No. _____

IN THE

Supreme Court of the United States

SUSAN BENNETT,

PETITIONER,

V.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO; AFSCME LOCAL 672; AND MOLINE-COLE VALLEY SCHOOL DISTRICT NO. 40,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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May 14, 2021

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:

Whether an employee's signature on a union membership card and dues deduction authorization by itself authorizes a government employer and public-sector union to withhold union dues or other fees from an employee's wages consistent with this Court's affirmative consent waiver requirement set forth in *Janus*?

PARTIES TO THE PROCEEDING

Petitioner Susan Bennett is a natural person and a citizen of the State of Illinois.

Respondents AFSCME Council 31 and AFSCME Local 672 are labor unions representing public employees in Moline-Cole Valley School District No. 40.

Respondent Moline-Cole Valley School District No. 40 is an Illinois public school district organized under the Illinois School Code, 105 Ill. Comp. Stat. 1 *et seq*.

Respondent Kwame Raoul is a natural person and the Attorney General of Illinois. Respondents Andrea Waintroob, Judy Biggert, Gilbert O'Brien, Jr., Lynne Sered, and Lara Shayne are natural persons and members of the Illinois Educational Labor Relations Board.[1]

RULE 29.6 STATEMENT

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

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[1] Respondents Kwame Raoul, Andrea Waintroob, Judy Biggert, Gilbert O'Brien, Jr., Lynne Sered, and Lara Shayne, (collectively, the "State Defendants"), were listed as defendants in this case with respect to Count II of the Complaint only, which challenged Illinois's exclusive representation system. Petitioner does not appeal Count II to this Court. State 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:

- *Bennett v AFSCME Council 31,* No. 20-1621, United States Court of Appeals for the Seventh Circuit. Judgment entered March 12, 2021.
- *Bennett v AFSCME Council 31,* No. 19-CV-4087-SLD-JEH, United States District Court for the Central District of Illinois. Judgment entered April 2, 2020; Amended Judgment entered September 23, 2020.

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INTRODUCTION

After holding 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, this Court in *Janus v. AFSCME, Council 31* held 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).

Petitioner Susan Bennett signed a union membership card/dues deduction authorization before this Court's decision in *Janus*. Subsequent to this Court's ruling in *Janus*, in November 2018, Bennett sent a letter to her employer, Moline-Cole Valley School District No. 40, and AFSCME International— an international union based in Washington, D.C. with which AFSCME Council 31 is affiliated—stating that she no longer wished to be a member of AFSCME Council 31 and that dues should no longer be taken from her paycheck. On or around December 13, 2018, AFSCME Council 31 sent a letter to Bennett, advising her that she could not revoke her union dues authorization until a specific "window period" and her next opportunity to submit a written request to revoke these deductions would be from July 27, 2019, to August 11, 2019. The School District continued withholding union dues from her wages until her withdrawal window.

At the time she signed the union membership card/dues deduction authorization, Bennett was a non-member agreeing to have money deducted from her paycheck to pay the union. Therefore, the affirmative consent waiver analysis set forth in *Janus* applies to Bennett's 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 School District to continue withholding union dues after she 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 she signed a union membership agreement prior to the *Janus* decision, Bennett could not have knowingly waived a right that this Court had not yet recognized. Further, she could not have been effectively waiving her right to not pay a union because at the time she signed the union card/dues deduction authorization she was forced into a choice which 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 non-member of the Union. Thus, at the very least, continuing to withhold union dues from Bennett's paycheck after this Court's decision in *Janus* and after Bennett's demand that such deductions stop violated her First Amendment rights under *Janus*.

The Seventh 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); *Oliver v. SEIU Local 668*, 830 F. App'x 76 (3d Cir. 2020) (nonprecedential decision), held that employees like Bennett who sign a union card/dues deduction agreement are not subject to the affirmative consent waiver requirement set forth in *Janus* because they have consented to pay. App. 16. The Seventh Circuit's holding contradicts this Court explicit holding in *Janus*. This Court specifically said that "consent" was not enough to meet the waiver requirement. "*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). The Seventh Circuit got the language in *Janus* exactly backwards. It's when a nonmember consents to pay that the waiver requirements apply. When an employee consents to pay the union, she is waiving her First Amendment rights, and therefore waiver analysis must apply to analyze that decision.

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 Seventh 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*, lobby for legislation that makes it more likely that employees will remain ignorant of those rights by giving unions near-exclusive power to communicate with employees about union membership, and even use coercion, fraud, and forgery in order to have money withheld from employees' paychecks on the unions' behalf. 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.

Finally, this Court should grant the petition in this case because this case provides a clean vehicle to reach the question presented without having to address contradictory opinions on mootness by the Ninth and Tenth Circuits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724 (7th Cir. 2021), and reproduced at App. 1.

The opinion of the United States District Court for the Central District of Illinois is reported at *Bennett v. Am. Fedn. Of State*, ___ F. Supp. 3d ___ (C.D. Ill. 2020), and reproduced at App. 25.

JURISDICTION

The Seventh Circuit issued its decision and judgment on March 12, 2021. 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

Susan Bennett has been employed as a custodian by the Moline-Coal Valley School District No. 40 ("School District") since August 2009. App. 4. Bennett initially became a member of Council 31 and Local 672 (collectively, "the Union") in November 2009 by signing a membership and dues-deduction authorization card. App. 4. At the time Bennett signed the union membership and dues authorization card, the operating collective bargaining agreement between Council 31 and the School District, and Illinois state law, 115 ILCS 5/11 required her to either to join the Union and pay union dues or pay agency or "fair-share" fees to the Union as a condition of her employment. App. 30.

The union membership card she signed contained a provision limiting her ability to stop the withholding of dues from her wages on behalf of Council 31 to a 15-day window corresponding to the anniversary of her signing the authorization card. App. 5. The deduction of agency fees and the limited opt-out window were both provisions of the collective bargaining agreement between Council 31 and the School District, entered into under color of state law. App. 5-6.

On June 27, 2018, this Court issued its decision in *Janus,* holding that the binary choice to which Bennett had been subjected was unconstitutional. *See* 138 S. Ct. at 2486. Bennett sent a letter, dated November 1, 2018, to AFSCME International—an international union based in Washington, D.C. with which Council 31 is affiliated—seeking to resign her membership and stop union dues. App. 6. On November 5, 2018, Bennett sent a letter to the School District, informing her

employer that she was resigning from her membership in the Union and asking the School District not to enforce "[a]ny previous authorizations of membership and/or the deduction of dues or fees." App. 6. On or around December 13, 2018, Council 31 sent a letter to Bennett, advising her that she could not revoke her union dues authorization until a specific "window period" and her next opportunity to submit a written request to revoke these deductions would be from July 27, 2019, to August 11, 2019. App. 6. Based on a letter from the Union, the School District continued withholding union dues from her wages until her withdrawal window. App. 7.

Bennett filed her complaint on April 26, 2019, alleging two counts: First, that the School District and the Union violated her First Amendment rights to free speech and freedom of association by withholding dues from her wages without her affirmative consent to waive her right to not pay the union. App. 7. Second, that Illinois law granting the Union the power to speak on her behalf as her exclusive representative to her employer violated Bennett's free speech and free association rights.[2] App. 7.

The State Defendants—Attorney General Kwame Raoul, Andrea R. Waintroob, Judy Biggert, Gilbert O'Brien Jr., Lynne Sered, and Lara Shayne—filed a motion to dismiss on June 27, 2019. App. 8. Plaintiffs and Defendants School District and the Union filed

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[2] Plaintiff has chosen not to appeal the dismissal of Count II challenging exclusive representation to this Court. She instead urges the Court to take up this issue as presented in *Thompson v. Marietta Education Association, et al.*, No. 20-1019.

cross-motions for summary judgment. App. 8. On March 31, 2020, the District Court denied Bennett's motion for summary judgment, granted the School District's and the Union's motions for summary judgment, and granted the State Defendants' motion to dismiss. App. 8.

Bennett filed a timely notice of appeal on April 14, 2020. App. 8. On March 12, 2021, the Seventh Circuit ruled that the affirmative consent waiver requirement that this Court set forth in *Janus* does not apply to Bennett or any other employee who consents to pay money to the union. App. 14. Further, the Seventh Circuit ruled that the exclusive representation system of labor relations does not violate Bennett's free speech and freedom of association rights. App. 22.

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, immediately after holding 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, set forth a standard for protecting public employees' First Amendment rights in the context of the public-sector labor system in the states. 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).

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) because permitting a government employer to withhold money from an employees' wages requires that employee to waive her First Amendment rights, certain standards must be met 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 Bennett 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, Bennett and others like her 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.

Bennett 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, but could not have properly waived their First Amendment rights to do so because at the time they agreed to pay money to the union and become members they did not know they had a right to pay no money to the union 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 Bennett; 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); *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 Bennett and those like her 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 Bennett's 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 Bennett was in.

One might object that it is theoretically possible that an employee could consent to pay money to a union without wanting to join that union. Even if that is theoretically possible, it does not explain why the *Janus* waiver analysis should apply only to a nonmember who consents to pay money to the union without joining the union and not to a nonmember who consents to pay money to the union by becoming a member. According to this Court's holding in *Janus*, both nonmembers by agreeing to pay money to the union are waiving their constitutional rights and in order for their employer to withhold union dues, standards for constitutional waiver must be met in both circumstances.

The Seventh Circuit in this case uses circular logic to conclude that Bennett is not subject to the *Janus* waiver requirement. This Court held that by agreeing to pay money to a union, a nonmember is waiving her First Amendment right, and therefore waiver analysis must apply. The Seventh Circuit held that waiver analysis does not apply because Bennett already agreed to join and pay the union. "Having consented to pay dues to the union, regardless of the status of her membership, Bennett does not fall within the sweep of *Janus's* waiver requirement." App. 16. But when an employee consents to pay money to a union is exactly when this Court said the waiver analysis applies. The

Seventh's Circuit's conclusion that waiver analysis does not apply to Bennett because she consented to pay the union is exactly the opposite of this Court's holding in *Janus*.

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 "conlus[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 *Belgau* Court's analysis is that if this Court's holding was limited only to those nonmembers who had agency fees withheld from their paychecks without their consent, then why did this Court explicitly refer to nonmembers who "agree[] to pay" money to the union, *Janus*, 138 S. Ct. at 2486—a circumstance that did not apply to Janus or any other nonmember who paid agency fees at the time of this Court's ruling in *Janus*? 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. Thus, the Ninth's Circuit's conclusion that the Court's waiver analysis was only relevant to nonmembers subject to agency

fees, like Janus, who never agreed to pay money to the union, is simply wrong.

These cases are not the only ones. In the Ninth Circuit alone, Petitioner is aware of 17 cases that now will be controlled by the *Belgau* Court's faulty logic that ignores this Court's clear holding in *Janus*. Further, the Third Circuit has issued a non-precedential decision on this issue, similarly ignoring the explicit waiver language in *Janus*. *Fisher,* 2021 U.S. App. LEXIS 1158. Similarly, the Tenth Circuit has refused to apply waiver analysis set forth in this Court's clear holding in *Janus*. *See Hendrickson v. AFSCME Council 18,* 992 F.3d 950 (10th Cir. 2021).[3]

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

When Bennett agreed to join and pay the union, she was a nonmember. Thus, under *Janus*, waiver analysis applies to Bennett. *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

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[3] In contrast to the federal courts, at least three state attorney generals have recognized that *Janus* requires evidence of a waiver for a state to take union payments from employees' wages. Alaska Atty. Gen. Op., at *5 (Aug. 27, 2019) (2019 ALAS. AG LEXIS 5); Indiana Atty. Gen. Op. 2020-5, at *3-4 (June 17, 2020) (2020 IND. AG LEXIS 14); Texas Atty. Gen. Op. KP-0310, at *2-3 (May 31, 2020) (2020 TEX. AG LEXIS 89).

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*, Bennett's 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).

Bennett could not have waived her First Amendment rights under *Janus* when she signed the union membership card and dues deduction authorization. First, she did not and could not have knowledge of her right to not have her employer withhold money from her paycheck on behalf of the union because, at the time she signed the dues authorization, this Court had not yet issued its decision in *Janus*. Second, she could not have voluntarily, knowingly, or intelligently waived her First Amendment right under *Janus* because at the time she was 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)).

The result is that Bennett did not waive her rights under *Janus* by signing the union membership card and dues deduction authorization. As a result, the Union and the School District had no right to continue to withhold money from her paycheck after this Court's *Janus* decision and to limit her withdrawal from the Union a time window specified in the union membership and dues deduction authorization.[4]

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

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[4] The union may have a good faith defense protecting the withholding of dues from Bennett's paycheck prior to this Court's *Janus* decision based on Seventh Circuit precedent. *Janus v. Am. Fed'n. of State*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*") (petition for cert. denied, No. 19-1104 (U.S. Jan. 25, 2021). But that is not a defense to Bennett's damages claim for dues withheld after this Court's *Janus* decision.

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.

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. 1:20−cv−02126 (N.D. Ill.). 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.

If the Seventh Circuit is correct and those who sign a union card are not subject to *Janus* waiver analysis, then Ramon-Baro may not have a constitutional claim against the union and her employer. As a result, she and those who similarly are 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.

Further, unions in Illinois have used their political power to persuade lawmakers to pass laws that make it more difficult for public sector employees to be told of their First Amendment rights under *Janus*. On December 20, 2019, Governor Pritzker signed Senate Bill 1784 into law—creating Public Act 101-0620. Among other things, this Act amends current law to:

- Requires public employers to give unions a list of workers at least once a month, including names, home addresses, and any personal email or cell phone numbers the employer might have on file, regardless of the employees' membership status or preferences.

- Prohibits employers from disclosing certain information about workers to third parties. Prohibits employees' information, including contact information, from being disclosed under the Public Labor Relations Act, Illinois Educational Labor Relations Act, Pension Code, and Freedom of Information Act.

- Requires employers to not discourage membership and refer all inquiries about membership to the union.

- Gives the union sole authority for processing requests to stop paying dues to the union itself, rather than the employer.

- Allows unions to restrict the window of time that members can leave the union and stop

> dues deductions to as little as a 10-day period once a year. The bill also allows any dues authorization to be automatically renewed if the employee does not request an end to the deductions within the designated window.

5 ILCS 315/6. *See also* S.B. 866, 2017-2018 Reg. Sess. (Cal. 2018) (containing similar provisions); H.B. 3854, 191st Gen. Ct. (Mass. 2019) (same); S.B. 254, 2019-2020 Sess. (Vt. 2020) (same).

This Act clearly makes it easier for public sector unions in Illinois to control the flow of information about union membership to employees in their bargaining unit. It requires employers to give unions all the contact information about employees in their bargaining unit, while explicitly preventing any private third-party from obtaining contact information.[5] This makes it more difficult for third-party organizations who want to inform public sector workers about their *Janus* rights. Further, the Act prevents employers from "discouraging" union membership, which makes it less likely that an employer would risk informing its employees about their rights to not join or pay a union under *Janus*, because doing so could be seen as an unfair labor practice.

Without *Janus* waiver analysis for employees who consent to pay the union, laws like this one in Illinois will allow public sector unions to prey on employees' ignorance of their constitutional rights under *Janus*. The Seventh Circuit's decision in this case means that those employees have no constitutional remedy when

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[5] *See Boardman v. Inslee*, 978 F.3d 1092 (9th Cir. 2020) (petition for cert. pending, No. 20-1334).

unions prey on this ignorance. 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).

In addition, relying on the Ninth Circuit's conclusion that *Janus* waiver analysis does not apply to those who have joined the union, numerous district courts have dismissed cases filed by public sector employees who allege that they never signed union membership agreements and that their government employers deducted union dues from their paychecks, based on a union's forgery of their signatures on union membership agreements. *See* Brief of Goldwater Institute and National Taxpayers Union as Amici Curiae, *Belgau v. Inslee*, No. 20-1120 (*citing Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *1 (D. Or. Jan. 6, 2021), appeal docketed, No. 21- 35133 (9th Cir. Feb. 19, 2021); *Zielinksi v. SEIU Local 503*, No. 3:20-cv-00165-HZ, ___ F.Supp.3d ___, 2020 WL 6471690, *1 (D. Or. Nov. 2, 2020), appeal docketed, No. 20-36076 (9th Cir. Dec. 15, 2020); *Schiewe v. SEIU Local 503*, No. 3:20-cv-00519-JR, 2020 WL 5790389, *1–2 (D. Or. Sept. 28, 2020), appeal docketed, No. 20-35882 (9th Cir. Oct. 9, 2020); *Wright v. SEIU Local 503*, No. 6:20-cv-00520-MC, ___ F.Supp.3d ___, WL 5797702, *1 (D. Or. Sept. 28, 2020), appeal docketed, No. 20-35878 (9th Cir. Oct. 8, 2020); *Semerjyan v. SEIU Local 2015*, No. CV 20-02956 AB (ASx), ___ F.Supp.3d ___, 2020 WL 5757333 (C.D. Cal. Sept. 25, 2020), appeal docketed, No. 21-55104 (9th Cir. Feb. 9, 2021); *Yates v. Wash. Fed'n of State Emps.*, 466 F.Supp.3d 1197, 1201 (W.D. Wash. 2020), appeal docketed, No. 20-35879 (9th Cir. Oct. 8, 2020); *Quezambra v. United Domestic Workers of Am. AFSCME Local 3930*, 445 F.Supp.3d 695, 702

(C.D. Cal. 2020), appeal docketed, No. 20-55643 (9th Cir. June 23, 2020).

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 these courts have held that forging an employee's signature on a union membership card is not a constitutional violation. When, contrary to this Court's decision in *Janus*, lower courts hold that employees who choose to join a union are *not* subject to *Janus's* waiver analysis, the ironic result is that public sector employees who did not choose to join a union can be forced to join and pay money to a union because the federal courts refuse to review a union's coercion, fraud, and forgery.

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, lobby for legislation that makes it more likely that employees will remain ignorant of those rights by giving unions near-exclusive power to communicate with employees about union membership, and even use coercion, fraud, and forgery in order to have money withheld from employees' paychecks on the unions' behalf.

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, unlike other similar cases, there are no mootness issues.

Unions across the country for years have attempted to avoid judicial review of their unconstitutional policies by dodging lawsuits from employees that challenge their practices. *See, e.g., Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). In cases since this Court's holding in *Janus*, where plaintiffs in situations similar to Bennett have brought claims, union defendants have often refunded all the union dues that could possibly be alleged as damages, while subsequently alleging that upon doing so, the case became moot. *See, e.g., Jackson v. Napolitano*, No. 19cv1427-LAB (AHG), 2020 U.S. Dist. LEXIS 175603 (S.D. Cal. Sep. 23, 2020); *Durst v. Or. Educ. Ass'n*, 450 F. Supp. 3d 1085, 2020 U.S. Dist. LEXIS 56638, 2020 WL 1545484 (D. Ore. 2020). Similarly, other courts have found mootness at the point where the plaintiff was allowed to stop paying dues, because the time window for opting out of the union and cancelling dues deductions eventually arrived. *See Hendrickson v. AFSCME Council 18,* No. _____ (Tenth Circuit No. 20-2018).

On the issue of mootness in cases that where the plaintiffs have alleged the same claim as Bennett does here, the decisions of the Ninth and Tenth Circuits are

in conflict. Where the Tenth Circuit held that a plaintiff's prospective claims for relief were moot once he was allowed to stop paying dues, the Ninth Circuit has ruled twice that these sorts of windows claims are not mooted by the window expiring or the union voluntarily ceasing its conduct as to the plaintiff. *See Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020); *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019).

In this case, the Seventh Circuit did not address mootness, leaving this Court to address the substantive question in this case without having to resolve a side issue like mootness. That makes this case a better vehicle to reverse the lower courts' failure to apply the *Janus* waiver analysis than other similar cases where this Court would also have to address mootness.

Further, 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. Finally, the question presented in this case is illustrative of the dozens of other cases where plaintiffs, like Bennett, 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,

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