No. 20-1383

In the Supreme Court of the United States

ARTHUR DIAMOND, ET AL.
Petitioners

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, ET AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

COMMONWEALTH'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The questions presented, as stated by Petitioners, are as follows:

Is there a good-faith defense to 42 U.S.C. § 1983 that shields a defendant from damages liability for depriving citizens of their constitutional rights if the defendant acted under color of a law before it was held unconstitutional?

Are employees who had compulsory union fees seized from them in violation of their First Amendment rights prior to *Janus v. AFSCME, Council 31*, __ U.S. __,138 S. Ct. 2448 (2018), entitled to damages or restitution for their injuries?

PARTIES TO THE PROCEEDING

Petitioners are Arthur Diamond, Jeffrey Schawarts, Sandra Ziegler, Matthew Shively, Matthew Simkins, Douglas Kase, Justin Barry, Janine Wenzig, and Catherine Kioussis (Petitioners).

Respondents are Pennsylvania Attorney General Josh Shapiro, Chairman of the Pennsylvania Labor Relations Board James Darby, board member Albert Mezzaroba, and former board member Robert Shoop, Jr. (collectively the Commonwealth officials).

Also respondents are the Pennsylvania State Education Association, the Chestnut Ridge Education Association, the National Education Association, the Service Employees International Union Local 668 (collectively the Unions), and Bedford County District Attorney Lesley Childers-Potts.

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INTRODUCTION

For four decades, this Court's precedent allowed public sector unions to collect fair share fees from non-union employees. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977). Pennsylvania, like many states, enacted a statute in reliance on *Abood*, which safeguarded collective bargaining agreements with fair share clauses by requiring public employers and unions to collect the fees and imposing criminal sanctions on those who willfully violated that statute. In Petitioners' view, however, public sector unions were wrong to rely on this Court's pronouncements and should have defied state law in anticipation that this Court, after 40 years, would reverse *Abood*.

Every court that has been presented with Petitioners' view has correctly rejected it, and since January of this year, this Court has denied seven petitions for certiorari that have asked this Court to upend that consensus. Undeterred, Petitioners here present the same arguments raised in those rejected petitions. As with those prior petitions, there is no confusion in the law. And here, Petitioners present a case with more idiosyncrasies than the prior seven.

The Court should not issue a ruling that would discourage respect for its precedent, and encourage defiance of state laws. This eighth invitation for the Court to do precisely that should be declined.

OPINIONS BELOW

The District Court for the Western District of Pennsylvania's opinion granting the Pennsylvania State Education Association, the Chestnut Ridge Education Association, the National Education Association, and Commonwealth officials' motions to dismiss is reported at *Diamond v. Pa. State Education Assoc.*, 399 F.Supp.3d 361 (W.D. Pa. 2019) and is reprinted at Appendix C of the Petition.

The District Court for the Middle District of Pennsylvania's opinion granting the Service Employees International Union Local 668's motion to dismiss is reported at *Wenzig v. Serv. Employees Int'l Union Local 668*, 426 F.Supp.3d 88 (M.D. Pa. 2019) and is reprinted at Appendix B of the Petition.

The Court of Appeal's opinion affirming the district courts' judgments is reported at *Diamond v. Pa. State Education Assoc.*, 972 F.3d 262 (3d Cir. 2020) and is reprinted at Appendix A of the Petition.

STATEMENT OF THE CASE

1. For several decades, Pennsylvania had authorized public sector employers and labor unions to bargain for an arrangement whereby a single union could be granted the exclusive right to collectively bargain for the employees on the condition that the union represented *all* employees, even those who chose not to join the union. This arrangement promoted uniform bargaining and streamlined administration. It also, however, created an incentive for employees to decline union membership and its corresponding dues, while

still accruing the benefits of union representation. Pet. App. A at 7 (3d Cir. Op.).

To address this concern, Pennsylvania enacted legislation in 1988 requiring, if the provisions of a collective bargaining agreement so provided, that nonmembers of the collective bargaining unit "pay to the exclusive representative a fair share fee." 71 P.S. § 575(b). "Fair share fees" were the regular membership dues required of union members less the cost of activities not related to the union's collective-bargaining representation. 71 P.S. § 575(a). The public employer deducted the fair share fee from the non-union members' paychecks and transmitted it to the union representing all of the employees. 71 P.S. § 575(c).

The Pennsylvania General Assembly enacted this legislation relying on this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977). *Abood* upheld the constitutionality of fair share fees in the public sector so long as those fees were not used for political activities. *Ibid.* As the Third Circuit observed below, over the course of four decades this Court re-affirmed its holding in *Abood* against similar challenges to the constitutionality of state laws. Pet. App. A at 9 (3d. Cir. Op.) (citing, *inter alia*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) *and Locke v. Karass*, 555 U.S. 207 (2009)).

The Unions here were chosen as the exclusive bargaining representatives for certain Pennsylvania public employees, including Petitioners. Under the statutory framework described above, the public employers

deducted fair share fees from the paychecks of the non-member employees and transmitted those fees to the Unions.

2. On June 27, 2018, the Court overruled *Abood* and its progeny, deciding for the first time that public sector employees could not be constitutionally required to pay fair share fees. *Janus v. AFSCME Counsel 31*, __ U.S. __, 138 S.Ct. 2448 (2018) (*Janus I*). In accord with this change in the law, Pennsylvania public employers immediately terminated the deduction of fair share fees from the paychecks of non-union member employees, including Petitioners. Pet. App. A at 11-12 (3d Cir. Op.).

3. In the United States District Court for the Western District of Pennsylvania, Petitioner Arthur Diamond and six other former and current public-school teachers filed a putative class action under 42 U.S.C. § 1983 against the Pennsylvania State Education Association, the Chestnut Ridge Education Association, the National Education Association, and Commonwealth officials to, in pertinent part, collect fair share fees paid to these unions prior to June 27, 2018. Both the unions and the Commonwealth officials filed motions to dismiss. Pet. App. C at 1-2 (*Diamond* Dist. Ct. Op.).

The district court granted both sets of motions. *First* it concluded that the Eleventh Amendment barred the teachers' suit against the Commonwealth officials, as there were no allegations of continuing violations of federal law or that these officials were involved in the past collection of fair share fees. Pet. App. C at 19, 24-25 (*Diamond* Dist. Ct. Op.). *Second*, the district court concluded that these unions were entitled to a good-

faith defense to Section 1983 liability because they reasonably relied upon Pennsylvania law and Supreme Court precedent in collecting fees prior to *Janus I*. Pet. App. C at 48-58 (*Diamond* Dist. Ct. Op.). Diamond and the other teachers appealed.[1]

4. In the United States District Court for the Middle District of Pennsylvania, Petitioners Janine Wenzig and Catherine Kioussis filed a similar action for fair share fees collected prior to June 27, 2018 by the Service Employees International Union Local 668. Pet. App. B at 1 (*Wenzig* Dist. Ct. Op.). Local 668 filed a motion to dismiss, raising, in relevant part, a good-faith defense to liability given the state of the law when it collected the fees. The district court agreed, granting the motion and dismissing the complaint. Pet. App. B at 18-20, 24-25 (*Wenzig* Dist. Ct. Op.). Mses. Wenzig and Kioussis appealed.

5. The Third Circuit Court of Appeals consolidated the *Diamond* and *Wenzig* appeals and affirmed the district courts' judgments, joining "our sister circuits who, in virtually identical cases, have held that because the unions collected the fair share fees in good-faith reliance on a governing state statute and Supreme Court precedent, they are entitled to a good-faith defense." Pet. App. A at 14 (3d Cir. Op.).

In the lead opinion, Judge Rendell cited binding Third Circuit precedent, *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994), establishing that a "good faith defense is available to

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[1] The teachers in *Diamond* did not appeal the district court's dismissal of their claims against the Commonwealth officials.

private parties who act under color of state law and are sued for monetary liability under § 1983." Pet. App. A at 16 (3d Cir. Op.) (quotation marks omitted). Under this precedent, "private defendants should not be held liable under Section 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." *Ibid.* (quotation marks omitted). Petitioners failed to establish these elements where "the Unions' collection of fair-share fees was authorized by over four decades of Supreme Court precedent and a Pennsylvania statute that explicitly authorized fair-share fees for public-sector unions like the Unions." *Id.* at 18 (citation omitted).

Judge Fisher, concurring in the judgment, reached the same holding, though through a different pathway. Judge Fisher concluded that Petitioners' claims failed 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 24. He agreed with Judge Rendell in rejecting the *Diamond* teachers' argument that the Union's good-faith defense did not apply to claims sounding in restitution. *Id.* at 21-22, 44 n.6. Where he diverged from Judge Rendell was in the breadth of the *Jordan* decision, which in his view was "best read as limited to the context before it." Pet. App. A at 34-35 (3d Cir. Op.).

In response to Judge Fisher's concurrence, Judge Rendell noted that Petitioners had "not urge[d] (or even suggest[ed]) that we delve into the historical 'common-law approach' with the level of historical detail and specificity that JUDGE FISHER's concurrence would require[.]" *Id.* at 20 n.4. But if such an approach

was warranted, Petitioners' claims were most analogous to the common-law tort of abuse of process, because it is a "cause[] of action against private defendants for unjustified harm arising out of the misuse of governmental processes[.]" *Ibid.* (quoting *Wyatt v. Cole*, 504 U.S. 158, 164 (1992)). Abuse of process requires the same two elements to defeat the defense recognized in *Jordan*: malice and probable cause. *Ibid.* Therefore, under either the *Jordan* defense or the historical common-law approach suggested by Judge Fisher, Petitioners' Section 1983 claims were barred by a good-faith defense. *Ibid.*

Petitioners filed a motion for rehearing and rehearing *en banc*, which the Third Circuit denied. Pet. App. D (3d Cir. Order denying *en banc*).

REASONS FOR DENYING THE WRIT

Petitioners abandoned their specific claims against the Commonwealth officials. But Pennsylvania—like all states—has a strong interest in the good-faith defense. The Court should not entertain Petitioners' effort to radically alter the law for three fundamental reasons.

First, there is no conflict for this Court to resolve, as the lower courts are in agreement as to the existence of a good-faith defense. *Second*, this case presents an inherently flawed vehicle to consider the questions presented. *Third*, the consensus among the courts is unsurprising, as the good-faith defense is grounded in basic principles of the law.

I. There is No Disagreement Among the Lower Courts on the Existence of a Good-Faith Defense.

Petitioners argue that the Third Circuit's decision conflicts with the holdings of six other Circuit Courts of Appeals. Pet. at 9. It does not. The courts of appeals—including the Third Circuit—have unanimously rejected attempts to hold public-sector unions liable for their good-faith reliance on pre-*Janus* state law and Supreme Court precedent. Petitioners attempt to craft a conflict where none exists.

This case is about whether public-sector unions that collected fair share fees prior to *Janus* in good-faith reliance on state law and four decades of Supreme Court precedent are nevertheless liable for retrospective monetary relief under 42 U.S.C. § 1983. The Third Circuit answered that question in the negative. Pet. Appx. A at 18. So has the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. *See Doughty v. State Employees' Ass'n of N.H.*, 981 F.3d 128, 133–37 (1st Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 1163740 (Mar. 29, 2021); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 379–80 (4th Cir. 2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 231560 (Jan. 25, 2021)*; Lee v. Ohio Educ. Ass'n,* 951 F.3d 386 (6th Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 231559 (Jan. 25, 2021); *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*)*, cert. denied*, 2021 WL 231649 (Jan. 25, 2021)*;* and *Danielson v. Inslee*, 945 F.3d 1096, 1099 (9th Cir. 2019), *cert. denied*, _ S. Ct. _, 2021 WL 231555 (Jan. 25, 2021).

It is no moment, of course, that the judges in some of these cases arrived at the same conclusion using different paths carved out by their circuit's precedent. "[T]his Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). A circuit split only exists where the "conflicting courts would actually reach different results given the same set of facts." Timothy S. Bishop, *et al.*, "Considering Supreme Court Review," Federal Appellate Practice, 648 (ed. Philip Allen Lacovara 2008). Because every court of appeals to consider this question arrived at the same answer under similar facts, no conflict exists.

Given this unanimity of holdings among the circuit courts, Petitioners propose a broader, more academic question: Whether a general good-faith defense exists as a shield against any claim under 42 U.S.C. § 1983 for actions done under the color of law before that law was held unconstitutional? Pet. at i. But as the Third Circuit emphasized, "let us be clear: we are not talking about an across-the board good faith defense to a § 1983 action that is inconsistent with the common law." Pet. App. A at 17, n.3 (3d Cir. Op.). The good-faith defense recognized by the Third Circuit is instead "narrow," as "only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute *and* unambiguous Supreme Court precedent validating that statute." Pet. App. A at 23 (3d Cir. Op.) (cleaned up). That narrow defense is in accord with the other circuits. *See, e.g.*, *Janus II*, 942 F.3d at 367 ("Before closing, we emphasize again that the good-faith defense to section 1983 liability is narrow. It is not true,

as Mr. Janus charges, that this defense will be available to 'every defendant that deprives any person of any constitutional right.'"); *Ogle*, 951 F.3d at 797 ("A narrow good-faith defense protects those who unwittingly cross that line 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.").

As to whether a *narrow* good-faith defense exists for private parties sued under Section 1983, courts have unanimously answered that question in the affirmative. In *Wyatt v. Cole*, 504 U.S. 158, 169 (1992), five Justices expressed support for such a defense without disagreement from the majority. *See id*. at 174 (Kennedy, J., concurring) ("[T]here is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law. . . ." (citing *Birdsall v. Smith*, 122 N.W. 626, 627 (Mich. 1909))); *id*. at 177 (Rehnquist, C.J., dissenting) (agreeing "that a good-faith defense will be available for respondents to assert on remand"); *id*. at 169 (majority opinion) (leaving open the possibility that private defendants "could be entitled to an affirmative defense based on good faith"). And again, every court of appeals to consider the question has concluded that a narrow good-faith defense exists. *See, e.g., Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008); *Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993) (*Wyatt II*).

This includes the Third Circuit. *See Jordan*, 20 F.3d at 1276–77 ("[W]e believe in accord with the court of appeals in *Wyatt* [*II*] that a good faith defense [for private parties] is available[.]"). This circuit court precedent, some of which dates back over two decades, has not changed with time. Thus, the issue of whether a good-faith defense exists is not one that requires this Court's guidance.

Presented with unbroken consensus, Petitioners attempt to invent conflict by focusing on Judge Fisher's concurrence. But Judge Fisher did not reject the existence of a good-faith defense for private parties. Pet. 9. In fact, he explicitly recognized that, in *Jordan*, 20 F.3d at 1276, the Third Circuit held that private-parties sued under Section 1983 were, in certain cases, protected by a good-faith defense. Pet. App. A at 34 (3d Cir. Op.). He merely disagreed with Judge Rendell on the reach of *Jordan*.[2]

In at least three prior petitions for writ of certiorari, petitioners suggested that Judge Fisher's concurrence somehow represented a circuit split. *See Janus v. American Fed. Of State, County and Municipal Employees, Council 31*, 19-1104 (suppl. brief at 1-4); *Ogle v. Ohio Civil Service Employees Assoc. AFSCME Local 11, AFL-CIO*, 20-486 (pet. at 15-18); *Wholean v. CSEA SEIU Local 2001*, 20-605 (pet. 16-18). It did not. What those prior petitions failed to recognize—as Petitioners fail to recognize here—is that a disagreement between

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[2] Even if Judge Fisher disagreed with the idea of a good-faith defense for private parties sued under Section 1983, and he did not, he would have been bound by Third Circuit precedent. *See Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 293 n.13 (3d Cir. 2018); 3d Cir. I.O.P. 9.1.

two Third Circuit judges over the reach of Third Circuit precedent does not amount to a circuit split. Certainly, a mere intra-circuit divergence in analysis, which did not affect the holding, does not constitute the conflict necessary to fall within Supreme Court Rule 10(a).

The Courts of Appeals that have addressed it are unanimous in holding that public-sector unions are not liable for retrospective monetary relief under Section 1983.

II. This Case Presents an Exceedingly Flawed Vehicle to Address the Questions Presented.

Petitioners ask this Court to upend the unanimous consensus of every court of appeals to reach the question and hold that there is no good-faith defense under Section 1983. This case presents an exceedingly flawed vehicle to consider such a drastic alteration in the law. Insofar as the existence of the good-faith defense is worthy of this Court's attention, a case in which the defendants lacked discretion under state law and relied on binding precedent from this Court presents no opportunity to explore that defense.

It is critical that the Unions' collection of fair share fees not be viewed in a vacuum. Pennsylvania's fair share statute was enacted in reliance on this Court's 1977 decision in *Abood* that fair share fees were constitutional. *See* Pet. App. A. at 9 (3d Cir. Op.) ("In light of *Abood*, Pennsylvania enacted a law * * * authorizing unions that serve as exclusive representatives to collect fair-share fees."); *see also* Pet. App. C. at 4 (Diamond Dist. Ct. Op.) (observing that Pennsylvania enacted its

fair share statute in 1988 "[i]n accordance with *Abood*"). That statute, in turn, *required* employees to pay fair share fees. 71 P.S. § 575(b) (" * * * each nonmember of a collective bargaining unit *shall* be required to pay to the exclusive representative a [fair share] fee.") (emphasis added). And the law further *required* both unions and public employers to effectuate fair share fee arrangements by deducting the fees from employees' paychecks. *See* 71 P.S. § 575(c).

Thus, under Pennsylvania law, public unions and public employers had no discretion but to collect the fair share fees pursuant to their collective bargaining agreements. The sanction for willingly violating Section 575 included fines up to $1,000, or imprisonment up to 30 days, or both. 71 P.S. § 575(m).

Conversely, good-faith cases outside the *Janus* context typically implicate situations in which the validity of the underlying state law was an open legal question. *See*, *e.g.*, *Jordan*, 20 F.3d at 1276–77 (defendants relied upon an untested state replevin and garnishment statute that did not require pre-deprivation notice). The Unions here relied on a statute that was unquestionably constitutional based on then-controlling precedent. Accordingly, this case concerns the most straightforward application of the good-faith defense, and does not present any basis for questioning the reasonableness of legally required actions.

Further, if this Court were to take up the issue of the good-faith defense in the context of this case and rule (as Petitioners suggest) that there is no good-faith defense, it would severely undermine respect for the

rule of law and for this Court's precedents. In Petitioners' view, the Unions should have acted as fortune tellers and knowingly violated a duly enacted state statute in anticipation that this Court would, someday, overturn *Abood*. To adopt that view is to encourage lawlessness and a disregard for this Court's decisions.[3]

That view is also directly contrary to this Court's repeated admonitions to lower courts that they are bound by its precedents and are not to anticipate reversal of binding precedent, even when subsequent cases raise doubts about its continued vitality. *See e.g., Bossee v. Oklahoma*, 137 S.Ct. 1, 2 (2016) (*per curiam*) (summarily reversing where lower court disregarded binding Supreme Court precedent). "It is this Court's prerogative alone to overrule one of its precedents." *Ibid.* (cleaned up). Petitioners' construction requires this Court to outsource that prerogative to private parties, and encourages disregard for binding law.

III. Fundamental Principles of Notice and Fairness Require that Private Parties be able to Rely upon Statutory and Judicial Authorization of their Actions.

Every circuit court to have considered the existence of a good-faith defense under these facts has found one.

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[3] A central component of the good-faith defense here is that Pennsylvania law required collection of fair share fees. Petitioners respond that this argument "effectively makes a statutory *element* of Section 1983 * * * a *defense* to Section 1983." Pet. at 11 (emphasis in original). They are simply wrong. Petitioners confuse the good-faith defense with the "under color of law" element of Section 1983—an entirely separate element that is not disputed in this case. *See* Pet. App. A. at 15 (3d Cir. Op.).

This is unsurprising, as a good-faith defense is entirely consistent with the fundamental principles of notice and fairness that undergird our law. As any child instinctively will attest, "[i]t violates fundamental concepts of justice and fairness, to change the rules after the game is played." *Bay View, Inc. v. United States*, 278 F.3d 1259, 1267 (Fed. Cir. 2001) (Newman, J. dissenting).

The concept that a person can be punished for faithfully complying with the law as it stood at the time is "contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist No. 44, p. 218 (Dover Thrift ed. 2019) (J. Madison). While Madison was discussing bills of attainder and *ex post facto* laws, the core principle is applicable here: "[P]rivate parties like the Unions should be able to rely on statutory and judicial authorization of their actions without hesitation or fear of future monetary liability." Pet. App. A at 19 (3d Cir. Op.). Just as an *ex post facto* law is contrary to notions of good governance, the lack of a good-faith defense would hinder the states' ability to fulfill essential government functions. *See* Ohrenberger, *Prison Privatization and the Development of a "Good Faith" Defense for Private party defendants to 42 U.S.C. § 1983 Actions*, 12 Wm. & Mary Bill Rts. J. 1035 (2005) (observing that states increasingly rely on private parties "as a more economical alternative to directly executing governmental objectives").

* * *

Pennsylvania law and four decades of this Court's precedent allowed public sector unions to collect fair share fees from non-union employees. The Court

should not issue a ruling that would undercut basic principles of fairness, discourage the private-public partnerships that are critical to providing services to our citizens, and discourage respect for its precedent and the law itself. This eighth invitation for the Court to do precisely that should be declined.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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