NO. __________

IN THE

Supreme Court of the United States

SCOTT WILFORD, BONNIE HAYHURST, REBECCA FRIEDRICHS, MICHAEL MONGE, HARLAN ELRICH, JELENA FIGUEROA, AND GENE GRAY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are public school teachers in the State of California 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 Ninth 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 several, distinct questions for this Court's review:

1. Whether the Ninth Circuit erred by basing a defense to § 1983 on "equality and fairness" rather than determining whether the common law in 1871 provided a good-faith defense to a private party for the most analogous tort.

2. Whether the remedy Petitioners seek is equitable restitution such that a good-faith defense to money damages, if it exists, does not apply.

3. Whether a good-faith defense, if it exists, applies only to individuals, not legal entities like the Respondent unions.

4. Whether the Ninth Circuit erred by failing to give *Janus* truly retroactive effect.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Scott Wilford, Bonnie Hayhurst, Rebecca Friedrichs, Michael Monge, Harlan Elrich, Jelena Figueroa, and Gene Gray, individually and on behalf of all others similarly situated.

Respondents are National Education Association of the United States; American Federation of Teachers; California Federation of Teachers; Community College Association; Saddleback Valley Educators Association; Exeter Teachers Association; Savanna District Teachers Association; Certified Hourly Instructors, Long Beach City College Chapter; Coast Federation of Educators, Local 1911; South Orange County Community College District Faculty Association; Sanger Unified Teachers Association; Orange Unified Education Association; United Teachers Los Angeles; and Mt. San Antonio College Faculty Association, Inc.

Petitioners are not corporations, so Supreme Court Rule 29.6 does not require a corporate-disclosure statement.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, No. 19-55712, *Scott Wilford,* et al.*, individually and on behalf of all others similarly situated* v. *National Education Association of the United States,* et al., judgment entered January 26, 2022. Petitioner's Petition for Panel Rehearing and Petition for Rehearing En Banc filed on February 9, 2022, was denied on April 19, 2022.

U.S. District Court for the Central District of California, No. 8:18-cv-1169, *Scott Wilford,* et al.*, individually and on behalf of all others similarly situated* v. *National Education Association of the United States,* et al., final judgment entered May 22, 2019.

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The district court's order granting Respondents' motion to dismiss is reprinted in the Appendix ("App.") at 5a–54a and its judgment is reprinted at App. 55a–56a. The Ninth Circuit's affirmance is reprinted at App. 1a–4a, and its denial of Petitioners' motion for panel rehearing and petition for rehearing en banc is reprinted at App. 57a–58a.

STATEMENT OF JURISDICTION

On January 26, 2022, the Ninth Circuit issued its memorandum concluding that Respondent unions were not required to return the illegal fair-share fees they had taken from Petitioners' paychecks because the unions enjoyed a good-faith defense to liability under 28 U.S.C. § 1983. The Ninth Circuit denied Petitioners' motion for panel rehearing and petition for rehearing en banc on April 19, 2022. The 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 California law, public unions had the right to deduct from the wage or salary of non-union public-school employees a so-called "fair share service fee." Cal. Gov. Code § 3546. But in *Janus* v. *American Fed'n of State, County, and Mun. 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 California's, "violate the First Amendment." *Id.* at 2478. The Court overruled *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), a case about which the Court had long expressed misgivings.

Petitioners Scott Wilford, Bonnie Hayhurst, Rebecca Friedrichs, Michael Monge, Harlan Elrich, Jelena Figueroa, and Gene Gray, 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 and post-*Janus*.[1] Their theory is simple: when you take something that does not belong to you, you must give it back. It makes no difference whether that "take" was intentional or inadvertent.

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[1] Petitioners refer to fees illegally seized "post-*Janus*" because Wilford, Monge, and Figueroa had fair-share fees deducted *after* this Court decided *Janus*, and only 4/30th of the post-*Janus* deductions were returned to them. The unions rationalized that they should be allowed to keep the fees for the first 26 days of June 2018 because the *Janus* opinion issued June 27, 2018.

The district court granted the unions' motion to dismiss based on the unions' supposed good-faith defense to liability under 42 U.S.C. § 1983, and the Ninth Circuit affirmed based on its previous decision in *Danielson* v. *Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied* 141 S. Ct. 1265 (2021) (Case No. 19-1130).

Danielson held "that a union defendant can invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected pre-*Janus*, where its conduct was directly authorized under both state law and decades of Supreme Court jurisprudence." *Id.* at 1098–99. According to *Danielson*, this is so even if *Janus* is given retroactive application, *id.* at 1099, as though *Janus* could be applied retroactively without that making any difference whatsoever to the remedy.

The Ninth Circuit applied a good-faith defense based on "principles of equality and fairness—values that are inconsistent with rigid adherence to the oft-arbitrary elements of common law torts as they stood in 1871." *Id.* at 1101. Yet this Court has repeatedly held that it is *precisely* the common law in 1871 that determines the elements of, and immunities and defenses to, a § 1983 claim. *Thompson* v. *Clark*, 142 S. Ct. 1332, 1340 (2022); *Filarsky* v. *Delia*, 566 U.S. 377, 384 (2012). The Ninth Circuit ignored this Court's rule, infusing its own sense of what it thinks fair with no regard for the common law.

Further, even if a good-faith defense exists, it wouldn't apply in this case because the remedy Petitioners seek is equitable in nature. Just as qualified immunity doesn't protect a government employee from equitable relief, *Wood* v. *Strickland*, 420 U.S. 308, 314 n.6 (1975), a so-called good-faith

defense would likewise not apply to equitable relief. This conclusion is consistent with this Court's precedents requiring illegal fair-share fees to be refunded to an employee from whom they were illegally (even if innocently) taken.

There's another reason a good-faith defense wouldn't apply in this case: Even if good faith may protect an individual actor from § 1983 liability, it doesn't protect a legal entity for whom the individual works. *Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 625 (1980).

And finally, the Ninth Circuit's retroactivity holding conflicts with *Harper* v. *Virginia Dep't 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 Ninth Circuit refused to do.

The bottom line is that Respondent unions continue to keep monies that do not belong to them. This Court should grant the petition, resolve the Ninth Circuit's conflicts with this Court's precedents, 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 Cal. Gov. Code § 3546, a public-employee union has the right to take wages or salary from public school employees who are not members of the union, a so-called "fair-share service fee." Petitioners—and many others like them—were public school employees in California who chose not to join a public-employee union. Class-Action Compl. ¶¶ 1-7 and 27. Nonetheless, their employers relied on California's law and deducted fair-share fees from their paychecks. *Id.* ¶ 27.

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

II. Proceedings

Petitioners filed their first amended class-action complaint under 42 U.S.C. § 1983, requesting injunctive and declaratory relief against Respondent unions' further assessment of fair-share fees and requesting a refund for past fees unlawfully withheld or collected. But the district court granted the unions' motion to dismiss, holding Petitioners' request for prospective relief was moot because there was no threat the unions would continue collecting fees in violation of *Janus*, App. 16a–17a, and Petitioners' refund claims were barred by the good-faith defense, App. 17a–28a. The district court also held the California law preempted Petitioners' state-law claims for conversion and money had and received. App. 29a–41a.

The Ninth Circuit affirmed in a memorandum opinion based on its previous decision in *Danielson*, which addressed some of the same issues in an indistinguishable context. App. 2a–4a (discussing *Danielson* v. *Inslee*, 945 F.3d 1096 (9th Cir. 2019). In *Danielson*, the Ninth Circuit held that "a union defendant can invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected pre-*Janus* …." *Danielson*, 945 F.3d 1098–99.

In *Danielson*, the Ninth Circuit 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. 945 F.3d at 1099. The court followed the Seventh Circuit in holding "that a union defendant can invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected pre-*Janus*, where its conduct was directly authorized under both state law and decades of Supreme Court jurisprudence." *Id.* at 1098–99 (citing *Janus* v. *AFSCME*, 942 F.3d 352, 366 (7th Cir. 2019), and *Mooney* v. *Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019)).

Ignoring this Court's repeated holding that § 1983 claims, immunities, and defenses must be grounded in the common law as it existed in 1871—when § 1983 was first enacted—the Ninth Circuit applied a good-faith defense based on "principles of equality and fairness," despite recognizing that doing so was "inconsistent with rigid adherence to the oft-arbitrary elements of common law torts as they stood in 1871." *Id.* at 1101.

Danielson further opined that "it is unnecessary to 'wrestle the retroactivity [of *Janus*] question to the ground.'" 945 F.3d at 1099. While professing to assume the retroactivity of *Janus*, *id.*, there is nothing suggesting that this had any impact on the court's decision.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review because the Ninth Circuit's decision conflicts with this Court's oft-repeated requirement that § 1983 claims, immunities, and defenses be based on the common law as it existed in 1871.

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.

Earlier this year, in *Thompson*, this Court held that in determining the elements of a claim under § 1983, "[t]he status of American law as of 1871 is the relevant inquiry for our purposes." *Thompson*, 142 S. Ct. at 1340. The respondent in that case relied on the 1976 Restatement in support of its position. This Court held such reliance was "flawed because the Restatement did not purport to describe the consensus of American law as of 1871, at least on that question." *Id.*

The same rule applies to determining whether an immunity or defense applies to a § 1983 claim. In the unanimous decision in *Filarsky* v. *Delia*, 566 U.S. 377 (2012), the Court held that whether a private party was entitled to immunity under § 1983 turns on "the 'general principles of tort immunities and defenses' applicable at common law[.]" *Id.* at 384 (quoting *Imbler*, 424 U.S. at 418). "Under our precedent, the inquiry begins with the common law as it existed when Congress passed § 1983 in 1871." *Id.* (citing *Tower* v. *Glover*, 467 U.S. 914, 920 (1984)). Under *Tower*, there could be no immunity under § 1983 unless "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871[.]" *Tower*, 467 U.S. at 920.[2] But rather than conduct a historical review of the common law, the Ninth Circuit determined what was, in its view, "fair": "We would find it neither 'equal' nor 'fair' for a private party's entitlement to a good faith defense to turn not on the innocence of its actions but rather on the elements of an 1871 tort that the party is not charged with committing." *Id.* at 1101–02.

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[2] Recently, this Court endorsed this "historical approach" outside the § 1983 context, as well. See *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2126 (2022) (conduct covered by the Second Amendment's text is presumptively protected and may be abridged only by government regulation that "is consistent with this Nation's historical tradition of firearm regulation."); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) ("Establishment Clause must be interpreted by reference to historical practices and understandings.") (cleaned up).

Thus, having disregarded the standard this Court requires, the Ninth Circuit turned instead to "general principles of equality and fairness[.]" *Id.* at 1101. These latter principles, the court held, "are inconsistent with rigid adherence to the oft-arbitrary elements of common law torts as they stood in 1871." *Danielson*, 945 F.3d at 1101.

The Ninth Circuit's decision cannot be reconciled with this Court's controlling law. And the decision adopts an unreliable and subjective standard of "equality and fairness." As Justice Scalia opined, "when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges." *Schad* v. *Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring).[3] That's why Judge Bumatay opines in his concurring opinion in *Allen* v. *Santa Clara County Corr. Peace Officers Ass'n*, 38 F.4th 68, 75 (9th Cir. 2022), that "in any case breaking new ground on § 1983 defenses, the first place we turn is our history and common law." *Danielson*'s ignoring of our history and common law in favor of "equality and fairness" was "wrong-headed." *Id.* (Bumatay, J., concurring).

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[3] Similarly, in *New York State Rifle*, the Court held that "reliance on history to inform the meaning of constitutional text … is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of[expertise' in the field." 142 S. Ct. at 2130.

Two of the three judges in *Diamond* v. *Pennsylvania State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), reached the same conclusion as Judge Bumatay. 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).[4] 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 Phipps's opinion in *Diamond* explains exactly why good faith cannot be considered an affirmative defense at common law. He starts by noting that none of the 18 affirmative defenses listed in Fed. R. of Civ. Proc. 8(c) mentions "good faith." 972 F.3d at 285 (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

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[4] 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.

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." *Id.* at 286. "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 wished 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.*

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*." *Diamond*, 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." *Id.* (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*; rather he showed only 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, including public employees who should get refunds from unions for fair-share fees that the unions took from worker paychecks in violation of the First Amendment. 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.

But what's perfectly clear is that the Ninth Circuit's skirting of history and the common law in favor of "equality and fairness" cannot be allowed. This Court should set the record straight, reject the Ninth Circuit's subjective test, and provide the historical analysis this Court's precedents require—the analysis the Ninth Circuit refused to perform.

II. Because Petitioners seek equitable relief, a good-faith defense, if it exists, doesn't apply in this case.

The defense of qualified immunity protects a defendant from monetary damages, but not from equitable relief. *Wood* v. *Strickland*, 420 U.S. 308, 314 n.6 (1975). This is not controversial. And, if qualified immunity doesn't protect a defendant from equitable relief, neither does a good-faith defense (if such a defense exists).

Further, *Danielson* seems to think that, simply because Petitioners seek a monetary award, the relief they seek is legal, not equitable. Not so. As this Court held in *Chauffeurs, Teamsters and Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 370 (1974), "we have characterized damages as equitable where they are restitutionary …." Further, the Court has held that restitution encompasses a decree "ordering the return of that which rightfully belongs to" the plaintiff. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946). See also *Salerno* v. *Corzine*, 449 Fed. Appx. 118, 123 (3d Cir. 2011) (no qualified immunity for a claim seeking money to restore the plaintiff back to the position occupied before the claimed violations); *Hopkins* v. *Saunders*, 199 F.3d 968, 977 (8th Cir. 1999) (no qualified immunity for a monetary award that is "restitutionary" in nature). "The fundamental

substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff." 1 D. Dobbs, *Law of Remedies* § 4.1(2), p. 557 (2d ed. 1993).

Danielson also held that restitution can't apply in this case because "[t]he Union bears no fault for acting in reliance on state law and Supreme Court precedent." 945 F.3d at 1103. The unions' supposed innocence is not a basis to deny refund. ("Supposed" 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). Indeed, it is precisely where a defendant is *not* at fault that restitution or refund is most appropriate. *E.g.*, Rest. (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.").

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).

In *Fairfax*, for example, the school district violated the church's first amendment rights by charging it higher rent than non-religious lessees paid. The district court held that retroactive application of the decision was not warranted because the school district had acted in good faith. *Id.* at 709. The Fourth Circuit disagreed: "The good faith of a defendant … may be relevant when the elements of a cause of action, or where a defense to it, depend on the defendant's state of mind." *Id.* at 710. "But in the circumstances here, whether the defendant acted in good faith is irrelevant …." *Id.*

Anyway, 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. This is no reason that the unions should get to keep monies that rightfully belong to public servants.

That restitution in the form of a refund is the appropriate relief in this case is clear from the Court's prior fee cases. In the portion of *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), that *Janus* did not overrule, this Court confirmed the remedy to be applied when a fair-share, or agency, fee is found to be unconstitutional. The Court held that all unconstitutional fees must be refunded to the employee from whom the fees were collected. This remedy obviously was retroactive; the very nature of *refund* is that what has been wrongfully taken in the past is being restored in the present. Refund, in this context, is a form of restitution.

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." *Id.* 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 turned to 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).

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." *Id.* (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*. Yet here, the Ninth Circuit, like other post-*Janus* opinions denying refunds, ignored *Abood*.

Several post-*Janus* courts refused to grant a refund on the ground that restitution/refund is available only if the amounts collected from a plaintiff can be traced to particular money in the unions' coffers. Wrong. 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). The inability to trace the money is *not* a valid basis to refuse a refund—this Court has eliminated that argument.

III. If a good-faith defense exists, it protects only individuals, not legal entities.

At the time this Court decided *Owen* v. *City of Independence, Mo.*, 445 U.S. 622 (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, if such a defense continued to exist. And, as the holding in *Owen* shows, that defense would not protect the unions here. In *Owen*, this Court 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)). Because Owen didn't challenge the award of good-faith immunity to the individuals, the Court didn't address it. What the Court did address was the question whether the city could to ride the coattails of its employees' *good faith*. The Court's answer was no.

Explaining why, this Court focused on the fact that defenses apply to § 1983 claims only if (1) "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it'"; and (2) public-policy justifications also support the application of the defense. *Id.* at 638 (quoting *Imbler*, 424 U.S. at 421). The Court held that neither of these requirements protected the city based on its employees' good faith. *Id.*

Looking first at the state of the law when Congress enacted the Civil Rights Act, 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 legal 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 when 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, even if good faith might insulate an individual union official from § 1983 liability, it cannot insulate the unions from liability. Of course, the Ninth Circuit's refusal to address in any kind of meaningful way how the common law dealt with good faith allowed that court to ignore this issue. But it is an independent basis for denying a good-faith defense to the unions, even if such a defense exists.

IV. This Court should grant review to address the Ninth Circuit's conflict with this Court's retroactivity jurisprudence.

The Ninth Circuit's decision violates this Court's requirement that § 1983 claims and defenses be framed by an historical analysis of tort law as of 1871 and ignores this Court's holding in *Abood* that the refund of fees is equitable relief to which a good-faith defense would not apply. But it also violates this Court's retroactivity jurisprudence. Indeed, in *Danielson*, incorporated into the decision below, the Ninth Circuit found "it unnecessary to 'wrestle the retroactivity question to the ground.'" *Danielson*, 945 F.3d at 1099 (quoting *Janus* v. *Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 942 F.3d 352, 360 (7th Cir. 2019)). That's legal language for "we aren't applying *Janus* retroactively."

Under this Court's precedents, *Janus* must be applied retroactively. This point is made clear in *Harper* v. *Virginia Dep't 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 (emphasis added).

What's more, *Harper* involved a plaintiff's refund claim and resulted in the plaintiff receiving that refund for tax assessments taking place for the four years *before* the governing precedent was reversed. The decision is on all fours and in direct conflict with the Ninth 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 acknowledged 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 California, which, despite *Janus*, has not repealed its agency-fee statute). While Harper was no doubt pleased with that development, he was not satisfied because such prospective relief didn't make him whole; 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 Ninth 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 this 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[es] 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." *Id.* at 110–11 (Kennedy, J., concurring); *id.* at 123 (O'Connor, J., dissenting).

Similarly, retroactive application of *Janus* precludes a good-faith defense here. California'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 grds.*, 418 US. 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, *Danielson* is wrong and in irreconcilable conflict with this Court's precedents about 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.* (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*, or what it will *tomorrow be*." *Id.*

The declaratory theory of law applies here. Per *Janus*, the Constitution does not allow—and thus *never* did allow—California 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 California fair-share-fee statute at issue here did not *become* invalid on June 27, 2018; rather, it was void *ab initio*. Yet the Ninth Circuit ignored the declaratory theory of law.

In so doing, the Ninth Circuit effectively said that up to the time this Court overruled in *Janus*, a union was 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.

In *Danielson*, the Ninth Circuit suggested that retroactivity and remedy are separate questions and that, as a question of remedy, the good-faith defense protects the unions from damages. *Danielson*, 945 F.3d at 1099. This is an unsupported conclusion.

It's true that "retroactivity of a right does not guarantee a retroactive remedy." *Id*. But *Danielson* misapplies this principle. The case *Danielson* cites—*Davis* v. *United States*, 564 U.S. 229 (2011) (a different *Davis* case from the one discussed in connection with *Harper*)—has no application here. *Davis* involved whether to apply the exclusionary rule in a criminal case when the police had relied on federal caselaw that the Supreme Court later overruled. Suppression of evidence is not required to remedy a Fourth Amendment violation; rather, the exclusionary rule is a "prudential" doctrine, whose "sole purpose is to deter future Fourth Amendment violations." *Id.* at 236–37. So "real deterrent value is a necessary condition for exclusion." *Id.* at 237 (cleaned up). Thus, "when the police act with an

objectively 'reasonable good faith belief' that their conduct is lawful, … the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 238 (cleaned up). Because *Davis* applies only in criminal cases involving the exclusionary rule, it is inapposite here. Petitioners ask the Court to restore their property that the Unions unconstitutionally have taken from them; deterrence of future bad acts is not the purpose.

This Court should grant review, correct the Ninth Circuit's retroactivity analysis, and direct the unions to refund the monies they illegally collected from Petitioner's paychecks.

V. 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 *Danielson* and other circuit courts have persistently blocked plaintiffs from vindicating their rights post-*Janus*.

First, the validity of the unions' good-faith defense was dispositive and outcome-determinative. The Ninth Circuit held that the unions' reliance on Cal. Gov. Code § 3546 and *Abood* required the dismissal of Petitioners' federal claims. App. 2a–3a (quoting *Danielson*). If this Court concludes that the unions cannot assert a good-faith defense—whether based on (a) a determination that a good-faith defense is not available under § 1983, (b) *Abood*'s application of an equitable remedy to which a good-faith defense would not apply, (c) unavailability of good-faith defense to legal entity, or (d) a proper retroactive

application of *Janus*—then the Court should reverse the dismissal of Petitioners' claim and enter judgment in favor of Petitioners. All that would remain is class certification.

Second, the record provides a clean vehicle for deciding the questions presented. The district court ruled on a motion to dismiss, and both it and the Ninth 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*. 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 final question presented here, this petition addresses squarely issues not as directly or clearly raised in those prior petitions.

Finally, the Ninth Circuit has ignored several, distinct lines of this Court's precedents. This Court should make clear that such flouting of the Court's precedents will not be tolerated.

* * *

As this Court reiterated in *New York State Rifle*, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about what which evidence to consult and how to interpret it." 142 S. Ct. at 2130 (citation omitted). "But reliance on history to inform the meaning of" constitutional provisions and statutes is "more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits'" of government action or inaction. *Id.* It is for these very reasons that this Court defines § 1983 defenses with respect to the common law as it existed in 1871. *Thompson*, 142 S. Ct. at 1340; *Filarsky*, 566 U.S. at 384.

Leaving the Ninth Circuit's ruling in place here would work a tremendous injustice on Petitioners and those like them, all of whom are hard working public servants who have been pick-pocketed by the defendant Unions.

Far worse, doing so would rubber stamp the Ninth Circuit's refusal to follow this Court's command of interpreting § 1983 consistent with the common law as it existed in 1871 and instead imposing its own, "Ninth Circuit brand" of justice and fairness. The Court should emphatically rebuke such behavior and restore § 1983's proper, historical meaning, one that does not include a good-faith defense.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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