

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**

PETITIONER'S SUPPLEMENTAL BRIEF

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Pursuant to Rule 15.8 of the Court's Rules, Petitioner Mark Janus files this supplemental brief to bring to the Court's attention a recently decided case: *Diamond v. Pennsylvania State Education Association*, Nos. 19-2812 & 19-3906, 2020 WL 5084266 (3d Cir. Aug. 28, 2020). A majority of the panel in *Diamond* rejected the "good faith defense" recognized by the Second, Sixth, Seventh, and Ninth Circuits, creating a conflict that the Court should resolve by granting review in this case.

1. *Diamond* addressed the question presented here: is there a good faith defense to 42 U.S.C. § 1983? The three members of the Third Circuit panel reached different conclusions in separate opinions.

Judge Rendell accepted the good faith defense recognized by the Seventh Circuit in this case. *Diamond*, 2020 WL 5084266 at **4,7. Judge Rendell found this defense to be predicated on policy interests in equality and fairness or, alternatively, on an analogy to the common law tort of abuse of process, *id.* at *6 & n.4.

Judge Fisher, concurring in the judgement, disagreed and found no categorical good faith defense to Section 1983. *Id.* at *8. He recognized that this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992) did not imply "that alternative policy grounds might supply an affirmative defense" to Section 1983. *Diamond*, 2020 WL 5084266 at **10-11. Judge Fisher also recognized that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to a First Amendment compelled speech claim. *Id.* at *13.

However, while he rejected a good faith defense, Judge Fisher found an alternative limit to Section 1983 liability. According to Judge Fisher, prior to

1871, “[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision.” *Id.* at *8. Judge Fisher concluded that Section 1983 incorporates this exception to retroactive liability. *Id.* at *16.

Judge Phipps, dissenting, agreed with Judge Fisher that there is no good faith defense to Section 1983. *Id.* at *17. He found that “principles of equality and fairness” do not justify such a defense. *Id.* at *21. According to Judge Phipps, “[g]ood 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.*

Turning to Judge Fisher’s alternative limit on Section 1983 liability, Judge Phipps found it “immaterial that no pre-1871 cause of action permitted recovery for voluntary payments that were subsequently declared unconstitutional” because “the Civil Rights Act of 1871 established a new cause of action in part to provide ‘a remedy where state law was inadequate.’” *Id.* at *19 (quoting *Monroe v. Pape*, 365 U.S. 167, 173 (1961), overruled on other grounds by *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658 (1977)). Moreover, “the agency fee payments at issue here were not voluntary—they were wage garnishments that were paid to unions.” *Id.* Judge Phipps thus did “not see the common law as limiting the scope of a § 1983 claim for compelled speech—either through a good faith affirmative defense or through a separate limitation on the statutory cause of action.” *Id.*

2. *Diamond* supports granting review here because a majority of the Third Circuit panel rejected the good faith defense recognized by the Seventh Circuit here and by the Second, Sixth, and Ninth Circuits. See Pet. App. 25a; *Wholean v. CSEA*, 955 F.3d 332 (2d Cir. 2020); *Ogle v. Ohio Civil Serv. Emps. Ass’n, AFSCME Local 11*, 951 F.3d 794 (6th Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019). A majority of the Third Circuit panel also rejected the two alternative justifications cited by some of these courts for an affirmative good faith defense: policy interests in equality and fairness and a common law tort analogy.¹ See *Diamond*, 2020 WL 5084266 at **11-13 (Judge Fisher, concurring in the judgment); *id.* at **17-21 (Judge Phipps, dissenting). Circuit courts now disagree on the issue this Court left open in *Wyatt*, 504 U.S. at 169: is there a good faith defense to Section 1983 damages liability?²

The Court should finally resolve this important issue and hold there is no good faith defense to Section 1983 for the reasons stated in the petition and by Judge Phipps in *Diamond*. His opinion persuasively establishes that neither equitable interests, nor common law analogies or history, justify deviating from Section 1983’s statutory mandate that “[e]very person

¹ See *Danielson*, 945 F.3d at 1101-02; *Ogle*, 951 F.3d at 797; *Wholean*, 955 F.3d at 334.

² Respondent AFSCME will miss the mark if it responds by arguing that the circuit courts are not split on the narrower issue of whether unions are liable for damages for pre-*Janus* agency seizures. The primary issue before this Court is whether there is a good faith defense to Section 1983. The application of any such defense to pre-*Janus* agency fee seizures is a secondary issue.

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.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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