No. 20-1725

IN THE
Supreme Court of the United States

DAVID SEIDEMANN, ET AL.,
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

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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

None of the Respondents is a corporation except for Respondent National Education Association. Respondent National Education Association has no parent corporation and no publicly held company owns stock in Respondent National Education Association.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. Background 1

B. Proceedings below 3

REASONS FOR DENYING THE PETITION 4

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 5

II. Petitioners' merits arguments have already been found insufficient to justify granting review 13

III. There is no other justification for this Court's intervention 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 2, 8, 9, 11

Agostini v. Felton,
521 U.S. 203 (1997) 15

Akers v. Md. State Educ. Ass'n,
990 F.3d 375 (4th Cir. 2021) 7, 10

Allen v. Cooper,
140 S. Ct. 994 (2020) 14

Casanova v. Machinists Local 701,
141 S. Ct. 1283 (2021) 1

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 12

Clement v. City of Glendale,
518 F.3d 1090 (9th Cir. 2008) 7

Danielson v. Inslee,
141 S. Ct. 1265 (2021) 1

Danielson v. Inslee,
945 F.3d 1096 (9th Cir. 2019) 7, 9, 13

Diamond v. Pa. St. Educ. Ass'n,
__ S. Ct. __, 2021 WL 2405172
(June 14, 2021) 1, 10

Diamond v. Pa. St. Educ. Ass'n,
972 F.3d 262 (3d Cir. 2020).................7, 9, 10, 13

Doughty v. State Emps.' Ass'n of N.H.,
981 F.3d (1st Cir. 2020) 7, 9, 13

Duncan v. Peck,
844 F.2d 1261 (6th Cir. 1988) 12

Ellis v. Railways Clerks,
466 U.S. 435 (1984) 11

Fairfax Covenant Church v. Fairfax County School Board,
17 F.3d 703 (4th Cir. 1994) 12

Howerton v. Gabica,
708 F.2d 380 (9th Cir. 1983) 9

Janus v. AFSCME Council 31,
138 S. Ct. 2448 (2018) ....*passim*

Janus v. AFSCME Council 31,
141 S. Ct. 1282 (2021) 1

Janus v. AFSCME Council 31,
942 F.3d 352 (7th Cir. 2019) 7, 13

Jordan v. Fox, Rothschild, O'Brien & Frankel,
20 F.3d 1250 (3d Cir. 1994)................................6

Lee v. Ohio Educ. Ass'n,
141 S. Ct. 1264 (2021) 1

Lee v. Ohio Educ. Ass'n,
951 F.3d 386 (6th Cir. 2020) 7, 13

Lowary v. Lexington Local Board of Education,
903 F.2d 422 (6th Cir. 1990) 11, 12

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 5, 6

Machinists v. Street,
367 U.S. 740 (1961) 10, 11

Mattos v. AFSCME Council 3,
2020 WL 2027365 (D. Md. Apr. 27, 2020) 8

Mooney v. Ill. Educ. Ass'n,
141 S. Ct. 1283 (2021) 1

Mooney v. Ill. Educ. Ass'n,
942 F.3d 368 (7th Cir. 2019) 7

Ogle v. Ohio Civ. Serv. Emps. Ass'n,
141 S. Ct. 1265 (2021) 1

Ogle v. Ohio Civ. Serv. Emps. Ass'n,
951 F.3d 794 (6th Cir. 2020) 7

Osmond v. Spence,
359 F. Supp. 124 (D. Del. 1972) 12

Pinsky v. Duncan,
79 F.3d 306 (2d Cir. 1996)....................................7

Railway Clerks v. Allen,
373 U.S. 113 (1963) 10, 11

Vector Research, Inc. v. Howard & Howard Att'ys, P.C.,
76 F.3d 692 (6th Cir. 1996) 7, 12

Wessel v. City of Albuquerque,
299 F.3d 1186 (10th Cir. 2002) 11, 12

Wholean v. CSEA SEIU Local 2001,
141 S. Ct. 1735 (2021) 1, 5

Wholean v. CSEA SEIU Local 2001,
955 F.3d 332 (2d Cir. 2020)............................7, 13

Wyatt v. Cole,
504 U.S. 158 (1992) ....*passim*

Wyatt v. Cole,
994 F.2d 1113 (5th Cir.) 6

Statutes

42 U.S.C. § 1983..*passim*

N.Y. Civ. Serv. Law
§ 208...1, 2
§ 204..2
§ 209a..2

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 eight petitions for certiorari that raised the same question presented here.[1] There have been no developments in the short time since those denials that would make the Second Circuit's non-precedential summary order worthy of this Court's review. This petition should also be denied.

STATEMENT OF THE CASE

A. Background

New York, 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. *See* N.Y. Civ. Serv. Law § 208 *et seq*. Under New York law, the chosen representative has a duty to represent in good faith all bargaining unit workers in negotiating and administering

[1] *Diamond v. Pa. St. Educ. Ass'n*, __ S. Ct. __, 2021 WL 2405172 (June 14, 2021); *Wholean v. CSEA SEIU Local 2001*, 141 S. Ct. 1735 (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).

contracts, including workers who are not union members. *Id.* §§ 204(2), 209a(2)(c).

Prior to this Court's decision in *Janus*, unions were authorized by New York law to collect agency fees through payroll deductions from bargaining unit employees who were not union members, to cover the nonmembers' share of the costs of collective bargaining representation. *See* N.Y. Civ. Serv. Law § 208(b). At the time, agency fee requirements were constitutional under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that the First Amendment allows public employers to require employees to pay their proportionate share of the costs of union collective bargaining representation but prohibits requiring nonmembers to pay for a union's political or ideological activities. *Abood*, 431 U.S. at 235–36.

On June 27, 2018, this Court issued its decision in *Janus*. *Janus* considered the same First Amendment challenge to agency fees rejected in *Abood*. *Janus* recognized that the lower court had "correctly" dismissed that challenge as "foreclosed by *Abood*." 138 S. Ct. at 2462. But *Janus* concluded that *Abood* had erred in holding that agency fees are consistent with the First Amendment, and this Court held that *Abood* "is now overruled" and agency fee-requirements "cannot be allowed to continue." 138 S. Ct. at 2486.

Petitioners are two public employees in New York who, prior to *Janus*, paid agency fees to the unions that represented their bargaining units. App. 14a–15a. Petitioners' public employers and union representatives immediately complied with this Court's

Janus decision by ceasing all deductions of agency fees. App. 22a.

B. Proceedings below

Petitioners filed this putative class action lawsuit on October 24, 2018, about four months after this Court's decision in *Janus*. App. 15a. Petitioners sued the unions that represent their bargaining units as well as other labor organizations with which those unions are affiliated (collectively, the "Unions"). App. 15a–16a; 2d Cir. J.A. 28–31. Petitioners alleged that they and all putative class members are entitled under 42 U.S.C. § 1983 to repayment of all agency fees collected prior to *Janus*. App. 12a. Petitioners also asserted claims for prospective relief and for violation of state law. *Id.*

The district court granted the Unions' motion to dismiss. App. 11a–48a. The district court held that unions that received agency fees prior to this Court's decision in *Janus* could assert the good-faith defense available to private parties under 42 U.S.C. § 1983 because the unions had relied on state law and then-controlling Supreme Court precedent. App. 26a–40a. The district court held that Petitioners lacked standing to seek prospective relief and that their state law claims were meritless. App. 20a–26a, 40a–47a.

The Second Circuit affirmed the district court's ruling with a non-precedential summary order. App. 1a–10a. The Second Circuit concluded that Petitioners' § 1983 claims for retrospective monetary relief were foreclosed by the Second Circuit's precedential ruling in *Wholean,* which "held 'that a party who complied with directly controlling Supreme Court

precedent in collecting fair-share fees cannot be held liable for monetary damages under § 1983.'" App. 7a (quoting *Wholean v. CSEA SEIU Local 2001,* 955 F.3d 332, 334 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1735 (2021)). The Second Circuit observed that Petitioners had "provide[d] essentially no explanation why *Wholean*'s holding does not control the outcome here." App. 8a. The Second Circuit also affirmed the district court's dismissal of Petitioners' prospective relief and state law claims. App. 6a–9a.

REASONS FOR DENYING THE PETITION

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 have unanimously answered that question in the negative. The non-precedential summary order that Petitioners ask this Court to review reaches the same outcome as those prior decisions. There is no conflict to resolve.

Further, the unique circumstances that gave rise to post-*Janus* Section 1983 claims are unlikely to recur, so the question actually presented by the facts here is unlikely to have widespread significance. 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 already has denied eight petitions for certiorari that raised the same question presented here. *See supra* at 1. One of those petitions sought review of the same Second Circuit opinion that controlled the outcome here. *See Wholean v. CSEA SEIU Local 2001*, 141 S. Ct. 1735 (2021). 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 "conflict." Pet. 3–4. There is no conflict to resolve. Every court to have considered these issues has held that private parties facing claims for retrospective monetary relief under Section 1983, including unions that received and spent pre-*Janus* agency fees, are not liable when they reasonably relied upon then-valid state law and this Court's controlling precedent that was subsequently overturned. The Second Circuit's non-precedential summary order below reaches the same conclusion as every other decision about pre-*Janus* liability.

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 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 have uniformly 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 have all since reached the same conclusion. *See Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Research, 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, 1097 (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).

That consensus extends to the specific claim for pre-*Janus* agency fees being pursued by Petitioners here. Numerous lawsuits similar to Petitioners' were filed throughout the country following issuance of the *Janus* decision. Pet. 23. 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 published decisions from seven different courts of appeals.[2] It also includes more than 30

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[2] *Akers*, 990 F.3d 375 (4th Cir. 2021); *Doughty*, 981 F.3d 128 (1st Cir. 2020), *petition for cert. docketed*, No. 20-1534 (May 4, 2021); *Diamond v. Pa. St. Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), *cert. denied*, __ S. Ct. __, 2021 WL 2405172 (June 14, 2021); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1735 (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 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1282 (2021); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir.

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 this Court's analysis of reliance interests in *Janus*. This Court considered in *Janus* whether reliance interests justified retaining *Abood* as a matter of stare decisis, 138 S. Ct. at 2478–86, and this Court acknowledged that unions had entered into existing collective bargaining agreements with the understanding that future agency fees would help pay for collective bargaining representation. *Id.* at 2484. The Court concluded that unions' reliance interests in the continued enforcement of those agreements were not sufficiently weighty to justify retaining *Abood*. *Janus,* 138 S. Ct. at 2478–86. The Court never suggested, however, that its decision would expose public employee unions to massive retrospective monetary liability for having followed the Court's 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 monetary liability. Indeed, Respondents are not aware of *any* decision by *any* court to that effect.

In a futile effort to establish a conflict, Petitioners contend that the First and Ninth Circuits had rejected the existence of a good-faith defense for private parties before this Court decided *Wyatt*. Pet. 24–25 (citing *Downs v. Sawtell*, 574 F.2d 1 (1st Cir. 1978), and *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983)). To the

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2019), *cert. denied*, 141 S. Ct. 1283 (2021).

contrary, those cases were about qualified immunity, not the good-faith defense. *See Wyatt*, 504 U.S. at 161 (citing *Downs* and *Howerton* as holding that "private parties acting under color of state law are not entitled to [qualified] immunity"); *Danielson*, 945 F.3d at 1099–1100 (distinguishing *Howerton*).

Indeed, the First and Ninth Circuits subsequently applied the good-faith defense to reject Section 1983 claims arising from unions' pre-*Janus* receipt of agency fees, just as the Second Circuit did here. *See Doughty*, 981 F.3d at 134–38; *Danielson*, 945 F.3d at 1103–05.[3] As such, there is no conflict.

Petitioners also argue that the non-precedential summary order here conflicts with the Third Circuit's decision in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020). But the outcome in *Diamond* was the same as the outcome here—the Third Circuit affirmed the dismissal of former union members' Section 1983 claims for retrospective monetary relief based on unions' receipt of pre-*Janus* agency fees. *Id.* at 265.

Petitioners attempt to create a conflict on the basis of Judge Fisher's concurring opinion in *Diamond*, *see* Pet. at 20, 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. *Diamond*, 972 F.3d at 281 (Fisher, J.,

[3] Petitioners fail to even cite *Doughty* in arguing that the decision below is in conflict with First Circuit law.

concurring). The result reached by Judge Fisher was no different from the result reached by 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.[4]

3. Petitioners also erroneously contend that the non-precedential summary order here conflicts with this Court's decisions about agency fees in *Abood, Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963). Pet. 8–11. Those decisions did not address the issue presented here.

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[4] The unsuccessful petitioners in *Diamond* also argued that Judge Fisher's concurring opinion created a circuit split. *See* Cert. Pet. at 9, *Diamond v. Pa. St. Educ. Ass'n*, Nos. 19-2812, 19-3906 (Mar. 29, 2021). The same argument also was raised in other unsuccessful petitions. *See* Supp. Br. at 1, *Janus v. AFSCME Council 31*, No. 19-1104 (Sept. 4, 2020); Cert. Pet. at 6–7, *Wholean v. CSEA SEIU Local 2001*, No. 20-605 (Oct. 30, 2020). The Petition here offers nothing new.

Petitioners rely heavily on the *dissent* in *Diamond*. *See* Pet. 20–22. But the dissent does not represent the law of the Third Circuit. Further, the dissent misses the mark by focusing on the narrow question of whether there was an affirmative defense of good faith at common law. *Diamond*, 972 F.3d at 285–87 (Phipps, J., dissenting). 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 (including the Third Circuit) has held that the answer is "yes." *See, e.g.*, *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.").

The portions of those decisions that Petitioners rely upon considered what procedures should be implemented to protect nonmembers' rights *going forward*. Specifically, the decisions considered how to provide injunctive relief that would protect nonmembers' First Amendment rights while avoiding undue interference with unions' necessary functions. The Court identified "two possible remedies" that would accommodate both concerns—one in which nonmembers initially would pay a reduced fee, and an alternative in which nonmembers initially would pay an amount equal to full union membership dues and later receive "restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee." *Abood*, 431 U.S. at 238. *See also Street*, 367 U.S. at 774–75; *Allen*, 373 U.S. at 120–21.[5]

The Court's decisions in *Abood, Street*, and *Allen* did not discuss potential defenses to retrospective liability. Nor did those cases involve situations in which unions had received and spent funds in reliance on state law and directly controlling Supreme Court precedent. The impermissible fees in those cases also were for political and ideological activities, not collective bargaining representation that the unions were obligated to provide to the entire bargaining unit. For all these reasons, there is no conflict.

Nor can Petitioners manufacture a conflict based on *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), and *Lowary v. Lexington Local Board of*

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[5] *Ellis v. Railways Clerks*, 466 U.S. 435 (1984), subsequently held that a "pure rebate" system was impermissible because it forced nonmembers to provide the union with an "involuntary loan." *Id.* at 443–44.

Education, 903 F.2d 422 (6th Cir. 1990). Pet. 10–11. Neither decision considered whether private parties can assert a good-faith defense to Section 1983 claims for retrospective monetary relief.[6] To the contrary, the remedial issue presented on appeal in those cases was whether violations of the procedural requirements established by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), required the return of *all* agency fees paid without the required procedures, including the portion that was used to support collective bargaining on nonmembers' behalf. The Sixth and Tenth Circuits rejected the argument that such a refund was required. *Wessel*, 299 F.3d at 1194–95; *Lowary*, 903 F.2d at 433.

Wessel and *Lowary* also are irrelevant because neither case involved private parties who were following then-binding Supreme Court precedent. *See Wessel*, 299 F.3d at 1192–94 (concluding that the fair-share fee notice at issue failed to satisfy *Hudson*'s preexisting requirement of verification by an independent auditor); *Lowary*, 903 F.2d at 429 (noting that *Hudson* "did not overrule any prior cases").[7]

4. Finally, Petitioners contend that review is required to resolve a "conflict" between the decision

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[6] By the time *Lowary* was decided, the Sixth Circuit already had held that a good-faith defense is available to private parties in Section 1983 litigation. *See Duncan v. Peck*, 844 F.2d 1261, 1267–68 (6th Cir. 1988); *see also Vector Research, Inc.*, 76 F.3d at 698–99 (confirming availability of defense after *Wyatt*).

[7] Petitioners also cite *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994), and *Osmond v. Spence*, 359 F. Supp. 124 (D. Del. 1972), Pet. 12–13, but those cases considered only public entities' obligations, not the potential liability of private parties.

below and this Court's precedents regarding the retroactive application of Supreme Court decisions. Pet. 15–19. To the contrary, the Second Circuit, like the other Circuits to consider the issue of pre-*Janus* liability, has held that the good-faith defense bars claims against unions for retrospective monetary relief "even if the retroactivity of *Janus* is presumed." *Wholean*, 955 F.3d at 336; *see also Doughty*, 981 F.3d at 131; *Diamond*, 972 F.3d at 268 n.1; *Lee*, 951 F.3d at 389; *Danielson*, 945 F.3d at 1099; *Janus II*, 942 F.3d at 359–60.

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

Petitioners urge that review is justified because the Second Circuit purportedly erred on the merits by rejecting their Section 1983 claims. Pet. 12–19. But this Court generally does not grant review solely to correct purported errors in a decision below. The same merits arguments were raised in other recent petitions for certiorari and are fully addressed by the briefs in opposition to certiorari in those cases. *See, e.g.*, Brief in Opposition at 17–19, *Danielson v. Inslee*, No. 19-1130 (addressing petitioner's argument that "money taken in violation of another's constitutional rights must be restored") (quotation and emphasis omitted); Brief in Opposition at 22–24, *Ogle v. Ohio Civil Service Employees Ass'n*, No. 20-486 (rebutting petitioner's argument that application of the good-faith defense conflicts with this Court's retroactivity precedents). This Court denied those petitions earlier this year, 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 there are (or were) "37 class action lawsuits that seek refunds from unions for fair-share fees" paid prior to *Janus*. Pet. 23. 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 to impose 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. The Second Circuit held only "'that a party *who complied with directly controlling Supreme Court precedent* … cannot be held liable for monetary damages under § 1983.'" App. 7a (emphasis supplied; quoting *Wholean*, 955 F.3d at 334). 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). 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.

Respectfully submitted,

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