No. 19-1104

IN THE

*Supreme Court of the United States*

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MARK JANUS,

*Petitioner,*

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

*Respondents.*

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

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# REPLY TO BRIEFS IN OPPOSITION

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**MISCELLANEOUS**

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AFSCME acknowledges that this Court raised, but did not decide, the question of whether there exists a "good faith defense" to Section 1983 damages liability in *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). *See* AFSCME Br. 6. AFSCME also acknowledges that recently a slew of lower courts, in cases dealing with unconstitutional agency fee seizures, have relied on *Wyatt's* dicta to hold that a defendant's reliance on a then-thought valid statute exempts the defendant from paying damages to injured parties under Section 1983. *See id*. at 6-7, 11.

That is the reason the Court should finally resolve the question it left open in *Wyatt* and *Lugar*: to disabuse lower courts of the notion that a defendant acting under color of a state statute is both an element of and a defense to Section 1983. This statutory reliance defense is not the defense suggested in *Wyatt*. Indeed, this new defense is incompatible with Section 1983's text, with equitable principles, and with this Court's retroactivity precedents.

Nevertheless, the Ninth, Seventh, Sixth, and Second Circuits and numerous district courts have now accepted this defense in the wake of *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). Unless repudiated by this Court, this new defense will serve to deprive innocent victims of agency fee seizures and other constitutional deprivations of compensation for their injuries. The Court should hold there is no statutory reliance defense to Section 1983. This case is the ideal vehicle in which to do it.

### A. A Statutory Reliance Defense Has No Basis in *Wyatt*, in Section 1983, or in Equity.

1. The good faith defense several Justices supported in *Wyatt* was a defense to the malice and

probable cause elements of a Section 1983 due process claim arising from the use of a judicial process. 504 U.S. at 167 n.2; *id*. at 172 (Kennedy J., concurring); *id*. at 176 n.1 (Rehnquist C.J., dissenting). As Chief Justice Rehnquist explained: "[r]eferring 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*. at 176 n.1.

That is how the circuit courts initially interpreted *Wyatt*. *See Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993); *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). The new interpretation sweeping through the lower courts—that *Wyatt* suggested a broad statutory reliance defense to all Section 1983 damages claims—has no basis in this Court's decision. *See* Pet. 7-11.

AFSCME tries to create a disagreement where none exists by arguing (at 17-19) that Justices in *Wyatt* found malice and lack of probable cause to be elements not for proving the due process violation, but for proving damages liability for that violation. That is also Janus' position. The parties differ in that Janus submits that malice and lack of probable cause are not elements for establishing damages liability for a deprivation of First Amendment rights.

AFSCME submits (at 18-21) that most, if not all, Section 1983 claims against private defendants are analogous to malicious prosecution and abuse of process because such defendants must invoke state processes for there to be state action under Section 1983.[1] To the contrary, "[t]he tort of abuse of process requires misuse of the *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (emphasis added); *see* J. Bishop, *Commentaries on Non-Contract Law* § 224 at 90 (1889) (stating that "[t]he [common] law has provided the action of malicious prosecution as a remedy for private injuries from abuse of the process of the courts."). The analogy is not close enough to justify making malice and lack of probable cause elements of a First Amendment compelled subsidization of speech claim, much less elements of *every* Section 1983 damages claim against a defendant that relies on a statute.

Tort analogies are merely a rough guide for determining the elements of Section 1983 claims. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 920-21 (2017). Some Section 1983 claims have no common law equivalent. "[Section] 1983 is not simply a federalized amalgamation of pre-existing common-law claims.'" *Id.* at 921 (quoting *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012)). A First Amendment claim for compelled subsidization of speech has no common

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[1] AFSCME's assertion only proves Janus' point that a statutory reliance defense overlaps with Section 1983's under-color-of-state-law element. *See* Pet. 11-13.

law tort equivalent. There is no basis for making malice and lack of probable cause elements for establishing damages liability for these types of First Amendment violations.

Notably, the Seventh Circuit did not base its statutory reliance on common law. The court said the "search for the best [tort] analogy is a fool's errand." Pet. App. 24a. The court found "reasonable arguments for several different torts," though it was "inclined to agree with AFSCME that abuse of process comes closest." *Id.* Ultimately, the court chose to "leave common-law analogies behind." *Id.* at 25a. And so did the Ninth Circuit in *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019), which found "[i]t would be an odd result for an affirmative defense grounded in concerns for equality and fairness to hinge upon historical idiosyncrasies and strained legal analogies for causes of action with no clear parallel in nineteenth century tort law." The fact that AFSCME cannot defend the Seventh's and Ninth Circuit's decisions on their own terms is telling.

2. AFSCME does not defend any other ostensible basis for a statutory reliance defense. Like the Seventh and Ninth Circuits, AFSCME makes no attempt to square a statutory reliance defense with Section 1983's statutory command: 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 (emphasis added). Nor does AFSCME attempt to explain how acting "under color of any statute" can

be both an *element* and a *defense* to Section 1983 liability. *See* Pet. 11-13.

AFSCME only attempts to minimize the self-defeating statutory interpretation its defense requires by asserting (at 21) that claims against private defendants are a small fraction of Section 1983 claims. But that does not refute the point that a statutory reliance defense lacks a statutory basis. And the assertion is small comfort to victims of union agency fee seizures, or victims of other constitutional deprivations, who will not receive just compensation as a result of this new defense.

With respect to the notion that equity justifies a statutory reliance defense, *see Danielson*, 945 F.3d at 1101, while AFSCME says (at 24) that equality and fairness support the defense, AFSCME makes no attempt to defend that proposition. It is likely because the proposition is indefensible. *See* Pet. 14-18. Courts cannot just carve equitable exemptions into Section 1983. *See id*. at 15. Even if they could, it would be inequitable to *victims* of constitutional deprivations, such employees who had agency fee seized from them, to deprive them of relief for their injuries. *See id*. at 15-17. As this Court said in *Owen v. City of Independence*, 445 U.S. 622, 654 (1980), when it held that Section 1983's equitable purposes did not justify a good faith immunity for municipalities, "elemental notions of fairness dictate that one who causes a loss should bear the loss."

Finally, the State of Illinois argues (at 5-6) that private parties who act under state law should be shielded from liability to encourage those parties to rely on state laws. But Congress reached the opposite conclusion in Section 1983 when it mandated that "[e]very person who, under color of any statute" deprives a citizen of their constitutional rights "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. This statutory mandate not only ensures that victims of constitutional deprivations are made whole, it deters future unconstitutional conduct. *See Owen*, 445 U.S. at 651. In *Owen*, the Court said with respect to municipal defendants that "[t]he 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. The same deterrence interest weighs against recognizing a statutory reliance defense.

The inability of AFSCME, the State of Illinois, and the Seventh and Ninth Circuits to identify any cognizable legal basis for a statutory reliance defense strongly suggests that it lacks any such basis. The Court should grant review to repudiate this new defense lower courts are recognizing to Section 1983 based on their misunderstanding of *Wyatt*.

**B. A Statutory Reliance Defense Conflicts with Retroactivity Principles.**

This Court has held that the retroactive effect of its constitutional jurisprudence precludes courts from fashioning remedies based on a party's reliance on a statute before it was held unconstitutional. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995). A statutory reliance defense is just such a remedy. *See* Pet. 13-14.

AFSCME asserts that "even if a newly recognized legal principle applies retroactively, that rule will not dictate the outcome of a claim for monetary relief where there is 'a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief.'" AFSCME Br. 23 (quoting *Reynoldsville Casket*, 514 U.S. at 759). That is true, but it cannot be said that a statutory reliance defense has "'nothing to do with retroactivity.'"

The ostensible defense is predicated on the (incorrect) notion that it is inequitable to hold defendants liable for injuries they caused when relying on a statute that has not yet been declared unconstitutional. *See, e.g., Danielson*, 945 F.3d at 1101. The defense turns on whether the defendant reasonably relied on a statute before it was held unconstitutional. A statutory reliance defense has everything to do with avoiding the retroactive effect of court decisions holding state statutes unconstitutional. The defense is incognizable under *Reynoldsville Casket*.

### C. The Question Presented Is Important

AFSCME does not dispute the importance of the question presented. Nor could it. There are at least thirty-seven (37) class action lawsuits pending that seek refunds from unions for agency fees they seized from workers in violation of their First Amendment rights. *See* Amicus Br. of Goldwater Inst. et al., 4. These workers will all be denied relief for their injuries if a statutory reliance defense is accepted.

The lower courts' recognition of a statutory reliance also has grave consequences for victims of other constitutional deprivations. AFSCME asserts the defense may be raised against a host of constitutional claims, *see* AFSCME Br. 9, and when the legality of the state law the defendant relied upon is uncertain, *id*. at 26. And there is no reason municipal defendants could not raise this defense in addition to private defendants. A broad defense to Section 1983 will come into existence absent review by this Court.

### D. This Case Is an Excellent Vehicle to Resolve the Question This Court Left Open in *Wyatt*.

The Court should take this case to resolve whether there exists a statutory reliance defense to Section 1983 because the situation here—a union claiming this ostensible defense shields it from compensating employees for agency fee seizures—is the same situation presented in over three dozen other cases. The Court's decision in this case would largely determine the outcome of those similar cases. This case also is the flagship case that established agency fee seizures

are unconstitutional. It is a fitting vehicle to resolve whether victims of agency fee seizures are entitled to damages for their injuries.

AFSCME argues (at 13) the Court should wait until a court breaks ranks with courts that have accepted a statutory reliance defense. That, however, would deny relief to employees in earlier decided agency-fee seizure cases, which would be over by that point (and new cases could not be filed for those employees because of statutes of limitations).

Moreover, twenty-eight (28) of the thirty-seven (37) class action cases seeking a return of agency fees are in the Ninth, Seventh, Sixth, and Second Circuits, which have accepted a statutory reliance defense. *See* Amicus Br. of Goldwater Inst. et al., App. 1a-6a (listing cases). Most individual actions also are in these circuits. *See id.* at 7a-9a. A different result cannot be expected in cases pending in these circuits.

AFSCME also argues (at 25-27) the Court should wait for a case that does not involve union agency fee seizures. But doing so would mean that unions would escape having to compensate tens of thousands of victims of their agency fee seizures (which, of course, is why AFSCME suggests that course of action). The Court should not countenance such an inequity. In *Janus*, the Court recognized the "considerable windfall" unions wrongfully received, and found it "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."

Pet. App. 96a. The Court should permit nonmembers to recover a portion of the monies unconstitutionally seized from them.

Finally, AFSCME contends (at 25-27) the Court should wait for a case where a defendant relies on a state law whose constitutionality was uncertain at the time. On its own terms, that is no reason to avoid determining, in this case, if a statutory reliance defense exists. In any event, such uncertainty exists here. In *Janus*, this Court recognized that "unions have been on notice for years regarding this Court's misgiving about *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]" and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that *the constitutionality of such a provision was uncertain*." Pet. App. 94a (emphasis added).

That is especially true of AFSCME. In early 2015, Illinois' Governor, and then Mark Janus, sued AFSCME and alleged Illinois' agency fee statute was unconstitutional. Pet. App. 132a. The Court granted certiorari in this case on September 28, 2017. AFSCME either knew or should have known that the constitutionality of Illinois' agency fee statute was uncertain when it was seizing agency fees from Janus and other dissenting employees prior to June 27, 2018. This case is a suitable vehicle for determining not only if there is a statutory reliance defense to Section 1983, but also the scope of that defense if it is found to exist.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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