No. 21-185

IN THE

Supreme Court of the United States

SCOTT SOLOMON,

PETITIONER,

V.

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

RESPONDENT.

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

REPLY TO BRIEF IN OPPOSITION

William L. Messenger
National Right to Work Foundation
8001 Braddock Rd.
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Jeffrey M. Schwab
Counsel of Record
Liberty Justice Center
141 W. Jackson Street
Suite 1065
Chicago, IL 60604
(312) 637-2280
jschwab@libertyjustice-center.org

Counsel for Petitioners

September 8, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Based on a misconception of what this Court wrote in *Wyatt v. Cole,* 504 U.S. 158, 169 (1992), several appellate courts recently recognized a new categorical good-faith defense to Section 1983 that deprives victims of constitutional rights violations of any monetary relief for their injuries if the defendant relied on a state law before it was held unconstitutional. This ostensible defense is being used by unions across the country to deny relief to tens of thousands of workers who were forced to subsidize union speech in violation of their First Amendment rights under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

This Court has never recognized a good-faith defense to Section 1983. However, three times this Court raised, but then did not decide, the question of whether such a defense exists. *Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt v. Cole,* 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 n.23 (1982). Respondent AFSCME, Council 37 ("AFSCME") asserts that the Court should refrain from answering the question now because several appellate courts have already recognized a categorical good-faith defense to Section 1983 claims. Brief in Opposition ("BIO") 1, 7–9. But the categorical defense the lower courts have recognized is not the claim-specific defense this Court suggested in *Richardson*, *Wyatt*, and *Lugar*.

There are numerous reasons why a defendant's reliance on a statute before it is held unconstitutional cannot be an affirmative defense to Section 1983 liability. The Court should thus finally resolve the question it left open in *Richardson*, *Wyatt*, and *Lugar*.

I. This Court should correct the lower courts' misapplication of *Wyatt v. Cole* and resolve the conflict between the Third Circuit and several other Circuit Courts.

AFSCME suggests that because this Court's decision in *Wyatt* left open the question of whether the defendants could raise "an affirmative defense based on good faith and/or probable cause," 504 U.S. at 168–69, that the Second Circuit and other lower courts are correct in finding that private parties may assert a categorical good-faith defense to Section 1983 claims for monetary relief. BIO 7–8. But the lower courts have misunderstood the defense suggested by this Court in *Wyatt*. That suggested defense was not a categorical defense to all Section 1983 damages claims; rather, it was a defense to the malice and probable cause elements of the specific due process claim at issue in that case. This is clear from all three opinions in *Wyatt*. *See* Pet. 5–9.[1]

AFSCME sows confusion by using the term "good-faith defense" to describe two different things. First, there is a *claim-specific* good-faith defense, in which malice and lack of probable cause are deemed elements of a specific constitutional deprivation. This is the narrow defense to due process deprivations that the Court suggested in *Wyatt*, 504 U.S. at 166 n.2. *See*

---

[1] *Lugar* offers even less support to AFSCME's position than *Wyatt*. In *Lugar*, the Court speculated in a footnote that perhaps a defense should be established for private defendants who invoke "seemingly valid state laws." 457 U.S. at 942 n.23. The Court stated that "[w]e need not reach the question of the availability of such a defense to private individuals at this juncture" and that "'[w]e intimate no views concerning the relief that might be appropriate if a violation is shown.'" *Id.* (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 174 n.44 (1970)).

Pet. 5–9. This claim-specific defense "is of no moment here because a claim for compelled speech does not have a *mens rea* requirement." *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262, 289 (3d Cir. 2020) (J. Phipps, dissenting); *see Janus*, 138 S. Ct. at 2468.

Second, there is a *categorical* good-faith defense, in which a defendant's good-faith reliance on state law is considered an affirmative defense to all constitutional claims for damages or restitution brought under Section 1983. This is not the defense the Court suggested in *Wyatt*. It is, however, the defense that six circuit courts recently recognized in cases concerning union agency fee seizures. *See* Pet. 16–18.

A majority of a Third Circuit panel correctly rejected this new defense to Section 1983 liability. *See Diamond*, 972 F.3d at 274 (J. Fisher, concurring the judgment); *id.* at 285 (J. Phipps, dissenting). The Court should grant review to resolve this disagreement amongst the circuit courts over whether a categorical good-faith defense exists.

AFSCME argues that the circuit courts that have addressed the issue agree that employees who had compulsory fees unconstitutionally seized from them prior to *Janus* should be denied damages and restitution for their injuries. BIO 6–9. But this does not change the fact that the courts disagree on the legal question presented to this Court—whether there is a good-faith defense to Section 1983. As Judge Phipps cogently explained in *Diamond*, other circuit courts were wrong to conclude that unions are exempt from Section 1983 liability if they relied on state laws when

unconstitutionally seizing agency fees from employees. 972 F.3d at 288–89 (J. Phipps, dissenting).

Acting under color of a state law is an element of a Section 1983 action, not a defense to the statute. Section 1983 states 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 "s*hall 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). The statute's historical purpose was "to remedy actions taken in accordance with state law." *Diamond*, 972 F.3d at 288 (J. Phipps, dissenting). "[T]hus a good faith affirmative defense—that a state actor was merely following state law—is an especially bad fit as an atextual addition to § 1983." *Id*. Indeed, the defense turns Section 1983's text and purpose on their head. *See* Pet. 9-12.

There is no cognizable basis for a categorical good-faith defense to Section 1983. This defense is not the defense suggested in *Wyatt*, is not justified by policy interests in fairness and equality, and is not supported by a strained analogy to an abuse-of-process tort. *See* Pet. 5–9, 12–16. The Court should take this case to repudiate the groundless new defense several lower courts created to Section 1983.

II. The categorical good-faith defense contradicts this Court's retroactivity jurisprudence.

The Court should also grant the petition because a good-faith defense conflicts with this Court's retroactivity doctrine. *See* Pet. 16–18. The Court has held

that the retroactive effect of its constitutional jurisprudence precludes lower courts from fashioning a remedy based on a party's reliance on a statute that is later held unconstitutional. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995). A good faith defense is just such a remedy.

AFSCME argues that "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.'" BIO 10 (quoting *Reynoldsville Casket*, 514 U.S. at 759). That is true, but it cannot be said that a good faith defense has "'nothing to do with retroactivity.'" The ostensible defense is predicated on the notion that private defendants should not be liable for injuries they caused when relying on a statute later declared unconstitutional. *See* BIO 10–11; *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019), *cert. denied* 141 S. Ct. 1265 (2021). The defense turns on whether the defendant reasonably relied on such a statute. A good faith defense has everything to do with avoiding the retroactive effect of court decisions holding state statutes unconstitutional. The defense is incognizable under *Reynoldsville Casket*.

III. AFSCME cannot skirt *Abood* and *Street*'s remedial measures which should apply equally to post-*Janus* remedies.

AFSCME attempts to distance this Court from the order for restitution in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), by stating that *Abood* "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." BIO 13. AFSCME claims *Abood* only addressed "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." BIO 12 (citing 431 U.S. at 212–14, nn.2, 6).

AFSCME's reading of *Abood* is simply wrong. *Abood* relied on *Railway Clerks v. Allen*, 373 U.S. 113 (1963), where the Court held that a proper remedy for employees compelled to pay unlawful union fees is "(1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion." *Abood*, 431 U.S. at 240 (quoting *Allen*, 373 U.S. at 122). The *Abood* Court held that a lower court erred in "depriving [employees] of an opportunity to establish their right to appropriate relief, such, for example, as the kind of remedies described in [*Machinists v. Street*, 367 U.S. 740 (1961)] and *Allen*." *Abood*, 431 U.S. at 242

The *Abood* Court would not have remanded the case for a determination and calculation of refund payments if the Court was only addressing future rights, as AFSCME claims. AFSCME also fails to address that lower courts interpret *Abood* to require that unions refund to employees unconstitutionally withheld union fees. *See Lowary v. Lexington Local Board of Education*, 903 F.2d 422 (6th Cir. 1990); *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002).

AFSCME argues that the refund and restitution remedies ordered in *Abood* and *Street* are irrelevant because they do not discuss a good-faith defense. BIO

13. But that is the point: *Abood* and *Street* did not consider a good-faith defense because this Court has never recognized such a defense because there is no basis for such a defense.

AFSCME argues that the union in *Abood* did not rely on a Supreme Court precedent when seizing agency fees from employees. But the union did rely on a state statute authorizing agency fee seizures, 431 U.S. at 211, just like AFSCME did here. As for AFSCME's alleged reliance on *Abood*, the Court in *Janus* recognized that "public sector unions have been on notice *for years* regarding this Court's misgivings about *Abood*." 138 S. Ct. 2448, 2484 (emphasis added). Indeed, "[d]uring this period of time, any public-sector union seeking an agency-fee provision in a collective bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.* at 2485.

IV. This case presents questions of national importance.

Section 1983 was enacted one-hundred-fifty years ago to provide a remedy to persons deprived of constitutional rights by parties that act under color of state law. *See Owen v. City of Independence*, 445 U.S. 622, 650–51 (1980). It is highly significant that six courts of appeals—the First, Second, Fourth, Sixth, Seventh, and Ninth—have now decided that defendants owe victims no remedy under Section 1983 if they acted under a state law before it was held unconstitutional. These courts have rendered Section 1983 largely self-defeating, at least with respect to retroactive relief, because almost any defendant that acts under color of state law, as the statute requires, will have a defense

to Section 1983 liability for the same reason. The massive hole that these courts have carved into the nation's preeminent civil rights statute is a matter of exceptional importance that this Court should address and rectify.

AFSCME suggests that the "unique circumstances presented by cases seeking pre-*Janus* monetary liability do not provide a suitable vehicle for this Court to provide guidance on the application of the good-faith defense in other circumstances." BIO 16. According to AFSCME, the lower court's application of a categorical good-faith defense would only apply to a defendant who relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute. *Id.* (*citing Janus v. AFSCME, Council 31*, 942 F.3d 352, 367 (7th Cir. 2019) ("*Janus II*")).

While finding that the unions' good-faith reliance on state law and this Court's decision in *Abood* was *sufficient* to entitle them to a categorical good-faith defense to Section 1983 liability, none of the circuit courts explicitly say that reliance on Supreme Court precedent is a *necessary* requirement to be entitled to a good faith defense. Even in *Janus II*, where the Seventh Circuit recognized a good faith defense for private parties "who acted under color of state law for purposes of Section 1983," the court noted that "only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute." *Janus II*, 942 F.3d at 367. The court did not, however, *require* that a defendant rely on Supreme Court precedent to avail itself of this defense

Judge Rendell of the Third Circuit similarly concluded that a "good faith defense is available to a private-party defendant in a Section 1983 case if, after considering the defendant's 'subjective state of mind,' the court finds no 'malice' and no 'evidence that [the defendant] either knew or should have known of the statute's constitutional infirmity.'" *Diamond*, 972 F.3d at 270 (*quoting Jordan v. Fox, Rothschild, O'Brien, & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994)). This standard does not require reliance on this Court's precedents. The defense merely requires the defendant either knew or should have known the statute was unconstitutional.

The question presented in this case is of national importance because its resolution will determine whether victims of agency fee seizures receive relief for their injuries or whether unions can keep their ill-gotten gains. *See* Pet. 22–23. This Courts intervention is, therefore, necessary to secure the promise of *Janus* for tens of thousands of workers around the country.

V. This case is an excellent vehicle to resolve the questions presented.

AFSCME suggests that the fact that this Court has denied petitions raising the same claim is a reason why this Court should deny this petition. BIO 1, 6. But this Court's denial of certiorari does not suggest a view on the merits. *Lawrence v. Chater*, 516 U.S. 163, 191 (1996).

AFSCME also asserts that this Court should deny this petition because it presents unique circumstances that will not likely be repeated. BIO 5–6. Whether tens of thousands of victims of agency fee seizures receive relief for injuries is itself an important matter. Moreover, the importance of the question presented

extends beyond such individuals to victims of other constitutional deprivations. Unless rejected by this Court, defendants in Section 1983 claims could raise a good-faith defense against any constitutional claim, including discrimination based on race, faith, or political affiliation. Courts would have to adjudicate this defense. More importantly, plaintiffs who would otherwise receive damages for their injuries will be remediless unless this Court rejects this new judicially created defense to Section 1983 liability.

This petition is an excellent vehicle for this Court to grant review to clarify that defenses to Section 1983 must rest on a firm statutory basis, and that the new reliance defense recognized below lacks any such basis.

CONCLUSION

For the reasons stated above and, in the Petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

William L. Messenger
National Right to Work Foundation
8001 Braddock Rd.
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Jeffrey M. Schwab
Counsel of Record
Liberty Justice Center
141 W. Jackson Street
Suite 1065
Chicago, IL 60604
(312) 637-2280
jschwab@libertyjusticecenter.org

Counsel for Petitioners

September 8, 2021