No. 21-1372

IN THE

Supreme Court of the United States

HOLLIE ADAMS, JODY WEABER, KAREN UNGER, *and* CHRIS FELKER,

PETITIONERS,

V.

TEAMSTERS UNION LOCAL 429, COUNTY OF LEBANON, JOSH SHAPIRO, *in his official capacity as Pennsylvania Attorney General*, *and* JAMES M. DARBY, ALBERT MEZZAROBA, *and* ROBERT H. SHOOP, JR., *in their official capacities as members of the Pennsylvania Labor Relations Board*,

RESPONDENTS.

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

REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

This Court has made clear that the First Amendment guarantees public-sector employees a right to not subsidize a union and its speech. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). Specifically, in *Janus*, this Court held that requiring nonconsenting government employees to pay agency fees to public sector unions violated this First Amendment right. *Id.*

To protect this right, this Court set forth the following principles: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by clear and compelling evidence.'" *Id.* (citations omitted).

In this case, and others like it, employees who joined the union before this Court's *Janus* decision but sought to leave the union and cease dues deductions after *Janus*, are compelled to continue paying dues until the next escape window dictated by the terms of union authorization cards or collective bargaining agreements, often leaving employees one annual ten- or fifteen-day period to opt out of such funding. Thus, depending on the time of the escape window and the date of an employee's resignation, an employee might pay up to one year's worth of dues *after* resigning from the union.[1]

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[1] In some cases, escape windows occur even less frequently than once a year, such as windows that occur

But employees who joined a union prior to *Janus* have not provided affirmative consent to waive their right not to subsidize a union and its speech. Rather, at the time they signed a union card and dues deduction agreement they were required to pay the union either in the form of membership dues or nonmember agency fees. Because these employees could not have freely, voluntarily, or knowingly waived their right not to pay the union when they signed dues deduction authorization cards, as *Janus* requires, they cannot be forced to continue to pay union dues.

Nonetheless, the circuit courts that have heard these claims—the Third, Seventh, Ninth, and Tenth Circuits—have gutted the principles set forth in *Janus* by holding that state actors do not need evidence of a constitutional waiver to seize union dues from employees who, prior to the *Janus* decision, signed a dues deduction authorization or union membership agreement subject to an opt-out window. *Fischer v. Gov. New Jersey,* 842 F. App'x 741, 753 (3rd Cir. 2021) (nonprecedential opinion); *Troesch v. Chi. Teachers Union, Local Union No. 1*, No. 21-1525, 2021 WL 2587783 (7th Cir. 2021); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 731-33 (7th Cir. 2021); *Belgau v. Inslee*, 975 F.3d 940, 950-52 (9th Cir. 2020); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961-62, 964 (10th Cir. 2021).

This Court should grant the petition to correct the lower courts' misapplication of this Court's decision in *Janus* and make clear that nonmembers who consent to pay a public sector union, including nonmembers

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at the expiration of a collective bargaining agreement. *See, e.g., O'Callaghan v. Napolitano*, No. 19-56271, 2022 WL 1262135 (9th Cir. Apr. 28, 2022).

seeking to join the union, may only have dues withheld by their government employer if there is clear and compelling evidence that they have voluntarily, knowingly, and intelligently waived their First Amendment right to not pay money to the union.

ARGUMENT

I. This Court should correct the lower courts' misapplication of *Janus*.

Prior to *Janus*, public-sector workers were subject to what *Janus* deemed an unconstitutional choice: paying money to the union as a member in the form of dues or paying money to the union as a nonmember in the form of agency or fair-share fees. Given these "options," some chose to join the union. Naturally, following *Janus*, many of these workers, including Petitioners, sought to leave the union and cease all union payments in light of their newly recognized rights. However, the union cards and dues deduction agreements they signed contained narrow opt-out windows. These escape periods limit workers' ability to cease payments to as small as a 10-day annual window. Consequently, employees like Petitioners have been forced to pay union dues after revoking their membership and seeking to stop payments to the union.

The affirmative-consent waiver requirement set forth by this Court in *Janus* applies equally to Petitioners because they never waived their First Amendment right not to make payments to the union in the first place. Nor could their union cards or dues deduction agreements constitute a waiver of their right not to pay the union, because at the time they became union members, they were unaware of the right to pay no money to the union. Petitioners and other pre-*Janus*

workers who became members under similar conditions, could not have freely or voluntarily waived their right not to fund union speech. Put another way, consent in its true form was impossible given this Hobson's choice of subsidizing the union in one form or another and the fact that their right to be free from forced union subsidization had not yet been expressly recognized by this Court.

A. Constitutional waiver requirements set forth in *Janus* apply to employees like Petitioners who joined the union prior to this Court's decision in *Janus*.

Respondents assert that the lower court in this case faithfully applied this Court's decision in *Janus*. Teamsters BIO 16; Lebanon Co. BIO 9; Commonwealth BIO 10. The lower courts held, and Respondents assert, that "*Janus* did not change the law governing the formation and enforcement of voluntary contracts between unions and their members." Teamsters BIO 16.

However, in *Janus*, this Court held:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless

> employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted).

Waiver analysis applies to "an agency fee [or] *any other payment to the union* . . . deducted from a nonmember's wages." *Janus*, 138 S. Ct. at 2486 (emphasis added). But the lower courts held that this waiver does not apply "whenever a public employee elects to join a union and pay membership dues" because the relationship between unions and their members was not at issue in *Janus*. Teamsters BIO 16; *see also* Lebanon Co. BIO 8; Commonwealth BIO 8. Respondents assert that this "waiver" passage from *Janus* concerns only nonmembers—employees who, like Mr. Janus, never joined the union and never affirmatively authorized membership dues deductions. Teamsters BIO 17; Commonwealth BIO 8.

But employees are not born union members. They become union members by signing a union membership card. Before Petitioners signed the union membership card, they were nonmembers.[2] Because all employees are nonmembers when they first sign a union

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[2] Respondents assert that Petitioners do not explain what the term "nonmember" means and cite nothing in the record to show that they are nonmembers. Teamsters BIO 13 n.7. But of course, nonmember means an employee who is not a union member. The union cannot seriously contend that it does not know the difference between nonmembers and members. If it does not, then how does it know who to collect union dues from and from whom collecting fees would violate

membership card and authorize dues deductions, the waiver language quoted above applies any time a public employer withholds any money from an employee's paycheck on behalf of a union.

When this Court in *Janus* held that "[b]y *agreeing to pay*, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed," *Janus*, 138 S. Ct. at 2486 (emphasis added), it clearly *was not* referring to an employee in Mr. Janus's position. Mr. Janus *never agreed to pay the union*. The only way an employee in Janus's position could voluntarily pay money to a union would be for that employee to join the union. Thus, the only way for the *Janus* waiver analysis to apply—where a nonmember agrees to pay a union—is when a nonmember employee agrees to pay money to the union by signing the union card and dues deduction authorization and becomes a member. That is exactly the position Petitioners are in. When they were nonmembers, they signed the union card and dues deduction authorization, which meant they agreed to pay money to the union. By doing so, this Court said that employees like Petitioners are waiving their First Amendment rights. The Court held that waiver cannot be presumed—in other words, waiver analysis must apply.

Respondents also heavily rely on *Cohen v. Cowles Media Co.*, 501 U.S 663, 672 (1991) for the proposition that the First Amendment does not permit Petitioners to renege on their union membership agreements. Teamsters BIO 17. In *Cohen*, an informant provided confidential information to a newspaper based on a

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Janus? The union's assertion is either disingenuous or an admission that they are not complying with *Janus*.

promise that it would keep the informant's identity confidential. *Cohen*, 501 U.S. at 665–66. When the newspaper published a story including informant's name, he sued under state promissory estoppel law. *Id*. at 666. The *Cohen* Court found that the First Amendment right to publish truthful information does not provide an exception to liability in a state court action for breach of the promise of confidentiality. *Id*. at 672.

But in *Cohen* the newspaper contracted away its right to publicize with full knowledge of its First Amendment rights, which had been long established by prior case law. There was no intervening change in law that recognized a right that the newspaper could not have previously asserted. *Cohen* does not stand for the proposition that under waiver analysis signing a contract *always* results in one waiving one's constitutional rights. Petitioners do not deny that one can make a knowing waiver of First Amendment rights. They simply deny that they made any such knowing waiver when signing the union membership agreement.

The clear language of this Court's decision in *Janus* shows that waiver analysis must apply to employees like Petitioners—inquiring whether Petitioners' signing of the union membership card and dues-deduction authorization constituted a proper waiver of their First Amendment rights. Yet the Third Circuit and other lower courts have declined to apply waiver analysis to Petitioners and other employees who joined a union before this Court's decision in *Janus*. The Third Circuit's decision finding that waiver analysis does not apply to Petitioners, and similar lower court decisions, must be overturned because they effectively remove

language from this Court's decision in *Janus* setting forth a standard for protecting public employees' First Amendment rights in the context of the public-sector labor system in the states. Without it, public sector unions and their political allies will continue to take actions that undermine this Court's holding in *Janus*. (*See* Pet. 15–18).

B. Pre-*Janus* dues deduction authorizations alone are incapable of meeting the requirements for a valid constitutional waiver.

This Court has long held that certain standards must be met for a person to properly waive his or her constitutional rights. Waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waiver must also be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185–86 (1972). Because a court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Pub. Utils. Com.*, 301 U.S. 292, 307 (1937), the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. at 2484. In addition, "'[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

Petitioners could not have voluntarily, knowingly, or intelligently waived their First Amendment rights

under *Janus* when they signed a union membership card and dues deduction authorization because, at the time, this Court had not yet issued its decision in *Janus*. Thus, they had no knowledge of the rights they were purporting to waive in the first place. Moreover, it was impossible for them and workers like them to voluntarily waive their First Amendment right under *Janus* because they were forced into an unconstitutional choice: pay union dues as a member or pay agency fees to the union as a nonmember. As a result, the "contracts" signed by Petitioners and similarly situated workers are incapable of meeting the requirements of a *Janus* waiver. Unions and government employers therefore had no right to continue to withhold money from these workers' paychecks following *Janus* by limiting their withdrawal from the union to an arbitrary window specified in the union membership and dues deduction authorization.

This Court should grant the petition in this case to find that Petitioners, and those similarly situated to them, could not have waived their First Amendment rights under *Janus* simply by signing the union card and dues deduction authorization prior to this Court's *Janus* decision.

II. The Third Circuit did not hold that Petitioners' entire case was moot and that they lacked standing, as Respondents assert.

Respondents assert that the Petition is nonjusticiable because the Third Circuit held, "Petitioners lack standing to advance their claims, and their case is moot." Teamsters BIO 11; Lebanon Co. BIO 6; Commonwealth BIO 5–6. Respondents are wrong. They misrepresent the Third Circuit's holding.

First, the Third Circuit held that Petitioners "lack standing to seek a refund of union dues paid *before* they resigned the union." App. 6 (emphasis added). But Petitioners sought damages in the form of union dues paid after they resigned from the union as well. *See* Pet. 6. Thus, Petitioners have standing for those claims. And while the Third Circuit did hold that Petitioners claims for damages for union dues paid after they resigned from the union were moot to the extent that the union had paid those dues back, App. 6, the union did not return all the money taken from Petitioners after this Court's *Janus* decision. Pet. 11. Thus, while some of Petitioners' claims may fail for lack of standing or mootness, not all of them do. Pet. 11 (citing App. 18–20). Indeed, the Third Circuit stated that those claims that were not moot failed to state a claim under the First Amendment, App. 6, the exact issue that Petitioners seek review of in this Court.

Thus, Respondents' assertion that Petitioners have no standing and that their claims are moot misstates the Third Circuit's ruling and misrepresents Petitioners' claims in this case. This Court should not deny the Petition based on Respondents' incorrect assertion that this matter is nonjusticiable.

III. This case raises important issues and is an excellent vehicle to resolve those issues.

The Court in *Janus* set forth a standard for protecting public employees' First Amendment rights in the context of the public-sector labor system in the states. That standard required the lower courts to apply waiver analysis before a public employer withholds any money from an employee on behalf of a public-sector union.

The Third Circuit and other lower courts, however, have limited this Court's analysis, contrary to its language, to apply only where a plaintiff was an agency-fee payer. Teamsters BIO 17. But as explained, above, and in the Petition, this significantly limits the application of the Court's holding in *Janus* and is contrary to its language. *See* Pet. 8–15; *supra* 6–9.

Without this Court's intervention, no constitutional scrutiny will be applied to government employees' decisions to join the union, contrary to what this Court stated in *Janus*. That means unions will have every incentive to ensure that government employees remain ignorant of this Court's decision in *Janus*, and will make every effort to ensure that employees immediately join the union without knowledge of their *Janus* rights, since this Court and the lower courts will have refused to safeguard this right by applying waiver analysis. *See* Pet. 15–18.

Respondents maintain that the cases cited in the Petition in support of this allegation do not involve the same issue involved in this case and are irrelevant. *See* Teamsters BIO 20. For example, Respondents maintain that *Ramon Baro v. Lake County Federation of Teachers Local 504*, No. 20-cv-02126, 2022 U.S. Dist. LEXIS 56106 (N.D. Ill. Mar. 28, 2022), is distinct from the issues involved in this case. But the district court in *Ramon Baro*—and the union's defense in that case—relied directly and exclusively on the reasoning by the Seventh Circuit in *Bennett v. AFSCME Council 31*, 991 F.3d 724, 731-33 (7th Cir. 2021). *Ramon Baro*, No. 20-cv-02126, 2022 U.S. Dist. LEXIS 56106, at *13 (N.D. Ill. Mar. 28, 2022). And Respondents concede that *Bennett* involves the exact issues before this Court in this case. Teamsters BIO 14 n.8. Respondents cite nothing that disproves that the reasoning set forth by

the Third Circuit in this case and by other circuit courts in similar cases is being used and will be used to deny government employees their First Amendment right to not pay a union.

Similarly, Respondents attempt to distinguish a trio of Ninth Circuit cases—*O'Callaghan v. Napolitano*, No. 19-56271, 2022 WL 1262135 (9th Cir. Apr. 28, 2022); *Savas v. Cal. State Law Enf't Agency*, No. 20-56045, 2022 WL 1262014 (9th Cir. Apr. 28, 2022); *Cooley v. Cal. Statewide Law Enf't Ass'n*, No. 19-16498, 2022 WL 1262015 (9th Cir. Apr. 28, 2022) —that rely exclusively on *Belgau v. Inslee,* 975 F.3d 940, 952 (9th Cir. 2020), another case which Respondents concede involves the exact issues set forth in this Petition. Teamsters BIO 14.

As stated in the Petition, these cases are examples of how public-sector unions will continue to exploit employees' ignorance of this Court's decision in *Janus* to prevent those workers from exercising their First Amendment rights that *Janus* sought to protect. Respondents' assertions that these cases are factually different from this matter does not diminish the problem of the lower courts' refusal to fully enforce the rights protected by *Janus*.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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