No. ________

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

PETITION FOR A WRIT OF CERTIORARI

Jeffrey M. Schwab
Counsel of Record
LIBERTY JUSTICE CENTER
440 North Wells, Ste. 200
Chicago, IL 60654
(312) 637-2280
jschwab@libertyjusticecenter.org
Counsel for Petitioners

April 20, 2022

QUESTION PRESENTED

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018), this Court held that no payment to a union may be deducted from a nonmembers' paycheck unless a government employee "affirmatively consents" to waive her First Amendment rights not to pay money to a union.

The question in this case is:

For whom does this Court's affirmative consent waiver requirement set forth in *Janus* apply: nonmembers currently or previously employed in agency shop arrangements, like Mark Janus—as several lower courts have held—or employees, like Petitioners, who sign an agreement to pay a union, such as union membership card or dues deduction authorization?

PARTIES TO THE PROCEEDING

Petitioners Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker are natural persons and citizens of the Commonwealth of Pennsylvania.

Respondent Teamsters Union Local 429 is a labor union headquartered in Wyomissing, Pennsylvania, and includes among its members municipal government employees across central Pennsylvania.

Respondent Lebanon County is a Pennsylvania county and public employer.

Respondent Joshua Shapiro is a natural person and the Attorney General of Pennsylvania. Respondents James M. Darby, Albert Mezzaroba, and Robert H. Shoop Jr. are natural persons and members of the Pennsylvania Labor Relations Board.[1]

RULE 29.6 STATEMENT

As Petitioners are natural persons, no corporate disclosure is required under Rule 29.6.

---

[1] Respondents Joshua Shapiro, James M. Darby, Albert Mezzaroba, and Robert H. Shoop Jr., (collectively, the "Commonwealth Defendants"), were listed as defendants in this case with respect to Count II of the Complaint only, which challenged Pennsylvania's exclusive representation system. Petitioners do not appeal Count II to this Court. Commonwealth Defendants are listed as parties pursuant to Supreme Court Rule 14.1(b)(i), and served pursuant to Rule 12.6.

STATEMENT OF RELATED CASES

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

- *Adams et al. v Teamsters Union Local 429 et al.,* No. 20-1824, United States Court of Appeals for the Third Circuit. Judgment entered January 20, 2022.
- *Adams et al. v Teamsters Union Local 429 et al.,* No. 19-CV-336, United States District Court for the Middle District of Pennsylvania. Judgment entered March 31, 2020.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING............................ ii

RULE 29.6 STATEMENT... ii

STATEMENT OF RELATED CASES iii

TABLE OF AUTHORITIES vi

INTRODUCTION.. 1

OPINIONS BELOW.. 5

JURISDICTION... 5

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE PETITION 8

I. This Court should grant the petition because the lower courts have failed to implement this Court's holding in *Janus*. 8

II. Lower courts' failure to apply *Janus's* affirmative consent waiver analysis ensures that at least some government employees will pay unions without the employees' freely given and informed affirmative consent. 15

III. This case is an excellent vehicle for this Court to resolve these issues because the facts are undisputed and the question of law is clearly presented. 18

CONCLUSION 19

APPENDIX

OPINION, United States Court of Appeals for the Third Circuit (January 20, 2022) .... App. 1

JUDGMENT, United States Court of Appeals for the Third Circuit (January 20, 2022) .... App. 10

REPORT AND RECOMMENDATION, United States District Court for the Middle District of Pennsylvania (December 5, 2019) .... App. 12

MEMORANDUM, United States District Court for the Middle District of Pennsylvania (March 31, 2020) .... App. 42

ORDER, United States District Court for the Middle District of Pennsylvania (March 31, 2020) .... App. 49

ORDER, United States District Court for the Middle District of Pennsylvania (March 31, 2020) .... App. 51

TABLE OF AUTHORITIES

CASES

Belgau v. Inslee,
975 F.3d 940 (9th Cir. 2020) 2, 10, 12

Bennett v. AFSCME Council 31,
991 F.3d 724 (7th Cir. 2021) 3, 10, 13

College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 14

Cooley v. CA Statewide Law Enforcement,
No. 19-16498 (9th Cir.).. 17

D.H. Overmyer Co. v. Frick Co.,
405 U.S. 174 (1972) 2, 14

Diamond v. Pa. State Educ. Ass'n,
972 F.3d 262 (3d Cir. 2020)...................................... 15

Fischer v. Governor of New Jersey,
No. 19-3914, 2021 U.S. App. LEXIS 1158, 2021 WL141609 (3d Cir. Jan. 15, 2021) 2, 10

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993) 13

Hendrickson v. AFSCME Council 18,
992 F.3d 950 (10th Cir. 2021) 10

Janus v. AFSCME Council 31,
138 S. Ct. 2448 (2018) .... passim

Johnson v. Zerbst,
304 U.S. 458 (1938) 13, 17

LaSpina v. SEIU Pa. State Council,
985 F.3d 278 (3d Cir. 2021) 3, 11

O'Callaghan v. Napolitano,
No. 19-56271 (9th Cir.) 17

Ohio Bell Tel. Co. v. Pub. Utils. Com.,
301 U.S. 292 (1937) 14

Oliver v. SEIU Local 668,
830 F. App'x 76 (3d Cir. 2020) 3, 10

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) 16

Savas v. CSLEA,
No. 20-56045 (9th Cir.) 17

STATUTES

28 U.S.C. § 1254(1) 5

42 U.S.C. § 1983 5–6

INTRODUCTION

This Court in *Janus v. AFSCME, Council 31* held that an Illinois law allowing government employers to withhold agency fees from nonconsenting employees on behalf of public sector unions violated those employees' First Amendment rights. In doing so, this Court stated that "[n]either 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.'" 138 S. Ct. 2448, 2486 (2018) (citations omitted).

Petitioners Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker signed union membership cards/dues deduction authorizations before this Court's decision in *Janus*. Subsequent to this Court's ruling in *Janus*, Petitioners sent letters to Teamsters Union Local 429 and their employer, Lebanon County, stating that they no longer wished to be members of the Union and that dues should no longer be taken from their paychecks. Lebanon County withheld dues on behalf of the Union from Plaintiffs' paychecks without Petitioners affirmative consent to waive their right not to pay money to the Union.

At the time they signed the union membership card/dues deduction authorization, Petitioners were nonmembers agreeing to have money deducted from their paychecks to pay the union. Therefore, the affirmative consent waiver analysis set forth in *Janus*

applies to Petitioners' actions—"[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—and dictates whether the union's opt-out window restrictions permitted the County to continue withholding union dues after they requested that they stop.

This Court in *Janus* required "freely given" affirmative consent to "waive" one's 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 Petitioners signed union membership agreements prior to the *Janus* decision, they could not have knowingly waived a right that this Court had not yet recognized. Further, they could not have been effectively waiving their right to not pay a union because at the time they signed the union cards/dues deduction authorization they were forced into a choice that this Court held to be unconstitutional in *Janus*: a choice between paying union dues as a member of the Union or paying agency fees as a nonmember of the Union. Thus, the Union and County violated Petitioners' First Amendment rights by relying on the dues deduction authorizations they signed before *Janus* to withhold dues from their paychecks after *Janus* when Petitioners had demanded that such deductions stop.

The Third Circuit, in direct conflict with the language in *Janus*, but consistent with other appellate courts, *see Belgau v. Inslee*, No. 20-1120, 975 F.3d 940, 952 (9th Cir. 2020); *Fischer v. Governor of New Jersey*, No. 19-3914, 2021 U.S. App. LEXIS 1158, 2021 WL

141609, at *1-2 (3d Cir. Jan. 15, 2021) (nonprecedential decision); *LaSpina v. SEIU Pa. State Council*, 985 F.3d 278 (3d Cir. 2021), *Oliver v. SEIU Local 668*, 830 F. App'x 76 (3d Cir. 2020) (nonprecedential decision); *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), held that employees like Petitioners who sign a union card/dues deduction agreement are not subject to the affirmative consent waiver requirement set forth in *Janus*. App. 6 (relying on *LaSpina*, 985 F.3d at 288). The Third Circuit found Petitioners had no First Amendment claim because it held that this Court's statement in *Janus* that an employee must have provided affirmative consent before an agency fee or any other payment to a union may be deducted from a nonmember's wages only applies to "nonmembers currently or previously employed in agency shop arrangements" and not employees who joined the union prior to the *Janus* decision. *LaSpina*, 985 F.3d at 288.

But the Third Circuit ignored language in *Janus* that indicates that this Court did not intend to limit its holding to only nonmembers employed in agency shop arrangements. "*By 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). Nonmembers who pay agency fees never agreed to pay the union. Thus, the affirmative consent waiver analysis is not meant to protect them—they've never agreed to pay, so no money may be withheld. It is only when the union asserts that a nonmember has agreed to pay money to the union (presumably by agreeing to become a member) that the *Janus* waiver analysis applies. According to *Janus*, any agreement to pay must constitute "affirmative[] consent[]" to pay, must be "freely given," "shown by clear

and compelling evidence," and "cannot be presumed." 138 S. Ct. at 2486.

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 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.

The Third Circuit's refusal to enforce the plain language of this Court's ruling in *Janus* must additionally be reversed by this Court because the First Amendment rights that this Court recognized in *Janus* are not being fully protected. By not enforcing the *Janus* waiver analysis, unions have been able to capitalize on government employees' ignorance of their First Amendment rights under *Janus*, and trap employees into paying union dues for multiple years. Unless this Court intervenes, it is certain that some public-sector workers will continue having money withdrawn from their paychecks and remitted to unions without their freely given and informed affirmative consent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Adams v. Teamsters Local Union 429,* ___ F. 3d ___ (3d Cir. Jan. 20, 2022), and reproduced at App. 1.

The orders of the United States District Court for the Middle District of Pennsylvania are reported at *Adams v. Teamsters Local Union 429*, __ F. Supp. 3d _ (M.D. Pa. Dec. 3, 2019), and reproduced at App. 49, 51.

JURISDICTION

The Third Circuit issued its decision and judgment on January 20, 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."

> 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.

Section 1983, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker were employed by Lebanon County and became members of Teamsters Union Local 429 ("the Union") at some point after they began their employment. App. 3. At the time they signed the union membership and dues authorization cards, they were required to pay money to the Union as a condition of their employment regardless of whether they became members of the Union: either in the form of union dues as a member or agency fees as nonmembers. App. 4.

On June 27, 2018, this Court issued its decision in *Janus,* holding that the binary choice to which Petitioners had been subjected was unconstitutional. *See* 138 S. Ct. at 2486. Petitioners each sent letters to the Union seeking to resign their membership and stop union dues. App. 18–20. The County continued to collect dues from some Petitioners after *Janus*. App. 18–20. Although the County ceased the collection of dues from all Petitioners by May 2019, and the Union returned the money withheld from Petitioners from the time of their requested resignation until the collection of dues ceased, the Union did not return money taken from Petitioners from the time before *Janus*, nor did they return money taken from the time after *Janus* until they sent their resignation letters. App. 18–20.

Petitioners filed their complaint on February 27, 2019, alleging two counts: First, that the County and the Union violated their First Amendment rights to free speech and freedom of association by withholding dues from their wages without affirmative consent to waive the right to not pay the union. App. 21. Second, that Pennsylvania law granting the Union the power to speak on their behalf as their exclusive representative to their employer violated Petitioners' free speech and free association rights.[2] App. 21.

Lebanon County and the Union both moved to dismiss this complaint, which the district court converted to motions for summary judgment. App. 21. The Commonwealth Defendants filed a motion to dismiss on May 20, 2019, which the district court converted to a motion for summary judgment. App. 44. On March 31, 2020, the district court denied Petitioners' motion for summary judgment and granted Respondents' motions for summary judgment. App. 4.

Petitioners filed a timely notice of appeal on April 15, 2020. App. 4. On January 20, 2022, the Third Circuit ruled that the affirmative consent waiver requirement that this Court set forth in *Janus* does not apply to Petitioners or any other employee who consents to pay money to the union. App. 5–6. Further, the Third Circuit held that the exclusive representation system of labor relations does not violate Petitioners' free speech and freedom of association rights. App. 6–9.

---

[2] Petitioners have chosen not to appeal the dismissal of Count II challenging exclusive representation to this Court.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition because the lower courts have failed to implement this Court's holding in *Janus*.

In its landmark decision in *Janus*, this Court held that state laws allowing government employers to withhold agency fees from nonconsenting employees on behalf of public sector unions violate those employees First Amendment rights. Further, this 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:

> 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).

What is clear from this paragraph is (1) that agency fees or other payments withheld by a government employer to unions without an employees' consent are unconstitutional, and (2) when an employee does consent

to pay money to a union, that employee's consent must meet certain waiver standards—clear and affirmative consent, freely given and shown by clear and compelling evidence—before a government employer can withhold money from an employee's paycheck on behalf of a union.

Prior to *Janus*, public-sector workers were subject to what *Janus* would subsequently find as unconstitutional—a choice between paying money to the union as a member in the form of dues or paying money to the union in the form of agency or fair-share fees. Given this unconstitutional choice, many workers chose to join the union. However, after this Court's decision in *Janus*, many public sector workers like Petitioners who had decided to join because they had to pay money anyway now sought to leave the union and stop dues from being deducted from their paychecks.

But these employees ran into a barrier: most union cards and dues deduction agreements contained provisions that limited their ability to stop dues deductions to a narrow time window—usually a 10-to-20-day period recurring annually or upon expiration of the collective bargaining agreement. Thus, Petitioners and others like them were forced to pay months (or even years) of union dues after the time they sought to stop union dues from being deducted from their paychecks.

This case became one of dozens of cases filed by government employees who joined the union prior to the *Janus* decision—during which they faced an unconstitutional choice requiring them to pay the union as members or pay the union as nonmembers via agency fees. These plaintiffs argued that the affirmative consent waiver requirement set forth by this Court in *Janus* applied to them because they were nonmembers

who agreed to pay money to the union. Further, they could not have properly waived their First Amendment rights to not pay money to a union because at the time they agreed to pay money to the union and become members they did not know they had that right and could not have freely consented to pay money to the union since at the time they had no choice but to do so.

The lower courts, however, have held that this Court's decision in *Janus* did not apply to people like Petitioners; rather, they limited this Court's holding in *Janus* only to agency fee payers. *See, e.g.*, *Fischer v. Governor of New Jersey*, No. 19-3914, 2021 U.S. App. LEXIS 1158, 2021 WL 141609, at *1-2 (3d Cir. Jan. 15, 2021) (nonprecedential decision); *Oliver v. SEIU Local 668*, 830 F. App'x 76 (3d Cir. 2020) (nonprecedential decision); *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021); *Belgau v. Inslee*, 975 F.3d 940, 945 (9th Cir. 2020), petition for cert. docketed, No. 20-1120 (U.S. Feb. 16, 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021).

These courts either ignored this Court's holding in *Janus* that nonmembers who consent to pay money to a union must meet the waiver standards before money is deducted from their paychecks, or asserted that this section in *Janus* did not apply to Petitioners and those like them who chose to join the union.

The holdings of these lower courts render a significant portion of this Court's holding in *Janus* immaterial. While it's true that this Court held in *Janus* that agency fees or other payments withheld by a government employer to unions without an employees' consent are unconstitutional, the lower courts incorrectly found that this was this Court's only holding. This

Court also held that a nonmember who agrees to pay money to a union is waiving her First Amendment rights and thus, the consent must meet certain standards for waiving constitutional rights. *Janus*, 138 S. Ct. at 2486.

"By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id*. This sentence clearly applies to an employee in Petitioners' position: employees that have agreed to pay money to the union. And it clearly states that waiver analysis must be applied. Notably, this sentence does not apply to someone in Mark Janus's position, because Janus never agreed to pay and never waived his First Amendment rights. The only way for a nonmember—an employee in Janus's position who wishes to pay money to her union—to agree to pay money to a union would be to join the union by signing a membership and dues deduction authorization card. Thus, the only way for the second sentence of the *Janus* waiver analysis to apply—where an employee agrees to pay a union—is when a nonmember employee agrees to become a member. That's exactly the situation Petitioners were in.

The Third Circuit held that employees who sign a union card/dues deduction agreement are not subject to the affirmative consent waiver requirement set forth in *Janus*. App. 5–6 (relying on *LaSpina*, 985 F.3d at 288). According to the Third Circuit, only "nonmembers currently or previously employed in agency shop arrangements"—not employees who joined the union prior to the *Janus* decision—must provide affirmative consent before an agency fee or any other payment to a union may be deducted from a nonmember's wages. *LaSpina*, 985 F.3d at 288.

Similarly, the Ninth Circuit concluded that *Janus* waiver analysis does not apply to employees at the time they sign a union membership and dues deduction agreement. According to the Ninth Circuit, it was in the context of this Court's "conclus[ion] that the practice of automatically deducting agency fees from nonmembers violates the First Amendment" that the Court "considered whether a waiver could be presumed for the deduction of agency fees." *Belgau v. Inslee*, 975 F.3d 940, 952 (9th Cir. 2020). Therefore, the Court "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id*.

The problem with the analysis of the Third and Ninth Circuits is that they ignore language in *Janus* that indicates that this Court did not intend to limit its holding to only nonmembers employed in agency shop arrangements. "*By 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). Nonmembers who pay agency fees, like Mark Janus, never agreed to pay the union. Thus, the affirmative consent waiver analysis is not meant to protect them. By referring to nonmembers who agreed to pay money to a union, this Court was explicitly referring to a situation different from that of Janus and other agency fee payers. It is only when a nonmember has agreed to pay money to the union (presumably by agreeing to become a member) that the *Janus* waiver analysis applies. According to *Janus*, any agreement to pay must constitute "affirmative[] consent[]" to pay, must be "freely given," "shown by clear and compelling evidence," and "cannot be presumed." 138 S. Ct. 2448, 2486. Thus, the Third and Ninth Cir-

cuit's conclusion that the waiver analysis was only relevant to nonmembers subject to agency fees, who never agreed to pay money to the union, is contrary to the text of *Janus*.

The Seventh Circuit held that the *Janus* waiver analysis does not apply to employees who joined a union prior to the Janus decision because they consented to pay the union. *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021). But when an employee consents to pay money to a union is exactly when this Court said the waiver analysis applies. The Seventh Circuit turns the *Janus* waiver analysis on its head. This Court said in *Janus* that waiver analysis applies when a nonmember agrees to pay a union. The Seventh Circuit said that waiver analysis does not apply to the plaintiff in that case because she agreed to pay the union.

When Petitioners agreed to join and pay the union, they were nonmembers. Thus, under *Janus*, waiver analysis applies to Petitioners. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("[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."). As this Court held in *Janus*, Petitioners' waiver must be freely given and shown by "clear and compelling" evidence. *Janus*, 138 S. Ct. at 2486. In addition, this Court has long held that certain standards be met in order 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).

And 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).

Petitioners could not have waived their First Amendment rights under *Janus* when they signed the union membership card and dues deduction authorization. First, they did not and could not have knowledge of their right to not have their employer withhold money from their paycheck on behalf of the union because, at the time they signed the dues authorization, this Court had not yet issued its decision in *Janus*. Second, they could not have voluntarily, knowingly, or intelligently waived their First Amendment right under *Janus* because at the time they were forced into an unconstitutional choice: pay union dues as a member or pay agency fees to the union as a nonmember.

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 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

Therefore, Petitioners did not waive their rights under *Janus* by signing the union membership card and dues deduction authorization. As a result, the Union and the County had no right to continue to withhold money from their paychecks after this Court's *Janus* decision and to limit their withdrawal from the

Union to a time window specified in the union membership and dues deduction authorization.[3]

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. Lower courts' failure to apply *Janus's* affirmative consent waiver analysis ensures that at least some government employees will pay unions without the employees' freely given and informed affirmative consent.

This case is of exceptional federal importance because if the lower courts' decisions are allowed to stand, then no constitutional scrutiny will be applied to government employees' decisions to join the union. 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

---

[3] The district court found a good faith defense protecting the withholding of dues from Petitioners' paychecks prior to this Court's *Janus* decision based on Third Circuit precedent. App. 32–35 (citing *Diamond v. Pa. State Educ. Ass'n,* 972 F.3d 262 (3d Cir. 2020)). A good faith defense to a Section 1983 claim is contrary to the decision of this Court and for that reason if the Court grants this petition, it should also address that issue. Still that is not a defense to Petitioners' damages claims for dues withheld after this Court's *Janus* decision.

without knowledge of their *Janus* rights, since this Court and the lower courts will have refused to safeguard this right by applying waiver analysis.

For example, in another case pending in Illinois where the facts take place entirely after this Court's decision in *Janus*, an English-as-a-second-language teacher from Spain employed by a school district under a cultural exchange program, who was ignorant about this Court's decision in *Janus*, signed a union card and dues deduction authorization after attending a mandatory new-hire meeting during which the union was given time to talk about union members. *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). Because she believed she was required to join the union, she signed the union card, only later realizing that she did not have to. Yet, when she attempted to leave the union, initially, she second-guessed herself because a union representative in an email to all teachers falsely claimed that all teachers would have to pay money to the union, regardless of whether they joined. When she then attempted to withdraw from the union and stop union dues based on her mistaken understanding, the union told her that she would have to wait until her opt-out window almost a full year later.

In dismissing plaintiff's claim, the district court relied on the Seventh Circuit's erroneous analysis holding that because she voluntarily joined the union, *Janus* waiver analysis does not apply. *Ramon Baro v. Lake County Federation of Teachers Local 504*, No. 20-cv-02126, 2022 U.S. Dist. LEXIS 56106, at *13 (N.D. Ill. Mar. 28, 2022). As a result, an employee who is unaware of this Court's decision in *Janus* could end up

paying union dues for months, when if they had been aware of their right not to join and pay a public sector union, they would have chosen not to do so.

Public employees who join a union thinking they are either required to or because they think they have to pay agency fees to the union as a non-member have no constitutional claims to stop union dues being withheld from their paychecks when they finally learn of their constitutional rights. However, it is well-established that waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Without this Court's intervention, unions and their political allies have a direct financial incentive to ensure that public employees are ignorant about *Janus*.

In addition, another consequence of the lower court's failure to fully enforce the *Janus* decision is that unions may seek to limit a union member's ability to stop paying union dues to a small two-week window that comes about only after multiple years, meaning that a decision to join a union might be irreversible for years. Indeed, the Ninth Circuit is currently considering a trio of cases where the union has provided a small opt-out window that is triggered only after multiple years, rather than the usual one-year window. *O'Callaghan v. Napolitano*, No. 19-56271 (9th Cir.); *Savas v. CSLEA*, No. 20-56045 (9th Cir.); *Cooley v. CA Statewide Law Enforcement*, No. 19-16498 (9th Cir.).

Only because the Ninth Circuit in *Belgau* ignored this Court's clear holding in *Janus*—that a government employer may not withhold money from an employee's paycheck unless that employee affirmatively consents to waive his or her First Amendment right—could lower courts have held unions can trap their

members in a union membership and force them to pay union dues for years before being allowed to stop such payments.

As a result of the lower court's refusal to enforce the plain language of this Court's ruling in *Janus*, unions have been able to take advantage of government employees' ignorance of their First Amendment rights and trap them into paying union dues, sometimes for multiple years.

This Court should grant the petition in this case not only because the lower courts have refused to apply the plain language of this Court's *Janus* decision, but because, as a result of the lower courts' refusal to do so, the First Amendment rights that this Court recognized in *Janus* are not being fully protected. By failing to enforcing the *Janus* waiver requirements, as shown in this case and the other cases referenced herein, the lower courts are ensuring that some public sector workers still are having money withdrawn from their paychecks and remitted to unions without the employees' freely-given and informed affirmative consent.

III. This case is an excellent vehicle for this Court to resolve these issues because the facts are undisputed and the question of law is clearly presented.

This case is an excellent vehicle for this Court to address the question presented because the facts are undisputed by the parties and the question was raised on cross motions for summary judgment. Further, the question presented in this case is illustrative of the dozens of other cases where plaintiffs, like Petitioners, have alleged that dues have been withheld from their paychecks without their affirmative consent.

CONCLUSION

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

Respectfully submitted,

Jeffrey M. Schwab
Counsel of Record
LIBERTY JUSTICE CENTER
440 North Wells St., Ste. 200
Chicago, IL 60654
(312) 637-2280
jschwab@libertyjusticecenter.org

Counsel for Petitioners

April 20, 2022