No. 24-2

IN THE

Supreme Court of the United States

CAMILLE BOURQUE,

Petitioner,

v.

ENGINEERS AND ARCHITECTS ASSOCIATION, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns a minor clerical error in processing union dues for two employees, not, as Petitioners assert, conduct identical to the questions presented in *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, 585 U.S. 878, 920-30 (2018). Unlike *Janus*, Petitioners do not nor can they allege that Respondent City of Los Angeles ("City"), a public employer, regularly deducts "union shop" or fair share agency fees out of its employees' paychecks without their affirmative consent. Rather, Petitioners challenged the City's conduct in relying upon a union member list to erroneously include two employees in processing paycheck deductions for union members. The list provided by Respondent Engineers & Architects Association ("EAA" or "union") to the City inadvertently included the names of the two Petitioners in this matter and the union paid back all deductions and monies with interest prior to the institution of the underlying lawsuit. The correction rendered Petitioner Morejon without legal standing and Petitioner Bourque's case moot.

Unsurprisingly, the Petition for Writ of Certiorari ("Petition") abandons any claim against the City and forgoes any challenge to that portion of the Ninth Circuit ruling dismissing the City from this litigation. Instead, the Petition seeks to frame a clerical error as an issue of constitutional moment, which it is not. This case is not a case or controversy involving the First Amendment or the color of state law. Rather, as the City argued in its successful motion to dismiss below, the only questions presented are:

1. Whether Camille Bourque and Peter Morejon can state a claim for prospective relief in this case or whether the claims against the City were properly

dismissed for lack of standing and mootness (and the writ of certiorari does not raise any issue challenging that dismissal); and

2. Whether Petitioners can state a claim under 42 U.S.C. § 1983 (Section 1983) where the City's only role in the conduct alleged was a ministerial function required by state law.

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INTRODUCTION

The only arguments advanced in the Petition focus exclusively on EAA's conduct and California's statutory framework for union dues deductions. Given the strong interest in judicial economy and the substantive Section 1983 and First Amendment arguments in the other Briefs in Opposition, the City, seeking to avoid repetition, provides this supplemental response.

Other than a cursory restatement of the Ninth Circuit's ruling as to the City on page 6 of the Petition, Petitioners make no arguments nor allege any error as to the Ninth Circuit's decision finding that the district court properly dismissed Petitioners' claims against the City. Accordingly, Petitioners have abandoned their legal arguments against the City, and the City respectfully requests that this court deny Petitioners' Writ of Certiorari.

With respect to the questions presented, the Petition mischaracterizes both the legal issues and the facts in the proceedings below. Petitioners contend the instant case involves conduct "substantively identical" to that in *Janus*, but this assertion lacks merit. As set forth in Appendices C and D to the Petition, the issues decided before the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit addressed a lack of subject matter jurisdiction based on standing and mootness for prospective relief (and its exceptions), and Section 1983 relief liability under legal standards analyzing the "private misuse" of a state statute.

In addition, the Petition cites to seven (7) cases allegedly involving "widespread post-Janus abuse of power," but neglects to mention that this Court has already denied *certiorari* in three of these cases[1] and that all 7 were brought by counsel for the Petitioners in this matter. Pet. 17, 1. The City opposes the Petition based on well-established precedent set forth by this Court and by the Ninth Circuit regarding the legal issues of standing and mootness for prospective relief. In addition, as noted in the other opposing parties' briefs, the Petition completely abandons the claims for Section 1983 relief under the legal standards set forth in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978) and otherwise fails to state a cognizable claim.

STATEMENT OF THE CASE

The City disagrees with Petitioners' statement of the factual and legal background of the case. Nevertheless, taking all reasonable inferences of fact, but not legal conclusions, in a light most favorable to Petitioners, this case is factually distinguishable from *Janus* in every respect. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is not a case about fair share agency fees being deducted from every public employee's paycheck as was the type of legal arrangement that existed in public

1. *Laird v. United Teachers Los Angeles, et. al*, No. 23-1111 (S. Ct.); *Deering v. Int'l Brotherhood of Electrical Workers, Local 18, et al.* No. 23-1215 (S.Ct.); and *Kant v. Serv. Employees Int'l Union, Local 721, et al.* No. 23-113 (S.Ct.)

employment before *Janus*.[2] Rather, this case involves a dues processing error for two City employees that EAA remedied by paying the monies back to both employees with interest.

According to the Complaint, Bourque alleges she never joined EAA and neither signed a membership card nor authorized the City to deduct union dues from her paycheck. Pet.App. 4a, ¶ 10. She claims the union dues were taken out in error in an amount totaling $2,842.40 over 24 years. Pet.App. 6a, ¶ 27.

Morejon alleges he joined EAA in 2005 and signed a membership card and dues authorization. Pet.App. 7a, ¶ 30. Morejon further alleges that on October 5, 2020, he sent a letter to EAA resigning his membership and revoking the authorization to take union dues from his paycheck. Pet.App. 7a, ¶ 34. He claims the union dues were taken out in error in an amount totaling $464.00. Pet.App. 8a, 9a, ¶ 48; 155, Part C.

As noted by the district court, all deductions for union dues ceased for Morejon prior to the filing of the instant lawsuit. Pet.App. 20a. Morejon was also removed from EAA's member list before the Complaint was filed. *Id.* In addition, EAA has refunded both Petitioners' past dues deducted, plus interest. Pet.App. 50a, 55a.

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2. Following this Court's decision in *Janus*, the City stopped processing all fair share agency fee deductions immediately, and removed such provisions from its Memoranda of Understanding ("MOU").

The Ninth Circuit, following its precedent, *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1118-21 (9th Circ. 2022), *cert denied*, 143 S. Ct. 749 (2023), correctly concluded that "[t]he district court properly dismissed Morejon's claims for prospective relief for a lack of standing . . . [where] Morejon was removed from EAA's member list and all deductions from his wages ceased before he filed his complaint." Pet.App. 20a. The Ninth Circuit further held that allegations of past injury alone did not confer standing and the threat of future unauthorized deductions was "highly speculative" and insufficient to establish standing. *Id.*

As to Bourque, the Ninth Circuit followed U.S. Supreme Court precedent, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000), and held that the district court properly dismissed Bourque's claim for prospective relief as moot. Pet.App. 20a. As the Ninth Circuit acknowledged, EAA refunded the money at issue and corrected the list sent to the City. *Id.* "When a defendant voluntarily ceases allegedly unlawful conduct, that defendant 'bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Friends of the Earth*, 528 U.S. at 190.) The Ninth Circuit concluded that the defendants (i.e., Respondents) "have carried their burden and the deductions are unlikely ever to resume." Pet.App. 20a.

REASONS FOR DENYING CERTIORARI

I. THE FACTS OF THIS CASE DO NOT PRESENT THE ISSUES RAISED BY THE PETITION FOR WRIT OF CERTIORARI

A. The Ninth Circuit Properly Affirmed the District Court's Dismissal for Lack of Subject Matter Jurisdiction

As set forth in detail above, the alleged conduct in this case is not the same as the conduct in *Janus* as Petitioners claim. Instead, this case is a straightforward and routine legal analysis of a court's subject matter jurisdiction over an action where one Petitioner lacks standing and the other's claim is moot.

1. Morejon's claims for prospective relief were correctly dismissed for lack of standing.

The United States Constitution limits the court's jurisdiction to live cases and controversies. *U.S. Constit. Art. III, § 2; Murphy v. Hunt*, 455 U.S. 478, 481 (1982) *GTE Cal., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994). A "case or controversy" exists only if a plaintiff has standing to bring the claim. *Nelson v. NASA*, 530 F.3d 865, 873 (9th Cir. 2008), *rev'd on other grounds*, 113 S.Ct. 746 (2011). To survive a motion to dismiss brought under Rule 12(b)(1), a plaintiff must "clearly allege facts demonstrating each element" required to establish she has standing." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (citations omitted). "A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and

direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). When a plaintiff's standing is grounded entirely on the perceived threat of a repeated injury, a plaintiff must show "a sufficient likelihood that [s]he will again be wronged in a similar way." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018).

Pursuant to this Court's guidance on standing and its own precedent in *Wright*, the Ninth Circuit affirmed the district court's ruling of no standing for Morejon. In *Wright*, the plaintiff, a retired employee, sought prospective relief claiming a fear that if she returned to work, her union, SEIU would again forge her signature on a union membership agreement and take future unauthorized dues. 48 F.4th at 1119. In rejecting this argument, the court in *Wright* held that the plaintiff's allegations of past injury alone were insufficient to establish standing and "the threat of future authorized dues deductions from her wages is entirely 'imaginary'." *Id*. at 1121.

Likewise, in the instant case, EAA established that Morejon had been removed from the union member list before the Complaint was even filed, leading the Court to correctly find that "there is no plausible suggestion that Morejon would be subject to unlawful wage deductions in the future." *Id*. Moreover, the Court further held that any suggestion EAA would engage in unconstitutional conduct by violating Janus is "imaginary." *See Wright*, 48 F.4th at 1118 ("Wright cannot rely 'on mere conjecture' about Defendants' possible actions; she must present 'concrete evidence to substantiate [her] fears.'"). Accordingly, Morejon's claims for prospective relief were properly dismissed for lack of standing.

2. Bourque's claims for prospective relief were correctly dismissed for mootness.

Bourque conceded in district court that her claim for prospective relief was moot; however, she argued that the voluntary cessation exception to mootness applied because the court has "no assurance the conduct will not be repeated." Pet.App. 56a.

The voluntary cessation exception to mootness applies to prevent a party from evading judicial review by temporarily altering questionable behavior. *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1. (2001). The party asserting mootness must show that "the challenged behavior cannot reasonably be expected to recur." *Already, LLC. Nike, Inc.*, 568 U.S. 85, 96 (2013).

The Ninth Circuit relied on this Court's holding in *Friends of the Earth, Inc.* and held that Bourque could not carry her "formidable burden" of showing that the behavior is reasonably expected to recur when EAA has refunded the money and corrected the union member list. 528 U.S. at 190; Pet.App. 20a. Therefore, Bourque's claims for prospective relief were properly dismissed for mootness.

3. The dismissal of this case on jurisdictional and mootness grounds makes this a poor vehicle for consideration of the questions presented in the Petition.

This matter would be a poor vehicle for addressing the First Amendment arguments raised in the Petition because the courts below did not reach the merits of those

claims. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not first view."). And, to the extent that Petitioners sought *any* relief from the City in the lower courts, they have now failed to raise the claims in their Petition to this Court.

B. The Ninth Circuit Properly Affirmed Dismissal Due to the Petitioners' Inability to State a Section 1983 Claim

The Ninth Circuit correctly decided that the City could not be held liable because it had no choice but to deduct union dues in reliance on EAA's information based on California state law. "Plaintiffs also cannot point to any deliberate choice the municipalities made, as the municipalities had to comply with California State law requiring them to deduct dues in reliance on the union's representations," Pet.App. 23a-24a. citing *Connick v. Thompson*, 563 U.S. 51, 60 (2011) and related authorities; *see also* California Government Code Section 1157.12 (requiring such reliance and indemnifying public employers "for any claims made by the employee for deductions made in reliance on [the union's] information." Pet.App. 77a.)

Under California state law, the City's role in the processing of union dues is merely ministerial. The City's only conduct here was to rely on EAA's membership list submitted to it and deduct dues in accordance with state law. Where, as here, a municipality exercises no discretion and merely complies with a mandatory state law, there can be no violation caused by such act of the municipality. *See Monell*, 436 U.S. at 694; *Penbaur v. Cincinnati*, 475

U.S. at 479; *Ochoa v. Pub. Consulting Grp., Inc.* 48 F.4th 1102, 1110 (9th Cir. 2022), *cert denied*, 143 S. Ct. 783 (2023).

II. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR DECISIONS OF OTHER CIRCUITS REGARDING SUBJECT MATTER JURISDICTION

Petitioners claim that the Ninth Circuit's holding in the instant case conflicts with legal precedent in this Court and the Third Circuit. This contention lacks merit. There is no conflict in interpretation about the well-established law regarding subject matter jurisdiction relating to standing and mootness.

As an overall matter, there is no conflict with *Janus* and, as set forth above, this was a clerical error and not fair share fee arrangements embodied in MOUs or routine deductions of non-union members' wages for collective bargaining activities.

Nor is there a conflict with the Third Circuit case in *Lutter v. JNESO*. The *Lutter* plaintiff received a refund check for monies taken in error and "did not cash or deposit that check," 86 F.4th at 119, resulting in a live case or controversy that the Third Circuit "remanded for resolution of Lutter's claims for damages (and potentially attorney's fees and costs) against JNESO." *Id*. at 135.

The cases listed in footnote 3 of the Petition are all trial level decisions on the merits and raise no novel issues of law. *Klee v. International Union of Operating Engineers, Local 501, et al.*, CV-22-00148 (C.D. Cal. August 14, 2023) involved the continuing deduction of dues from plaintiff's

wages following his repeated efforts to cancel his union membership. In *Chandavong v. Fresno Deputy Sheriff's Ass'n*, 599 F. Supp. 3d 1017 (E.D. Cal. 2022), the union and the County were continuing their practice of collecting vacation hours from all County bargaining unit employees, including non-union employees, to give to the union's president for use in conducting union-related business, while in *Bright v. Leslie*, CV 23-00320 (D. Or. March 14, 2023), the Department of Administrative Services and the state of Oregon refused to discontinue nonconsensual dues deductions from the plaintiff's paycheck. Each of these cases were decided on the facts presented under established legal principles and are simply inapplicable to the facts present here (where there was an individual clerical error that has been fully corrected and paid back with interest).

Finally, the seven cases that Petitioners contend raise similar issues of post-*Janus* abuses are matters that counsel for the Petitioners have filed throughout federal courts in the Ninth Circuit. *See* Pet. 8, 17, 18. These cases have routinely been dismissed for lack of subject matter jurisdiction and no state action under 42 U.S.C. § 1983. In fact, this Court has already denied *certiorari* in three (3) of these cases thus far: *Laird v. United Teachers Los Angeles, et. al*, No. 23-1111 (S. Ct.); *Deering v. Int'l Brotherhood of Electrical Workers, Local 18, et al*. No. 23-1215 (S.Ct.); and *Kant v. Serv. Employees Int'l Union, Local 721, et al*. (No. 23-113 (S.Ct.) *See* Pet. 17, 18.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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