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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit

UNION RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a union can be held liable for retrospective monetary relief under 42 U.S.C. § 1983 for receiving and spending agency fees to pay for collective bargaining representation prior to *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), even though such fees were authorized by state law and constitutional under then-controlling Supreme Court precedent.

CORPORATE DISCLOSURE STATEMENT

Respondents Pennsylvania State Education Association and National Education Association are organized as nonprofit corporations. Neither has any parent corporation, nor does any publicly held company own any stock in either respondent. Respondents Chestnut Ridge Education Association and Service Employees International Union Local 668 are unincorporated associations.

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INTRODUCTION

The lower courts, including the court below, have unanimously and correctly held that unions are not subject to retrospective monetary liability in suits under 42 U.S.C. § 1983 for having collected agency fees prior to *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in accordance with state law and this Court's then-controlling precedent. Since January of this year, this Court has denied seven petitions for certiorari that raised the same question presented here,[1] and there have been no developments in the short time since those denials that would make the question worthy of this Court's review. This petition should also be denied.

STATEMENT OF THE CASE

A. Pennsylvania, like many other states, allows public employees to organize and bargain collectively with their employer, through a representative organization of their choosing, over the terms and conditions of their employment. Respondent Service Employees International Union Local 668 and the local affiliates of Respondent Pennsylvania State Education Association (collectively "the Unions") have been chosen and recognized as the exclusive bargaining representatives for certain units of public employees in

[1] *Wholean v. CSEA SEIU Local* 2001, _ S. Ct. _, 2021 WL 1163740 (Mar. 29, 2021); *Janus v. AFSCME Council 31*, 141 S. Ct. 1282 (2021); *Mooney v. Ill. Educ. Ass'n*, 141 S. Ct. 1283 (2021); *Danielson v. Inslee*, 141 S. Ct. 1265 (2021); *Casanova v. Machinists Local 701*, 141 S. Ct. 1283 (2021); *Lee v. Ohio Educ. Ass'n*, 141 S. Ct. 1264 (2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 141 S. Ct. 1265 (2021).

Pennsylvania that included Petitioners. That status brought with it the legal duty for the Unions, in collective bargaining and grievance administration, to represent equally all members of the respective bargaining units, whether union members or not.

Recognizing that the imposition of this "duty of fair representation" with respect to non-dues-paying members of the bargaining unit was not cost-free, Pennsylvania law authorized unions and public employers to negotiate, as part of their collective bargaining agreements, a "fair share" (or "agency fee") clause requiring nonmembers to pay unions a fee covering their portions of the cost of collective bargaining on their behalf. 71 P.S. § 575(b)–(c). The Pennsylvania General Assembly enacted this statute in 1988, following this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld the constitutionality of such agency-fee requirements in the public sector.

Consistent with Pennsylvania law and this Court's decision in *Abood*, the Unions entered into collective bargaining agreements with public employers that included a requirement that members of the bargaining unit who declined to join the union would have an agency fee deducted from their paychecks to help defray the costs of collective bargaining and contract enforcement undertaken for the benefit of all employees, union members and nonmembers alike.

B. On June 27, 2018, this Court issued its decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), which overruled *Abood* and held that agency-fee requirements "cannot be allowed to continue." *Id.* at 2486. Following *Janus*, both the Unions and the public employers that had agreed to the agency-fee

clauses recognized that the statutory and contractual provisions authorizing agency fees were no longer enforceable, and they immediately terminated the deduction of agency fees from the paychecks of nonmembers, including Petitioners.

Shortly before this Court issued its decision in *Janus*, Petitioner Arthur Diamond and several other public-school teachers filed a putative class action under 42 U.S.C. § 1983 against Respondents Pennsylvania State Education Association, National Education Association, Chestnut Ridge Education Association, and various public officials. More than a year later, Petitioners Janine Wenzig and Catherine Kioussis filed a similar lawsuit against Respondent Service Employees International Union Local 668. As relevant here, both sets of plaintiffs claimed that the agency fees they had paid *before* June 27, 2018—at a time when Pennsylvania law explicitly authorized agency fees, and the *Abood* decision upholding the constitutionality of such statutes was the law of the land—must be paid back by the Unions.

The district courts (Hon. Kim R. Gibson and Hon. Malachy E. Mannion) granted the Unions' motions to dismiss, holding that the Unions could assert the good-faith defense available to private parties under 42 U.S.C. § 1983 because they had relied on state law and then-controlling Supreme Court precedent. Pet. App. B at 5–23, Pet. App. C. at 44–59.

The Third Circuit consolidated the *Diamond* and *Wenzig* appeals for disposition and affirmed the district courts' judgments on August 28, 2020, "join[ing] a growing consensus of 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.

Judge Rendell's lead opinion relied on the Third Circuit's prior decision in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), where the court had held 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." Pet. App. A. at 16 (quoting *Jordan*, 20 F.3d at 1276). Judge Rendell also concluded, in the alternative, that an analogy to the common-law tort of abuse of process supported the Unions' good-faith defense. *Id.* at 20 n.4.

Judge Fisher concurred in the judgment. While he disagreed with Judge Rendell that the *Jordan* decision was controlling in this circumstance, *id.* at 34–35, he agreed that the Unions could assert a defense to Petitioners' Section 1983 claims for pre-*Janus* agency fees—relying on the fact that "[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. Because Judge Fisher found the Unions' defense amply supported by this body of common-law authority, he found it "unnecessary" to decide whether the common-law tort of abuse of process was sufficiently analogous to Petitioners' Section 1983 claims in order for that comparison to serve as the basis for the Unions' defense. *Id.* at 37. Both Judge Rendell and Judge Fisher also rejected the *Diamond* Petitioners' argument that, because their claim sounded in restitution, they could defeat the Unions' good-faith defense. *Id.* at 21–22, 44 n.6.

Petitioners filed a petition for rehearing and rehearing en banc, which the Third Circuit denied on October 30, 2020. Pet. App. D.

REASONS FOR DENYING THE WRIT

This petition presents the narrow question of whether unions that received and spent agency fees prior to *Janus* in accordance with state law and this Court's then-controlling precedent are liable for retrospective monetary relief under 42 U.S.C. § 1983. Since *Janus*, seven courts of appeals and more than 30 district courts—including the Third Circuit in the decision Petitioners ask this Court to review—have unanimously answered that question in the negative. There is thus no circuit split with respect to the question presented.

Nor is there any disagreement among the circuits about the broader question of whether, as a general matter, private parties are entitled to assert a good-faith defense to Section 1983 monetary liability. In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court held that private-party defendants sued for monetary relief under Section 1983 are not entitled to the same form of qualified immunity available to public officials but stated that such defendants "could be entitled to an affirmative defense based on good faith." *Id.* at 169. Since *Wyatt*, every circuit court to consider the question has recognized this good-faith defense. And *no* court has held that a private party is liable for monetary relief under Section 1983 simply for following then-valid state law.

Further, the unique circumstances that gave rise to post-*Janus* Section 1983 claims are unlikely to recur. This Court only rarely overrules its prior

precedents, and private parties seldom face monetary claims under Section 1983 for engaging in conduct that was authorized by state law and by directly on-point Supreme Court precedent.

This Court has recently denied seven petitions for certiorari that raised the same question presented here. *See supra* at 1. All seven of those petitions, each of which was filed by one or more of the law firms or advocacy groups that represent Petitioners here, made the same arguments in support of review. Given the continued, unbroken consensus in the lower courts, there remains no reason for this Court to intervene.

I. The lower courts unanimously have held that unions are not subject to retrospective monetary liability under Section 1983 for having collected pre-*Janus* agency fees.

Petitioners contend that this Court should grant their petition in order to resolve a purported circuit "conflict" about whether private parties may assert a good-faith defense to claims for monetary relief under Section 1983. Petition at 8.[2] But there is no conflict to resolve. Each of the circuit courts to have considered the question has held that private parties facing claims for monetary relief under Section 1983 are not liable when they reasonably relied upon then-valid state law that was subsequently overturned. Far from creating a conflict, the decision below reaches the same conclusion about union liability for having collected pre-*Janus* agency fees as all the other courts to have considered the issue.

1. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that private parties who invoke state-created laws and processes may, in certain circumstances, be considered state actors subject to liability under Section 1983. *Id.* at 936–37. The Court

[2] Only the *Wenzig* Petitioners—not the *Diamond* Petitioners—argued below that there is no good-faith defense available to private parties sued under Section 1983. *See* Reply Br. for Appellant at 3, *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (2020) (No 19-2812), ECF No. 55 ("The plaintiffs are contesting the scope rather than the existence of a good-faith defense."). The *Diamond* Petitioners have therefore waived any argument that the good-faith defense does not exist. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (argument waived where litigant stated it "will not challenge, but [is] not conceding" the issue).

acknowledged that its construction of Section 1983 created a "problem"—namely, that "private individuals who innocently make use of seemingly valid state laws" could be sued for monetary relief "if the law is subsequently held to be unconstitutional." *Id.* at 942 n.23. The Court suggested that this problem "should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense." *Id.*

Ten years later, *Wyatt v. Cole*, 504 U.S. 158 (1992), held that private-party defendants in Section 1983 litigation are not entitled to the same form of immediately-appealable qualified immunity that is available to public officials. 504 U.S. at 167. The Court acknowledged, however, that "principles of equality and fairness may suggest . . . 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," and the Court explained that its decision did not "foreclose the possibility that private defendants faced with § 1983 liability under *Lugar* . . . could be entitled to an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.

Since *Wyatt*, the eight courts of appeals to consider the question uniformly have held that private parties may assert a good-faith defense to Section 1983 claims for monetary relief. The Fifth Circuit squarely considered the issue on remand from this Court in *Wyatt*, holding that "private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures." *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir.), *cert. denied*, 510 U.S. 977

(1993). In *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994), the Third Circuit expressed its agreement with the Fifth Circuit's holding, and the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits all have reached the same conclusion. *See Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Res., Inc. v. Howard & Howard Att'ys, P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Janus v. AFSCME Council 31*, 942 F.3d 352, 361–64 (7th Cir. 2019) (*Janus II*); *Doughty v. State Emps.' Ass'n of N.H.*, 981 F.3d 128, 133–37 (1st Cir. 2020); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 379–80 (4th Cir. 2021).

This consensus extends to the specific claim for pre-*Janus* agency fees being pursued by Petitioners. Numerous lawsuits similar to Petitioners' were filed throughout the country following issuance of the *Janus* decision. Petition at 24. The outcome of each of those lawsuits has been the same: Every court has concluded that unions' reliance on then-valid state laws and then-binding precedent of this Court precludes monetary relief under Section 1983. That consensus includes nine decisions from seven different courts of appeals.[3] It also includes more than 30

[3] Pet. App. A; *Akers*, 990 F.3d 375 (4th Cir. 2021); *Doughty*, 981 F.3d 128 (1st Cir. 2020), *petition for cert. filed*, No. 20-1534 (U.S. Apr. 29, 2021); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, _ S. Ct. _, 2021 WL 1163740 (Mar. 29, 2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1265 (2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1264 (2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1265 (2021); *Janus II*, 942 F.3d 352

district court decisions. *See Mattos v. AFSCME Council 3*, 2020 WL 2027365, at *2 n.3 (D. Md. Apr. 27, 2020) (citing most of these cases).

This consensus in the lower courts is consistent with the analysis of reliance interests in *Janus*. This Court considered in *Janus* whether reliance interests justified retaining *Abood* as matter of stare decisis, 138 S. Ct. at 2478–86, and acknowledged that unions had entered into existing collective bargaining agreements with the understanding that agency fees would help pay for collective bargaining representation, *id.* at 2484. But the Court concluded that unions' reliance interests in the continued enforcement of those agreements were not sufficiently weighty to justify retaining *Abood*. *Id.* at 2484–85. In reaching that conclusion, the Court never suggested nor considered that its decision would expose public employee unions to massive retrospective monetary liability for having followed then-governing precedent. *See id.* at 2486.

2. No circuit court has held that private-party defendants sued on the basis of *Lugar* are *not* entitled to assert a good-faith defense to Section 1983 claims for monetary liability. Indeed, Respondents are not aware of *any* decision by *any* court to that effect.

Petitioners nonetheless attempt to create a conflict between the Third Circuit's decision below and the other circuit-court decisions on the basis of Judge

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(7th Cir. 2019), *cert. denied*, 141 S. Ct. 1282 (2021); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1283 (2021).

Fisher's concurring opinion.[4] But Judge Fisher *agreed* that unions that relied on state law and *Abood* in accepting and expending agency fees prior to *Janus* cannot be held monetarily liable under Section 1983 for having done so. He merely identified an "alternative basis" for that outcome based on an additional body of common-law authority. Pet. App. A at 37; *see supra* at 4–5.

As this Court has often stated, it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). That principle applies here, as the Third Circuit's judgment—in accord with the judgment of every court to address Section 1983 claims seeking the repayment of pre-*Janus* agency fees—is that unions are *not* liable to repay such fees.

While Judge Fisher did not use the term "good-faith defense" to describe the common-law doctrine that he found supported the Unions' defense to monetary liability, this Court surely does not sit to resolve differences in nomenclature among lower-court judges. The dispositive point is that the result reached by Judge Fisher, on the facts presented by this and the other cases seeking the repayment of pre-*Janus* agency fees, is no different from the result reached by

[4] Shortly after *Diamond* issued, petitioner Mark Janus filed a supplemental brief in support of his petition for certiorari in *Janus v. AFSCME Council 31*, No. 19-1104, that likewise argued that *Diamond* created a circuit-court conflict. *See* Supp. Br. at 1, *Janus v. AFSCME Council 31*, No. 19-1104 (Sept. 4, 2020). This Court denied that petition. Petitioner Kiernan Wholean made the same argument in his petition for certiorari, which this Court also denied. *See* Cert. Pet. at 6–7, *Wholean v. CSEA SEIU Local 2001*, No. 19-1563 (Oct. 30, 2020).

the other courts of appeals in allowing a defense to Section 1983 claims for monetary liability based on the defendant's reliance on state law and this Court's directly-on-point precedent. That Judge Fisher invoked a harmonious but distinct body of common-law authority to reach the same result does not require 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.[5]

3. Finally, Petitioners contend that even if the good-faith defense bars damages liability, they can nonetheless recover agency fees as "property" that

[5] The dissent below—the only dissenting opinion in the nine court of appeals cases that have considered (and rejected) claims for pre-*Janus* agency fees, *see supra* at 9 n.3—misses the mark by focusing on the narrow question of whether there was an affirmative defense of good faith at common law. Pet. App. A at 47–49. The proper question is whether "parties [like the union] were shielded from tort liability when Congress enacted the Civil Rights Act of 1871," *Wyatt*, 504 U.S. at 164, either by an affirmative defense, by an immunity or privilege, or because their conduct could not prove the necessary elements of a tort. Every court of appeals to address this properly framed question has held that the answer is "yes" such that unions should not be subject to liability in this circumstance. Notably, the dissent failed even to consider whether an analogy to the common-law tort of abuse of process supports the conclusion of no liability, as the Sixth, Seventh, and Ninth Circuits already had held. See *Ogle*, 951 F.3d at 797; *Janus II*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1102; *see also Akers*, 990 F.3d at 382 ("[A]s the First, Sixth, Seventh, and Ninth Circuits have ruled, the tort of abuse of process is the most closely analogous tort [to claims for pre-*Janus* agency fees], and good faith was recognized as a defense to that tort in 1871.").

must be "return[ed]." Petition at 27–28.[6] But all five courts of appeals to address Petitioners' argument, including the Third Circuit below, have correctly rejected the contention that pre-*Janus* agency fees can be recovered on such a theory. Pet. App. A. at 21–22, 44 n.6; *Akers*, 990 F.3d at 381–82; *Lee*, 951 F.3d at 391; *Danielson*, 945 F.3d at 1102; *Mooney*, 942 F.3d at 370. As the courts have recognized, agency fees that unions collected from nonmembers were expended to provide ongoing collective bargaining representation, so there is no "property" to be "returned." *Danielson*, 945 F.3d at 1103 (noting that exchange of fees for representation "cannot be unwound"). And the equities would not support such a remedy in any event. *See, e.g.*, *Janus II*, 942 F.3d at 367. The restitution cases that Petitioners cite—none of which even involved a claim under Section 1983, let alone a claim for pre-*Janus* agency fees, *see* Petition at 26–27—do not establish a conflict on the issue.

On this point as well, therefore, Petitioners are unable to point to any conflict among the circuit courts, or for that matter *any* courts, that merits this Court's attention.

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[6] Before the Third Circuit, only the *Diamond* Petitioners argued that their claims sounded in restitution; the *Wenzig* Petitioners acknowledged that they sought money damages. *See Wenzig* (CA3 No. 19-3906), Appellants' Reply Brief at 20 (ECF No. 23) (requesting that the Court remand "to decide the award of damages"). The *Wenzig* Petitioners have therefore waived any argument that their claims are restitutionary in nature.

II. Petitioners' merits arguments have already been found insufficient to justify granting review.

This Court generally does not grant review solely to correct purported errors in a decision below. Nonetheless, Petitioners devote the bulk of their petition to arguing that the Third Circuit erred on the merits by rejecting their Section 1983 claims. Petition at 10–23, 25–28. The same merits arguments were raised by the recent petitions for certiorari in, for example, *Danielson v. Inslee*, No. 19-1130, and *Ogle v. Ohio Civil Service Employees Ass'n*, No. 20-486; those arguments are fully addressed by respective briefs in opposition to certiorari in those cases. This Court denied those petitions on January 25, 2021, and there have been no relevant legal developments since that time that would support a different outcome here.

III. There is no other justification for this Court's intervention.

Petitioners contend that review of the decision below is justified because "[o]ver 37 class action lawsuits are pending that seek refunds from unions for agency fees" paid prior to *Janus*. Petition at 24. As stated already, however, every court to consider such a claim has held that the union defendants are not subject to Section 1983 monetary liability. Far from suggesting this Court's guidance is required, the broad consensus that Section 1983 claims for pre-*Janus* agency fees are meritless demonstrates that this Court's involvement is unnecessary.

The unique circumstances presented by a case seeking pre-*Janus* monetary liability also do not

provide a suitable vehicle for this Court to provide guidance on the application of the good-faith defense in other cases. *See* Petition at 24–25 (arguing that this Court should grant review because a good-faith defense "could shield" defendants from liability in other situations). The Third Circuit held only that retrospective monetary relief is unavailable where the defendant "successfully claim[s] 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 (quoting *Janus II*, 942 F.3d at 367). Such situations are likely to be rare.

Stare decisis is "a 'foundation stone of the rule of law.'" *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). This Court seldom overrules its precedents. Moreover, this Court has held that when a precedent of this Court is directly on point, that precedent is the law of the land binding on all lower courts, even if subsequent decisions have criticized that precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Accordingly, this case—in which the private-party defendants were acting in accordance not only with the requirements of state law but also with this Court's governing precedent—would not provide a suitable vehicle for this Court to consider the potential application of a good-faith defense to more typical situations.

CONCLUSION

The petition for certiorari should be denied.

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