NO. _____

IN THE

Supreme Court of the United States

DAVID SEIDEMANN AND BRUCE MARTIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PROFESSIONAL STAFF CONGRESS LOCAL 2334, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are current and former public-school teachers in the State of New York who declined to join a public union. They seek a refund of the fair-share fees that public-sector unions forcibly took from them and that this Court invalidated in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). The Second Circuit rejected Petitioners' claims and allowed the Respondent unions to keep their ill-gotten gains, concluding that 42 U.S.C. 1983 provides the unions with a good-faith defense. That ruling presents three, distinct questions for this Court's review:

1. Whether the proper remedy for the collection of an illegal fee is refund or restitution, regardless of the purported good faith of the fee collector.

2. Whether this Court's application of a rule of federal law to the parties before it requires every court to give retroactive effect to that decision.

3. Whether 42 U.S.C. 1983 provides a good-faith defense for private entities who violate private rights if the private entities acted under color of a law before it was held unconstitutional.[1]

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[1] This question is similar to the second question presented by the petition in *Ocol* v. *Chicago Teachers Union, et al.*, No. 20-1574, and the first question presented in *Diamond* v. *Pennsylvania State Education Association*, Nos. 19-2812 & 19-3906.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are David Seidemann and Bruce Martin, individually and on behalf of all others similarly situated.

Respondents are Professional Staff Congress Local 2334, Faculty Association of Suffolk County Community College, United University Professors, Farmingdale State College Chapter, National Education Association of the United States, American Federation of Teachers, American Federation of Labor and Congress of Industrial Organizations, American Association of University Professors Collective Bargaining Congress, and New York State United Teachers.

Because no Petitioner is a corporation, Supreme Court Rule 29.6 does not require a corporate-disclosure statement.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Second Circuit, No. 20-460, *David Seidemann and Bruce Martin, individually and on behalf of all others similarly situated* v. *Professional Staff Congress Local 2334, et al.*, judgment entered January 11, 2021.

United States District Court for the Southern District of New York, No. 1:18-cv-09778, *David Seidemann and Bruce Martin, individually and on behalf of all others similarly situated* v. *Professional Staff Congress Local 2334, et al.*, final judgment entered January 10, 2020.

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The district court's opinion and order granting Respondents' motion to dismiss is reported at 432 F. Supp. 3d 367 and reprinted in the Appendix ("App.") at 11a–48a. The Second Circuit's affirmance is reported at 842 F. App'x 655 and reprinted at App. 1a–10a.

STATEMENT OF JURISDICTION

On January 11, 2021, the Second Circuit issued its summary order concluding that Respondent unions were not required to return the illegal fair-share fees they had taken from Petitioners' paychecks because of the unions' good faith under 42 U.S.C. 1983. Lower courts had jurisdiction under 28 U.S.C. 1331, 1343, 1367, and 2201. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. 1983 states, in relevant part:

> 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.

INTRODUCTION

Under New York law, public unions have the right to deduct from the wage or salary of non-union public employees a so-called "fair-share fee." N.Y. Civ. Serv. Law 208(3). In *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), this Court concluded that such a scheme violates free-speech rights by compelling non-union public employees to subsidize private speech on matters of substantial public concern. As a result, "public-sector agency-shop arrangements" like New York's "violate the First Amendment." *Id.* at 2478.

Petitioners David Seidemann, Bruce Martin, and those similarly situated to them filed this lawsuit to recoup the fees that Respondent unions illegally seized during the relevant, pre-*Janus* limitations period. Their theory is simple: when you take something that does not belong to you, you must give it back. And it makes no difference whether that "take" was intentional or inadvertent.

The district court granted the unions' motion to dismiss based on the unions' good-faith defense to liability under 42 U.S.C. 1983, and the Second Circuit affirmed based on its previous decision in *Wholean* v. *CSEA SEIU Local 2001*, 955 F.3d 332, 334 (2d Cir. 2020). *Wholean* held "that a party who complied with directly controlling Supreme Court precedent in collecting fair-share fees cannot be held liable for monetary damages under § 1983." *Id.* at 334. That rule applies, said the Second Circuit, "[e]ven if the retroactivity of *Janus* is presumed." *Id.* at 336. The unions were entitled to rely in good faith on the rule this Court announced in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). *Ibid.*

The Second Circuit's ruling conflicts with decisions of this Court and those of other circuits in three distinct ways. To begin, the Second Circuit's decision conflicts with *Abood* itself. There, too, plaintiffs filed claims challenging agency fees as infringing on their First Amendment rights. And while *Abood* upheld union collection of fair-share fees, the Court invalidated agency fees used for political activities. Critically, Part III of the Court's opinion specified the appropriate remedies on remand: (1) an injunction preventing future use of the fees for political purposes, and (2) "restitution" or "refund" of the fees collected in violation of the Constitution. 431 U.S. at 237–42. This was so even though *Abood* undeniably changed the law, and even though the unions were acting under color of a state law. If restitution or refund was appropriate in *Abood*, then it must be an appropriate remedy here as well.

In reaching the opposite conclusion, the Second Circuit followed the Sixth, Seventh, and Ninth Circuits. *E.g.*, *Ogle* v. *Ohio Civil Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *Janus* v. *AFSCME*, 942 F.3d 352 (7th Cir. 2019), and *Danielson* v. *Inslee*, 945 F.3d 1096 (9th Cir. 2019). But that decision deepened a circuit conflict with the Tenth Circuit and a competing Sixth Circuit decision. In *Wessel* v. *City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), the Tenth Circuit ordered a refund of excess fees that did not benefit the employees from whom those fees were collected. And in *Lowary* v. *Lexington Local Board of Education*, 903 F.2d 422 (6th Cir. 1990), the Sixth Circuit ordered a refund of fees illegally collected before this Court's decision in *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986). Only this Court can resolve these conflicts.

In addition, the Second Circuit's retroactivity analysis conflicts with this Court's holding in *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993). *Harper* admonished that when "this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, *regardless of whether such events predate or postdate* [the Court's] announcement of the rule." *Id.* at 97 (emphasis added). And that is precisely the relief Petitioners request here: to have *Janus* applied to the period before it was issued, just as in *Harper*. Indeed, *Harper* shows that lower courts have no option but to apply *Janus* retroactively in this manner, yet this is precisely what the Second Circuit refused to do.

Finally, the Second Circuit's decision raises several conflicts with respect to the existence and scope of any good-faith defense under 42 U.S.C. 1983. As explained in more detail below, there is now a 4-1 circuit split over whether § 1983 incorporates a good-faith defense at all, and a 6-1 circuit split over whether private defendants like the unions may assert such a defense if it exists. The Second Circuit also erred in concluding that the common-law tort most analogous to Petitioners' claim was abuse of process rather than conversion, where the latter does not allow a good-faith defense.

The bottom line is that the Respondent unions continue to keep monies that do not belong to them. This Court should grant the petition, resolve the multiple conflicts, and vindicate the public employees from whom public-sector unions illegally took fair-share fees until *Janus* stopped that unconstitutional conduct.

STATEMENT OF THE CASE

I. Background

Under N.Y. Civ. Serv. Law 208(3), a public-employee union has the right to take wages or salary from public employees who are not members of the union, a so-called "fair-share fee." Petitioners David Seidemann, Bruce Martin, and many others like them, were teachers at New York public institutions who chose not to join a public-employee union. Am. Class-Action Compl. ¶¶ 1–2. Nonetheless, their employers relied on New York's pro-union law and deducted fair-share fees from their paychecks on a bi-weekly basis. *Id.* ¶¶ 15–18.

It is undisputed that this taking of public-teacher wages violated Petitioners' free-speech rights; that was the whole point of this Court's holding in *Janus*. Yet post-*Janus*, the unions have declined to return their illegal seizure of Petitioners' wages, precipitating this class-action lawsuit.

II. Proceedings

Petitioners filed their amended class-action complaint under 42 U.S.C. 1983, requesting an injunction against Respondent unions' further assessment of fair-share fees and requesting a refund for past fees unlawfully withheld or collected. The district court granted the unions' motion to dismiss, holding that Petitioners lacked standing to request injunctive relief because there was no threat that the unions would continue collecting fees in violation of *Janus*, App. 20a–26a, and Petitioners' refund claims were barred by the unions' good-faith defense, App. 26a–40a.

In rejecting Petitioners' refund claims, the district court concluded that (1) private actors as well as public actors can raise a good-faith defense in response to § 1983 claims, App. 27a–29a; (2) Petitioners' refund claim is most analogous to a common-law abuse-of-process claim (rather than a conversion claim) and therefore allows the unions to assert the defense under § 1983, App. 30a–32a; (3) the defense can be invoked by entities as well as individuals, App. 32a–33a; (4) the good-faith defense is not limited to the performance of government functions, App. 53a; (5) *Janus*'s declaration that compelled fair-share fees are unconstitutional does not foreclose a good-faith defense, App. 34a–35a; (6) Petitioners' entitlement to a return of the fair-share fees does not foreclose a good-faith defense, App. 36a–37a; and (7) the unions are entitled to the good-faith defense as a matter of law, notwithstanding this Court repeatedly placing the unions on notice of *Abood*'s shaky ground before deciding *Janus*, App. 37a–39a. The district court also held Petitioners' state-law claims for conversion and unjust enrichment barred by a recently enacted New York statute that bars all refund claims based on New York law post-*Janus*. App. 40a–47a.

The Second Circuit affirmed in a Summary Order based on its previous decision in *Wholean*, which addressed some of the same issues in an indistinguishable context. App. 7a–8a (discussing *Wholean* v. *CSEA SEIU Local 2001*, 955 F.3d 332, 334 (2d Cir. 2020), *cert. denied* 2021 WL 1163740 (2021) (Case No. 20-605)). In *Wholean*, the Second Circuit held that "a party who complied with directly controlling Supreme Court precedent in collecting fair-share fees cannot be held liable for monetary damages under § 1983." *Id.* at 334.

The *Wholean* opinion noted that this Court in *Wyatt* v. *Cole*, 504 U.S. 158, 168 (1992), left open the question of whether private parties may invoke a good-faith defense in response to § 1983 liability. 955 F.3d at 334–35. And it followed those circuits that have "held that a good-faith defense exists under § 1983 for private individuals and entities acting under the color of state law who comply with applicable law, including three circuits who have concluded that a good-faith defense is available to unions that relied on *Abood* and applicable state law in collecting fair-share fees prior to *Janus*." *Id.* at 335 & n.2 (citing *Ogle* v. *Ohio Civil Serv. Emps. Ass'n*, 951 F.3d 794, 797 (6th Cir. 2020); *Lee* v. *Ohio Educ. Ass'n*, 951 F.3d 386, 390–91 (6th Cir. 2020); *Danielson* v. *Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019), and *Janus* v. *AFSCME*, 942 F.3d 352, 366 (7th Cir. 2019)).

The *Wholean* opinion further opined that *Janus* was not intended to be retroactive. 955 F.3d at 336. And it concluded—without reasoning or citation to any authority—that "[e]ven if the retroactivity of *Janus* is presumed, no different outcome is warranted. A good-faith defense would still preclude the relief [the public employees] seek." *Ibid.*

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to resolve a conflict with this Court's *Abood* decision and a related circuit split over the propriety of a refund claim when a union unconstitutionally charges and takes a fair-share fee.

The first obvious problem with the Second Circuit's ruling is its conflict with *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and circuit decisions that have relied on it.

Because *Janus* overruled *Abood*'s holding regarding fair-share fees, it is often forgotten that *Abood* itself invalidated agency fees used for political activities. The *Abood* plaintiffs were public-school teachers who filed suit to challenge a service fee "equal in amount to union dues." 431 U.S. at 211. The issue was whether the fees "violate[d] the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees." *Ibid.* This Court concluded that the Constitution prohibits public-employee unions from advancing political views, candidates, or other ideological causes not germane to the collective-bargaining process using "charges, dues, or assessments paid by employees who" object to doing so and are coerced into paying "by the threat of loss of governmental employment." *Id.* at 235–36.

Part III of the opinion gave the lower courts guidance about "determining what remedy will be appropriate." 431 U.S. at 237. In so doing, the Court was guided by its decisions 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.

In *Street*, this Court ruled in favor of plaintiffs who objected to the use of union fees for certain political purposes, in violation of the Railway Labor Act. The union there defended its agency-fee practices by relying on a Michigan law that authorized the fees. After rejecting that defense and holding the fees unconstitutional, the Court remanded the case and outlined two possible remedies: (1) an injunction prohibiting the unions from using the fees of objecting employees for political purposes, and (2) "*restitution* of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee." *Abood*, 431 U.S. at 238 (discussing *Street*, 367 U.S. at 774–75) (emphasis added).

Similarly, the Court in *Allen* was required to address the remedy question after ruling in favor of public employees "who had refused to pay union-shop dues" but "had not notified the union prior to bringing the lawsuit of their opposition to political expenditures." *Abood*, 431 U.S. at 239 (discussing *Allen*, 431 U.S. at 118–19). The Court reiterated the appropriateness of the injunction and restitution remedies, and it "remanded for determination [and calculation of refund payments] of which expenditures were properly to be characterized as political and what percentage of total union expenditures they constituted." *Ibid.* (summarizing *Allen*, 431 U.S. at 122). Specifically, the Court outlined a "practical decree" that would provide for "(1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion." *Id.* at 240 (analyzing *Allen*, 373 U.S. at 122).

Following the holdings of *Street* and *Allen*, the *Abood* Court reversed the Michigan Court of Appeals' ruling "that the plaintiffs were entitled to no relief," because that decision deprived the plaintiffs of their opportunity to establish their right to restitution or a refund. 431 U.S. at 241–42. And it did so in a context where the Court changed the law by addressing an issue that had not previously been resolved—the validity of a state-approved collective bargaining agreement's agency-shop provision under the U.S. Constitution.

There is no daylight between the circumstances in *Abood* and those here other than the fact that *Janus* overruled a previous Supreme Court precedent. So if restitution or refund was appropriate in *Abood*, where the unions similarly relied on a state law authorizing them to assess agency fees, the same remedy should be available here after *Janus*.

Post-*Abood* circuit-court decisions confirm this. In *Wessel* v. *City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), union nonmembers sued their city employer, alleging that the union's process for compulsory deduction of fair-share fees violated their First Amendment rights. After agreeing that the union's notice of expenses for political activities was insufficient, the Tenth Circuit unequivocally ordered "a refund of the portion of the amounts collected that exceed what could be properly charged." *Id.* at 1194–95. 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). There was no question that the unions had to pay back or refund the improper fees collected.

Likewise, in *Lowary* v. *Lexington Local Board of Education*, 903 F.2d 422 (6th Cir. 1990), nonunion teachers challenged a fair-share fee collection plan, including a "local union presumption" for determining what percentage of union expenditures were chargeable to nonmembers. The Sixth Circuit held the scheme unconstitutional and concluded that the plaintiffs were entitled to recover "the nonchargeable portion of the unconstitutionally collected fees." *Id.* at 433.[1]

The Second Circuit's decision here—as well as the Sixth Circuit's decisions in *Ogle* and *Lee*, the Seventh Circuit's decision in *Janus* on remand, and the Ninth Circuit's decision in *Danielson*—cannot be reconciled with *Abood*, *Wessel*, and *Lowary*. Either the post-*Janus* decisions are correct that an agency-fee refund is *never* available if a union unconstitutionally collects the fee under color of a law that is later deemed invalid, or this Court and the Sixth and Tenth Circuits were correct that a refund or restitution is *always* the appropriate remedy. This Court should grant the petition, reverse, and reaffirm that portion of *Abood* which held that unions must return illegally obtained agency fees from public employees.

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[1] In deciding the merits, the Sixth Circuit held that this Court's decision in *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986), should be applied retroactively under the three-part test articulated in *Chevron Oil Co.* v. *Hudson*, 404 U.S. 97 (1971). As discussed at greater length below, *Chevron* has since been superseded by *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993), which holds that this Court's "controlling interpretation of federal law [ ] must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Id.* at 97.

Significantly, nothing in *Abood* suggests that the unions' good faith is legally relevant. Once fees turn out to be illegal, they must be returned. If a § 1983 defendant "was wrong, even innocently, it should not be allowed to retain" money unlawfully collected. *Fairfax Covenant Church* v. *Fairfax Cty. Sch. Bd.*, 17 F.3d 703, 710 (4th Cir. 1994).[2]

Here, the unions violated the law, albeit supposedly innocently. ("Supposedly" is warranted because, as *Janus* held, "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*" and have received a "considerable windfall" under *Abood*. *Janus*, 138 S. Ct. at 2484, 2486.) But what is clear is that Petitioners bear absolutely no fault. They objected to the fee deductions, and this Court has determined those deductions were unconstitutional. Equity favors the party whose constitutional rights have been violated, not the violator—even if the violator has acted innocently. *Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 655 (1980). And it is precisely where a defendant is *not* at fault that restitution or refund is most appropriate. *E.g.*, Restatement (3d) of Restitution § 40 cmt. *b* (2011) ("[I]nnocent trespassers and converters are liable in restitution for the value of what they have acquired . . . but not for consequential gains.").

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[2] Nor is restitution or refund precluded by an ability to trace the money. As *Abood* explained, in "proposing a restitution remedy, the *Street* opinion made clear that '[t]here should be no necessity . . . for the employee to trace his money up to and including its expenditure.'" 431 U.S. at 238 n.38 (quoting *Street*, 367 U.S. at 775).

In this respect, unconstitutional prejudgment remedies provide a good analogy to Petitioners' claim here. In *Sniadach* v. *Family Financial Corporation*, 395 U.S. 337 (1969), this Court held unconstitutional state statutes allowing prejudgment garnishment or replevin. Later, in *Osmond* v. *Spence*, 359 F. Supp. 124 (D. Del. 1972), the court addressed "a form of the prejudgment garnishment procedure declared unconstitutional in [*Sniadach*]." *Id.* at 128. What was the appropriate remedy? "Under the authority and rationale of *Sniadach*, the Court concluded that the monies must be returned to the debtors from whose wages they were deducted." *Id.* at 128. Indeed, Petitioners are unaware of *any* case holding that property seized through an unconstitutional prejudgment remedial statute does not need to be returned.

It is unimaginable that a prejudgment creditor would be able to keep wages garnished from an alleged debtor's paycheck in reliance on an unconstitutional statute. It would make no difference that the creditor relied "in good faith" on the statute, which was struck down only after the garnishment had been accomplished. Yet the unions' position here, which the lower courts accepted, is no different. Their result should be equally unimaginable.

One last analogy. Section 19 of the Third Restatement of Restitution addresses the recovery of tax payments. Under that section, "the payment of a tax that is erroneously or illegally assessed or collected, gives the taxpayer a claim in restitution against the taxing authority as necessary to prevent unjust enrichment." Restatement (3d) of Restitution § 19(1). Comment *a* explains that "[t]he rule in this section recognizes a prima facie claim in restitution to recover any payment of taxes, fees, or other

governmental charges in excess of the taxpayer's true legal obligation." Comment *c* adds: "Any payment of tax in excess of the taxpayer's legal liability, correctly determined, gives rise to a prima facie claim in restitution." Finally, comment *d* explains that it makes no difference that the assessment was incorrectly determined based on a legal statute or was correctly determined based on an unconstitutional or illegal statute. No matter the circumstances, the government must refund the improperly assessed tax or fee. Thus, Illustration 10 in Section 19 provides: "Taxpayer makes payments to State under a tax that is subsequently held to violate the federal Constitution. Taxpayer has a claim against State to recover the amount of the illegal tax." Restatement (3d) of Restitution § 19, cmt. *e*, illus. 10.

So too here. If the State of New York had levied an unlawful tax on David Seidemann, Bruce Martin, and other public-school teachers working in the State, and the teachers paid the unlawful tax under objection and then sued, no court anywhere would have denied them a refund based on the State's purported "good faith." It makes no difference here that "the State" was a public-employee union acting under color of state law or that the unlawful "tax" was an unlawful agency fee. Just like a state taxing authority, the unions must refund the money.

The unions have never suggested that Petitioners were somehow at fault here. The unions' best-case scenario is that neither side was at fault (though *Janus* calls the unions' good faith into serious question). There is no reason that the unions should get to keep monies that rightfully belong to our nation's public servants.

II. This Court should also grant review to resolve a conflict with this Court's retroactivity jurisprudence.

The Second Circuit erred a second way in considering the retroactive effect of this Court's decision in *Janus*. App. 7a–8a (relying on *Wholean* as the law of the Circuit). In *Wholean*, the Second Circuit examined *Janus* and concluded that nothing in the opinion "suggests that the Supreme Court intended its ruling to be retroactive." 955 F.3d at 336. Moreover, without any reasoning or citation to authority, the Second Circuit concluded that "[e]ven if the retroactivity of *Janus* is presumed, no different outcome is warranted" because a "good-faith defense would still preclude the relief" of a refund. *Ibid.* The Second Circuit's approach conflicts radically with this Court's view of retroactivity.

Under this Court's precedent, *Janus* must be applied retroactively. This point is made crystal clear by *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993), which held that when "this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, *regardless of whether such events predate or postdate* [the Court's] announcement of the rule." *Id.* at 97. *Harper* involved a plaintiff's refund claim and resulted in the plaintiff receiving that refund for four years of government tax assessments that took place *before* the governing precedent was reversed. The decision is on all fours with this case and in direct conflict with the Second Circuit's retroactivity analysis.

The *Harper* litigation's genesis was this Court's decision in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989). In *Davis*, this Court invalidated a Michigan tax law that taxed federal pension benefits while exempting state and local pension benefits. Because the State of Michigan recognized that a refund was appropriate, this Court recognized that the federal retirees were entitled to a refund of taxes paid pursuant to the invalid tax law.

Twenty-three other states, including Virginia, had similar laws. After *Davis*, Virginia promptly repealed its similar statute (unlike New York, which, despite *Janus*, has not repealed its agency-fee statute). While Harper was no doubt pleased with that development, he was not satisfied; he sought a refund of taxes he had paid *before* the Virginia statute was repealed, specifically, going back to 1985, four years before this Court issued its decision in *Davis*.

The Virginia state courts held that Harper could recover taxes paid *after* the Supreme Court decided *Davis*, but not for the years *before Davis*—precisely the position the Second Circuit took here. So, Harper petitioned for review, and this Court remanded to the Virginia Supreme Court to reconsider in light of *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991). On remand, the Virginia Supreme Court affirmed its previous decision denying Harper a refund of taxes paid for the four years before *Davis*.

Harper petitioned for review again, and this time, this Court granted it. In 1993, the Court issued its opinion in *Harper*, reversing the Virginia Supreme Court's decision that Harper was not entitled to a refund of the taxes he paid before the issuance of *Davis*.

As noted above, *Harper* held that *Davis* "must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate" the decision. 509 U.S. at 97. On that basis, this Court remanded the case to the Virginia Supreme Court yet again for further proceedings consistent with the decision. And this time, the Virginia Supreme Court got it right, ruling that Harper was entitled to a refund of the taxes he had paid, not only after the Supreme Court decided *Davis* but also for the four years before *Davis* was decided. This was so even though Virginia had no reason to know *before Davis* that its tax law was unconstitutional.

This Court's *Harper* decision shows that retroactivity entitles a plaintiff to obtain relief *for the period before the relevant statute was determined to be unconstitutional*—that is, for the period when the unconstitutional statute was presumptively valid. This is precisely the relief Petitioners request—to have *Janus* applied to the period before it was issued. That's exactly what happened in *Harper* and what should happen here.

It doesn't matter that *Janus* overruled *Abood*. As the concurring and dissenting opinions in *Harper* recognized, *Harper* retroactivity applies even though the new decision "overrule[s] clear past precedent on which litigants may have relied"—as here—or "decid[es] an issue of first impression whose resolution was not clearly foreshadowed." 509 U.S. at 110–11 (Kennedy, J., concurring); *id.* at 123 (O'Connor, J., dissenting).

Similarly, retroactive application of *Janus* precludes a good-faith defense for relying on the unconstitutional statute. New York's fair-share-fee

statutes are "void," *Marbury* v. *Madison*, 1 Cranch 137, 177–80 (1803), they "afford[ ] no protection," *Norton* v. *Shelby Cty.*, 118 U.S. 425, 442 (1886), and no defense may be premised on them, *Richardson* v. *United States*, 465 F.2d 844, 850 (3d Cir. 1972) (*en banc*), *rev'd on other grounds*, 418 U.S. 166 (1974). "[W]hat a court does with regards to an unconstitutional law is simply to ignore it" and "provide[ ] a remedy." *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., concurring). Accordingly, *Wholean* is wrong and in irreconcilable conflict with this Court's view of retroactivity in the context of refunds.

What *Harper* requires is consistent with what is required under the declaratory theory of law. In *James B. Beam*, Justice Souter opined that full retroactivity "reflects the declaratory theory of law, according to which courts are understood only to find the law, not to make it." 501 U.S. at 535–36 (Souter, J.) (citation omitted). Justice Scalia expounded on this theory in his concurring opinion. The Court, he said, has "the power 'to say what the law is,' not the power to change it." *Id.* at 549 (Scalia, J., concurring) (citing *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Judges "make" law but only "*as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*." *Ibid.*

The declaratory theory of law applies here. Per *Janus*, the Constitution does not allow—and thus *never* did allow—New York to force a public-sector employee to pay agency fees. Such *fees were always invalid*. And because *Abood* was mistaken in its construction of the Constitution, it is as though *Abood* never existed. So the New York agency-fee statute at

issue here did not *become* invalid on June 27, 2018; rather, it was void *ab initio*. Yet the Second Circuit ignored the declaratory theory of law, and the district court declined to apply the theory because, in part, doing so would require it to reject the good-faith defense. App. 34a–35a.

In so doing, the Second Circuit effectively said that up to the time this Court overruled in *Janus*, a union is protected from paying back illegally collected fair-share fees because it relied on a statute premised on *Abood*. That is *not* a retroactive application of *Janus*. As just explained, retroactive application of *Janus* requires the Court to treat *Abood* as though it never existed. *Harper*, 509 U.S. at 97. This Court should grant review, correct the Second Circuit's retroactivity analysis, and direct the unions to refund the monies they improperly took from Petitioners' paychecks.

III. Finally, this Court should grant review to resolve two distinct circuit splits and correct an error regarding the unions' good-faith defense to § 1983 liability.

The Second Circuit's *Wholean* precedent also creates two distinct circuit conflicts and an unforced error regarding § 1983 liability and a good-faith defense. Each will be described briefly here.

1. Three times this Court has considered but not decided whether a good-faith defense to § 1983 liability even exists. See *Richardson* v. *McKnight*, 521 U.S. 399, 413–14 (1997); *Wyatt* v. *Cole*, 504 U.S. 158, 169 (1992); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). And there has developed a 4-1 circuit split over that very question.

Four circuits—the Second, Sixth, Seventh, and Ninth—have held that there is a good-faith defense to § 1983 liability for unions who supposedly acted in good faith when taking fair-share fees from objecting public employees' paychecks. *Wholean*, 955 F.3d at 334–35; *Ogle* v. *Ohio Civ. Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020); *Janus* v. *AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019); *Danielson* v. *Inslee*, 945 F.3d 1096 (9th Cir. 2019). Even among these circuits, there is little agreement as to why that should be so. The Ninth Circuit points to equality and fairness. *Danielson*, 945 F.3d at 1101. The Sixth Circuit analogizes the defense to the common-law abuse-of-process tort. *Ogle*, 951 F.3d at 797. The Seventh Circuit did, too, though it questioned whether such a justification was even necessary. *Janus*, 942 F.3d at 365–66.

The Third Circuit panel majority disagreed in *Diamond* v. *Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020). Judge Fischer recognized that it was "beyond our remit to invent defenses to § 1983 liability based on our views of sound policy." *Id.* at 274 (Fischer, J., concurring in the judgment). And Judge Phipps concluded that "[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 (Phipps, J., dissenting). (Judge Fisher nevertheless concurred in the judgment dismissing fair-share-fee-refund claims because he believed that the common law in 1871 allowed a defense for a voluntary payment made before a statute requiring the payment was declared unconstitutional. But Petitioners did not make any payment—their money was withheld as a payroll deduction—let alone make the payment voluntarily.)

The Third Circuit got it right because good faith is not now, and never was, a common-law defense. Section 1983 creates liability but is silent about whether any immunity or defense tempers that liability. See *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). Of course when Congress created the law in 1871, it could have expressly provided that no immunities or defenses applied, but Congress didn't do that. So "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Id.* at 418; accord *Filarsky* v. *Delia*, 566 U.S. 377, 389 (2012).

Judge Phipps's opinion in *Diamond* explains exactly why good faith cannot be considered an affirmative defense at common law. He starts by noting that of the 18 affirmative defenses listed in Federal Rule of Civil Procedure 8(c), none mentions "good faith." 972 F.3d at 285 (3d Cir. 2020) (Phipps, J., dissenting). Moreover, leading treatises supplement those 18 defenses but do not identify a common-law good-faith affirmative defense either. *Id.* at 285–86 (citing Arthur R. Miller et al., Federal Practice and Procedure § 1271 (3d ed., Apr. 2020 Update), and 2 Jeffrey A. Parness, Moore's Federal Practice § 8.08 (3d ed. 2020)). "If a good faith affirmative defense were deeply rooted in the common law, such as defenses like statute of limitations, laches, or accord and satisfaction, then one would expect to find it listed in Rule 8(c)—or at least to make a showing in a leading treatise." *Id.* at 286.

"Similarly," notes Judge Phipps, "a review of other statutory causes of action reveals that Congress has not understood good faith to be so deeply rooted as to go unspoken." 972 F.3d at 286 (Phipps, J., dissenting). "Rather, when Congress wants to include

good faith as an affirmative defense, it does so expressly." *Id.* at 286 & n.1 (numerous examples omitted). "And that begs the question: if the good faith defense were so well established that it could be assumed 'that Congress [in enacting § 1983] would have specifically so provided had it wishes to abolish the doctrine,' then why did Congress find the need to expressly provide for the defense in many other statutes but not in § 1983?" *Id.* at 286 (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)). "In sum, the *absence* of a good faith affirmative defense from Rule 8(c) along with its *presence* as a defense in other federal statutes suggests that today the good faith affirmative defense is not firmly rooted in the common law." *Id.*

Unsurprisingly, Petitioners, like the parties in *Diamond*, are unaware of any "pre-1871 case recognizing a common-law good faith affirmative defense—either as a general matter or in the context of any particular cause of action." 972 F.3d at 286 (Phipps, J., dissenting). There is simply no evidence that good faith was a common-law defense in 1871. Quite the opposite, in 1836, this Court expressly rejected a good-faith defense. *Tracy* v. *Swarthout*, 35 U.S. 80, 95 (1836). And state courts in the mid- to late 1800s did not appear to recognize such a defense either. *E.g.*, *Kelly* v. *Bemis*, 4 Gray 83, 84 (Mass. 1855) (holding that a justice of the peace, who issues a warrant under an unconstitutional statute, is liable in damages to the person arrested); *Sumner* v. *Beeler*, 50 Ind. 341, 342 (1875) (holding that "ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void").

Perhaps the "strongest case for such a defense," Judge Phipps explains, "comes from Chief Justice Rehnquist's dissenting opinion in *Wyatt* v. *Cole*." 972 F.3d at 287 (Phipps, J., dissenting). But even Chief Justice Rehnquist "viewed the good faith defense as 'something of a misnomer' because it actually referred to elements of the common-law torts of malicious prosecution and abuse of process." *Ibid.* (quoting *Wyatt*, 504 U.S. at 176 & n.1 (Rehnquist, C.J., dissenting)). Chief Justice Rehnquist provided no authority suggesting good faith was a *defense*, but rather he only showed that "the elements of two common-law tort claims could be defeated by proof of subjective good faith." *Id.*

Given § 1983's status as the nation's preeminent civil rights statute, whether the statute includes a common-law good-faith defense is no small matter. The issue is of critical importance to many, but particularly to the public employees represented in the 37 class action lawsuits that seek refunds from unions for fair-share fees that the unions took from workers' paychecks in violation of the First Amendment. Amicus Br. of Goldwater Inst. 4, *Janus* v. *AFSCME, Council 31*, No. 19-1104 (Apr. 9, 2020). It is long past time for this Court to decide the question left open in *Wyatt* and determine whether good faith was a defense at common law and is therefore a defense today to a § 1983 claim.

2. Assuming a good-faith defense to § 1983 liability exists, there is also a 6-1 circuit split over whether private defendants like the unions may invoke it.

In *Downs* v. *Sawtell*, 574 F.2d 1 (1st Cir. 1978), the First Circuit emphatically rejected a good-faith defense for private entities. The court observed that while this Court has "reasoned that a 'good faith' qualified immunity is an integral part" of § 1983's background, "the Court has never held that private individuals are in any way shielded from damage liability in a comparable fashion." *Id.* at 15 (quoting *Pierson* v. *Ray*, 386 U.S. 547, 556–57 (1967)). The First Circuit declined to recognize such a defense because private-party immunity "could in many instances work to eviscerate the fragile protections of individual liberties." *Ibid.* Unlike public actors, "[p]rivate parties simply are not confronted with the pressure of office, the often split-second decision-making or the constant threat of liability facing police officers, governors and other public officials." *Ibid.* "Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights." *Id.* at 15–16. Accordingly, the First Circuit held that the private defendant's liability was "to be determined by the jury without regard to any claim of good faith." *Id.* at 16. The First Circuit later reaffirmed this decision in *Lovell* v. *One Bancorp*, 878 F.2d 10, 13 (1st Cir. 1989).

The Ninth Circuit initially reached the same conclusion. Acting five years after *Downs*, that court held that "there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights." *Howerton* v. *Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983). Later, however, the Ninth Circuit allowed a private defendant to assert a

good-faith defense to § 1983 liability without acknowledging *Howerton*. *Clement* v. *City of Glendale*, 518 F.3d 1090 (9th Cir. 2008). And when confronted with this conflict in the context of unions illegally taking fair-share fees from objecting public employees' paychecks, the Ninth Circuit later characterized *Howerton* as denying only qualified immunity to private defendants, even though that's not what *Howerton* did or said. See *Danielson* v. *Inslee*, 945 F.3d 1096, 1099 (9th Cir. 2019).

If one takes the Ninth Circuit's latest word on the good-faith defense's availability to private defendants, then the Ninth Circuit falls in the same camp as the Second, Third, Fifth, Sixth, and Seventh Circuits. *Pinsky* v. *Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Jordan* v. *Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994); *Wyatt* v. *Cole*, 994 F.2d 1113 (5th Cir. 1993), *Vector Research, Inc.* v. *Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *Janus* v. *AFSCME, Council 31*, 942 F.3d 352, 361–64 (7th Cir. 2019). Otherwise, it is in the First Circuit's camp.

All these later-decided cases post-date *Wyatt* v. *Cole*, 504 U.S. 158 (1992), which left open whether private defendants could assert a good-faith defense, *id.* at 169. Presumably the Court did so because, prior to *Filarsky* v. *Delia*, 566 U.S. 377, 392–94 (2012), a private actor was foreclosed from asserting qualified immunity. *Wyatt*, 504 U.S. at 167. But now that this Court has held that qualified immunity *can* be applied to some private defendants, there is no legal justification for a good-faith defense for a private union based on the good faith of its individual officials, as explained in an analogous context in *Owen* v. *City of Independence, Mo.*, 445 U.S. 622 (1980).

At the time this Court decided *Owen* in 1980, qualified immunity and good-faith immunity (or defense) were one and the same. It was not until two years later, in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), that the Court untethered qualified immunity from its historical, good-faith roots. But the modifications *Harlow* made to qualified immunity did not change the preexisting good-faith defense. And, as the holding in *Owen* shows, that defense does not protect the unions here. In fact, *Owen* reversed the Eighth Circuit's ruling that the city "'is entitled to qualified immunity from liability' based on the good faith of its officials." *Owen*, 445 U.S. at 625.

In April of 1972, Owen, the city's former police chief, was fired for alleged wrongdoing without first being provided notice of the reasons for the firing and an opportunity for a pre-termination hearing. *Id.* at 629. Two months later, this Court decided *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), holding that a public employee was entitled to notice and an opportunity for a hearing before being fired. Because these rights were not crystalized until *after* the city fired Owen, the Eighth Circuit held that (a) the individual defendants involved in firing him acted in good faith and therefore were entitled to good-faith immunity, and (b) the city was "'not liable for actions it could not reasonably have known violated [Owen's] constitutional rights.'" *Owen*, 445 U.S. at 634 (quoting *Owen* v. *City of Independence, Mo.*, 560 F.2d 925 (8th Cir. 1978)). While this Court did not object to granting good-faith *immunity* to the individuals, the Court refused to allow the city to ride the coattails of its employees' *good faith*.

Explaining why, this Court began with the fact that, "[b]y its terms, § 1983 'created a species of tort that on its face admits of no immunities.'" *Id.* at 635 (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976)). So any immunity (or defense, as *Imbler* and *Filarsky* show) that would be applied against a § 1983 claim must be "'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Id.* at 638 (quoting *Imbler*, 424 U.S. at 421). Not only that, public-policy justifications must also support the application of an immunity before it can be apply against a § 1983 claim. *Ibid.* The Court held that neither of these requirements protected the city based on its employees' good faith. *Ibid.*

Looking first at the state of the law in 1871, the Court observed that, "by 1871, municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Owen*, 445 U.S. at 638–39. "[I]t is clear that at the time § 1983 was enacted, local governmental bodies did not enjoy the sort of 'good-faith' qualified immunity extended to them by the Court of Appeals." *Id.* at 640. Indeed, "one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers," such that "the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful." *Id.* at 641. "In sum, we can discern no 'tradition so well grounded in history and reason' that would warrant the conclusion that in enacting § 1 of the Civil Rights Act [now codified at § 1983], the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers." *Id.* at 650.

Further, this Court held that public-policy considerations did not support extending good-faith protection to the employer even if the employees were so protected. Central to this conclusion was the rule that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees[.]" *Id.* at 651. While it may be unjust to hold individual employees liable for their good-faith violations, it is not unjust to hold the employer liable for those violations. *Id.* at 654–55. Specifically, the public policy of ensuring that government employees not be deterred from carrying out their duties does not come into play if only the employer is liable. *Id.* at 655–56. Thus, under *Owen*, even if an employee's good-faith protects that employee against § 1983 liability, it does not protect the employer: "We hold . . . that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983." *Id.* at 638.

While *Owen* addressed the extent of municipal liability in 1871, the case shows that private entities—like the unions here—were also liable in tort despite the good faith of their employees. Thus, the Court observed that, in 1871, "a municipality's tort liability in damages was identical *to that of private corporations*[.]" *Id.* at 640 (emphasis added). From this, one deduces that, in 1871, a private employer would *not* have been protected from liability because its employee acted in good faith. *Cf. Wyatt*, 594 U.S. at 174 (Kennedy, J., concurring) ("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"). In sum, good faith cannot insulate the unions from § 1983 liability.

3. To the extent a good-faith defense to § 1983 liability exists and is available to private parties, then it must be analyzed in terms of the common-law tort most analogous to Petitioners' claim. *Imbler*, 424 U.S. at 418 (§ 1983 must "be read in harmony with general principles of tort immunities *and defenses*") (emphasis added). And contrary to the Second Circuit's analysis here, App. 8a ("*Wholean* controls") and in *Wholean*, 955 F.3d at 335, the tort most analogous to Petitioners' claim is conversion, not abuse of process.

The common-law tort of abuse of process applied when a person "ma[de] use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court." C.G. Addison, *The Law of Torts* 257 (1870). That tort is nothing like what happened here, where the unions unlawfully took money from Petitioners' paychecks and won't give it back. The proper damages remedy for a tort like conversion is restitution or reparation—compelling the defendant to put the plaintiff back in the position where the plaintiff would have been had the conversion not been committed, *regardless of good faith*. F. Pollock, *The Law of Torts*, 12–13 (1887); Restatement (3d) of Restitution § 40 cmt. b (2011). That should be Petitioners' remedy here, too.

IV. This case is an ideal vehicle to resolve the numerous conflicts presented and to give full effect to *Janus*.

For five reasons, this petition provides an ideal vehicle for this Court to resolve the glaring conflicts that have arisen as circuit courts have persistently blocked plaintiffs from vindicating their rights post-*Janus*.

First, the validity of the union's good-faith defense was dispositive and outcome-determinative. The Second Circuit held that the unions' reliance on N.Y. Civ. Serv. Law § 208(3) and *Abood* required the dismissal of Petitioners' federal claims. App. 8a & n.1. If this Court concludes that the unions cannot assert a good-faith defense—whether based on *Abood*'s remedies analysis, a proper retroactive application of *Janus*, or a determination that a good-faith defense is not available under § 1983, is not available to private-party § 1983 defendants, or is not available to a § 1983 claim analogous to conversion—then dismissal must be reversed and judgment entered in favor of Petitioners. The only remaining issues will be those related to class certification.

Second, the record provides a clean vehicle for deciding the three questions presented. The district court ruled on a motion to dismiss, and both it and the Second Circuit rejected Petitioners' claims entirely because of the unions' assertion of their supposed good faith. There are no disputes of any material facts or jurisdictional defects that will prevent this Court from squarely deciding the questions presented.

Third, there is a gross inequity here and in the numerous other pending class actions seeking a refund of unlawful fair-share fees paid before *Janus*. As discussed in more detail above, there is no court in the country that would bar a plaintiff from receiving a refund for taxes paid under an unconstitutional taxing scheme, no matter the good faith of state tax officials. Nor is there a court in the country that would prevent a plaintiff from recovering wages garnished from a paycheck notwithstanding the purported creditor's good-faith reliance on an unconstitutional statute. The result should be the same here.

Fourth, while this Court has recently declined to grant public-employee petitions asserting similar claims and raising variations on the third question presented here, this petition is the Court's first opportunity to squarely apply *Abood*'s remedy analysis and *Harper*'s retroactivity requirements to a circuit-court decision that has badly botched both. It is inconceivable that the plaintiffs were entitled to a refund of illegally garnished agency fees in *Abood* while Petitioners are barred from obtaining a refund of illegally garnished agency fees here. And it makes no sense to speak of the unions' "good faith" given *Harper*'s clear instruction that, properly applying *Janus*, it is as though N.Y. Civ. Serv. Law 208(3) and *Abood*'s fair-share-fee holding never existed.

Finally, while this Court has allowed the circuit splits framed by the third question presented to percolate, it is long past time for the Court to resolve them. The initial circuit rulings upholding the unions' keeping of ill-gotten fair-share fees have had a domino effect, and aside from the partial vindication announced by the Third Circuit in *Diamond*, millions of public employees—especially teachers—are being forever barred from recouping their hard-earned dollars that the unions illegally took from them. If the Court does not act here, for example, no teachers at public institutions in New York will ever have a remedy for the unlawful taking of their salaries by public-sector unions. After this Court in *Harris* v. *Quinn*, 573 U.S. 616 (2014), put public-sector unions on notice that fair-share fees were unconstitutional, those unions managed to effect one of the largest (non-tax) transfers of wealth in this country's history at the expense of public servants. The petition should be granted.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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