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

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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July 14, 2021

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. The Liberty Justice Center represents the petitioners *Leitch, et al. v. AFSCME, Council 31*, No. 21-29, which sets forth a similar question in its petition for certiorari to question 3 presented in this case.

SUMMARY OF ARGUMENT

David Seidemann, Bruce Martin, and other current and former public-school teachers in New York State who declined to join a public union but were forced under state law to pay fair-share fees to a public-sector union seek a refund of those fees, which this court invalidated in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

Yet, the Second Circuit Court of Appeals, joined by a number of lower courts, have now denied victims of agency fees seizures—including Mr. Janus himself, *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus* II"), cert. denied 19-1104 (Jan. 25,

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondent received notice more than 10 days before its filing that Amicus intended to file this brief, and both consented to its filing.

2021)—relief for their injuries on the grounds that there exists a general good faith defense to Section 1983 liability. *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *Solomon v. Am. Fed'n of State*, No. 20-3878, 2021 U.S. App. LEXIS 15000 (2d Cir. Mar. 10, 2021); *Pellegrino v. N.Y. State United Teachers*, 843 F. App'x 409 (2d Cir. 2021); *Doughty v. State Emples. Ass'n of N.H.*, 981 F.3d 128 (1st Cir. 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375 (4th Cir. 2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020); *Leitch v AFSCME Council 31*, No. 20-1379 (Feb. 3, 2021, 7th Cir. 2021); *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Hoekman v. Educ. Minn.*, No. 18-cv-01686 (SRN/ECW), 2021 U.S. Dist. LEXIS 26927 (D. Minn. Feb. 12, 2021); *Brown v. Am. Fed'n of State, Cty., & Mun. Emples.,* No. 20-cv-01127 (SRN/ECW), 2021 U.S. Dist. LEXIS 26926 (D. Minn. Feb. 12, 2021)

This Court has three times raised whether a good faith defense to Section 1983 exists but has never recognized such a defense. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt v. Cole,* 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 n.23 (1982).

The Court should grant this petition, or one of the many like it, and reject the notion that a defendant acting under color of a statute before it is held unconstitutional is a defense to Section 1983 because such a defense conflicts with Section 1983's text, history, and legislative purpose.

ARGUMENT

I. A categorical good faith defense is not the claim-specific defense suggested by this Court in *Wyatt v. Cole*.

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). "Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id.* "But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Id.* at 921.

The issue in *Wyatt* was whether a private defendant who used an *ex parte* replevin statute to seize the plaintiff's property without due process of law was entitled to qualified immunity in a Section 1983 claim. 504 U.S. at 161. The Court recognized that the plaintiff's claims were analogous to "malicious prosecution and abuse of process," and 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) (similar). The *Wyatt* Court determined 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 . . . .” 504 U.S. at 165. This was so because the “rationales mandating qualified immunity for public officials are not applicable to private parties.” *Id.* at 167.

Wyatt left open the question of whether the defendants could raise “an affirmative defense based on good faith and/or probable cause.” *Id.* at 168–69. But this potential defense was not a categorical defense to all Section 1983 damages claims, as the lower courts addressing claims for the return of fair share fees seem to have held. Rather, the good faith defense to which the *Wyatt* Court was referring was a defense to the malice and probable elements of the specific due process claim at issue in that case. This is clear from all three opinions in *Wyatt*.

First, Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it was a “misnomer” to even call it a 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 (Rehnquist, C.J., dissenting). “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.*

Second, 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.” 504 U.S. at 172. Justice Kennedy further explained that “if the plaintiff could prove

subjective bad faith on the part of the defendant, he had gone far towards proving both malice and lack of probable cause." *Id.* at 173. Indeed, often "lack of probable cause can *only* be shown through proof of subjective bad faith." Id. at 174 (emphasis in original) (citing *Birdsall v. Smith*, 122 N.W. 626 (Mich. 1909) (holding that a plaintiff alleging malicious prosecution failed to prove the prosecution lacked probable cause)).

Third, Justice O'Connor's majority opinion in *Wyatt* recognized that the dissenting and concurring opinions were referring to a defense to the malice and probable cause elements of claims analogous to malicious prosecution cases. 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." 504 U.S. at 167 n.2 (emphasis added).

In short, the *Wyatt* Court suggested that there may be a *claim-specific* good faith defense to Section 1983 actions in which malice and lack of probable cause are elements of the alleged constitutional deprivation. However, the *Wyatt* Court was not suggesting that there exists a *categorical* good faith defense in which a defendant's good faith reliance on state law is a defense to all constitutional claims for damages brought under Section 1983. There is no basis for such a sweeping defense to Section 1983.

The claim-specific good faith defense suggested in *Wyatt* is no bar to Petitioners' cause of action because,

quite simply, malice and lack of probable cause are not elements of, or a defense to, a First Amendment deprivation. In general, "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). In particular, a compelled speech violation does not require any specific intent. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that Section 1983 "contains no independent state-of-mind requirement.")

The limited good faith defense members of this Court actually suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights by seizing agency fees from them. The Court should grant review to clarify what it intended in *Wyatt*.

II. A categorical good faith defense conflicts with the text, history, and legislative purpose of Section 1983.

Section 1983 states, in relevant part, 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)).

The proposition that a defendant's good faith reliance on a state statute exempts it from Section 1983 damages liability has no basis in Section 1983's text. In fact, the proposition conflicts with the statute in at least two ways. First, it cannot be reconciled with the statute's mandate that "every person"—not some persons, or persons who acted in bad faith, but "every person"—who deprives a party of constitutional rights under color of law "shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. The term "shall" is not a permissive term, but a mandatory one.

Second, an element of Section 1983 is that a defendant must act "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. The Second Circuit and other lower courts have turned Section 1983 on its head by holding that persons who act under color of a not yet invalidated state law to deprive others of a constitutional right are *not* liable to the injured parties in an action for damages. *Janus II*, 942 F.3d at 362. The courts have effectively declared a statutory *element* of Section 1983—that defendants must act under color of state law—to be a *defense* to Section 1983. Under the decisions of the Second Circuit and other lower courts, acting under color of a state law yet to be held unconstitutional is now a potential defense to all Section 1983 damages claims.

But a defendant acting under color of a state statute cannot be both an element of and a defense to Section 1983. That would render the statute self-defeating: any private defendant that acted "under color of any statute," as Section 1983 requires, would

be shielded from liability because it acted under color of a state statute.

Here, the fact that Professional Staff Congress Local 2334 acted under color of New York's agency fee law when it deprived Petitioners of their constitutional rights is not exculpatory, but a reason why the unions are liable for damages under Section 1983. This conclusion is consistent with the purpose of Section 1983, which is to provide a federal remedy to persons deprived of constitutional rights by parties that act under color of state law. *See Owen v. United States*, 445 U.S. 622, 650–51 (1980). "By creating an express federal remedy, Congress sought to 'enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). The proposition that a defendant acting under authority of an existing state law is exculpatory under Section 1983 inverts the purposes of the statute. *See Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262, 288–89 (3d Cir. 2020) (Phipps, J., dissenting)

The lack of any basis in Section 1983's text and history for a good faith defense distinguishes it from other recognized immunities or defenses to Section 1983, which have a statutory basis. Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg,* 566 U.S. at 363. Courts accord 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 (cleaned up).

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 (finding "[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) (finding "[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."). The policy justifications for immunities generally are not applicable to private defendants. *Wyatt*, 504 U.S. at 164–167. Thus, unlike with recognized immunities, there is no justification for recognizing a good faith defense that defies Section 1983's statutory 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.

CONCLUSION

The general good faith defense, adopted by the lower courts to shield public-sector unions from having to return fair share fees taken under color of state law from petitioners in this and other cases, is not consistent with any decisions from this Court. Further, the general good faith defense conflicts with Section 1983's text, history, and legislative purpose.

For the reasons stated above, this Court should grant the petition for writ of certiorari to deny the

existence of a general good faith defense to Section 1983 liability.

Respectfully submitted,

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