No. 20-1120

IN THE
Supreme Court of the United States

MELISSA BELGAU, ET AL.,
Petitioners,

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT WASHINGTON FEDERATION OF STATE EMPLOYEES, AFSCME COUNCIL 28

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QUESTIONS PRESENTED

1. Whether public employees who voluntarily joined a union, signed written agreements to pay membership dues via payroll deduction for a one-year period, and received membership rights and benefits in return, suffered a violation of their First Amendment rights when their employer made the deductions that they affirmatively and unambiguously had authorized.

2. Whether a labor union engaged in "state action" for purposes of 42 U.S.C. § 1983 when the union entered into voluntary private membership and dues authorization agreements with its individual members.

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Federation of State Employees, AFSCME Council 28 is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.

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STATEMENT OF THE CASE

A. Background

1. Respondent Washington Federation of State Employees, AFSCME Council 28 ("WFSE" or "Union") is the democratically chosen union representative for certain bargaining units of Washington state employees. Pet. App. 5a–6a. "Washington employees are not required to join a union to get or keep their jobs," and those who choose to become members may resign from union membership at any time. Pet. App. 6a, 87a ¶8; RCW 41.80.050.

Petitioners are seven state employees. They each joined WFSE and signed voluntary union membership agreements that "authoriz[ed] their employer … to deduct union dues from their bi-weekly paychecks and transmit them to WFSE." Pet. App. 5a–6a, 87a ¶9; *e.g.*, Pet. App. 81a ("YES! I want to be a union member. … I authorize and direct my employer to deduct from my pay … the amount of dues….").

Petitioners subsequently each signed a second membership agreement, voluntarily reaffirming their decisions to be WFSE members and expressly authorizing their employer to deduct union dues from their paychecks for a one-year time period. Pet. App. 7a, 87a ¶9. The single-page agreements were titled "Payroll Deduction Authorization & Maintenance of Dues Card," and stated, immediately above each petitioner's signature:

YES! I want to be a union member. …

> Effective immediately, **I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, the amount of dues** as set in accordance with the WFSE Constitution and By-Laws **and authorize my Employer to remit such amount semi-monthly to the Union** (currently 1.5% of my salary per pay period not to exceed the maximum). **This voluntary authorization and assignment shall be irrevocable for a period of one year** from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period, regardless of whether I am or remain a member of the Union, unless I am no longer in active pay status in a WFSE bargaining unit; provided however, if the applicable collective-bargaining agreement specifies a longer or different revocation period, then only that period shall apply. This card supersedes any prior checkoff authorization card I signed. **I recognize that my authorization of dues deductions, and the continuation of such authorization from one year to the next, is voluntary and not a condition of my employment**.

Pet. App. 83a (emphases added).

As union members, petitioners received rights and benefits not available to nonmembers, including the right to "vote on the ratification of collective bargaining agreements, vote or run in WFSE officer elections, serve on bargaining committees, and otherwise participate in WFSE's internal affairs." Pet. App. 6a, 89a ¶17. They also "enjoyed members-only benefits, including discounts on goods and services, access to scholarship programs, and the ability to apply for disaster/hardship relief grants." Pet. App. 6a, 89a ¶18.

The provision in petitioners' membership agreements stating that dues deductions would be irrevocable for one-year periods incorporated the same terms Congress has authorized for federal employees, postal employees, and employees covered by the National Labor Relations Act and the Railway Labor Act. *See* 5 U.S.C. § 7115(a)–(b); 39 U.S.C. § 1205; 29 U.S.C. § 186(c)(4); 45 U.S.C. § 152, Eleventh (b).[1] A one-year irrevocability period for a union member's dues authorization "provides [the union] with financial stability by ensuring a predictable revenue stream" and allowing it to "make long-term financial commitments without the possibility of a sudden loss of revenue," and prevents individuals "from gaming the [u]nion's system of governance" by "pay[ing] dues for only a month to become eligible to vote in a [u]nion officer election" or access a members-only benefit "and then reneg[ing] on all future financial contributions."

[1] The United States Department of Justice determined more than 70 years ago that union dues deduction authorizations with an annual window for revocation comport with 29 U.S.C. § 186, which regulates dues authorizations for employees covered by the National Labor Relations Act. Justice Department's Opinion on Checkoff, 22 LRRM 46–47 (1948).

Fisk v. Inslee, 2017 WL 4619223, at *3 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F.App'x 632 (9th Cir. 2019).

Petitioners stipulated below that the State did not require them to become WFSE members and "had no say in shaping the terms" of petitioners' private membership agreements with WFSE. Pet. App. 11a, 87a ¶10; RCW 41.80.110(1)(b).

2. Before June 27, 2018, Washington law and this Court's precedent permitted public employers to require employees who are not union members to pay fair-share fees to their bargaining unit's union representative. Pet. App. 6a, 88a ¶14; RCW 41.80.100(1); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Under *Abood*, fair-share fees could be collected to cover the nonmembers' share of union costs germane to collective bargaining representation, but not to cover a union's political, ideological, or membership activities. 431 U.S. at 235–36. The collective bargaining agreements between the State and WFSE provided for the collection of fair-share fees, which were 21–35% less than union dues paid by members. Pet. App. 6a, 88a ¶15.

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that *Abood* "is now overruled" and that a public employer's requirement that nonmembers must pay fair-share fees as a condition of employment "violates the First Amendment and cannot continue." *Id.* at 2486. *Janus* did not involve voluntary union membership agreements, and the Court explained that, beyond eliminating compulsory nonmember fair-share fees, "States can keep their labor-relations systems exactly as they are." *Id.* at 2485 n.27; Pet App. 5a. The State and WFSE immediately

complied with *Janus* by ceasing collection of fair-share fees. Pet. App. 88a ¶14.

3. Washington law provides for public employers to make union dues deductions "[u]pon written authorization of an employee." RCW 41.80.100(3)(a).[2] The relevant collective bargaining agreement between WFSE and the State similarly provides that the employer will deduct "the membership dues from the salary of employees who request such deduction … on a Union payroll deduction authorization card," and the employer will "honor the terms and conditions of each employee's signed membership card." Pet. App. 7a, 66a–67a; *see* Pet. App. 86a–87a ¶¶6–7, 90a ¶22.

Petitioners each resigned their union memberships after *Janus*. Pet. App. 8a, 89a–90a ¶¶20, 23. Pursuant to the terms of their signed authorization agreements, their employer continued to deduct dues for a short time until the end of the one-year dues commitment period each petitioner had authorized, the last of which expired in April 2019. Pet. App. 8a, 89a–90a ¶¶22, 23. Dues deductions ended automatically at the end of the one-year period, without petitioners having to make any further requests. Pet. App. 90 ¶23.

B. Proceedings below

Petitioners filed suit against WFSE and certain state officials under 42 U.S.C. § 1983, alleging that petitioners' payment of union dues pursuant to their own dues authorization agreements violated their

[2] Citations are to the section numbers in effect at the time of the deductions at issue. Pet. App. 7a n.1.

First Amendment rights. Pet. App. 8a. Petitioners did not dispute that the First Amendment permits public employees to authorize the payment of union membership dues via payroll deduction and to commit to pay such dues for a one-year period. Pet. App. 10a. Rather, petitioners' sole contention was that their express, affirmative consent to join WFSE and pay dues was invalid because it was provided before this Court decided *Janus* and did not include a special "waiver" that petitioners claim *Janus* now requires. Pet. App. 16a. Petitioners sought to recover from WFSE all the dues they had paid within the applicable statute of limitations and also sought prospective relief to prevent further dues deductions. Pet. 7–8; Pet. App. 115a–116a ¶¶92, 93.

The district court granted summary judgment to WFSE and the state officials based on the parties' stipulated undisputed facts. Pet. App. 22a. The district court held that petitioners' claims against WFSE failed because the terms of petitioners' private membership agreements with the Union were not "state action" subject to challenge under Section 1983, and the Union (a private party) was not a "state actor." Pet. App. 34a–41a. The district court rejected petitioners' claims against the state officials because the applicable statutes and collective bargaining agreement "d[id] not compel involuntary dues deductions and d[id] not violate the First Amendment." Pet. App. 43a. Rather, "[t]he State's deduction of dues from the [petitioners'] pay [wa]s pursuant to the [petitioners'] explicit written instructions in [their membership] agreements;" petitioners did not need to sign those agreements as a condition of employment; and "the State play[ed] no role in deciding what terms and conditions [we]re in the membership agreements." Pet.

App. 44a. The district court rejected petitioners' argument that their dues authorization agreements were invalid because they were signed before *Janus*, reasoning that "[t]he notion that the [petitioners] may have made a different choice if they knew the Supreme Court would later invalidate public employee agency fee arrangements … does not void their previous knowing agreements." Pet. App. 44a (quotation marks omitted).

The Ninth Circuit affirmed. The circuit court held that petitioners' claims against WFSE failed because the Union is a private party and its receipt of membership dues pursuant to its private agreements with petitioners did not constitute "state action" sufficient to support a claim against the Union under Section 1983. Pet. App. 8a–14a. The Ninth Circuit explained that petitioners

> do not generally contest the state's authority to deduct dues according to a private agreement. Rather, the claimed constitutional harm is that the agreements were signed without a constitutional waiver of rights. Thus, the source of the alleged constitutional harm is not a state statute or policy but the particular private agreement between the union and [petitioner].

Pet. App. 10a (quotation marks omitted).

The Ninth Circuit next held that petitioners' individual claims for prospective relief against the state officials were moot, because petitioners were no longer union members and their dues deductions had long since ended. Pet. App. 14a. The Ninth Circuit nevertheless addressed the merits of petitioners' claims

against the state officials by applying an exception to mootness for certain "inherently transitory … class-action claim[s]." Pet. App. 15a–16a. Petitioners had never moved for class certification, and no class had been certified.

On the merits, the Ninth Circuit held that petitioners' claims against the state officials failed because the deduction of dues pursuant to petitioners' own voluntary, affirmative authorizations did not violate the First Amendment. Pet. App. 16a–20a. The Ninth Circuit explained that "[w]hen 'legal obligations ... are self-imposed,' state law, not the First Amendment, normally governs," and the First Amendment does not "provide a right to 'disregard promises that would otherwise be enforced under state law.'" Pet. App. 16a (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991)). Washington simply "honored the terms and conditions of a bargained-for contract" between private parties "by deducting union dues only from the payrolls of Employees who gave voluntary authorization to do so." Pet. App. 17a (citing RCW 41.80.100(3)(a)). Based on the undisputed factual record, the Ninth Circuit concluded that "[n]o fact supports even a whiff of compulsion." Pet. App. 17a.

The Ninth Circuit rejected petitioners' argument that *Janus* imposed a new "waiver" standard for voluntary union membership agreements. Pet. App. 19a–20a. The Ninth Circuit explained:

> The Court [in *Janus*] considered whether a waiver could be presumed for the deduction of agency fees only after concluding that the practice of automatically deducting agency fees from nonmembers violates the First

> Amendment. … The Court discussed constitutional waiver *because* it concluded that nonmembers' First Amendment right had been infringed, and in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement.

Pet. App. 20a (emphasis in original).

REASONS FOR DENYING THE PETITION

In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991), this Court held that "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." The Ninth Circuit simply applied that established principle to hold that the enforcement of a public employee's own voluntary, affirmative written agreement to pay union membership dues, for which the employee received membership rights and benefits in return, did not violate the employee's First Amendment rights.

Petitioners provide no good reason for this Court to review the Ninth Circuit's decision. Petitioners concede that there is no circuit split. To the contrary, three other circuits and more than two dozen district courts have all joined the Ninth Circuit in unanimously rejecting indistinguishable claims. Like the Ninth Circuit, every other court to address the issue has recognized that *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)—which invalidated a government requirement that public employees pay mandatory agency fees to a union as a condition of public employment—did not address or invalidate

voluntary dues authorization agreements by employees who choose to become union members.

The petition mischaracterizes the Ninth Circuit's opinion and invokes hypothetical scenarios not presented by the facts here. Petitioners stipulated below that they voluntarily chose to become union members and signed membership agreements. In those agreements, petitioners clearly and affirmatively agreed to pay union dues for one-year periods. Their dues deductions ended at the end of the one-year period. This case could not be the vehicle to consider petitioners' hypotheticals about other situations.

Moreover, this case would not be an appropriate vehicle for the Court to consider even the narrow issues that the facts actually present, because there would be a jurisdictional barrier to addressing the primary question presented. As such, the Court should deny this petition.

I. The petition is premised on a fundamental mischaracterization of the Ninth Circuit's opinion.

Petitioners repeatedly contend that the decision below holds "that evidence of union membership alone … shows that employees consent to union dues and fee payments." Pet. 9, 12; *see id.* at 13, 15. This fundamentally mischaracterizes the Ninth Circuit's opinion. As the Ninth Circuit explained, petitioners did not simply become WFSE members; instead, petitioners voluntarily signed express written agreements "titled 'Payroll Deduction Authorization,'" in which they "repeatedly stated that they 'voluntarily authorize[d]' Washington to deduct union dues from their wages,

and that the commitment would be 'irrevocable for a period of one year.'" Pet. App. 7a, 17a–18a; *see* Pet. App. 83a. The undisputed facts concerning petitioners' entry into these agreements did not show "even a whiff of compulsion." Pet. App. 17a.

Petitioners also repeatedly discuss what they characterize as a "ten-day escape period," complaining that their dues deductions would automatically renew unless they made "a timely objection during that period." Pet. 3, 5; *id.* at 16 (contending that petitioners were "compelled … to continue subsidizing WFSE and its speech until the ten-day escape period was satisfied"). As the Ninth Circuit's opinion reflects, however, petitioners stipulated below that their dues deductions ceased at the end of the one-year dues period to which they had each agreed, without the need for petitioners to make any objection during a particular window period. Pet. App. 8a; *see* Pet. App. 90a ¶23 (deductions ended "one year after each Plaintiff signed his or her current card, without requiring Plaintiffs to again object to the deductions"). WFSE followed the same practice for its other members who resigned from membership after *Janus*, so their dues deductions also ended years ago. This case thus does not present a question regarding the timeliness of an objection.

Many of petitioners' arguments for review are premised on these mischaracterizations of the decision below and on hypothetical scenarios not remotely presented by the facts here. Those arguments provide no basis for granting their petition.

II. The lower courts have unanimously rejected petitioners' argument.

Petitioners contend that review is justified because the Ninth Circuit's decision affects many public employees and "reintroduces uncertainty in an area where *Janus* should have given the lower courts clear guidance." Pet. 10. But there is no such "uncertainty." As petitioners acknowledge, the Ninth Circuit's decision creates no split of authority about the application of the First Amendment. Pet. 28. The Ninth Circuit stated that it was joining a "swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union dues" that a public employee affirmatively agreed to pay in a voluntary union membership agreement. Pet. App. 18a–19a & n.5 (citing 18 decisions).

Since the Ninth Circuit's opinion, three other circuits have joined that unanimous consensus. *See Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961 (10th Cir. 2021) ("Mr. Hendrickson thrice signed agreements to become a union member and to have dues deducted from his paycheck. Each agreement was a valid, enforceable contract. A change in the law does not retroactively render the agreements void or voidable. *Janus* thus provides no basis for Mr. Hendrickson to recover the dues he previously paid."); *Bennett v. Council 31 of the AFSCME, AFL-CIO*, 991 F.3d 724, 730–33 (7th Cir. 2021) ("*Janus* said nothing about union members who, like Bennett, freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union."); *Fischer v. Governor of N.J.*, 842 F.App'x 741, 753 & n.18 (3d Cir. 2021) (unpublished) ("Plaintiffs chose to enter into membership

agreements with NJEA, rather than abstain from membership and, instead, pay nonmember agency fees. They did so in exchange for valuable consideration. By signing the agreements, Plaintiffs assumed the risk that subsequent changes in the law could alter the cost-benefit balance of their bargain. … *Janus* does not abrogate or supersede Plaintiffs' contractual obligations ….''); *Oliver v. SEIU Local 668*, 830 F.App'x 76, 80 (3d Cir. 2020) (unpublished) ("By choosing to become a Union member, [the plaintiff] affirmatively consented to paying union dues," and thus "was not entitled to a refund."); *cf. LaSpina v. SEIU Pa. State Council*, 985 F.3d 278, 287 (3d Cir. 2021) ("LaSpina joined the Union and paid Union membership dues. She cannot connect those events to the Union's [collection of agency fees from nonmembers before *Janus*]. Her claimed injury of economic loss occurred not because of the Union's actions toward nonmembers but because of her decision to join the Union.").[3]

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[3] *See also Mendez v. Cal. Teachers Ass'n*, 419 F.Supp.3d 1182, 1186 (N.D. Cal. 2020) ("As every court to consider the issue has concluded, *Janus* does not preclude enforcement of union membership and dues deduction authorization agreements ...."); *Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME, Local 11*, 2020 WL 1322051, at *12 (S.D. Ohio Mar. 20, 2020) (noting "the unanimous post-*Janus* district court decisions holding that employees who voluntarily chose to join a union ... cannot renege on their promises to pay union dues"); *Troesch v. Chicago Teachers Union, Local Union No. 1, Am. Fed'n of Teachers*, __ F.Supp.3d ___, 2021 WL 736233, at *4–5 (N.D. Ill. Feb. 25, 2021); *Hoekman v. Educ. Minn.*, __ F.Supp.3d ___, 2021 WL 533683, at *8 (D. Minn. Feb. 12, 2021); *Woods v. Alaska State Emps. Ass'n/AFSCME Local 52, AFL-CIO*, 496 F.Supp.3d 1365, 1372–73 (D. Alaska 2020); *Yates v. Am. Fed'n of Teachers, AFL-CIO*, 2020 WL 6146564, at *1 (D. Or. Oct. 19, 2020); *Wagner v. Univ. of Wash.*, 2020 WL

Petitioners fail to identify any contrary judicial authority.[4] Given the unanimous consensus of the lower courts, there is no reason for this Court to intervene at this time.

5520947, at *5 (W.D. Wash. Sept. 11, 2020); *Labarrere v. Univ. Prof'l & Tech. Employees, CWA 9119*, 493 F.Supp.3d 964, 971–72 (S.D. Cal. 2020); *Polk v. Yee*, 481 F.Supp.3d 1060, 1071 (E.D. Cal. 2020); *Creed v. Alaska State Emps. Ass'n/AFSCME Local 52*, 472 F.Supp.3d 518, 524–31 (D. Alaska 2020); *Molina v. Pa. Soc. Serv. Union*, __ F.Supp.3d ___, 2020 WL 2306650, at *7–8 (M.D. Pa. May 8, 2020); *Durst v. Or. Educ. Ass'n*, 450 F.Supp.3d 1085, 1090–91 (D. Or. 2020); *Loescher v. Minn. Teamsters Pub. & Law Enf't Emps.' Union, Local No. 320*, 441 F.Supp.3d 762, 772–73 (D. Minn. 2020); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F.Supp.3d 1108, 1118–19 (S.D. Cal. 2020); *Hernandez v. AFSCME Cal.*, 424 F.Supp.3d 912, 923–24 (E.D. Cal. 2019); *Smith v. Super. Ct., Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2019); *Anderson v. SEIU Local 503*, 400 F.Supp.3d 1113, 1115–16 (D. Or. 2019); *Seager v. United Teachers L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019); *Babb v. Cal. Teachers Ass'n*, 378 F.Supp.3d 857, 876–77 (C.D. Cal. 2019); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019).

[4] Amicus Attorney General of Alaska cites his predecessor's own letter opining that *Janus* invalidates all existing union membership agreements. But the Alaska superior court permanently enjoined implementation of that opinion letter, joining the unanimous judicial consensus and concluding that the opinion letter was incorrect. *See State of Alaska v. Alaska State Emps. Ass'n/AFSCME Local 52, AFL-CIO*, No. 3AN-19-09971CI, 2019 WL 7597328, at *1–7, Temporary Restraining Order (Oct. 3, 2019), Preliminary Injunction (Nov. 5, 2019), Order Granting Summary Judgment (Alaska Super. Ct. Feb. 8, 2021).

III. The Ninth Circuit's opinion does not conflict with *Janus*.

Petitioners also seek review on the ground that the Ninth Circuit's rejection of their First Amendment claims "conflicts with *Janus*." Pet. 12, 15. There is no conflict. *Janus* held that agency fee requirements for public employees are not consistent with the First Amendment. 138 S. Ct. at 2486. This case involves public employees who voluntarily became union members, expressly and affirmatively agreed to pay membership dues, and received membership rights and benefits in return. Petitioners did not experience any violation of their First Amendment rights when their employer made the dues deductions they had authorized because "the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen*, 501 U.S. at 672.

Petitioners erroneously contend that *Janus* imposed a new, heightened "waiver" analysis whenever a public employee elects to join a union and pay membership dues. As the lower courts unanimously have recognized, *see supra* at 12–14 & nn.3–4, *Janus* did not change the law governing the formation and enforcement of voluntary contracts between unions and their members. The relationship between unions and their members was not at issue in *Janus*.

Petitioners' arguments conflict with *Cohen*, which did not apply a special, heightened "waiver" analysis to a newspaper's promise not to reveal the identity of a confidential source, because the government's enforcement of the promise did not give rise to a First Amendment objection that needed to be waived. The

same is true here. Private parties often enter into agreements that implicate First Amendment rights—arbitration agreements, nondisclosure agreements, annual magazine subscriptions—and the government routinely honors those agreements. Outside the context of criminal suspects in custody or criminal defendants pleading guilty, a voluntary, affirmative, and unambiguous agreement is a waiver. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 234–48 (1973) (consent to search is waiver of Fourth Amendment right against involuntary searches).

The passage from *Janus* on which petitioners rely concerns workers who never joined the union ("nonmembers") and never affirmatively authorized membership dues deductions:

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

138 S. Ct. at 2486 (emphases added, citations omitted). The Court cited "waiver" cases in this passage not to tacitly overrule *Cohen*, but to make clear that

the States cannot presume from nonmembers' *inaction* that they wish to support a union.[5]

As the lower courts unanimously have recognized, *Janus* did not prohibit voluntary dues payments but "made clear that a union may collect dues when an 'employee affirmatively consents to pay.'" *Bennett*, 991 F.3d at 732 (quoting *Janus*, 138 S. Ct. at 2486). Petitioners stipulated here that they chose to join WFSE and signed membership and dues authorization agreements. In those agreements, petitioners "clearly and affirmatively consent[ed]," *Janus*, 138 S. Ct. at 2486, to dues payments.

Petitioners also contend that their otherwise-valid membership and dues deduction agreements were invalidated because this Court's later decision in *Janus* changed the options available to nonmembers going forward. Pet. 13–14. But it is well-established that contractual commitments are not voided by later changes in the law affecting potential alternatives to entering the contract, "even when the change is based

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[5] The four "waiver" cases *Janus* cited concerned whether waiver could be found solely from the plaintiff's inaction. *See Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938) (addressing whether pro se defendant had properly waived his Sixth Amendment right to counsel by failing to ask that counsel be appointed); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–80 (1999) (rejecting argument that State had "constructively" waived its sovereign immunity by engaging in activity that Congress decided to regulate); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315, 322 (2012) (nonmembers of union could not be deemed to consent to union political assessment through their silence); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–44 (1967) (libel defendant could not be deemed to have waived, through its silence, libel defense later recognized in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

on constitutional principles." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 277 (3d Cir. 2002). Even in cases involving plea agreements—contracts that waive constitutional rights, *Puckett v. United States*, 556 U.S. 129, 137 (2009)—this Court has held that the fact that a defendant may have accepted a plea agreement in part to avoid an alternative later deemed unconstitutional does not provide a basis for voiding that agreement. *See Brady v. United States*, 397 U.S. 742, 757 (1970); *see also Hendrickson*, 992 F.3d at 964 ("*Brady* shows that even when a 'later judicial decision[]' changes the 'calculus' motivating an agreement, the agreement does not become void or voidable."); *Bennett*, 991 F.3d at 731 ("a subsequent change in the law cannot retrospectively alter the parties' agreement") (quotation marks and citation omitted).

There is no merit to petitioners' contention that the Ninth Circuit's decision "effectively nullifies *Janus*' entire holding." Pet. 10, 25. This Court's holding in *Janus* was that "States and public-sector unions may no longer extract agency fees from *nonconsenting* employees." 138 S. Ct. at 2486 (emphasis added). The Ninth Circuit recognized that *Janus* "was a game-changer in the world of unions and public employment." Pet. App. 5a. It is undisputed that, after *Janus*, Washington State complied with that holding by immediately stopping the collection of agency fees from all nonmembers. Pet. App. 5a, 7a–8a, 88a ¶14. The Ninth Circuit's decision, in contrast, only addresses union members who *consented* to have union dues deducted from their paychecks.

IV. The second question presented also is not worthy of review.

Petitioners present a second, subsidiary question regarding the Ninth Circuit's holding that petitioners' Section 1983 claims against the Union failed for lack of sufficient "state action." Pet. i; Pet. App. 8a–14a. That question does not independently merit review. There is no conflict, and the resolution of the question would not change the outcome of this case.

The Ninth Circuit held that petitioners' claims against the state respondents failed on the merits because petitioners suffered no First Amendment violation when they paid the Union dues they had voluntarily and affirmatively authorized. Pet. App. 16a–20a. The same merits holding would foreclose petitioners' claims against WFSE even if those claims did not also fail for lack of state action. *See, e.g., Hendrickson*, 992 F.3d at 961 n.17 ("Because we find that Mr. Hendrickson's underlying claim for back dues against the Union fails, we do not additionally consider whether the Union meets the 'state actor' element for this § 1983 claim."); *Bennett*, 991 F.3d at 730–33 (rejecting indistinguishable First Amendment claim against union on the merits without addressing "state action" issue); *Fischer*, 842 F.App'x at 752–53 (same).

In any event, petitioners are wrong in asserting that the Ninth Circuit's state action analysis is inconsistent with the Seventh Circuit's state action analysis in *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II).* Pet. 10, 20–21. The Union's conduct here is not, as petitioners assert, "the same as that in *Janus*." Pet. 19. *Janus* did not involve voluntary dues payments. The "state action" in *Janus*

was the *requirement,* contained in a collective bargaining agreement with the State, that nonmembers must pay agency fees as a condition of public employment. 138 S. Ct. at 2479 & n.24 (explaining that "a very different First Amendment question arises when a State *requires* its employees to pay agency fees") (emphasis in original). The union in *Janus* had jointly agreed with the government to impose that mandatory agency fee requirement on nonmembers. In this case, by contrast, petitioners' obligation to pay dues stemmed not from any state policy or law, but from their own voluntary private agreements. The Ninth Circuit expressly distinguished *Janus II, see* Pet. App. 13a n.3, and there is no conflict.

Contrary to petitioners' contention (Pet. 21–24), the Ninth Circuit's state action analysis also is consistent with *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). *Lugar* involved a challenge to a state prejudgment attachment statute that directed state officials to "attach property on the *ex parte* application of one party to a private dispute," based solely on that party's allegation that the other party might dispose of the property to defeat his creditors, without providing the other party prior notice or the opportunity to be heard. 457 U.S. at 925, 942. The source of the constitutional harm was the due-process-violating state statute. The private party invoking that invalid statutory procedure to obtain property was considered a joint actor with the State. *Id.* at 941–42.

By contrast, under Washington law, public employee dues deductions may only be made if the employee voluntarily and affirmatively authorizes the public employer to make those deductions. Pet. App. 7a; RCW 41.80.100(3)(a). The deductions here were

made pursuant to petitioners' own voluntary private agreements. The Union's conduct here was simply to enter into such private agreements. "That the State responds to [private parties'] actions … does not render it *responsible* for those actions." *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982) (emphasis in original) (rejecting argument that private conduct was state action). As such, the *Lugar* state action analysis does not apply here.[6]

It also bears emphasis that petitioners' framing of their second question presented does not encompass the actual facts of this case. This case does not present the question of whether a union engages in "state action" for purposes of Section 1983 "when it collectively bargains with a state to authorize and enforce *restrictions* on public employees' First Amendment right not to subsidize union speech." Pet. i (emphasis added). Washington law and the applicable collective bargaining agreement do not impose any "restrictions" on employees' rights; they simply provide

[6] Petitioners' other cited cases do not support their argument that WFSE could be subject to liability here as a Section 1983 "state actor." *See* Pet. 23 n.14 (citing cases). Four involved appeals from state court proceedings in which one party alleged that the proceedings violated due process—and thus involved no question of whether a private party was a "state actor" under Section 1983. *See N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). In *Fuentes v. Shevin*, 407 US. 67 (1972), the plaintiffs sued state officials. The Court did not address whether any private co-defendants were Section 1983 "state actors." Similarly, in *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989), the Fifth Circuit addressed claims against state officials; the private co-defendant settled before the appeal. *Id.* at 167.

that the State will honor the terms that its employees voluntarily accept in private dues authorization agreements with their unions. Pet. App. 7a, 11a–12a. The State has "no say in shaping the terms" of those agreements, and its role is simply "to enforce a private agreement." Pet. App. 11a, 14a.

Nor does this case involve a union that "work[s] jointly with [a] state[]" to "seiz[e] money from [public employees'] wages *without the*[*ir*] *affirmative consent*." Pet. 18 (emphasis added). It is undisputed that petitioners each "affirmatively consented" to the dues deductions at issue and also that the State did not require petitioners to become union members or to sign dues authorization agreements. *See supra* at 1–4.

Public employees authorize voluntary payroll deductions for many purposes, including for charitable campaigns and health and pension plans. On petitioners' state action analysis, every private party that receives money through such voluntary payroll deductions would be a "state actor" subject to suit under 42 U.S.C. § 1983. Moreover, every dispute about whether a union representing public employees engaged in misconduct to obtain an employee's signature on a dues deduction authorization agreement would be cognizable in federal court, thereby turning the federal courts into substitutes for state public employment relations boards, which exist to resolve labor-relations disputes involving public employees and unions. There is no authority for either proposition.

For all of these reasons, the second question presented is not worthy of this Court's review.

V. A jurisdictional issue makes this case an unsuitable vehicle.

Finally, the petition should be denied because there would be a jurisdictional obstacle to addressing the primary question presented. The Ninth Circuit considered the merits of petitioners' First Amendment arguments only in the context of petitioners' claims for prospective relief against the state respondents. Pet. App. 14a, 16a–20a. The claims against the Union were dismissed for lack of state action, and petitioners did not seek retrospective relief against the state respondents. As the Ninth Circuit recognized, however, petitioners' individual claims for prospective relief were moot because petitioners were no longer union members and their dues deductions ended long ago. Pet. App. 14a ("[A]ny prospective injunction would not provide relief for [petitioners'] mooted claim.").

The Ninth Circuit addressed petitioners' First Amendment claims on the basis of an exception to mootness doctrine applicable "[i]n the class action context." Pet. App. 15a. Petitioners, however, never moved for class certification. The Ninth Circuit held that the class action mootness exception still applied because "the duration of the challenged action is too short to allow full litigation before it ceases." Pet. App. 15a (quotation marks and citations omitted). The Ninth Circuit's reasoning was incorrect.

There are narrow circumstances in which the mootness of a named plaintiff's individual claims *before* class certification will not moot the case if those claims "are so inherently transitory that the trial court will not have even enough time *to rule on a motion for class certification* before the proposed

representative's individual interest expires." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (emphasis added, quotation marks omitted) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)); *see also Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975). There was no showing here, however, that the district court could not "rule on a motion for class certification before" petitioners' dues commitments expired.

To the contrary, the complaint was filed on August 2, 2018; the district court granted defendants' motions for summary judgment more than six months later, on February 15, 2019; and petitioners' claims did not become moot until April 2019. Pet. App. 8a. Petitioners thus had ample time to obtain a ruling on class certification in the district court. *Cf. Cty. of Riverside*, 500 U.S. at 47 (plaintiffs' claims would become moot after, at most, seven days). This Court has explained that "[i]n cases such as this one where mootness problems are likely to arise, district courts should heed strictly the requirement of Fed. Rule Civ. Proc. 23(c)(1) that '*[a]s soon as practicable* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.'" *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (emphasis in original). Yet petitioners never filed a motion for class certification.

The Ninth Circuit failed to recognize that petitioners had ample time to obtain a "rul[ing] on a motion for class certification," *Cty. of Riverside*, 500 U.S. at 52, from the district court before their individual claims became moot. The Ninth Circuit instead erroneously considered whether petitioners would have enough time to obtain a final appellate ruling on the merits on their claims. *See* Pet. App. 15a (even "three

years is 'too short'") (quoting *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010)). The Ninth Circuit relied on a case that applied a different mootness exception, not confined to the class action context, for claims that are "capable of repetition yet evading review" because the harm is of limited duration and the *same plaintiff* is reasonably likely to suffer the same harm in the future. *See Johnson*, 623 F.3d at 1019; *see also, e.g.*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990). Petitioners here did not allege they intended to join WFSE again, nor would such an allegation be plausible, so *that* mootness exception did not apply.

Were the Court to grant this petition, there is a substantial risk that this threshold jurisdictional barrier would prevent the Court from resolving the primary question presented.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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