No. _____

IN THE

Supreme Court of the United States

DAVID SCHASZBERGER, BRADFORD SCHMITTLE, KYLE CLOUSE, COLBY CONNOR, JEANETTE HULSE, GARY LANDIAK, AND ANDREW MALENE,

PETITIONERS,

V.

AFSCME COUNCIL 13,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

Brian K. Kelsey
Counsel of Record
Reilly Stephens
LIBERTY JUSTICE CENTER
440 N. Wells Street
Suite 200
Chicago, Illinois 60654
(312) 637-2280
bkelsey@libertyjustice-center.org

Aaron Solem
c/o National Right to Work Legal Defense Foundation
8001 Braddock Rd.
Suite 600
Springfield, VA 22160
Phone: 703-321-8510
Fax: 703-321-9319
abs@nrtw.org

Counsel for Petitioners

October 18, 2022

QUESTION PRESENTED

Is there a "good faith" defense under 42 U.S.C. § 1983 that shields a defendant from damages liability for depriving citizens of their constitutional rights if the defendant acted under color of a state law before this Court held the law was unconstitutional?

PARTIES TO THE PROCEEDING

Petitioners, David Schaszberger, Bradford Schmittle, Kyle Clouse, Colby Connor, Jeanette Hulse, Gary Landiak, and Andrew Malene, are natural persons and citizens of the Commonwealth of Pennsylvania.

Respondent, AFSCME Council 13, is a labor union representing public employees in the Commonwealth of Pennsylvania.

RULE 29.6 STATEMENT

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

STATEMENT OF RELATED CASES

The proceedings in other courts that are directly related to this case are:

- *Schaszberger v. AFSCME Council 13*, 21-2172, United States Court of Appeals for the Third Circuit. Judgment entered July 20, 2022.
- *Schaszberger v. AFSCME Council 13*, No. 3-19-cv-01922, United States District Court for the Middle District of Pennsylvania. Judgment entered May 20, 2021.

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INTRODUCTION

Three times this Court has raised, but then not decided, the important question of whether there exists a "good faith" defense to 42 U.S.C. § 1983 that exempts defendants from paying damages if they acted under color of a state law before it was held unconstitutional. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt v. Cole*, 504 U.S. 158, 169 (1992); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). Lacking a clear answer, the existence, basis, and scope of any such defense has vexed the courts below. The Court should clear up this confusion and finally resolve whether there is a "good faith" defense to Section 1983.

It is important that the Court answer this question because it affects thousands of government workers who had compulsory union fees seized from them in violation of their First Amendment rights under *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). Absent this Court's review, they will be denied compensation for their injuries. Therefore, the Court should take this case and reject the "good faith" defense. It should adopt the view of the dissenting opinion of Judge Phipps in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262, 289 (3d Cir. 2020): "[P]rinciples of equality and fairness [do not] favor recognition of good faith as an affirmative defense to a compelled speech claim for wage garnishments." "[N]either the history nor the purpose of § 1983 supports the recognition of good faith as an affirmative defense for violations of every constitutional right." *Id.* at 288 (Phipps, J., dissenting).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Schaszberger v. AFSCME Council 13*, No. 21-2172, 2022 U.S. App. LEXIS 19972 (3d Cir. July 20, 2022), and reproduced at App. 1.

The opinion of the United States District Court for the Middle District of Pennsylvania is reported at *Schaszberger v. AFSCME Council 13*, 540 F. Supp. 3d 481 (M.D. Pa. 2021), and reproduced at App. 18.

JURISDICTION

The Third Circuit issued its opinion and judgment on July 20, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

> party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Petitioners are Commonwealth of Pennsylvania employees who were compelled to pay agency fees to Respondent American Federation of State, County, and Municipal Employees Council 13 ("AFSCME" or the "Union"), in violation of their First Amendment rights under *Janus v. AFSCME*. App. 20. Petitioners brought this action to vindicate their rights and reclaim the funds taken from them and from a class of similarly situated employees.

Pennsylvania's Public Employee Fair Share Fee Law provides that "[i]f the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee." 71 Pa. Stat. Ann. § 575. AFSCME is the exclusive representative for numerous bargaining units throughout the Commonwealth of Pennsylvania, including Petitioners' bargaining units. App. 20. AFSCME negotiated a master agreement with the Commonwealth of Pennsylvania for the collection of service fees from nonmember Commonwealth employees such as Petitioners. Article 4, Section 2 of the Master Agreement, effective from July 1, 2016, through June 30, 2019, provided:

> The Employer further agrees to deduct a fair share fee biweekly from all employees in the bargaining unit who are not members of the Union. Authorization from non-members to deduct fair share fees shall not be required. The amounts to be deducted shall be certified to the Employer by the Union, and the aggregate deductions of all employees shall be remitted together with an itemized statement to the Union by the last day of the succeeding month, after such deductions are made.

App. 21. Pursuant to this agreement and prior to this Court's decision in *Janus* on June 27, 2018, employees in the bargaining units represented by AFSCME who were not union members, including Petitioners, had "fair-share fees" seized from their wages without their consent. App. 22.

On June 27, 2018, this Court held that it violates the First Amendment for the government and unions to seize agency fees from public employees' wages without their consent. *Janus*, 138 S. Ct. at 2486. The Court lamented the "considerable windfall" of compulsory fees unions seized from employees during prior decades, remarking, "It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Id.* at 2485. The Court also recognized that, since 2012, "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.*

Petitioners filed this action on November 7, 2019 to recoup, on behalf of themselves and a putative class of similarly situated employees, compulsory fees unconstitutionally seized from dissenting employees within the applicable two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524; *Kost v. Kozakiewicz*, 1 F.3d 176, 190 (3d Cir. 1993). On January 17, 2020, this case was stayed pending the Third Circuit's consideration of a pair of cases raising similar issues, *Diamond v. Pa. State Educ. Ass'n* (No. 19-2812) and *Wenzig v. SEIU Local 668* (19-3906).

On August 28, 2020, the Third Circuit issued its decision in *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), consisting of three separate and inconsistent opinions. Judge Rendell, writing for herself, recognized the affirmative "good faith" defense for which the Union had advocated. *Id.* at 269. Judge Fisher, concurring only in the judgment, rejected the categorical "good faith" defense that Judge Rendell and some other circuits had recognized. *Id*. at 274. Judge Fisher found that policy interests in fairness or equality could not justify creating this defense. *Id*. at 278. While he rejected a "good faith" defense, Judge Fisher found that Section 1983, enacted in 1871, incorporated a common law doctrine that barred recovery where unlawful payments had been voluntarily made. *Id*. at 284. Judge Phipps, dissenting, agreed with Judge Fisher that there is no "good faith" defense to Section 1983, *id*. at 284, and that principles of equality and fairness could not justify such a defense, *id*. at 289. But contrary to Judge Fisher, Judge Phipps found the common law theory of Judge Fisher's opinion unpersuasive, and concluded that, even if it did apply, the

agency fees at issue were *involuntary* wage garnishments not subject to the rule established in the pre-1871 cases that Judge Fisher relied on regarding the return of voluntary payments. *Id*.

Taking the three separate opinions together, two members of the panel affirmed the lower court's judgment, albeit on different grounds. However, a majority of the court (Judges Fisher and Phillips) rejected the notion that there is an affirmative "good faith" defense to Section 1983.

Upon the issuance of the decision in *Diamond*, the stay in this case was lifted, at which point AFSCME filed a motion to dismiss, and on May 20, 2021, the District Court ruled for AFSCME, dismissing Petitioners' claims on the basis that they were foreclosed by *Diamond*. App. 38. Petitioners timely appealed, and on July 20, 2022, the Third Circuit issued its unpublished opinion, relying on Judge Rendell's opinion in *Diamond*, and declining to follow the opinions of Judges Fisher and Phipps, who had rejected the union's claim for a "good faith" defense. App. 15. Therefore, Petitioners now petition to this Court for relief.

REASONS FOR GRANTING THE PETITION

The Court should finally resolve the question it raised, but did not decide, in *Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at 169; and *Lugar*, 457 U.S. at 942 n.23: Is there a "good faith" defense to Section 1983? The Third Circuit's fractured decisions, including two opinions cogently rejecting the "good faith" defense recognized by several other circuits, make clear this Court's guidance is needed.

The Court should reject the proposition that a defendant acting under color of a statute before it is held unconstitutional has an affirmative defense under Section 1983. That defense cannot be reconciled with Section 1983's text, which makes acting "under color of any statute" an element of the statute that renders defendants liable. 42 U.S.C. § 1983. Nor can the defense be reconciled with this Court's retroactivity doctrine. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995).

An affirmative "good faith" defense to all Section 1983 claims is not what members of this Court suggested in *Wyatt*. Several Justices in that case wrote that good-faith reliance on a statute could defeat the *malice* and *probable cause* elements of certain constitutional claims. 504 U.S. at 166 n.2 (majority opinion); *id.* at 172 (Kennedy, J., concurring); *id.* at 176 n.1 (Rehnquist, C.J., dissenting). Those Justices were not suggesting that a defendant's reliance on a statute yet to be invalidated should provide an affirmative defense to *all* Section 1983 claims, including a First Amendment claim arising from compelled subsidization of speech.

The two different rationales often cited for a "good faith" defense—either equitable principles or an analogy to an abuse-of-process tort—are both untenable in this context.

Courts cannot create equitable exemptions to federal statutes such as Section 1983. And even if they could, fairness to victims of constitutional deprivations warrants enforcing Section 1983 as written. As for

common-law analogies, not every Section 1983 claim for damages or restitution against an otherwise-private defendant is closely akin to an abuse of a process tort. Most importantly here, a First Amendment claim for compelled subsidization of speech is not akin to an abuse of process and does not justify importing that tort's malice and probable cause elements into the First Amendment claim.

The Court should reject the proposition that a defendant acting under color of a state law before it is invalidated is an affirmative defense to Section 1983. It is important that the Court do so. Absent this Court's review, tens of thousands of victims of union agency fee seizures will be deprived of compensation for their injuries. The Union, and others like it, should have to return to dissenting employees some of the windfall they unlawfully seized from workers in violation of their First Amendment rights.

I. The Court should finally determine whether there exists a "good faith" defense to section 1983.

A. The Court should resolve the conflict between the Third Circuit and several other Circuit Courts.

A majority of the opinions in *Diamond*, which the panel below relied on as controlling precedent, rejected the "good faith" defense now recognized by the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth

Circuits. App. 14. The Court should resolve this conflict.

The Third Circuit's fractured opinion in *Diamond* is illustrative of the broader doctrinal confusion that exists on this issue. Even the circuit courts that recognize a "good faith" defense disagree on its ostensible basis. The Second and Ninth Circuits found it is an equitable defense rooted in concerns about equality and fairness. *See Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 334 (2d Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019). The First, Sixth, and Eighth Circuits held that the defense exists because claims against private defendants that use state law procedures are analogous to an abuse-of-process tort, and good-faith reliance on state law is a defense to that tort. *Doughty v. State Empls. Ass'n of N.H.*, 981 F.3d 128, 135 (1st Cir. 2020); *Ogle v. Ohio Civil Serv. Empls. Ass'n*, 951 F.3d 794, 797 (6th Cir. 2020); *Brown v. AFSCME*, 41 F.4th 963, 968 (8th Cir. 2022) (also comparing the claim to malicious prosecution). The Seventh Circuit found abuse of process to be the most closely analogous tort but believed the "search for the best [tort] analogy is a fool's errand" and chose to "leave common-law analogies behind." *Janus v. AFSCME, Council 31*, 942 F.3d 365, 365-66 (7th Cir. 2019) ("*Janus II*"). The Ninth Circuit similarly found that it "would be an odd result for an affirmative defense grounded in concerns for equality and fairness to hinge upon historical idiosyncrasies and strained legal analogies for causes of action with no clear parallel in

nineteenth century tort law." *Danielson*, 945 F.3d at 1101.

The circuit courts' disagreement on both the existence of a "good faith" defense to Section 1983 and the supposed legal basis for this ostensible defense is reason enough for the Court to grant review. This is especially true given that a "good faith" defense lacks any cognizable legal basis, as Judges Fisher and Phipps explained in *Diamond*.

B. The Court should resolve the conflict between the Third Circuit and several other Circuit Courts.

None of the purported grounds for creating a "good faith" defense to Section 1983 survive scrutiny: it is not the defense suggested by members of this Court in *Wyatt*; the defense cannot be judicially created from equitable interests; and the defense cannot be justified by a strained analogy to an abuse-of-process tort. A "good faith" defense also cannot be reconciled with Section 1983's text, which largely has been ignored by courts that have recognized the ostensible defense. But "[s]tatutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Consequently, an analysis of the "good faith" defense also must begin with Section 1983's text.

1. The "good faith" defense conflicts with Section 1983's text.

Section 1983 states, in relevant part: "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 (emphases 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. at 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

It turns Section 1983 on its head to conclude that persons who act under the color of state laws that are later held unconstitutional are not liable to the injured parties in a suit for damages. The proposition effectively makes a statutory *element* of Section 1983—that defendants must act under color of state law—a *defense* to Section 1983. An affirmative defense predicated on a defendant's reliance on a state law cannot be reconciled with Section 1983's plain language.

It is telling that circuit courts that have recognized a "good faith" defense make no attempt to square it with the fact that a defendant's action under color of state law establishes liability under Section 1983's text. In fact, the Seventh Circuit's only response to the argument was to claim that this Court "abandoned" strictly following Section 1983's language when recognizing other immunities. *Janus II*, 942 F.3d at 362.

To the contrary, this Court has held, "We do not simply make our own judgment about the need for immunity," and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. The Court accords 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 (quoting *Wyatt*, 504 U.S. at 164). 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; 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"). Thus, unlike with immunities, there is no justification for deviating from Section 1983's 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.

2. *Wyatt* did not suggest that a defendant's reliance on a statute should be an affirmative defense to Section 1983.

Circuit courts that have held that a "good faith" defense excuses unions from having to compensate victims of their compulsory fee seizures have relied on the idea that *Wyatt* suggested, though it did not decide, that private defendants in Section 1983 actions should be entitled to an affirmative "good faith" defense. *See, e.g., Janus II*, 942 F.3d at 366. Those courts misread *Wyatt*, as Judges Fisher and Phipps explained in *Diamond*. Judge Fisher recognized that the defense discussed in *Wyatt* concerns "whether the defendant acted with malice and without probable cause," and

that this defense does not "appl[y] categorically to all cases involving private-party defendants," but rather depends on the claim at issue. *Diamond*, 972 F.3d at 279. Judge Phipps similarly recognized that Chief Justice Rehnquist's discussion of a "good faith" defense in *Wyatt* "actually referred to elements of the common-law torts of malicious prosecution and abuse of process," and he "identified no authority for the proposition that good faith functions as transsubstantive affirmative defense–applicable across a broad class of claims . . ." *Id.* at 287. Judges Fisher and Phipps are correct.

In *Wyatt* the plaintiff claimed a private defendant deprived him of due process of law by seizing his property under an *ex parte* replevin statute. 504 U.S. at 161. The Court found the plaintiff's due process claims analogous to "malicious prosecution and abuse of process," and recognized 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 Court in *Wyatt* held 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 . . . ." *Id.* at 165. The reason was that the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. *Wyatt* left open whether Section 1983 defendants

could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69.

The defense "based on good faith and/or probable cause" suggested in *Wyatt* was not a broad statutory reliance defense to all Section 1983 damages claims, as some courts have concluded. *See, e.g., Janus II*, 942 F.3d at 366. Rather, several Justices suggested a defense to Section 1983 claims only when malice and lack of probable cause are elements for establishing damages. This is clear from all three opinions in *Wyatt*.

Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it is a "misnomer" to use the term good-faith "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." *Wyatt*, 504 U.S. at 176 n.1 (citation omitted). "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.*

Justice Kennedy, in his concurring opinion 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." *Id.* at 172. Justice Kennedy explained, "The common-law tort actions most analogous to the action commenced here are malicious prosecution and abuse of process," and that in both actions "it was essential for the plaintiff to prove that the wrongdoer

acted with malice and without probable cause." *Id.* Justice Kennedy found that because "a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law . . . lack of probable cause can only be shown through proof of subjective bad faith." *Id.* at 174.

Finally, Justice O'Connor's majority opinion in *Wyatt* recognized that the "good faith" defense discussed in the dissenting and concurring opinions was in reality a defense refuting a plaintiff's allegations of malice and lack of probable cause. *Id.* at 166 n.2. The majority opinion found, "One 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." *Id.*

On remand in *Wyatt*, the Fifth Circuit recognized that this Court "focused its inquiry on the elements of these torts." *Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993). It therefore found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice and without probable cause." *Id.* The Third and Second Circuits followed suit in cases also arising from abuses of judicial processes and held the defendants could defeat the malice and probable cause elements of those claims by showing good-faith reliance on a statute. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 &

n.31 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

The limited, claim-dependent defense members of this Court suggested in *Wyatt* offers no protection to unions that compelled employees to subsidize union speech in violation of the First Amendment. The reason is straightforward: malice and lack of probable cause are not elements of a First Amendment claim under *Janus*, which held that unions violate employees' First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486.

The First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits erred in interpreting *Wyatt* to signal that good faith should become an affirmative defense under Section 1983 for a defendant who relied on a statute before it was held unconstitutional. *See Doughty*, 981 F.3d at 135; *Wholean*, 955 F.3d at 334-35; *Akers v. Md. State Educ. Ass'n,* 990 F.3d 375, 380 (4th Cir. 2021); *Ogle*, 951 F.3d at 796; *Janus II*, 942 F.3d at 366; *Brown*, 41 F.4th at 966; *Danielson*, 945 F.3d at 1101-02. *Wyatt* suggested nothing of the sort. The Court should grant review in this case to clarify that *Wyatt* did not create the sort of free-standing affirmative defense some circuits have recognized.

3. Policy interests in fairness and equality do not support a "good faith" defense but weigh against recognizing the defense.

The Second and Ninth Circuits assert that policy concerns about equality and fairness justify recognizing a "good faith" defense to Section 1983. *See*

Wholean, 955 F.3d at 334; *Danielson*, 945 F.3d. at 1101. But courts cannot invent defenses to causes of action simply because they think it would be good policy. "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990).

Congress mandated in Section 1983 that "every person who, under color of any statute" deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. "Shall" is a mandatory term, not a permissive one. Courts cannot refuse to enforce Section 1983's statutory command against defendants who act under color of statutes because courts believe doing so would be unfair to those defendants. "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). The "fairness" rationale for a good faith defense is inadequate on its own terms. *Cf. Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998) (finding that "[f]airness alone is not . . . a sufficient reason for the immunity defense, and thus does not justify its extension to private parties").

If anything, fairness to victims of constitutional deprivations supports rejecting a "good faith" defense and enforcing Section 1983 as written. It is not fair to deny relief to people who have suffered violations of a fundamental constitutional rights. 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 v. Independence*, 445 U.S. 622, 654 (1980).

The Court in *Owen* wrote those words when holding that municipalities are not entitled to a good-faith immunity to Section 1983. *Owen*'s equitable justifications for so holding are equally applicable here.

First, *Owen* 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 will be left remediless if defendants to Section 1983 suits can escape liability by showing they had a good-faith, but mistaken, belief their conduct was lawful. Those victims include not just Petitioners and other employees who had agency fees seized from them. Under the theory some circuits have adopted, every defendant to a Section 1983 damages claim could assert a "good faith" defense. For example, the municipalities that this Court in *Owen* held not to be entitled to a good-faith immunity could raise an equivalent "good faith" defense, leading to the very injustice this Court sought to avoid.

Second, *Owen* further recognized that Section "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 Section 1983.

Third, the *Owen* Court found 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." 445 U.S. at 654. So too here: when the employees' and unions' interests are weighed, the balance of equities overwhelmingly favors requiring the unions to return the money it unconstitutionally seized from workers who affirmatively chose not to join the union. Fairness should reward the victims of the constitutional deprivation, not the perpetrator.

As for some courts' view that principles of "equality" justify extending to private defendants a defense similar to the immunity enjoyed by some public officials, that proposition makes little sense. Public officials enjoy qualified immunity for reasons not applicable to 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. That unions are not entitled to an immunity is no reason to create a new defense for them. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for an immunity.

Even if principles of equality required treating unions like their closest government counterpart, that

still would not entitle them to an immunity-like defense. Large organizations like AFSCME are nothing like individual government workers who enjoy qualified immunity. Unions are most like a type of governmental body that lacks qualified immunity—a municipality. *Owen*, 445 U.S. at 654. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby." *Id*. Nor is it unjust to require large organizations like the Union to compensate citizens for violating their constitutional rights.

Neither fairness nor equality justifies recognizing a "good faith" defense to Section 1983. Rather, both principles weigh against carving this exemption into Section 1983's remedial framework.

4. An analogy to abuse of process does not justify creating a "good faith" defense to Section 1983.

Several circuit courts that recognized a "good faith" defense justified their decision by claiming abuse of process is the tort most closely analogous to a Section 1983 claim against a private defendant. *See, e.g.*, *Danielson*, 945 F.3d at 1102; *Janus II*, 942 F.3d at 366; *Lee v. Ohio Educ. Ass'n,* 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Wholean*, 955 F.3d at 335; *Brown*, 41 F.4th at 968 (also comparing the claim to malicious prosecution). But "the torts of abuse of process and malicious prosecution provide at best attenuated analogies." *Diamond*, 972 F.3d at 280 (Fisher, J., concurring in the judgment). Most importantly here, the torts certainly are not so analogous to justify importing their malice

and probable cause elements into a First Amendment claim for compelled subsidization of speech.

"Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017). "Sometimes . . . [a] review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. But not always." *Id.* at 920-21. Some Section 1983 claims have no common law equivalent. "[Section] 1983 is not simply a federalized amalgamation of pre-existing common-law claims.'" *Id.* at 921 (quoting *Rehberg*, 566 U.S. at 366). Section 1983 "reaches constitutional and statutory violations that do not correspond to any previously known tort." *Rehberg*, 566 U.S. at 366.

A First Amendment claim for compelled subsidization of speech has no common law equivalent. "Compelling a person to subsidize the speech of other private speakers" violates the First Amendment because it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common-law torts. It is peculiar to the First Amendment.

A violation of First Amendment speech rights is nothing like an abuse-of-process tort. "[T]he tort of abuse of process requires misuse of a judicial process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008). The tort exists to protect the integrity of the judicial process and to protect litigants from harassment. *See* 8 Am. Law of Torts § 28:32 (2019). The tort does not exist, as the First Amendment does, "to

foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Most importantly, abuse of process is not so similar to a compelled subsidization of speech claim to justify making malice and lack of probable cause elements of that constitutional claim. And that is the only potential relevance of common law analogies—to determine whether to import a tort's elements into a particular Section 1983 claim. *See Manuel*, 137 S. Ct. at 920-21. Given that malice and lack of probable cause are not elements of a First Amendment claim under *Janus*, the limited "good faith" defense suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights under *Janus*.

5. A "good faith" defense conflicts with this Court's retroactivity doctrine.

Janus has retroactive effect under the rule this Court announced in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). The "good faith" defense several courts have fashioned to defeat *Janus*'s retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

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*. An Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed

under the statute before this 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 do an end-run around retroactivity by creating an equitable remedy based on a party's reliance on a statute later held unconstitutional by this Court. *Id.* at 759.

The "good faith" defense constitutes just such an end-run around this Court's retroactivity doctrine. The defense is predicated on a defendant's reliance on a statute before it was effectively deemed unconstitutional by a decision of this Court. Therefore, a good-faith reliance defense is incompatible with *Reynoldsville Casket*.

C. The Court should finally determine whether there exists a "good faith" defense to section 1983.

Section 1983 is the nation's preeminent civil rights statute and is often used by citizens to protect their constitutional rights. It is no small matter when lower courts create a new affirmative defense to Section 1983 liability.

Several circuit courts have now done just that, based largely on the misconception that this Court in *Wyatt* signaled that private defendants should be granted a defense to Section 1983 liability akin to qualified immunity. Again, *Wyatt* did not suggest such

a defense but only suggested that reliance on a statute could defeat the malice and lack-of-probable cause elements of certain due process claims. See *supra* at 12. The Court should clarify what it meant in *Wyatt*.

It is important that the Court act quickly because whether tens of thousands of victims of agency fee seizures can receive compensation hangs in the balance. Over thirty-seven class action lawsuits have been filed around the country seeking refunds from unions for agency fees they seized from workers in violation of their First Amendment rights. *See* Amicus Br. of Goldwater Inst. et al., 4, *Janus v. AFSCME, Council 31*, No. 19-1104 (Apr. 9, 2020). The vast majority of these cases are in or from the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, which have accepted a "good faith" defense. *Id.* at 1a-6a (listing cases). Most individual actions seeking a return of agency fees also are in these circuits. *See id.* at 7a-9a. The employees in these suits should be permitted to recover a portion of what this Court called a "windfall" of compulsory fees unions wrongfully seized from them. *Janus*, 138 S. Ct. at 2486. But without this Court's review, these employees will likely be denied relief.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. The "good faith" defense several circuits have now recognized could shield from liability all kinds of defendants who invoke state-law processes, including those who do so to discriminate against individuals on the basis of race, gender, or faith. An "unwillingness to examine the root of a precedent has led to the sprouting of many noxious

weeds that distort the meaning of the Constitution and statues alike." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 151 (2020) (Thomas, J., dissenting). Absent this Court's review, the law over the existence of a good-faith defense will have ossified. To prevent this, the Court should make sure it has the final word on this important matter of law and grant the petition to hear this case.

CONCLUSION

The purpose of Section 1983 is to provide a remedy to citizens whose constitutional rights are violated by actions taken under color of state law. A "good faith" defense that a defendant relied on state law is inconsistent with that purpose. For the reasons stated above, this Court should grant the petition for writ of certiorari and repudiate this ostensible new defense to Section 1983.

Respectfully submitted,

Brian K. Kelsey
Counsel of Record
Reilly Stephens
LIBERTY JUSTICE CENTER
440 N. Wells Street
Suite 200
Chicago, Illinois 60654
(312) 637-2280
bkelsey@libertyjustice-center.org

Aaron Solem
c/o National Right to Work Legal Defense Foundation
8001 Braddock Rd.
Suite 600
Springfield, VA 22160
Phone: 703-321-8510
Fax: 703-321-9319
abs@nrtw.org

Counsel for Petitioners

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