No. 21-185

IN THE
Supreme Court of the United States

SCOTT SOLOMON,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 37, AFL-CIO,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a union can be held liable for retrospective monetary relief under 42 U.S.C. § 1983 for receiving and spending agency fees to pay for collective bargaining representation prior to *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), where such fees were authorized by state law and constitutional under this Court's then-controlling precedent.

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INTRODUCTION

The lower courts have unanimously and correctly held that unions are not subject to retrospective monetary liability in suits under 42 U.S.C. § 1983 for having collected agency fees, in accordance with state law and this Court's then-controlling precedent, prior to this Court's decision overruling that precedent in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). Since January of this year, the Court has denied nine petitions for certiorari that raised the same question presented here[1]—including in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1735 (2021), which Petitioner acknowledges is factually and legally indistinguishable from this case. As there have been no developments in the short time since those denials of certiorari that would make this question worthy of this Court's review, this petition should likewise be denied.

STATEMENT

A. The New York Public Employees' Fair Employment Act, N.Y. Civil Service Law § 200 et seq. ("the Act"), like the laws of many other states, allows public employees to organize and bargain collectively with

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[1] *See Doughty v. State Emps.' Ass'n of N.H.*, 2021 WL 2405208 (U.S. June 14, 2021); *Diamond v. Pa. State. Educ. Ass'n*, 2021 WL 2405172 (U.S. June 14, 2021); *Wholean v. CSEA SEIU Local 2001*, 141 S. Ct. 1735 (2021); *Janus v. AFSCME Council 31,* 141 S. Ct. 1282 (2021); *Danielson v. Inslee*, 141 S. Ct. 1265 (2021); *Casanova v. Machinists Local 701*, 141 S. Ct. 1283 (2021); *Mooney v. Ill. Educ. Ass'n*, 141 S. Ct. 1283 (2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 141 S. Ct. 1265 (2021); *Lee v. Ohio Educ. Ass'n*, 141 S. Ct. 1264 (2021).

their public employer, through a representative organization of their choosing, over the terms and conditions of their employment. Respondent American Federation of State, County and Municipal Employees, District Council 37, AFL-CIO ("District Council 37" or "Union") was chosen and certified as the exclusive representative of a unit of employees of the City of New York that included Petitioner. That certification brought with it the legal duty to represent equally the interests of all employees in the bargaining unit in negotiating and enforcing the terms of the applicable collective bargaining agreement, whether union members or not. N.Y. Civ. Serv. Law § 209-a(2)(c).

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, the Act further authorized a union certified as an exclusive representative to receive "fair-share fees" (also known as "agency fees") from nonmembers. N.Y. Civ. Serv. Law § 208(b) (2018). The agency fee that nonmembers were required to pay consisted of the amount of the union's membership dues, less a pro rata share of the union's political and ideological expenditures. *Id.* The agency-fee provisions of the Act were first enacted by the New York State Legislature several months after this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had specifically upheld, against a First Amendment challenge, the constitutionality of such agency-fee arrangements in the public sector.

Consistent with these statutory provisions, members of the bargaining units represented by District Council 37 who declined to become dues-paying members of the Union were required to pay a fee to help

defray the Union's costs of collective bargaining and contract enforcement undertaken for the benefit of union members and nonmembers alike. Pet. App. 8.

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 its *Abood* precedent and held for the first time that public employees could not constitutionally be required to pay agency fees. More than a year later, on July 23, 2019, Petitioner brought the instant putative class action lawsuit under 42 U.S.C. § 1983 against District Council 37. Petitioner did not allege that the City of New York had continued to collect agency fees from him after *Janus* in violation of that decision, and indeed it is undisputed that neither he nor anyone else in his bargaining unit was required to pay any such fees after *Janus* was decided. Petitioner accordingly sought no injunctive relief. Rather, he claimed that the agency fees he had paid *before* June 27, 2018—at a time when the Act explicitly authorized agency fees and the *Abood* decision upholding the constitutionality of such statutes was the law of the land—were "unconstitutionally seized" and must be paid back.

After the complaint was filed, Petitioner and the Union jointly agreed to stay the case pending the Second Circuit's disposition of *Wholean v. CSEA SEIU Local 2001*, a case that also sought the repayment of pre-*Janus* agency fees under Section 1983.

On April 15, 2020, the Second Circuit issued its decision in *Wholean*, holding that "a party who complied with directly controlling Supreme Court precedent in collecting fair-share fees cannot be held liable for monetary damages under § 1983." 955 F.3d 332, 334. The court noted that this Court's majority opinion in *Wyatt v. Cole*, 504 U.S. 158 (1992), had left open the

question of whether "private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability." *Id.* at 334–35 (quoting *Wyatt*, 504 U.S. at 168). In answering that question in the affirmative, the Second Circuit relied on Justice Kennedy and Chief Justice Rehnquist's separate opinions in *Wyatt*—collectively joined by five members of the Court—which *did* address this question and concluded "that a good-faith defense for private individuals who rely on precedent has always existed." *Id.* at 335 (citing *Wyatt*, 504 U.S. at 174 (Kennedy, J., concurring), 176 (Rehnquist, C.J., dissenting)).

In light of the reasoning in Justice Kennedy's and Chief Justice Rehnquist's separate opinions in *Wyatt*, as well as the reasoning in the Second Circuit's unpublished decision in *Jarvis v. Cuomo*, 660 F. App'x 72, 75 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017), the *Wholean* court held that unions are not liable under Section 1983 to repay pre-*Janus* agency fees because they relied on then-valid state law and then-valid Supreme Court precedent in collecting those fees. 955 F.3d at 336.

After the Second Circuit decided *Wholean*, District Council 37 moved to dismiss Petitioner's complaint in the district court. Petitioner did not oppose the motion, observing that "*Wholean* is currently controlling circuit precedent that requires this Court to grant District Council 37's motion to dismiss." Dist. Ct. ECF No. 25 at 3. The district court thus dismissed the case. Pet. App. 3–4.

On appeal, District Council 37 filed a motion for summary affirmance, which Petitioner again did not

oppose. The Second Circuit granted the motion and affirmed the district court's judgment, concluding that "summary affirmance is appropriate because the issue on appeal was squarely resolved against the Appellant by this Court's decision in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020)." Pet. App. 2.

REASONS FOR DENYING THE WRIT

This petition presents the narrow question of whether unions that received and expended agency fees prior to *Janus* in accordance with state law and this Court's then-controlling precedent are liable for retrospective monetary relief under 42 U.S.C. § 1983. Since *Janus*, seven courts of appeals and more than 30 district courts have unanimously answered that question in the negative. There is thus no circuit split with respect to the question presented.

Nor is there any disagreement among the circuits about the broader question of whether, as a general matter, private parties are entitled to assert a good-faith defense to a Section 1983 claim for monetary liability. In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court held that private-party defendants sued for monetary relief under Section 1983 are not entitled to the same form of qualified immunity available to public officials, but the Court noted that such defendants "could be entitled to an affirmative defense based on good faith." *Id.* at 169. Since *Wyatt*, every circuit court to consider the question has recognized such a good-faith defense. And *no* court has held that a private party is liable for monetary relief under Section 1983 simply for following then-valid state law.

Not only is there no disagreement among the lower courts as to the legal issue presented here, but the

unique circumstances that led to invocation of the good-faith defense in the post-*Janus* litigation are unlikely to recur. This Court only rarely overrules its prior precedents, and private parties seldom face monetary claims under Section 1983 for engaging in conduct that was authorized by state law and by directly on-point Supreme Court precedent.

This Court has recently denied nine petitions for certiorari that raised the same question presented here. *See supra* at 1 n.1. Those petitions, a majority of which were filed by one or both of the advocacy groups that represent Petitioner in this case, have made the same arguments in support of review as Petitioner presents here. Given the continued, unbroken consensus in the lower courts, there remains no reason for this Court to intervene.

I. The lower courts unanimously have held that unions are not subject to retrospective monetary liability under Section 1983 for having collected pre-*Janus* agency fees.

Contrary to Petitioner's submission, this case does not present a "conflict" for this Court to resolve. On the contrary, the circuit courts have unanimously held that private parties are not liable for monetary relief under Section 1983 when they reasonably relied upon then-valid state law that was subsequently overturned. This unanimity extends to each of the circuit courts to have specifically considered a Section 1983 claim for pre-*Janus* agency fees, all of which have rejected such claims.

1. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that private parties who invoke state-created laws and processes may, in certain

circumstances, be considered state actors subject to liability under Section 1983. *Id.* at 936–37. The Court acknowledged that its construction of Section 1983 created a "problem"—namely, that "private individuals who innocently make use of seemingly valid state laws" could be sued for monetary relief "if the law is subsequently held to be unconstitutional." *Id.* at 942 n.23. The Court suggested that this problem "should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense." *Id.*

Ten years later, *Wyatt v. Cole*, 504 U.S. 158 (1992), held that private-party defendants in Section 1983 litigation are not entitled to the same form of immediately-appealable qualified immunity that is available to public officials. 504 U.S. at 167. The Court acknowledged, however, that "principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability," and the Court explained that its decision did not "foreclose the possibility that private defendants faced with § 1983 liability under *Lugar* . . . could be entitled to an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.

Since *Wyatt*, the eight courts of appeals to consider the question uniformly have held that private parties may assert a good-faith defense to Section 1983 claims for monetary relief. The Fifth Circuit squarely considered the issue on remand from this Court in *Wyatt*, holding that "private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures." *Wyatt v. Cole*, 994

F.2d 1113, 1118 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993). In *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994), the Third Circuit expressed its agreement with the Fifth Circuit's holding, and the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits all have reached the same conclusion. *See Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Res., Inc. v. Howard & Howard Att'ys, P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Janus v. AFSCME Council 31*, 942 F.3d 352, 361–64 (7th Cir. 2019) ("*Janus II*"); *Doughty v. State Emps.' Ass'n of N.H.*, 981 F.3d 128, 133–37 (1st Cir. 2020); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 379–80 (4th Cir. 2021).

This consensus extends to the specific claim for pre-*Janus* agency fees being pursued by Petitioner here. Numerous lawsuits similar to Petitioner's were filed throughout the country following issuance of the *Janus* decision. The outcome of each of those lawsuits has been the same: Every court has concluded that unions' reliance on then-valid state laws and then-binding precedent of this Court precludes monetary relief under Section 1983. That consensus includes nine decisions from seven different courts of appeals.[2]

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[2] *Doughty*, 981 F.3d 128 (1st Cir. 2020), *cert. denied*, 2021 WL 2405208 (U.S. June 14, 2021); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, 141 S.Ct. 1735 (2021); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), *cert. denied*, 2021 WL 2405172 (U.S. June 14, 2021); *Akers*, 990 F.3d 375 (4th Cir. 2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1265 (2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1264 (2021); *Janus II*, 942 F.3d 352 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1282 (2021); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1283

It also includes more than 30 district court decisions. *See*, *e.g.*, *Mattos v. AFSCME Council 3*, 2020 WL 2027365, at *2 n.3 (D. Md. Apr. 27, 2020) (citing most of these cases).

This consensus in the lower courts is consistent with the analysis of reliance interests in *Janus*. This Court considered in *Janus* whether reliance interests justified retaining *Abood* as a matter of stare decisis, 138 S. Ct. at 2478–86, and acknowledged that unions had entered into existing collective bargaining agreements with the understanding that agency fees would help pay for collective bargaining representation, *id.* at 2484. But the Court concluded that unions' reliance interests in the continued enforcement of those agreements were not sufficiently weighty to justify retaining *Abood*. *Id.* at 2484–85. In reaching that conclusion, the Court never suggested nor considered that its decision would expose public employee unions to massive retrospective monetary liability for having followed then-governing precedent. *See id.* at 2486.

2. No circuit court has held that private-party defendants sued on the basis of *Lugar* are *not* entitled to assert a good-faith defense to Section 1983 claims for monetary liability. Indeed, Respondent is not aware of *any* decision by *any* court to that effect.

Notwithstanding this unbroken line of authority as to the question presented, Petitioner argues that the decision below implicates no fewer than three different "conflicts" that require this Court's intervention. Petition at 16–22. All three alleged conflicts are illusory.

(2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1265 (2021).

a. Petitioner is incorrect to assert that the good-faith defense, as applied by the Second Circuit, "conflicts" with this Court's cases on the retroactive application of its decisions. Petition at 16–18.

As the Second Circuit recognized, the question of whether the new rule of law set forth by this Court in *Janus* was to be applied retroactively was a potentially difficult one. *Wholean*, 955 F.3d at 336. The court of appeals therefore chose to assume *arguendo* that this Court's *Janus* decision did apply retroactively and to decide the question before it on the more straightforward ground of whether the plaintiffs were entitled to the particular remedy they sought. *See id.*; *see also, e.g.*, *Janus II*, 942 F.3d at 359–60 (same).

That approach is consistent with the fact that, as this Court has repeatedly made clear, "[r]etroactive application [of a new rule] does not . . . determine what 'appropriate remedy' (if any) the defendant should obtain . . . . Remedy is a separate, analytically distinct issue," and "[t]he Court has never equated its retroactivity principles with remedial principles." *Davis v. United States*, 564 U.S. 229, 243 (2011) (quoting *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 189 (1990)). Accordingly, even if a newly recognized legal principle applies retroactively, that rule will not dictate the outcome of a claim for relief where there is "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995).

Petitioner's attempt to establish a conflict between the good-faith defense and this Court's retroactivity doctrine focuses entirely on *Reynoldsville Casket*, in which the Court rejected a litigant's attempt to characterize as a remedial issue her argument for avoiding application of a prior decision striking down a state's

discriminatory statute of limitations. This Court properly rejected the contention that permitting the plaintiff to proceed with her lawsuit under an unconstitutional statute was a bona fide remedial matter, but in the same breath it made clear the limits of that holding: "[T]he ordinary application of a new rule of law 'backwards,' say, to pending cases, may or may not, involve a further matter of remedies." 514 U.S. at 754 (alterations omitted). And the Court specifically went on to discuss at length "the unsurprising fact that, as courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case" because the particular remedy sought is unavailable. *Id.* at 758–59. The Court cited, as one such instance, the circumstance where qualified immunity is invoked to preclude a monetary remedy. *Id.*

Just as qualified immunity is an independent remedial doctrine that can shield public officials from monetary liability under Section 1983, the good-faith defense is an independent remedial doctrine that can shield private parties from monetary liability under Section 1983. Indeed, in *Lugar*, this Court, in identifying the "problem" of imposing monetary liability on private-party defendants for "mak[ing] use of seemingly valid state laws," stated that this problem presented a "*remedial* issue[]" that "should be dealt with . . . by establishing an affirmative defense." 457 U.S. at 942 n.23 (emphasis added and citation omitted). The reasoning of *Reynoldsville Casket* thus supports the uniform view of the courts of appeals that recognition of the good-faith defense to preclude monetary relief in Section 1983 suits against private parties is entirely consistent with this Court's retroactivity jurisprudence.

b. Petitioner next argues that the decision below "conflicts" with this Court's reasoning in the (overruled) *Abood* decision, in which the Court held that public employees could be required to pay for their proportionate share of a union's collective-bargaining activities but could not be required to support a union's political or ideological activities. Petition at 4; *see also id.* at 18–19.

Abood, however, did not even involve claims for retrospective monetary relief; it instead involved claims for prospective relief against the enforcement of an agency-fee clause in a collective bargaining agreement between the defendant union and the defendant public employer. 431 U.S. at 212–14 & nn.2, 6. Accordingly, the portion of *Abood* that Petitioner cites addressed how a *prospective* remedy should be crafted to ensure that the petitioners' agency fees would not be improperly used to support the union's political or ideological activities. It was in that context that the Court considered "two possible remedies": an "injunction against expenditure for political purposes" (such that nonmembers only would be required pay for representational costs in the first instance) or "restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee" (such that a union could require nonmembers to pay full union dues and later rebate a portion of that amount). *Id.* at 238 (quoting *Machinists v. Street*, 367 U.S. 740, 774–75 (1961)).[3]

[3] This Court later held that the second, rebate remedy that it had suggested in *Abood* was constitutionally insufficient, because the union would effectively "obtain[ ] an involuntary loan for purposes to which the employee objects." *Ellis v. Ry. Clerks*, 466 U.S. 435, 444 (1984).

Abood thus says nothing about whether there is a good-faith defense to claims for *retrospective* monetary relief under Section 1983 for private parties that rely on existing law. Indeed, *Abood* was not even a Section 1983 case. *See* Petition, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (No. 75-1153), 1976 WL 194711, at *3 (U.S. Nov. 28, 1975) (observing that petitioners' claims were brought in state court pursuant to state-law causes of action).

In any event, even if (contrary to fact) *Abood* was a Section 1983 case seeking retrospective monetary relief, it is unlikely that a good-faith defense like that recognized by the Second Circuit below and in all other post-*Janus* decisions would have applied, as the union could not conceivably have "reli[ed] on directly controlling Supreme Court precedent," *Wholean*, 955 F.3d at 336, in assessing such fees. On the contrary, all of this Court's prior holdings on the issue had made it appear unlikely that such a practice would survive constitutional scrutiny. *See Abood*, 431 U.S. at 236 (observing that, in *Machinists v. Street*, the Court had held that such a practice was impermissible under the Railway Labor Act).

For these reasons, there is no inconsistency—let alone a conflict—between *Abood* and the Second Circuit's decision below holding that the Union could assert a good-faith defense to Petitioner's Section 1983 claim for pre-*Janus* agency fees.[4]

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[4] For similar reasons, *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), and *Lowary v. Lexington Local Board of Education*, 903 F.2d 422 (6th Cir. 1990), are inapposite. In both cases, the courts ordered the respective defendant unions to refund the portion of agency fees that had been expended to support the union's political or ideological activities. Because no

c. Finally, Petitioner attempts, based on Judge Fisher's concurring opinion in *Diamond v. Pennsylvania State Education Ass'n*, 972 F.3d 262 (3d Cir. 2020), *cert. denied*, 2021 WL 2405172 (U.S. June 14, 2021), to create a conflict between the Third Circuit and the six other circuit courts that have rejected claims for pre-*Janus* agency fees. Petition at 20–22. But in fact Judge Fisher *agreed* that unions that relied on state law and the *Abood* precedent in accepting and expending agency fees prior to *Janus* could not be held monetarily liable under Section 1983 for having done so. He merely identified an "alternative basis," based on an additional body of common-law authority, for reaching the same result as has every other court of appeals. *See* 972 F.3d at 281–84.

As this Court has often stated, it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). That principle applies here, as the Third Circuit's judgment in *Diamond*—in accord with the judgment of every court to address a Section 1983 claim seeking the repayment of pre-*Janus* agency fees, including the Second Circuit's controlling decision in *Wholean*—is that unions are *not* liable to repay such fees.

While Judge Fisher did not use the term "good-faith defense" to describe the common-law doctrine

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provision of state law—let alone a precedent of this Court—had permitted the unions to collect the fees in question, it is understandable that the unions did not even attempt to argue that a good-faith defense applied. *Compare Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988) (applying good-faith defense to "eliminat[e] liability for private parties who, in good faith . . . invoke presumptively valid state statutes").

that he found supported the unions' defense to monetary liability, this Court surely does not sit to resolve differences in nomenclature among lower-court judges. The dispositive point is that the result reached by Judge Fisher is no different from the result reached by the other courts of appeals in allowing a defense to Section 1983 claims for monetary liability based on the defendant's reliance on state law and this Court's directly-on-point precedent. That Judge Fisher invoked a harmonious but distinct body of common-law authority to reach the same result does not require this Court's intervention. To the contrary, Judge Fisher's analysis simply identifies an additional rationale for the uniform result reached by the lower courts.

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

This Court generally does not grant review solely to correct purported errors in a decision below. Nonetheless, Petitioner devotes the bulk of his submission to arguing that the lower courts have erred on the merits in uniformly rejecting claims for pre-*Janus* agency fees. Petition at 5–16. The same merits arguments were raised by the petition for certiorari in *Janus II* (which was litigated by the same counsel as Petitioner's counsel here), No. 19-1104, as well as in, for example, the petition in *Ogle v. Ohio Civil Service Employees Ass'n*, No. 20-486; those arguments are fully addressed by respective briefs in opposition to certiorari in those cases. This Court denied those petitions on January 25, 2021, and there have been no relevant legal developments since that time that would support a different outcome here.

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

Petitioner contends that review of the decision below is justified because there are "roughly two dozen cases" where courts have rejected similar claims under Section 1983 for agency fees remitted to unions before *Janus* and that, as a result, "such cases are likely doomed to failure" unless this Court grants certiorari. Petition at 22. Far from suggesting that this Court's guidance is required, the broad consensus that Section 1983 claims for pre-*Janus* agency fees are meritless—now spanning seven courts of appeals—amply demonstrates that this Court's involvement is unnecessary.

The unique circumstances presented by cases seeking pre-*Janus* monetary liability also do not provide a suitable vehicle for this Court to provide guidance on the application of the good-faith defense in other circumstances. *Compare* Petition at 23 (arguing that this Court should grant review because private parties "could raise" a good-faith defense to other types of constitutional claims). The Second Circuit's decision in *Wholean*, which is the controlling decision below, held only that retrospective monetary relief under Section 1983 is unavailable where a private-party defendant acted "in reliance on directly-controlling Supreme Court precedent and then-valid state statutes." 955 F.3d at 336. Such situations are likely to be rare.

Stare decisis is "a 'foundation stone of the rule of law.'" *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). This Court seldom overrules its

precedents. It has held, moreover, that when a precedent of this Court is directly on point, that precedent is the law of the land that all lower courts are bound to follow, even if subsequent decisions have criticized that precedent, *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Quite simply, "[i]t would be paradoxical for the circuit courts to be *required* to follow *Abood* until its overruling in *Janus*, while private parties incur liability for doing the same." *Danielson v. Inslee*, 945 F.3d 1096, 1104 (9th Cir. 2019).

These special circumstances would not be presented by the more common case in which the constitutionality of the state statute upon which the private-party defendant relied had never been tested. *See, e.g.*, *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993). Accordingly, this case—in which District Council 37 was acting not just in accordance with the provisions of state law but also in reliance on this Court's then-controlling precedent—would not provide a suitable vehicle for this Court to consider the potential application of a good-faith defense to more typical situations.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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