No. 20-605

IN THE
Supreme Court of the United States

KIERNAN WHOLEAN, ET AL.,
Petitioners,

v.

CSEA SEIU LOCAL 2001, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeal for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a union can be held liable for retrospective monetary relief under 42 U.S.C. § 1983 for receiving and spending agency fees to pay for collective bargaining representation prior to *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), even though such fees were authorized by state law and constitutional under then-binding Supreme Court precedent.

CORPORATE DISCLOSURE STATEMENT

Respondent CSEA SEIU Local 2001 is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

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INTRODUCTION

The lower courts have unanimously and correctly held that unions are not subject to retrospective monetary liability in suits under 42 U.S.C. § 1983 for having collected agency fees before *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in accordance with then-controlling precedent. The decision below agrees with this unanimous authority and provides no basis for a grant of review. Indeed, this Court on January 25, 2021, denied six petitions for certiorari that raised the same question presented here, and there have been no developments in the short time since then that would make the question presented worthy of this Court's review.[1] This petition should also be denied.

STATEMENT OF THE CASE

A. Background

Respondent CSEA SEIU LOCAL 2001 ("CSEA") serves as the collective bargaining representative for certain employees of the State of Connecticut. Pet. App. 3a; D. Ct. Doc. 54 ¶ 11. Under Connecticut law, CSEA has a duty to represent all bargaining unit workers in negotiating and administering its contracts, including workers who are not union members. Conn. Gen. Stat. § 7-468(c) (exclusive representative

[1] *Ogle v. Ohio Civ. Serv. Emps. 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).

"shall be responsible for representing the interests of all … [bargaining unit members] without discrimination and without regard to employee organization membership").

Prior to June 27, 2018, Connecticut state law and the collective bargaining agreements between the State of Connecticut and CSEA required individuals in those bargaining units who had chosen not to join CSEA to pay "agency fees" to cover their portion of the costs of collective bargaining representation. Pet. App. 4a. At the time, such agency fee provisions were authorized by Connecticut law (which required the payment of agency fees), *see* Conn. Gen. Stat. § 5-280, and by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that the First Amendment allows public employers to require employees to pay their proportionate share of the costs of union collective bargaining representation but prohibits requiring nonmembers to pay for a union's political or ideological activities. *Abood*, 431 U.S. at 235–36.

On June 27, 2018, this Court issued its decision in *Janus*, 138 S. Ct. 2448. *Janus* considered the same First Amendment challenge to agency fees rejected in *Abood*. *Janus* recognized that the lower court had "correctly" dismissed that challenge as "foreclosed by *Abood*." *Id.* at 2462. But *Janus* concluded that *Abood* had erred in holding that agency fees are consistent with the First Amendment, and *Janus* concluded that principles of *stare decisis* did not justify retaining *Abood*. *Id.* at 2478–79.

Janus acknowledged that, in determining whether *stare decisis* principles weigh against overruling precedent, "reliance provides a strong reason for adhering

to established law." *Id.* at 2484. *Janus* reasoned, however, that unions' reliance interests—which this Court identified as those arising from existing collective-bargaining agreements that had been negotiated with the expectation of receiving ongoing agency fees—were limited, because such agreements were "generally of rather short duration" and would include non-severability provisions if their agency fee provisions were "essential to the overall bargain." *Id.* at 2484–85. This Court did not suggest that overruling *Abood* would expose unions to potentially massive liability for having previously received and spent agency fees in accordance with the Court's controlling precedent.

CSEA and the State of Connecticut immediately complied with the ruling in *Janus* by terminating all collection of agency fees from nonmembers and renegotiating their collective bargaining agreements to eliminate all agency fee provisions. *See* Pet. App. 4a; D. Ct. Doc. 37-2 ¶¶ 5–10.

B. Proceedings below

Petitioners are two workers in a CSEA-represented bargaining unit who are not CSEA members. Pet. App. 3a–4a. They filed this lawsuit against Connecticut state officials and CSEA, asserted a single cause of action under 42 U.S.C. § 1983, and sought two forms of relief. D. Ct. Doc. 1 ¶¶ 33–47. First, petitioners asked that the Connecticut statute providing for the collection of agency fees be declared unconstitutional and the practice enjoined. *Id.* ¶¶ 45–46. Second, petitioners asked that CSEA be required to repay to petitioners all of the agency fees the union received before *Janus*. *Id.* ¶45. Petitioners later filed a First Amended Complaint adding a request that CSEA be

required to repay, to a putative class of all nonmembers, all of the agency fees the union received to pay for collective bargaining representation, D. Ct. Doc. 31 ¶¶ 16–27; and a Second Amended Complaint adding a state law claim for unjust enrichment, D. Ct. Doc. 54 ¶¶ 54–65.

The district court dismissed petitioners' claims for prospective relief as moot because "defendants ha[d] demonstrated that collection of [agency] fees has ceased and is unlikely to recur." Pet. App. 17a. The district court also granted CSEA's motion to dismiss petitioners' claim for monetary relief. Pet. App. 18a–19a. The district court held that CSEA has a good faith defense to Section 1983 liability for collecting and spending pre-*Janus* agency fees because, before *Janus*, "the Connecticut General Statutes … authorized the collection of agency fees, which [were] considered constitutional under United States Supreme Court and Second Circuit precedent." Pet. App. 18a (citing Conn. Gen. Stat. § 5-280; *Abood*, 431 U.S. 209; *Scheffer v. Civ. Serv. Emp. Ass'n, Local 828*, 610 F.3d 782 (2d Cir. 2010)). The district court declined to exercise supplemental jurisdiction over petitioners' state law claim. Pet. App. 19a.

Petitioners appealed only the dismissal of their Section 1983 damages claim against CSEA. *See* Pet. App. 3a n.1; 2d Cir. Doc. 30, at 1. The Second Circuit affirmed. Pet. App. 1a–10a. The Second Circuit held that, because CSEA "complied with directly controlling Supreme Court precedent in collecting fair-share fees," CSEA "cannot be held liable for monetary damages under § 1983." Pet. App. 6a.

REASONS FOR DENYING THE PETITION

In *Wyatt v. Cole*, 504 U.S. 158 (1992) ("*Wyatt*"), this Court held that private party defendants sued for monetary relief under Section 1983 cannot assert the same form of qualified immunity available to public officials, but stated that such defendants "could be entitled to an affirmative defense based on good faith …." *Id.* at 168–69. Since *Wyatt*, every circuit court to consider the question has recognized this good faith defense.[2] In the decision below, the Second Circuit applied the defense to hold that CSEA was not liable for receiving and spending agency fees prior to *Janus* because in doing so the union "complied with directly controlling Supreme Court precedent." Pet. App. 6a.

Petitioners provide no good reason for this Court to review the Second Circuit's decision. Contrary to petitioners' contention, there is no circuit split to resolve. Six circuit courts and more than 30 district courts all have uniformly rejected indistinguishable claims against unions seeking recovery of pre-*Janus* agency fees. And *no* court has held that the good-faith defense does not exist or has refused to apply it in a

[2] *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 510 U.S. 977 (1993); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Janus v. AFSCME Council 31*, 942 F.3d 352, 367 (7th Cir. 2019) ("*Janus II*"), *cert. denied*, _ S. Ct. _, 2021 WL 231649 (Jan. 25, 2021); *Doughty v. State Employees' Ass'n of N.H., SEIU Local 1984*, 981 F.3d 128 (1st Cir. 2020).

circumstance where, as here, a private party was sued under Section 1983 simply for following then-valid state law.

Further, the unique circumstances that gave rise to post-*Janus* Section 1983 claims are unlikely to recur. This Court only rarely overrules its prior precedents, and private parties seldom face monetary claims under Section 1983 for engaging in conduct that was authorized by state law and by directly on-point Supreme Court precedent.

This Court recently denied six petitions for certiorari that raised the same question presented here. *See supra* at 1. Several of those petitions were filed by the same advocacy group that represents petitioners here and made the same arguments in support of review. Given the unbroken consensus in the lower courts, there is still no reason for this Court to intervene at this time.

I. The lower courts have unanimously held that unions are not subject to retrospective monetary liability under Section 1983 for having collected pre-*Janus* agency fees.

Petitioners contend that this Court should grant their petition in order to resolve a purported circuit split about whether private parties may assert a good faith defense to claims for monetary relief under Section 1983. But there is no circuit split to resolve. The circuit courts to have considered the question all have held that private parties facing claims for monetary relief under Section 1983 are not liable when they reasonably relied upon then-valid state law that was only

subsequently overturned. Far from creating a conflict, the Third Circuit decision cited by petitioners reaches the same conclusion about union liability for having collected pre-*Janus* agency fees as each of the other courts to have considered it.

1. In *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982), this Court held that private parties who invoke state-created laws and processes may, in certain circumstances, be considered state actors subject to liability under Section 1983. *Id.* at 936–37. The Court acknowledged that its construction of Section 1983 created a "problem"—namely, that "private individuals who innocently make use of seemingly valid state laws" could be sued for damages "if the law is subsequently held to be unconstitutional." *Id.* at 942 n.23. The Court suggested that this problem "should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense." *Id.*

Ten years later, *Wyatt* held that private party defendants in Section 1983 litigation cannot assert the same form of "qualified immunity" available to public officials. 504 U.S. at 167. The Court acknowledged, however, that "principles 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," and the Court explained that its decision did not "foreclose 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." *Id.* at 168–69.[3]

Since *Wyatt*, the seven courts of appeals to consider the question uniformly have held that private parties may assert a good faith defense to Section 1983 claims for monetary relief. The Fifth Circuit considered the issue on remand from this Court in *Wyatt*, concluding 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." *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 510 U.S. 977 (1993). In *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994), the Third Circuit expressed its agreement with the Fifth Circuit's holding, and the First, Second, Sixth, Seventh, and Ninth Circuits all reached the same conclusion. *See Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *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); *Janus v. AFSCME Council 31*, 942 F.3d 352, 361–64 (7th Cir. 2019); *Doughty v. State Employees' Ass'n of N.H., SEIU Local 1984*, 981 F.3d 128 (1st Cir. 2020).

This uniform consensus extends to the specific claim being pursued by petitioners. Lawsuits similar

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[3] *Wyatt* emphasized that its holding applied only to the "type of objectively determined, immediately appealable immunity" available to certain public officials under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and distinguished that immunity from "an affirmative defense based on … good faith and/or probable cause." *Wyatt*, 504 U.S. at 166 & n.2.

to petitioners' were filed throughout the country following issuance of the *Janus* decision. Pet. at 24. The outcome of each of those lawsuits has been the same: Every court has concluded that unions' reliance on then-valid state laws and then-binding precedent of this Court precludes monetary relief under Section 1983. That consensus now includes eight decisions from six different courts of appeals.[4] It also includes more than 30 district court decisions.[5]

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[4] *Doughty*, 981 F.3d 128 (1st Cir. 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); *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); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 231559 (Jan. 25, 2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, _ S. Ct. _, 2021 WL 231555 (Jan. 25, 2021); *Janus II*, 942 F.3d 352 (7th Cir. 2019), *cert. denied*, 2021 WL 231649 (Jan. 25, 2021); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, _ S. Ct. _, 2021 WL 231650 (Jan. 25, 2021).

[5] *Danielson v. AFSCME Council 28*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018), *aff'd*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, _ S. Ct. _, 2021 WL 231555 (Jan. 25, 2021); *Cook v. Brown*, 364 F. Supp. 3d 1184 (D. Or. 2019), *appeal pending*, No. 19-35191 (9th Cir.); *Carey v. Inslee*, 364 F. Supp. 3d 1220 (W.D. Wash. 2019), *appeal pending*, No. 19-35290 (9th Cir.); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), *appeal pending*, No. 19-35299 (9th Cir.); *Janus v. AFSCME Council 31*, 2019 WL 1239780 (N.D. Ill. Mar. 18, 2019), *aff'd*, 942 F.3d 352 (7th Cir. 2019), *cert. denied*, 2021 WL 231649 (Jan. 25, 2021); *Hough v. SEIU Local 521*, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), *appeal pending*, No. 19-15792 (9th Cir.); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980 (N.D. Ohio 2019), *aff'd*, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 231559 (Jan. 25, 2021); *Mooney v. Ill. Educ. Ass'n*, 372 F. Supp. 3d 690 (C.D. Ill.), *aff'd*, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, _ S. Ct. _, 2021 WL 231650 (Jan. 25, 2021); *Bermudez v. SEIU Local 521*, 2019

WL 1615414 (N.D. Cal. Apr. 16, 2019); *Akers v. Md. State Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019), *appeal pending*, No. 19-1524 (4th Cir.); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021 (D. Conn. Apr. 26, 2019), *aff'd*, 955 F.3d 332 (2d Cir. 2020); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019), *appeal pending*, No. 19-55692 (9th Cir.); *Doughty v. State Emps. Ass'n of N.H.*, No. 1:19-cv-00053-PB (D.N.H. May 30, 2019), *aff'd*, 981 F.3d 128 (1st Cir. 2020); *Hernandez v. AFSCME Cal.*, 386 F. Supp. 3d 1300 (E.D. Cal. 2019), *appeal pending*, No. 20-15076 (9th Cir.); *Imhoff v. Cal. Teachers Ass'n*, No. 2:19-cv-01841 (C.D. Cal. July 1, 2019); *Diamond v. Pa. State Educ. Ass'n*, 399 F. Supp. 3d 361 (W.D. Pa. 2019), *aff'd*, 972 F.3d 262 (3d Cir. 2020); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 397 F. Supp. 3d 1076 (S.D. Ohio 2019), *aff'd*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 231560 (Jan. 25, 2021); *Brice v. Cal. Faculty Ass'n*, No. 19-cv-04095 (C.D. Cal. Sept. 10, 2019), *appeal pending*, No. 19-56164 (9th Cir.); *Allen v. Santa Clara Cty. Corr. Peace Officers Ass'n*, 400 F. Supp. 3d 998 (E.D. Cal. 2019), *appeal pending*, No. 19-17217 (9th Cir.); *Casanova v. Machinists Local 701*, No. 1:19-cv-00428 (N.D. Ill. Sept. 11, 2019), *aff'd*, No. 19-2987 (7th Cir. Feb. 11, 2020), *cert. denied*, _ S. Ct. _, 2021 WL 231651 (Jan. 25, 2021); *O'Callaghan v. Regents of the Univ. of Cal.*, 2019 WL 6330686 (C.D. Cal. Sept. 30, 2019), *appeal pending*, No. 19-56271 (9th Cir.); *Smith v. N.J. Educ. Ass'n*, 2019 WL 6337991 (D.N.J. Nov. 27, 2019), *aff'd sub nom*, _ F. App'x _, 2021 WL 141609 (3d Cir. Jan. 15, 2021); *Wenzig v. SEIU Local 668*, 2019 WL 6715741 (M.D. Pa. Dec. 10, 2019), *aff'd*, 972 F.3d 262 (3d Cir. 2020); *Seidemann v. Prof'l Staff Cong. Local 2334*, 432 F. Supp. 3d 367 (S.D.N.Y. Jan. 10, 2020), *appeal pending*, No. 20-460 (2d Cir.); *Penning v. SEIU Local 1021*, 424 F. Supp. 3d 684 (N.D. Cal. 2020), *appeal pending*, No. 20-15226 (9th Cir.); *Leitch v. AFSCME Council 31*, No. 1:19-cv-02921 (N.D. Ill. Jan. 30, 2020), *appeal pending*, No. 20-1379 (7th Cir.); *Ocol v. Chi. Teachers Union*, 2020 WL 1467404 (N.D. Ill. Mar. 26, 2020); *Chambers v. AFSCME Int'l*, 450 F. Supp. 3d 1108 (D. Or. 2020), *appeal pending*, No. 20-35355 (9th Cir.); *Mattos v. AFSCME Council 3*, 2020 WL 2027365 (D. Md. Apr. 27, 2020); *Hoekman v. Ed. Minn.*, _ F. Supp. 3d _, 2021 WL 533683 (D. Minn. Feb. 12, 2021); *Brown v. AFSCME Council No. 5*, _ F. Supp. 3d. _, 2021 WL 533690 (D. Minn. Feb. 12, 2021).

This consensus in the lower courts is entirely consistent with what this Court contemplated in *Janus*. After determining that *Abood* was wrongly decided, this Court considered whether reliance interests nonetheless justified retaining *Abood* as matter of *stare decisis*. 138 S. Ct. at 2478–86. The 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 concluded that unions' reliance interests in the continued enforcement of those agreements were not weighty. *Id.* at 2484–85. The Court did not suggest that its holding also would expose public employee unions to massive retrospective monetary liability for having followed then-governing precedent. *See id.* 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") (emphases added); *see also* Pet. App. 9a (noting purely prospective nature of decision's language); *Lee*, 951 F.3d at 389 (same).

2. No circuit court has held that private party defendants sued on the basis of *Lugar* are *not* entitled to assert a good faith defense to Section 1983 monetary

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Courts considering similar claims in the wake of *Harris v. Quinn*, 134 S. Ct. 2618 (2014), also uniformly applied the good faith defense to defeat claims for retrospective liability. *See Jarvis v. Cuomo*, 660 F.App'x 72, 75–76 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Hoffman v. Inslee*, 2016 WL 6126016, at *4 (W.D. Wash. Oct. 20, 2016); *Winner v. Rauner*, 2016 WL 7374258, at *5–6 (N.D. Ill. Dec. 20, 2016).

liability. Indeed, CSEA is not aware of *any* decision by *any* court to that effect.

Petitioners attempt to create a conflict between the Third Circuit and other circuit courts on the basis of the concurring opinion authored by Judge Fisher in *Diamond*. *See Diamond*, 972 F.3d at 273–285 (Fisher, J., concurring). But Judge Fisher *agreed* that unions that relied on state law and *Abood* in accepting agency fees prior to *Janus* cannot be held monetarily liable under Section 1983 for having done so, and merely identified an "alternative basis" for that outcome. *Id.* at 274, 281. Judge Fisher explained that, under the common law, "a judicial decision either voiding a statute or overruling a prior decision does not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress of fraud, in reliance on the invalidated statute or overruled decision." *Id.* Because this robust body of common-law authority amply supported a defense to the plaintiffs' Section 1983 claims for monetary relief, Judge Fisher found it "unnecessary" to consider whether an analogy to the common-law tort of abuse of process also supported the existence of a defense or how such a defense might apply in other cases. *Id.* at 281.

As this Court has often stated, it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). That judges have taken somewhat different paths to reach a uniform result does not amount to a conflict warranting a grant of certiorari.[6] Nor does

[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

this Court sit to resolve differences in nomenclature used by lower-court judges who reach the same conclusion.[7]

II. Petitioners' merits arguments have already been found insufficient to justify granting review.

This Court generally does not grant review solely to correct purported errors in a decision below. Nonetheless, petitioners devote the bulk of their petition to arguing that the Second Circuit erred on the merits by applying a good-faith defense to Section 1983 monetary liability. Pet. at 12–23. The same merits arguments were raised by the substantively identical petition for certiorari in *Ogle v. Ohio Civil Service Employees Association*, No. 20-486, and those arguments are fully addressed by the *Ogle* Brief in Opposition, at

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decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

[7] The dissent in *Diamond* 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, the answer is "yes." Notably, the *Diamond* dissent did not even consider whether, as the First, Sixth, Seventh, and Ninth Circuits have reasoned, an analogy to the common-law tort of abuse of process supported the recognition of a defense for unions that relied on state law to invoke the government's process for collecting agency fees.

14–24. This Court denied the *Ogle* petition on January 25, 2021, and there have been no relevant legal developments since that time that would support a different outcome here.[8]

III. There is no other justification for this Court's intervention at this time.

Petitioners contend that review of the decision below is justified because "over 37 class action lawsuits are pending that seek refunds from unions for agency fees" paid prior to *Janus*. Pet. at 24. As stated already, however, every court to consider such a claim has held that the union defendants are not subject to Section 1983 monetary liability. Far from suggesting this Court's guidance is required, the broad consensus that petitioners' claim is meritless demonstrates that this Court's involvement is unnecessary. That other cases are still pending in the lower courts suggests, if anything, that this Court should wait to see whether a conflict develops.

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[8] Each of petitioners' merits arguments also has been thoroughly considered and correctly rejected by the lower courts, most recently in Judge Barron's careful opinion for the First Circuit. *See Doughty*, 981 F.3d at 134–38 (explaining why *Wyatt* and the numerous post-*Wyatt* decisions recognizing a good-faith defense cannot be distinguished on the ground that they involved procedural due process rather than the First Amendment, why the abuse-of-process analogy is apt, and why the purported retroactivity of *Janus* does not preclude application of the good-faith defense to claims for monetary relief); *see also, e.g.*, *Ogle*, 951 F.3d at 796–97 (explaining why recognition of a good-faith defense is consistent with this Court's methodology for interpreting Section 1983, and why abuse of process provides an appropriate common law analogy).

The unique circumstances presented by a case seeking pre-*Janus* monetary liability also do not provide a suitable vehicle for this Court to provide guidance on Section 1983's application in more typical cases. *See* Pet. at 23–25 (arguing that this Court should grant review to consider whether a good-faith defense is available in cases not premised upon *Janus*'s overruling of prior precedent). The Second Circuit held only that "a party who complied with *directly controlling Supreme Court precedent* in collecting fair-share fees cannot be held liable for monetary damages under § 1983." Pet. App. 6a (emphasis supplied). Such situations are likely to be rare.

Stare decisis is "a 'foundation stone of the rule of law.'" *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). This Court seldom overrules its precedents. Moreover, this Court has held that when a precedent of this Court is directly on point, that precedent is the law of the land binding on all lower courts, even if subsequent decisions have criticized that precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Accordingly, this case—in which a private defendant was acting in accordance not only with the requirements of state law but also with this Court's governing precedent—would not provide a suitable vehicle for this Court to consider the potential application of a good faith defense to more typical situations.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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