No. _____

IN THE

Supreme Court of the United States

THOMAS FEW,

PETITIONER,

v.

UNITED TEACHERS OF LOS ANGELES; ALBERTO M. CARVALHO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT; AND ROBERT BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

RESPONDENTS.

On Petition for a 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

1) Whether a union can trap a public worker into paying dues without the "affirmative consent" required by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

2) Whether a union can moot a claim that it has violated *Janus*'s affirmative consent requirements by establishing opt-out windows too short to reach appellate review.

PARTIES TO THE PROCEEDING

Petitioner, Thomas Few, is a natural person and citizen of the State of California.

Respondent Alberto M. Carvalho is a natural person and the Superintendent of the Los Angeles Unified School District. Respondent Robert Bonta, is a natural person and the Attorney General of California.[1]

Respondent United Teachers of Los Angeles is a labor union representing public employees in the State of California.

RULE 29.6 STATEMENT

As Petitioner is a natural person, no corporate disclosure is required under Rule 29.6.

STATEMENT OF RELATED CASES

The proceedings in other courts that are directly related to this case are:

- *Few v UTLA,* No. 20-55338, United States Court of Appeals for the Ninth Circuit. Judgment entered January 27, 2022.
- *Few v. UTLA*, No. 2:18-cv-09531-JLS-DFM, United States District Court for the Central District of California. Judgment entered January 31, 2020.

[1] Respondents Carvalho and Bonta are sued in their official capacity and are substituted for previous official-capacity parties Austin Beutner and Xavier Becerra, who held the same positions when the case was pending below. *See* Fed. R. Civ. P. 25(d).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that unions cannot collect money from government workers' paychecks without their affirmative consent. Petitioner, Thomas Few ("Few"), notified his employer, the Los Angles Unified School District ("LAUSD") that it did not have his consent to deduct union dues from his paycheck. For months afterward, LAUSD and the United Teachers of Los Angeles ("UTLA" or the "Union") worked jointly to continue to deduct union dues from Few's paychecks without his consent, limiting his ability to exercise his First Amendment rights to an arbitrary annual window of the Union's choosing.

The district court ruled that because Few's withdrawal window occurred during the pendency of this litigation, his claim is now moot. It further ruled that Few had no right to a refund of the dues taken by the Union, even though he had never provided UTLA the affirmative consent to dues deductions that *Janus* requires. On appeal in the Ninth Circuit, Few conceded that the Ninth Circuit's opinion in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), decided during the pendency of his appeal, foreclosed his claims, but he argued that *Belgau* was in error and should be overruled. The Ninth Circuit followed *Belgau* and ruled that the Union agreement Few signed was sufficient to waive his rights under *Janus*, even though that agreement included no such waiver.

1) Government employees like Few have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so.

Janus, 138 S. Ct. at 2486. This Court in *Janus* required such affirmative consent to be "freely given" through a "waiver" of First Amendment rights that must be shown by "clear and compelling" evidence. *Id*. This Court also requires that a "waiver" of a constitutional right must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). When he signed a union membership agreement prior to the *Janus* decision, Few could not have knowingly waived a right that this Court had not yet recognized. He signed agreements in August 2016 and February 2018. *Janus* was decided in June 2018. Beginning in June 2018, Few explicitly told his employer that it did not have his affirmative consent to withhold union dues. Trapping Few in the Union until an annual escape period and continuing to deduct union dues violated his rights to Free Speech and Freedom of Association under *Janus*.

2) Few's claim for prospective relief is not moot because he has a live damages claim; therefore, he has a right to receive a declaration that the statute was unconstitutional as applied to him. Because the constitutional violation at issue in this case is a 30-day escape window that occurs once per-year, allowing unions to moot a case in this manner would permit the Union and the state to constantly evade review of their unconstitutional actions.

This Court should grant this Petition to resolve whether unions can avoid *Janus* claims by setting annual windows that are too short to allow appellate review, and to answer the important question whether *Janus* means what it said: that unions cannot fund their political speech by taking money from non-consenting employees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Few v. United Teachers L.A.*, No. 20-55338, 2022 U.S. App. LEXIS 2545 (9th Cir. Jan. 27, 2022) and reproduced at App. 1.

The opinion of the United States District Court for the Central District of California is reported at *Few v. United Teachers L.A.*, No. 2:18-cv-09531-JLS-DFM, 2020 U.S. Dist. LEXIS 24650 (C.D. Cal. Feb. 10, 2020) and reproduced at App. 5.

JURISDICTION

The Ninth Circuit issued its decision and judgment on January 27, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

Section 1983, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Thomas Few has been a special education teacher employed by LAUSD since August 2016. App. 6. At all times relevant to this appeal, he has been represented in that employment by UTLA, the union certified as the exclusive representative of his bargaining unit, pursuant to Cal. Gov't Code §§ 3543 and 3543.1. App. 6. Prior to June 2018, that employment was subject to a binary choice: employees who were members of Few's bargaining unit were required to either 1) join UTLA as union members or 2) pay an agency fee (sometimes called a "fair share" fee) to the union in lieu of membership. App. 8.

Few relied on this false choice, by which he would have had to pay the Union either way, and he became a member of the Union, signing membership agreements in September 2016 and February 2018. App. 6. The 2018 agreement, relevant to this appeal, included language stating that "[t]his agreement to pay dues shall remain in effect and shall be irrevocable unless I revoke it by sending written notice via U.S. mail to UTLA during the period not less than thirty (30) days and not more than sixty (60) days before the annual

anniversary date of this agreement or as otherwise required by law." *Id.* Therefore, unless Few were to send a written notice during an arbitrary 30-day period set by the Union, his employer would not honor any request to withdraw his authorization of membership dues. App. 8. In June 2018, prior to the *Janus* decision, Few sent a letter to UTLA requesting to withdraw his membership and dues authorization. App. 7.

On June 27, 2018, this Court issued its decision in *Janus*, holding that the binary choice to which Few had been subjected was unconstitutional. *See* 138 S. Ct. at 2486. No longer faced with the unconstitutional choice between union dues and agency fees, Few notified his employer days later on July 13, 2018, that he wished to withdraw his membership authorization and end the dues deduction. App. 8. But his attempt to assert his First Amendment right was denied. *Id.*

Therefore, Few filed this case in the district court on November 9, 2018. App. 10. The First Amended Complaint includes two counts: Count I challenges the refusal to allow Few to withdraw from the union and the deduction of dues from his paycheck without his affirmative consent. Count II challenges the Union's status as exclusive representative for bargaining purposes.

After Few filed this suit, on November 21, 2018, the Union informed him that it would disregard its own window requirement, process his resignation, and stop taking further dues from him. App. 9. The Union also sent Few a check equivalent to the dues collected from him from June 2018 onward. Although Few pled a claim seeking the return of all dues, at least back to the statute of limitations, he has received no refund of any dues taken prior to June 2018.

UTLA filed a motion to Dismiss Count II of the First Amended Complaint, which challenged the Union's status as exclusive representative. The district court granted that motion. App. 10. The parties then filed cross-motions for summary judgment on Count I. The district court denied Few's motion and granted the Defendants' motions. App. 19.

Few timely appealed, but on April 20, 2020, the case was stayed pending the outcome of another case raising similar claims, *Belgau v. Inslee*, No. 19-35137. On September 16, 2020, the Ninth Circuit issued a decision in that case, *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), which held that Janus "in no way created a new First Amendment waiver requirement for union members before dues are deducted" pursuant to a dues deduction authorization. *Id.* at 19, 20.

On November 11, 2020, Few filed a Motion for Summary Affirmance in light of *Belgau*, and another recent Ninth Circuit opinion, *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019). Few conceded in his Motion that *Belgau* controlled the outcome of his case before the Ninth Circuit. App. 2. Therefore, he asked that the Court of Appeals summarily affirm the district court's opinion. The Respondents opposed Few's motion, which was denied.

The parties proceeded to brief the case, with Few conceding that *Belgau* controlled but arguing it was in error and should be overruled. The Ninth Circuit affirmed the district court based on Few's admission. App. 3.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition to address key legal questions about the application of *Janus* to numerous cases pending in courts around the county.

This Court's "decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* was a gamechanger in the world of unions and public employment." *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020). It has, unsurprisingly, led to a significant amount of litigation around the nation, in almost every state and circuit where agency fees were previously allowed. Petitioner is aware of another petition involving similar claims which was filed one week before his own. *See Adams v. Teamsters*, (No. 21-1372). And more are coming. In the Ninth Circuit alone, Petitioner is aware of at least nine cases that

raise the same issue or similar issues.[2] Around the country, the story is much the same.[3]

Despite this Court's teaching, lower courts have almost universally been hostile to the rights recognized in *Janus*. As this case and the other pending petitions exemplify, this Court's intervention is necessary to clarify that *Janus* meant what it said: that unions may not take money from employees without their affirmative consent.

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[2] *See O'Callaghan v. Teamsters Local 2010,* No. 19-56271; *Ochoa v. SEIU*, No. 19-56271 (raising the issue of whether a government worker can be trapped in a union for longer than a year); *Cooley v. CA Statewide Law Enforcement*, No. 19-16498; *Polk v. Yee*, No. 20-17095; *Wagner v. University of Washington,* No. 20-35808; *Wright v. SEIU*, No. 20-35878; Zielinski v. SEIU, No. 20-36076; *Quirarte v. UDWA AFSCME Local 3930*, No. 20-55266; Savas v. CSLEA, No. 20-56045.

[3] *See, e.g., Pellegrino v. New York State United Teachers*, No. 18CV3439NGGRML, 2020 WL 2079386 (E.D.N.Y. Apr. 30, 2020); *Lutter v. JNESO*, No. 1:19-cv-13478 (D.N.J. 2020); *Baro v. AFT*, No. 1:20-cv02126 (N.D. Ill. 2022); *Nance v. SEIU*, No. 1:20-cv-03004 (N.D. Ill. 2020); *Troesch v. CTU*, No. 1:20-cv-02682 (N.D. Ill. 2021); *Hoekman v. Ed. Minn.*, No. 18-cv-1686 (D. Minn. 2020); *Prokes v. AFSCME 5*, No. 0:18-cv-2384 (D. Minn. 2020).

II. *Janus* requires clear and convincing evidence of a voluntary, knowing, and intelligent waiver to prove affirmative consent.

This Court in *Janus* explained that payments to a union may be deducted from an employee's wages only if that employee "affirmatively consents" to pay:

> 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.

138 S. Ct. at 2486 (citations omitted) (emphasis added).

The courts below concluded that the holding in *Janus* is limited in application to agency fee payers. App. 2, 18. But this Court was clear that all "employees" must "freely give[ ]" their "affirmative[ ] consent" to "any . . . payment" made to a union. *Id*. And any waiver of an employee's First Amendment right to pay nothing to the union must be "shown by 'clear and compelling' evidence." *Id*.

Certain standards must be met for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458,

464 (1938). Second, the waiver must 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). Finally, this Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). 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, 681 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

Few could not have waived his First Amendment right to not join or pay a union when he signed the union agreement at issue. First, neither the Union nor his employer informed him of his right not to pay a union because, at the time he signed his union membership application, this Court had not yet issued its decision in *Janus*. Second, neither the Union nor his employer informed him of his right not to pay a union because such a right was prohibited by the collective bargaining agreement in place at the time. Therefore, Few had no choice but to pay the Union and could not have voluntarily, knowingly, or intelligently waived his First Amendment right.

The union application Few signed did not provide a clear and compelling waiver of his First Amendment right not to join or pay a union because it did not expressly state that he had a constitutional right not to pay a union, and it did not expressly state that he was waiving that right.

Nor can the Union rely on the extant case law at the time Few signed his union authorization. In *Harper v. Virginia Department of Taxation*, 509 U.S. 86,

97 (1993), this Court explained that "[w]hen 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 our announcement of the rule." The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

By this rule, the Union's liability for dues paid by Few extends backward before *Janus*, limited only, if at all, by a possible statute of limitations defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

Under *Harper* and these precedents, the Union has no basis to hold Few to his union authorization or to keep the monies it seized from his wages before this Court put an end to this unconstitutional practice. Few is entitled to a refund of these pre-*Janus* dues.

After the *Janus* decision, the Union maintained that Few could only end his dues deduction during an arbitrary window of the Union's choice, despite Few's repeated requests to stop the dues deductions from his paycheck. The union dues authorization application that Fewsigned before *Janus* cannot meet the standards set forth for waiving a constitutional right, as required in *Janus*. 138 S. Ct. at 2484. Therefore, the Union cannot hold employees like Few to a time window to withdraw their union membership based on these invalid authorizations.

After being informed of his constitutional rights by the *Janus* decision, Few did not sign any additional union authorization application. Therefore, he has never knowingly waived his constitutional right not to pay the Union and has never given the Union the "affirmative consent" required by the *Janus* decision.

This Court should grant certiorari in this case to ensure that lower courts are properly applying its decision in *Janus* to employees like Few, who never knowingly waived his right not to pay the Union.

III. This Court should resolve the confusion among the circuits and hold that unions cannot moot claims through gamesmanship.

The district court held that Few was not entitled to a ruling on his claim regarding the escape window because, once he was allowed to stop paying dues, his prospective claims for relief were moot. The Ninth Circuit affirmed this holding in a brief, unpublished opinion, even though the Courts of Appeals' decisions on mootness have not been consistent on that issue. *See Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020); *compare Hendrickson v. AFSCME Council 18*, 992

F.3d 950, 957 (10th Cir. 2021), *with Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019). Moreover, it was wrong as to Few, since his damages claim means there remains a live controversy regarding the window period.

Few has a live claim for damages for the dues collected from him that have never been returned. Therefore, his claim cannot be moot. Few's requested declaratory relief is simply a predicate of the damages claim: in order to determine whether Few is entitled to monetary damages, a court must determine whether the Union's policy violates *Janus*.

Moreover, even the partial return of some or all of the relevant dues, and the expiration or the release of the window requirement should not moot the case.

Unions across the country have attempted to avoid judicial review of their unconstitutional policies by dodging lawsuits from employees who challenge their practices. When workers like Petitioner sue, unions consistently mail them checks to attempt to avoid constitutional scrutiny. A plaintiff in a case pending in the Ninth Circuit found herself trapped into paying union dues for almost *four years* just days before the *Janus* decision, . The union she was forced to pay sent her a partial refund check and stopped taking dues only after the case was fully briefed in the Court of Appeals. *See O'Callaghan v. Teamsters*, Ninth Circuit Case No. 19-56271. These instances of gamesmanship are not isolated. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (after being sued, union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their membership without requiring employees to

send the notice their policy required). This Court should not allow unions to avoid judicial review by picking off employees one by one. A "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Yet that is precisely what the court below allowed.

By contrast, some courts have recognized that the relevant exceptions to mootness apply. In *Belgau* the Ninth Circuit exercised jurisdiction over employees' First Amendment claim "[b]ecause Washington continued to deduct union dues until the one-year terms expired, other persons similarly situated could be subjected to the same conduct." 975 F.3d at 949-50. This is precisely the scenario faced by workers around the country.

The Ninth Circuit's opinion in *Belgau* followed its earlier unpublished opinion to the same effect in *Fisk*:

> Although no class has been certified and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three

> years is "too short to allow for full judicial review." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

Fisk, 759 F. App'x at 633. *Fisk* and *Belgau* recognized that claims like Petitioner's would never be addressed by the court if the Union were allowed to moot them in this way.

But unions are doing everything they can to prevent this Court from ruling on the simple question presented as the first issue in this Petition: Can a union trap government workers into paying dues if they never provided the consent required by *Janus*? Such avoidance tactics are not new; they are a typical and longstanding strategy by unions to avoid judicial scrutiny. In *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), for example, this Court rejected a union's attempt to moot a case by sending a full refund of improperly exacted dues to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal

> for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Knox, 567 U.S. at 307. In *Knox*, the Court reached the merits of the plaintiffs' constitutional claim because the defendants "continue[d] to defend the legality" of their practice. *Id.* at 307. All the defendants in this case also continue to defend the legality of trapping government workers into paying dues without consent. Because both the government defendants and the Union "continue[] to defend the legality" of their practice, the Union's mootness argument should be denied. *Id.*

A district court in New Jersey properly rejected this same mootness strategy. Again, the union in that case had attempted to moot claims about their escape window policies by ending deductions and sending a check. The court explained its reasoning:

> In short, Defendants' argument is seemingly that unions can: compel membership for up-to 11 months and 20 days from those wishing to resign, collect fees that it may not be entitled to, and avoid court intervention by paying off only those who file lawsuits. But the Third Circuit warned against nearly this exact scenario in [*Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020)]. As noted above, this Court must be "skeptical of a claim of mootness when a defendant . . . assures [the

> Court] that the case is moot because the injury will not recur, yet maintains that its conduct was lawful all along." *Hartnett*, 963 F.3d at 306. Indeed, the Court must focus "on whether the defendant made that change unilaterally and so may 'return to [its] old ways' later on." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 189). And when Defendants make these mootness arguments, they bear a "heavy burden of persuading the court that there is no longer a live controversy." *Id.* at 305-06 (cleaned up).

Lutter v. JNESO, No. 19-13478 (RMB/KMW), 2020 U.S. Dist. LEXIS 223559, at *13 (D.N.J. Nov. 30, 2020). The court in *Lutter,* addressing the same basic facts, rejected the mootness argument because "[t]he WDEA's resignation restrictions are still enforced today, and Defendants seemingly maintain that the statute is constitutional." *Id.* at *15.

Lutter further explained that "the WDEA's resignation window may still affect Plaintiff. If Plaintiff desires union representation in the future—or, possibly, the present—the WDEA's restrictive resignation scheme is undoubtedly a factor in weighing the pros and cons of union membership." *Id.*

Where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125 (1974), this Court recognized that "[i]t is sufficient . . . that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a

right to abortion. Nor was Jane Roe forced to submit an affidavit of her intention to get pregnant again. The Court explained in *Super Tire* that, even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." 416 U.S. at 125. The escape window that Petitioner was subjected to is a policy of the State of California, embodied in an agreement it negotiated with the Union and authorized by statute. This policy continues to impact present interests because Respondents continue to enforce it and assert its legality. This continuing direct effect on the behavior of public employees is grounds for declaratory relief. This Court should grant certiorari in this case and declare that the mandated "limited escape window" in California Act 7 unconstitutionally violates its decision in *Janus*.

Although the Ninth Circuit panel opinion in this case did not grapple with these issues, the district court attempted to distinguish *Fisk* (*Belgau* had not been decided yet) and similar cases on the basis that they were putative class actions. App. 16. That is not true of all the relevant cases—neither *Lutter* nor *Super Tire* mention a class, for instance. But even in those cases that were class actions, the proposed class was not the basis for the ruling because "a class lacks independent status until certified." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165 (2016). The basis for the ruling was the inherent transience of the claim. For example, in *Roe,* this Court was not concerned with the uncertified class; instead, it focused on the length of pregnancy:

> [T]he normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.

410 U.S. at 125. A constitutional violation cannot avoid court scrutiny simply because the relevant time period will run out before the appellate process is complete.

It was precisely this concern with the transience of the claim that guided the court in *Fisk*: "*although no class has been certified* and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible." 759 F.App'x at 633 (emphasis added). *Belgau*, likewise, dealt with "an inherently transitory, pre-certification class-action claim" that justified an exception to usual mootness principles. 975 F.3d at 949. In both cases, the Ninth Circuit relied on its previous decision in *Johnson v. Rancho Santiago Community College District*, which had held that even a three-year duration is "too short to allow for full judicial review." 623 F.3d 1011, 1019 (9th Cir. 2010). Few's declaratory relief claim lasts only one year at most. The Ninth Circuit's theory that other "escape window" cases are to be distinguished regarding mootness because they pled putative class membership is a misreading of the clear language of those cases.

Likewise, in *Knox*, there was a class, but that was not the basis for this Court's ruling. Indeed, the union in *Knox* had offered refunds to the *entire class*, so there

were no absent class members who hadn't received the money. Instead, this Court explained that the union's refund was irrelevant because "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). This is precisely the scenario Petitioner urges this Court to avoid.

For these reasons, this Court should grant certiorari in this case to resolve the difference in these decisions and clarify that unions cannot moot claims by changing their conduct for individual plaintiffs only after being sued.

CONCLUSION

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

Respectfully submitted,

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