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 United States Court of Appeals for the Third Circuit

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REPLY TO BRIEFS IN OPPOSITION

Brian K. Kelsey
Counsel of Record
Reilly Stephens
Liberty Justice Center
208 South LaSalle Street, Suite 1690
Chicago, Illinois 60604
Telephone: 312-637-2280
Facsimile: 312-263-7702
bkelsey@libertyjusticecenter.org

William Messenger
National Right to Work Legal Defense Foundation
8001 Braddock Rd., Suite 600
Springfield, VA 22160
Telephone (703) 321-8510
Facsimile (703) 321-9319
wlm@nrtw.org

Attorneys for the Wenzig Petitioners

Jonathan F. Mitchell
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Attorney for the Diamond Petitioners

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INTRODUCTION

The Commonwealth of Pennsylvania acknowledges that this Court raised, but did not decide, the question of whether there exists a good-faith defense to Section 1983 in *Wyatt v. Cole*, 504 U.S. 158, 169 (1992). Commonwealth Br. 8. It is time for the Court to finally decide that question. Based on a misconception of what the Court wrote in *Wyatt*, several appellate courts recently recognized a categorical good-faith defense to Section 1983 that deprives victims of constitutional deprivations of all monetary relief for their injuries if the defendant relied on a state law before it was held unconstitutional. This ostensible defense is being used to deny relief to tens of thousands of workers who were forced to subsidize union speech in violation of their First Amendment rights under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

A majority of the Third Circuit panel below, however, correctly recognized that a categorical good-faith defense to all Section 1983 claims was *not* what this Court was suggesting in *Wyatt*. *See* App. A at 34-36 (Judge Fisher, concurring in the judgment); *id*. at 50 (Judge Phipps, dissenting). Indeed, there is no a "valid basis for recognizing such a defense." *Id*. at 46 (J. Phipps, dissenting). "Good 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*. at 56. The Court should grant review to clear up the confusion over what it intended in *Wyatt* and to repudiate the categorical good-faith defense that several courts have mistakenly created.

A. The Court should resolve the conflict between the Third Circuit and several other circuits concerning whether there exists a good-faith defense to Section 1983.

1. This case differs from other recent cases in which this Court denied certiorari because, here, a majority of the Third Circuit panel rejected the categorical good-faith defense to Section 1983 liability now recognized by six other circuit courts. *See* App. A at 24 (Judge Fisher, concurring in the judgment); *id.* at 47 (Judge Phipps, dissenting). Only Judge Rendell, writing for herself, accepted this ostensible defense. *Id.* at 14. Thus, there exists a conflict of authority on the first question presented: is there a good-faith defense that shields private defendants from Section 1983 liability for actions done under color of state laws before they are held unconstitutional?

The Commonwealth tries to obscure this conflict and sow confusion by using the phrase "good faith defense" to describe two different things. *See* Commonwealth Br. 9-11. A clarification of terms is necessary. First, there is a *claim-specific* good-faith defense, in which malice and lack of probable cause are deemed elements of a specific constitutional deprivation. This is the narrow defense to due process deprivations that the Court suggested in *Wyatt v. Cole*, 504 U.S. 158, 166 n.2 (1992), and that the Third Circuit later recognized in *Jordan v. Fox, Rothschild, O'Brien*, & *Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994). *See* Pet. 13-17. This claim-specific defense "is of no moment here because a claim for compelled speech does not have a *mens rea* requirement." App. A at 54 (J. Phipps, dissenting); *see Janus*, 138 S. Ct. at 2468.

Second, there is a *categorical* good-faith defense, in which a defendant's good-faith reliance on state law is considered an affirmative defense to *all* constitutional claims

for damages or restitution brought under Section 1983. This is the broad, new defense that six circuit courts recently recognized in cases concerning union agency fee seizures. *See* Pet. 6 (citing cases). A conflict of authority exists with respect to this ostensible defense because both Judges Fisher and Phipps unambiguously rejected a categorical good-faith defense to Section 1983. *See* App. A at 33 (J. Fisher, concurring the judgment); *id*. at 50, 54 (J. Phipps, dissenting).

With this distinction in mind, it is clear that the Commonwealth is wrong when it argues that no conflict of authority exists because Judge Fisher recognized that "private parties sued under Section 1983 were, *in certain case*s, protected by a good faith defense." *Id*. at 11 (emphasis added). Judge Fisher was referring to a claim specific defense—i.e., one that is "context dependent." App. A at 33. Judge Fisher was not referring to a broad defense that "applies categorically to all cases involving private-party defendants," which he rejected. *Id*. The Court should resolve the conflict among circuits concerning whether a categorical good-faith defense exists because, among other reasons, "neither the history nor the purpose of § 1983 supports the recognition of good faith as an affirmative defense for violations of every constitutional right." *Id*. at 52 (J. Phipps, dissenting).

2. Unlike with the first question presented, Respondents are correct that the circuit courts have been unanimous on the second question: are employees who had compulsory union fees seized from them in violation of their First Amendment rights prior to *Janus* entitled to damages or restitution for their injuries? This unfortunate

unanimity is reason for the Court to grant to review.[1] When the lower courts are uniformly wrong, only this Court can correct their error. And the lower courts were wrong to conclude that unions are exempt from Section 1983 liability because they relied on state laws when unconstitutionally seizing agency fees from employees.

Acting under color of a state law is an element of Section 1983, not a defense to the statute. Section 1983 states that "[e]very person who, *under color of any statute*, ordinance, regulation, custom, or usage, of any State" deprives a citizen of a constitutional right "s*hall 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 (emphasis added). The statute's historical purpose was "to remedy actions taken *in accordance with state law*." App. A at 54 (J. Phipps, dissenting) (emphasis in original). "[T]hus a good faith affirmative defense–that a state actor was merely following state law—is an especially bad fit as an atextual addition to § 1983." *Id*. Indeed, the defense turns Section 1983's text and purpose on their head. *See* Pet. 11-13.

An affirmative defense predicated on a defendant's good-faith reliance on a later invalidated state law also defies this Court's retroactivity jurisprudence. *See* Pet. 22-23. The Court made clear in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995) that courts cannot create equitable remedies based on a party's reliance on a statute later held unconstitutional by this Court.

[1] If the Court takes the first question, it should take the second question because the questions are interrelated.

The three rationales cited by lower courts in agency fee cases for recognizing a categorical good-faith defense are untenable for the reasons discussed in the Petition and Judges Phipps's and Fisher's opinions. The categorical defense is not the defense suggested in *Wyatt*, is not justified by policy interests in fairness and equality, and is not supported by a strained analogy to an abuse-of-process tort. *See* Pet. 13-22; Pet. App. A at 24 (Fisher, J., concurring in the judgment); *id.* at 46 (Phipps, J., dissenting).

The Commonwealth contends it would be unfair to hold unions liable for agency fees they took from employees because unions "lacked discretion under state law and relied on binding precedent from this Court." Commonwealth Br. 12, 12-16. In support of this contention, the Commonwealth asserts that its agency fee law "*required* employees to pay fair share fees," and "*required* both union and public employers to effectuate fair share agreements by deducting the fees from employees' paychecks." *Id*. at 13. The argument fails in at least two respects.

First, the Commonwealth's assertions about its agency fee law are misleading. The law states that *"[i]f the provisions of a collective bargaining agreement so provide*, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee." 71 Pa. Stat. Ann. § 575(b) (emphasis added).[2] The law calls for agency fee deductions only where unions chose to enter into "fair share agreements" with public employers. *Id*. at § 575(c). Contrary to the false im-

[2] The Commonwealth omitted the italicized words in its citation to 71 Pa. Stat. Ann. § 575(b) on page 13 of its brief.

pression the Commonwealth attempted to create, nothing in Pennsylvania law required unions to seize agency fees from employees. The Respondent Unions had discretion not to enter into agency fee agreements, but chose to do so in order to seize agency fees from nonmember employees.

Second, as Judge Phipps recognized, "[n]either equality nor fairness overwhelmingly favors the reliance interests of the unions in pre-existing law over the free speech rights of non-members who were compelled to support the unions." App. A at 74 (J. Phipps, dissenting). Judge Phipps is right. It is unfair to make victims of constitutional deprivations bear the burden of a defendant's unconstitutional conduct. *Id*. at 18-21. The Court recognized this point when rejecting the proposition that Section 1983's equitable purposes justified creating a good-faith immunity for municipalities in *Owen v. City of Independence*, 445 U.S. 622, 654 (1980), stating "elemental notions of fairness dictate that one who causes a loss should bear the loss."

Here, the Respondent Unions caused the loss when they seized agency from nonmembers without their consent and in violation of their First Amendment rights. Fairness dictates that the Unions make these nonmembers whole for their losses and not that these innocent employees be forced pay for the Unions' unlawful conduct. Principles of fairness, therefore, also support rejecting the notion that there exists a categorical good-faith defense to Section 1983.

B. This case presents questions of national importance.

1. Section 1983 was enacted one-hundred-fifty years ago to provide a remedy to persons deprived of constitutional rights by parties that act under color of state law.

See Owen, 445 U.S. at 650-51. It is highly significant that seven courts of appeals—the First, Second, Third, Fourth, Sixth, Seventh, and Ninth—have now decided that defendants owe no remedy under Section 1983 if they acted under a state law before it was held unconstitutional. These courts have rendered Section 1983 largely self-defeating, at least with respect to retroactive relief, because almost any defendant that acts under color of state law, as the statute requires, will have a defense to Section 1983 liability for the same reason. The massive hole that these courts have carved into the nation's preeminent civil rights statute is a matter of exceptional importance that this Court should address and rectify.

The Commonwealth advances contradictory positions concerning the scope of a categorical good-faith defense. First, the Commonwealth claims (at 9) that the defense is narrow and applies when a defendant relies on both a state statute and controlling Supreme Court precedent. *See also* Resp. Union Br. 16 (similar). Later, the Commonwealth acknowledges (at 13) that "good-faith cases outside the *Janus* context typically implicate situations in which the validity of the underlying state law was an open legal question."

The Commonwealth's second position is closer to the mark—a defendant acting under color of any state law yet to be held unconstitutional could support a good-faith defense. According to Judge Rendell, a "good faith defense is available to a private-party defendant in a § 1983 case if, after considering the defendant's 'subjective state of mind,' the court finds no 'malice' and no 'evidence that [the defendant] either knew or should have known of the statute's constitutional infirmity.'" App. A. at 18 (quoting

Jordan, 20 F.3d at 1276-77). This standard does not require reliance on this Court's precedents. The defense merely requires the defendant either knew or should have known the statute was unconstitutional. Given that state statutes are presumed to be constitutional until their invalidity is judicially declared, *see Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944), a defendant acting pursuant to any statute that has not been judicially declared invalid could support a good-faith defense. This will encompass virtually all private defendants sued under Section 1983, for it is difficult to invoke a state law after a court declares it invalid. A categorical good-faith defense threatens to severely undermine Section 1983's remedial framework. This Court's immediate review is warranted.

2. The second question is important because its resolution will determine whether victims of agency fee seizures receive relief for their injuries. *See* Pet. 24. In *Janus*, the Court lamented the "considerable windfall" that unions wrongfully received from employees during prior decades, finding, "[i]t is 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." 138 S. Ct. at 2486. Yet, as the Respondent Unions note (at 5), seven courts of appeals and thirty district courts have now refused to hold unions liable to nonmembers for any monetary relief. Absent this Court's timely review, the Respondent Unions and other unions will get to keep their ill-gotten windfall and nonmembers will receive nothing for their injuries. This Courts intervention is, therefore, necessary to secure the promise of *Janus* for tens of thousands of workers around the country.

C. This case is an excellent vehicle to resolve the questions presented.

This case squarely presents the questions posed in the Petition and does not involve any extraneous procedural or jurisdictional issues that could complicate the Court's resolution of those questions. Judges Phipps' dissenting opinion cogently explains why the Court should reject a categorical good-faith defense and hold the Respondent Unions liable for repaying the agency fees they seized from employees. The case is, thus, an excellent vehicle to resolve the questions presented.

The Respondent Unions point out that the Court has denied several petitions for certiorari that raised similar questions. Resp. Unions Br. 1. But those petitions arose from unanimous circuit court decisions that recognized a categorical good-faith defense. *Id.* at 1 n.1. This petition, by contrast, concerns a decision with three opinions, two of which rejected the categorical defense recognized by other circuits in agency fee cases. *See infra* 1-4. This petition presents an ideal case in which to resolve the conflict of authority that exists between the Third Circuit and other circuit courts on this issue.

The Commonwealth contends (at 13) that, because "[t]he Unions here relied on a statute that was unquestionably constitutional based on then-controlling precedent," this case is a flawed vehicle to resolve whether a good-faith defense exists. All this amounts to an argument that, *if* there is a good-faith defense to Section 1983, the Unions here qualify for it. But that is no reason for the Court not to determine, in this case, if the ostensible defense even exists.

The Commonwealth's premise also is flawed because, even if the Court found a good-faith defense to exist (the first question presented), the second question of

whether the Respondent Unions must pay damages or restitution to injured employees would remain. A good-faith defense should not shield the Respondent Unions from paying damages because they should have known that the constitutionality of agency fee provisions "was uncertain," *Janus*, 138 S. Ct. 2485, and that a decision holding agency fee laws unconstitutional would apply retroactively. *See* Pet. 25-26. The defense also should not shield the Respondent Unions from restitution of the money that they took from employees in violation of their constitutional rights. *Id.* at 26-28. This case presents these issues to the Court, making it an excellent vehicle to determine both whether there is a good-faith defense to Section 1983 and, if there is, the scope and elements of such a defense.

CONCLUSION

For the forgoing reasons, the petition should be granted.

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Respectfully Submitted,

Brian K. Kelsey
Counsel of Record
Reilly Stephens
Liberty Justice Center
208 South LaSalle Street, Suite 1690
Chicago, Illinois 60604
Telephone: 312-637-2280
Facsimile: 312-263-7702
bkelsey@libertyjusticecenter.org

Jonathan F. Mitchell
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Attorney for the Diamond Petitioners

William Messenger
National Right to Work Legal
Defense Foundation
8001 Braddock Rd., Suite 600
Springfield, VA 22160
Telephone (703) 321-8510
Facsimile (703) 321-9319
wlm@nrtw.org

Attorneys for the Wenzig Petitioners