

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

ERIC BROWN et al.

*PETITIONERS,*

v.

AMERICAN FEDERATION OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES, COUNCIL 5, AFL-CIO et al.

*RESPONDENTS.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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October 24, 2022

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**QUESTION PRESENTED**

Section 1983 provides that “every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State” deprives a citizen of a constitutional right “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983.

Petitioners are current and former employees of the State of Minnesota who were compelled to pay agency fees to AFSCME Council 5 or the Minnesota Association of Professional Employees, under color of Minnesota state law, in violation of their First Amendment rights according to *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

The question presented is: does defendants’ good-faith reliance on a state law before it was held unconstitutional shield them from damages liability for taking agency fees from Petitioners in violation of their constitutional rights under 42 U.S.C. § 1983?

## **PARTIES TO THE PROCEEDING**

Petitioners Eric Brown, Jody Tuchtenhagen, Debbie Schultz, Mark Fellows, Alicia Bonner, and Catherine Wyatt are natural persons and citizens of the State of Minnesota. They are, or at one time were, employees of the State of Minnesota.

Respondents AFSCME Council 5 and Minnesota Association of Professional Employees are unions representing public employees of the State of Minnesota.

## **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:

- *Brown v. AFSCME Council 5*, No. 21-1640, United States Court of Appeals for the Eighth Circuit. Judgment entered July 25, 2022.
- *Fellows v. Minnesota Association of Professional Employees*, No. 21-1684, United States Court of Appeals for the Eighth Circuit. Judgment entered July 25, 2022.
- *Brown v. AFSCME Council 5*, No. 20-cv-01127, United States District Court for the District of Minnesota. Judgment entered February 12, 2021.
- *Fellows v. Minnesota Association of Professional Employees*, No. 20-cv-01128, United States District Court for the District of Minnesota. Judgment entered February 12, 2021.

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## OPINIONS BELOW

The United States District Court for the District of Minnesota’s order of February 12, 2021, dismissing Petitioners’ complaints is reproduced at App. 14–26. The United States Court of Appeals for the Eighth Circuit affirmed the lower court’s judgment on July 25, 2022, in a published opinion, *Brown v. AFSCME*, 41 F.4th 963 (8th Cir. 2022), and reproduced at App. 1–13.

## JURISDICTION

The Eighth Circuit issued its opinion on July 25, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech.”

42 U.S.C. § 1983, states:

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 or were Minnesota state employees who were forced to pay agency fees to AFSCME Council 5 or Minnesota Association of Professional Employees against their will. App. 2. On June 27, 2018, this Court in *Janus v. AFSCME Council 31*, held agency fee seizures violated employees’ First Amendment rights. 138 S. Ct. 2448, 2486 (2018). The Court overruled its precedent that allowed unions to seize agency fees from employees—*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—and held Illinois’ agency fee statute to be unconstitutional. *Janus*, 138 S. Ct. at 2486. This Court also lamented the “considerable windfall that unions have received under *Abood*.” 138 S. Ct. at 2486.

Petitioners, individually and on behalf a class of employees forced to pay agency fees to AFSCME Council 5 or Minnesota Association of Professional Employees, filed two separate actions—one against each union—under 42 U.S.C. § 1983, seeking the return of the monies that were seized from them in violation of their First Amendment rights. App. 3. The unions moved to dismiss the Petitioners’ complaints, asserting that for deductions taken until *Janus* was decided, the unions were entitled to rely “in good faith upon then-valid Minnesota law and then-binding Supreme Court precedent in receiving Plaintiffs’ fair-share fees payments.” App. 4. On February 12, 2021, the district court granted the unions’ motions to dismiss, concluding “that private actors who act in good faith reliance on a state statute and Supreme Court case law holding that statute constitutional have an

affirmative defense to § 1983 liability.” App. 4, 22. On July 25, 2022, the Eighth Circuit affirmed, stating that “a plaintiff who sues a private-party defendant based on the defendant’s employment of a state law that has been declared unconstitutional must show that the defendant was not acting in good-faith reliance on that law.” App. 9. The Eighth Circuit held that “[b]y requiring the plaintiff to negate a private-party defendant’s good faith as an element of his or her claim” the good-faith defense protects parties who unwittingly cross the line into unconstitutionality while acting in reliance on a presumptively valid state law. App. 10. Petitioners now seek this Court’s review.

### **REASONS FOR GRANTING THE PETITION**

This case is one of many in which employees who had agency fees seized from them in violation of their First Amendment rights seek damages for their injuries. Every circuit court of appeals that will likely hear these claims has now denied victims of agency-fee seizures relief for their injuries based on a general good-faith defense to Section 1983 liability.

This Court has never recognized a good-faith defense under Section 1983. But three times this Court has raised, but then not decided, the question of whether such a defense exists. *See 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). The Court should finally resolve this important question to disabuse the lower courts of the rapidly spreading notion that a defendant acting under color of a statute before it is held unconstitutional has a defense under Section 1983.

**I. A categorical good-faith defense is not the claim-specific defense suggested by this Court in *Wyatt v. Cole*.**

Section 1983 provides a cause of action for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. Because Section 1983 “is not itself a source of substantive rights,” but merely provides “a method for vindicating federal rights elsewhere conferred,” *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979), the elements of a Section 1983 claim vary considerably. The threshold inquiry in a Section 1983 suit “is to identify the specific constitutional right allegedly infringed.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994). “After pinpointing that right, courts still must determine the elements of, and rules associated with, an action seeking damages for its violation.” *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017).

“In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts.” *Id.* “Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort.” *Id.* “But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims.” *Id.* “[T]he Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims . . . . [Section] 1983 differs . . . from . . . pre-existing torts. It is broader in that it reaches constitutional and statutory violations

that do not correspond to any previously known tort.” *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012).

In *Wyatt v. Cole*, the Court considered whether a private defendant who used an *ex parte* replevin statute to seize the plaintiff’s property without due process of law was entitled to qualified immunity in a Section 1983 claim. 504 U.S. at 161. The Court held that private parties sued under Section 1983 are not entitled to the same qualified immunity from suit accorded government officials because the “rationales mandating qualified immunity for public officials are not applicable to private parties.” *Id.* at 167.

*Wyatt* left open the question whether the defendants could raise “an affirmative defense based on good faith and/or probable cause.” *Id.* at 168-69. That potential defense was based on the Court’s recognition that the plaintiffs’ claims in *Wyatt* were analogous to “malicious prosecution and abuse of process,” and that at common law “private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause.” *Id.* at 164-65; *see also id.* at 172-73 (Kennedy, J., concurring) (similar).

But, contrary to the conclusions of the Eighth Circuit and a growing number of lower courts, this potential affirmative defense based on good faith that the *Wyatt* Court referenced was not a categorical defense to all Section 1983 damages claims. Rather, the good-faith defense to which the *Wyatt* Court was referring was a defense to the malice and probable cause elements of the specific due process claim at issue in that case—the claim that the defendants’ use of the *ex parte* replevin statute to seize the plaintiff’s property without due process violated the plaintiff’s rights. The

Court found that claim was most analogous to the torts of malicious prosecution and abuse of process, which provided causes of action against private defendants for unjustified harms arising out of the misuse of government processes. *Id.* at 164. The torts of malicious prosecution and abuse of process require plaintiff to show the defendant acted with malice and with probable cause. *Id.* Thus, the Court left open the possibility that defendants could prevail on the specific claim by raising a claim-specific defense that they acted in good faith.

This is clear from all three opinions in *Wyatt*.

First, Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it was a “misnomer” to even call it a defense because “under the common law it was plaintiff’s burden to establish as elements of the tort both that the defendant acted with malice and without probable cause.” 504 U.S. at 176 n.1 (Rehnquist, C.J., dissenting). “Referring to the defendant as having a good-faith defense is a useful shorthand for capturing plaintiff’s burden and the related notion that a defendant could avoid liability by establishing *either* a lack of malice or the presence of probable cause.” *Id.* (emphasis in original).

Second, 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.” 504 U.S. at 172 (emphasis in original). Justice Kennedy further explained that “if the plaintiff could prove subjective bad faith on the part of the defendant, he had gone far towards proving

both malice and lack of probable cause.” *Id.* at 173. Indeed, often “lack of probable cause can *only* be shown through proof of subjective bad faith.” *Id.* at 174 (emphasis in original) (citing *Birdsall v. Smith*, 122 N.W. 626 (Mich. 1909) (holding that a plaintiff alleging malicious prosecution failed to prove the prosecution lacked probable cause)).

Third, Justice O’Connor’s majority opinion in *Wyatt* recognized that the dissenting and concurring opinions were referring to a defense to the malice and probable cause elements of claims analogous to malicious prosecution cases. The majority opinion stated that “[o]ne could reasonably infer from the fact that a plaintiff’s malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs *bringing an analogous suit* under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action.” 504 U.S. at 167 n.2 (emphasis added).

In short, the *Wyatt* Court suggested that there may be a *claim-specific* good-faith defense to Section 1983 actions in which malice and lack of probable cause are elements of the alleged constitutional deprivation. Malicious prosecution and abuse of process actions were the most analogous torts at common law to the misuse of an *ex parte* replevin statute, so the *Wyatt* Court concluded that a court might hold that malice and lack of probable cause are required elements of the underlying constitutional claim—that the use of an *ex parte* replevin statute by defendants to seize plaintiff’s property without due process is unconstitutional. Contrary to the Eighth Circuit and other lower courts, the *Wyatt* Court was not suggesting, let alone establishing, a *categorical* good-faith defense under

which a defendant's good-faith reliance on state law is a defense to all constitutional claims for damages brought under Section 1983. *See Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262, 279-80 (3d Cir. 2020) (Fisher, J., concurring in the judgment); *id.* at 287 (Phipps, J., dissenting). There is no basis for such a sweeping defense to Section 1983.

The claim-specific good-faith defense suggested in *Wyatt* is no bar to Petitioners' cause of action because malice and lack of probable cause are not elements of, or a defense to, a First Amendment deprivation. That is because the malicious prosecution and abuse of process torts are not analogous to First Amendment claims. In general, "free speech violations do not require specific intent." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). In particular, a compelled-speech violation does not require any specific intent. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that Section 1983 "contains no independent state-of-mind requirement.")

The limited good-faith defense that members of this Court suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights by seizing agency fees from them. The unions' actions deprived Petitioners of their First Amendment rights, and they are due a return of their unconstitutionally seized fees. As Judge Phipps put it in *Diamond*, a claim-specific defense "is of no moment here because a claim for compelled speech does not have a *mens rea* requirement." 972 F.3d at 289

(Phipps, J., dissenting). The Court should grant review to clarify what it intended in *Wyatt*.

## **II. A categorical good-faith defense conflicts with the text and purpose of Section 1983.**

Section 1983 states, in relevant part, that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State” deprives a citizen of a constitutional right “*shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.*” 42 U.S.C. § 1983 (emphasis added). Section 1983 means what it says: “Under the terms of the statute, ‘[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.’” *Rehberg*, 566 U.S. at 361 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

The proposition that a defendant’s good-faith reliance on a state statute exempts it from Section 1983 damages liability has no basis in Section 1983’s text. In fact, the proposition conflicts with the statute in at least two ways. First, it cannot be reconciled with the statute’s mandate that “every person”—not some persons, or persons who acted in bad faith, but “every person”—who deprives a party of constitutional rights under color of law “shall be liable to the party injured in an action at law . . . .” 42 U.S.C. § 1983. The term “shall” is not a permissive term, but a mandatory one.

Second, an element of Section 1983 is that a defendant must act “under color of any statute, ordinance, regulation, custom, or usage, of any State.” 42 U.S.C. § 1983. The Eighth Circuit and other lower courts have turned Section 1983 on its head by holding that persons who act under color of a not-yet-in-

validated state law to deprive others of a constitutional right are *not* liable to the injured parties in an action for damages. App. 9. The courts have effectively declared a statutory *element* of Section 1983—that defendants must act under color of state law—to be a *defense* to Section 1983. Under the decisions of the Eighth Circuit and other lower courts, acting under color of a state law yet to be held unconstitutional is now a potential defense to all Section 1983 damages claims.

But acting under color of a state statute cannot be both an element of and a defense to Section 1983. That would render the statute self-defeating: any private defendant that acted “under color of any statute,” as Section 1983 requires, would be shielded from liability because it acted under color of a state statute. Here, the fact that AFSCME Council 5 and Minnesota Association of Professional Employees acted under color of Minnesota’s agency fee law when they deprived Petitioners of their constitutional rights is not exculpatory, but a reason why the unions are liable for damages under Section 1983.

This conclusion is consistent with the purpose of Section 1983, which is to provide a federal remedy to persons deprived of constitutional rights by parties that act under color of state law. *See Owen v. Independence*, 445 U.S. 622, 650-51 (1980). “By creating an express federal remedy, Congress sought to ‘enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.’” *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). The proposition that acting under authority of an existing state law is exculpatory under Section 1983 inverts

the purposes of the statute. *See Diamond*, 972 F.3d at 288-89 (Phipps, J., dissenting). “Good faith was not firmly rooted as an affirmative defense in the common law in 1871, and treating it as one is inconsistent with the history and the purpose of § 1983.” *Id.* at 289.

The lack of any basis for a good-faith defense in Section 1983’s text and history distinguishes that supposed defense from other recognized immunities or defenses under Section 1983, which have a statutory or historical basis. Courts “do not have a license to create immunities based solely on [the court’s] view of sound policy.” *Rehberg*, 566 U.S. at 363. Courts accord an immunity only when a “tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine when it enacted Section 1983.” *Richardson*, 521 U.S. at 403 (cleaned up).

Unlike with immunities, “there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims.” *See Janus v. AFSCME Council 31*, 942 F.3d 352, 364 (7th Cir. 2019) (“*Janus II*”); *see Diamond*, 972 F.3d at 288 (finding “[a] good faith defense is inconsistent with the history of the Civil Rights Act of 1871”) (Phipps, J., dissenting); 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”). As discussed below, *infra* at 12–17, policy justifications for immunities generally are not applicable to private defendants. *Wyatt*, 504 U.S. at 164-67. Thus, unlike with recognized immunities, there is no justification for recognizing a good-faith defense that

defies Section 1983’s statutory mandate that “[e]very person who, under color of any statute” deprives a citizen of a constitutional right “shall be liable to the party injured in an action at law.” 42 U.S.C. § 1983.

**III. Policy interests in fairness and equality do not support a good-faith defense, but weigh against recognizing it.**

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

Most circuit courts that have recognized a categorical good-faith defense to Section 1983 assert that policy interests in equality and fairness justify recognizing this defense. *See Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Janus II*, 942 F.3d at 366; *Lee v. Ohio Educ. Ass’n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 334-35 (2d Cir. 2020); *see also* App. 10 (the good-faith defense “protects parties who ‘unwittingly cross [the] line’ into unconstitutionality while acting ‘in reliance on a presumptively valid state law—those who had good cause in other words to call on the governmental process in the first instance.’”) (citing *Ogle v. Ohio Civ. Serv. Emps. Ass’n*, 951 F.3d 794, 797 (6th Cir. 2020)). This rationale is inadequate, even on its own terms, because courts cannot create defenses to federal statutes when they believe it is unfair to enforce the statute.

“As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text.” *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). Statutes must be

enforced as Congress wrote them. “[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with ‘common sense and the public weal.’” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

This principle applies to Section 1983. “It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate.” *Tower v. Glover*, 467 U.S. 914, 923 (1984). Thus, courts “do not have a license to create immunities based solely on [their] view of sound policy.” *Rehberg*, 566 U.S. at 363. So too with the “fairness” justification for a good-faith defense: courts cannot just invent defenses to § 1983 liability based on their views of sound policy. *See Diamond*, 972 F.3d at 274 (Fisher, J., concurring in the judgment); *see id.* at 289 (Phipps, J., dissenting) (finding that fairness and equality cannot justify creation of a good-faith defense).

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

This Court wrote those words in *Owen* when holding that municipalities are not entitled to a good faith immunity to Section 1983. The Court’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—not just Petitioners and other employees who had agency fees seized from them—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.

Second, *Owen* 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 held that “even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss” to the entity that caused the harm rather “than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.” *Id.* at 654. So too here: when Petitioners’ and the unions’ interests are weighed, the balance of equities favors requiring the unions to return the monies they unconstitutionally seized from workers who chose not to join the union.

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

Individual public servants enjoy qualified immunity for reasons not applicable to the unions and most other private entities: to ensure that the threat of personal liability does not dissuade individuals from acting as public servants. *See Wyatt*, 504 U.S. at 168. The fact that this interest does not apply to the unions is not grounds for creating an equivalent defense for them. “Fairness alone is not . . . a sufficient reason for the immunity defense, and thus does not justify its extension to private parties.” *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998).

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

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

This Court’s retroactivity jurisprudence makes clear that *Janus* has retroactive effect, and it undermines the unions’ asserted good-faith defense. The reliance defense the Eighth Circuit and other lower 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 Co. v. Hyde*, 514 U.S. 749 (1995).

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

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

The Eighth Circuit and other lower courts have engaged in just such an end run. They have created an equitable defense based on a defendant's reliance on a statute this Court later deemed unconstitutional. The reliance defense the Eighth Circuit has created thus

conflicts with this Court's *Reynoldsville Casket* precedent.

A good-faith defense is unlike an immunity, which does not conflict with this Court's retroactivity doctrine because an immunity is a well-established legal rule grounded in "special federal policy considerations." *Reynoldsville Casket*, 514 U.S. at 759. A categorical good-faith defense to Section 1983 is not well established. This Court has never recognized such a defense. Moreover, the good-faith defense is an equitable defense predicated on a defendant's reliance interests. The equitable remedy at issue in *Reynoldsville Casket* was similarly based on "a concern about reliance [that] alone has led the Ohio court to create to what amounts to an ad hoc exemption to retroactivity." *Id.* This Court rejected that equitable remedy as inconsistent with its retroactivity doctrine.

**IV. It is important that the Court finally resolve whether Congress provided a good-faith defense to Section 1983.**

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

The Court should end the misconception among lower courts that *Wyatt* signaled that private defendants should be granted a broad reliance defense to Section 1983 liability akin to qualified immunity. In the wake of *Janus*, a chorus of lower courts has interpreted *Wyatt* in that way. *See* App. 6 (collecting cases). Yet *Wyatt* did not suggest such a defense, but merely suggested that reliance on a statute could defeat the

malice and lack-of-probable cause elements of claims analogous to malicious prosecution and abuse of process claims. *See supra* 4–9. The Court should explain what it meant in *Wyatt*.

And now is the time for this Court to act. Every circuit court that is likely to address this issue—the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits—has recognized the good-faith defense in the context of agency fees. *See Doughty v. State Emples. Ass’n of N.H.*, 981 F.3d 128 (1st Cir. 2020); *Wholean*, 955 F.3d 332 (2d Cir. 2020); *Schaszberger v. AFSCME Council 13*, No. 21-2172, 2022 U.S. App. LEXIS 19972 (3d Cir. July 20, 2022); *Akers v. Md. State Educ. Ass’n*, No. 19-1524, 2021 U.S. App. LEXIS 6851 (4th Cir. Mar. 8, 2021); *Lee*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Janus II*, 942 F.3d 365 (7th Cir. Nov. 5, 2019); *Danielson*, 945 F.3d 1096, 1101 (9th Cir. 2019). Given that the states in the Fifth and Eleventh Circuits did not require public-sector employees to pay agency fees, those circuits will almost certainly not have the opportunity to address the issue.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. Unless this Court rejects the good-faith defense for Section 1983 actions, defendants could raise that defense for *any* Section 1983 claim, including claims based on 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.

Further, once one accepts that a general good-faith defense may apply to private party defendants in Section 1983 cases, there is no logical or legal basis to deny applying the good-faith defense to other Section 1983 defendants, such as municipalities. While this Court has rejected the application of immunity to municipalities found to violate Section 1983, *Owen*, 445 U.S. at 657, the application of the good-faith defense to municipalities will have the same effect: to provide immunity from damage claims. Indeed, the Ninth Circuit has already extended the good-faith defense to municipalities. See *Allen v. Santa Clara Cty. Corr. Peace Officers Ass'n*, 38 F.4th 68, 75 (9th Cir. 2022) (“Because . . . unions get a good faith defense to a claim for a refund of pre-<sup>^</sup>agency fees . . . and municipalities' tort liability for proprietary actions is the same as private parties . . . the County is also entitled to a good faith defense to retrospective § 1983 liability for collecting pre-*Janus* agency fees.”) (citations omitted).

The Court should grant review to clarify that immunities and 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, this Court should grant the petition for writ of certiorari.

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