No. 21-480

IN THE

Supreme Court of the United States

WILLIAM D. BRICE,

Petitioner,

v.

CALIFORNIA FACULTY ASSOCIATION,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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CHE' S. COOK, ET AL.,

Petitioners,

v.

OREGON AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES COUNCIL 75,

Respondent.

WILLIAM HOUGH,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,

Respondent.

STEVEN MASUO, ET AL.,

Petitioners,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,

Respondents.

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INTRODUCTION

Based on a misconception of what the Court wrote in *Wyatt v. Cole,* 504 U.S. 158, 169 (1992), several appellate courts during the last two years recognized a new categorical good-faith defense to Section 1983 that deprives those victimized by constitutional rights violators of any monetary relief for their injuries if the defendants relied on a state law before it was held unconstitutional.[1] This ostensible defense is being used by unions across the country to deny relief to tens of thousands of workers who were forced to subsidize union speech in violation of their First Amendment rights under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). "It is 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." *Id.* at 2486.

The Court has never recognized a good-faith defense to Section 1983. However, three times the Court raised, but then did not decide, the question of whether such a defense exists. *Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt v. Cole,* 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 n.23 (1982). Respondent unions assert that the Court should refrain from answering the question now because many appellate courts have already recognized a categorical good-faith defense to Section 1983 claims. Joint Brief in Opposition ("JBIO") 1, 5–9. However, the categorical defense the lower courts have recognized is not the claim-specific defense the Court suggested in *Richardson*, *Wyatt*, and *Lugar*.

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[1] See cases listed in Joint Brief in Opposition ("JBIO") 7 & n.3.

There are numerous reasons why a defendant's reliance on a statute before it is held unconstitutional cannot be an affirmative defense to Section 1983 liability. The Court should thus finally resolve the question it left open in *Richardson*, *Wyatt*, and *Lugar*.

I. The Court should correct the Ninth Circuit's (and other lower courts') misapplication of *Wyatt v. Cole*.

The unions suggest that because the Court's decision in *Wyatt* left open the question of whether defendants could raise "an affirmative defense based on good faith and/or probable cause," 504 U.S. at 168–69, the Ninth Circuit and other lower courts are correct in finding that private parties may assert a categorical good-faith defense to Section 1983 claims for monetary relief. JBIO 6–7, 9 n.4. In fact, the lower courts misunderstood the defense suggested by the Court in *Wyatt*. That suggested defense was not a categorical defense to all Section 1983 damages claims; rather, it was a defense to the malice and probable cause elements of the specific due process claim at issue in that case. *Wyatt*, 504 U.S. at 164–65; *see id.* at 172–73 (Kennedy, J., concurring).[2]

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[2] *Lugar* offers even less support to the unions' position, JBIO 5-6, 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)).

The unions sow confusion by using the term "good-faith defense" to describe two different things. First, there is a *claim-specific* good-faith defense, in which malice and lack of probable cause are deemed elements of a specific constitutional deprivation. This is the narrow defense to due process deprivations that the Court suggested in *Wyatt*, 504 U.S. at 166 n.2. This claim-specific defense "is of no moment here because a claim for compelled speech does not have a *mens rea* requirement." *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262, 289 (3d Cir. 2020) (J. Phipps, dissenting), *cert. denied*, 141 S. Ct. 2756 (2021); *see Janus*, 138 S. Ct. at 2468; *see also* Pet. 18–20.

Second, there is a *categorical* good-faith defense, in which a defendant's good-faith reliance on state law is considered an affirmative defense to all constitutional claims for damages or restitution brought under Section 1983. This is not the defense the Court suggested in *Wyatt*. It is, however, the defense that six of the seven circuit courts have recognized in cases concerning union agency fee seizures.[3] *See* Pet. 15–17.

The unions also argue that the circuit courts that have addressed the issue agree that employees who had compulsory fees unconstitutionally seized from them prior to *Janus* should be denied damages and restitution for their injuries. JBIO 1, 4, 7, 8, 10. This does not change the fact that the courts disagree on the legal question presented to the Court—whether there is a good-faith defense to Section 1983. As Judge Phipps cogently explained in *Diamond*, other circuit

[3] A majority of a Third Circuit panel correctly rejected this new defense to Section 1983 liability. *See Diamond*, 972 F.3d at 274 (J. Fisher, concurring the judgment); *id.* at 285 (J. Phipps, dissenting). The Court should grant review to resolve this disagreement amongst the circuit courts over whether a categorical good-faith defense exists.

courts were wrong to conclude that unions are exempt from Section 1983 liability if they relied on state laws when unconstitutionally seizing agency fees from employees. 972 F.3d at 288–89 (J. Phipps, dissenting).

Acting under color of a state law is an element of a Section 1983 action, not a defense to the statute. Section 1983 states 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 "s*hall 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). The statute's historical purpose was "to remedy actions taken in accordance with state law." *Diamond*, 972 F.3d at 288 (J. Phipps, dissenting). "[T]hus a good faith affirmative defense—that a state actor was merely following state law—is an especially bad fit as an atextual addition to § 1983." *Id*. Indeed, the defense turns Section 1983's text and purpose on their head.

There is no cognizable basis for a categorical good-faith defense to Section 1983. This defense is not the defense suggested in *Wyatt*, nor is it justified by policy interests in fairness and equality. *See* Pet. 1–4, 16–30. The Court should take this case to repudiate the groundless new defense the Ninth Circuit and other lower courts have created to Section 1983.

II. This case presents a question of national importance.

Section 1983 was enacted one-hundred-fifty years ago to provide a remedy to persons deprived of constitutional rights by parties that act under color of state law. *See Owen v. City of Independence*, 445 U.S. 622, 650–51 (1980); Pet. 21–27. It is highly significant that the Ninth Circuit and five other courts of appeals—the First, Second, Fourth, Sixth, and Seventh—have

now decided that defendants owe victims no remedy under Section 1983 if they acted under a state law before it was held unconstitutional. These courts have rendered Section 1983 largely self-defeating, at least with respect to retroactive relief, because almost any defendant that acts under color of state law, as the statute requires, will have a defense to Section 1983 liability for the same reason. The massive hole that these courts have carved into the nation's preeminent civil rights statute is a matter of exceptional importance that the Court should address and rectify.

The unions suggest that the "unique circumstances presented by cases seeking to impose pre-*Janus* monetary liability also do not provide a suitable vehicle for this Court to provide guidance on the application of the good-faith defense in other cases, as petitioners request." JBIO 10; *see also* 4–5, 11. According to the unions, the lower court's application of a categorical good-faith defense would only apply to a defendant who relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute. *Id*. (*citing Danielson v. Inslee*, 945 F.3d 1096, 1104 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1265 (2021)).

Judge Rendell of the Third Circuit concluded that a "good faith defense is available to a private-party defendant in a Section 1983 case if, after considering the defendant's 'subjective state of mind,' the court finds no 'malice' and no 'evidence that [the defendant] either knew or should have known of the statute's constitutional infirmity.'" *Diamond*, 972 F.3d at 270 (*quoting Jordan v. Fox, Rothschild, O'Brien, & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994)). This standard does not require reliance on the Court's precedents. The defense merely requires the defendant either knew or should have known the statute was unconstitutional.

The question presented in this case is of national importance because its resolution will determine whether victims of agency fee seizures receive relief for their injuries or whether unions can keep their ill-gotten gains. *See* Pet. 27–31. In *Janus*, the Court lamented the "considerable windfall" that unions wrongfully received from employees during prior decades. 138 S. Ct. at 2486. Yet, as the unions note, every lower court to hear these cases have refused to hold unions liable to nonmembers for any monetary relief, which the Court found "ha[d] been taken from nonmembers . . . in violation of the First Amendment." *Id.*

Absent the Court's timely review, the unions will get to keep their ill-gotten windfall and nonmembers will receive nothing for their First Amendment injuries. The Court's intervention is, therefore, necessary to secure the promise of *Janus* for tens of thousands of workers around the country.

III. This case is an excellent vehicle to resolve the question presented.

The unions suggest that the fact the Court has denied petitions raising the same claim is a reason why the Court should deny this petition. JBIO 1, 4–5, 7, 9–10. However, the Court's denial of certiorari does not suggest a view on the merits. *Lawrence v. Chater*, 516 U.S. 163, 191 (1996).

The unions also assert that the Court should deny this petition because it presents a unique circumstance that will not likely be repeated. JBIO 4–5, 10–11. Whether tens of thousands of victims of agency fee seizures receive relief for injuries is itself an important matter. Moreover, the importance of the question presented extends beyond these individuals to victims of other constitutional deprivations. Unless

rejected by the Court, defendants in Section 1983 claims could raise a good-faith defense against any constitutional claim, including discrimination based on race, faith, sex or political affiliation. Courts would have to adjudicate this defense. More importantly, plaintiffs who would otherwise receive damages for their injuries will be remediless unless the Court rejects this new judicially created defense to Section 1983 liability.

This joint petition is an excellent vehicle for the Court to grant review to clarify that defenses to Section 1983 must rest on a firm statutory basis, and that the new broad reliance defense recognized below lacks any such basis.

CONCLUSION

For the reasons stated above and in the joint petition, the Court should grant their joint petition for a writ of certiorari to the Ninth Circuit.

Respectfully submitted,

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