[2] the Second Circuit agreed that the union was entitled to a good faith defense. Specifically, the Second Circuit found it important that CSEA collected the fair share agency fees in reliance "on directly controlling

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[2] *See Doughty v. State Emps. Ass'n of N.H., SEIU Local 1984*, 981 F.3d 128 (1st Cir. 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, ___ S. Ct. ___, 2021 WL 231560 (Jan. 25, 2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, ___ S. Ct. ___, 2021 WL 231555 (Jan. 25, 2021); *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019), *cert. denied*, 2021 WL 231649 (Jan. 25, 2021).

Supreme Court precedent and then-valid state statutes." *Id.* at 8a.

Connecticut and its state officials are not named as respondents before this Court. At the Second Circuit, petitioners abandoned their claims against all Connecticut officials. *Id.* at 3a n.1 ("[Appellants] also sued certain officials of the Connecticut state government but they do not appeal the [D]istrict [C]ourt's dismissal of their claims against the State Defendants."). But the State welcomes the opportunity, afforded by this Court's order, to explain why the certiorari petition should be denied.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT A SUITABLE VEHICLE FOR CONSIDERATION OF THE EXISTENCE AND SCOPE OF A GOOD FAITH DEFENSE

Petitioners urge this Court to "to disabuse lower courts of the misconception that a defendant acting under color of a statute before it is held unconstitutional always has an affirmative defense to Section 1983." Pet. 6. But that conception, mis- or not, is not at issue here. This case does not ask and cannot resolve the question of whether a private defendant acting under color of law may "always" raise a good faith defense.

Instead, this case asks, and the lower courts correctly answered, a very narrow question: Can a

union (CSEA, here) properly advance a good faith defense to a post-*Janus* claim for retroactive damages where: (1) The union stopped collecting and spending the fees immediately after the *Janus* decision; (2) The fees were constitutional under directly controlling and then-binding Supreme Court precedent; (3) The fees were approved by Connecticut's appellate court; and (4) The fees were mandated by state law.

The latter two conditions make this case a particularly inappropriate vehicle for considering whether there are situations under which a good faith defense to § 1983 damages claims may not exist. Connecticut law did not simply allow unions to bargain for fair share agency fees. It required nonmember employees to pay the fees to keep their jobs: "If an exclusive representative has been designated for the employees in an appropriate collective bargaining unit, each employee in such unit who is not a member of the exclusive representative *shall be required*, as a condition of continued employment, to pay to such organization for the period that it is the exclusive representative, an amount equal to the regular dues, fees and assessments that a member is charged." Conn. Gen. Stat. § 5-280 (emphasis added).

The statutory "shall," as a default rule in Connecticut, is mandatory. *Dep't of Transp. v. White Oak Corp.*, 213 A.3d 459, 465 (2019) ("The usual rule, however, is that [t]he . . . use of the word shall generally evidences an intent that the statute be interpreted as mandatory.") (internal citation omitted). And both state and federal courts have interpreted it

as mandatory in Connecticut's agency fee context. *Lamberty v. Conn. State Police Union*, No. 15-378 (VAB), 2018 U.S. Dist. LEXIS 179805, at *20 (D. Conn. Oct. 19, 2018) ("[T]he statute at issue only requires agency fees to be deducted from the payroll of current employees."); *Dombrowski*, 458 A.2d at 700 (requiring a nonmember to pay agency fees). The state attorney general's office, too, had affirmed that the statute was both constitutional and mandatory. Connecticut A.G. Op. No. ___, 1977 Conn. AG LEXIS 61 (Aug. 3, 1977).

The *Wyatt* Court's recognition of a good faith defense was grounded in part on the inequity of forcing private actors to pay for their reasonable reliance on, and compliance with, state law. All nine *Wyatt* justices expressed that equitable concern. *See* 504 U.S. at 168 ("[P]rinciples of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability"); *id*. at 173 (Kennedy, J., concurring) (doubting conduct was unlawful "in a case where a private citizen may have acted in good faith reliance upon a statute"); *id.* at 179-80 (Rehnquist, C.J., dissenting) ("[T]here is a strong public interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity.").

The concern can only be heightened here, where private actors were not simply relying on state law but actually compelled to comply. If they hadn't, the courts

could have made them—as, in fact, the Connecticut Court of Appeals did in *Dombrowski.*[3]

This is the prototypical case where equity and fairness mandate a good faith defense. So if the broad question about a good faith defense that petitioners seek to have answered was not appropriately presented in the six cases in which this court denied certiorari on January 25, 2021,[4] it is surely not appropriately presented here.

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[3] The First Circuit, which found support for the good faith defense in the defenses available at common law, also acknowledged the importance of equitable reliance concerns. *Doughty v. State Emps. Ass'n of N.H.*, 981 F.3d 128 (1st Cir. 2020) ("From this review, then, we see no support for concluding that the common law was as indifferent as Doughty and Severance impliedly suggest that it was to the threat to reliance interests posed by affording a damages remedy for a private defendant's acquisition of payments via the invocation of then-lawful state processes that—due only to a subsequent change in the law—retroactively are revealed to have been unlawful.").

[4] *Ogle v. Ohio Civil Service Ass'n*, ___ S. Ct. ___, 2021 WL 231560 (Jan. 25, 2021)*; Lee v. Ohio Educ. Ass'n*, ___ S. Ct. ___, 2021 WL 231559 (Jan. 25, 2021); *Janus v. AFSCME Council 31*, ___ S. Ct. ___, 2021 WL 231649 (Jan. 25, 2021); *Mooney v. Ill. Educ. Ass'n*, ___ S. Ct. ___, 2021 WL 231650 (Jan. 25, 2021); *Casanova v. Int'l Ass'n of Machinists*, ___ S. Ct. ___, 2021 WL 231651 (Jan. 25, 2021); *Danielson v. Inslee*, ___ S. Ct. ___, 2021 WL 231555 (Jan. 25, 2021).

II. CONNECTICUT, LIKE ITS SISTER STATES, DEPENDS ON A GOOD FAITH DEFENSE TO SECURE COMPLIANCE WITH STATE LAW

Connecticut and its sister states have a strong interest in the continued vitality of the good faith defense. Allowing private actors to plead good faith is important to both the perception and reality of fairness and equity in the relationship between state governments and residents. It promotes the public-private partnerships that deliver critical services while saving public dollars; it incentivizes reliance on, and compliance with, state law; and it enhances the public trust that is essential to democratic government. One Connecticut case explains why.

In Newington, Connecticut, a drunk man left a bar, got in his car, and got ready to drive away. The bar called a police officer, who intervened. If an intoxicated person declines less-intrusive help, Connecticut law authorizes a police officer to place the person into protective custody and have them transported to a hospital until they are sober. Conn. Gen. Stat. § 17a-683. So the police officer called an ambulance and gave its staff a written protective custody order, pursuant to the law. The man was brought to a local hospital. When he sobered up, he sued the private ambulance operators, under 42 U.S.C. § 1983, alleging constitutional civil rights violations. *Palmer v. Garuti*, No. 06-795, 2009 U.S. Dist. LEXIS 11432 (D. Conn. Feb. 17, 2009).

The District Court found that the ambulance operators acted under color of state law. After all, they had a contract with the town requiring them to provide any transport demanded by a municipal police officer. *Id.* at *9-*10. And, unlike the police officer—whom the plaintiff, perhaps mindful of the officer's right to qualified immunity, did not sue—the ambulance operators were not protected by qualified immunity. *Id*. at *16; *and see Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992).

So were the ambulance operators liable for following the apparently lawful direction of a police officer, which they were bound by law to obey and when the officer himself could not be sued? The District Court held that would be "manifestly unfair." *Id*. at *19 (citing *Franklin v. Fox*, No. 97-2443, 2000 U.S. Dist. LEXIS 19651, at *5 (N.D. Cal. Jan. 22, 2001). Instead, the District Court allowed the ambulance operators to invoke a good faith defense, explaining: "The rationale for a good faith defense is that private actors should not be held liable for relying on the apparently legitimate directions of public officers, especially those who are themselves entitled to assert qualified immunity." *Id.*

Connecticut needs private ambulance drivers to transport patients when police officers ask for the help. More broadly: Like its sister states, Connecticut needs private actors to rely on and to comply with state law. As *Palmer* shows: States' public health and safety policies—like Connecticut's policy for keeping drunk drivers off the road—often depend on private actors

collaborating and cooperating with government. The good faith defense helps incentivize that collaboration, in Connecticut and across the country. *See*, *e.g.*, *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008) (allowing good faith defense to liability for a private company that towed a vehicle at police direction); *Nemo v. City of Portland*, 910 F. Supp. 491, 499 (D. Or. 1995) (allowing a good faith defense for an employee of a private company that managed a city park).

Private actors in Connecticut fulfill critical functions for public health and safety that go far beyond driving ambulances. For instance: They operate group homes for the developmentally disabled and provide mental health services to seriously ill residents, helping the state's most vulnerable residents while saving money as against services directly provided by state agencies.[5] According to a legislative study, it costs 250% more—a difference of about $152,000 per person, per year—for the state to care for a developmentally disabled adult in its direct-run care facility, as opposed to in a nonprofit group home.[6] So Connecticut has a deep interest in incentivizing service providers to rely upon and comply with the law in working with the State and serving its residents. They cannot be

[5] *See* Connecticut Nonprofit Alliance, *Nonprofit Community Services Save the State Money* (2021), https://tinyurl.com/2jcvkgcv.

[6] Connecticut Leg. Program Review & Investigations Comm., *Provision of Selected Services for Clients with Intellectual Disabilities* (2012), https://tinyurl.com/y9gqq9j7.

required to second-guess state law as interpreted and applied by state courts and the state attorney general.

Not only current and potential private partners but the public, more broadly, must be able to rely on Connecticut law. When the state passes legislation that tracks Supreme Court precedent and is upheld and enforced by its courts, the public should be able to trust that the law is legal. That trust is a prerequisite to following the law. As Chief Justice Rehnquist explained in *Wyatt*: "The normal presumption that attaches to any law is that society will be benefitted if private parties rely on that law to provide them a remedy, rather than turning to some form of private, and perhaps lawless, relief." 504 U.S. at 179.

Trust in government, which is essential to the health of our democracy, comes not only from confidence that the law is legal but that processes for enforcement and consequences for violation are fair and equitable.[7] As the *Palmer* district court explained: The problem with denying a good faith defense to private actors in CSEA's position but granting qualified immunity to similarly-situated state actors is not just the *unfairness*. It's also the *manifestness*

[7] *See*, *e.g.*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting that "both the appearance and reality of fairness" contribute to "the feeling, so important to a popular government, that justice has been done." (internal citation omitted); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283 (2003) (marshalling empirical research to show the importance of the perception of fairness to compliance with the law).

of that unfairness. Legal protections for me and not for thee erode public trust. Connecticut has a powerful interest in ensuring that government does not appear to be an unaccountable cartel that outsources risk to mere private citizens but hoards immunity for itself. So it has a powerful interest in maintaining the *status quo* recognized by the federal courts in Connecticut and across the country that affirmed the existence of a good faith defense here.

CONCLUSION

CSEA's collection and spending of agency fees were authorized by this Court's *Abood* decision and mandated by Connecticut statute. The liability that petitioners seek here would be punishment for good faith compliance with then-valid and binding state law.

For all of the reasons given by CSEA in its brief, and for the reasons given above, Connecticut respectfully asks this Court to deny the petition for certiorari.

Respectfully Submitted,

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