No. 21-_____

IN THE

Supreme Court of the United States

KOUROSH KENNETH HAMIDI; KIM MCELROY; *ET AL.*; ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT, AND CECILIA STANFIELD,

PETITIONERS,

v.

SERVICE EMPLOYEES INT'L UNION, LOCAL 1000,

RESPONDENT.

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

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PETITION FOR WRIT OF CERTIORARI

W. JAMES YOUNG
Counsel of Record
c/o NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
wjy@nrtw.org

Attorney for Petitioners

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QUESTIONS PRESENTED

The Civil Rights Act of 1871 provides that "every 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.

In *Knox v. SEIU, Local 1000*, this Court held that in earlier cases, "we assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter," and that "By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." 567 U.S. 298, 313-14 (2012). In the context of a procedure to collect a "Temporary Special Assessment to Create a Political Fight-Back Fund" from nonmembers (including those who previously opted out), this Court declared "This aggressive use of power... to collect fees from nonmembers... indefensible." *Id.*

In *Janus v. AFSCME, Council 31*, this Court went further, stating that "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S.Ct. 2448, 2486 (2018).

Nevertheless, notwithstanding these unambiguous pronouncements, Respondent persisted in imposing an

"opt-out" requirement upon nonmembers, requiring an affirmative objection in order to avoid the seizure from their wages of fees exceeding the reduced fee amount authorized by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *overruled Janus*, 138 S.Ct. at 2486.

The questions presented are:

1. May a labor union acting in concert with State officials, consistent with the First and Fourteenth Amendments, seize for union political speech payments from an employee absent clear and compelling evidence that he knowingly, intelligently, and voluntarily waived his First Amendment right under the standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)?

2. May a private party who violates constitutional rights be immunized from liability for damages under 42 U.S.C. § 1983 by a profession of "good faith" reliance under color of a law before that law or practice was held unconstitutional?

PARTIES TO THE PROCEEDINGS

In addition to Petitioners named on the cover, Kourosh Kenneth Hamidi and Kim McElroy, Petitioners are Dawn P. Ammons, William L. Blaylock, Christopher Browne, Ryan Christensen, Kelly Giles, Madeline L. Lopez; Clint Miller, Gary W. Morrish, Virginia Ollis, Olayemi Sarumi, Antonia Toledo, Diane C. Tutt, and the class they represent, and Cecilia Stanfield, Plaintiffs-Appellants in the courts below. All are natural persons and citizens of the State of California and are, or at one time were, employees of the State of California.

Respondent Service Employees International Union, Local 1000, was Defendant-Appellee below, and is a union representing public employees of the State of California.

Betty T. Yee, Controller of the State of California, was also a Defendant-Appellee below, but was dismissed as immune pursuant to the Eleventh Amendment. Dist. Ct. ECF No. ("ECF No.") 139 at 12. Yee's predecessor, John Chiang, was initially a Defendant below, and his successor Yee was substituted as a Defendant by operation of Rule 25(d), FED. R. CIV. P.

Sandra Kieffer, Angel Lo, and Mozelle Yarbrough, individuals, were initially Plaintiffs below, but were voluntarily dismissed from this action by stipulation pursuant to Rule 41(a)(1)(A)(ii), FED. R. CIV. P.

RULE 29.6 STATEMENT

As Petitioners are natural persons, no corporate disclosure statement is required under Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

- *Hamidi et al. v. Service Employees Int'l Union, Local 1000*, No. 19-17442, U.S. Court of Appeals for the Ninth Circuit. Judgment entered 26 October 2021; and

- *Hamidi et al. v. Service Employees Int'l Union, Local 1000*, No. 2:14-cv-00319-WBS-KJN, U.S. District Court for the Eastern District of California. Final Judgment entered 24 October 2019.

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IN THE
Supreme Court of the United States

NO. 21-_____

KOUROSH KENNETH HAMIDI; KIM MCELROY; DAWN P. AMMONS; WILLIAM L. BLAYLOCK; CHRISTOPHER BROWNE; RYAN CHRISTENSEN; KELLI GILES; MADELINE L. LOPEZ; CLINT MILLER; GARY W. MORRISH; VIRGINIA OLLIS; OLAYEMI SARUMI; ANTONIA TOLEDO; AND DIANE C. TUTT; ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT, AND CECILIA STANFIELD,
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000; AND BETTY T. YEE, CONTROLLER, STATE OF CALIFORNIA,
Respondents.

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

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Petitioners Kourosh Kenneth Hamidi, Kim McElroy, Dawn P. Ammons, William L. Blaylock, Christopher Browne, Ryan Christensen, Kelly Giles, Madeline L. Lopez; Clint Miller, Gary W. Morrish, Virginia Ollis, Olayemi Sarumi, Antonia Toledo, Diane C. Tutt, on behalf of themselves and the class they represent, and Cecilia Stanfield, individually,

respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on 26 October 2021.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Appendix ("App.") A, *infra* 1a, is unreported and designated as "not for publication," but appears at 2021 WL 4958855 (9TH CIR. 2021). The decision of the United States District Court for the Eastern District of California, App. B, *infra* 6a, granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, is unreported but appears at 2019 WL 5536324 (E.D. CAL. 2019).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its *per curiam* Memorandum Order on 26 October 2021. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. *See* Apps. C & D, *infra* 16a &17a. This case also involves provisions of the Ralph C. Dills Act, CAL. GOVT. CODE

ANN. § 3512 *et seq.*, and specifically § 3515 thereof. *See* App. E, *infra* 18a.

STATEMENT OF THE CASE

A. Legal Background

This Court's decision in *Knox v. Serv. Emp. Int'l Union, Local 1000*, held that schemes to extract "agency fees" from nonunion public employees are subject to "exacting First Amendment scrutiny." 567 U.S. 298, 310 (2012); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001).

Subsequently, in *Janus*, this Court held that seizing from public employees' wages payments for union speech without their affirmative consent likewise violates their constitutional rights. 138 S.Ct. at 2486. This Court recognized that, "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* Thus, an employee's consent to supporting financially a union must be demonstrated by a "waiver ... freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

As with many unions exercising their authority to extract forced dues from represented public employees under the now-unconstitutional *Abood* regime (even though it was long recognized as "imping[ing] seriously upon interests in free speech and association protected by the First Amendment," 431 U.S. at 255 (Powell, J., concurring)), Respondent Service Employees International Union, Local 1000 ("Local 1000") long required that individuals subject to its forced-dues

scheme with the State of California — even though they had remained nonmembers — *additionally* object annually to the seizure of full union dues from their wages. They did so pursuant to this Court's comment in *Machinists v. Street*, 367 U.S. 740, 774 (1961), where this Court stated that "dissent is not to be presumed — it must affirmatively be made known to the union by the dissenting employee," which was recognized in *Knox* to be "*dicta*." 567 U.S. at 313.

Employment relations between California and its agencies and labor unions representing their employees is governed by the Ralph C. Dills Act ("Dills Act"), CAL. GOV'T. CODE § 3512 *et seq.*; App. E at 18a-19a, which grants to labor unions certified by the State monopoly-bargaining powers over bargaining units of State employees. The Dills Act also authorizes forced-unionism (or "fair share fee" agreements). CAL. GOV'T. CODE §§ 3513(k) & 3515; App. E at 18a-19a.[1] Such agreements were entered into governing Petitioners' employment.

In *Janus*, this Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees," and that "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By

[1] "Under an 'agency shop' arrangement, a union that acts as exclusive bargaining representative may charge non-union members ... a fee for acting as their bargaining representative." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 303 n.10 (1986); *see also Abood*, 431 U.S. at 232. Such schemes in public-sector employment were declared unlawful in *Janus*, 138 S.Ct. at 2486, as a violation of the First Amendment.

agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." 138 S.Ct. at 2486 (citations omitted). However, the Court went on to specify that "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence.... Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.* (citations omitted).

Nevertheless, relying solely upon this *dicta*, the United States Court of Appeals for the Ninth Circuit long ago held in a challenge to this impediment to employees' exercise of their First Amendment rights that "There is ... no support for the plaintiffs' position in this case that affirmative consent to deduction of full fees is required in order to protect their First Amendment rights." *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258, 260-61 (9TH CIR.), *cert. denied*, 506 U.S. 940 (1992).

The Questions Presented address whether *Knox* and *Janus* permit a public employer and a union to rely upon language that this Court has declared "*dicta*" and creating the "risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree," 567 U.S. at 312, survived *Knox* particularly where — as here — that recognition was made abundantly clear to Local 1000, respondent in that case.

B. Facts

Kourish Kenneth Hamidi *et al.*, and the class they represent ("the Employees"), as well as Cecilia

Stanfield, are among tens of thousands of employees in nine bargaining units who are not union members, and are (or were) employed by various instrumentalities of the State of California ("State"). As such, they are "state employees" within the meaning of the Dills Act, CAL. GOV'T. CODE, § 3513(c). By statute (the Dills Act, CAL. GOV'T. CODE § 3512 *et seq.*; *see* App. E, *infra*, at 18a-19a), the State recognizes Local 1000 — an "employee organization," CAL. GOV'T. CODE, § 3513(a) — as the monopoly bargaining representative of all State employees in those nine bargaining units representing nine different classes of State employees. Local 1000 and the State have entered into a series of Memoranda of Understanding ("MOUs") controlling the terms and conditions of employment for all employees in these bargaining units. These MOUs include forced-unionism (or "fair share fee") provisions, authorized by the Dills Act, CAL. GOV'T. CODE § 3515 (App. E at 18a-19a), subjecting State employees who fail or refuse to join Local 1000 to agency fee seizures by the State Controller as a condition of continued public employment.

In June 2013, Local 1000 sent to each Employee a notice, informing them of their right to object to the seizure of fees equal to full union dues. Through the vicissitudes of changing their residences and/or the United States Postal system, not every Employee received these notices. Dist. Ct. ECF No. ("ECF No.") 149-2, ¶¶ 14 & 15. Because, as a result, they missed Local 1000's deadline for "opting out," many were subject to fee seizures for admittedly chargeable political and other non-bargaining expenditures.

The Employees' Complaint, ECF No. 1, alleges that the "choice architecture" of Respondents' procedure burdens and impedes nonmembers, making it more difficult for employees who have already rejected union membership to retain their political and associational autonomy than it is to forfeit that autonomy to Local 1000. The procedure and statute do this, in part, by setting the nonmembers "default" position as supporting union political and other non-bargaining activities. More specifically, Local 1000's notice and the statute propel employee choice towards forfeiture of their political and associational rights as detailed in the Complaint. ECF No. 1 at 8-10, ¶ 26.[2]

Notwithstanding the fact that each Employee was and remains a nonmember of Local 1000, on or about 1 July 2013, the State Controller commenced: (1) automatic deductions of agency fees equal to 99.5% of full union dues from the wages of Employees previously objecting to the seizure of full union dues from their wages, but failing to renew their objections for whatever reason, or transmitting their objections to Local 1000 absent strict compliance with Local 1000's onerous requirements, or whose objections were sent regular mail, and somehow were "lost" or simply ignored; and (2) from Employees who successfully

[2] On the other hand, for Employees desiring to give to Local 1000 the political and non-bargaining portion of the agency fee, nothing is required. Employees joining Local 1000 are **subsidized**, with a union-provided single-page, easy-to-complete form, and a postage-paid envelope. ECF No. 1 at 31-32. There is no deadline for filing this form. Once the employee joins Local 1000, the matter is final. The employee is not required affirmatively to join or re-join annually.

navigated Local 1000's process and its various impediments and pitfalls, deductions of agency fees equal to 55.3% of full union dues from their wages, and forwarded such deductions to Local 1000.

C. Proceedings Below

1. Initial Proceedings

The Employees' action was filed on 31 January 2014, alleging that the Employees had suffered and would continue to suffer loss of their First, Fifth, and Fourteenth Amendment rights because the California State Controller (John Chiang, succeeded by Betty T. Yee), and Local 1000 were requiring nonunion State employees to object and/or annually renew their objections to avoid the seizure of agency fees exceeding their *pro rata* share of Local 1000's costs of collective bargaining, contract administration, and grievance adjustment ("chargeable costs").

Petitioners sought and obtained class certification, with their counsel certified as class counsel. ECF No. 53 at 20-21 *as amended upon stipulation by* ECF No. 55. The Court limited class certification (pursuant to Rule 23(b)(2), FED.R.CIV.P.), to Petitioners' first claim, *i.e.*, "the theory that a union is not permitted to seize from any 'potential objector' fees exceeding those which serve a compelling state interest — *i.e.*, those for constitutionally-chargeable costs — absent their affirmative consent." ECF No. 53 at 8.[3]

[3] Their second claim was ultimately dismissed upon settlement. ECF No. 91.

Approximately five weeks after class certification, this Court granted *certiorari* in *Friedrichs v. California Teachers Ass'n*, 576 U.S. 1082 (2015). Recognizing that the Court's adjudication of both questions presented in that case could determine the outcome of this case, the District Court stayed further proceedings pending its outcome. ECF No. 57. Upon the passing of Justice Antonin Scalia, the Supreme Court affirmed this Court by an equally-divided Court on 29 March 2016, 578 U.S. 1 (2016), and the stay was lifted.

Thereafter, the parties moved forward to resolve the Employees' remaining claim on Cross-Motions for Summary Judgment. On 8 February 2017, the Court issued its Memorandum and Order, granting Defendants' Motions for Summary Judgment. ECF No. 94.

In its decision, the District Court recognized that "Plaintiffs' sole cause of action, brought under 42 U.S.C. § 1983, alleges that Local 1000's fee collection system violates the First Amendment by 'requir[ing] that individuals pay agency fees ... [that] subsidiz[e Local 1000's] political and other non-bargaining activities, absent their affirmative consent.'" ECF No. 94 at 4. While acknowledging the light that *Knox* shed on *Street*'s "*dicta*," and that *Knox*'s reasoning mandated examination anew of the constitutionality of the opt-out regime, *i.e.*, whether it satisfied the "exacting scrutiny" required by *Knox*, the District Court considered but rejected the Employees' argument that it was free in light of *Knox* to declare Local 1000's opt-out system unconstitutional, distinguishing between *Knox*'s consideration of "'a special assessment or dues

increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set,'" and this case's concern for "fees collected pursuant to annual *Hudson* notices." ECF No. 94 at 12, *quoting Knox*, 567 U.S. at 321-22.

Instead, the District Court concluded that "*Knox* is not 'clearly irreconcilable' with *Mitchell*," and that *Mitchell* remained controlling law. ECF No. 94 at 13, *citing* 963 F.2d at 260-61. The District Court therefore concluded that, "Because *Mitchell* remains good law after *Knox*, the court must deny plaintiffs' challenge to the constitutionality of Local 1000's opt-out requirement." ECF No. 94 at 14.

Upon these findings, the District Court entered judgment in favor of Defendants. ECF No. 95. The Employees timely noticed their appeal on 6 March 2017. ECF No. 102.

2. The First Appeal

Shortly before briefing on the first appeal was completed before the Ninth Circuit, this Court granted *certiorari* in *Janus v. AFSCME Council 31*, 138 S.Ct. 54 (2017), addressing whether an agency shop requirement — previously found constitutionally permissible in *Abood*, *supra* — violates the First Amendment rights of nonunion employees. On 27 June 2018, this Court answered that question in the affirmative, and *inter alia*, overruled *Abood*. *Janus*, 138 S.Ct. at 2460, 2486.

Subsequent to this Court's decision in *Janus* — after which Local 1000 and the State Controller ceased

all fee seizures from nonmember State employees — oral argument was conducted on the first appeal on 18 December 2018. In a *per curiam* decision, the panel vacated the District Court's judgment, acknowledged the termination of fee seizures by the State after the decision in *Janus*, and remanded the case "for further proceedings in light of *Janus*." On remand, the panel noted that "the district court may determine in the first instance whether any of Hamidi's claims are moot." Dkt. Ent. 63 at 2.

3. Proceedings on Remand

On remand, the District Court addressed Respondents' assertion of mootness, dismissing the Employees claims for prospective relief, holding that "the Supreme Court's decision in *Janus* and subsequent actions taken by the state and the union have mooted plaintiffs' claims for prospective relief." ECF No. 139 at 5. Determining that "All available evidence indicates that defendants changed their position, not because of this lawsuit, but because the Supreme Court's decision in *Janus* rendered the collection of union dues from nonconsenting employees unconstitutional," *id.* at 7, the District Court rejected the Employees' argument that the "voluntary cessation" exception to the mootness doctrine applies here, as Local 1000's and the State Controller's actions were adequate to sustain their burden. *Id.* at 8-9.

However, the District Court declined to dismiss the Employees' claim for retrospective monetary relief against Local 1000. *Id.* at 16. The parties' subsequent cross-Motions for Summary Judgment were decided on

25 October 2019, when the District Court issued its Memorandum and Order (App. B at 6a-15a), and entered judgment in favor of Respondents.

In its Memorandum, the District Court focused on Local 1000's invocation of "a good faith defense to § 1983 liability because the law at the time of Local 1000's collection of agency fees permitted such a system," App. B at 9a-13a,[4] because this Court had implied but not conclusively held that such a defense might be available. *Id.* at 9a-10a, *citing Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (noting "possibility" of such a defense); *see also Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) (declining to decide availability again). Further noting that *Janus* "'did not specify whether the plaintiff was entitled to retrospective monetary relief for conduct the Supreme Court had authorized for the previous forty years," *id.*, *citing Cooley v. California Statewide Law Enf't Ass'n*, 385 F.Supp.3d 1077, 1081 (E.D.CAL. 2019), the District Court concluded that the Ninth Circuit's recognition of a "good faith defense in shielding private defendants from liability in § 1983 actions" was both available in

[4] Because their claim for relief sought "compensatory damages for the injuries sustained as a result of Defendants' unlawful interference with and deprivation of their constitutional and civil rights including, but not limited to, the amount of agency fees improperly deducted from their wages, nominal damages, and such other amounts as principles of justice and compensation warrant," ECF No. 1 at 14, ¶ C, and in light of *Janus*' declaration that all fee seizures were unlawful, 138 S.Ct. at 2486, the Employees sought a full refund of their fees seized from their wages during the limitations period, plus interest. ECF No. 149-1 at 46.

and applicable to this case. *Id.*, *citing Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9TH CIR. 2008). Noting that a series of district courts, as well as the Second Circuit, had applied the defense to deny relief to similarly-situated nonmembers for virtually identical violations of their constitutional rights, the District Court denied relief, holding that "compliance with previously valid law suffices to grant a good faith defense to § 1983 liability." App. B at 12a (citations omitted).

The Employees timely noticed their appeal on 18 November 2019. ECF No. 162.

4. The Second Appeal

On 26 October 2021, the United States Court of Appeals affirmed the District Court's judgment based upon its prior decision in *Danielson v. Inslee*, 945 F.3d 1096 (9TH CIR. 2020), *cert. denied* 141 S.Ct. 1265 (2021), in a Memorandum Opinion formulaically and perfunctorily holding that: (a) "unions are entitled to a good-faith defense under § 1983 and are not liable to pay back the agency fees collected before *Janus*," *citing Danielson*, 945 F.3d at 1103-05 (App. A at 5a); and (b) "the Union's use of the opt-out system still complied with then-existing Supreme Court and Ninth Circuit law," *citing Abood*, 431 U.S. at 239; *Hudson*, 475 U.S. at 306; *Mitchell*, 963 F.2d at 260-61, and addressing *Knox*'s declaration that all of those cases relied upon *dicta* with the conclusion that "the Union was entitled to rely on *Mitchell*'s pronouncement of the law in good faith." App. B at 5a. Notably, the Ninth Circuit failed

to comment upon *Mitchell*'s continued viability, or lack thereof.

REASONS FOR GRANTING THE WRIT

This Court has regularly granted review to consider various questions related to forced-unionism provisions pursuant to monopoly bargaining statutes in both the private and public sectors. *See Janus*, *supra*; *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984); *Hudson*, *supra*; *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Locke v. Karass*, 555 U.S. 207 (2009); *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014).

This case is among many in which employees who had agency fees seized from them in violation of their First Amendment rights seek damages for their injuries. Nevertheless, a number of lower courts have now denied victims of unconstitutional agency fees seizures relief for their injuries on the grounds that there exists a general good faith defense to liability for Federal civil rights violations.

This "good faith" defense to Section 1983 has never been recognized by this Court.[5] However, three times

[5] Indeed, it seems to have been rarely applied outside of the context presented by this case. The Ninth Circuit had (continued...)

this Court has discussed, and declined to decide, whether such a defense exists. *See Richardson*, 521 U.S. at 413; *Wyatt,* 504 U.S. at 169; *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 n.23 (1982).[6] The Court should finally resolve this important question to disabuse the lower courts of the rapidly spreading notion that a defendant acting under color of a statute before it is held unconstitutional and/or prior judicial decision overtaken by controlling authority is a defense to § 1983, contrary to its explicit creation of remedies for Federal civil rights violations.

I. The Categorical Good Faith Defense Applied by the Court of Appeals Differs from 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

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[5] (...continued)
recognized it outside of this context in *Clement*, *supra*, and merely suggested its availability in the context of contract services provided by private physician to a public entity. *See Jensen v. Lane County*, 222 F.3d 570, 580 n.5 (9TH CIR. 2000).

[6] Indeed, Justice Thomas has expressed grave "doubts about our qualified immunity jurisprudence" accorded to public officials. *Baxter v. Bracey*, 140 S.Ct. 1862 (2020) (Thomas, J., dissenting from the denial of *certiorari*).

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.

Wyatt considered 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 § 1983 claim. 504 U.S. at 161. The Court recognized that the plaintiffs' 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, contrary to the conclusions of the Ninth Circuit

and a growing number of lower courts, this potential defense was not a categorical defense to all Section 1983 damages claims. Rather, the good faith defense to which the *Wyatt* Court was referring was a defense to the malice and probable cause elements of the specific due process claim at issue in that case. All three opinions in *Wyatt* make this clear.

First, Chief Justice Rehnquist, dissenting (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, concurring (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 § 1983 actions in which malice and lack of probable cause are elements of the alleged constitutional deprivation. Contrary to the Ninth Circuit and other lower courts, 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 § 1983. There is no basis for such a sweeping defense to § 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. Generally, "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 § 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 violating nonunion employees' First Amendment rights by seizing agency fees from them. The Court should grant review to clarify what it intended in *Wyatt*.

II. The Categorical Good Faith Defense Conflicts with the Text and Purpose of § 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 § 1983 damages liability has no basis in § 1983's text. In fact, the proposition conflicts with the statute in at least two serious 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 mandatory, not permissive.

Second, an element of § 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. By creating a "safe harbor" in reliance upon a statute or intermediate appellate court decision-making, the Ninth Circuit and other lower courts have turned § 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 v. AFSCME Council 31 ("Janus II")*, 942 F.3d 352, 362 (7TH CIR. 2019). The courts have effectively declared a statutory *element* of § 1983 — that defendants must act under color of state law — to be a *defense* to § 1983. Under the decisions of the Ninth Circuit and other lower courts, acting under color of a state law yet to be held unconstitutional is now a potential defense to all § 1983 damages claims.

But a defendant acting under color of a state statute cannot simultaneously be both an element of and a defense to § 1983. That would render the statute self-defeating: any private defendant that acted "under color of any statute," as § 1983 requires, would be shielded from liability because it acted under color of a state statute. The "sword" placed in the hands of victims of civil rights violations will have been turned into an impenetrable "shield" against liability if the Ninth Circuit's decision is allowed to stand.

Here, the fact that Local 1000 acted under color of California's forced-unionism law and *Mitchell* when it deprived Petitioners of their constitutional rights is not exculpatory, but a necessary element of their claim for damages under § 1983. This conclusion is consistent with the purpose of § 1983, which is to provide a federal remedy to persons deprived of constitutional rights by parties acting under color of state law. "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.'" *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650-51 (1980), 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 § 1983 inverts the purposes of the statute, rendering it self-defeating by its own terms. *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 § 1983's text and history for a good-faith defense distinguishes it from other recognized, statutorily-based immunities or defenses to a § 1983 claim. 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); see also 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 § 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.

III. Policy Interests in "Fairness" and Equality Do Not Support a Good Faith Defense, But Weigh Against Recognizing It.

A. Courts cannot create defenses to § 1983 based on policy interests in fairness and equality.

Most circuit courts recognizing a categorical good-faith defense to § Section 1983 assert that policy interests in equality and fairness justify recognizing this defense. *See Danielson*, 945 F.3d at 1101; *Janus II*, 942 F.3d at 366; *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6TH CIR. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 333 (2D CIR. 2020).[7] This rationale is inadequate, even by its own terms, because courts cannot create defenses to federal statutes when they believe it is unfair to enforce the statute.

"As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by

[7] Some, like the Ninth Circuit here, have a long history of substituting their notions of "fairness and equality" to frustrate the decisions of this Court. The Ninth Circuit's conclusion hearkens back to *Knox v. Service Employees Intern'l Union, Local 1000*, 628 F.3d 1115, 1119-20 (9TH CIR. 2010) (applying balancing and reasonable accommodation test pitting union's interest in seizing fees against nonmembers' First Amendment rights), *rev'd*, 567 U.S. 298, 313 (2012); *see also Davenport*, 551 U.S. at 185; *see also Grunwald v. San Bernardino Unified School District*, 994 F.2d 1370, 1376 n.7 (9TH CIR. 1993). Nevertheless, like a bad penny, this balancing test keeps turning up in Ninth Circuit decisionmaking.

the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). Statutes must be enforced as Congress wrote them. "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

This principle applies to Section 1983. "It is for Congress to determine whether § 1983 litigation has become too burdensome ... and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984). Thus, 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. So too with the "fairness" justification for a "good faith" defense: courts cannot just invent defenses to § 1983 liability based on their views of sound policy.

Even if a policy interest in fairness could justify creating a defense to a federal statute like § 1983 — which it cannot — fairness to *victims* of constitutional deprivations would require enforcing § 1983 as written. It is not fair to make victims of constitutional deprivations pay for their antagonists' unconstitutional conduct. Nor is it fair to let wrongdoers keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 654.

The Supreme Court in *Owen* wrote those words when holding that municipalities are not entitled to a

good faith immunity to § 1983. The Court's equitable justifications for so holding are equally applicable here.

First, the *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id.* at 651. That injustice also should not be tolerated here. Countless victims of constitutional deprivations — not just Petitioners and other employees who had agency fees seized from them — will be left remediless if defendants to § 1983 suits can escape liability by showing they had a good faith, but mistaken, belief their conduct was lawful.

Second, the *Owen* Court recognized that § 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, *whether committed in good faith or not*, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651-52 (emphasis added). The same rationale weighs against a "good faith" defense to § 1983.

Third, the *Owen* Court held that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm

rather "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id*. at 654. So too here, when Petitioners' and Local 1000's interests are weighed together, the balance of equities favors requiring Local 1000 to return the monies unconstitutionally seized from workers who chose not to join the union.

The same reasoning applies to the notion that principles of "equality" justify creating a defense for private defendants that is similar to the immunities enjoyed by some public defendants. *Danielson*, 945 F.3d, 1101; *see also Janus II*, 942 F.3d at 366; *Lee*, 951 F.3d at 392 n.2; *Wholean*, 955 F.3d at 333. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for qualified immunity.

Individual public servants enjoy qualified immunity for reasons not applicable to rent-seeking[8] unions and most other private entities: to ensure that the threat of personal liability does not dissuade individuals from acting as public servants. *See Wyatt*, 504 U.S. at 168. The fact that this interest does not apply to the unions is not grounds for creating an equivalent defense for them. "Fairness alone is not . . . a sufficient reason for the immunity defense, and thus

[8] Rent-seeking, according to public choice theory, "refer[s] to actions aimed at obtaining special government privilege," and is aimed at securing profits through the political process rather than the market process of exchange. Gordon Tullock, "The Origin Rent-Seeking Concept," 2 Int'l J. of Bus. and Econ. 1, 5 (2003). An example of rent-seeking is when a firm, union, or special-interest group lobbies political actors (*e.g.*, politicians or bureaucrats) to influence legislation in a beneficial manner.

does not justify its extension to private parties." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998).

Neither fairness nor equality justify the reliance defense the Ninth Circuit and other lower courts have recognized. Rather, both principles weigh against carving out this exemption in Section 1983's remedial framework.

B. The reliance defense adopted by the Ninth Circuit and other lower courts conflicts with *Reynoldsville Casket*.

This Court's retroactivity jurisprudence makes clear that both *Knox* and *Janus* have retroactive effect, and undermines Local 1000's asserted good faith defense. The reliance defense the Ninth Circuit and other lower courts have fashioned to defeat their retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), the Court held that its decisions in civil cases were presumptively retroactive unless the Court specifically states that its decision is not to be applied retroactively. Nothing in *Knox* or *Janus* specifically states that the decisions are not retroactive.

Two years later, in *Reynoldsville Casket Co. v. Hyde*, the Court held that courts cannot create equitable remedies based on a party's reliance on a statute before it was held unconstitutional by the Supreme Court. 514 U.S. 749, 759 (1995).

Reynoldsville Casket concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at 751. This Court had earlier held the statute unconstitutional. *Id.* The Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed under the statute before the Court invalidated it. *Id.* at 751-52. The plaintiff asserted this was a permissible equitable remedy because she relied on the statute before it was held unconstitutional. *Id.* at 753 (describing the state court's remedy "as a state law 'equitable' device [based] on reasons of reliance and fairness"). This Court rejected that contention, holding the state court could not evade retroactivity by creating an equitable remedy based on a party's reliance on a statute before it was held unconstitutional. 514 U.S. at 759.

The Ninth Circuit and other lower courts have engaged in just such an evasion, creating a "union exception" to the standards set by this Court for the retroactive application of its decisions. They created an equitable defense based on a defendant's reliance on a practice this Court deemed unconstitutional. The reliance defense the Ninth Circuit created conflicts with this Court's *Reynoldsville Casket* precedent.[9]

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[9] A "good faith" defense is unlike an immunity, which does not conflict with this Court's retroactivity doctrine because an immunity is a well-established legal rule grounded in "special federal policy considerations." *Reynoldsville Casket*, 514 U.S. at 759. A categorical good faith defense to § 1983 is not well established. This Court has never recognized such a defense. Moreover, the good faith defense is an equitable defense (continued...)

IV. This Court Should Resolve the Conflict Between the Third Circuit and Several Other Circuit Courts.

In three separate opinions, a majority of a Third Circuit panel in *Diamond*, *supra*, rejected the good faith defense now recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. Judge Rendell, writing for herself, recognized the affirmative good faith defense that several other circuit courts had recently adopted. *Id*. at 271. Judge Fisher, concurring in the judgment, rejected the categorical good faith defense that Judge Rendell and some other circuits had recognized. *Id*. at 274 (Fisher, J., concurring in the judgment). Judge Fisher found that policy interests in fairness or equality could not justify creating this defense. *Id*. He also found that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to First Amendment claims for compelled speech. *Id*. at 280.[10]

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[9] (...continued)
predicated on a defendants' reliance interests. The equitable remedy at issue in *Reynoldsville Casket* was similarly based on "a concern about reliance [that] alone has led the Ohio court to create to what amounts to an ad hoc exemption to retroactivity." *Id*. This Court rejected that equitable remedy as inconsistent with its retroactivity doctrine.

[10] While he rejected a good faith defense, Judge Fisher found an alternative limit to Section 1983 liability. According to Judge Fisher, prior to 1871, "[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision."
(continued...)

Judge Phipps, dissenting, agreed with Judge Fisher that there is no good faith defense to Section 1983. *Id.* at 285 (Phipps, J. dissenting). According to Judge Phipps, "[g]ood faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983." *Id.* at 289. Judge Phipps continued, "Nor does our precedent or even principles of equality and fairness favor recognition of good faith as an affirmative defense to a compelled speech claim for wage garnishments." *Id.*

Taking the three opinions together, a majority of the Third Circuit rejected the good faith defense recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. *See Doughty v. State Emples. Ass'n of N.H.*, 981 F.3d 128 (1ST CIR. 2020); *Wholean*, 955 F.3d 332 (2D CIR. 2020); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375 (4TH CIR. 2021); *Lee*, 951 F.3d at 392 n.2; *Janus II*, 942 F.3d 365 (7TH CIR. 2019); *Danielson*, 945 F.3d at 1101. The Court should resolve this conflict amongst the circuit courts. This is especially true given that a good faith defense lacks any cognizable legal basis, just as Judges Fisher and Phipps recognized.

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[10] (...continued)
Id. at 281. Judge Fisher concluded that Section 1983 incorporates this ostensible liability exception. *Id.* at 284. This view is idiosyncratic. To Petitioners' knowledge, no court has adopted it.

V. It Is Exceptionally Important that This Court Resolve Whether Congress Created a Good Faith Defense to § 1983 Claims.

In at least three prior cases the Court questioned, but opted not to decide, whether Congress has provided private defendants with a "good-faith" defense. *See Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at 169; *Lugar*, 457 U.S. at 942 n.23. It is time for the Court to finally resolve the matter.

The Court should end the growing misconception among lower courts that this Court in *Wyatt* signaled that private defendants should be granted a broad reliance defense to Section 1983 liability akin to qualified immunity. In the wake of *Janus*, a chorus of lower courts have interpreted *Wyatt* in that way. *See Danielson*, 945 F.3d at 1104 n.7 (collecting most cases). Yet *Wyatt* did not suggest such a defense, but merely suggested that reliance on a statute could defeat the malice and lack-of-probable cause elements of claims analogous to malicious prosecution and abuse of process claims. *See supra* at 16-18. The Court should explain what it meant in *Wyatt*.

It is important that the Court do so quickly because whether tens of thousands of victims of forced-unionism schemes can receive compensation hangs in the balance. District courts in roughly two dozen cases — most filed as class actions — have held that a "good-faith" defense exempts unions from having to pay damages to employees whose First Amendment rights the unions violated. *See Danielson*, 945 F.3d at 1104 n.7 (collecting most cases). Absent review, such

cases are likely doomed to failure and employees will be left without a remedy, a serious deviation from bedrock American law.

From its earliest decisions, this Court has held fast to the proposition that "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (Marshall, C.J.); *see id.* at 163; *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392 (1971); *see also Ziglar v. Abbasi*, 137 S.Ct. 1843, 1874 (2017) (Breyer, J., dissenting). The Court should grant review so the employees in these suits can recover a portion of the "windfall," *Janus*, 138 S. Ct. at 2486, of compulsory fees enjoyed by unions wrongfully seizing it from them.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. Unless rejected by this Court, defendants could raise this defense against any constitutional claim actionable under § 1983, including discrimination based on race, religious faith, or political affiliation. Courts would have to adjudicate this defense, lest it become a "union exception" to normal principles of law, the "*damnum absque injuria* — a loss without an injury" against which the Great Chief Justice warned. *Marbury*, 5 U.S. at 163-64.[11]

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[11] Of course, even this remedy has its limitations, as nothing will remedy the "distortions of the political process," *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring); *see also Austin v. Michigan* (continued...)

More importantly, plaintiffs who would otherwise receive damages for their injuries will be remediless unless this Court rejects this new, judicially-created defense to § 1983 liability.

The Court should grant review to clarify that immunities and defenses to § 1983 must rest on a firm statutory basis, and that the new reliance defense recognized below lacks any such basis. Chief Justice Marshall warned that "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 U.S. at 163-64.

The Court should grant certiorari to vindicate its clear holdings in *Knox* and *Janus*: governments and unions cannot seize payments for union speech from employees unless those employees knowingly, intelligently, and voluntarily waive their right not to subsidize that speech. 138 S.Ct. at 2486. This holding

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[11] (...continued)
Chamber of Com., 494 U.S. 652, 663 n.2 (1990), *overruled on other grounds by Citizens United v. Fed. Election Commn.*, 558 U.S. 310 (2010); *McConnell v. Fed. Election Commn.*, 540 U.S. 93, 333 (2003) (Scalia, J., concurring), *overruled on other grounds by Citizens United*, *supra*, occasioned by the unions' utilization of millions of dollars of "other people's money," *Davenport*, 551 U.S. 177, 187 (2007), forcibly extracted from nonunion public employees. Refunding illegally extracted monies ameliorates the harm only to its direct victims. It does not remedy the harm to the body politic arising from and caused by the practice, which is almost certainly beyond meaningful measure, and almost certainly beyond the power of the courts to remedy.

has particular force when, as here, the Respondent was on notice that the juridical basis for their "opt-out" scheme was derived from nothing but this Court's *dicta*, conveyed in a decision against it specifically.

Any doubts with regard to *Knox*'s significance were removed when this Court restored public employees' full free choice in *Janus*. Unless the Employees had knowingly, intelligently, and voluntarily waived their First Amendment right to stop subsidizing union political speech, 138 S.Ct. at 2486, it certainly was unconstitutional for the government and union to compel them to pay for union speech in the absence of an objection.

CONCLUSION

For the reasons stated above, certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

W. JAMES YOUNG
Counsel of Record
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
E-MAIL — wjy@nrtw.org

ATTORNEY FOR PETITIONERS

January 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KOUROSH KENNETH HAMIDI; et al., Plaintiffs-Appellants, and CECILIA STANFIELD; MOZELLE YARBROUGH, Plaintiffs, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000; BETTY T. YEE, State of California, Defendants-Appellees,	No. 19-17442 D.C. No.2:14-cv-00319-WBS-KJN MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3

Submitted October 22, 2021[**]
San Francisco, California

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,[***] District Judge.

Kourosh Hamidi and over a dozen other public sector employees ("Employees") appeal from the district court's dismissal of their class action lawsuit against the Service Employees International Union, Local 1000 ("Union") and California State Controller. The Employees seek declaratory and monetary relief under 42 U.S.C.§ 1983 for agency fees collected from their paychecks in violation of the First Amendment.

We review both the dismissal of a complaint for failure to state a claim and the grant of summary judgment de novo. *Telesaurus VPC, LLC v. Power,* 623 F.3d.998, 1003 (9th Cir. 2010); *United States v. Phattey*, 943 F.3d 1277, 1280 (9th Cir. 2019).

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

1. The Employees' claim for prospective declaratory relief is moot.[1] "It is an inexorable command of the United States Constitution that the federal courts confine themselves to deciding actual cases and controversies." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128 (9th Cir. 2005) (en banc). "The limitations that Article III impose upon federal court jurisdiction are not relaxed in the declaratory judment context." *Id.* at 1129. Thus, "an actual controversy must be extant at all states of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

The Union stopped collecting agency fees in light of *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Thus, the challenged opt-out system has not been used for more than a year. The day after *Janus* was decided, the State Controller cancelled the deduction of agency fees from all nonconsenting public employees. Over a month later, the California Attorney General issued an advisory opinion concerning *Janus*, explaining that the state "may no longer automatically deduct a mandatory agency fee from the salary or wages of a non-member public employee who does not affirmatively choose to financially support the union." Similarly, in-house counsel for the Union filed an affidavit stating that the Union stopped collecting agency fees and using the opt-out procedure following *Janus*. Union counsel also conceded that the collecting agency fees from non-union members is unconstitutional under Janus and

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1 The Employees concede that their claim for injunctive relief is moot.

that this determination binds the Union. Based on these facts, the district court found the Employees' claim for prospective relief moot.

We agree that "subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphasis added) (citation omitted). The Attorney General's and the Union's acceptance of the unconstitutionality of mandatory agency fee collection, along with the termination of the opt-out system itself, make it clear that their "allegedly wrongful behavior [is not] likely [to] occur or continue and that [there is no] threatened injury...certainly impending." *Id.* at 190 (simplified). There is no reasonable likelihood that the Union or the State Controller will resume collecting fees or using the challenged opt-out procedure.

That the California statutes about agency fees, such as Cal. Gov't Code §§ 3513(I) & (k), 3515, 3515.7, and 3515.8, have not been repealed does not give standing to the Employees. Unconstitutional statutes, without more, give no one a right to sue. *See, e.g., Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1129 (9th Cir. 2000) (en banc) ("[T]he mere existence of a...statute...[does not] satisf[y] a 'case or controversy' requirement..Rather, there must be a 'genuine threat of imminent prosecution.'") (citations omitted). Thus, we hold that Employees' allegations do not "plausibly give rise to an entitlement to relief," *Telesaurus*, 623 F.3d at 1003 (simplified), and affirm.

2. The Employees' claim for retroactive relief is

foreclosed by *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019). The Employees ask the Union for a refund of all agency fees collected from their paychecks after July 2013. *Danielson* ruled that unions are entitled to a good-faith defense under § 1983 and are not liable to pay back the agency fees collected before *Janus*. *Id.* at 1103-05. *Danielson* also held that "private parties" are entitled "to rely on judicial pronouncements of what the law is, without exposing themselves to potential liability for doing so." *Id.* at 1099.

Even though the Employees' claim here is slightly different from *Danielson*, the Union's use of the opt-out system still complied with then-existing Supreme Court and Ninth Circuit law. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 2019, 239 (1977); *Chicago Teachers Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 306 (1986); *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258, 260-61 (9th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992). Even with the Supreme Court's decision in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012), the Union was entitled to rely on *Mitchell*'s pronouncement of the law in good faith. Because the Union's collection of agency fees through the opt-out system was "sanctioned not only by state law, but also by directly on-point" Ninth Circuit precedent, we hold that the Union is entitled to a good-faith defense to "retrospective monetary liability under section 1983 for the agency fees it collected pre-*Janus*." *Danielson*, 945 F.3d at 1104, 1099. Thus, *Danielson* precludes the Employees' recovery of agency fees.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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KOUROSH KENNETH HAMIDI; et al., and the CLASS THEY SEEK TO REPRESENT, Plaintiffs, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000; BETTY T. YEE, State of California, Defendants,	Case No. 2:14-cv-00319 WBS KJN MEMORANDUM AND ORDER: CROSS-MOTIONS FOR SUMMARY JUDGMENT, MOTION TO DECERTIFY THE CLASS, AND MOTION TO AMEND CLASS CERTIFICATION ORDER

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Plaintiffs Kourosh Kenneth Hamidi et al., and the class they represent ("the Employees"), brought this class action against defendants Service Employees International Union Local 1000 ("Local 1000") and the California state controller,[1] alleging that Local 1000's

1 After this court dismissed plaintiffs' claims for declaratory and injunctive relief, plaintiffs had no claims remaining

'opt-out' system for collecting optional union fees violates the Employees' First Amendment rights. In light of the Supreme Court's recent decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), requiring employees' affirmative consent prior to any collection of union fees, the court is now presented with the parties' cross-motions for summary judgment, defendant's motion to decertify the class, and plaintiffs' motion to amend the class certification order.

I. Factual and Procedural Background

On June 27, 2018, the Supreme Court decided *Janus* and held that payment to union may not be collected from an employee without the employee's affirmative consent. 138 S. Ct. at 2486. The decision overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny, which established that unions may require nonmembers to pay a fee to the union that would be used to fund expenditures germane to collective bargaining.

Plaintiffs are employees of the State of California. (Local 1000 Resp. to Statement of Undisputed Material Facts ("SUMF") at 7, ¶ 6 (Docket No. 152-1).) Local 1000 is the exclusive representative for collective bargaining purposes of plaintiffs and other state employees. (*Id.* at 8, ¶ 8).

Before *Janus*, employees represented by Local 1000 could either join the union as dues-paying

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against the state controller. The court thus dismissed the party from this lawsuit. (*See* June 18, 2019 Order at 16 (Docket No. 139).)

members (*id*. at 11, ¶ 12) or remaining nonmembers and pay Local 1000 a 'fair share' fee. (*Id*. at 11, ¶ 12). Nonmembers could choose to pay the "full" fair share fee, which local 1000 used to fund expenditures both germane and not germane to collective bargaining, or a "reduced" fair share fee, which defendant used to fund only expenditures that were germane to collective bargaining. (*See* Decl. of Brian Calderia ("Caldeira Decl." ¶ 3 (Docket No. 37).) Non-germane expenditures, also known as non-chargeable expenditures, included, for example, contributions to "political or ideological causes only incidentally related to the terms and conditions of employment." (Local 1000 Resp. to SUMF at 12, ¶ 13 (Docket No. 152-1)).

Under the pre-*Janus* system, in deciding whether to charge a nonmember the full or reduced fair share fee, Local 1000 had, with the state's authorization and assistance, implemented an 'opt-out' system. (*Id*. at 3-4, ¶ 1). Prior to each annual fee cycle, Local 1000 sent nonmembers, a notice ("*Hudson* notice") informing them that they will be charged the full fair share fee for the upcoming cycle unless they opt out by sending back a written statement stating that they wish to be charged only the reduced fair share fee. (Local 1000 Resp. to SUMF at 11-12, ¶ 13.) Employees who did not object were charged the full fair share fee. (Pls.' Mot. in Supp. Summ. J. at 3-4 (Docket No. 149-1).) The day after *Janus* was decided, the California State Controller's Office cancelled the deduction of agency fees from all nonconsenting public employees. (*See* June 18, 2019 Order at 5 (Docket No. 139).)

On January 31, 2014, plaintiffs brought this

action under 42 U.S.C. § 1983 alleging that Local 1000's fee collection system violated nonmembers' First and Fourteenth Amendment rights. (Compl. at 1-2, ¶ 1 (Docket No. 1).) This court first certified plaintiff's cause of action for class treatment to the extent it is brought as a facial challenge to the constitutionality of Local 1000's opt-out requirement. (*See* Feb. 8, 2017 Order at 14, 18 (Docket No. 94).) After the Court decided *Janus*, this court dismissed as moot plaintiff's claims for declaratory and injunctive relief. (*See* June 18, 2019 Order at 16 (Docket No. 139).) Plaintiff's "sole remaining claim" is "for retrospective monetary relief." (Joint Status Report at 1 (Docket No. 143).)

II. Defendant's Motion for Summary Judgment

Plaintiff seeks repayment of all fees – both germane and non-germane to collective bargaining – collected from nonmembers prior to the Court's decision in *Janus*. (Pls.' Mot. in Supp. Summ. J. at 46 (Docket No. 149-1).) Defendant does not contest that Local 1000's opt-out system to collect agency fees from nonmembers violates nonmembers' First Amendment rights under *Janus*. Defendant instead asserts a good faith defense to § 1983 liability because the law at the time of Local 1000's collection of agency fees permitted such a system. This court agrees that such a defense applies here.

A. Section 1983 Good-Faith Defense

In *Wyatt v. Cole*, the Supreme Court did not foreclose "the possibility that private defendants faced with § 1983 liability ... could be entitled to an affirmative defense based on good faith." *Wyatt v.*

Cole, 504 U.S. 158, 169 (1992); *see also Richardson v. McKnight*, 521 U.S. 399, 413-14 (1977) ("*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense ... we do not express a view on this last-mentioned question.")

The Supreme Court in *Janus* "itself did not specify whether the plaintiff was entitled to retrospective monetary relief for conduct the Supreme Court has authorized for the previous forty years." *Cooley v. California Statewide Law Enf't Ass'n*, 385 F. Supp. 3d 1077, 1081 (E.D. Cal. 2019) (citing *Janus*, 138 S. Ct. at 2486). The controlling law in the Ninth Circuit, however, recognizes a good faith defense in shielding private defendants from liability in § 1983 actions. In *Clement v. City of Glendale*, the Ninth Circuit granted summary judgment in favor of defendant – a towing company – as to the plaintiff's § 1983 claim because the defendant "did its best to follow the law" in that "the tow was authorized by the police department, conducted under close police supervision and appeared to be permissible under both local ordinance and sate law." 518 F. 3d 1090, 1097 (9th Cir. 2008). Since *Clement*, "[t]he threshold question of whether the good faith defense is available to private parties in § 1983 actions has been answered affirmatively by the Ninth Circuit." *Cook v. Brown*, 364 F. Supp. 3d 1184, 1190 (D. Or. 2019).

B. Application of Good-Faith Defense

1. Legal Standard

Plaintiffs construct a five-element good-faith test

out of the Ninth Circuit's decision in *Clement* to argue that defendant's actions do not qualify for the defense. No court, however, as read *Clement* so rigidly. "[T]he [good faith] defense has been applied by the Ninth Circuit without a precise articulation of its contour." *Cook v. Brown*, 364 F. Supp. 3d 1184, 1192 (D. Or. 2019) ("The Ninth Circuit has thus far expressed no position regarding the proper standard."). Courts instead apply "traditional principles of equity and fairness." *Cook* 364 F. Supp. 3d at 1192. Because union defendants relied on 40-year precedent, and because unions cannot retract the bargaining they carried out on plaintiffs' behalf, district courts have concluded that requiring the union to refund the collected fees would be inequitable. *See, e.g., Babb,* 378 F. Supp. 3d at 876; *Cook*, 364 F. Supp. 3d at 1192; *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019).

In the fair share fee context, "every district court to consider whether union that collected agency fees prior to *Janus* have a good-faith defense to § 1983 liability have answered in the affirmative." *Babb v. California Teachers Ass'n*, 378 F. Supp. 3d 857, 872 (C.D. Cal. 2019) (collecting cases). Most recently, this court found that, because unions enjoyed Supreme Court and statutory authorization, the unions that followed then-valid law were "entitled to the good-faith defense as a matter of law." *Hernandez v. AFSCME California*, 2019 WL 2546196, at *2 (E.D. Cal. June 20, 2019).

Although courts have not articulated a standard to evaluate good faith after *Janus*, the district courts that have considered the issue having found good faith

where the union complied with then-existing Supreme Court precedent and state law. *See, e.g., Babb*, 378 F. Supp. 3d 876 (finding good faith where union defendant relied "on a presumptively valid state statute" and "the 40-year-precedent of *Abood*"); *Danielson v. Am. Fed'n of State, Cty., * Mun. Employees, Council 28, AFL-CIO*, 340 F. Supp. 3d 1083, 1086 (finding good faith where "the Union Defendant followed the then-applicable laws"); *Cook*, 364 F. Supp. 3d at 1192 (finding that "[i]t would be highly inequitable to hold [the union defendant] retroactively liable" where the union collected fees in accordance with state law and Supreme Court precedent); *Crockett*, 367 F. Supp. 3d 996, 1006 (same).

Moreover, the limited circuit-level guidance available concludes that a union's compliance with previously valid law suffices to grant a good faith defense to § 1983 liability. In *Jarvis v. Cuomo*, 660 F. App'x 72, (2d Cir. 2016), the Second Circuit considered a union's § 1983 liability for fair share fees collected before the Supreme Court ruled in *Harris v. Quinn*, 573 U.S. 616 (2014), that unions may not compel personal care providers to pay fair share fees. The *Janus* court found that the union was "not liable for damages stemming from the pre-*Harris* collection of fair share fees," because the union "relied on a validly enacted state law and the controlling weight of Supreme Court precedent," such that "it was objectively reasonable for [the union] 'to act on the basis of a statute not yet held invalid.'" *Jarvis v. Cuomo*, 660 F. App'x 72, 76 (2d Cir. 2016) (citing *Pinksy v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996)).

This court previously "express[ed] skepticism

that the good faith defense depends on more than the union's actual compliance with then-existing law." *Hamidi v. Serv. Employees Int'l Union Local 1000*, 386 F. Supp. 3d 1289, 1300 (E.D. Cal. 2019). Today, in reliance on the guidance above, this court makes the standard clear: in the agency fee context, a union's compliance with then existing law indeed suffices to find good faith.

2. Application to Local 1000's Opt-Out System

Local 1000 is entitled to the good-faith defense because its opt-out system complied with then-valid Supreme Court precedent. Prior to *Janus*, this court specifically found that Local 1000's opt-out procedure was consistent with both Ninth Circuit and Supreme Court decisions on agency fee collection. (Feb. 8, 2017 Order at 14, 18 (Docket No. 94).) When Plaintiffs filed suit, it was well established that unions may require nonmembers to pay the portion of the fair share fees that are used to fund expenditures germane to collective bargaining. *Abood*, 431 U.S. at 235. Further, this court found that the Ninth Circuit's finding in *Mitchell v. Los Angeles Unified Sch. Dist.*, namely "that the Constitution does not mandate a system under which nonmembers...'opt-in,'" 963 F.2d 258, 260 (9th Cir. 1992), was consistent with Supreme Court juris-prudence and was therefore the controlling law in the circuit. (*See* Feb. 8, 2017 Order at 12-13 (Docket No. 94).) Defendants "are entitled to rely" upon the Supreme Court's binding precedent and Local 1000 did so here. *See Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980, 983 (N.D. Ohio 2019).

Local 1000 also complied with then-valid state law. The Dills Act ("The Act") expressly permitted the collection of fair share fees. *See* Cal. Gov't Code § 3513 (k). Specifically, the Act permitted Local 1000 to establish procedures for a nonmember employee to object to paying the full fair share fee. Cal. Gov't Code § 3515.8. Moreover, the Public Employment Relations Board issued a regulation requiring exclusive representatives like Local 1000 to "provide an annual written notice to each nonmember who will be required to pay an agency fee" that includes "procedures...objecting to the payment of an agency fee amount that includes nonchargeable expenditures." 8 C.C.R. § 32992. Both Supreme Court precedent and then-valid state law authorized Local 1000 to require nonmembers to opt out of payment of non-chargeable fees. Local 1000's compliance with then-valid law therefore entitles defendant to good-faith defense as a matter of law.

3. Local 1000's Subjective Belief

Plaintiffs contend that defendant did not in fact act in good faith because they should have known that the Court would overturn *Abood*. Plaintiffs are correct that "union have been on notice for years regarding [the] Court's misgivings about *Abood*." *Janus*, 138 S. Ct. at 2484. But "reading the tea leaves of Supreme Court Dicta has never been precondition to good faith reliance on governing law." *Cook*, 364 F. Supp. 3d at 1192. To find otherwise would force defendants to engage in "constitutional gambling" and "decid[e] if they truly agree with the Supreme Court's reasoning to avoid future liability." *Carey*, 364 F. Supp. 3d at 1231.

More importantly, evaluating defendant's October Term predictions in a good-faith determination would "imperil the rule of law." *Cook*, 364 F. Supp. 3d at 1193. Unions that followed what was then the law – *Abood* – would not be entitled to the defense, while those that questioned the Supreme Court's binding interpretation of the Constitution would walk away unscathed. *See also Danielson*, 340 F. Supp. 3d at 1086 (concluding that consideration of a union's "subjective anticipation of an unpredictable shift in the law undermines the importance of observing existing precedent"). Defendant need not engage in telepathy to avail itself of the good faith defense to § 1983 liability. *See Winner v. Rauner*, No. 15-cv-7213, 2016 WL 7374258, at *5 (N.D. Ill. 2016). Instead, as state above, Local 1000's compliance with what was then the law is sufficient for a finding of good faith.

IT IS THEREFORE ORDERED that defendant's Motion for Summary Judgment (Docket No. 148) be, and the same hereby is, GRANTED.[2]

Dated: October 24, 2019

[2] The court's ruling here resolves plaintiffs' "sole remaining claim." (Joint Status Report at 1 (Docket No. 143).) Defendant's motion to decertify the class and plaintiffs' motion to amend the class certification order are therefore moot.

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES CONSTITUTION

First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

UNITED STATES CONSTITUTION

Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> Section 1. .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

RALPH C. DILLS ACT,
CAL. GOV'T CODE § 3512 *ET SEQ.*

§ 3513. Definitions

As used in this chapter:

(k) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

§ 3515. Employee organizational rights, maintenance of membership; fair share fee; self representation

Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provisions, as defined in subdivision (I) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of

Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.