No. 19-1104

In the Supreme Court of the United States

MARK JANUS, PETITIONER,
v.
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,
RESPONDENTS.

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

BRIEF IN OPPOSITION FOR RESPONDENTS KWAME RAOUL AND JANEL L. FORDE

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QUESTION PRESENTED

Whether private parties who reasonably relied on state laws that were valid under then-governing precedent are protected by a good-faith defense to Section 1983 liability.

RELATED CASES

- *Janus, et al. v. Am. Fed'n of State, Cty. & Mun. Emps., et al.*, No. 15-c-1235, U.S. District Court for the Northern District of Illinois, Eastern Division. Judgment entered September 13, 2016.
- *Janus, et al. v. Am. Fed'n of State, Cty. & Mun. Emps., et al.*, No. 16-3638, U.S. Court of Appeals for the Seventh Circuit. Judgment entered March 21, 2017.
- *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., et al.*, No. 16-1466, Supreme Court of the United States. Judgment entered June 27, 2018.
- *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., et al.*, No. 15-c-1235, U.S. District Court for the Northern District of Illinois, Eastern Division. Judgment entered March 18, 2019.
- *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., et al.*, No. 19-1553, U.S. Court of Appeals for the Seventh Circuit. Judgment entered November 5, 2019.

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BRIEF IN OPPOSITION

The petition for certiorari should be denied for the reasons respondent American Federation of State, County and Municipal Employees, Council 31 ("AFSCME"), details in its brief in opposition. The lower courts' uniform recognition of a good-faith defense to Section 1983 liability, including in the specific circumstances presented here, leaves this Court with no conflict to resolve. That consensus among the lower courts rests on a sound interpretation of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Wyatt v. Cole*, 504 U.S. 158 (1992), and addresses the concerns shared by all members of this Court in those cases about holding private parties who relied on presumptively valid state laws liable for damages under Section 1983. Thus, contrary to petitioner's argument, the Seventh Circuit neither broke new ground when it recognized the good-faith defense nor denied the retroactive effect of this Court's constitutional holding in *Janus v. American Federation of State, County & Municipal Employees*, 138 S. Ct. 2448 (2018), when it applied the defense to preclude damages here. Therefore, for the reasons stated by AFSCME, which the state respondents adopt, the petition for certiorari should be denied. The state respondents write separately to explain that the continued recognition of the good-faith defense is necessary to protect the States' interest in encouraging private parties to rely on, and act in accordance with, existing laws. This provides yet another reason for this Court to resist petitioner's attempt to disrupt the status quo.

STATEMENT

In 1984, the Illinois General Assembly enacted the Illinois Public Labor Relations Act ("Act"), which created a comprehensive framework to "regulate relations between public employers and employees" through a system of exclusive representation and collective bargaining. 5 ILCS 315/2. The Act authorized employees to form collective bargaining units and select a union to bargain on their behalf over wages, hours, and other conditions of employment. 5 ILCS 315/6(a). Under the Act, a collective bargaining agreement could include a provision allowing the union to collect a fee from members of a bargaining unit who chose not to join the union equal to their proportionate share of the costs of bargaining and administering the agreement. 5 ILCS 315/6(e). That agency fee provision was modeled on an arrangement upheld against a First Amendment challenge in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *See* 83rd Ill. Gen. Assembly, House Proceedings, Nov. 2, 1983, at 188 (statement of Representative Stuffle) ("The fact of the matter is that this Bill, as drafted with the amendatory veto, speaks to and considers the basic case law, the Abood case and a couple of other cases that have defined what fair share is or ought to be."); 83rd Ill. Gen. Assembly, Senate Proceedings, June 27, 1983, at 37 (statement of Senator Savickas) ("We tried to address the question of agency shop brought up by Senator Hudson, and I believe we did so by drafting into this Act the exact language out of the Supreme Court case.").

In 2015, petitioner Mark Janus filed this lawsuit, alleging that the Act's authorization of an agency fee provision violated the First Amendment. Dist. Ct. Doc. 120. The district court dismissed petitioner's suit, Dist. Ct. Doc. 150, and the Seventh Circuit affirmed, *Janus v. Am. Fed'n of State, Cty & Mun. Emps.*, 851 F.3d 746 (7th Cir. 2017). This

Court subsequently granted certiorari and overruled *Abood*, holding that the agency fee arrangements that decision had blessed were unconstitutional. Pet. App. 43a-44a. The Court directed that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" and remanded for further proceedings consistent with its opinion. *Id.* at 97a-98a.

Following this Court's decision, the State of Illinois immediately stopped collecting agency fees. *Id.* at 10a. Nevertheless, on remand, petitioner sought damages against AFSCME to refund him for fees paid prior to this Court's decision overruling *Abood*. *Ibid.* The district court entered summary judgment in favor of AFSCME, concluding that it was entitled to a good-faith defense to liability for damages, *id.* at 31a-37a, and the Seventh Circuit affirmed, *id.* at 1a-30a. The Seventh Circuit assumed that this Court's constitutional holding should be given retroactive effect but, noting that "retroactivity and remedy are distinct questions," held that damages were precluded by the good-faith defense. *Id.* at 12a-30a. In reaching this holding, the Seventh Circuit joined the consensus of courts that have unanimously recognized a good-faith defense to Section 1983 liability, as well as the growing list of courts that have decided that the good-faith defense precluded damages under the circumstances presented here – that is, against a union that relied in good faith on a state statute authorizing the collection of agency fees, which *Abood* had permitted, when the union accepted fees reflecting the proportionate cost of bargaining and administering a collective bargaining agreement. *Id.* at 16a-28a.

REASONS FOR DENYING THE PETITION

This Court's review is unwarranted because the lower courts unanimously agree that private parties may assert a good-faith defense to liability for damages under Section 1983. And the lower courts also agree that the defense protects unions, like AFSCME, who accepted agency fees pursuant to then-valid state laws from actions seeking a refund of fees paid prior to this Court's decision overruling *Abood*. Petitioner's claim that all those decisions are wrong provides no basis for granting certiorari. Indeed, as AFSCME explains, recognition of the good-faith defense follows from this Court's decisions in *Lugar* and *Wyatt*, and application of the good-faith defense is appropriate here because AFSCME reasonably relied on the Act's agency fee provision given this Court's then-governing precedent. In addition, recognition of the good-faith defense protects state interests in promoting public reliance on state laws, while petitioner's contrary position would inject needless instability into the relationship between States and their citizens.

The inequity of holding private parties liable for damages under Section 1983 for actions taken in good-faith reliance on state laws has been apparent to this Court from the start. In *Lugar*, the majority acknowledged the legitimacy of the dissent's concern that permitting Section 1983 actions against private parties could unfairly "ensnare a person who had every reason to believe he was acting in strict accordance with law," 457 U.S. at 944 (Powell, J., dissenting), but explained that the appropriate solution to that problem was "establishing an affirmative defense" to liability, *id.* at 942 n.23. Later, in *Wyatt*, all justices indicated that it would be unfair to impose liability for damages under Section 1983 on private parties that reasonably relied on presumptively valid state laws, as well as that it was necessary to provide protection from such liability. *See* 504 U.S. at 168 ("principles of

equality and fairness may suggest, as respondents argue, 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) ("there 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").

Moreover, imposing Section 1983 damages liability on private parties who acted in accordance with seemingly valid state laws would not only injure the private parties vulnerable to such liability, it would also harm the public. As Chief Justice Rehnquist explained in *Wyatt*, "[t]he 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." *Id.* at 179. States thus have an interest in encouraging private parties to model their conduct on existing state laws.

States, in fact, often implement public policy through private entities acting pursuant to state law, and the good-faith defense furthers their vital interest in maintaining a pool of potential partners. Indeed, the defense has provided protection from liability in numerous contexts of public-private collaboration, such as to a private towing company that towed a vehicle under police supervision, *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008), ambulance personnel who transported someone to the hospital pursuant to a protective custody order, *Palmer v. Garuti*, No. 3:06-cv-795 (RNC), 2009 WL 413129, at *7 (D. Conn. 2009), and an employee of a private company that managed a city park, *Nemo v. City of Portland*, 910 F. Supp. 491, 499 (D. Ore. 1995). By protecting private

parties from unforeseen liability, the good-faith defense serves the public interest in convincing those entities to utilize state laws and participate in state programs. Holding private parties liable for actions taken pursuant to presumptively valid state laws, by contrast, would discourage them from relying on those laws and thereby harm the public.

The Seventh Circuit's opinion below, like the opinions of the many other courts that have decided the question presented by this case, honors this state interest in encouraging reliance on presumptively valid state laws. The Act's agency fee provision was modeled on *Abood* and indisputably valid under that decision. *See supra* p. 2. Holding private parties like AFSCME liable for relying on a state statute that was valid under then-governing precedent would injure the States by diminishing public confidence in the reliability of legislation and the rule of law. The Seventh Circuit correctly stated that "[t]he Rule of Law requires that parties abide by and be able to rely on, what the law is, rather than what the readers of tea-leaves predict that it might be in the future." Pet. App. 26a; *see also Danielson v. Inslee*, 945 F.3d 1096, 1100 (9th Cir. 2019) *(*"private parties should be entitled to rely on binding judicial pronouncements and state law without concern that they will be held retroactively liable for changing precedents"). The widespread recognition of a good-faith defense to Section 1983 liability protects state interests by promoting public reliance on presumptively valid state laws. This is yet another reason, in addition to those detailed by AFSCME, that this Court should decline petitioner's request to upset that settled understanding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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