**No. _____**

IN THE

# Supreme Court of the United States

GARY MATTOS, DORIS BEEGLE, VICKIE BOGGS, BRADLEY FRENCH, CARLA GURGANUS, STEVEN HALE, JOHN HILL, BENJAMIN ICKES, MICHELLE LAMBERT, JESSICA MERRITT, JOHN MEYERS, CAROLE MILLER, MELISSA POTTER, JIM RIEMAN, LAURIE RUBIN, JOYCE STONER, RUSSELL STOTT, AND LARRY TEETS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED,

*PETITIONERS*,

*V.*

AFSCME COUNCIL 3,

*RESPONDENT.*

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

## PETITION FOR WRIT OF CERTIORARI


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December 15, 2022

## QUESTION PRESENTED

Section 1983 provides that "every 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.

Petitioners are employees of the State of Maryland who were compelled to pay agency fees to AFSCME Council 3, under color of Maryland state law, in violation of their First Amendment rights according to *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

The question presented is: does defendant's good-faith reliance on a state law before it was held unconstitutional shield it from damages liability for taking agency fees from Petitioners in violation of their constitutional rights under 42 U.S.C. § 1983?

## PARTIES TO THE PROCEEDING

Petitioners Gary Mattos, Doris Beegle, Vickie Boggs, Brad-Ley French, Carla Gurganus, Steven Hale, John Hill, Benjamin Ickes, Michelle Lambert, Jessica Merritt, John Meyers, Carole Miller, Melissa Potter, Jim Rieman, Laurie Rubin, Joyce Stoner, Russell Stott, and Larry Teets are natural persons and citizens of the State of Maryland. They seek to represent a class of public employees like themselves, all members of which would also be natural persons.

Respondent, AFSCME Council 3, is a labor union representing public employees in the State of Maryland.

## RULE 29.6 STATEMENT

As Petitioners are natural persons, no corporate disclosure is required under Rule 29.6.

## STATEMENT OF RELATED CASES

The proceedings in other courts that are directly related to this case are:

- *Mattos v. AFSCME Council 3*, 20-1531, United States Court of Appeals for the Fourth Circuit. Judgment entered September 16, 2022.
- *Mattos v. AFSCME Council 3*, No. 1:19-2539, United States District Court for the District of Maryland. Judgment entered April 27, 2020.

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The opinion of the United States Court of Appeals for the Fourth Circuit, *Mattos v. AFSCME Council 3,* is unpublished, may be found at 2022 U.S. App. LEXIS 25973 (4th Cir. Md., Sept. 16, 2022), and is reproduced at App. 1.

The opinion of the United States District Court for *Mattos v. AFSCME Council 3*, Civil Action No. GLR-19-2539, 2020 U.S. Dist. LEXIS 77210 (D. Md. Apr. 27, 2020), is reproduced at App. 7.

## JURISDICTION

The Fourth Circuit issued its opinion and judgment on September 16, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

> that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

## STATEMENT OF THE CASE

Petitioners are state employees in Maryland who were compelled to pay agency fees to Respondent AFSCME Council 3 (the "Union"), in violation of their First Amendment rights under *Janus v. AFSCME*. App. 7-8. Petitioners brought this action to vindicate their rights and reclaim the funds taken from them and from a class of similarly situated employees.

Under Maryland's state labor regime, "Collective bargaining may include negotiations relating to the right of an employee organization to receive service fees from nonmembers." Md. Code Ann., State Pers. & Pens. § 3-502. AFSCME is the exclusive representative for numerous bargaining units throughout Maryland state government, including the Department of Social Services, the Maryland Transportation Authority, the various state correctional institutions, and the University of Maryland.[1]

In 2009, the State of Maryland repealed its ban on agency, or "service," fees, allowing unions to place new provisions in collective bargaining agreements requiring nonmembers to fund union activities. *See* SB 264, 2009 Md. laws 187. After this change in the law, AFSCME negotiated for the collection of agency fees from

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[1] *See* AFSCME Council 3, *Our Locals*, *available at* https://www.afscmemd.org/our-union/our-locals (last visited Dec. 14, 2022).

nonmembers such as Petitioners beginning in July 2011. App. 13, 18. Article 4, Section 14.A of the applicable[2] Memorandum of Understanding ("MOU") between AFSCME and the state provided that all employees in the bargaining units represented by AFSCME who were not union members—including Petitioners—were required to pay agency fees to AFSCME as a condition of their employment. [3] App. 8. State employers covered by the collective bargaining agreement deducted agency fees from Petitioners' and other nonmembers' wages without their consent and transferred those funds to AFSCME.

On June 27, 2018, this Court, in *Janus,* declared it a violation of the First Amendment for the government and unions to seize agency fees from public employees' wages without their consent. 138 S. Ct. at 2486. The Court overruled its precedent that allowed unions to seize agency fees from employees—*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—and held Illinois' agency fee statute unconstitutional. *Janus*, 138 S. Ct. at 2486. This Court lamented the "considerable windfall" of compulsory fees unions seized from employees during prior decades, remarking that "[i]t 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 2485. This Court also recognized that, since 2012, "any public sector union seeking an agency fee

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[2] Since the *Janus* decision, AFSCME and the State have entered into a new MOU that no longer provides for agency fees.

[3] The current MOU is available online at: https://www.afscmemd.org/sites/default/files/mou_abcdf_2022-2023.pdf.

provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.*

Petitioners filed this action on September 3, 2019, to recoup compulsory fees unconstitutionally seized from dissenting employees. App. 8. AFSCME filed a motion to dismiss, which the district court granted. App. 14. The district court held AFSCME was entitled to a good-faith defense against liability for fees taken prior to this Court's decision in *Janus*. App. 10-11.

Petitioners timely appealed to the Fourth Circuit. While this case was pending there, the Fourth Circuit issued its decision *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375 (4th Cir. 2021), which endorsed the same good-faith defense invoked by the district court in this case. On September 16, 2022, the Fourth Circuit issued its opinion in this case, citing *Akers*, which it found foreclosed Petitioners' claim under circuit precedent. App. 3. Petitioners now seek this Court's review.

## REASONS FOR GRANTING THE PETITION

This case is one of many in which employees who had agency fees seized from them in violation of their First Amendment rights seek damages for their injuries.

This Court has never recognized a good-faith defense under Section 1983. But three times this Court has raised, but then not decided, the important question of whether such a defense exists. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt v. Cole*, 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). The Court should finally resolve this important question to disabuse the lower

courts of the rapidly spreading notion that a defendant acting under color of a statute before it is held unconstitutional has a defense under Section 1983. That defense cannot be reconciled with Section 1983's text, which makes acting "under color of any statute" an element of the statute that renders defendants liable. 42 U.S.C. § 1983. Nor can the defense be reconciled with this Court's retroactivity doctrine. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995).

## I. A categorical good-faith defense is not the claim-specific defense suggested by this Court in *Wyatt v. Cole*.

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Because Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred," *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979), the elements of a Section 1983 claim vary considerably. The threshold inquiry in a Section 1983 suit "is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). "After pinpointing that right, courts still must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017).

"In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts." *Id.* "Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id.* "But not always. Common-law principles are

meant to guide rather than to control the definition of § 1983 claims." *Id.* "[T]he Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims . . . . [Section] 1983 differs . . . from . . . pre-existing torts. It is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012).

In *Wyatt v. Cole*, the Court considered whether a private defendant who used an *ex parte* replevin statute to seize the plaintiff's property without due process of law was entitled to qualified immunity in a Section 1983 claim. 504 U.S. at 161. The Court held that private parties sued under Section 1983 are not entitled to the same qualified immunity from suit accorded government officials because the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167.

*Wyatt* left open the question whether the defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168-69. That potential defense was based on the Court's recognition that the plaintiffs' claims in *Wyatt* were analogous to "malicious prosecution and abuse of process," and that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id.* at 164-65; *see also id.* at 172-73 (Kennedy, J., concurring) (similar).

The defense "based on good faith and/or probable cause" suggested in *Wyatt* was not a broad statutory reliance defense to all Section 1983 damages claims, as some courts have concluded. *See, e.g., Janus II*, 942 F.3d at 366. Rather, the good-faith defense to which

the *Wyatt* Court was referring was a defense to the malice and probable cause elements of the specific due process claim at issue in that case—the claim that the defendants' use of the *ex parte* replevin statute to seize the plaintiff's property without due process violated the plaintiff's rights. The Court found that claim was most analogous to the torts of malicious prosecution and abuse of process, which provided causes of action against private defendants for unjustified harms arising out of the misuse of government processes. *Id.* at 164. The torts of malicious prosecution and abuse of process require plaintiff to show the defendant acted with malice and with probable cause. *Id.* Thus, the Court left open the possibility that defendants could prevail on the specific claim by raising a claim-specific defense that they acted in good faith.

This is clear from all three opinions in *Wyatt*.

First, Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it is a "misnomer" to even call it a defense because "under the common law it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice and without probable cause." *Wyatt*, 504 U.S. at 176 n.1 (Rehnquist, C.J., dissenting) (citation omitted). "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.*

Second, Justice Kennedy, in his concurring opinion joined by Justice Scalia, agreed that "it is something of a misnomer to describe the common law as creating a good-faith *defense*; we are in fact concerned with the

essence of the wrong itself, with the essential elements of the tort." 504 U.S. at 172 (emphasis in original). Justice Kennedy further explained that "if the plaintiff could prove subjective bad faith on the part of the defendant, he had gone far towards proving both malice and lack of probable cause." *Id*. at 173. Indeed, often "lack of probable cause can *only* be shown through proof of subjective bad faith." *Id.* at 174 (emphasis in original) (citing *Birdsall v. Smith*, 122 N.W. 626 (Mich. 1909) (holding that a plaintiff alleging malicious prosecution failed to prove the prosecution lacked probable cause)).

Finally, Justice O'Connor's majority opinion in *Wyatt* recognized that the dissenting and concurring opinions were referring to a defense to the malice and probable cause elements of claims analogous to malicious prosecution cases. The majority opinion found, "One could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs *bringing an analogous suit* under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action." 504 U.S. at 167 n.2 (emphasis added).

In short, the *Wyatt* Court suggested, without deciding, that there may be a *claim-specific* good-faith defense to Section 1983 actions in which malice and lack of probable cause are elements of the alleged constitutional deprivation. Malicious prosecution and abuse of process actions were the most analogous torts at common law to the misuse of an *ex parte* replevin statute, so the *Wyatt* Court concluded that a court might hold that malice and lack of probable cause are required elements of the underlying constitutional claim—that

the use of an *ex parte* replevin statute by defendants to seize plaintiff's property without due process is unconstitutional.

On remand in *Wyatt*, the Fifth Circuit recognized that this Court "focused its inquiry on the elements of these torts." *Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993). It therefore found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice and without probable cause." *Id*. The Third and Second Circuits followed suit in cases also arising from abuses of judicial processes and held the defendants could defeat the malice and probable cause elements of those claims by showing good-faith reliance on a statute. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 & n.31 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

Contrary to the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits , the *Wyatt* Court was not suggesting, let alone establishing, a *categorical* good-faith defense under which a defendant's good-faith reliance on state law is a defense to all constitutional claims for damages brought under Section 1983. *See Doughty*, 981 F.3d at 135 ; *Wholean*, 955 F.3d at 334-35; *Akers v. Md. State Educ. Ass'n,* 990 F.3d 375, 380 (4th Cir. 2021); *Ogle*, 951 F.3d at 796; *Janus II*, 942 F.3d at 366; *Brown*, 41 F.4th at 966; *Danielson*, 945 F.3d at 1101-02. *Wyatt* suggested nothing of the sort. There is no basis for such a sweeping defense to Section 1983.

The claim-specific good-faith defense suggested in *Wyatt* is no bar to Petitioners' cause of action because malice and lack of probable cause are not elements of, or a defense to, a First Amendment deprivation. That

is because the malicious prosecution and abuse of process torts are not analogous to First Amendment claims. In general, "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). In particular, a compelled-speech violation does not require any specific intent. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that Section 1983 "contains no independent state-of-mind requirement.")

The limited good-faith defense that members of this Court suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights by seizing agency fees from them. The unions' actions deprived Petitioners of their First Amendment rights, and they are due a return of their unconstitutionally seized fees. As Judge Phipps put it in *Diamond v. Pa. State Educ. Ass'n*, a claim-specific defense "is of no moment here because a claim for compelled speech does not have a *mens rea* requirement." 972 F.3d 262, 289 (3rd Cir. 2020) (Phipps, J., dissenting). The Court should grant review to clarify what it intended in *Wyatt*.

## II. A categorical good-faith defense conflicts with the text and purpose of Section 1983.

Section 1983 states, in relevant part: "Every 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. Section 1983

means what it says: "Under the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. at 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

The proposition that a defendant's good-faith reliance on a state statute exempts it from Section 1983 damages liability has no basis in Section 1983's text. In fact, the proposition conflicts with the statute in at least two ways. First, it cannot be reconciled with the statute's mandate that "every person"—not some persons, or persons who acted in bad faith, but "every person"—who deprives a party of constitutional rights under color of law "shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. The term "shall" is not a permissive term, but a mandatory one.

Second, an element of Section 1983 is that a defendant must act "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. It turns Section 1983 on its head to conclude that persons who act under color of a not-yet-invalidated state law to deprive others of a constitutional right are *not* liable to the injured parties in an action for damages. App. 9. The courts have effectively declared a statutory *element* of Section 1983—that defendants must act under color of state law—to be a *defense* to Section 1983. An affirmative defense predicated on a defendant's reliance on a state law cannot be reconciled with Section 1983's plain language.

But acting under color of a state statute cannot be both an element of and a defense to Section 1983. That would render the statute self-defeating: any private defendant that acted "under color of any statute," as

Section 1983 requires, would be shielded from liability because it acted under color of a state statute. Here, the fact that AFSCME Council 3 acted under color of Maryland's agency fee law when it deprived Petitioners of their constitutional rights is not exculpatory, but a reason why the unions are liable for damages under Section 1983.

This conclusion is consistent with the purpose of Section 1983, which is to provide a federal remedy to persons deprived of constitutional rights by parties that act under color of state law. *See Owen v. Independence*, 445 U.S. 622, 650-51 (1980). "By creating an express federal remedy, Congress sought to 'enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). Again, the proposition that acting under authority of an existing state law is exculpatory under Section 1983 inverts the purposes of the statute. *See Diamond*, 972 F.3d at 288-89 (Phipps, J., dissenting). "Good 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 lack of any basis for a good-faith defense in Section 1983's text and history distinguishes that supposed defense from other recognized immunities or defenses under Section 1983, which have a statutory or historical basis. Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg,* 566 U.S. at 363. Courts accord an immunity only when a "tradition of immunity was so firmly rooted in the common law and was supported by

such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine when it enacted Section 1983." *Richardson*, 521 U.S. at 403 (cleaned up).

Unlike with immunities, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *See Janus v. AFSCME Council 31*, 942 F.3d 352, 364 (7th Cir. 2019) ("*Janus II*"); *see Diamond*, 972 F.3d at 288 (finding "[a] good faith defense is inconsistent with the history of the Civil Rights Act of 1871") (Phipps, J., dissenting); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018) (finding "[t]here was no well-established, good faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment"). As discussed below, *infra* at 14–19, policy justifications for immunities generally do not apply to private defendants. *Wyatt*, 504 U.S. at 164-67. Thus, unlike with recognized immunities, there is no justification for recognizing a good-faith defense that defies Section 1983's statutory mandate that "[e]very person who, under color of any statute" deprives a citizen of a constitutional right "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983.

## III. Policy interests in fairness and equality do not support a good-faith defense, but weigh against recognizing it.

### A. Courts cannot create defenses to Section 1983 based on policy interests in fairness and equality.

Most circuit courts that have recognized a categorical good-faith defense to Section 1983 have asserted

that policy interests in equality and fairness justify recognizing this defense. *See Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Janus II*, 942 F.3d at 366; *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 334-35 (2d Cir. 2020); *see also* App. 10 (the good-faith defense "protects parties who 'unwittingly cross [the] line' into unconstitutionality while acting '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'") (citing *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794, 797 (6th Cir. 2020)). This rationale is inadequate, even on its own terms, because courts cannot create defenses to federal statutes when they believe it is unfair to enforce the statute.

"As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). Statutes must be enforced as Congress wrote them. "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

This principle applies to Section 1983. "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 923 (1984). Thus, courts "do not have a license to create immunities based solely on [their] view of sound

policy." *Rehberg,* 566 U.S. at 363. So too with the "fairness" justification for a good-faith defense: courts cannot just invent defenses to § 1983 liability based on their views of sound policy. *See Diamond*, 972 F.3d at 274 (Fisher, J., concurring in the judgment); *see id*. at 289 (Phipps, J., dissenting) (finding that fairness and equality cannot justify creation of a good-faith defense).

Even if a policy interest in fairness could justify creating a defense to a federal statute like Section 1983—which it cannot—fairness to *victims* of constitutional deprivations would require enforcing Section 1983 as written. It is not fair to make victims of constitutional deprivations pay for the unions' unconstitutional conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 654.

This Court wrote those words in *Owen* when holding that municipalities are not entitled to a good-faith immunity to Section 1983. The Court's equitable justifications for so holding apply equally here.

First, *Owen* reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id*. at 651. That injustice also should not be tolerated here. Countless victims of constitutional deprivations—not just Petitioners and other employees who had agency fees seized from them—will be left remediless if defendants to Section 1983 suits can escape liability by showing they had a good-faith, but mistaken, belief their conduct was lawful.

Second, *Owen* recognized that Section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, *whether committed in good faith or not*, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651-52 (emphasis added). The same rationale weighs against a good-faith defense to Section 1983.

Third, the *Owen* Court held that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm rather "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id.* at 654. So too here: when Petitioners' and the union's interests are weighed, the balance of equities favors requiring the union to return the monies it unconstitutionally seized from workers who chose not to join the union.

The same reasoning applies to the notion that principles of "equality" justify creating a defense for private defendants that is similar to the immunities enjoyed by some public defendants. *Danielson*, 945 F.3d 1101; *see also Janus II*, 942 F.3d at 366; *Lee*, 951 F.3d at 392 n.2; *Wholean*, 955 F.3d at 333. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for qualified immunity.

Individual public servants enjoy qualified immunity for reasons not applicable to the union and most

other private entities: to ensure that the threat of personal liability does not dissuade individuals from acting as public servants. *See Wyatt*, 504 U.S. at 168. The fact that this interest does not apply to the unions is not grounds for creating an equivalent defense for them. "Fairness alone is not . . . a sufficient reason for the immunity defense, and thus does not justify its extension to private parties." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998).

Neither fairness nor equality justify the reliance defense the Fourth Circuit and other lower courts have recognized. Rather, both principles weigh against carving out this exemption in Section 1983's remedial framework.

### B. The reliance defense adopted by the lower courts conflicts with *Reynoldsville Casket*.

This Court's retroactivity jurisprudence makes clear that *Janus* has retroactive effect, and it undermines the union's asserted good-faith defense. The reliance defense the Fourth Circuit and other lower courts have fashioned to defeat *Janus*'s retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), this Court held that its decisions in civil cases are presumptively retroactive unless this Court specifically states that its decision is not to be applied retroactively. Nothing in *Janus* specifically states that the decision is not retroactive.

Two years after *Harper*, in *Reynoldsville Casket*, the Court held that courts may not create equitable remedies based on a party's reliance on a statute before this Court has held the statute to be unconstitutional. 514 U.S. at 759. *Reynoldsville Casket* concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at 751. This Court had earlier held the statute unconstitutional. *Id.* The Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed under the statute before the Court invalidated it. *Id.* at 751-52. The plaintiff asserted this was a permissible equitable remedy because she relied on the statute before it was held unconstitutional. *Id.* at 753 (describing the state court's remedy "as a state law 'equitable' device [based] on reasons of reliance and fairness"). The Court rejected that contention, holding that the state court could not do an end run around retroactivity by creating an equitable remedy based on a party's reliance on a statute before it was held unconstitutional. 514 U.S. at 759.

The lower courts have engaged in just such an end run. They have created an equitable defense based on a defendant's reliance on a statute this Court later deemed unconstitutional. The reliance defense the Fourth Circuit has created thus conflicts with this Court's *Reynoldsville Casket* precedent.

A good-faith defense is unlike an immunity, which does not conflict with this Court's retroactivity doctrine because an immunity is a well-established legal rule grounded in "special federal policy considerations." *Reynoldsville Casket*, 514 U.S. at 759. A categorical good-faith defense to Section 1983 is not well established. This Court has never recognized such a

defense. Moreover, the good-faith defense is an equitable defense predicated on a defendant's reliance interests. The equitable remedy at issue in *Reynoldsville Casket* was similarly based on "a concern about reliance [that] alone has led the Ohio court to create to what amounts to an ad hoc exemption to retroactivity." *Id*. This Court rejected that equitable remedy as inconsistent with its retroactivity doctrine.

## IV. It is important that the Court finally resolve whether Congress provided a good-faith defense to Section 1983.

In at least three decisions this Court has questioned, but then opted not to decide, whether Congress has provided private defendants with a good-faith defense. *See Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at 169; *Lugar*, 457 U.S. at 942 n.23. It is time for the Court to finally resolve the matter.

The Court should end the misconception among lower courts that *Wyatt* signaled that private defendants should be granted a broad reliance defense to Section 1983 liability akin to qualified immunity. In the wake of *Janus*, a chorus of lower courts has interpreted *Wyatt* in that way. *See Brown v. AFSCME*, 41 F.4th 963, 966 (8th Cir. 2022) (collecting cases). Yet *Wyatt* did not suggest such a defense, but merely suggested that reliance on a statute could defeat the malice and lack-of-probable cause elements of claims analogous to malicious prosecution and abuse of process claims. *See supra* 5-10. The Court should explain what it meant in *Wyatt*.

And now is the time for this Court to act. Every circuit court that is likely to address this issue—the First, Second, Third, Fourth, Sixth, Seventh, Eighth,

and Ninth Circuits—has recognized the good-faith defense in the context of agency fees. *See Doughty v. State Emples. Ass'n of N.H.*, 981 F.3d 128 (1st Cir. 2020); *Wholean*, 955 F.3d 332 (2d Cir. 2020); *Schaszberger v. AFSCME Council 13*, No. 21-2172, 2022 U.S. App. LEXIS 19972 (3d Cir. July 20, 2022); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375 (4th Cir. 2021); *Lee*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Janus II*, 942 F.3d 365 (7th Cir. Nov. 5, 2019); *Danielson*, 945 F.3d 1096, 1101 (9th Cir. 2019). Given that the states in the Fifth and Eleventh Circuits did not require public-sector employees to pay agency fees, those circuits will almost certainly not have the opportunity to address the issue.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. Unless this Court rejects the good-faith defense for Section 1983 actions, defendants could raise that defense for *any* Section 1983 claim, including claims based on discrimination based on race, faith, 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 this Court rejects this new judicially created defense to Section 1983 liability. An "unwillingness to examine the root of a precedent has led to the sprouting of many noxious weeds that distort the meaning of the Constitution and statues alike." *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498, 1515 (2020) (Thomas, J., dissenting).

Further, once one accepts that a general good-faith defense may apply to private party defendants in Section 1983 cases, there is no logical or legal basis to

deny applying the good-faith defense to other Section 1983 defendants, such as municipalities. While this Court has rejected the application of immunity to municipalities found to violate Section 1983, *Owen*, 445 U.S. at 657, the application of the good-faith defense to municipalities will have the same effect: to provide immunity from damage claims. Indeed, the Ninth Circuit has already extended the good-faith defense to municipalities. *See Allen v. Santa Clara Cty. Corr. Peace Officers Ass'n*, 38 F.4th 68, 75 (9th Cir. 2022) ("Because . . . unions get a good faith defense to a claim for a refund of pre-agency fees . . . and municipalities' tort liability for proprietary actions is the same as private parties . . . the County is also entitled to a good faith defense to retrospective § 1983 liability for collecting pre-*Janus* agency fees.") (citations omitted).

The Court should grant review to clarify that immunities and defenses to Section 1983 must rest on a firm statutory basis, and that the new reliance defense recognized below lacks any such basis.

## CONCLUSION

The purpose of Section 1983 is to provide a remedy to citizens whose constitutional rights have been violated by actions taken under color of state law. A good-faith defense that a defendant relied on state law is inconsistent with that purpose. For the reasons stated above, this Court should grant the petition for writ of certiorari and repudiate this ostensible new defense to Section 1983.

Respectfully submitted,

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