No. 20-1751

IN THE
Supreme Court of the United States

SUSAN FISCHER, ET AL.,
Petitioners,

v.

PHIL MURPHY, GOVERNOR OF NEW JERSEY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS NEW JERSEY EDUCATION ASSOCIATION AND TOWNSHIP OF OCEAN EDUCATION ASSOCIATION

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QUESTIONS PRESENTED

1. Whether public employees who voluntarily joined a union, signed written agreements to pay membership dues through payroll deduction for a specified time 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 the lower courts correctly concluded that Petitioners lacked standing to challenge a New Jersey statute because the summary judgment record failed to demonstrate that Petitioners suffered an injury caused by the statute.

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INTRODUCTION

The lower courts unanimously and correctly have held that the deduction of union dues pursuant to a public employee's voluntary union membership and dues-deduction authorization agreement does not violate the employee's First Amendment rights. These decisions—which include the Ninth Circuit's decision in *Belgau v. Inslee*, a case in which this Court denied certiorari at the end of last Term, *see* 2021 WL 2519114 (U.S. June 21, 2021)—are a straightforward application of this Court's precedent establishing that "the First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Nothing in this Court's decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), which addressed the constitutionality of agency-fee requirements for nonmembers of unions who did not consent to such payments, alters the enforceability of contracts in which union members agreed to pay union dues for a set period of time. In light of the unanimous consensus among the lower courts on this issue and Petitioners' failure to present any other reason why this case is worthy of this Court's review, the petition should be denied.

STATEMENT

A. Background

1. Respondent New Jersey Education Association ("NJEA") is a labor organization representing approximately 200,000 public employees in New Jersey, including public school teachers like

Petitioners who are employed by the Township of Ocean school district. 3d Cir. Joint Appendix ("JA") 109, ¶ 1. Respondent Township of Ocean Education Association is a local affiliate of NJEA. *Id.* ¶ 3.

When a school district employee desires to become a member of NJEA, he or she must complete and sign the NJEA-NEA Active Membership Application. JA 109, ¶ 6. Those who choose to join NJEA also have a choice as to how to pay their annual membership dues. JA 110, ¶¶ 8-10. The employees can take care of the payments themselves by making a direct cash payment to their union. *Id.* Alternatively, employees can elect to have their employer handle the payments for them and pay their annual dues in installments by having the appropriate amounts deducted from each paycheck and remitted to the union. *Id.* The NJEA-NEA Active Membership Application contains a section where the employee checks a box to select whether to pay dues via "Cash" or "Payroll Deduction." JA 61, 76.

On August 27, 1999, Petitioner Fischer executed an NJEA-NEA Active Membership Application to become a full dues-paying member of the union. JA 61. On August 30, 2001, Petitioner Speck executed an NJEA-NEA Active Membership Application to become a full dues-paying member of the union. JA 76. Petitioners also each checked the box on their application forms to select the option of Payroll Deduction for their dues payments. JA 61, 76, 111-12 ¶¶ 18-19. Petitioners admitted that they knew union membership was voluntary and that by executing their dues authorization agreements, they were "authoriz[ing] membership in the NJEA and the deduction of union dues from [their] wages." JA 112 ¶¶ 20-23; JA 166 ¶¶ 20-23.

The dues authorization agreements signed by Petitioners included the following terms: "This authorization may be terminated only by prior written notice from me effective Jan. 1 or July 1 of any year." JA 61, 76. In effect, those who chose the option of having their dues paid through payroll deduction agreed in exchange to pay dues for up to a six-month period. Petitioners' membership agreements did not state that termination requests had to be submitted during any particular window period during the year.

The provision in Petitioners' membership agreements that dues deductions would be irrevocable for a specified period of time is similar to membership terms that 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). The advance commitments to pay dues via payroll deduction are important for NJEA's annual budget and planning purposes because they provide predictability in NJEA's funding stream, allowing NJEA to prepare responsible budgets, make long-term funding commitments, and provide members-only benefit programs, which serves the collective interests of all NJEA members. JA 113, ¶ 25. The advance commitment also prevents individuals from becoming members solely to obtain a particular benefit—such as the ability to vote in a union election or to be covered by a members-only insurance product during a period of high risk—and then immediately cancelling their dues authorizations, which would make it more expensive to offer these types of member-only benefits and less

fair to those who do not opportunistically join and quit in quick succession. *Id.* ¶ 26. In exchange for their agreement to become union members and pay dues for the specified time period, Petitioners received rights and benefits available only to members, including the right to vote on union matters and participate in members-only benefits programs provided at reduced cost or no-cost by the union. JA 110-111, ¶¶ 13-15. Petitioner Fischer participated in several such members-only programs during her time as a union member. *Id.* ¶ 17.

2. Before June 27, 2018, New Jersey law and this Court's precedent permitted public employers to require employees who were not union members to pay agency fees to their bargaining unit's union representative for the costs of collective-bargaining representation, to the exclusion of any of the union's political or ideological activities. N.J. Stat. Ann. 34:13A-5.3, 5.5; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). When Petitioners became union members, the applicable collective bargaining agreement provided for the collection of agency fees from nonmembers. JA 116, ¶ 3.

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 pay agency 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 "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2485 n.27. Respondents immediately

complied with *Janus* by ceasing collection of agency fees. JA 116, ¶ 3.

3. On May 18, 2018, New Jersey's Workplace Democracy Enhancement Act ("WDEA") went into effect. Section 6 of the WDEA provides employees an annual opportunity to revoke their prior authorization of payroll deduction by providing written notice to their employer in the ten days after their employment anniversary date. N.J. Stat. Ann. § 52:14-15.9e.[1] Dues deductions then terminate thirty days following the anniversary date. *Id.* Section 6 amended prior law under which payroll deduction terminated on the next January 1 or July 1 after notice of revocation, whichever is earlier.

Respondent Governor of New Jersey (the "State") interprets Section 6 to apply only prospectively, *i.e.*, only to individuals who authorized payroll deduction after May 18, 2018. *See* D. Ct. ECF No. 41-1, at 16 n.1; *see also Skulski v. Nolan*, 343 A.2d 721, 733 (N.J. Sup. Ct. 1975) ("in construing legislation, statutes should not be given retrospective application unless such an intention is manifested by the Legislature in clear terms"). Thus, the dues authorization agreements signed by Petitioners are not subject to Section 6. The State also interprets Section 6 to set a floor, not a ceiling, on the right of an employee who has authorized payroll deduction to revoke that authorization, meaning that Section 6 guarantees one revocation method each year but does not

[1] The United States Department of Justice determined more than 70 years ago that a 10-day annual window for submitting revocation requests comports with 29 U.S.C. § 186, which regulates dues authorizations for employees covered by the National Labor Relations Act. Justice Dep't Op. on Checkoff, 22 L.R.R.M. (BL) 46, 46–47 (1948).

foreclose additional methods agreed to between unions and their members. D. Ct. ECF No. 41-1, at 11-15.

Consistent with the State's interpretation of the statute, NJEA has applied Section 6, in conjunction with the terms of its pre-WDEA membership agreements, to provide that a member who had chosen to pay dues via payroll deduction can revoke that authorization effective on the *earliest* of either January 1, July 1, or 30 days after the anniversary date of employment. JA 118, ¶ 12. NJEA promulgated guidance to this effect to its local affiliates. JA 122-23.

Petitioners were members of NJEA for nearly twenty years. Then, in July 2018, Petitioners each submitted a written request to NJEA to revoke their prior dues deduction authorizations. JA 113-14, ¶¶ 28-29. These requests were accepted and processed by the NJEA membership department, without regard to the fact that they were not submitted within the ten-day window period set forth in WDEA Section 6. JA 119, ¶ 16. Petitioners' dues deductions terminated on September 30, 2018, which was the earliest of the three options provided to Petitioners annually for the termination of payroll deduction (January 1, July 1, or 30 days after date of hire). JA 113-114, ¶¶ 28-29.

B. Proceedings below

Petitioners filed suit under 42 U.S.C. § 1983, contending that the deduction of union dues from their wages after submitting their revocation requests, consistent with the terms of their signed membership agreements, violated their First Amendment rights. In a separate claim brought only

against the State, Petitioners alleged that WDEA Section 6 was unconstitutional. The district court, ruling on cross-motions for summary judgment, rejected Petitioners' claims and granted summary judgment to Respondents. Pet. App. 36-57.

As to the claim against the unions, the district court held that Petitioners' written membership agreements were "valid and enforceable contracts" in which they agreed to pay union membership dues for a specified period of time, and *Janus* "does not invalidate the existing contractual relationships between unions and their members." Pet. App. 38, 51. With regard to WDEA Section 6, the district court found Petitioners lacked Article III standing to challenge the statute because the only effect of Section 6 as to Petitioners was to provide them with a third annual opt-out date in addition to the two opt-out dates in their signed membership contracts, and thus they had suffered no injury-in-fact traceable to the statute. Pet. App. 53-55.

The Third Circuit affirmed in a non-precedential order. *See* Pet. App. 2-34.[2] Observing that Petitioners had "chose[n] to enter into membership agreements with NJEA, rather than abstain from membership," Pet. App. 23-24, the court explained that there was no constitutional violation in enforcing the plain terms of these contractual commitments because "the First Amendment does not provide a right to 'disregard promises that would otherwise be enforced

[2] In the same opinion, the Third Circuit also affirmed the judgments in favor of Respondents in *Smith v. New Jersey Education Association*, No. 19-3995 (3d Cir.), which raised the same First Amendment challenge to enforcement of the NJEA membership agreements. The *Smith* plaintiffs did not file a petition for certiorari.

under state law.'" Pet. App. 23 (quoting *Cohen*, 501 U.S. at 672). The Third Circuit went on to find, in agreement with the Ninth Circuit in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), that this Court's decision in *Janus* did not "abrogate or supersede Plaintiffs' contractual obligations, which arise out of longstanding, common-law principles of 'general applicability,'" and thus "*Janus* does not give Plaintiffs the right to terminate their commitments to pay union dues unless and until those commitments expire under the plain terms of their membership agreements." Pet. App. 24 (citation omitted). Because Petitioners' membership contracts authorized the dues deductions in question and were "enforceable under laws of general applicability," there was no additional requirement to "obtain an affirmative First Amendment waiver from Plaintiffs before deducting union dues from their paychecks." Pet. App. 24 n.18.

The Third Circuit also affirmed the district court's dismissal of Petitioners' constitutional challenge to WDEA Section 6 for lack of Article III standing. The court cited the "undisputed evidence that [NJEA] accepted and processed the Fischer Plaintiffs' July 2018 revocation notices—even though those notices were submitted earlier than the ten-day notice period—consistent with union policy," Pet. App. 15, and noted the fact that the actual effect of WDEA Section 6 on Petitioners was to permit them to terminate their dues deduction earlier than provided under the terms of their membership agreements, *id.* at 16-17. Accordingly, Petitioners had not demonstrated an injury caused by the statute. *Id.* at 17-18.

REASONS FOR DENYING THE WRIT

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 Third Circuit 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 decision below. They concede that there is no circuit split. To the contrary, three other circuits and more than two dozen district courts have rejected indistinguishable claims. This Court recently denied review in one of these cases. *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 2021 WL 2519114 (U.S. June 21, 2021).

Like the Third Circuit below, every court to address a claim like Petitioners' has recognized that *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), did not invalidate voluntary dues authorization agreements by employees like Petitioners who affirmatively chose to become union members, but held only that public employees who elect *not* to join a union have a First Amendment right not to be compelled, as a condition of employment, to pay fees to the union. Where, by contrast, a public employee agrees to become a union member and pay union dues in exchange for union membership rights and benefits, *Cohen* makes clear that the First Amendment does not permit the employee to renege

on that agreement. That is so even where the employee contends that she would not have entered into the agreement if the legal landscape had been different at the time. It is well established that changes in the law—even constitutional law—do not provide a basis to void contractual obligations.

Finally, Petitioners provide no basis under this Court's rules to grant review of the second question presented relating to the Third Circuit's dismissal of their challenge to WDEA Section 6 for lack of standing. Petitioners state only that review should be granted "for the sake of completeness," Petition at 25, but their contention that resolution of the first question presented will also resolve the standing issue is erroneous and based on a mischaracterization of the lower court's decision. Moreover, Petitioners' argument is nothing more than a general assignment of error to the lower court's application of the Article III standing requirement to the facts in the summary judgment record. This Court generally does not sit to hear such challenges. *See* Court Rule 10.

In short, there is nothing in this Petition, or the related Petitions raising the same issue, that requires this Court's review.

I. The lower courts unanimously have rejected Petitioners' arguments.

As Petitioners acknowledge, "[t]he Third Circuit is not alone" in rejecting claims brought by union members challenging the deduction of union dues pursuant to the terms of their signed membership agreements. Petition at 9. In every case to present this question, the court has held that the deduction of an employee's union dues did not violate the public

employee's First Amendment rights, when, as here, the employee consented to those payments as part of a contract through which the employee received the benefits of union membership.

This consensus among the lower courts includes decisions from four different circuits, all of which have joined the "swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union dues." *Belgau*, 975 F.3d at 951. *See also* Pet. App. 23-24 & n.18 ("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."); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 732 (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."), *petition for cert. filed*, No. 20-1603 (U.S. May 14, 2021); *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."), *petition for cert. filed*, No. 20-1606 (U.S. May 14, 2021); *Oliver v. SEIU Local 668*, 830 F. App'x 76, 80 (3d Cir. 2020) ("By choosing

to become a Union member, [the plaintiff] affirmatively consented to paying union dues," and thus "was not entitled to a refund."). This consensus also includes more than twenty district court decisions. *See, e.g.*, *Belgau*, 975 F.3d at 951 n.5 (citing many of these cases); *Hoekman v. Educ. Minn.*, 519 F. Supp. 3d 497, 506-10 (D. Minn. 2021), *appeal docketed*, No. 21-1366 (8th Cir. Feb. 18, 2021); *Littler v. Ohio Pub. Sch. Emps. Ass'n*, Case No. 2:18-cv-1745, 2020 WL 4038999, at *5-6 (S.D. Ohio July 17, 2020), *appeal docketed*, No. 20-3795 (6th Cir. July 27, 2020).

Given this unbroken consensus among the lower courts on the first question presented here, this Court should not grant certiorari.

II. The Third Circuit's opinion faithfully applies this Court's precedents.

Notwithstanding that the lower courts have uniformly rejected the arguments that Petitioners have pressed in this case, Petitioners ask this Court to grant their Petition because the lower courts are allegedly "defying *Janus*" by concluding "it is sufficient if . . . employees contractually consent to restrictions on their First Amendment rights." Petition at 14. According to Petitioners, consent expressed through a written contract is somehow inferior to consent expressed through a unilateral waiver. Petitioners provide no support for that proposition, nor could they. For a contractual obligation to be binding, the law requires *both* manifestation of assent *and* consideration, *see* Restatement (Second) of Contracts, § 17 (Am. Law Inst. 1981), whereas a waiver requires only the former.

In any event, there is no conflict between the Third Circuit's decision and *Janus*. In *Janus*, this Court held that agency-fee requirements for public employees—by which an employee who declined to become a union member was nonetheless required, as a condition of employment, to pay a service fee to the union that represented her bargaining unit—are not consistent with the First Amendment. 138 S. Ct. at 2486. This case does not involve such an involuntary agency-fee requirement for nonmembers of the union. Petitioners are public employees who voluntarily became union members, expressly and affirmatively agreed to pay membership dues, and received membership rights and benefits in return. Petitioners admitted in the district court proceedings that they were aware they had the choice to decline union membership, that they affirmatively entered into agreements that authorized membership in the NJEA and the deduction of union dues from their wages, and that those agreements expressly stated that dues authorization could be revoked only at specified times each year. JA 112-113 ¶¶ 20-24; JA 166 ¶¶ 20-24. Petitioners did not experience any violation of their First Amendment rights when their employer made the dues deductions they had expressly 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 "waiver" standard, requiring an enhanced form of consent that exceeds the commitments provided through a binding written contract, whenever a public employee elects to join a union and agrees to pay membership dues through

payroll deduction. Petition at 12-14. As the lower courts uniformly have recognized, *see supra* at pp. 11-12, *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*. *See, e.g.*, 138 S. Ct. at 2485 n.27 ("States can keep their labor-relations systems exactly as they are—only they cannot force *nonmembers* to subsidize public-sector unions" (emphasis added)).

Petitioners' argument cannot be reconciled with *Cohen*. The Court in *Cohen* did not apply a multi-factor constitutional "waiver" analysis to a promise made by newspaper reporters not to reveal the identity of a confidential source because the government's enforcement of that promise did not give rise to any First Amendment right that needed to be waived. 501 U.S. at 669. Rather, the Court held that the First Amendment is not implicated by a promise that is enforceable under generally applicable principles of state law. *Id.* The same is true here. Petitioners have never disputed that they entered into agreements that are enforceable under generally applicable principles of New Jersey contract law, by which they agreed to pay the union dues that are the subject of this litigation. Just as the enforcement of the newspaper's promise of confidentiality did not violate its First Amendment rights in *Cohen*, the enforcement of Petitioners' contractual agreement to pay union dues does not violate their First Amendment rights either. Private parties often enter into contracts that restrict their constitutional rights—such as arbitration agreements and nondisclosure agreements—and

courts routinely honor those commitments without requiring any enhanced waiver.

The passage from *Janus* on which Petitioners rely concerns employees who, like Mr. Janus, never joined the union ("nonmembers") and never affirmatively authorized membership dues deductions:

> Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the *nonmember's* wages. § 315/6(e). No form of employee consent is required.
>
> This procedure violates the First Amendment and cannot continue. 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. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *see also Knox* [*v. SEIU Local 1000*], 567 U.S. 298,] 312–313 [(2012)]. 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. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145 (1967) (plurality opinion); *see also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 680–682 (1999). 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).

Petitioners contend that although the Court was addressing a claim by an employee who had *declined* union membership and never agreed to pay any money to the union, in this paragraph the Court also concluded that a written contract supported by consideration was insufficient to constitute affirmative consent by a union *member* to pay membership dues. Petition at 12-14. In other words, as Petitioners would have it, this Court concluded its *Janus* opinion—which held that nonmembers like Mr. Janus cannot be required by law to pay agency fees as a condition of their public employment—by issuing an advisory ruling addressing the circumstances in which dues-deduction provisions in membership contracts can be enforced.

Contrary to Petitioners' interpretation, this Court did not conclude *Janus* by addressing a situation entirely different from the one before it. Rather, the passage on which Petitioners rely expressly pertains to individuals who did not consent to join a union (like Mr. Janus) and expressly *distinguishes* those who did consent (like Petitioners). The Court cited "waiver" cases not to tacitly overrule its holding in *Cohen* that "self-imposed" restrictions on speech or associational rights do not violate the First Amendment, 501 U.S. at 671, but to make clear that the States cannot presume from nonmembers' *inaction* that they wish to support a union (*e.g.*, by implementing an opt-out system to collect fees from nonmembers who do not object). *Cf. Knox v. SEIU Local 1000*, 567 U.S. 298, 312, 315, 322 (2012) (union could not use opt-out system to collect nonchargeable special political assessment from nonmember agency-fee payers who failed to object; instead, union could collect such fees

only from nonmembers who opted into paying them). Indeed, in one of the "waiver" cases cited in this very passage, the Court indicated that its assessment that there had been no waiver of Eleventh Amendment immunity would be different if the State had made a "contractual commitment" in which it "expressly consented to being sued in federal court." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 676 (1999).[3]

As the lower courts unanimously have recognized, "*Janus* does not abrogate or supersede Plaintiffs' contractual obligations." Pet. App. 24. Rather, *Janus* "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). Here, Petitioners signed membership contracts that they understood "authorize[d] membership in the NJEA and the deduction of union dues from wages." JA 166 ¶¶ 20-21. Through those agreements, Petitioners "clearly and affirmatively consent[ed]" to pay the union dues at issue in this lawsuit. *Janus*, 138 S. Ct. at 2486.

That Petitioners signed these agreements prior to *Janus*, which changed the consequences of a public employee's decision not to join a union, does not alter

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[3] Like *Knox* and *College Savings Bank*, the other "waiver" cases that this Court cited in *Janus* 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); *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)).

the enforceability of these contracts. Petition at 20-22. 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 on constitutional principles." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 277 (3d Cir.), *cert. denied*, 537 U.S. 947 (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 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) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"); *see also* Pet. App. 21 ("Changes in decisional law, even constitutional law, do not relieve parties from their pre-existing contractual obligations."); *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."). Here, the Court's decision in *Janus* does not permit Petitioners to renege on their prior contractual agreements to pay union dues.

Finally, Petitioners' public policy argument is entirely misplaced. Petitioners contend a "ten-day escape period restriction" is contrary to public policy. Petition at 22-24. But Petitioners' membership agreements do not contain any "ten-day escape period" and the evidence was undisputed that no ten-day window period was applied to Petitioners. Pet.

App. 15. Petitioners cannot seek review based on facts that are not present here.[4]

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

Petitioners also request review of the Third Circuit's dismissal of their constitutional challenge to WDEA Section 6, N.J.S.A. § 52:14-15.9e, for lack of standing. Petitioners do not provide any independent grounds for the Court to grant review of this question, arguing only that the lower courts erred in concluding that Petitioners had failed to show an injury-in-fact resulting from Section 6 as necessary to demonstrate Article III standing. Petition at 24-25. This Court does not ordinarily exercise its review power to hear such challenges. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("[w]e do not grant a certiorari to review evidence and discuss specific facts"); *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari) ("we rarely grant review where the thrust of the claim is

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[4] Nor can they seek review based on a legal question not present here: whether the ten-day window period in WDEA Section 6 is reasonable. Petitioners seize on dicta in the district court's opinion labeling that window period "draconian." Pet. App. 22. That statement was unaccompanied by any reasoning, failed to acknowledge that such window periods have long been accepted, *see supra* n.1, and was correctly recognized by the Third Circuit as outside the district court's jurisdiction in light of the conclusion that Petitioners lacked standing to challenge this aspect of the New Jersey statute. *See* Pet. App. 20 n.14 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.")).

that a lower court simply erred in applying a settled rule of law to the facts of a particular case"); *see also* Court Rule 10.

Petitioners instead argue that the Court should take this question "for the sake of completeness" if it grants review of the first question because, they claim, "resolution of the first question presented will control the answer to the second question." Petition at 25. As discussed above, Petitioners have not demonstrated a basis to grant review of the first question. But regardless, Petitioners' "completeness" argument is premised on a mischaracterization of the Third Circuit's decision.

In dismissing Petitioners' constitutional challenge to WDEA § 6, the Third Circuit applied this Court's well-established three-part test for Article III standing. Pet. App. 11 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014)). The court concluded that Petitioners had failed to satisfy that test because based on the undisputed evidence in the record, Petitioners had not suffered an injury traceable to the statute. Pet. App. 15-17. Contrary to Petitioners' contention, the court's decision did not turn on the *merits* of their First Amendment challenge to enforcement of the terms of their union membership agreements. Rather, it turned on the *fact* that—whatever the legal enforceability of those membership agreements—the reason Petitioners' dues deductions did not immediately cease upon submission of their July 2018 revocation notices was that they had signed membership agreements in which they authorized dues payments for the time period at issue. Thus, as the lower courts concluded, the only effect of Section 6 as to Petitioners in this case was to provide them a third annual opt-out date

that allowed them to terminate their dues deductions earlier than otherwise stated in their membership agreements. Pet. App. 17. The factual reality as to what happened in this case remains unchanged regardless of whether Petitioners were successful on their claim that enforcing the terms of those membership agreements violated their First Amendment rights. And, as the lower courts concluded, on these facts, Petitioners could not demonstrate an injury caused by Section 6 as required for Article III standing.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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