No. 21-29

IN THE
Supreme Court of the United States

BLAKE LEITCH, ET AL.,
Petitioners,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO,
Respondent.

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

BRIEF IN OPPOSITION

JACOB KARABELL
(*Counsel of Record*)
JOHN M. WEST
BREDHOFF & KAISER,
P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
202.842.2600
jkarabell@bredhoff.com

Counsel for Respondent

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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 *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*), *cert. denied*, 141 S. Ct. 1282 (2021), which Petitioners acknowledge 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 the question worthy of this Court's review, this petition should likewise be denied.

STATEMENT

A. Illinois' Public Labor Relations Act, 5 ILCS 315 ("IPLRA"), like the laws of many other states, allows public employees to organize and bargain collectively with their public employer, through a representative

[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); *Mooney v. Ill. Educ. Ass'n*, 141 S. Ct. 1283 (2021); *Danielson v. Inslee*, 141 S. Ct. 1265 (2021); *Casanova v. Machinists Local 701*, 141 S. Ct. 1283 (2021); *Lee v. Ohio Educ. Ass'n*, 141 S. Ct. 1264 (2021); *Ogle v. Ohio Civ. Serv. Emps. Ass'n*, 141 S. Ct. 1265 (2021).

organization of their choosing, over the terms and conditions of their employment. Respondent American Federation of State, County and Municipal Employees, Council 31, AFL-CIO ("Council 31" or "Union") was chosen and certified as the exclusive representative of certain units of employees of the state of Illinois that included Petitioners. That certification brought with it the legal duty to represent equally the interests of all employees in the bargaining unit, in collective bargaining and grievance administration, whether they were union members or not. 5 ILCS 315/6(d).

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 IPLRA further authorized unions and public employers to negotiate, as part of their collective bargaining agreements, a "fair-share" (or "agency fee") clause:

> When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment . . . .

5 ILCS 315/6(e). The IPLRA, including its agency-fee provisions, was enacted in 1983 following 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, the collective bargaining agreement negotiated between Council 31 and the Illinois Department of Central Management Services ("CMS"), which governed Petitioners' terms and conditions of employment, included an agency-fee clause like the one upheld in *Abood*. That clause required bargaining-unit members who declined to become dues-paying members of the union 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. 11.

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 1977 *Abood* precedent and held for the first time that public employees could not constitutionally be required to pay agency fees. Approximately eight months later, on May 1, 2019, Petitioners brought the instant putative class-action lawsuit under 42 U.S.C. § 1983 against the same union—Council 31—that was the defendant union in *Janus*. Petitioners did not allege that CMS was continuing to collect agency fees from them in violation of the *Janus* decision, and indeed it is undisputed that neither they nor anyone else in the bargaining unit was required to pay any such fees after *Janus* was decided. Petitioners accordingly sought no injunctive relief. Rather, they claimed that the agency fees they had paid *before* June 27, 2018—at a time when the IPLRA 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, Petitioners and the Union jointly agreed to stay the case pending the Seventh Circuit's disposition of two appeals that also sought the repayment of pre-*Janus* agency fees, one of which was the *Janus* case itself (on remand from this Court).

On November 5, 2019, the Seventh Circuit issued its decisions in those cases, affirming the judgments entered in favor of the defendant unions. *Janus II*, 942 F.3d 352 (7th Cir. 2019); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019). In its lead *Janus II* opinion, the Seventh Circuit joined an unbroken line of circuit-court authority holding that private parties sued under Section 1983 can, in certain limited circumstances, assert a good-faith defense to monetary liability. The court explained that this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992), had "pointed toward" a good-faith defense as "the solution to th[e] problem" of "leaving private defendants [in Section 1983 suits] in the unenviable position of being just as vulnerable to suit as public officials, per *Lugar* [*v. Edmondson Oil Co.*, 457 U.S. 922 (1982)], but not protected by the same immunity." 942 F.3d at 362–63. The court noted particularly the observation in Justice Kennedy's concurring opinion in *Wyatt* that "there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law," *id.* at 363 (quoting 504 U.S. at 174), as well as this Court's explanation in *Lugar* that the "problem" of private individuals being held liable under Section 1983 if a law they invoked "is subsequently held to be unconstitutional . . . should be dealt with . . . by establishing an affirmative defense." *Id.* (quoting *Lugar*, 457 U.S. at 942 n.23).

Noting the unanimity of the numerous district courts that had rejected Section 1983 claims seeking the repayment of pre-*Janus* agency fees, *id.* at 364 & n.1, the Seventh Circuit agreed that unions were not liable to repay such fees. To the extent identification of the most closely analogous common-law tort to the plaintiff's claim was necessary, the court agreed that abuse of process—which contained a state-of-mind element at common law—was the appropriate analogue in this circumstance. *Id.* at 365. The court went on to hold that Council 31 could assert the good-faith defense because it had "relied substantially and in good-faith on both a state statute *and* unambiguous Supreme Court precedent validating that statute." *Id.* at 367.

In light of *Janus II*, the district court in Petitioners' lawsuit lifted the stay and dismissed the complaint. Pet. App. 3. After filing a notice of appeal, Petitioners requested that the Seventh Circuit stay proceedings pending this Court's disposition of the petition for certiorari in *Janus II*, acknowledging that "[s]hould the Supreme Court deny the petition in *Janus II*, then a panel of this Court will have to affirm the lower court's judgment under *Janus II*." CA7 ECF No. 8 at 2. This Court did indeed deny the petition for certiorari in *Janus II* on January 25, 2021. *See* 141 S. Ct. 1282. Shortly thereafter, the parties in the instant case jointly moved for summary affirmance. The Seventh Circuit granted the motion, holding that "the district court correctly dismissed the case in light of this court's decision in [*Janus II*]." 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 Petitioners here, made the same arguments in support of review as Petitioners present in this case. 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.

Petitioners contend that this Court should grant their petition in order to resolve a purported circuit "conflict" about whether private parties may assert a good-faith defense to claims for monetary relief under Section 1983. Petition at 15. But there is no conflict to resolve, as each of the circuit courts to have considered the question has held that private parties facing claims for monetary relief under Section 1983 are not liable 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 II*, 942 F.3d at 361–64 (7th Cir. 2019); *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 Petitioners. Numerous lawsuits similar to Petitioners' 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] 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).

---

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

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 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, Respondents are not aware of *any* decision by *any* court to that effect.

Petitioners nonetheless attempt, 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.[3] But in fact Judge Fisher

[3] Shortly after *Diamond* issued, petitioner Mark Janus filed a supplemental brief in support of his petition for certiorari in *Janus II*, No. 19-1104, that likewise argued that *Diamond* created a circuit-court conflict. *See* Supp. Br. at 1, *Janus v. AFSCME Council 31*, No. 19-1104 (Sept. 4, 2020). This Court denied that petition. The plaintiffs in *Diamond* itself then renewed this argument in their petition for certiorari, which this Court

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 Seventh Circuit in *Janus II*—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 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

---

also denied. *See* Cert. Pet. at 8–10, *Diamond v. Pa. State Educ. Ass'n*, No. 20-1383 (Mar. 29, 2021).

Fisher's analysis simply identifies an additional rationale for the uniform result reached by the lower courts.

II. Petitioners' 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, Petitioners devote the bulk of their submission to arguing that the Seventh Circuit's decision in *Janus II* was incorrect on the merits. Petition at 4–15. The same merits arguments were raised by the petition for certiorari in *Janus II* itself (which was litigated by the same counsel as Petitioners' 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 the 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.

Petitioners contend 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 18. Far from suggesting 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 18 (arguing that Court should grant review because private parties "could raise" a good-faith defense to other types of constitutional claims). The Seventh Circuit's decision in *Janus II*, which is the controlling decision below, held only that retrospective monetary relief under Section 1983 is unavailable in the "narrow" circumstance where the defendant "successfully claim[s] 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. 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 Council 31 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,

JACOB KARABELL
(*Counsel of Record*)
JOHN M. WEST
BREDHOFF & KAISER,
P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
202.842.2600
jkarabell@bredhoff.com

Counsel for Respondent

Dated: August 3, 2021