

No. 19-1104

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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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**SUPPLEMENTAL BRIEF  
FOR RESPONDENT AFSCME COUNCIL 31**

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## SUPPLEMENTAL BRIEF

Bowing to the reality that the Petition on its face does not satisfy the criteria that this Court uses to decide whether to grant certiorari, Petitioner, in his Supplemental Brief, has changed course. He now claims that the Third Circuit’s recent decision in *Diamond v. Pennsylvania State Education Association*, -- F.3d --, 2020 WL 5084266 (3d Cir. Aug. 28, 2020), “creat[es] a conflict” with the decisions of other circuits, Petitioner’s Suppl. Br. at 1, even though it reaches the very same result as the Second, Sixth, Seventh, and Ninth Circuit decisions. What creates this supposed “conflict,” according to Petitioner, is that the reasoning of one of the concurring judges in *Diamond* differs from that of the other judges who have written on this question.

There is, in fact, still no conflict that requires this Court’s attention. As this Court often has stated, it “reviews judgments, not opinions.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.3, at 4-11 (11th ed. 2019) (“A genuine conflict . . . arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.”). In *Diamond*, the Third Circuit joined all four of the other courts of appeals that have considered the issue presented by this Petition in holding that unions sued under 42 U.S.C. § 1983 for agency fees assessed and collected prior to this Court’s decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), can assert a defense to monetary liability for following state law and this Court’s precedent as it existed at the time of their actions. That some judges have used different

reasoning to reach the identical result does not create a conflict requiring this Court's intervention. And, in any case, Petitioner overstates the divergence among the reasoning of the lower courts in these cases.

I. *Diamond* involved two of the numerous class-action lawsuits brought under § 1983 after *Janus*, seeking monetary liability in the amount of agency fees remitted to unions before that decision—*i.e.*, at a time when agency fees were expressly authorized by state law and were constitutional under this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The respective district courts both held—along with all other courts that have considered the issue—that the defendant unions could not be held liable under § 1983 for having acted in accordance with the law as it existed at the time. *Diamond v. Pa. State Educ. Ass'n*, 399 F. Supp. 3d 361 (W.D. Pa. 2019); *Wenzig v. SEIU Local 668*, 426 F. Supp. 3d 88 (M.D. Pa. 2019).

The Third Circuit affirmed, with two separate opinions making up the court's majority. Judge Rendell voted to affirm on the basis of a prior Third Circuit opinion, which had held, in the wake of this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992), that “private defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity.” *Diamond*, 2020 WL 5084266, at \*5 (quoting *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994)). She also concluded, in the alternative, that an analogy to the common-law tort of abuse of process supported the unions' defense. *Id.* at \*6 n.4.

Judge Fisher authored a concurring opinion. While Judge Fisher disagreed with Judge Rendell's view

that the Third Circuit’s *Jordan* decision was controlling, *id.* at \*12, he concluded that the unions could assert a defense to a § 1983 claim for monetary relief in this circumstance because “[t]here was available in 1871, in both law and equity, a well-established defense to liability substantially similar to the liability the unions face here,” *id.* at \*8. Judge Phipps dissented, disagreeing that the common-law provided a basis for such a good-faith defense. *Id.* at \*17-20.

As is clear from the foregoing, the Third Circuit—far from creating a conflict with the other courts of appeals—has now *joined* the Second, Sixth, Seventh, and Ninth Circuits in holding that unions can assert a defense to monetary liability under § 1983 for collecting agency fees in reliance on state statutes and this Court’s *Abood* precedent. *See* Union Opp’n Br. 12 (citing cases). *Diamond* thus presents no reason for this Court to grant certiorari in this case.

Undaunted, Petitioner argues that *Diamond* has created a circuit-court conflict because, he asserts, “a majority of the Third Circuit panel [Judges Fisher and Phipps] rejected the good faith defense” that has been recognized by the other courts of appeals. Petitioner’s Suppl. Br. at 3.

There is no substance to this argument—only semantics. While Judge Fisher did not use the term “good-faith defense,” this Court surely does not sit to resolve differences in nomenclature. The result reached by Judge Fisher is, on the facts presented by this and the other post-*Janus* cases, no different from the defense that the other courts of appeals have recognized—a defense to a claim under § 1983 for monetary liability for unions that relied on state law and this Court’s directly-on-point precedent that was controlling at the time of their actions. The fact that

Judge Fisher relied on somewhat different reasoning—and, in particular, a different body of common-law authority—than the other courts to reach the same result does not amount to a conflict requiring this Court’s intervention. To the contrary, Judge Fisher’s analysis simply identifies an additional rationale for the uniform result reached by the lower courts.

II. Quite apart from that point, Petitioner overstates the divergence in reasoning between the Third Circuit and the other courts. In particular, after citing the courts of appeals that have analogized § 1983 agency-fee claims to the common-law tort of abuse of process, Petitioner attempts to create discord by asserting that a majority of the Third Circuit “rejected a . . . common law tort analogy.” Petitioner’s Suppl. Br. at 3. That assertion is wrong. Judge Fisher expressly found it “unnecessary” to decide whether the tort of abuse of process was sufficiently analogous to the § 1983 claims here in order for that comparison to serve as the basis for the unions’ defense, because he found the defense amply supported by a separate body of common-law authority. *See* 2020 WL 5084266, at \*13.

It thus remains the case, as we showed at pages 19-20 of our opposition brief, that those courts that have addressed the issue are in agreement that—similar to this Court’s analysis in *Wyatt*—the common-law tort of abuse of process provides an appropriate analogy to the § 1983 claim at issue here. *See Ogle v. Ohio Civil Serv. Emps. Ass’n*, 951 F.3d 794, 797 (6th Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096, 1102 (9th Cir. 2019); Pet App. 24a.

**CONCLUSION**

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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