

No. 20-605

IN THE
Supreme Court of the United States

—————
KIERNAN J. WHOLEAN
JAMES A. GRILLO,
Petitioners,

v.

CSEA SEIU LOCAL 2001,
Respondent.

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

—————
REPLY TO BRIEFS IN OPPOSITION

MILTON L. CHAPPELL
Counsel of Record
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
mlc@nrtw.org

Counsel for Petitioners

The Lower Courts Failed to Consider the Victims of the First Amendment Violations When They Provided Violators with a Good Faith Defense to 42 U.S.C. § 1983 Damages.

The Second Circuit here, Pet. App. 6a, created a good faith exception to Section 1983 damages for First Amendment violators based on the proposition that “principles of equality and fairness” justify the defense.¹ *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). However, the courts only applied those principles to the perpetrators of these violations, without considering the rights or interests of the victims of those constitutional violations.

The State and SEIU similarly offer no response to Wholean’s argument, Pet. 20-23, that principles of equality and fairness require considering the interests of victims of constitutional deprivations, like Petitioners here, in deciding whether a good faith defense to 42 U.S.C. § 1983 damages exists for public-sector unions that seized forced fees from nonmembers before it was held unconstitutional in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

This one-sided focus on what is equitable and fair to unions who violated the First Amendment rights of the nonmember employees they represent, without any mention or consideration of either the nonmember victims or the public interest, is wrong. Any consideration of the adoption of a good faith defense against First Amendment violations must include an evenhanded analysis of all involved, which is sadly

¹ Most, if not all, of the other courts in the cases listed in SEIU Br. 9, nn. 4-5 and discussed in Pet. 24, did the same.

missing here. This failure to consider victims' interests justifies the granting of certiorari.

This Court in *Janus* recognized “the considerable windfall that unions have received under *Abood*^[2] for the past 41 years,” and found it “hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.” *Janus*, at 2486. The nonmembers in this case and others like it do not seek the indefinite return of all unconstitutional exactions for the past 41 years. Instead, they seek only damages going back to the applicable statute of limitations, which range from one to six years under Section 1983, with most limitation periods being between two and three years.³ The damages sought here and in similar cases seek a return of but a fraction of the billions of dollars unions unconstitutionally seized from nonmembers over the past 41 years.

The statute of limitations also reduces and eventually eliminates the unions' risk of new suits to recover pre-*Janus* damages. In twenty-six states, Puerto Rico and the U.S. Virgin Islands, the risk has passed. See *supra* n.3. In another fourteen states and the District of Columbia, the risk will pass in less than four months on June 28, 2021. *Id.* Of the remaining ten states with four to six-year limitations periods, *id.*, only two, Maine and Missouri, allowed nonmember

² *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), overruled by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

³ 8 Emp. Coord. Employment Practices § 100:15 (updated Feb. 2021), <file:///C:/Users/MLC/Downloads/10015%20Table%20of%20applicable%20state%20statutes%20of%20limitations.pdf>,

forced fees.⁴ The other states prohibit union forced fees by statute. *See supra* n.4. Even without a good faith defense, the statute of limitations allows unions to retain the overwhelming majority of the funds they seized from employees in violation of the First Amendment.

But with a good faith defense, the victims of these constitutional violations get nothing. Not even a return of the monies taken from them within the statute of limitations. The unions' serial violations of these employees' First Amendment rights has no remedy.

This result is wholly inconsistent with principles of equality and fairness. There is nothing fair about depriving these victims of all compensation for their injuries within the limitations period. As Judge Phipps correctly observed when rejecting the proposition that there is a good faith defense to Section 1983 liability:

Neither equality nor fairness overwhelmingly favors the reliance interests of the unions in pre-existing law over the free speech rights of non-members who were compelled to support the unions. The Supreme Court in *Janus* already accounted for those reliance interests in overturning *Abood*. *See Janus*, 138 S. Ct. at 2484-86 . . . Those considerations need not be double-counted under the guise of a good faith affirmative defense. And that is to say nothing of the text, history, and purpose § 1983, which make it particularly ill-suited to a construction that elevates reliance interests over the vindication of constitutional rights.”

⁴ National Right to Work Legal Defense Foundation, “Right to Work States” (2021), <https://www.nrtw.org/right-to-work-states>.

Diamond v. Pennsylvania State Educ, Ass'n, 972 F.3d 262, 289 (3d. Cir. 2020) (Phipps, dissenting) (other citations omitted). This Court should correct the injustice that lower courts have imposed on victims of forced fee seizures when they considered only the equitable interests of the perpetrators of First Amendment violations.

CONCLUSION

The petition for a writ of certiorari should be granted so this Court may consider the interest of all involved in deciding whether a good faith defense should apply to public-sector unions who violated the First Amendment rights of the nonmember employees by seizing forced fees from them prior to the issuance of *Janus*.

Respectfully submitted,

MARCH 4, 2021

MILTON L. CHAPPELL
Counsel of Record
c/o NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
mlc@nrtw.org