No. 20-1725

IN THE
Supreme Court of the United States

DAVID SEIDEMANN AND BRUCE MARTIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PROFESSIONAL STAFF CONGRESS LOCAL 2334, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

RAYMOND L. LAJEUNESSE, JR.
Counsel of Record
WILLIAM L. MESSENGER
FRANK D. GARRISON
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Rd., Ste 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

Counsel for Amicus Curiae

QUESTIONS PRESENTED

Petitioners are current and former public-school teachers in the State of New York who declined to join a public union. They seek a refund of the fair-share fees that public-sector unions forcibly took from them and that this Court invalidated in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). The Second Circuit rejected Petitioners' claims and allowed the Respondent unions to keep their ill-gotten gains, concluding that 42 U.S.C. 1983 provides the unions with a good-faith defense. That ruling presents three, distinct questions for this Court's review:

1. Whether the proper remedy for the collection of an illegal fee is refund or restitution, regardless of the purported good faith of the fee collector.

2. Whether this Court's application of a rule of federal law to the parties before it requires every court to give retroactive effect to that decision.

3. Whether 42 U.S.C. 1983 provides a good-faith defense for private entities who violate private rights if the private entities acted under color of a law before it was held unconstitutional.

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INTEREST OF THE AMICUS CURIAE[1]

The National Right to Work Legal Defense Foundation, Inc. is a nonprofit organization that provides free legal aid to individuals whose rights are infringed upon by compulsory unionism. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements. Foundation attorneys have represented individuals in many compulsory union fee cases that have come before this Court. *E.g.*, *Janus v. AFSCME Council 31,* 138 S. Ct. 2448 (2018); *Harris v. Quinn,* 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000,* 567 U.S. 298 (2012).

Foundation attorneys also represent employees in cases that seek to require unions to pay damages to employees who had agency fees seized from them in violation of their First Amendment rights under *Janus*. *E.g.*, *Brice v. California Faculty Ass'n*, No. 19-56164 (9th Cir. 2021). The Foundation submits this brief to address the third question presented: Whether there is a "good faith defense" to Section 1983, 42 U.S.C. § 1983, that shields a defendant from monetary liability for depriving citizens of their constitutional rights if the defendant acted under color of a law before it was held unconstitutional.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief and have consented to the filing of this brief. No party's counsel authored any part of the brief and no one other than *amicus* funded its preparation or filing.

SUMMARY OF THE ARGUMENT

This Court raised, but then did not decide, whether there is a good faith defense to Section 1983 in *Wyatt v. Cole*, 504 U.S. 158, 169 (1992). The Court should finally resolve this important question to disabuse lower courts of the misconception that a defendant acting under color of a statute before it is held unconstitutional is an affirmative defense to Section 1983.

That defense is not the defense members of this Court suggested in *Wyatt*. Several Justices in that case wrote that good-faith reliance on a statute could defeat the malice and probable cause elements of certain constitutional claims. 504 U.S. at 166 n.2 (majority opinion); *id.* at 172 (Kennedy, J., concurring); *id.* at 176 n.1 (Rehnquist, C.J., dissenting). Those Justices were not suggesting that a defendant's reliance on a yet to be invalidated statute should be a categorical defense to all Section 1983 claims for damages.

That is for a good reason: the ostensible defense conflicts with Section 1983's text. A defendant acting "under color of any statute" is an element of the statute that renders a defendant "liable to the party injured in an action at law." 42 U.S.C. § 1983. Lower courts turned the statute on its head by holding that a defendant acting under color of a state law renders that defendant *not* liable in actions at law.

The different rationales cited by lower courts for a good faith defense—either equitable principles or an analogy to an abuse-of-process tort—are both untenable. A majority of the Third Circuit panel in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020) recognized as much, and rejected

both ostensible bases for a good faith defense. *Id.* at 274 (Fisher, J., concurring in the judgment); *id.* at 289-90 (Phipps, J., dissenting). The *Diamond* majority had it right: Courts cannot create equitable exemptions to congressionally enacted statutes like Section 1983. Even if they could, fairness to victims of constitutional deprivations supports enforcing the statute as written. As for common law analogies, a First Amendment claim for compelled subsidization of speech is not so like an abuse of a judicial process as to justify importing that tort's malice and probable cause elements into a First Amendment speech claim.

There is no cognizable basis for a categorical good faith defense to Section 1983. Lower courts have violated separation of powers principles by creating this new limit to the remedies Congress prescribed in the statute. The Court should thus take this case to reject the proposition that a defendant relying on a state law before it is invalidated exempts the defendant from compensating injured parties under Section 1983.

ARGUMENT

A. *Wyatt* Did Not Suggest That a Defendant's Reliance on a Statute Should Be an Affirmative Defense to Section 1983.

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The elements of different constitutional deprivations vary considerably. "In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017).

The claim in *Wyatt* was that a private defendant deprived the plaintiff of due process of law when seizing his property under an *ex parte* replevin statute. 504 U.S. at 161. The Court found the plaintiff's due process claims analogous to "malicious prosecution and abuse of process," and recognized that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id.* at 164–65; *see id.* at 172–73 (Kennedy, J., concurring).

The Court in *Wyatt* held that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id.* at 165. That is because the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. *Wyatt* left open whether Section 1983 defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.

The good faith defense mentioned in *Wyatt* was *not* a broad statutory reliance defense to all Section 1983 damages claims, as several lower courts have erroneously concluded. *See, e.g.*, *Janus v. AFSCME Council 31,* 942 F.3d 352 (7th Cir. Nov. 5, 2019) *("Janus II").* Rather, several Justices suggested a defense to Section 1983 claims in which malice and lack of probable cause are elements for establishing damages. This is clear from all three opinions in *Wyatt*.

Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it is

a "misnomer" to use the term good faith "defense" because "under the common law, it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice and without probable cause." 504 U.S. at 176 n.1 (citation omitted). "Referring to the defendant as having a good faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id*.

Justice Kennedy, in his concurring opinion joined by Justice Scalia, agreed that "it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." *Id*. at 172. Justice Kennedy explained that "[t]the common-law tort actions most analogous to the action commenced here are malicious prosecution and abuse of process," and that in both actions, "it was essential for the plaintiff to prove that the wrongdoer acted with malice and without probable cause." *Id*. Justice Kennedy found that because "a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law . . . lack of probable cause can *only* be shown through proof of subjective bad faith." *Id*. at 174.

Finally, Justice O'Connor's majority opinion in *Wyatt* recognized that the good faith defense discussed in the two other opinions was in reality a defense to a plaintiff proving malice and lack of probable cause. *Id*. at 166 n.2. The majority opinion found that "[o]ne could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed

if she could not affirmatively establish both malice and want of probable cause that plaintiffs bringing an analogous suit under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action." *Id.*

On remand in *Wyatt*, the Fifth Circuit recognized that this Court "focused its inquiry on the elements of these torts." *Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993). It therefore found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause." *Id.* The Third and Second Circuits followed suit in cases also arising from abuses of judicial processes and held the defendants could defeat the malice and probable cause elements of those claims by showing good-faith reliance on a statute. *See Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 & n.31 (3d Cir. 1994).

More recently, Judge Fisher of the Third Circuit recognized that the defense discussed in *Wyatt* is "whether the defendant acted with malice and without probable cause." *Diamond*, 972 F.3d at 278–79 (Fisher, J., concurring in the judgment). Judge Fisher recognized that this defense does not "appl[y] categorically to all cases involving private-party defendants," but depends on the claim at issue. *Id.* at 279. Judge Phipps similarly recognized that Chief Justice Rehnquist's discussion of a good faith defense "actually referred to elements of the common-law torts of malicious prosecution and abuse of process," and that he "identified no authority for the proposition that good faith functions as a transsubstantive affirmative

defense–applicable across a broad class of claims . . ." *Id*. at 287 (Phipps, J., dissenting).

The Second, Sixth, Seventh, and Ninth Circuits erred in interpreting *Wyatt* as signaling that it should become an affirmative defense to Section 1983 for a defendant to rely on a statute before it is held unconstitutional. *See Wholean v. CSEA*, 955 F.3d 332, 334–35 (2d Cir. 2020); *Ogle v. Ohio Civil Serv. Emps. Ass'n,* 951 F.3d 794, 797 (6th Cir. 2020); *Janus II*, 942 F.3d at 366; *Danielson v. Inslee*, 945 F.3d 1096, 1101–02 (9th Cir. 2019). The Court in *Wyatt* suggested nothing of the sort. Indeed, such a statutory reliance defense would conflict with both Section 1983's plain language and the Constitution's separation of powers.

B. A Good Faith Defense Conflicts with Section 1983's Text.

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 "*shall 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). Section 1983 means what it says. "Under the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

It turns Section 1983 on its head to conclude that persons who act under the color of state laws later held unconstitutional are *not* liable to the injured parties in a suit for damages. The proposition effectively

makes a statutory *element* of Section 1983—that defendants must act under color of state law—a *defense* to Section 1983.[2] An affirmative defense based on a defendant's reliance on a state law conflicts with Section 1983's plain language.

The Court rejected a comparable defense more than one hundred years ago in *Myers v. Anderson*, 238 U.S. 368 (1915). There, the Court held that a state statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued that they were not liable for money damages under what is now Section 1983 because they acted on a good-faith belief that the state statute was constitutional. The Court noted that "[t]he nonliability . . . of the election officers for their official conduct is seriously pressed in argument." *Id.* at 378. The Court rejected that contention as contradicting its decision in *Guinn v. United States*, 238 U.S. 347 (1915), and "*the very terms*" of the federal statute implementing the Fifteenth Amendment. *Id.* at 379 (emphasis added).[3]

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[2] Defendants in Section 1983 actions will almost always act under color of state laws that have not been held invalid at the time, because a party will seldom dare to invoke a state law that a court has already declared unconstitutional.

[3] The lower court, the judgment of which this Court affirmed, was more explicit in its reasoning rejecting the defendants' argument that plaintiffs had not alleged that they acted "willfully or maliciously," i.e., in bad faith:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 226, 230 (C.C.D. Md. 1910).

It is telling that the circuit courts that have recognized a categorical good faith defense in the post-*Janus* cases have not tried to square that ostensible defense with Section 1983's text. In fact, the Seventh Circuit's only response to the argument that it violates Section 1983's text to find a defendant's reliance on state law an affirmative defense to Section 1983 was to claim this Court "abandoned" strictly following Section 1983's language when recognizing immunities. *Janus II*, 942 F.3d at 362.

To the contrary, the Court has held that "[w]e do not simply make our own judgment about the need for immunity," and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. The Court accords an immunity only when a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine' when it enacted Section 1983." *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164).

Unlike with immunities, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364; *see Diamond*, 972 F.3d at 288 ("[a] good faith defense is inconsistent with the history of the Civil Rights Act of 1871") (Phipps, J., dissenting); William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 55 (2018) ("[t]here was no well-established, good faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."). Thus, unlike with immunities, there is no justification for de-

viating from Section 1983's mandate that "[e]very person 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.

C. Circuit Courts Disagree on Whether There Is a Good Faith Defense and the Justifications for That Defense.

A majority of the opinions in *Diamond* rejected the good faith defense recognized by the Second, Sixth, Seventh, and Ninth Circuits. 972 F.3d at 274 (Fisher, J., concurring in the judgment); *id*. at 289–90 (Phipps, J., dissenting). Although Judge Fisher found a different exemption to retroactive liability under Section 1983, *see id*. at 284,[4] the relevant point here is that the circuit courts disagree on whether there is a categorical good faith defense to Section 1983. The Court should resolve that disagreement.

Even the circuit courts that have recognized a good faith defense disagree on the basis for that defense. The Sixth Circuit held that it "looks to the most closely analogous tort at common law in deciding whether private defendants may assert a good-faith defense to

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[4] Judge Fisher's limit on retroactive liability under Section 1983 and a good faith defense have different elements and rationales. The latter is purported to be an affirmative defense that applies when a defendant relies in good faith on presumptively valid law, *see* Pet.App. 4a, and is based on equitable interests or a tort analogy, *see infra* 17–18. Judge Fisher found, based on pre-1871 common law history, that a court decision that invalidates a statute or overrules a decision does not generate Section 1983 liability "except where duress or fraud was present." *Diamond*, 972 F.3d at 284. Judge Fisher's idiosyncratic limit on Section 1983's scope is untenable for the reasons stated by Judge Phipps in his dissent in *Diamond*, 972 F.3d at 287–-88.

certain § 1983 claims." *Ogle,* 951 F.3d at 797. The Court concluded that the union defendant could assert the defense because "abuse of process is the most plausible common-law tort analogue to employees' post-*Janus* First Amendment claims." *Id.*

The Seventh Circuit in *Janus II* stated, in contrast, that the "search for the best [tort] analogy is a fool's errand." 942 F.3d at 365. The court found "reasonable arguments for several different torts," though it was "inclined to agree . . . that abuse of process comes closest." *Id.* Ultimately, the Seventh Circuit chose to "leave common-law analogies behind." *Id.* at 366.

The Ninth Circuit in *Danielson* also held a good faith defense is not rooted in common law. 945 F.3d at 1101. The court held "the availability of the defense arises out of general principles of equality and fairness—values that are inconsistent with rigid adherence to the oft-arbitrary elements of common law torts as they stood in 1871." *Id.*[5] According to the Ninth Circuit, "[i]t would be an odd result for an affirmative defense grounded in concerns for equality and fairness to hinge upon historical idiosyncrasies and strained legal analogies for causes of action with no clear parallel in nineteenth century tort law." *Id.* But the court alternatively held that, if common-law analogies mattered, "abuse of process provides the best analogy to Plaintiffs' claim." *Id.* at 1102.

The lower courts' struggle to agree upon a basis for recognizing a good faith defense is another reason for the Court to grant review. This is all the more true

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[5] The Second Circuit also cited equality and fairness as a justification for a good faith defense. *Wholean*, 955 F.3d at 335.

because neither equity nor common-law analogies support recognizing this defense to Section 1983.

Judges Fisher and Phipps recognized as much in *Diamond*. Judge Fisher found both that courts cannot "invent defenses to § 1983 liability based on our views of sound policy," 972 F.3d at 274, and that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to a First Amendment compelled speech claim, *id.* at 280 (Fisher, J., concurring in the judgment). Judge Phipps also rejected both rationales for a good faith defense. 972 F.3d at 288–90 (Phipps, J., dissenting). As discussed below, Judges Fisher and Phipps were right. Neither equity nor a tort analogy can justify creating this new affirmative defense to Section 1983.

1. Policy Interests in Fairness and Equity Do Not Justify a Good Faith Defense.

a. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so. "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990). "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984). The "fairness" rationale for a good faith defense to Section 1983 is inadequate on its own terms.

Indeed, fairness to *victims* of constitutional deprivations requires enforcing Section 1983's text as written. It is not fair to make employees pay for unconstitutional union conduct. Nor is it fair to let wrongdoers

keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980).

The Court said that in *Owen* when holding that Section 1983's legislative purposes did not justify extending good-faith immunity to municipalities. The Court's reasons for so holding apply here. As the Court said in *Janus* in the *stare decisis* context, this "is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about" the constitutionality of compelling public employees to pay union fees. 138 S. Ct. at 2484–85.

First, the *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." 445 U.S. at 651 (footnote omitted). So too here. It would be an injustice to leave innocent victims of agency fee seizures and other constitutional violations remediless for their injuries.

Second, the Court recognized that Congress enacted Section 1983 to "serve as a deterrent against future constitutional deprivations." *Id.* "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52. This deterrence interest also weighs against a reliance defense, which will encourage defendants to risk infringing on constitutional rights by limiting their exposure for so doing.

Third, the *Owen* Court reasoned that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss" to the entity that caused the harm "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id*. at 655. So too here. It is not fair to have employees pay for unconstitutional union conduct. Equity favors requiring unions to return to employees monies unconstitutionally seized from them.

b. As for the proposition that principles of "equality" justify extending to private defendants a defense like the immunity enjoyed by some public defendants, *see Danielson*, 945 F.3d at 1101, that proposition makes little sense. That unions are not entitled to qualified immunity is not reason to create a similar defense for unions under a different rubric. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for an immunity.

Even if principles of equality required treating a union like its closest government counterpart, that still would not entitle it to an immunity-like defense. A large organization like a public sector union is nothing like individual persons who enjoy qualified immunity. A union is most like a governmental body that lacks qualified immunity—a municipality. *Owen*, 445 U.S. at 654. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby." *Id*. Nor is it unjust to require a large organization, like a public sector union, to compensate citizens for violating their constitutional rights.

Neither fairness or equity nor equality justifies recognizing a good faith defense to Section 1983. Rather, both principles weigh against carving this exemption into Section 1983's remedial framework.

2. An Analogy to Abuse of Process Does Not Justify Creating a Good Faith Defense.

"Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Manuel*, 137 S. Ct. 911, 921 (2017). "Sometimes . . . [a] review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. But not always." *Id*. at 920–21. Some Section 1983 claims have no common law equivalent. "[Section] 1983 is not simply a federalized amalgamation of pre-existing common-law claims.'" *Id*. at 921 (quoting *Rehberg*, 566 U.S. at 366).

A First Amendment claim for compelled subsidization of speech has no common law equivalent. "Compelling a person to *subsidize* the speech of other private speakers" violates the First Amendment because it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common law torts. It is peculiar to the First Amendment.

A violation of First Amendment speech rights is nothing like an abuse of process tort. "[T]he tort of abuse of process requires misuse of a *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008). The tort seeks to protect the integrity of the judicial process and to protect litigants from harassment. *See* 8 Am. Law of Torts § 28:32 (2019). The tort does not exist, as the First Amendment does,

"to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Abuse of process is not so much like a compelled subsidization of speech claim to justify making malice and lack of probable cause *elements* of that constitutional claim. And that is the only potential relevance of common law analogies—to determine whether to import a tort's elements into a particular Section 1983 claim. *See Manuel*, 137 S. Ct. at 920–21.

Malice and lack of probable cause are not elements of a First Amendment claim under *Janus*. Under *Janus*, a union deprives employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when doing so is immaterial. The possible limited good faith defense Justices suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights under *Janus*.

D. A Judicially Created Affirmative Defense to Section 1983 Circumvents the Constitution's Separation of Powers.

The separation-of-powers doctrine bars courts from creating equitable defenses to federal statutes. "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). For example, in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), the Court recently held it would violate

"separation-of-powers principles" for courts to apply the equitable defense of laches to a statutory damages remedy. *Id.* at 960. The Court found that allowing courts to superimpose this equitable defense onto a federal statute would "give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *Id.* (citation omitted).

Lower courts, including the courts in this case, have violated separation-of-powers principles by inventing an equitable good faith defense to Section 1983's mandate that "[e]very person" who violates another's constitutional rights "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. This ostensible defense has no basis in the statute's text or history. The defense amounts to nothing more than courts refusing to enforce Section 1983 as written because those courts (mistakenly) believe that enforcing the statute would be unfair when a defendant acts under a state law before it is held unconstitutional.

Courts cannot refuse to enforce federal statutes on such grounds. "Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J. dissenting) (citation omitted).

CONCLUSION

The Court should take this case to instruct the lower courts to enforce Section 1983 pursuant to its terms. The petition should be granted.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
WILLIAM L. MESSENGER
FRANK D. GARRISON
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Rd., Ste. 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

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