No. 20-1786

IN THE

Supreme Court of the United States

JOANNE TROESCH, *et al.*,

Petitioners,

v.

CHICAGO TEACHERS UNION, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO

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September 27, 2021

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QUESTION PRESENTED

When a public school employee has voluntarily joined a teachers' union and has signed an agreement authorizing her employer (a public school district) to deduct union dues from her paychecks, does the public school district violate her First Amendment rights by making the payroll deductions according to the terms of her written agreement?

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BRIEF IN OPPOSITION

JoAnne Troesch and Ifeoma Nkemdi are teachers at Chicago Public Schools, employed by the Board of Education of the City of Chicago. In 2017, Troesch and Nkemdi each signed a written agreement to join the Chicago Teachers Union, and that agreement authorized the Board to deduct union dues from their paychecks (referred to as the "dues checkoff" agreement). By signing that document, Troesch and Nkemdi each agreed that they could change their dues checkoff status -- that is, revoke their authorizations for payroll deductions -- only during August of any year. (This brief refers to that August revocation period as the "opt-out window" in the dues checkoff agreement.)

Even though they had agreed to that process, Troesch and Nkemdi filed a lawsuit, claiming that the First Amendment barred the Board and the CTU from collecting union dues from them. The district court correctly dismissed that claim under *Cohen v. Cowles Media Co.,* 501 U.S. 663 (1991), finding that parties may not assert First Amendment rights as a means to avoid their obligations from their own agreements. The district court also correctly found that the Board could enforce Troesch and Nkemdi's agreements regarding union dues without running afoul of the decision in *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448 (2018). *Janus* decided only whether a non-union member could be compelled to pay union fees against his will, and *Janus* did not apply to Troesch and Nkemdi's dues agreements.

After the district court dismissed Troesch and Nkemdi's complaint, the court of appeals issued a non-precedential order that summarily affirmed that dismissal.

Both courts' decisions were: (i) consistent with *Cohen*; (ii) not in conflict with *Janus*; and (iii) in harmony with the decisions from the courts of appeals that have addressed *Janus* claims involving opt-out windows. Because there is no conflict among the courts of appeals decision on this issue -- as explained in more detail below -- this Court should deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Board oversees Chicago Public Schools, and the Chicago Teachers Union is the exclusive representative for CPS teachers as a bargaining unit *(Pet.App.5-6)*. The CTU negotiates collective bargaining agreements with the Board, framing the employment terms for thousands of CPS teachers and other school personnel *(id. at 6)*. Since 2015, the collective bargaining agreements have contained an identical Section 1-6, entitled "Dues Checkoff," which provides that the Board "shall deduct from the pay of each bargaining unit employee from whom it receives an authorization to do so the required amount of fees for the payment of [Union] dues" *(id.)*. Section 1-6 further states that any "bargaining unit employee may terminate the dues check off" -- meaning the dues authorization -- "during the month of August by submitting written notice to the [Board] and the Union" *(id.)*.

In September of 2017, JoAnne Troesch and Ifeoma Nkemdi signed agreements to become CTU members *(id. at 7)*. In those documents, they agreed to the following "Dues Authorization" procedure *(id.)*:

> "During my employment, I voluntarily authorize and direct my Employer to deduct from my pay

> each period, regardless of whether I am or remain a member of the Union, an amount equal to the dues and assessments certified by the Union, and to remit such amount monthly to the Union. This authorization and direction shall become revocable by sending written notice to the Union by United States Postal Service postmarked between August 1 and August 31."

That is, Troesch and Nkemdi committed to pay union dues (via payroll deductions) and agreed that they could only change their payroll deduction status during August at the beginning of any school year, even if they resigned from the CTU during another part of the year *(id.)*.

In June of 2018, this Court issued its decision in *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448 (2018). In *Janus,* this Court held that, under the First Amendment, a government employer may not deduct union fees from a paycheck for any employee who is not a member of the union, unless that non-member employee has consented to such a payroll deduction. *Id.* at 2486.

A year later -- in October of 2019, when the Board and the CTU were negotiating over a new collective bargaining agreement -- Troesch and Nkemdi sent letters to resign their membership in the CTU, asking to revoke their dues authorizations immediately *(Pet.App.7-8)*. The CTU responded with a letter, accepting their resignations and explaining that their dues authorizations would continue until the next August, which was the next opt-out window under their written agreements *(id. at 8)*. The Board continued to deduct dues from their paychecks until September 1, 2020 *(id.)*.

Troesch and Nkemdi filed suit, asserting that the Board and the CTU had violated their First Amendment rights by deducting union dues from their paychecks until the next opt-out window *(Pet.App.5, 8-9)*. The district court granted a motion to dismiss *(id. at 5)*, holding that the Board and the CTU did not violate the First Amendment by following the parties' written agreements and waiting until an August opt-out window before making requested changes to payroll deductions *(id. at 15-17)*.

Troesch and Nkemdi appealed. The court of appeals summarily affirmed the district court's ruling *(id. at 1-3)*. The court of appeals noted that the parties had all agreed that *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724 (7th Cir. 2021), controlled the appeal *(Pet.App.2)*. The court of appeals' decision was a non-precedential order, with no accompanying opinion *(id. at 1-3)*. See also *Troesch v. Chicago Teachers Union*, 2021 U.S. App. LEXIS 19108, *1 (7th Cir. April 15, 2021); 7th Cir. R. 32.1.

REASONS FOR DENYING THE PETITION

Most of the petition never engages with the considerations governing review on certiorari, which are set forth in Supreme Court Rule 10. As discussed below, this Court should deny the petition.

1. The ruling here is consistent with *Cohen v. Cowles Media Co.,* 501 U.S. 663 (1991), because the First Amendment does not provide a right to nullify contractual obligations.

The district court found that Troesch and Nkemdi had signed valid and enforceable contracts in which they

agreed to pay money to their union via payroll deductions, and in which they agreed that they could only discontinue those payroll deductions during any August *(Pet.App.15-16)*. The district court further held that Troesch and Nkemdi did not have a claim under *Janus* for being forced to pay union dues, given that they had signed a dues checkoff agreement that governed when and how they would pay dues to the CTU *(id. at 16)*.

The district court's analysis was consistent with *Cohen v. Cowles Media Co.,* 501 U.S. 663 (1991). In *Cohen,* this Court considered whether a person could sue a newspaper for violating a confidentiality agreement in connection with the publication of sensitive information, even though the newspaper cited a First Amendment right to set aside that confidentiality agreement. *Cohen,* 501 U.S. at 666-67. The Court held that the newspaper remained bound by its confidentiality agreement under the generally applicable laws of the state of Minnesota, and "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 559.

Here, *Cohen* means that an employee may not cite a First Amendment right as a strategy to avoid an otherwise-enforceable obligation from her contract. Because Troesch and Nkemdi signed contracts that authorized union dues as payroll deductions, and because their contracts specified how and when they could revoke their authorizations, the Board did not offend the First Amendment by holding Troesch and Nkemdi to those contracts.

After applying *Cohen,* any remaining dispute would turn on state contract law, not on First Amendment law.

For example, state law would apply to the petition's claim that public policy should prohibit the enforcement of any dues checkoff agreement that contains an opt-out window *(*see *Pet. at 19-21)*. State law issues -- such as public policy arguments under contract law -- are not proper subjects for certiorari review. See *Cohen,* 501 U.S. at 671-72 (declining to decide state law questions). See also *Agins v. Tiburon,* 447 U.S. 255, 259 n.6 (1980) (application of state law is not an appropriate question for review in the Supreme Court); *Bowen v. Massachusetts,* 487 U.S. 879, 908 (1988) (reciting a "settled and firm policy" of deferring to regional courts of appeals on matters involving the construction of state law).

Because the constitutional claims are foreclosed by *Cohen,* the petition should be denied.

2. The ruling here does not conflict with this Court's decision in *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448 (2018).

The petition asks for certiorari review by arguing that the dues checkoff agreement violates Troesch and Nkemdi's rights, claiming that the district court's ruling contradicts *Janus*. See *Pet. at 10-12.* But the petition's analysis of *Janus* is incorrect, for two reasons.

First, Troesch and Nkemdi have a different union membership status than the employee in *Janus*. While *Janus* decided only the rights of non-union members who had never consented to pay union fees (see *Janus,* 138 S. Ct. at 2486), Troesch and Nkemdi had agreed in writing to join the CTU and to pay CTU dues. Troesch and Nkemdi's agreement included an opt-out window, and

the *Janus* opinion did not concern opt-out windows. See *Janus*, 138 S. Ct. at 2459-86.

Second, Troesch and Nkemdi's case involves a different procedural posture than the petition suggests. That is, the petition contends that a district court errs if it finds against an employee unless it has "clear and compelling" proof that the employee waived a constitutional right, citing *Janus*, 138 S. Ct. at 2486 (see *Pet. at 10-12)*. But that proof-of-waiver argument has little to do with the events here.

- Troesch and Nkemdi asserted a claim that they were compelled to pay union dues against their will. See *Pet.App.8-9.*

- But in their complaint, Troesch and Nkemdi admitted that they signed a contract in which they: (i) agreed to become members of the CTU; (ii) agreed to a dues checkoff that authorized payroll deductions for union dues; and (iii) agreed that August was the only time in which they could revoke their authorization for those payroll deductions *(id. at 7)*. The payroll deductions then happened as authorized *(id.)*.

- On a pleadings motion, a district court may consider admissions from the plaintiff's pleadings. See *Orgone Capital III, LLC v. Daubenspeck,* 912 F.3d 1039, 1048-49 (7th Cir. 2019).

Thus, Troesch and Nkemdi pled themselves out of court, because their complaint included admissions that they were not compelled to pay union dues. They failed to

plead a viable claim of a compelled payment under *Janus*. Because the case was dismissed on the pleadings, it did not turn on whether any evidence on waiver was "clear and compelling," as the petition suggests. And, in any event, a party's admissions can be clear and convincing proof of a fact. See, *e.g., Lightspeed Media Corp. v. Smith,* 761 F.3d 699, 711 (7th Cir. 2014).

In short, Troesch and Nkemdi's case is not comparable to *Janus,* and the district court's dismissal did not conflict "with relevant decisions of this Court" under Rule 10(c). The petition should be denied.

3. The ruling here does not present a basis for certiorari review under the other considerations identified in Rule 10.

The petition does not identify any split in authority regarding how *Janus* applies, if at all, to union members who agree to opt-out windows in their dues checkoff agreements. The petition does not identify any conflict among the decisions from the courts of appeals or from the state courts of last resort.

Indeed, no such conflict exists. The courts of appeals have agreed that *Janus* does not support a union member's First Amendment challenge to an opt-out window in a dues checkoff agreement. In the leading opinion on the issue -- *Belgau v. Inslee,* 975 F.3d 940 (9th Cir. 2020) -- the court of appeals held that union members who had signed contracts to pay union dues via payroll deductions could not rely on *Janus* to claim that they had been forced into payroll deductions. *Belgau,* 975 F.3d at 950-51. The court of appeals further held that the union members

did not have a constitutional claim to challenge their own contracts that included opt-out windows. *Id.* at 950. And because *Janus* did not overrule *Cohen*, the court of appeals held, the parties could not assert a First Amendment right as a strategy to override their own contractual commitments. *Id.* at 950.

Other courts have followed *Belgau.* In *Hendrickson v. AFSCME Council 18,* 993 F.3d 950, 961 (10th Cir. 2021), the court of appeals enforced an opt-out window in a dues checkoff agreement, dismissing a union member's claim under *Janus*. In *Bennett,* 991 F.3d at 730-31, the court of appeals followed *Belgau* to dismiss an employee's *Janus* claim, focusing on the employee's signed dues checkoff agreement that included an opt-out window. And the same view prevailed in two non-precedential decisions. See *Oliver v. SEIU Local 668,* 830 Fed. Appx. 76, 79-80 (3rd Cir. 2020) (enforcing a dues checkoff agreement by union members), and *Fischer v. Gov'r of New Jersey,* 842 Fed. Appx. 741, 753 (3rd Cir. 2021) (enforcing an opt-out window agreement in a dues checkoff agreement). No court of appeals has disagreed with *Belgau*. And no state court of last resort has addressed the issue.

Hence, there is consensus regarding this issue, and the district court followed that consensus when it dismissed Troesch and Nkemdi's complaint. See *Pet. App.13-15.* Accordingly, there is no compelling reason to review this case under Supreme Court Rule 10(a).

Finally, the petition suggests that the court of appeals decision, if unreviewed, could impact the rights of "millions of workers," arguing that this case presents an important question of federal law that requires this Court's attention

under Rule 10(c) *(Pet. at 21)*. But the court of appeals' order is non-precedential -- see *Troesch*, 2021 U.S. App. LEXIS 19108, at *1; see also 7th Cir. R. 32.1 -- which means that the order here will not decide the rights of anyone beyond the parties to this case. Accordingly, the order here does not present an important question that requires review.

In Rule 10, this Court sets out the considerations that will support review on certiorari. None of those considerations are present in this case. The petition should be denied.

4. The ruling here does not offer a proper vehicle to consider whether an employee may rely on the First Amendment to void a union dues checkoff.

Even if this Court were inclined to consider whether a union member may somehow rely on the First Amendment to void a dues checkoff agreement that includes an opt-out window, this case does not provide a proper vehicle to reach that issue. There are several vehicle problems.

The Record. The court of appeals issued only a non-precedential order, without ever issuing a full opinion analyzing the issues. The parties never filed appellate briefs on the merits. Thus, the record in this case is too sparse to support a fulsome review on certiorari.

Section 11.1. The petition argues that this case offers an opportunity to review the constitutionality of Section 11.1 of the Illinois Educational Labor Relations Act, 115 ILCS 5/11.1 (West 2019), which covers dues checkoffs in Illinois public schools *(*see *Pet. at 4, 5, 16, 26)*. But this case is not a proper vehicle to review that statute. The district

court dismissed the complaint but specifically refused to decide any issue under Section 11.1 *(*see *Pet.App.9 n.3)*. The court of appeals also did not decide any issue under Section 11.1 *(*see *id. at 1-3)*. That should counsel strongly against using this case to review Section 11.1. See *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1652 n.4 (2017) (given "the lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance.").

Consent. Although the petition purports to seek review of whether the First Amendment protects union members from being forced to pay union dues, Troesch and Nkemdi are not proper candidates to test that claim. Troesch and Nkemdi were never forced to pay union dues. That is:

- Troesch and Nkemdi signed CTU membership agreements in 2017, authorizing payroll deductions for union dues and agreeing to an August opt-out window for when they could discontinue those deductions *(Pet.App.7)*.

- *Janus* was decided in June of 2018, but Troesch and Nkemdi did not try to withdraw their consent until October of 2019 *(id. at 7-8)*.

- And although Troesch and Nkemdi resigned from the CTU in October of 2019, they had previously agreed in writing that the August opt-out window rule would apply to them even after they resigned from the CTU *(id. at 7)*.

In short, Troesch and Nkemdi incurred payroll deductions pursuant to their own consent, and that consent was reflected in their written agreements. This case does not involve involuntary payroll deductions. The supposed First Amendment claim does not fit these facts.

For all of these reasons, this case is not a proper vehicle to address the First Amendment issues raised in the petition.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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