No. 20-1751

IN THE
Supreme Court of the United States

SUSAN FISCHER AND JEANETTE SPECK,
Petitioners,

v.

GOVERNOR OF NEW JERSEY; NEW JERSEY EDUCATION ASSOCIATION; TOWNSHIP OF OCEAN EDUCATION ASSOCIATION,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

I. This Case Is a Suitable Vehicle to Clarify That Governments and Unions Cannot Seize Payments for Union Speech from Nonmembers Without Proof They Waived Their First Amendment Rights.

This case squarely presents the important question of whether governments and unions, to lawfully seize payments for union speech from objecting employees who are not union members, need clear and compelling evidence those employees waived their First Amendment rights under *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). Petitioners Susan Fischer and Jeanette Speck each had union dues deducted from their wages after they resigned their union membership and objected to those deductions. *See* Pet. 6. The Third Circuit found the "Defendants do not dispute that Plaintiffs have standing to pursue their challenges to the membership agreements," Pet.App. 21 n.15, which restricted when petitioners could stop dues deductions, and ruled on the merits of their challenges, *id.* at 24. The lower court held that governments and unions can contractually restrict when employees can stop financially supporting a union without having to prove the employees waived their First Amendment rights under *Janus*. *Id.* at 24 n.18. This case is therefore a suitable vehicle for resolving the first question presented.

The State respondent tries to reframe the question presented by claiming (at 10) that "Petitioners ask this Court to resolve the constitutionality of the WDEA [Workplace Democracy Act]." That is not the first question petitioners present to this Court. Nor is it the second question, which is whether petitioners

"have standing to challenge New Jersey Statutes Annotated Section 52:14-15.9e." Pet. (i).

Petitioners raise this second question because the Court's resolution of the first question would resolve it as well. *See* Pet. 24-25. The Third Circuit held petitioners lack standing to challenge N.J. Section 52:14-15.9e because its escape period allowed petitioners to stop paying for union speech earlier than under the restrictions in their dues deduction assignments. Pet.App. 16-17. If the Court holds those restrictions are unenforceable because petitioners did not waive their First Amendment rights, the Third Circuit's standing decision collapses and must be reversed.

The State's arguments (at 10-18) about procedural hurdles to the Court ruling on the constitutionality of N.J. Section 52:14-15.9e are therefore misplaced and do not provide a reason for the Court to not review the actual questions this petition presents. Even if the State's arguments were relevant, they are meritless.

Contrary to the State's assertions (at 11), N.J. Section 52:14-15.9e's restrictions were enforced against petitioners. They were compelled to pay for NJEA's speech over their objections because: (1) their July 2018 requests to stop dues deductions were rejected by their public employer for being outside the statute's 10-day notification period; and, (2) their August 2018 requests could not be effectuated until the thirtieth day after the anniversary of their employment under the statute. *See* Pet. 6; Pet.App. 44; C.A. App. 57, ¶¶ 5-8; *id*. at 72, ¶¶ 5-8. But for N.J. Section 52:14-15.9e's

restrictions, petitioners would not have been forced to subsidize NJEA's speech in September 2018 against their will.

Petitioners' challenge to the statute's restrictions also are not moot as the State claims (at 12-14). Petitioners challenged the statute on behalf of putative class members and timely filed a motion for class certification.[1] C.A. App. 48, ¶ 45; *id.* at 89. The district court denied the class motion as moot because it granted the defendants summary judgment. Pet.App. 57. Petitioners appealed to the Third Circuit on behalf putative class members. *See* Appellants' C.A. Br. 1-2. If this Court reverses the lower courts, Petitioners' class claims will be justiciable because they relate back to the filing of the complaint. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991).

Finally, as for the State's sovereign immunity argument, the Court does not have to reach it to resolve the questions presented. The Court can hold the NJEA needs proof of a waiver to restrict employees' First Amendment rights under *Janus*, and find that petitioners have standing to challenge the State's statutory restriction on when employees can stop paying for union speech, and leave the State's sovereign immunity defense to the lower courts to adjudicate in the first instance.

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[1] Respondents do not claim, and nor could they, that petitioners individual claims for damages against the NJEA are moot.

II. The Third Circuit's Decision Conflicts with *Janus*.

1. The Third Circuit defied this Court's holding in *Janus*, 138 S. Ct. at 2486, by declaring that governments and unions do not need proof of a constitutional waiver to seize union payments from nonmembers over their objections. Pet.App. 24 n.18. Indeed, the lower court's holding defies common sense. It should be readily apparent that governments and unions cannot restrict when employees can stop paying for union speech unless those employees waived their First Amendment rights under *Janus*.

NJEA tries to obscure that this case concerns whether objecting nonmembers can be compelled to pay for union speech by repeatedly discussing union members voluntarily paying union dues in return for membership benefits. NJEA Br. (i), 1, 9, 13, 16. That is not at issue here. At issue are union dues involuntarily seized from petitioners and others *after* they resigned their membership in NJEA—and thus became ineligible for membership benefits—and objected to financially supporting the union.

Petitioners were not voluntary union members even before their resignations. Before *Janus*, nonmembers at their workplace had to pay representation fees equal to approximately 85% of full union dues. Pet.App. 39-40. Fischer and Speck both declared that "[b]ut for the representation fee requirement, I would not have become or remained a member of the NJEA or authorized the deduction of union dues from my

wages." C.A. App. 57, ¶ 4; *id.* at 73 ¶ 4. True to those words, petitioners resigned from the NJEA and objected to dues deductions shortly after this Court's decision in *Janus* freed them from the compulsory fee requirement. C.A. App. 57, ¶ 5; *id.* at 73 ¶ 4.

NJEA argues (at 16) that *Janus* pertains only to employees who never joined a union. That makes no sense. *Janus* construed the First Amendment, which grants rights to all citizens—union members and nonmembers alike. Employees who join a union do not forfeit their First Amendment right to stop subsidizing that union's speech in the future. Petitioners and other employees who choose to exercise their right by resigning their union membership are as much "nonmembers" under *Janus* as employees who never joined in the first place. 138 S. Ct. at 2486. If anything, the affirmative act of resigning and objecting only makes those employees' opposition to supporting the union more apparent. As "nonmembers" under *Janus*, petitioners and other dissenting employees cannot be made to subsidize union speech absent proof they waived their First Amendment rights. *Id.*

NJEA implausibly claims (at 16) that *Janus'* waiver language was meant only "to make clear that the States cannot presume from nonmembers' *inaction* that they wish to support a union." (emphasis in original). The claim ignores that the Court in *Janus* established the evidentiary burden that must be satisfied to prove employees consent to subsidizing a union by holding that "to be effective, the waiver must be

freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

Clear and compelling evidence of a waiver under the three precedents cited in *Janus* means proof of an "'intentional relinquishment or abandonment of a known right or privilege." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see Curtis Publ'g*, 388 U.S. at 143-45 (applying this standard to an alleged waiver of First Amendment rights). These criteria are sometimes stated as requiring that a valid waiver must be voluntary, knowing, and intelligently made and its enforcement not be against public policy. *See* Pet. 20. This is the standard that governments and unions must satisfy to lawfully extract payments for union speech from nonmembers like the petitioners.

Respondents do not claim they can satisfy this standard and prove petitioners waived their First Amendment right under *Janus* to stop subsidizing NJEA's speech. Among other things, there is no clear or compelling evidence that petitioners, when they signed dues deductions authorizations, knew they had a First Amendment right not to subsidize union speech or voluntarily and intelligently chose to waive that constitutional right. Pet. 20-23.

NJEA contends (at 17-18) that proof of a contract satisfies *Janus'* consent requirement. That contention conflicts with this Court's repeated use of the term

"waiver" in *Janus*, 138 S. Ct. at 2486. The Court stated that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights," that "such a waiver cannot be presumed," and that "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 at 145). The Court in *Janus* clearly required proof of a "waiver," and not proof of a contract.

The two are not equivalent. The criteria for proving a waiver of a constitutional right is different and more exacting than the criteria for proving formation of a contract. *See* Pet. 28-30. For example, a key element to proving a waiver is that an individual must have known of the constitutional right that he or she allegedly waived—i.e., the individual must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Moran v. Burbine,* 475 U.S. 412, 421 (1986); *see Curtis Publ'g*, 388 U.S. at 144-45 (holding that an individual did not waive his First Amendment right because he did not know of that right). That is not an element to proving a contract. Here, even if petitioners' dues deduction forms amount to a contract, they do not amount to a waiver because nothing on the forms prove petitioners knew of their First Amendment right not to support NJEA or intelligently chose to waive that speech right. *See* Pet. 20-21.

2. NJEA's heavy reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) is misplaced for the reasons discussed in the petition at 17-19, which NJEA does

not try to rebut. Unlike *Cohen*, this case does not concern an agreement with a private party being enforced by a law of general applicability, but agreements with government employers that are enforced under a state payroll deduction law (N.J. Section 52:14-15.9e). Most importantly, unlike with the conduct in *Cohen*, the state action here—seizures of payments for union speech from objecting nonmembers—violates the First Amendment rights absent proof the individuals waived their rights.

NJEA, like the Third Circuit, claims that in *Cohen* "the Court held that the First Amendment is not implicated by a promise that is enforceable under generally applicable principles of state law." NJEA Br. 14; *see* Pet.App. 23. The Court did no such thing. The Court narrowly held it did not violate the First Amendment for a state court to enforce a private agreement with a law of general applicability. *Cohen*, 501 U.S. at 669. The Court did not broadly declare that state contract law supersedes the First Amendment. Indeed, such a holding would lack a rational basis. A contract does not render the First Amendment inapplicable to state actions that otherwise violate an individual's speech rights (like compelling an individual to pay for union speech). A valid waiver by an individual of his or her speech rights may have that effect, but a waiver is different from a contract.

The Third Circuit's misinterpretation of *Cohen*, like its misinterpretation of *Janus*, imperils First Amendment freedoms by substituting a lesser contract analysis for a waiver analysis. The Court should clarify its

holdings in *Cohen* and *Janus* and firmly establish that states cannot violate individuals' First Amendment rights absent clear and compelling evidence the individuals knowingly, intelligently, and voluntarily waived their constitutional rights.

3. Contrary to the respondents' claims, the Court did not decline to review the first question this petition presents in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), cert denied, No. 20-1120 (June 21, 2021). *Belgau* presented the broader question of whether all deductions of union dues from employees, including from union members, require proof the employees waived their constitutional rights. *See* Pet. (i), 12, *Belgau*, No. 20-1120 (Feb. 11, 2021). According to the respondent union in *Belgau*, the "case . . . does not present a question regarding the timeliness of an objection" to paying union dues. Resp. Wash. Fed'n of State Employees' Br. in Opp. 11, *Belgau*, No. 20-1120 (May 12, 2021). In contrast, this petition presents the narrower question of whether governments and unions need proof of a waiver "to seize payments for union speech from employees who provide notice they are *nonmembers* and *object* to supporting the union." Pet. (i) (emphasis added). This petition focuses on the constitutionality of restrictions on when dissenting employees can exercise their right to stop subsidizing union speech.

If *Janus* requires clear and compelling evidence of a waiver in any circumstance, it is in the circumstance presented here. The Court should overrule the contrary holdings of four courts of appeals despite their

unanimity. The courts are uniformly wrong in construing *Janus* to not require proof that employees waived their First Amendment rights for the government to restrict those rights and to seize union payments from objecting nonmembers. *See* Pet. 14-19. The Court should not wait for a circuit split to develop to correct the lower courts' decision to effectively eliminate *Janus*' waiver requirement. Without this requirement, states and unions can, and will, continue to severely restrict employees' exercise of their First Amendment rights under *Janus*. Given that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Court should correct the lower courts' failure to enforce *Janus'* waiver requirement now.

III. The First Question Is Important Because States and Unions Are Severely Restricting When Employees Can Exercise Their First Amendment Rights Under *Janus*.

The vitality of *Janus'* waiver requirement is profoundly important because states and unions are undermining the speech rights *Janus* recognized by sharply restricting when employees can exercise those rights. Pet. 2-3, 25-30. New Jersey and eleven other states amended their dues-deduction laws to require government employers to enforce restrictions on when employees can stop paying union dues, and at least five other states enforce these restrictions under their

pre-existing laws. *Id.* at 2-3. These restrictions typically prohibit employees from stopping dues deductions for 335 to 355 days of each year. *Id.*

The State's claim (at 4-5) that New Jersey amended its dues deduction law one month before *Janus* for the salutatory purpose of guaranteeing employees at least one ten-day opportunity per year to stop dues deductions is as implausible as it is untrue. In the WDEA, the State rescinded its more lenient policy that permitted employees to stop dues deduction by submitting a revocation notice at any time to be effective January 1 or July 1, and replaced it with the far stricter requirement that employees may stop dues deductions by submitting a revocation notice during a ten-day period that "shall be effective on the 30th day after anniversary of employment." N.J. Section 52:14-15.9e (as amended by P.L. 2018, c.15, § 6, eff. May 18, 2018). The purpose of this "draconian requirement," as the district court called it, Pet.App. 52, is clear: to prohibit New Jersey public employees from freely exercising the First Amendment right the Court would recognize in *Janus*.

The Third Circuit's decision, like that of Seventh, Ninth, and Tenth Circuits, makes it easy for states and unions to impose these kinds of restrictions on employees' First Amendment rights. The restrictions simply need to be recited in the fine print of employees' dues deduction forms. *See* Pet. 28. The same would not be true if *Janus'* waiver requirement were enforced. An employee's right not to subsidize union

speech could not be restricted absent clear and compelling evidence the employee was notified of his or her right and voluntarily and intelligently chose to waive it. The restrictions also could not be so onerous as to be against public policy. *Id*. at 29.

It is important that the Court make clear that states and unions cannot restrict employees' First Amendment rights under *Janus* unless those employees waive their rights. Employees' ability to free exercise their newly recognized right to not subsidize union speech depends on it.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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