NO. 20-1725

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

REPLY BRIEF FOR PETITIONERS

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REPLY ARGUMENT SUMMARY

The Respondent unions are simply wrong that this Court has previously denied petitions raising the first and second questions presented here.

As to the first question—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, as this Court held in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and *Machinists* v. *Street*, 367 U.S. 740 (1961)—the unions cite to the petition in *Danielson* v. *Pennsylvania State Education Association*, Nos. 19-2812 & 19-3906. But the *Danielson* petition did not raise that question. And the unions' attempt to reconcile the decision below with *Abood* and *Street* underscores the conflict this Court must resolve.

On the second question—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, as this Court held in *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993)—the unions cite the cert. petition in *Ogle* v. *Ohio Civil Service Employees Ass'n*, No. 20-486. But the *Ogle* petition did not present a retroactivity question, and it touched on the issue only in passing. Tellingly, the opposition brief in *Ogle* did not even mention *Harper*, and the unions here do not address the substance of the retroactivity argument at all.

Regarding the third question presented, the unions do not dispute the multiple circuit splits the question implicates. Nor do the unions contest that they hold millions of dollars that they took illegally from innocent New York teachers. The petition should be granted.

REPLY ARGUMENT

I. This Court has not considered a petition involving the first question presented, and that question is meritorious.

The Respondent unions rely heavily on the fact that this Court has previously denied eight petitions for certiorari filed by public employees seeking the return of illegally seized fair-share fees. Br. in Opp'n ("Opp.") 1. The unions then go further and say that those petitions "raised the same question presented here." But that is not so.

As detailed in the petition, Pet. 8–14, the first question presented asks the Court to resolve a conflict between the decision below and this Court's decisions in *Abood* and *Street*. Whereas the Second Circuit held that Petitioners were not entitled to restitution or a refund of the agency fees that the unions illegally took here because the unions purportedly acted in "good faith," *Abood* and *Street* held that public employees *were* entitled to restitution or a refund of illegally seized union dues. *Abood*, 431 U.S. at 238 (discussing *Street*, 367 U.S. at 774–75). Accord *Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963) (discussed favorably in *Abood*, 431 U.S. at 239–240).

Post-*Abood* circuit decisions are in accord. In cases like *Wessel* v. *City of Albuquerque*, 299 F.3d 1186, 1194–95 (10th Cir. 2002), and *Lowary* v. *Lexington Local Board of Education*, 903 F.2d 422, 433 (6th Cir. 1990), the 6th and 10th Circuits held that nonunion public employees were entitled to a refund or restitution of illegal fair-share fees taken by unions. Pet. 10–11. The decision below—and those of the other circuit decisions reaching similar results in the past year—are in irreconcilable conflict.

The unions' first response is to justify the decision here and in other recent rulings by pointing to *Wyatt* v. *Cole*, 504 U.S. 158 (1992). There, the Court did not foreclose the possibility of a good-faith defense to § 1983 liability for private-party defendants "who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid." Opp. 6 (quoting *Wyatt*, 504 U.S. at 168–69). But that possible caveat does not apply here. As this Court ruled in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), "public sector unions have been on notice *for years* regarding this Court's misgivings about *Abood*." *Id.* at 2484 (emphasis added). "During this period of time, any public-sector union seeking an agency-fee provision in a collective bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.* at 2485. Indeed, the unions here anticipated the *Janus* ruling, urging "local unions to pump up organizing campaigns and enlist current members to pledge to remain dues-paying union members even in the event of a negative Supreme Court decision." Seidemann Decl. ¶ 4 & Ex. B (article from NYSUT's May 2017 issue of its monthly magazine), 2nd Cir. J.A. 43, 58. But *Wyatt* did not address the appropriateness of restitution or refund for illegally taking someone else's money. *Abood*, *Street*, and *Allen* did. So *Wyatt* is of no avail.

Next, the unions suggest that this Court denied the same question presented in the petition in *Danielson* v. *Inslee*, No. 19-1130. Opp. 13. But that petition and response do not cite *Street* or *Allen*, nor do they rely on the portion of *Abood* ordering refund or restitution. The petition here is the Court's first opportunity to consider the question.

Shifting to the merits, the unions say that *Abood* and *Street* only "considered what procedures should be implemented to protect nonmembers' rights *going forward*." Opp. 11. But that's not what those decisions say. We know that because *Abood* relied on *Allen*, which ordered both a past refund and a future reduction of illegal agency fees: "(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." *Abood*, 431 U.S. at 240 (analyzing *Allen*, 373 U.S. at 122). If this Court had only been addressing going-forward rights, there would have been no need to remand for a determination and calculation of refund payments. *Id.* at 239 (discussing *Allen*, 431 U.S. at 118–19).

So, the unions pivot and say this Court's refund and restitution decisions in *Abood* and *Street* are irrelevant because they do not discuss a good-faith defense. Opp. 11. The implication is that, had this Court considered good faith, those decisions would have been different. But the unions miss the point. *Abood* and *Street* did not consider a good-faith defense because there's no such defense to be had. The situation here is no different than when a government actor seizes property through an unconstitutional prejudgment remedial statute, or demands and receives an unlawful tax payment. Pet. 13–14. Just like a state actor unlawfully seizing property or taxes, the unions must refund or provide restitution for the agency fees they illegally took. That basic principle is so fundamental that the unions do not even address it—or the law to which the petition pointed. It remains unrebutted that if the State of New York had levied an unlawful tax, it would have to repay it.

The unions' only other argument is that *Abood*, *Street*, and *Allen* did not "involve situations in which unions had received and spent funds in reliance on state law and directly controlling Supreme Court precedent." Opp. 11. But as *Abood*'s very first paragraph makes plain, the agency fee at issue there was expressly authorized by a Michigan statute. 431 U.S. at 211. And while *Abood* did not involve controlling Supreme Court precedent, the unions here were on notice for years before *Janus* that they could not rely on this Court's precedent as justification for their illegal conduct. In any event, if a § 1983 defendant "was wrong, even innocently, it should not be allowed to retain" money unlawfully collected. *Fairfax Covenant Church* v. *Fairfax Cnty. Sch. Bd.*, 17 F.3d 703, 710 (4th Cir. 1994). There is no reason the unions should get to keep monies that rightfully belong to our nation's public servants—teachers.

II. This Court has not considered a petition involving the second question presented, either, and that question is also meritorious.

The Respondent unions' response to the second question presented is weaker still. Again, the unions say this Court has already considered the question presented, pointing to the petition filed in *Ogle* v. *Ohio Civil Service Employees Ass'n*, No. 20-486. But that petition did not present a retroactivity question, and the unions' opposition brief in that case did not even cite, much less discuss, this Court's controlling decision in *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993).

That's a problem for the unions here because they do not address the substance of the petition's well-developed retroactivity argument. Pet. 15–19. Instead, the unions simply say that the Second Circuit assumed *Janus*'s retroactivity. Opp. 13. The problem is that the Second Circuit paid only lip service to retroactivity. If that Court had applied *Janus* the same way this Court analyzed retroactivity in *Harper*—in accordance with the declaratory theory of law, Pet. 18 (citing *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 535–36 (1991), and *id.* at 549 (Scalia, J., concurring))—the Second Circuit could not have concluded that the unions are entitled to a good-faith defense.

Under the proper retroactivity analysis, the Constitution *never* allowed New York to force a public-sector employee to pay agency fees; rather, such fees were always invalid, and it is as though *Abood*'s liability holding (as opposed to its remedy holding) never existed. As a result, New York's agency-fee statute was void *ab initio*.

The Second Circuit ignored these principles, and the district court explained why: doing so would require rejection of the good-faith defense. Pet. App. 34a–35a. This Court should grant the petition, apply *Harper* and the declaratory theory of law, and reverse.

III. Finally, this Court should resolve the conflicts that have been simmering without resolution.

The third question presented—whether 42 U.S.C. 1983 provides a good-faith defense for private entities who violate private rights—frames two circuit splits. The first is a 4-1 split over whether § 1983 incorporates a good-faith defense. Pet. 4, 20–23. The second is a 6-1 circuit split over whether private defendants like the unions may assert such a defense if it exists. Pet. 4, 23–28. The Court has allowed these conflicts to percolate, but it is long past time to resolve them.

The unions say the first split is illusory because the court on the short side of the split—the Third Circuit—reached the same "outcome" as the Second Circuit here. Opp. 9 (citing *Diamond* v. *Pennsylvania State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020)). But that ignores the *Diamond* panel's holding. Both Judge Fischer and Judge Phipps cogently explained as a matter of text and history why the unions there could not claim a good-faith defense. Pet. 20 (citing *Diamond*, 972 F.3d at 274 (Fischer, J., concurring in the judgment), and at 289 (Phipps, J., dissenting)). Accord Br. of the Liberty Justice Center as *Amicus Curiae* 6–9 (explaining that a categorical good-faith defense conflicts with the text, history, and legislative purpose of § 1983); Br. of *Amicus Curiae* National Right to Work Legal Defense Found. 7–10 (same).

The reason the *Diamond* panel denied a recovery was because Judge Fischer alone 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 mandatory payroll deduction to which Petitioners objected. So, if Petitioners were in the Third Circuit rather than the Second, they would have prevailed. That is precisely the type of conflict that demands this Court's review.

Regarding the second split, the unions pan *Downs* v. *Sawtell*, 574 F.2d 1 (1st Cir. 1978), and *Howerton* v. *Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983), as qualified-immunity cases rather than good-faith-defense cases, and the unions correctly note that later decisions in those circuits "applied the good-faith defense to reject Section 1983 claims arising from unions' pre-*Janus* receipt of agency fees." Opp. 9. But that is because qualified immunity and good-faith immunity used to be one and the same. That changed in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), when this Court untethered qualified immunity from its historical good-faith roots.

As the petition explains at considerable length, Pet. 25–28, this Court's historical analysis in *Owen* v. *City of Independence, Mo.*, 445 U.S. 622 (1980), makes clear that a private entity would not have been able to invoke a good-faith defense in 1871. So *Downs* and *Howerton* were decided correctly, the First and Ninth Circuits' later decisions reached the wrong result, and it is not only appropriate but long overdue for this Court to resolve the question it has left open since *Wyatt* v. *Cole*, 504 U.S. 158 (1992): whether private defendants can assert a good-faith defense. Pet. 25. The Court should grant the petition and definitively answer that question now. Pet. 26–28.

* * *

There is no court that would deny a plaintiff a refund for an unconstitutional tax, or that would prevent a plaintiff from recovering garnished wages because the purported creditor relied in good faith on an unconstitutional statute. There is no logical reason why public employees—especially teachers—are being forever barred from recouping wages that unions illegally took from them. This Court should grant the petition and order restitution or a refund of one of the largest (non-tax) transfers of wealth in history, done at the expense of public servants.

CONCLUSION

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

Respectfully submitted,

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