RECORD NO. 20-1531

In The

United States Court Of Appeals

For The Fourth Circuit

GARY MATTOS; DORIS BEEGLE; VICKIE BOGGS; BRADLEY FRENCH; CARLA GURGANUS; STEVEN HALE; JOHN HILL; BENJAMIN ICKES; MICHELLE LAMBERT; JESSICA MERRITT; JOHN MEYERS; CAROLE MILLER; MELISSA POTTER; JIM RIEMAN; LAURIE RUBIN; JOYCE STONER; RUSSELL STOTT; LARRY TEETS, on behalf of themselves and all those similarly situated,

Plaintiffs - Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 3,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1531 Caption: Mattos, et al. v. AFSCME Council 3

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gary Mattos, et al. (additional parties listed in attachment)
(name of party/amicus)

who is Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Reilly Stephens Date: 5-12-20

Counsel for: Gary Mattos, et al., Appellants

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ADDENDUM

The following parties are Plaintiffs-Appellants in this case, who seek to represent themselves and all those similarly situated:

Gary Mattos, Doris Beegle, Vickie Boggs, Bradley French, Carla Gurganus, Steven Hale, John Hill, Benjamin Ickes, Michelle Lambert, Jessica Merritt, John Meyers, Carole Miller, Melissa Potter, Jim Rieman, Laurie Rubin, Joyce Stoner, Russell Stott, and Larry Teets.

Dated: May 13, 2019

Respectfully Submitted,

/s/ Reilly Stephens

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Constitutional Provisions:

Other Authorities:

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arose under the United States Constitution and pursuant to 28 U.S.C. § 1343 because relief was sought under 42 U.S.C. § 1983. On May 5, 2020, Appellants filed a timely Notice of Appeal (App. 22-24) from the District Court's April 27, 2020 Dismissal Order. (App. 18-21.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether a government union may rely on a "good faith" defense to keep agency fees taken unconstitutionally in violation of the First Amendment, per *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

STATEMENT OF THE CASE

Appellants are employees of the State of Maryland who were compelled to pay agency fees to Appellee, American Federation of State, County, and Municipal Employees, AFL-CIO, Council 3 ("AFSCME" or the "Union"), in violation of their First Amendment rights under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). (App. 2-4, 15-16.) Prior to *Janus*, the Appellants did not join the Union but were still compelled to pay agency, or "service," fees to AFSCME as a condition of their employment. Appellants brought this action to reclaim the funds taken from them.

Under Maryland's state labor regime, "Collective bargaining may include negotiations relating to the right of an employee organization to receive service fees from nonmembers." Md. Code Ann., State Pers. & Pens. § 3-502. AFSCME is the exclusive representative for numerous bargaining units throughout Maryland state government, including the Department of Social Services, the Department of Transportation, the various state correctional institutions, and the University of Maryland. (App. 12-13.)

In 2009, the State of Maryland repealed its ban on agency, or "service," fees, allowing unions to place new provisions in collective bargaining agreements requiring nonmembers to fund union activities. *See* SB 264, 2009 Md. laws 187. Pursuant to this change in the law, AFSCME negotiated for the collection of agency fees from nonmembers such as Plaintiffs beginning in July 2011. (App. 13, 18.) Article 4, Section 14.A of the current Memorandum of Understanding ("MOU") between AFSCME and the state provides that:

> All employees who are covered by this MOU but who are not members of AFSCME shall as a condition of employment pay to AFSCME a "service fee." Non-members must begin and currently pay the service fee assessed upon the latter of: (i) July 1, 2011 or (ii) thirty (30) calendar days of employment in the AFSCME unit.

(App. 13.) Article 4, Section 14.H of the MOU further provides that "AFSCME shall indemnify and save the State harmless and shall provide a defense of any and all claims" related to the agency fee provision, and "AFSCME assumes full

responsibility for the disposition of the funds deducted under this section as soon as they have been remitted by the State to AFSCME." (App. 13.)

On June 27, 2018, the Supreme Court, in *Janus,* declared it a violation of the First Amendment for the government and unions to seize agency fees from public employees' wages without their consent. 138 S. Ct. at 2486. The Court lamented the "considerable windfall" of compulsory fees unions seized from employees during prior decades, remarking that "[i]t 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*.

Appellants filed this action on September 3, 2019, to recoup compulsory fees unconstitutionally seized from dissenting employees. (App. 9-17.) AFSCME filed a motion to dismiss, which the court below granted. (App. 18-21.) The lower court dismissed the complaint, holding that AFSCME was entitled to a "good faith" defense against liability for fees taken prior to the Court's decision in *Janus*. (Opinion Below at n.3, App. 19-20.)

SUMMARY OF ARGUMENT

Neither this Court nor the Supreme Court have ever held that a private party can assert a "good faith" defense to a § 1983 claim. A "good faith" defense conflicts with both the text and the purpose of § 1983. The text of the statute applies to "every person" who deprives another of a constitutional right—not just those who act in bad faith to do so. The purpose of the statute is to hold liable every person who acts "under color of state law" to deprive another of a constitutional right. Allowing a defendant to escape liability because of reliance on state law would defeat that purpose.

Most commonly, public parties are defendants in § 1983 claims because the claim requires a showing that the defendant acted "under color of state law." Under certain circumstances and for policy reasons not applicable here, public defendants can assert a good faith immunity to suit. But even this good faith immunity does not absolve them from returning property that they have taken unconstitutionally.

The Supreme Court extends liability under § 1983 to private parties who "invoke the aid of state officials." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982). However, the Supreme Court explicitly declined to extend good faith immunity to private parties who are following state statutes in *Wyatt v. Cole*, 504 U.S. 158 (1992).

The District Court skirted this ruling in *Wyatt* by, instead, offering Defendant-Appellee the equivalent of good faith immunity under the guise of a "good faith" defense. The District Court could point to no ruling from this circuit or from the Supreme Court to justify this approach.

Certain cases from the 1990s and 2000s mistakenly recognized a "good faith" defense for private parties to a § 1983 claim because the claims against them were claims that required, at common law, a showing of bad faith, or "malice or lack of probable cause." *Wyatt*, 504 U.S. at 164–65. But the First Amendment deprivation at issue in this case does not require a showing of bad faith on the part of the Defendant-Appellee, see *OSU Student All. v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012); therefore, these cases are inapposite.

For this reason, this circuit should decline to join the other circuits which have recently extended the "good faith" defense to employees seeking return of "agency fees." Those circuits primarily justified their actions with an appeal to "fairness." But when plaintiffs are entitled to a legal remedy under a statute, as in this case, there can be no appeal to equity. This is not a common law claim; the statute must be enforced.

Other circuits also incorrectly reasoned that the most analogous common-law tort to the First Amendment deprivation in this case is abuse of process. However, abuse of process refers to the judicial process. Appellants' First

Amendment, compelled-speech claim under *Janus* has no common law analogue. Therefore, there can be no analogous "good faith" defense imported into the claim.

If this Court did appeal to equity, it should side with the victims of the constitutional deprivation and not the perpetrators: "[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). Regardless of whether AFSCME had grounds for believing it was constitutional to take the Appellants' money, it did not act in good faith by keeping their money after the Supreme Court's decision in *Janus*.

The Supreme Court explained that its constitutional decisions are to be enforced retroactively in *Harper v. Va. Dep't of Taxation*, 502 U.S. 86 (1993). The Court went further and explained that a party cannot rely on a prior statute that has now been ruled unconstitutional in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). For all these reasons, this circuit should decline to adopt the new "good faith" defense for private parties and should reverse the District Court for doing so.

ARGUMENT

I. Neither this Court nor the Supreme Court have ever held that a private party can assert a "good faith" defense to a § 1983 claim, and the District Court erred in allowing a "good faith" defense to stop AFSCME from returning the money it took unconstitutionally.

A. A "good faith" defense conflicts with the text and purpose of § 1983.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Section 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.

42 U.S.C. § 1983.

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)).

A "good faith" or statutory reliance defense to § 1983 cannot be reconciled with the statute's mandate that "every person"—not some persons, 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.

The proposition that a defendant's good faith reliance on a state statute exempts it from § 1983 damages liability has no basis in the statutory text. Section 1983 "contains no independent state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). A "good faith" defense would require penciling into § 1983 a state-of-mind requirement absent from its text, in defiance of *Daniels*.

For that reason, the Supreme Court rejected the application of a "good faith" defense to Section 1983 in *Anderson v. Myers*, 238 U.S. 368 (1915). There, the Court held that a state statute violated the Fifteenth Amendment's ban on racial discrimination in voting. 238 U.S. at 380. In that case, as in this one, the defendants argued that they could not be liable for money damages under §1983 because they acted on a good-faith belief that the Maryland statute they were following was constitutional at the time of their actions. The Court noted that "[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument," but it ultimately rejected any such "good faith" defense. *Id.* at 378.

The lower court was even more explicit in its ruling:

> [A]ny state law commanding such deprivation or abridgement is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). Therefore, the plain text of the statute requires that § 1983 applies to every person, regardless of motive.

A "good faith" defense also conflicts with the purpose of § 1983. The purpose of the statute is to hold liable every person who relies on state law to deprive another of a constitutional right. It is an element of § 1983 that a defendant must act "under color of any statute, ordinance, regulation, custom, or usage, of

any State." 42 U.S.C. § 1983. Allowing a defendant to escape liability because of reliance on a state statute would defeat the very purpose of the statute. In other words, the District Court declared a statutory *element* of § 1983 to be a *defense* to § 1983.

B. The Supreme Court extends liability under § 1983 to private parties.

The Supreme Court applies § 1983 to private defendants like AFSCME. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court explained that it extends liability under § 1983 to private parties who "invoke the aid of state officials." *Id*. at 942. *Lugar* is controlling law in this case, and Defendant-Appellant does not question its authority.

In *Lugar*, a private company sued its lessee to collect an outstanding debt. The debt-collection lawsuit occurred, pursuant to state statute, through an *ex parte* proceeding. After the proceeding, a clerk of the state court issued a writ of attachment, which was executed by the county sheriff and prevented the debtor from disposing of any assets. A state trial judge later dismissed the attachment. The debtor then sued in federal court under § 1983, arguing that the *ex parte* attachment of his assets violated his right to due process.

The Supreme Court held that the private company could be held liable for the due process violation because there was sufficient state action where it had "invok[ed] the aid of state officials to take advantage of state-created attachment

procedures." *Id.* at 942. While the dispute was over a private debt, "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Id.* at 941. Therefore, liability was appropriate "when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." *Id.* at 942.

Similar to the defendant in *Lugar*, AFSCME jointly participated with the State of Maryland to expropriate money from Appellants. The defendants in both cases argued that their reliance on a state statute should save them from liability as a private litigant. But if a private party's reliance on a state law were, by itself, sufficient to shield its conduct from liability, almost no private party would ever be liable under § 1983. Because liability under § 1983 requires that a defendant act "under color of state law," a defendant cannot then rely on such action to escape liability. For that reason, the Supreme Court denied this argument in *Lugar*, and this Court should, as well.

C. The Supreme Court declined to grant good faith immunity to private parties in *Wyatt v. Cole*, 504 U.S. 158 (1992).

The decision in *Lugar* "left open the question whether private defendants charged with 42 U. S. C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional are entitled to qualified immunity from suit. 457 U.S. at 942, n. 23." *Wyatt v. Cole*, 504 U.S. 158, 159

(1992). The Supreme Court answered the question definitively in *Wyatt* and denied good faith immunity to private parties in § 1983 actions.

AFSCME's argument below for a "good faith" defense relied on piecing together indicia from three different opinions in the *Wyatt* case. However, this ignores the clear pronouncement of the *Wyatt* majority: private litigants in § 1983 cases are *not* afforded immunity from liability simply because they had a good faith reliance on state law.

In *Wyatt*, disgruntled business partners had sued for replevin, pursuant to a state statute. Also pursuant to the statute, the sheriff had seized the property at issue without a hearing. *Id.* at 160. The question before the Court was whether a private party could invoke the qualified immunity available to state officials under § 1983 because the private party was relying in good faith on a state statute. The *Wyatt* Court determined that defendants were "not entitle[d] . . . to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id*. at 165. The reasoning for the holding was that the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167.[1] Similarly, this Court should not extend good faith qualified immunity to AFSCME in this case under the guise of a "good faith" defense.

[1] The Supreme Court also denied qualified immunity to cities in *Owen v. Independence*, 445 U.S. 622 (1980) for similar reasons. The case is discussed in detail below in Section E.

D. Early decisions in other circuits recognized a "good faith" defense only where malice or lack of probable cause was an element of the constitutional tort.

In the wake of *Wyatt,* four circuit courts, but not the Fourth Circuit, found that good faith reliance on a statute is available to defeat the malice and probable cause elements of abuse of judicial process claims. As Chief Justice Rehnquist observed in *Wyatt*, "[r]eferring 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." 504 U.S. at 176 n.1 (Rehnquist, C.J., dissenting).

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. The elements and defenses material to different constitutional and statutory deprivations vary considerably. For example, the elements of a Fourteenth Amendment due-process deprivation are different from those of a Fourth Amendment search and seizure violation. Most importantly here, state of mind is material to some constitutional deprivations but not others. For instance, a specific intent is required in "due process claims for injuries caused by a high-speed chase," "Eighth Amendment claims for injuries suffered during the response to a prison disturbance," and invidious discrimination claims under the Equal Protection clauses. *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir.

2012). In contrast, "free speech violations [like the one in this case] do not require specific intent." *Id.*

The *Wyatt* court left open the possibility that there *might* be a good faith defense available to private defendants only for claims analogous to "malicious prosecution and abuse of process." *Wyatt*, 504 U.S. at 164; *see also* 168-169. The Court 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). Justice Kennedy, who joined the *Wyatt* majority, wrote a separate opinion in which he 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 (Kennedy. J., concurring). Indeed, often "lack of probable cause can *only* be shown through proof of subjective bad faith" because 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 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)).

The *Wyatt* court's invocation of a potential "good faith" defense, therefore, was in the context of a claim in which malice and lack of probable cause *were elements of the claim* at common law. That is, good faith was a potential avenue left open to the defendants in *Wyatt* because the nature of the claim at issue was such that if there was good faith, there would have been no valid claim in the first place at common law. As explained below, there is no analogous element in Appellants' First Amendment claim; therefore, good faith is not a defense to liability in this case.

The Sixth Circuit was the first appellate court to find that private parties can raise a "common law good faith defense to malicious prosecution and wrongful attachment cases" brought under § 1983. *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988). "While probable cause and malice often have complicated meanings," *id*., these elements are generally not present if a defendant instituted a judicial process in good faith reliance on existing law. *See id.*; *Wyatt*, 504 U.S. at 172-74 (Kennedy. J., concurring); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997). At the time, *Duncan's* holding conflicted with other appellate decisions holding that private parties enjoy good-faith immunity to § 1983 liability. *See id*. at 1265.[2] The Sixth Circuit in *Duncan* believed that "courts who endorsed the concept

[2] A "defense" and an "immunity" differ in that "a defense rebuts the alleged deprivation of rights, while an immunity is an exemption from Section 1983 liability, even if there is a deprivation. *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504

of good faith immunity for private individuals improperly confused good faith immunity with a good faith defense." 844 F.2d at 1266.

On remand in *Wyatt* itself, the Fifth Circuit held the defendants could raise a "good faith" defense because malice and lack of probable cause were elements of the common-law abuse of process claim. 994 F.2d at 1119–21. The Fifth Circuit recognized that the Supreme Court "focused its inquiry on the *elements* of these torts," and found "that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause." *Id*. at 1119 (first emphasis added).

Two other circuits later followed the Sixth and Fifth Circuits' lead and recognized that good faith is a defense to an abuse of process or malicious prosecution claim arising from private party's *ex parte* seizure of property. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996). The Second Circuit in *Pinsky* required proof of "malice" and "want of probable cause" because "malicious prosecution is the most closely analogous tort and look[ed] to . . . for the elements that must be established in order for [the plaintiff] to prevail on his § 1983 damages claim." 79 F.3d at 312–13. The Third Circuit in *Jordan* required proof of "malice" for the same reason, recognizing that while "§ 1983 does not

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U.S. at 171-72 (Kennedy, J., concurring)).

include any *mens rea* requirement in its text, . . . the Supreme Court has plainly read into it a state of mind requirement specific to the particular federal right underlying a § 1983 claim." 20 F.3d at 1277 (emphasis added).[3]

The Ninth Circuit in *Clement v. City of Glendale*, 518 F.3d 1090, 1297 (9th Cir. 2008), held "the facts of this case justify allowing" a private towing company that towed a vehicle pursuant to police instructions to assert a good faith defense. *Id*. at 1297. The Ninth Circuit did not identify its legal basis for recognizing the defense or its scope.

As the foregoing review makes clear, these cases (with the exception of *Clement*),[4] held that good faith reliance on existing law can defeat the malice and probable cause elements of a constitutional claim arising from an abuse of judicial process. That was the claim at issue in those cases. *See Wyatt*, 504 U.S. at 160 (state court complaint in replevin); *Duncan*, 844 F.2d at 1267 (state court

[3] The Sixth Circuit also reiterated its *Duncan* holding in another abuse of process case, *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996). *Vector Research* involved, in relevant part, a *Bivens* claim against attorneys for searching and seizing property pursuant to an *ex parte* court order. *Id*. at 695-97. The court held the defendants could escape liability if they acted in good faith. *Id*. at 699.

[4] *Clement* does not support the good faith defense recognized by the district court because *Clement* did not involve reliance on a statute, but rather reliance on police instructions to tow a car. 518 F.3d at 1297. The decision is also too ambiguous to support the sweeping proposition of Appellee that reliance on a statute is a defense to all § 1983 claims.

prejudgment attachment order); *Jordan*, 20 F.3d at 1276–77 (state court judgment and garnishment process); *Pinsky*, 79 F.3d at 312–13 (state court prejudgment attachment procedure); *Vector Research*, 76 F.3d at 695-96 (federal court *ex parte* search order).

These cases did not recognize an across-the-board, "good faith" defense—i.e., that any defendant that relies on a statute is exempt from paying damages under § 1983. In fact, these cases did not recognize a true "defense" of any sort. *See Wyatt*, 504 U.S. at 172 (Kennedy J., concurring); *id*. at 176 n.1 (Rehnquist, C.J., dissenting). The Justices in *Wyatt* and the Second, Third, Fifth, and Sixth circuits found malice and lack of probable cause to be *elements* of abuse of process claims that *plaintiffs* bear the burden of proving. *See Wyatt*, 994 F.2d at 1119–20; *Jordan*, 20 F.3d at 1277; *Pinsky*, 79 F.3d at 312; *Duncan*, 844 F.2d at 1267. While good faith reliance on existing law may defeat those elements, such reliance is not a defense to § 1983 writ large.

Unlike in claims arising from abuses of judicial processes, malice and lack of probable cause are not elements of, or a defense to, a First Amendment deprivation. In general, "free speech violations do not require specific intent." *OSU Student Alliance*, 699 F.3d at 1074. 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.

Thus, whether AFSCME acted in good faith or in bad faith when it seized agency fees from Appellants and other employees without their consent is irrelevant. Either way, the action deprived the employees of their First Amendment rights, and they are due a return of their unconstitutionally seized fees.

E. This Court should decline to recognize the new "good faith" defense that other circuits have recognized.

1. An appeal to "fairness" does not absolve a party of statutory liability under § 1983.

Other circuit courts have recently found that "fairness" to defendants that rely on laws later held invalid justifies recognizing a "good faith" defense. *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Janus v. AFSCME, Council 31*, 942 F.3d 365 (7th Cir. Nov. 5, 2019) ("*Janus II*"); *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 (2d Cir. 2020). That rationale is inadequate on its own terms. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so.

"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). These situations are different from common law claims. Statutes must

be enforced. "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to pre-empt 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).

Here, Congress mandated in § 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 . . . ." Courts cannot refuse to enforce this statutory command against defendants who acted pursuant to then-valid statutes because it would supposedly 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). When plaintiffs are entitled to a legal remedy under a statute, as in this case, there can be no appeal to equity.

Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg v. Paulk,* 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 § 1983. *Richardson*, 521 U.S. at 403 (citation omitted). But in this case, even the recent Seventh Circuit opinion in *Janus II* recognized that "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.[5] Because a "good faith" defense did not exist prior to the passage of § 1983 and was not created within the text of the statute, it cannot be created now.

Other circuits found that principles of equity justify extending to private defendants a defense similar to the immunity 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. But courts should 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 AFSCME 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 AFSCME is not grounds for creating an equivalent defense for the Union. "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).

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[5] *See also* William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 49 (2018) (concluding "[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."); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (Justice Marshall rejecting a "good faith" defense: "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."); *Myers*, supra, 238 U.S. at 378 (rejecting "good faith" defense).

In any event, AFSCME still would not be entitled to a defense to paying damages under § 1983, even if it were treated like its most equivalent government counterpart. A large organization like the Union is nothing like individual persons who enjoy qualified immunity. If a public-sector analog is necessary, AFSCME is most akin to governmental bodies that lack qualified immunity, namely municipalities. *See Owen*, 445 U.S. at 654.

2. Appellants' claim lacks a closely analogous tort.

Wyatt instructs courts to "look to the most closely analogous torts" to determine the elements or defenses to constitutional claims under § 1983. *Wyatt*, 504 U.S. at 164. Other circuits missed the point when tersely declaring— after finding common law analogies *not* to be controlling—that abuse of process is the most analogous tort. *See Danielson,* 945 F.3d at 1102; *Janus II,* 942 F.3d at 366; *Lee,* 951 F.3d at 392 n.2; *Wholean*, 2020 U.S. App. LEXIS 11864, at *2.[6] Even if that finding were accurate, it has no significance unless it means that the tort's malice and probable cause elements are now elements of § 1983 claims for compelled subsidization of speech. Tellingly, the courts in *Danielson*, *Janus II*,

[6] A subsequent Sixth Circuit panel in *Ogle v. OCSEA*, 2020 WL 1057389, at *2 (6th Cir. Mar. 5, 2020) was bound by *Lee*'s holding on that point. The *Ogle* panel's attempt to square *Lee* with *Wyatt* fails for the reasons stated here: irrespective of what tort is most analogous, what matters is that malice and lack of probable cause are simply not elements of a First Amendment claim under *Janus*.

Lee, and *Wholean* did not go that far. Nor could they do so under the terms of *Janus*.

Appellants' claim is nothing like abuse of process. "[T]he tort of abuse of process requires misuse of the *judicial* process." *Tucker v. Interscope Records Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) (emphasis added); *see* J. Bishop, Commentaries on Non-Contract Law § 224 at 90 (1889) (stating that "[t]he [common] law has provided the action of malicious prosecution as a remedy for private injuries from abuse of the process of the *courts*.") (emphasis added). There is no allegation that the agency fee was an abuse of a court process. Nor can abuse of process be an analogous tort because it exists to protect the integrity of the judicial process and litigants from harassment. *See* 8 Am. Law of Torts § 28:32 (2019). Abuse of process does not cover every claim of governmental process.

The Seventh and Ninth Circuits admitted "'[n]one of these torts is a perfect fit.'" *Danielson*, 945 F.3d at 1102 n.5 (quoting *Janus II*, 942 F.3d at 365). The courts, however, erroneously believed "'they need not be,'" *id*., because courts supposedly "are directed to find the most *analogous* tort, not the exact-match tort," *Janus II*, 942 F.3d at 365. That is not correct. "[T]he Supreme Court said that the common law of torts was the starting point, not the only consideration, in analyzing a claim under § 1983." *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000). The Supreme Court reiterated that point in *Manuel*, stating that "'§ 1983 is not

simply a federalized amalgamation of pre-existing common-law claims.'" 137 S. Ct. at 920-21 (quoting *Rehberg v. Paulk*, 566 U.S. at 356, 366 (2012)).

These arguments lose sight of the fact that some constitutional claims actionable under Section 1983 have no common law analogue. Section 1983 "is broader [than the common law] in that it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Rehberg*, 566 U.S. at 366.

Appellants' First Amendment, compelled-speech claim has no common law analogue. The Supreme Court explained that "[c]ompelling 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.

Therefore, there is no basis for importing the elements or defenses to any common law tort into Appellants' First Amendment claim. There is especially no basis for importing a "good faith," state of mind element. To do so would violate the Supreme Court's holding that a claim for compelled subsidization for union speech requires only that a state and union seize union fees from employees without their prior consent, *Janus*, 138 S. Ct. at 2486.[7]

[7] Alternatively, if it is relevant, Appellants' claim is most like the tort of conversion because the Union wrongfully took their property without authorization. Good faith is not a defense to conversion, which is a strict liability tort. *See Morisette v.*

3. An appeal to "fairness" should lead the Court to side with Appellants.

Fairness to *victims* of constitutional deprivations supports enforcing § 1983 as written. It is not fair to make victims of constitutional deprivations pay for AFSCME's 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. The Supreme Court in *Owen* wrote those words when holding that municipalities are not entitled to a good faith immunity to § 1983. The Court's equitable justifications for so holding are equally applicable here.

First, the *Owen* Court 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 § 1983 suits can escape liability by showing they had a good faith, but mistaken, belief their conduct was lawful. Those victims include not just Plaintiffs-Appellants and other employees who had agency fees seized from them. Under AFSCME's argument, every defendant to every § 1983 damages claim can assert a "good faith" defense. For example, the municipalities that the Supreme Court

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United States, 342 U.S. 246, 253-54 (1952); Richard A. Epstein, *Torts*, § 1.12.1 at 32 (1999).

in *Owen* held not to be entitled to a good faith immunity could raise an equivalent "good faith" defense, leading to the very injustice the Court sought to avoid.

Second, the *Owen* Court 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 § 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." 445 U.S. at 654. So too here, when Plaintiffs-Appellants' and AFSCME's interests are weighed together, the balance of equities overwhelmingly favors requiring AFSCME to return the monies it unconstitutionally seized from workers who affirmatively chose not to join the union. Fairness should reward the victims of the constitutional deprivation and not the perpetrator.

F. The new "good faith" defense is incompatible with the Supreme Court's doctrine of retroactivity announced in *Harper* and *Reynoldsville Casket*.

The District Court stated it was unclear whether the rule in *Janus* should be considered retroactive. (Opinion Below at 3, App. 20.) The court also found that even if *Janus* were retroactive, the "good faith" defense applied in this case. (Opinion Below at 2-3 and n.3, App. 19-20.) But the Supreme Court's established retroactivity jurisprudence makes clear that *Janus* has retroactive effect, and that same line of cases undermines AFSCME's asserted "good faith" defense. The "good faith" defense the court fashioned is indistinguishable from the reliance defense that the Supreme Court held invalid for violating the retroactivity principles in *Harper* and *Reynoldsville Casket*.

In *Harper*, the Supreme Court held that its decisions in civil cases were 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 later, in *Reynoldsville Casket*, the Supreme Court held that courts cannot create equitable remedies based on a party's reliance on a statute before it was held unconstitutional by the Supreme Court. 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. The Supreme

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 Supreme 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 constitutional. *Id.* at 753 (describing the state court's remedy "as a state law 'equitable' device [based] on reasons of reliance and fairness."). The Supreme 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 before it was held unconstitutional by the Supreme Court. 514 U.S. at 759. Yet that is exactly what the District Court did below. It is true that courts can find "'a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief.'" *Reynoldsville Casket*, 514 U.S. at 759. But it cannot be said that AFSCME's reliance defense has "'nothing to do with retroactivity.'" *Id*. An equitable defense based on a party's reliance on a statute before it was held unconstitutional has everything to do with frustrating the retroactive effect of a Supreme Court decision.

The Supreme Court distinguished immunity from an equitable remedy, finding the former to be a well-established legal rule grounded in "special federal policy considerations." *Id*. at 759. By contrast, "a concern about reliance alone has led the Ohio court to create to what amounts to an ad hoc exemption to retroactivity." *Id*. As in *Reynoldsville Casket*, AFSCME's reliance defense is predicated on "a concern

about reliance," *id*., namely the ostensible unfairness of enforcing § 1983 against defendants who rely on statutes later held unconstitutional. In *Reynoldsville Casket* the law at issue was a statute of limitations, and in this case it is Maryland's agency fee law, but the remedy sought is exactly the same: AFSCME relied on the old law, and even though it now knows the old law violated Appellants' rights, it says the law cannot be applied to it, based on principles of equity. But the Supreme Court in *Reynoldsville Casket* explained that equity cannot thwart the retroactivity of its decisions. The same situation applies here, and *Janus* must be given retroactive effect.

Another case supporting Appellants' position that *Janus* is retroactive is *Davis v. United States*, 564 U.S. 229, 243 (2011) (holding constitutional decision to have retroactive effect and reiterating that "newly announced rules of constitutional criminal procedure must apply 'retroactively to all cases, state or federal, pending on direct review or not yet final, *with no exception*.'") (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (emphasis added). The *Davis* Court found the exclusionary rule not to bar evidence obtained in a search conducted under prior law because the exclusionary rule is an established remedy with an independent legal basis. *Id*. at 249-250. Once again, the Court rejected an equitable remedy based on reliance on an overturned law. Such a defense is not permitted under *Reynoldsville Casket* and should not be permitted in this case.

CONCLUSION

The District Court's judgment should be reversed, and this case remanded for further proceedings to decide the award of damages and certification of a class.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that this Court hear oral argument in this case. This appeal raises important and novel issues of first impression in this circuit as to the existence and scope of a potential "good faith" defense to 42 U.S.C. § 1983; therefore, Appellants believe the Court would benefit from oral argument.

Dated: July 16, 2020

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