No. 20-422

IN THE
Supreme Court of the United States

SARAH R. LEE,
Petitioner,

v.

OHIO EDUCATION ASSOCIATION, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff may defeat the good-faith defense under 42 U.S.C. § 1983—which Petitioner conceded below can shield a private-party defendant from liability for money damages—by characterizing the monetary remedy she seeks as restitution of property.

CORPORATE DISCLOSURE STATEMENT

Respondents Ohio Education Association and Avon Lake Education Association are unincorporated associations. Respondent National Education Association is a nonprofit corporation chartered by Act of Congress; it has no parent corporation, and no publicly held company owns any stock in it.

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STATEMENT

A. Ohio, like many other states, allows public employees to organize and bargain collectively with their employer, through a representative organization of their choosing, over the terms and conditions of their employment. Respondent Avon Lake Education Association ("ALEA")—which is affiliated at the state and national levels with Respondents Ohio Education Association and National Education Association—was chosen and recognized as the exclusive bargaining representative for teachers employed by the Avon Lake City School District ("School District"), including Petitioner Sarah R. Lee. That recognition brought with it the legal duty for the union, in collective bargaining and grievance administration, to represent equally all members of the bargaining unit, whether union members or not.

Recognizing that the imposition of this "duty of fair representation" with respect to non-dues-paying members of the bargaining unit was not cost-free, Ohio law authorized unions and public employers to negotiate, as part of their collective bargaining agreements, a "fair share" (or "agency fee") clause:

> The agreement may contain a provision that requires as a condition of employment … that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. … The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic ….

Ohio Rev. Code Ann. § 4117.09(C). This statute was passed by the Ohio General Assembly in 1984, following *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which this Court explicitly upheld the constitutionality of such agency-fee requirements in the public sector.

Consistent with Ohio law and the *Abood* decision, the collective bargaining agreement between ALEA and the School District included a requirement that members of the bargaining unit who declined to join the union would have an agency fee deducted from their paychecks to help defray the costs of collective bargaining and contract enforcement undertaken for the benefit of all employees, union members and nonmembers alike.

B. On June 27, 2018, this Court issued its decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in which the Court overruled *Abood* and held for the first time that public employees could not constitutionally be required to pay agency fees. Following *Janus*, the Respondent unions and the School District recognized that the statutory and contractual provisions authorizing agency fees were no longer enforceable, and they immediately terminated the deduction of agency fees from the paychecks of nonmembers, including Petitioner.

Two days before this Court issued its decision in *Janus*, Petitioner brought the instant class-action lawsuit against Respondents under 42 U.S.C. § 1983. As set forth in her Amended Complaint, Petitioner claimed that the agency fees she had paid *before* June 27, 2018—at a time when Ohio law explicitly authorized agency fees, and the *Abood* decision upholding the constitutionality of such statutes was

the law of the land—must be paid back by the unions. Petitioner also sought declaratory and injunctive relief.

Granting Respondents' motion to dismiss on March 25, 2019, the district court agreed with an "ever-growing number of courts" to have recognized a good-faith defense under § 1983 that shields defendant unions against claims for monetary relief in the amount of the agency fees they had received pursuant to state law prior to the *Janus* decision. Pet. App. 16a–17a. The district court also held that Petitioner's claims for declaratory and injunctive relief were moot because the Respondent unions and the School District immediately stopped collecting agency fees in response to *Janus*. Pet. App. 19a.

Petitioner appealed only the district court's dismissal of her claim for monetary relief. On February 24, 2020, the Sixth Circuit affirmed the district court's judgment. The Sixth Circuit held that, even assuming *arguendo* that this Court's *Janus* decision had retroactive effect, "the good-faith defense constitutes 'a previously existing, independent legal basis for denying' a retroactive remedy." Pet. App. 7a (quoting *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995) (alteration omitted)).

In so holding, the Sixth Circuit first turned to this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), where the Court observed in dicta that the potential "problem" of holding private parties liable under § 1983 merely for following procedures set forth in a state statute "should be dealt with by establishing an affirmative defense." Pet. App. 7a (quoting *Lugar*, 457 U.S. at 942 n.23 (alteration omitted)). The Sixth Circuit then explained that, in

the wake of this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992), which held that private parties sued under § 1983 cannot assert qualified immunity but expressly left open whether a good-faith defense was available, "a consensus has emerged among the lower courts" that private parties can assert such a defense. Pet. App. 9a. The Sixth Circuit added its "voice to that chorus," holding that the Respondents could assert a good-faith defense because they were "authorized by Ohio law and binding Supreme Court precedent to collect agency fees" until *Janus*. *Id.*

While Petitioner did "not directly challenge the existence of the good-faith defense," *id.*, the Sixth Circuit went on to reject her arguments that the defense could not be asserted by the Respondent unions on the facts here. The court first rejected Petitioner's argument that the unions could not assert the good-faith defense because Petitioner's claim sounded in "equitable restitution," holding instead that her claim for monetary relief was legal—not equitable—in nature. Pet. App. 10a–11a. In so holding, the Sixth Circuit followed *Mooney v. Illinois Education Ass'n*, 942 F.3d 368, 370 (7th Cir. 2019), and *Danielson v. Inslee*, 945 F.3d 1096, 1102 (9th Cir. 2019), both of which rejected the same argument on indistinguishable facts. Pet. App. 10a.

The court went on to address Petitioner's argument that the good-faith defense only could apply if the most analogous tort to her § 1983 claim was subject to a good-faith defense at common law. The court disagreed with Petitioner's premise but held that, even if that premise were correct, the good-faith defense would apply. That was because abuse of process—a tort that contained an element of scienter

at common law—was the most analogous tort to Petitioner's § 1983 claim. Pet. App. 11a & n.2.

C. Nine days after the Sixth Circuit issued its opinion in this case, a different panel of that court decided another § 1983 case seeking the repayment of pre-*Janus* agency fees: *Ogle v. Ohio Civil Service Employees Ass'n*, 951 F.3d 794 (6th Cir. 2020). In a per curiam opinion authored by Judge Sutton,[1] the *Ogle* court acknowledged that *Lee* required recognition of the defendant union's good-faith defense. *Id.* at 796. But because the plaintiff in *Ogle*—unlike Petitioner here—"object[ed] to [the] validity" of the good-faith defense, *id.*, the court went on to explain why the good-faith defense existed and applied. The court first observed that, in this Court's *Wyatt* decision, "five justices agreed that private parties may assert a good-faith defense or good-faith immunity to some § 1983 lawsuits." *Id.* It then explained that, as the Seventh and Ninth Circuits already had held, abuse of process was the most analogous common-law tort to claims for pre-*Janus* agency fees and that, applying this common-law analogy, unions' reliance on state law and this Court's *Abood* precedent shielded them from such § 1983 claims:

> Think about the problem this way. Public-sector unions may enlist the State's help (and its ability to coerce unwilling employees) to carry out everyday functions. But a union that misuses this help, say because the state-assisted action would violate the U.S.

[1] Judge Sutton is identified as the author of the per curiam opinion in the Sixth Circuit's docket notice accompanying the opinion.

> Constitution, may face liability under § 1983. A narrow good-faith defense protects those who unwittingly cross that line in reliance on a presumptively valid state law—those who had good cause in other words to call on the governmental process in the first instance. Unions that used the States' authority to extract "fair share" fees from non-members may in retrospect have crossed into forbidden territory, but if they did so before *Janus* they may invoke the good-faith defense because *Abood* and state law told them they were in the clear.

Id. at 797 (citations omitted).

The Sixth Circuit denied the plaintiffs' petitions for rehearing *en banc* in *Lee* and *Ogle*, with no judge calling for a vote on either petition. Pet. App. 21a–22a; *Ogle* (CA6 No. 19-3701), ECF No. 47-1.

REASONS FOR DENYING THE WRIT

Petitioner asks the Court to grant certiorari because, she claims, the courts of appeals are "divided" on two issues—(a) the existence, and (b) the scope, of the good-faith defense that can be invoked by private parties sued under 42 U.S.C. § 1983. In fact, there is no division of authority on either point. As to the first, Petitioner's attempt to conjure up a circuit split—on an issue on which the courts of appeals, and indeed the lower courts generally, have all reached the same result—rests entirely on her misreading of three pre-1990 cases that do not say what she claims they do. Nor is there any conflict among the courts of appeals on the scope of the good-faith defense. And Petitioner cannot cite a single case that has ever

articulated the "ubiquitous" proposition—that funds unconstitutionally received must always be returned—with which she claims the Sixth Circuit's decision (and all of the other recent union-fee cases) are in conflict. Finally, even if the Petition presented an otherwise cert-worthy question, this would not be the vehicle for the Court to address it, for Petitioner has waived both of the arguments she asks this Court to consider.

I. THERE IS NO DIVISION AMONG THE CIRCUITS ON THE EXISTENCE OF THE GOOD-FAITH DEFENSE

A. The most striking aspect of the state of the law on the good-faith defense is the lower courts' complete unanimity as to the availability of the defense to private parties sued under § 1983 for having acted in accordance with presumptively-valid state statutes. That is true generally, as well as specifically with respect to the post-*Janus* suits against labor organizations based on their receipt and expenditure of agency fees prior to this Court's decision in *Janus* to overrule its existing precedent and hold public-sector agency-fee requirements unconstitutional.

The good-faith defense, as it has been widely and unanimously adopted by the lower courts, grew directly out of two seminal decisions of this Court addressing the scope of liability for private-party defendants sued under 42 U.S.C. § 1983. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Court ruled that private parties could, under certain circumstances, be held liable along with their governmental counterparts for violations of § 1983. But as part and parcel of that ruling, the *Lugar* Court recognized the "problem" of imposing monetary

liability on private defendants for "mak[ing] use of seemingly valid state laws," and explained that "this problem should be dealt with … by establishing an affirmative defense." *Id.* at 942 n.23. Subsequently, when in *Wyatt v. Cole*, 504 U.S. 158 (1992), the Court rejected the extension of qualified immunity to private-party defendants as a potential way to resolve that problem, the Court distinguished immunities—meaning "immunity from suit," with its accompanying procedural privileges, such as immediate appealability of interlocutory orders—from defenses to monetary liability. *Id.* at 165–66. The Court then added, without having occasion to decide the issue, that "private defendants faced with § 1983 liability under *Lugar* … could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Id.* at 169.

Equally important, five Justices in *Wyatt*, in two separate opinions, stated even more explicitly their willingness to adopt such a good-faith defense. Justice Kennedy, in his concurring opinion (joined by Justice Scalia), underlined the historical grounding of this good-faith defense, noting the "support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *Id.* at 174. And although Chief Justice Rehnquist in dissent (joined by Justices Souter and Thomas) would have applied full-blown qualified immunity to private parties who acted in reliance on a state statute, he agreed that there was a "good-faith common-law defense at the time of § 1983's adoption," *id.* at 176, and that "a good-faith defense will be

available for respondents to assert on remand." *Id.* at 177. The Chief Justice emphasized, in this regard, the "strong public interest in encouraging private citizens to rely on valid state laws." *Id.* at 179–80.

The courts of appeals have followed this Court's suggestion in *Wyatt*. Specifically, no fewer than seven circuits—in a total of 15 opinions—have had occasion to address the question since *Wyatt* suggested the existence of a good-faith defense for private-party § 1983 defendants. All of these opinions have held that there is such a good-faith defense and have applied it on the facts of the case before the court.

Initially, the issue arose in a number of cases not involving union fees. The Sixth Circuit had already concluded, several years before *Wyatt*, that private-party defendants, while unable to avail themselves of qualified immunity, could invoke a good-faith defense to liability under § 1983. *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988). Following this Court's decision in *Wyatt*, the Fifth Circuit, on remand from this Court, also squarely addressed and decided the question, which it found "largely answered by the[] separate opinions" of Justice Kennedy and Chief Justice Rehnquist. *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993). The Fifth Circuit held "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, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Id.* Subsequently, four other courts of appeals considered the issue in a variety of contexts, and all reached the same result. *See Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Jordan*

v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1275–78 (3d Cir. 1994); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008). Similarly, numerous district courts, without exception, recognized the good-faith defense in addressing a variety of constitutional claims under § 1983.[2]

In the context of union fees, the good-faith defense was initially applied following this Court's decision in *Harris v. Quinn*, 573 U.S. 616 (2014), in which the Court, while declining to overrule *Abood*, held that *Abood*'s approval of agency-fee requirements did not apply to non-full-fledged public employees such as

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[2] We have identified more than 20 such cases from the district courts that have applied the good-faith defense to shield a private-party defendant from monetary liability under § 1983, addressing a variety of constitutional claims unrelated to the instant issue of union fees. A representative sample includes the following: *Franklin v. Fox*, 2001 WL 114438, at *3–7 (N.D. Cal. Jan. 22, 2001) (Sixth Amendment denial of right to counsel); *Lewis v. McCracken*, 782 F. Supp. 2d 702, 714–15 (S.D. Ind. 2011) (First Amendment free speech rights); *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 571–73 (W.D. Va. 2008) (Fourth Amendment illegal search), *rev'd on other grounds*, 570 F.3d 546 (4th Cir. 2009); *Doby v. Decrescenzo*, 1996 WL 510095, at *21 (E.D. Pa. Sept. 9, 1996) (Fourth, Eighth, and Fourteenth Amendment claims), *aff'd*, 171 F.3d 858 (3d Cir. 1999); *Nemo v. City of Portland*, 910 F. Supp. 491, 498–99 (D. Or. 1995) (First Amendment free speech rights); *Goodman v. Las Vegas Metro. Police Dep't*, 2013 WL 819867, at *2 (D. Nev. Mar. 5, 2013) (Fourth Amendment unlawful detention); *Robinson v. San Bernardino Police Dep't*, 992 F. Supp. 1198, 1207–08 (C.D. Cal. 1998) (Fourth, Eighth, Thirteenth, and Fourteenth Amendment claims); *Strickland v. Greene & Cooper, LLP*, 2013 WL 12061876, at *7 (N.D. Ga. Oct. 29, 2013) (Fourteenth Amendment due process violation).

state-compensated home-care and child-care workers. In addressing § 1983 claims requesting that unions repay agency fees collected from such employees, pursuant to state law, prior to the *Harris* decision, the Second Circuit and two district courts agreed that the good-faith defense as recognized in the foregoing cases shielded the defendant unions from monetary liability. *See Jarvis v. Cuomo*, 660 F. App'x 72, 75–76 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Winner v. Rauner*, 2016 WL 7374258 (N.D. Ill. Dec. 20, 2016); *Hoffman v. Inslee*, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016).

The current series of cases involving the good-faith defense arose out of lawsuits filed against public-sector unions following this Court's 2018 *Janus* decision overruling *Abood*, in which plaintiffs sought to hold the defendant unions liable for agency fees they had received and expended, pursuant to state law, prior to the *Janus* decision—in other words, at a time when this Court's controlling precedent held agency-fee requirements in public-sector employment to be constitutionally permissible.

To date, six courts of appeals—the First, Second, Third, Sixth, Seventh, and Ninth Circuits—have addressed such claims. All six circuits have held that unions are *not* required to repay agency fees remitted and expended in accordance with state law and this Court's then-governing precedent. Pet. App. 1a–14a; *Doughty v. State Emps.' Ass'n of N.H.*, --- F.3d ---, 2020 WL 7021600 (1st Cir. Nov. 30, 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020); *Janus v. AFSCME Council*

31, 942 F.3d 352 (7th Cir. 2019); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019).[3] The district courts that have addressed these claims—more than 30 in all—are uniformly in accord. *See Mattos v. AFSCME Council 3*, 2020 WL 2027365, at *2 n.3 (D. Md. Apr. 27, 2020) (citing most of these cases).[4]

B. In the face of this unanimity of the lower courts in addressing the availability of the good-faith defense to private § 1983 defendants—both in the present

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[3] Petitions for certiorari are currently pending in *Janus* (No. 19-1104), *Mooney* (No. 19-1126), *Danielson* (No. 19-1130), *Ogle* (No. 20-486), and *Wholean* (No. 20-605), as well as in *Casanova v. Machinists Local 701* (No. 20-20), a Seventh Circuit summary decision that followed *Janus* and *Mooney*.

[4] The unanimous result in the lower courts is consistent with what this Court appears to have contemplated in *Janus* itself. There, after the Court determined that *Abood* was wrongly decided, it considered whether reliance interests nonetheless justified retaining *Abood* under principles of stare decisis. 138 S. Ct. at 2478–86. This Court acknowledged that unions had entered into existing collective bargaining agreements with the understanding that agency fees would help pay for collective bargaining representation, but it concluded that the reliance interest in the continued enforcement of those agreements was not weighty. *Id.* at 2484–85. In assessing these reliance interests, the Court did not remotely suggest that overruling *Abood* also would expose public-employee unions to massive retrospective monetary liability for relying on this Court's then-governing precedent. *Cf. Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) (reliance interests did not weigh in favor retaining past precedent because overruling that precedent "will not expose … new liability"). On the contrary, the Court in *Janus* framed its holding in prospective language. *See* 138 S. Ct. at 2486 (holding that agency fees "cannot be allowed *to continue*" and that public-sector unions "may *no longer* extract agency fees from nonconsenting employees") (emphasis added).

context of pre-*Janus* union fees and otherwise—Petitioner's assertion that "[t]he courts of appeals have issued contradictory and irreconcilable opinions" on this issue, Petition at 10, rests entirely on her misreading of three cases from the First and Ninth Circuits. All were decided prior to *Wyatt*, and all of them held only—as did this Court subsequently in *Wyatt*—that *qualified immunity* was unavailable to nongovernmental defendants sued under § 1983. *See Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978); *Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). Petitioner's attempt to read these cases as rejecting a good-faith defense of the kind accepted by every federal court after *Wyatt* cannot be squared with the opinions themselves, with subsequent caselaw by the very courts that issued them, nor with this Court's own reading of those opinions.

All three opinions were issued at a time when it was unsettled whether private § 1983 defendants could invoke the same qualified immunity as government officials, with its accompanying procedural privileges. That was indeed the question upon which this Court later granted certiorari in *Wyatt,* in order to resolve a division of authority among the circuits. As the Court noted in *Wyatt*, while by 1992 three circuits had held that private parties could invoke qualified immunity, two—the First Circuit in *Downs* and the Ninth Circuit in (*inter alia*) *Howerton*—had held the opposite. *See Wyatt*, 504 U.S. at 161.[5] It was that question—the availability of

[5] Making clear that the qualified immunity rejected by those courts was something different than the good-faith defense at

qualified immunity to private § 1983 defendants—that was addressed in the three opinions upon which Petitioner relies.

That this was what those cases held is also apparent from any fair reading of the opinions. Thus, in *Downs*, after repeatedly referring to the issue before it as "qualified immunity" or "an immunity," 574 F.2d at 15, the First Circuit concluded that "the *Wood* defense is not available to Roberta Sawtelle." *Id.* at 16. The "*Wood* defense," as is apparent from the court's discussion a few paragraphs earlier, referred to this Court's decision in *Wood v. Strickland*, 420 U.S. 308 (1975), which the First Circuit described as "exhibit[ing] a willingness to make available a qualified immunity 'to avoid discouraging effective official action by public officers charged with a considerable range of responsibility and discretion.'" 574 F.2d at 14 (quoting *Wood*, 420 U.S. at 317–18). The court's concluding comment that the private-party defendant's liability was "to be determined by the jury without regard to any claim of good faith," *id.* at 16, can only be understood as part and parcel of the court's holding that the defendant was not entitled to invoke qualified immunity, which was the only subject addressed by the court to which good faith was relevant. *See also Rodriques v. Furtado*, 950 F.2d 805, 814 n.11 (1st Cir. 1991) (observing that *Downs* held

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issue here, *Wyatt* also cited the position taken by the Sixth Circuit, which had correctly anticipated not only this Court's holding in *Wyatt*, but also the universal acceptance by the lower courts, after *Wyatt*, of the good-faith defense: "The Sixth Circuit has rejected qualified immunity for private defendants sued under § 1983 but has established a good faith defense." 504 U.S. at 161 (citing *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988)).

"that a private individual could not assert a defense of qualified immunity"); *Lovell*, 878 F.2d at 13 n.5 (same). The *Downs* opinion thus contains no discussion of whether a separate good-faith defense, such as this Court subsequently suggested in *Wyatt*, would be available to private parties sued under § 1983.

At any rate, the First Circuit's recent *Doughty* opinion resolves any question about that court's position on this issue. In *Doughty*, a case with facts indistinguishable from the case at bar, the court squarely held that there *is* such a good-faith defense. *Doughty* thus confirms that there is no conflict between the First Circuit and the other courts of appeals on this issue. *Doughty*, 2020 WL 7021600, at *1 ("aligning ourselves with every circuit" to have rejected § 1983 claims against unions for pre-*Janus* agency fees).

As to the Ninth Circuit, all Petitioner can point to in *Howerton* is a passing footnote—in an opinion otherwise addressing only the question of whether the defendants had acted under color of state law—in which the court noted that "there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights." 708 F.2d at 385 n.10. That the court was indeed referring to an "immunity" is confirmed not only by the word it used, but also by the immediately following citation to *Lugar*'s "suggesti[on] that compliance with statute might be raised as an *affirmative defense*." *Id.* (emphasis added) (citing 457 U.S. at 942 n.23).

Not only does any fair reading of *Howerton* fail to support Petitioner's attempt to read that case as

rejecting the kind of good-faith defense the courts unanimously have accepted after *Wyatt*, but the Ninth Circuit itself has squarely rejected the same argument Petitioner advances here: In the recent *Danielson* decision, the court explained that "*Howerton* stands for the unremarkable proposition that private parties cannot avail themselves of *qualified immunity* to a section 1983 lawsuit." 945 F.3d at 1099. Petitioner goes to some length in attempting to convince this Court that the Ninth Circuit's reading of its own precedent was wrong. But even apart from the curious notion that this Court would grant certiorari to correct the Ninth Circuit's reading of its own caselaw, Petitioner's attack on *Danielson*'s explanation of the *Howerton* holding has no merit. Petitioner's argument is that the Ninth Circuit's "attempted recharacterization of *Howerton* is untenable" because "[i]mmunities *are* affirmative defenses, so there is no conceivable distinction that can be drawn between good-faith 'immunity' and good faith as an 'affirmative defense.'" Petition at 17. But on that reasoning, Petitioner would have to argue that this Court got it wrong as well, when in *Wyatt* the Court explicitly distinguished between "a good faith defense" and "the qualified *immunity* from suit accorded to government officials under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)." 504 U.S. at 165.

There is, in short, no division in authority among the circuits (or the district courts) on the existence of the good-faith defense—an issue upon which all of the lower courts to have considered the question are in agreement.

II. THERE IS NO DIVISION AMONG THE CIRCUITS ON THE SCOPE OF THE GOOD-FAITH DEFENSE

In advancing the contention that the courts of appeals are "divided" on the "scope" of the good-faith defense, Petition at 19, Petitioner nowhere cites any case that has declined to apply the defense in a circumstance in which another court has applied it. There are, quite simply, no conflicting decisions among the courts of appeals (or, for that matter, the district courts) about whether the good-faith defense should be applied in the context in which the Sixth Circuit applied it here. To the contrary, as noted above, all of the decisions that have considered whether the good-faith defense should be applied to preclude plaintiffs' attempts to recover agency fees paid to defendant unions prior to the *Janus* decision have reached the same result. *All* have held that the good-faith defense shields the defendant unions from being required to return agency fees that were received (and expended for the benefit of the bargaining unit) at a time when *Abood* was the law of the land.

The essence of Petitioner's argument is that she can avoid application of the good-faith defense by characterizing her claim as seeking "return of property" rather than "damages." Petition at ii. Her theory is that while the good-faith defense may shield a defendant from liability for damages, it "will never permit a defendant to escape *restitution* of wrongfully taken property." *Id.* at 19. But she points to no case that has ever so held—and certainly none that has ever accepted such a theory as a basis for refusing to apply the good-faith defense under § 1983. To the

contrary, all of the cases decided during the past two years involving union nonmembers' attempts to recover agency fees paid, prior to *Janus*, to the union that represented their bargaining unit have applied the good-faith defense and refused such claims—whether denominated as claims for damages or restitution.[6]

Petitioner's argument about a division of authority on the scope of the good-faith defense rests in part on her claim that the Sixth Circuit's decision in this case is "incompatible," Petition at 21, with the initial appellate decisions applying the good-faith defense in contexts not involving pre-*Janus* union fees. *See id.* at 21–23. But that is simply not correct. It may well be that those cases were decided on somewhat different facts than this and the other union-fee cases, but that hardly means that the cases are "incompatible" or that the courts of appeals are "divided."

Contrary to the impression Petitioner attempts to create, no issue was presented in the federal courts, in any of the good-faith defense cases on which she relies, concerning entitlement to property that was unconstitutionally taken. For example, in *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993), the Fifth Circuit simply noted that, in an earlier proceeding, the state court had dismissed Cole's complaint in replevin on state-law grounds and had accordingly ordered him to return the seized cattle and tractor—well before the replevin statute was held unconstitutional in federal

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[6] Petitioner's counsel also represented the plaintiffs in the *Mooney* and *Danielson* cases, in which the Seventh and Ninth Circuits rejected the same "property" argument that the Sixth Circuit considered and rejected here. *See Mooney*, 942 F.3d at 370–71; *Danielson*, 945 F.3d at 1102.

court. *See id.* at 1115. *See also Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1258 (3d Cir. 1994) (similar); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 696 (6th Cir. 1996) (similar). The other two cases Petitioner cites contain no mention at all of who ultimately was entitled to the property in question. *See Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008); *Pinsky v. Duncan*, 79 F.3d 306 (2d Cir. 1996). These courts simply did not address or decide the question on which Petitioner asserts that there is a conflict among the courts of appeals.[7]

Petitioner also relies heavily on a potpourri of cases involving issues such as unconstitutional taxes, fines paid to the government, and tangible property seized under unconstitutional warrants, *see* Petition at 19–20, 24–27, but it is not at all clear how these decisions—none of which involved a claim under § 1983—create a division among the courts.[8] Here too,

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[7] On the other hand, one other early good-faith defense case—which Petitioner does not even mention—is flatly contrary to her contention that the good-faith defense "will never permit a defendant to escape *restitution* of wrongfully taken property." Petition at 19. In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), the Sixth Circuit applied the good-faith defense to reject the plaintiff's attempt to recover the value of property (shares of stock) that the defendant had seized from him under an Ohio prejudgment attachment statute that subsequently was declared unconstitutional. *See id.* at 1267–68. Thus, the only one of the non-union-fee cases that implicated the issue Petitioner raises is fully consistent with the unanimous holdings of the cases involving pre-*Janus* union fees.

[8] Rather than establishing some "ubiquitous" principle as Petitioner claims, Petition at 19, the cases cited were decided on their specific facts and the law specifically applicable to those

as with the first question presented, Petitioner is unable to point to any conflict among the courts of appeals, or any courts for that matter, that merits this Court's attention.

III. THIS CASE WOULD NOT BE A SUITABLE VEHICLE FOR CONSIDERATION OF THE EXISTENCE OR SCOPE OF THE GOOD-FAITH DEFENSE BECAUSE PETITIONER HAS WAIVED THE ARGUMENTS SHE NOW SEEKS TO PRESENT

Even if one or the other of the two issues Petitioner asks this Court to address were worthy of the Court's review, this case would not provide an appropriate vehicle for their consideration. In both cases, Petitioner has waived the arguments she now asserts—either by declining to argue the issue below, or by advancing a different argument in support of her position than she asserts in her Petition to this Court.

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facts. Thus, for example, *United States v. Windsor*, 570 U.S. 744 (2013), was brought pursuant to statutes specifically permitting the recovery of erroneously collected taxes from the United States Treasury in certain circumstances. *See* 26 U.S.C. § 7422; 28 U.S.C. § 1346(a)(1). Petitioner's cases involving repayment of financial penalties accompanying criminal convictions, Petition at 24–25, simply ordered the refund of those penalties once the underlying convictions were vacated. Similarly, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), held no more than that the Eighth Amendment's Excessive Fines Clause was incorporated into the Fourteenth Amendment and thus made applicable to the states, while *United States v. Rayburn House Office Building*, 497 F.3d 654 (D.C. Cir. 2007), ordered that privileged materials seized in violation of the Speech and Debate Clause be returned to the Member of Congress from whose office they were taken. *See id.* at 663–66.

A. In her first question presented, Petitioner asks the Court to address the existence of the good-faith defense for private parties sued under § 1983. *See* Petition at i–ii; *id.* at 10 ("The courts of appeals are divided on whether 42 U.S.C. § 1983 establishes a 'good-faith defense' for private defendants.") (capitalization deleted). But that is an issue she chose not to contest below, as the Sixth Circuit pointed out. Pet. App. 9a ("Lee does not directly challenge the existence of the good-faith defense"); *Ogle*, 951 F.3d at 796 ("[t]he claimant in *Lee* conceded the existence of a good-faith defense"). Indeed, on the very first page of her opening brief in the court of appeals, Petitioner acknowledged that "[w]hen the Supreme Court announces a new constitutional right and makes it retroactive, a defendant's good-faith reliance on earlier statutes or court rulings can confer an immunity from damages," and she cited the Fifth Circuit's decision in *Wyatt* on remand as recognizing such a "defense for private parties who violate 42 U.S.C § 1983 in reliance on a statute that is later declared unconstitutional." Plaintiff-Appellant's Opening Brief (ECF No. 22) at 1–2 (emphasis omitted). And in her Reply Brief she stated quite explicitly that "Ms. Lee is contesting the scope rather than the existence of a good-faith defense." Plaintiff-Appellant's Reply Brief (ECF No. 26) at 6.

Even in her submission to this Court, Petitioner makes clear that she has never contested the existence of a good-faith defense under § 1983: "Ms. Lee has acknowledged throughout this litigation that defenses such as qualified immunity and good faith can shield a defendant from liability for *damages*." Petition at 19; *see also id.* at ii (same).

Petitioner has, in short, waived her argument with respect to the existence of the good-faith defense. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (argument waived where litigant stated it "will not challenge, but [is] not conceding" the issue). Even if the existence of the § 1983 good-faith defense were cert-worthy as an abstract matter—which it is not, given the unanimity of the lower courts—this case, in which Petitioner chose not to press the issue below, would not be a suitable vehicle for the Court to consider that question.

B. For a somewhat different reason, Petitioner has also waived the argument she asks this Court to consider with regard to the scope of the good-faith defense. She has, to be sure, advanced a "scope" argument throughout the litigation, but the argument she made to the Sixth Circuit was a different one than what appears in her Petition.

In the court of appeals, Petitioner's argument was that the good-faith defense was not available because her claim for repayment of her agency fees sounded in equity, not law. Thus, she drew a "distinction between claims for damages—which can be subject to qualified-immunity or 'good faith' defenses—and equitable claims for restitution of property (which are *not* subject to these defenses)." Opening Br. at 29. As she explained, her claim for "restitution of money that the union took in violation of her constitutional rights … is a claim for equitable relief rather than a demand for money damages." *Id.* at 30. And she doubled down on the point in her reply brief, devoting an entire section to explaining that "Ms. Lee is seeking equitable restitution rather than money damages," Reply Br. at 9, and that "claims for the equitable

return of money taken in violation of the Constitution are not subject to a qualified-immunity or good-faith defense." *Id.* at 14 (capitalization deleted in both).

It was that argument—that her claim sounded in equity rather than in law—that the court of appeals correctly understood her to be advancing: "She first styles her claim as one for 'equitable restitution' … which she says must be returned even if collected in good faith." Pet. App. 10a. And it was that contention that the court considered and rejected. The court first observed that Petitioner sought compensation "for the dignitary harm she suffered from being forced to subsidize the Union's speech," which made her claim "legal in nature." *Id.* (citing *Mooney*, 942 F.3d at 370 and *Danielson*, 945 F.3d at 1102). The court then explained that Petitioner's claim sounded in law, not in equity, for the additional reason that the monetary relief she sought "could [not] clearly be traced to particular funds or property in the defendant's possession." *Id.* (quoting *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 143 (2016)). As the court concluded, "it is not the case that the agency fees remain in a vault, to be returned like a seized automobile." *Id.* at 11a (citation omitted).

In her Petition to this Court, Petitioner has forsworn any attempt to press the argument that she made below and the Sixth Circuit rejected—that the good-faith defense had no application because the remedy she sought sounded in equity rather than in law. Indeed (other than in quotations or in describing the Sixth Circuit's holding), the words "equity" and "equitable" do not appear in her Petition. Rather, the argument in her Petition is simply that property that

is unconstitutionally obtained must always be returned. While she uses the term "restitution" to describe the remedy she seeks,[9] she has abandoned the contention she advanced below, which the Sixth Circuit addressed and rejected, that the availability of the good-faith defense turns on whether the remedy sought is properly characterized as sounding in law or in equity.

Having chosen to advance a different argument here than she presented to the court of appeals, Petitioner has waived her argument with regard to the scope of the good-faith defense as well.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

[9] "Restitution" can, of course, be either legal or equitable. *See, e.g.*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–15 (2002).

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