No. _____

IN THE

Supreme Court of the United States

SCOTT SOLOMON,

PETITIONER,

V.

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

RESPONDENT.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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

August 6, 2021

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

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.

Petitioner is a former employee of the State of New York who was compelled to pay agency fees to AFSCME Council 37, under color of New York state law, in violation of his First Amendment rights under *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

The question presented is whether there is a categorical good-faith defense to 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 law before it was held unconstitutional?

PARTIES TO THE PROCEEDING

Petitioner Scott Solomon is a natural person and citizen of the State of New York. He was, at one time, an employee of the State of New York.

Respondent AFSCME Council 37 is a union representing public employees of the State of New York.

RULE 29.6 STATEMENT

As Petitioner is a natural person, 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:

- *Solomon v AFSCME Council 37,* No. 20-3878, United States Court of Appeals for the Second Circuit. Judgment entered March 10, 2021.
- *Solomon v AFSCME Council 37,* No. 19-cv 6238, United States District Court for the Southern District of New York. Judgment entered October 14, 2020.

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The United States District Court for the Southern District of New York's unreported order of May 26, 2020, dismissing Petitioner's complaint is reproduced at App. 3. The United States Court of Appeals for the Second Circuit summarily affirmed the lower court's judgment on March 10, 2021, in an unreported order reproduced at App. 1.

JURISDICTION

The Second Circuit issued its summary affirmance on March 10, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1983, 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

Petitioner Scott Solomon, while he worked as a New York State employee, was forced to pay agency or "fair-share" fees to AFSCME Council 37 against his will. App. 7–8. Council 37 seized these payments from Solomon pursuant to New York's Public Employees' Fair Employment Act, which permits state employers to deduct from the wages of employees who are not union members union fees in "the amount equivalent to the dues levied by such employee organization . . ." NY Civ Serv L § 208(3) (2016).

On June 27, 2018, this Court in *Janus* v. *AFSCME Council 31*, overruled that portion of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that held it constitutional for unions to seize agency fees from nonmember employees. 138 S. Ct. 2448, 2486. *Janus* held that such agency fee arrangements (like NY Civ Serv L § 208(3)) violate the First Amendment because they compel employees to subsidize union speech. *Id*. In so holding, this Court lamented the "considerable windfall that unions have received under *Abood*." 138 S. Ct. at 2486.

Petitioner, individually and on behalf a class of employees forced to pay agency fees to AFSCME Council 37, filed this action under 42 U.S.C. § 1983 seeking to recoup the monies Council 37 wrongfully seized from these employees in violation of their First Amendment rights. App. 6. While the Petitioner's case was pending in the district court, the Second Circuit issued its decision in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2nd Cir. 2020), *cert. denied* No. 20-605 (March 29, 2021). In that case, the Second Circuit found that a good-faith defense to Section

1983 shielded Local 2001 from paying damages to plaintiffs for depriving them of their constitutional rights.

In light of the Second Circuit's decision in *Wholean*, Council 37 moved to dismiss Petitioner's complaint on the grounds that the decision controlled the outcome of Solomon's case. *Solomon v AFSCME, Council 37*, No. 19-cv-6823, Mot. to Dismiss, Dkts. #23–24 (filed May 26, 2020). On October 13, 2020, the district court granted AFSCME Council 37's Motion to Dismiss. App. 3. On March 10, 2021, the Second Circuit summarily affirmed that decision, stating that "the issue on appeal was squarely resolved against the Appellant by this Court's decision in *Wholean* . . . ." App. 1. Petitioner now seek this Court's review.

REASONS FOR GRANTING THE PETITION

This case is one of many in which employees seek damages from unions for seizing money from employees' paychecks in the form of agency fees in violation of their First Amendment rights recognized in *Janus*. Despite the fact that this Court has never recognized a general good-faith defense to Section 1983, lower courts are increasingly relying on this new-found defense to bar the employees' claims. *See, e.g.*, *Seidemann v. Prof'l Staff Cong. Local 2334*, 842 Fed. Appx. 655, 657 (2nd Cir. 2020) (non-precedential opinion), *petition for cert. filed*, No. 20-1725 (June 10, 2021); *Doughty v. State Employees' Ass'n of N.H.*, 981 F.3d 128 (1st Cir. 2020), *cert. denied*, No. 30-1534 (June 14, 2021); *Ogle* v. *Ohio Civil Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, No. 20-486 (Jan. 25, 2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Janus* v. *AFSCME*, 942 F.3d 352 (7th

Cir. 2019), *cert. denied*, No. 19-1104 (Jan. 25, 2021); and *Danielson* v. *Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, No. 19-1130 (Jan. 25, 2021).

The Court raised, but then stopped short of deciding, whether there exists a good-faith defense to Section 1983 in *Wyatt v. Cole,* 504 U.S. 158, 169 (1992). The Court should grant this petition, or one like it (*see also Seidemann*, *supra*, *petition for cert. filed*, No. 20-1725 (June 10, 2021)), to finally decide this important issue. The categorical good-faith defense lower courts have recognized is not the claim-specific defense this Court suggested in *Wyatt*.

In addition, the categorical good-faith defense recognized by the Second Circuit and other lower courts conflicts with this Court's remedy in *Abood* for plaintiffs who had money withheld from their paychecks for political activities. Although the Court in *Abood* permitted agency fees to be taken from a nonmember (which this Court overturned in *Janus*), it changed the law by prohibiting fee seizures used for political activities. Thus, this Court remanded the *Abood* case for an order of "restitution" or "refund" of the fees collected and used for political activities in violation of the Constitution. 431 U.S. at 237–42. The Sixth and Tenth Circuits followed course when they ordered a refund of such fees in *Lowary* v. *Lexington Local Board of Education*, 903 F.2d 422 (6th Cir. 1990) (refund of unconstitutionally withheld fees), and *Wessel* v. *City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002) (refund of excess fees not used to benefit plaintiffs). Thus, after *Abood*, plaintiffs who had fees taken from their paychecks on behalf of a union that were used for political activities were entitled to receive those fees back in the form of damages in Section 1983

cases, regardless of whether the union had taken them in good faith reliance of existing law.

Yet, after this Court declared all agency fees taken without affirmative consent to be unconstitutional, the First, Second, Seventh, Ninth Circuits—and even the Sixth Circuit—despite its earlier decision in *Lowary*—have found a good-faith defense for labor unions who relied on existing law when taking agency fees. These lower court decisions conflict with this Court's order in *Abood* requiring restitution to employees who had fees withheld from their paychecks that were used for political purposes.

Finally, this Court should grant this petition because the lower courts are not unanimous on whether a categorical good-faith defense to Section 1983 liability exists. A Third Circuit panel was divided on whether to recognize a good-faith defense in Section 1983 claims in *Diamond v. Pennsylvania State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), with the majority refusing to recognize the defense, through ultimately dismissing the claim for refund. This Court should grant this petition to resolve these conflicts.

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

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 of different constitutional deprivations vary considerably. "In defining the contours and prerequisites of a § 1983 claim . . . courts are to

look first to the common law of torts." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). "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.* at 921.

The issue in *Wyatt* was 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 recognized that the plaintiffs' claims 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 id.* at 172–73 (Kennedy, J., concurring) (similar). However, the *Wyatt* Court determined 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 . . . ." 504 U.S. at 165. This was so because the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167.

Wyatt left open the question of whether the defendants could raise a defense based on good faith and/or probable cause. *Id.* at 168–69. Contrary to the conclusions of the Second Circuit in *Wholean*, the Court in *Wyatt* was not suggesting that there exists a categorical good-faith defense to all Section 1983 damages claims. Rather, as is clear from all three

opinions in *Wyatt*, the good-faith defense to which the Court was referring was a defense to the malice and probable elements of the specific due process claim at issue in the case.

First, Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it was a "misnomer" to even call a good-faith defense 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.*

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. 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 found 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. Contrary to the Second Circuit's decision in *Wholean*, 955 F.3d at 334, the *Wyatt* Court was not suggesting that there exists a *categorical* good-faith defense in which a defendant's good faith reliance on state law is a defense to all constitutional claims for damages brought under Section 1983. 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 Petitioner's cause of action because, quite simply, 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 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. *Cf. 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 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 v. Paulk*, 566 U.S. 356, 361 (2012) (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 Second Circuit and other lower courts have turned Section 1983 on its head by holding that persons who act under color of a not-yet-invalidated state law to deprive others of a constitutional right are *not* liable to the injured parties in an action for damages. *Wholean*, 955 F.3d at 334, *Solomon*, 2021 WL 1964773; *Seidemann*, 842 Fed. Appx. 655, 657. The courts have effectively declared a statutory *element* of Section 1983—that a defendant must act under color of state law—to be a *defense* to Section 1983.

A defendant 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: almost any private defendant that acts "under color of any statute," as Section 1983 requires to establish liability, would then be shielded from liability for the same reason—i.e., because the defendant acted under color of an existing state statute.

The proposition that a defendant acting under authority of an existing state law is exculpatory under Section 1983 also inverts the purposes of the statute. *See Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262, 288–89 (3d Cir. 2020) (Phipps, J., dissenting). The

purpose of Section 1983 is to provide a federal remedy to persons deprived of constitutional rights by parties that act under color of state law. *See Owen v. United States*, 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)).

Here, the fact that AFSCME Council 37 acted under color of New York's agency fee law when it deprived Petitioner and employees like him of his constitutional rights is only a reason *why* the unions must be found liable for damages under Section 1983. *See Lowary v. Lexington Local Bd. Of Educ*., 903 F.2d 422 (6th Cir. 1990) (ordering a refund of fees illegally collected before this Court's decision in *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986), which rendered such recoupments unconstitutional). The fact cannot be deemed exculpatory.

The lack of any basis in Section 1983's text and history for a good-faith defense distinguishes it from other recognized immunities or defenses to Section 1983, which have a statutory 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 v. McKnight*, 521 U.S. 399, 403 (1997) (cleaned up).

Unlike the case of 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 352, 365 (7th Cir. Nov. 5, 2019); *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."). The policy justifications for immunities generally are not applicable to private defendants. *Wyatt*, 504 U.S. at 164–167. 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 weigh against a good-faith defense.

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*, 945 F.3d at 1101; *Janus II*, 942 F.3d at 366; *Lee*, 951 F.3d at 392 n.2; *Wholean*, 955 F.3d at 333. Neither fairness nor equality justify the reliance defense the Second Circuit and other lower courts have recognized to shield labor unions from their unconstitutional wage seizures pre-*Janus*. Rather, both principles weigh against carving out

this exemption in Section 1983's remedial framework.

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

1. The "fairness" rationale for a good-faith defense is inadequate, even on its own terms, because courts cannot create defenses to federal statutes if 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'l 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 same 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, 922–23 (1984). Thus, 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. 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.

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. Equity favors righting the wrong for those whose constitutional rights were violated, even if the violator acted without malice. The Court has held that "to the extent . . . Congress intended [that] the awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey v. Piphus*, 435 U.S. 247, 256–57 (1978) (citation omitted); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986). Indeed, "elemental 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—that the one who causes a loss should bear the loss—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, 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—not just Petitioner 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, the *Owen* Court 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 Petitioner's (and employees like him) and Council 37's interests are weighed together, the balance of equities favors requiring the unions to return the monies they unconstitutionally seized from workers who chose not to join the union.

2. Equally untenable is 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 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. Rather, "[f]airness 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).

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

This Court's retroactivity jurisprudence makes clear that *Janus* has retroactive effect, and undermines the unions' asserted good-faith defense. The reliance defense the Second Circuit and other lower courts have fashioned to defeat the retroactive effect of *Janus* is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), the 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, the Court held in *Reynoldsville Casket Co. v. Hyde* 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. 749, 759 (1995). *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 constitutional. *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 the state court could not end-run 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 Second Circuit, along with the First, Fourth, Sixth, Seventh, and Ninth Circuits, have engaged in such an end-run by creating an equitable defense based on a defendant's reliance on a statute this Court later deemed unconstitutional. *See Doughty*, 981 F.3d 128; *Wholean*, 955 F.3d 332; *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 at 392 n.2; *Janus II*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1101. The re-

liance defense these lower courts have created conflicts with this Court's *Reynoldsville Casket* precedent.[1]

IV. This Court should resolve the conflict among the Circuits as to whether a good-faith defense exists to Section 1983 claims or whether Petitioner is entitled to recoup his unconstitutionally seized wages.

A. This Court, along with the Sixth and Tenth Circuits, has found restitution appropriate when a union unconstitutionally charges and takes a fee without regard to a union's purported good faith.

The Court previously recognized the right of plaintiffs to recoup unconstitutional wage seizures in Section 1983 claims against unions. In addition to the portion of its holding overturned by *Janus* allowing fair-share fee seizures, *Abood* also invalidated mandatory agency fees used for political activities. 431 U.S.

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[1] 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 defendants' 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.

at 211. Notably, in so holding, the *Abood* Court directed the lower courts to determine the appropriate remedy for those plaintiffs who had financed the union's political activities with their compulsory fair share fees—without any reference or concern for the union's intent or reliance on prior (valid) law. *Id*. at 235–37.

Abood laid the roadmap for the lower courts to fashion a remedy for the plaintiffs who unwillingly financed political activities of the union by looking to prior Court precedent in *Machinists* v. *Street*, 367 U.S. 740 (1961), and *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963). *Abood*, 431 U.S. at 237–40. *See Seidemann's Petition for a Writ of Cert*., No. 20-1725, at 8-14 (June 10, 2021) for complete discussion. In both *Street* and *Allen*, the Court remanded the cases to determine, *inter alia*, the manner in which employees would receive a "refund" or "restitution" for the portion of union dues used by the unions for political purposes opposed by the employee. *Abood*, 431 U.S. at 238 (discussing *Street*, 367 U.S. at 774– 75 and *Allen*, 373 U.S. at 122).

Relying on this portion of *Abood*, the Tenth Circuit in *Wessel* v. *City of Albuquerque*, 299 F.3d 1186, 1194 (10th Cir. 2002), ordered plaintiff employees "a refund of the portion of the amounts collected that exceed what could be properly charged" following their lawsuit alleging the union's process for compulsory deduction of fair-share fees violated their First Amendment rights. In other words, "the proper remedy for an unconstitutional fee collection . . . is the refund of the portion of the exacted fees proportionate to the union's nonchargeable expenditures." *Id.* at 1195 (quoting *Allen*, 373 U.S. at 122). The Sixth Circuit reached the same conclusion in *Lowary* v. *Lexington Local*

Board of Education, 903 F.2d 422 (6th Cir. 1990), when it held that nonunion teachers challenging a fair-share fee collection plan, including a "local union presumption" for determining what percentage of union expenditures were chargeable to nonmembers, were entitled to recover the "nonchargeable" portion of the unconstitutionally collected fees. *Id.* at 433.

Wessel and *Lowary* are consistent with this Court's conclusions in *Abood*, *Allen* and *Street* that restitution is appropriate to make employees whole after they sustain unconstitutional union fee seizures. Indeed, the conclusion is common sense: unions should have to return monies unlawfully seized from employees.

This Court should resolve the discrepancy between the line of cases finding restitution appropriate for union fee seizures and the decisions of the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits exempting unions from returning their windfall to victimized employees.

B. The lower courts disagree as to the propriety of the unions' good-faith defense to Section 1983 claims.

A majority of a Third Circuit panel in *Diamond*, 972 F.3d 262 rejected the good-faith defense now recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. There were three separate opinions in *Diamond*.

Judge Rendell, writing only for herself, recognized the affirmative good-faith defense that several other circuit courts had recently adopted. *Id.* at 271.

Judge Fisher, concurring in the judgment, rejected the categorical good-faith defense that Judge Rendell

and some other circuits had recognized. *Id*. at 274 (Fisher, J., concurring in the judgment). Judge Fisher found that policy interests in fairness or equality could not justify creating this defense. *Id*. He also found that "the torts of abuse of process and malicious prosecution provide at best attenuated analogies" to First Amendment claims for compelled speech. *Id.* at 280.[2]

Judge Phipps, dissenting, agreed with Judge Fisher that there is no good-faith defense to Section 1983. *Id.* at 285 (Phipps, J. dissenting). According to Judge Phipps, "[g]ood 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. Judge Phipps continued, "Nor does our precedent or even principles of equality and fairness favor recognition of good faith as an affirmative defense to a compelled speech claim for wage garnishments." *Id*.

Taking the opinions together, a majority of the Third Circuit in *Diamond* rejected the good-faith defense recognized by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. *See Doughty*, 981 F.3d

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[2] While he rejected a good-faith defense, Judge Fisher found an alternative limit to Section 1983 liability. According to Judge Fisher, prior to 1871, "[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision." *Id.* at 281. Judge Fisher concluded that Section 1983 incorporates this ostensible liability exception. *Id.* at 284. Judge Fisher's view is idiosyncratic. To Petitioner's knowledge, no court has adopted it.

128; *Wholean*, 955 F.3d 332 (2d Cir. 2020); *Akers*, No. 19-1524, 2021 U.S. App. LEXIS 6851; *Lee*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Janus II*, 942 F.3d at 365; *Danielson*, 945 F.3d at 1101.

This Court should resolve this conflict amongst the circuit courts. This is especially true given that a good-faith defense lacks any cognizable legal basis, just as Judges Fisher and Phipps recognized.

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

The Court should end the growing misconception among lower courts that this Court signaled in *Wyatt* that private defendants should be granted a broad reliance defense to Section 1983 liability akin to qualified immunity. As set forth above, *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. The Court should explain what it meant in *Wyatt*.

It is important that the Court resolve this issue quickly because tens of thousands of victims of past agency fee seizures weigh in the balance. District courts in roughly two dozen cases, most of which were filed as class actions, have held that a good-faith defense exempts unions from having to pay damages to employees whose First Amendment rights the unions violated. *See Danielson*, 945 F.3d at 1104 n.7 (collecting most cases). Without this Court's review, such cases are likely doomed to failure and employees will be left without a remedy. The Court should grant re-

view so the employees in these suits can recover a portion of the "windfall," *Janus*, 138 S. Ct. at 2486, of compulsory fees unions wrongfully seized from them.

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

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.

Respectfully submitted,

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

Jeffrey Schwab
Counsel of Record
Stefanie Tripoli
LIBERTY JUSTICE CENTER
141 W. Jackson St.
Ste. 1065
Chicago IL 60604
(312) 637-2280
jschwab@libertyjustice-
center.org

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