No. 21-615

In the Supreme Court of the United States

CHRISTOPHER A. WOODS; LINDA CREED; TYLER RIBERIO,
Petitioners,

v.

ALASKA STATE EMPLOYEES ASSOCIATION / AFSCME LOCAL 52, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* WEST VIRGINIA AND 14 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Petitioners were once union members. After this Court's decision in *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448 (2018), they resigned their union memberships and asked their employers and now-former unions to stop withholding union dues from their paychecks. The unions refused, citing pre-*Janus* dues authorizations that the employees signed when they were union members.

The questions presented are:

1. Do government employers and unions need clear and compelling evidence showing that non-union-member employees have waived their First Amendment right to refrain from subsidizing union speech before those employers can withhold money from employees' paychecks and direct it to the unions?

2. When a union acts jointly with a State to deduct and collect union payments from employees' wages, is the union a state actor under 42 U.S.C. § 1983?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

The First Amendment's guarantee of freedom of speech "necessarily compris[es] the decision of both what to say and what *not* to say." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis in original). And just as the government cannot force citizens to speak, it also cannot force them to hand over dollars in service of *others'* speech. After all, "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Harris* v. *Quinn*, 573 U.S. 616, 647 (2014). Consequently, three years ago the Court held that "States and public-sector unions" cannot "extract" money from non-member employees to fund union speech—at least where those employees have not deliberately waived their First Amendment right to abstain. *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

Janus should have been easy enough to apply. If a State and a union have "clear and compelling" evidence that an employee wants to pay union dues, then the State can take dues from that employee's paycheck; otherwise, it cannot. *Janus*, 138 S. Ct. at 2486. But the Ninth Circuit—and other courts like it—have rewritten the test. In those circuits, a union need only invoke a prior authorization, even one that predates *Janus*, to trump the employee's present refusal to pay. A waiver in those jurisdictions can thus result from less intentional, less informed decisions than the Court rightly demands before

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

recognizing other waivers of constitutional rights. "Clear and compelling evidence" requires more.

Until this question is resolved public employers will continue to find themselves stuck in the middle. These employers regularly face demands from unions waving contracts and insisting that the States hand over funds from public-sector employees' wages. Yet they also receive outcry from their nonconsenting employees that diverting payroll to union purposes violates the First Amendment. *Amici* States—the States of West Virginia, Alabama, Arkansas, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, New Hampshire, South Carolina, South Dakota, Tennessee, Texas, and Utah—ask the Court to put the present fight to an end. Most must deal with public-employee dues authorizations. Without intervention from this Court, those States will continue to weather case after case from both sides. And all *Amici* States (even those without public unions) have a strong interest in seeing First Amendment protections respected nationwide.

The Court should grant the Petition and reaffirm what it said in *Janus*: Employees' First Amendment rights matter. Absent clear and compelling evidence that they wish to continue lending financial support to unions' speech, employees—even former union members—should not be compelled to pay.

SUMMARY OF ARGUMENT

Janus should have put the first question presented to rest. Unfortunately, lower courts have ignored *Janus*'s directive and undermined the fundamental rights of public-sector employees who object to paying union dues. These choices have in turn put many States in an untenable position.

I. Unions are using purportedly "voluntary" agreements to lock employees into months or years of dues payments—even over their objections. These agreements are often written in ways that make it difficult (or practically impossible) for workers to exercise their constitutional right to abstain from subsidizing union speech. The problematic agreements have then resulted in waves of litigation over whether they are enforceable consistent with well-established case law governing the waiver of fundamental rights. Those cases have, in turn, drawn in the States, many of whom stand as intermediaries in the union-dues-deduction process. Without the Court's help, States will likely continue to be pummeled by lawsuits on these issues.

II. Lower courts have often construed *Janus* in ways that are inconsistent with the approaches of States trying to give full effect to public-sector workers' constitutional rights. In particular, various State authorities—and one member of the Federal Labor Relations Authority—have concluded that effective *Janus* waivers must be truly voluntary; pre-*Janus,* automatically renewing dues authorizations won't do. In contrast, the Ninth Circuit and other federal courts of appeals have held that any contract can lock an employee into wage payments even though he or she now objects on constitutional grounds. The Court should resolve this confusion.

III. The lower court's view that dues authorization agreements effectively erase employees' First Amendment rights is inconsistent with this Court's cases governing the waiver of constitutional rights and *Janus* itself. Those cases require clear and compelling evidence that a person intended to waive a constitutional right, and nothing about the right to abstain from paying union dues or fees as a non-member calls for a different result.

Rather than applying this well-understood test, lower courts have chosen to look to state common law and inapplicable contract-law principles to determine whether the federal constitutional right rises or falls. That choice is mistaken.

If *Janus* means anything, it must mean that unions cannot take the pay of objecting non-union employees. When it comes to automatic payroll deduction disputes, this Court should grant the Petition to clarify exactly that.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Petition To Extract States From The Untenable Tug Of War Between Unions And Employees.

As public employers, States and state agencies are the parties actually responsible for deciding where employee wages go—so they have a responsibility to ensure the money gets to the right place. Yet disagreement over how to apply *Janus*'s clear and compelling evidence standard to inventive dues agreements has placed States with public-employee unions in the middle of a never-ending fight.

A. After *Janus*, unions have employed a number of measures to try to preserve their "extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport* v. *Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007) (emphases in original).

Perhaps most commonly, many unions have drafted maintenance-of-dues provisions that require one-time union members to continue paying union dues for a fixed period—even if the members later attempt to resign. Under these provisions, those employees are effectively compelled to remain members in everything but name, at

least temporarily. After all, "the obligation to pay dues to a union is the practical equivalent of requiring union membership." *United Auto., Aerospace & Agric. Implement Workers of Am. Loc. 3047* v. *Hardin Cnty.*, 842 F.3d 407, 421 (6th Cir. 2016). *Janus* and other authorities, however, are clear that this kind of involuntary involvement is wrong. See, *e.g.*, *Pattern Makers' League of N. Am., AFL-CIO* v. *NLRB*, 473 U.S. 95, 107 (1985) ("Congress in 1947 sought to eliminate completely any requirement that the employee maintain full union membership."); *Janus* v. *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31; AFL-CIO*, 942 F.3d 352, 358 (7th Cir. 2019) (explaining that this Court held in *Janus* that "the state may not force a person to pay fees to a union with which she does not wish to associate").

Another common tack is to create dues authorizations that contain only narrow windows for former members to opt out. See Brian A. Powers & Andrew Kelser, *Dues-Checkoff Dreams Do Come True, They Do, They Do*, 29 ABA J. Lab. & Emp. L. 299, 303 & n.32 (2014). In this very case, for example, Alaska public employees were given only ten days per year in which they could revoke their authorization to deduct union dues. If they missed the window, their "irrevocable" authorizations would renew automatically, year after year. See Pet. App. 16. And this case is no outlier. See, *e.g.*, *Ohlendorf* v. *United Food & Com. Workers Int'l Union*, 883 F.3d 636, 639 (6th Cir. 2018) (15-day window); *Stewart* v. *NLRB*, 851 F.3d 21, 25 (D.C. Cir. 2017) (same); *Williams* v. *NLRB*, 105 F.3d 787, 789 (2d Cir. 1996) (10-day window). These time limits are sometimes paired with other rigid requirements—spelled out in the finest of print—such as a requirement that the employee provide written notice by certified mail. See, *e.g.*, *Ohlendorf*, 883 F.3d at 639. In a real sense, then, many resigning members are not "free to leave the union"

and "escape" its reach. *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969).

What's more, these provisions are habitually written in confusing ways that might befuddle even a seasoned labor lawyer. For example, a maintenance-of-dues provision's length can often be tied to the length of the relevant collective-bargaining agreement—as is the case here. See Pet. App. 16. But frequently it is not obvious to an individual employee when the applicable collective-bargaining agreement will expire. The authorizations themselves can be no help, as they frequently omit definite dates. See, *e.g.*, Pet. App. 6, 27. Sometimes a union will negotiate a separate "union security agreement" that could further extend an individual employee's obligations in ways that may not be obvious at signing. See, *e.g.*, *Taylor Sch. Dist.* v. *Rhatigan*, 900 N.W.2d 699, 708 (Mich. Ct. App. 2016) (discussing a *ten-year* union security agreement). And in the usual case, the act of resigning union membership and the act of revoking a dues authorization are treated as separate acts, so employees who "resign" with the intent to free themselves from *all* ties with the union may instead remain on the hook for union-related financial obligations for months or years to come. See, *e.g.*, *Burse* v. *Pa. Lab. Rels. Bd.*, 425 A.2d 1182, 1186 (Pa. Commw. Ct. 1981). Still other times, employees are never told that they have a First Amendment right to decline membership, so they sign an agreement at the outset with no understanding that they had a right to say no. See, *e.g.*, *Allen* v. *Ohio Civ. Serv. Emps. Ass'n AFSCME, Loc. 11*, No. 2:19-cv-3709, 2020 WL 1322051, at *10 (S.D. Ohio Mar. 20, 2020).

B. In the face of onerous provisions like these, it likely comes as no surprise that dues-authorization agreements have spurred round after round of litigation. And because

unions are not themselves parties to the authorizations, see, *e.g.*, *Int'l Ass'n of Machinists Dist. Ten & Loc. Lodge 873* v. *Allen*, 904 F.3d 490, 492 (7th Cir. 2018), States frequently end up being named as defendants in these "expensive" dues-related disputes, *Harris*, 573 U.S. at 637. Together, troublesome agreements and the ambiguous state of the law have put States with public-sector unions in the middle of never-ending cycles of suits.

On the one hand, many employees have taken the plain language of *Janus* to heart and sought to free themselves from union dues by resigning union membership. When unions then refuse to let public-sector employers stop taking dues from those employee's paychecks, the employees sue—a lot. Just looking to the federal courts, employees have filed dozens of cases since *Janus* asking for employers and unions to respect their First Amendment right to stop paying union dues. Many of these cases have made their way to this Court—where the Court has, to this point, denied certiorari. See, e.g., *Troesch* v. *Chi. Tchrs. Union, Loc. 1*, No. 20-1786, 2021 WL 5043587, at *1 (U.S. Nov. 1, 2021); *Bennett* v. *Am. Fed'n*, No. 20-1603, 2021 WL 5043580, at *1 (U.S. Nov. 1, 2021); *Belgau* v. *Inslee*, 141 S. Ct. 2795 (2021). There looks to be no end to these lawsuits in sight.

On the other hand, unions do not go quietly into the night if States insist on clear and compelling proof of employee consent to pay. No, "unions defend union security with great intensity," Matthew Dimick, *Productive Unionism*, 4 U.C. Irvine L. Rev. 679, 705 n.147 (2014), and checkoffs have long been an especially important form of union security, E.B. McNatt, *Check-Off*, 4 Lab. L.J. 123, 123 (1953). So unions have not been shy about suing States that decline to respect old check-off arrangements out of deference to *Janus*.

For example, when Alaska tried to implement a new system requiring meaningful consent for union-dues payments, one of the same Respondents from this case sued and won almost $200,000 in damages and fees. *See* Pet. App. 81. Any other State that tries to follow Alaska's lead could face similar threats based on allegations of breach of contract (as to union-security agreements) or unfair labor practices (for changing the terms of employment unilaterally). See also, *e.g.*, *Asociación Puertorriqueña de Profesores Universitarios, Inc.* v. *Estado Libre Asociado*, No. SJ2018CV05688, 2019 WL 2185047 (P.R. Cir. Feb. 28, 2019) (discussing and ultimately reversing a lower court's injunction against a Puerto Rican administrative action that attempted to implement *Janus*'s consent requirement).

States cannot even remove themselves from the process altogether without substantial difficulty. When the West Virginia Legislature eliminated public-union-dues checkoff agreements earlier this year, unions quickly sued and obtained a preliminary injunction against the new law. See Order, *W. Va. AFL-CIO* v. *Justice*, No. 21-P-156, 2021 WL 4806638, at *19 (W. Va. Cir. Ct. June 16, 2021). The Supreme Court of Appeals of West Virginia was forced to intervene and reverse the injunction. See generally *Justice* v. *W. Va. AFL-CIO*, No. 21-0559, 2021 WL 5446106 (W. Va. Nov. 22, 2021). Likewise, a federal district court deemed a ban on public-employee payroll deductions in Idaho unconstitutional—until this Court stepped in and reversed. See generally *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353 (2009); cf. *Loc. Joint Exec. Bd. of Las Vegas* v. *NLRB.*, 540 F.3d 1072, 1074 (9th Cir. 2008) (describing a union's challenge to an employer's effort to end dues-checkoffs). So even when a State chooses to opt out from any role as intermediary between

unions and employees, it may well find itself facing a lawsuit.

C. Without the Court's intervention, the situation is unlikely to improve any time soon.

Absent a clear standard for valid waivers of employees' constitutional rights under circumstances like these, unions will have room to experiment with any number of methods to ensure that dues checkoffs continue for the longest possible duration. Unions would be free, for instance, to create ever-increasing barriers to revocation—opt-out windows could shorten, renewal periods could lengthen, and revocation methods could become more logistically challenging. See *Int'l Ass'n of Machinists Dist. Ten & Loc. Lodge 873* v. *Allen*, 904 F.3d 490, 513 (7th Cir. 2018) (Manion, J., dissenting) ("It is in the union's interest to procure the maximum irrevocability period allowed under the law, not to bargain for the best interests of its members."). These tactics are likely to encourage even *more* litigation from objecting employees, who might reasonably believe that they should be free of the burden of union dues when they are no longer part of the union. In short, leaving unresolved the question of valid revocation of union dues agreements "seems calculated to perpetuate give-it-a-try litigation." See *Lehnert* v. *Ferris Fac. Ass'n*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

The concern that unions might be motivated to test the limits is real. Unions have been known to press hard for dues revenue in the past. One organization recounted, for instance, how unions on the West Coast have used frequent phone calls and other communications to place undue pressure on employees to join or stay on as union members. See Br. of the Freedom Found. as Amicus

Curiae in Supp. of Pet. at 19, *Bennett* v. *AFL-CIO*, No. 20-1603 (U.S. Aug. 26, 2021), 2021 WL 3884251, at *20. The same organization catalogued many cases alleging that union membership forms and authorizations were forged. *Id.* at *21. Another organization described how, after Michigan implemented a "right to work" law in 2012, unions sent former members to collections agencies after they tried to leave the union and stop paying dues. See Br. of Amicus Curiae Mackinac Ctr. For Pub. Policy in Supp. of Pet. at 41, *Janus* v. *AFSCME, Council 31,* 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 WL 6311774. In still another example, unions successfully lobbied to pass a law that gave them exclusive access to employee contact information—in a calculated attempt to shut out groups that sought to inform employees about their *Janus* rights. See *Boardman* v. *Inslee*, 978 F.3d 1092, 1123-25 (9th Cir. 2020) (Bress, J., dissenting). And in yet another case, the National Labor Relations Board found that a union "failed time and again to respond to [employees'] requests [to revoke their dues authorizations] or, if they did respond, did so only after the employees' window periods closed or charges were filed." *Int'l Bhd. of Teamsters Loc. 385*, 366 NLRB No. 96 (June 20, 2018).

Granting the Petition to reaffirm the "clear and compelling evidence" standard for waiver would help put an end to such gamesmanship—and with it, the never-ending litigation that has too often drawn in the States.

II. The Ninth Circuit's View Conflicts With Many Others' Interpretations Of *Janus*.

Janus held that union dues cannot be taken without an employee's "affirmative[ ] consent," which must deliberately waive the employee's First Amendment rights. 138 S. Ct. at 2486. And the consent must be shown

through "clear and compelling evidence." *Id.* The Ninth Circuit, however, held that a mere dues authorization form (including one executed before *Janus*) can bind an employee even after that employee no longer supports the union—in other words, employees are locked into "join[ing] and support[ing] the union" until such time as state contract law says they can be free. Pet. App. 17 (quoting *Belgau* v. *Inslee*, 975 F.3d 940, 950 (9th Cir. 2020)). No constitutional waiver analysis was applied, much less any reference to "clear and compelling evidence."

Trouble is, the Ninth Circuit's construction is not only wrong, *see infra* Part III, but it conflicts with the approaches of several States and at least one member of the Federal Labor Relations Authority as they endeavor to apply *Janus* properly and safeguard public employees' rights.

The State of Alaska. In 2019, Alaska's Attorney General issued a legal opinion on the State's union dues deduction process after the Court's decision in *Janus*. See *First Amendment Rights and Union Dues Deductions and Fees*, Att'y Gen. of Alaska, 2019 WL 4134284 (Alaska A.G. Aug. 27, 2019). In examining Alaska's then-in-place payroll deduction practice, the Attorney General concluded that "*Janus* require[d] a significant change to the State's current practice in order to protect state employees' First Amendment rights." *Id.* at *1. Specifically, the opinion reasoned that the State must conduct its "payroll deduction process for union dues and fees to ensure that it does not deduct funds from an employee's paycheck unless it has 'clear and compelling evidence' of the employee's consent." *Id.* at *2. The opinion further explained that "forcing individuals to subsidize the speech of any other private speaker,

including a union, burdens those individuals' First Amendment rights." *Id.* Ultimately, the Attorney General found that the State's checkoff system did not adequately ensure the existence of "clear and compelling evidence" of each employee's freely given consent. *Id.* at *4.

In evaluating potential fixes, the opinion determined consent "must be reasonably contemporaneous, free from coercion, and accompanied by a clear explanation" of the rights being waived. 2019 WL 4134284, at *5. In the specific context of automatic payroll deductions of union dues and fees, a valid waiver must include a demonstrated awareness of the choice "to elect to retain one's First Amendment rights, or to financially support a union and thereby affiliate with and promote a union's speech and platform." *Id.* In that vein, *Janus*'s requirement of "clear and compelling evidence" demands that employers conduct "periodic inquir[ies] into whether a public employee wishes to continue to waive" his or her rights. *Id.* at *7.

The Attorney General concluded that the State's system did not satisfy these minimum requirements because, by placing the onus to collect automatic payroll deduction authorizations on unions, *the State* had not been fulfilling its duty to ensure that waivers were "freely given." 2019 WL 4134284, at *7. Indeed, the opinion emphasized the inherent risk that, as the collector and beneficiary of these authorizations, unions may add terms that render them irrevocable for significant periods—and thus raise additional concerns about valid waiver. *Id.* at *8.

In response to the Attorney General's opinion, Governor Dunleavy issued Administrative Order No. 312 for the express purpose of "establish[ing] a procedure that

ensures that the State of Alaska honors the First Amendment free speech rights of state employees to choose whether or not to pay union dues and fees through payroll deduction." Pet. App. 73. The decision below, of course, thwarts that goal, and highlights the difficulty of avoiding litigation even when the employer and employee agree about the scope of fundamental speech rights.

The State of Texas. In 2020, the Attorney General of Texas issued his own legal opinion explaining how *Janus* applies to automatic public employee payroll deductions for union fees. See *Application of the United States Supreme Court's* Janus *Decision to Public Employee Payroll Deductions for Employee Organization Membership Fees and Dues*, Att'y Gen. of Tex., Op. No. KP-0310, 2020 WL 7237859 (Tex. A.G. May 31, 2020). The Texas opinion acknowledged *Janus*'s requirement that a valid payroll deduction for union dues or fees can only occur where the employee has voluntarily waived his or her First Amendment rights, as shown by "clear and compelling evidence." *Id.* at *1. At a minimum, *Janus* requires public employers to ensure that employee consent to automatic payroll deductions remains voluntarily given. *Id.* at *3.

The State of Michigan. The Michigan Civil Service Commission quickly followed suit. Days after the Texas opinion, the Commission proposed amendments to its own rules requiring that employees have notice of their rights and intentionally reauthorize dues deductions each year. See State of Michigan Civil Service Commission, *Proposed Amendments to Rule 6-7, Dues and Service Fees* (June 5, 2020), *available at* https://www.michigan.gov/documents/mdcs/SPDOC_20-06_693193_7.pdf. In explaining the amendments, the Commission observed that "[o]ngoing deduction of fees based on old

authorizations is problematic." *Id.* at 1. Among other things, those authorizations were executed "when employees were unaware of later developments in … *Janus*" and "while [employees were] legally compelled to pay either [an agency] fee or higher dues." *Id.* The proposed amendments became effective in Michigan later in 2020.

The State of Indiana. Also in 2020, the Indiana Attorney General issued a legal opinion adopting the same interpretation of *Janus*. See *Payroll Deductions for Public Sector Employees*, Att'y Gen. of Ind., Op. No. 2020-5, 2020 WL 4209604 (Ind. A.G. June 17, 2020). That opinion reasoned that compliance with *Janus* required (1) notice to employees of their First Amendment rights advising "against compelled speech"; (2) a showing "by clear and compelling evidence" of a voluntary waiver of the employee's First Amendment rights coupled with consent to an automatic payroll deduction of union dues or fees; and (3) an annual renewal of any waiver. *Id.* at *1.

More generally, this is not the first time the States have asked the Court to intervene to clarify how *Janus* applies in this important context. See Amicus Br. of State of Alaska, et al., *Troesch* v. *Chic. Tchrs Union, Loc. 1*, No. 20-1786 (S. Ct. Jul. 23, 2021), 2021 WL 3262119 (signed by sixteen States); Amicus Br. of State of Alaska, et al., *Belgau* v. *Inslee*, 975 F.3d 940 (2020) (No. 20-1120), 2021 WL 1089791 (signed by thirteen States). Those briefs urge the Court to solidify the rule that a stale dues authorization—especially one signed before *Janus*—cannot be "clear and compelling evidence" of a waiver of fundamental constitutional rights. The schism between the Ninth Circuit's contract-focused approach to *Janus* and the States' waiver-focused approach is another reason why this Court should grant the Petition.

The Federal Labor Relations Authority. Finally, there is at least some confusion on the federal level as well. The Federal Labor Relations Authority ("FLRA") was also asked to provide guidance on *Janus* and the First Amendment rights that automatic payroll deduction for federal employees. See *Decision on Request for General Statement of Policy or Guidance*, Off. of Pers. Mgmt., 71 F.L.R.A. 571 (Feb. 14, 2020). While the FLRA addressed only the issue of revocation of dues assignments, member James Abbott authored a more expansive concurrence. See *id.* at 574-75. He explained that "the constitutional principles clarified in *Janus* have general applicability to agencies and labor organizations in the area of federal employees' requests to revoke union dues assignments." *Id.* at 574. Indeed, the "theme of *Janus* is that an employee has the right to support, or to stop supporting, the union by paying, or to stop paying, dues." *Id.* Member Abbott therefore concluded that *Janus* "indicates that [when] the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be 'freely given' and the earlier election can no longer serve as a waiver of the employee's First Amendment rights." *Id.* at 575.

The decision below gives short shrift to employees' right to support a union—or not—at a time when many States are working to give *Janus*'s holding full effect for the benefit of their workers. The Court should intervene to clarify that when dubious contractual waivers conflict with speech and associational rights, the First Amendment wins.

III. The Ninth Circuit's View Conflicts With *Janus* And Other Decisions Of This Court Addressing Waivers Of Constitutional Rights.

The Ninth Circuit's decision holds that former union members may be bound to continue paying union dues even if they object to further payments and signed dues authorizations without understanding the constitutional rights at stake and with no other evidence of voluntary and genuine waiver. This result contravenes this Court's holdings on constitutional waiver and *Janus* itself, which recognized the right of a non-member to refuse to subsidize union speech. *Janus*, 138 S. Ct. at 2486 (recognizing that waiver principles apply to "any … payment … deducted from a nonmember's wages").

A waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Given the importance of constitutional rights, waiver must be freely given—that is, voluntary, knowing, and intelligently made. See *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185-86 (1972). To meet that standard, the waiver must be "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

"Constructive consent" is not enough to show waiver of a constitutional right. *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974). Nor will the Court "presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937). To the contrary, "[c]ourts indulge every reasonable presumption *against* waiver of fundamental constitutional rights." *Coll. Savings Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (cleaned up; emphasis added).

There is thus nothing new about *Janus*'s insistence that waiver must be shown by "clear and compelling evidence." 138 S. Ct. at 2484. Contractual language does not operate as a waiver if it fails to "clear[ly]" call out the nature of the right at stake. See *Fuentes* v. *Shevin*, 407 U.S. 67, 95 (1972) (holding that a contract did not waive a party's right to a hearing where the contract did not address the prospect of a hearing); accord *J. Endres* v. *Ne. Ohio Med. Univ.*, 938 F.3d 281, 300 (6th Cir. 2019) ("[P]arties may agree by contract to waive their constitutional rights, … [but] [s]uch contracts, … require 'clear and unmistakable language.'"); *Democratic Nat'l Comm.* v. *Republican Nat'l Comm.*, 673 F.3d 192, 205 (3d Cir. 2012) ("[C]onstitutional rights ... may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver.").

The pre-*Janus* dues authorizations that the Ninth Circuit and other lower courts endorse do not satisfy this standard. Most obviously, public employees could not have knowingly and intelligently signed up for dues checkoffs before *Janus* because *Janus* was what made clear they had a First Amendment right to reject paying agency fees at all. See *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 145 (1967) ("We would not hold that Curtis waived a 'known right' before it was aware of the *New York Times* decision."). Unsurprisingly, none of the dues authorizations at issue here expressly referenced the constitutional right to abstain from payment. Voluntariness was also impossible before *Janus*, as employees were typically bound to pay *something* to a public-sector union—either union dues or agency fees. Cf. *NLRB* v. *Penn Cork & Closures, Inc.*, 376 F.2d 52, 56 (2d Cir. 1967) (Friendly, J.) (recognizing that "a union

security clause would be the procuring cause of checkoff authorizations for a substantial number of employees"). Nor is there any other suggestion that the employees in this case were informed of their rights at the time of signing. Now that *Janus* has given them a full understanding of the "relevant circumstances and likely consequences" of waiver, these same employees want out. *Brady*, 397 U.S. at 748.

Because the dues authorization contracts at issue here do not provide "clear and compelling" evidence of a true waiver, employees subject to them must be allowed to withdraw. That result should have been even more obvious under the circumstances here: The employees' once-upon-a-time status as union members is irrelevant because they were non-union members when they first signed the authorizations, and they are non-union members now. See Pet. 9-10. It is highly unlikely non-members would have voluntarily chosen to pay agency fees—at a minimum, there is no evidence to the contrary here. To hold them to agreements about the method of collecting fees signed at a time when they could not refuse to pay makes *Janus*'s promise a lie.

Decisions like this one thus show insufficient respect for employees' First Amendment interests. Indeed, the Ninth Circuit has seemed to subordinate the interest in freedom from compelled speech (which drove *Janus*) to the separate interest in freedom from compelled association. Contra *Knox* v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 309 (2012) (recognizing that "compelled speech and compelled association" are "closely related" to "compelled funding," but nevertheless treating them as distinct). In a prior dues case, the Ninth Circuit saw no cause for concern because "employees who do not want to be part of the union … can resign their union membership

after joining … subject to a limited payment commitment period." *Belgau*, 975 F.3d at 952. Yet even if freedom from compelled association were the sole concern, it would hardly make sense to condition the exercise of that right on the payment of an involuntary sum—what the law often calls a fine. And were the Ninth Circuit correct that the financial imposition is "limited," that temporal limit would not solve the problem, either: "*[E]ven temporarily*," unions "cannot be allowed to commit dissenters' funds to improper uses." *Knox*, 567 U.S. at 321 (emphasis added).

Cohen v. *Cowles Media Co.*, 501 U.S. 663 (1991), a case factoring heavily in the Ninth Circuit's and other courts' rejections of former members' claims, does not erase *Janus* rights. There, the Court held that two newspapers could be sued on a promissory-estoppel theory after they broke a promise to keep the identity of a source confidential. *Id.* at 665-66. The Court reasoned that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. In further explaining why the state law at issue was generally applicable, the Court observed that "any restrictions" imposed on the First Amendment right at issue—that is, the right to publish "truthful information"—were "self-imposed" by the choice to promise confidentiality. *Id.* at 671.

Cohen's passing comment about "self-imposed" obligations cannot support a new rule in an entirely different context that the mere invocation of a contract excepts a case from the rules of constitutional waiver. Perhaps more importantly, nothing about the underlying right in *Cohen* changed between the time the promise was made and when the suit was brought. In contrast, here, employees' understanding of the nature of the underlying

right has *substantially* changed, such that the initial agreement cannot be deemed "knowing" in a post-*Janus* world. *Cohen*'s confidentiality agreement also involved none of the coercive elements in the dues authorizations here. In short, *Cohen* is beside the point.

The Court should thus grant the Petition and bring the conflicting body of union-dues cases in line with the many other cases holding that constitutional waiver requires more—contract or no contract.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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