No. 20-1603

IN THE

Supreme Court of the United States

SUSAN BENNETT,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS AFSCME COUNCIL 31, AFSCME LOCAL 672, AND MOLINE-COAL VALLEY SCHOOL DISTRICT NO. 40

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QUESTION PRESENTED

Whether a public employee who voluntarily joined a union, signed a written agreement to pay membership dues through payroll deduction for a one-year period, and received membership rights and benefits in return, suffered a violation of her First Amendment rights when her employer made the deductions that she affirmatively and unambiguously had authorized.

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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 Petitioner's failure to present any other reason why this question is worthy of this Court's review, the petition should be denied.

STATEMENT

A. Background

1. Respondent AFSCME Council 31 ("the Union") is the democratically chosen representative of a bargaining unit of custodial and maintenance employees of Respondent Board of Education of Moline-Coal Valley School District No. 40 ("School District"). D. Ct. ECF No. 26 ("Stipulated Record")

¶¶ 2, 8. Shortly after Petitioner Susan Bennett became an employee of the School District in August 2009, she chose to join the Union by signing a voluntary union membership agreement and dues-deduction authorization. *Id.* ¶¶ 1, 10. She subsequently signed a second membership agreement on August 21, 2017, in which she "affirm[ed] [her] membership in AFSCME Council 31" and "[r]ecognized that [her] authorization of dues deductions, and the continuation of such authorization from one year to the next, is voluntary and not a condition of [her] employment." *Id.* ¶ 13. She also agreed that her dues-deduction authorization for an amount "equal to dues"

> shall be irrevocable for a period of one year from the date of authorization and shall automatically renew from year to year unless I revoke this authorization by sending written notice by the United States Postal Service to my Employer and to the Union postmarked not more than 25 days and not less than 10 days before the expiration of the yearly period described above, or as otherwise provided by law.

Id.

Thus, under the membership agreement—which was voluntary by its terms—Petitioner committed to have an amount equal to union dues deducted from her paychecks and remitted to the Union until August 21 of each year; on that date, the authorization automatically would renew for the following year unless it had been revoked. *Id.* ¶ 24.

The provision in Petitioner's membership agreement stating that dues deductions would be irrevocable for a one-year period 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 helps the Union budget and make advance financial commitments, such as renting offices, hiring staff, and entering into contracts with other vendors. Stipulated Record ¶ 40. In exchange for her agreement to become a union member and pay dues for an annual period, Petitioner received rights and benefits available only to members, including the right to vote on whether to ratify proposed collective bargaining agreements between the Union and the School District. *Id.* ¶¶ 41, 42, 43. She in fact exercised that voting right as recently as August 2018. *Id.* ¶ 42.

2. Before June 27, 2018, Illinois 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. *Id.* ¶ 19; 115 ILCS 5/11 (2018); *Abood v. Detroit Bd. of Educ.*, 431 U.S.

[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 Dep't Op. on Checkoff, 22 L.R.R.M. (BNA) 46, 46–47 (1948).

209 (1977). When Petitioner became a union member, the collective bargaining agreement between the School District and the Union provided for the collection of agency fees from nonmembers. Stipulated Record ¶¶ 19, 27.

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. The School District and the Union immediately complied with *Janus* by ceasing collection of agency fees, and the current collective bargaining agreement contains no agency-fee requirement. Stipulated Record ¶ 28.

3. In November 2018, Petitioner informed the School District that she intended to resign her union membership and asked the School District not to honor any prior dues-deduction authorization she had signed. *Id.* ¶ 30. The Union learned of Petitioner's communication and informed her that it would consider her a nonmember as soon as it received written notice that she wanted to resign but, regardless of whether she chose to resign from the Union, she had agreed to have an amount equal to union dues deducted from her paychecks until August 21, 2019. *Id.* ¶ 33. Petitioner subsequently resigned her union membership, and she revoked her dues-deduction authorization during the window period set forth in her membership agreement. *Id.* ¶¶ 34, 36.

The School District thus stopped deducting union dues from Petitioner's wages as of August 2019. *Id.* ¶ 39.

B. Proceedings below

Petitioner filed suit under 42 U.S.C. § 1983, contending that the union dues that she paid pursuant to her membership agreement—both before and after this Court's *Janus* decision—were deducted from her paycheck in violation of the First Amendment and must be paid back by the Union. Pet. App. 7. The district court granted summary judgment to the Union and the School District. Pet. App. 26–27 & 27 n.3.[2] Observing that "courts faced with similar challenges post-*Janus*" had all rejected them, Pet. App. 35, the district court agreed that the *Janus* decision "does not invalidate [Petitioner's] agreement." Pet. App. 39.

The Seventh Circuit affirmed. *See* Pet. App. 1–22 (Flaum, J., joined by Sykes, C.J. and Rovner, J.). The court explained that Petitioner's claim for a refund of the dues she paid pursuant to the clear terms of her membership agreement failed because "the First Amendment . . . does not, without more, render unenforceable any 'legal obligations' or 'restrictions that . . . are self-imposed' through a contract." Pet. App. 12 (quoting *Cohen*, 501 U.S. at 671). The court added that it is "generally accepted" that, once a contract is executed, a subsequent change in the law

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[2] The district court also granted summary judgment to the Union on Petitioner's separate claim that the system of exclusive union representation under Illinois state law is unconstitutional. Pet. App. 7. The court of appeals affirmed that decision, and Petitioner has not asked for this Court to review that issue. Petition at 7 n.2.

does not affect the enforceability of the agreement. *Id.* (citing 11 Williston on Contracts § 30:23 (4th ed. 2020)).

The Seventh Circuit went on to agree with the Ninth Circuit in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), and the Third Circuit in *Fischer v. Governor of New Jersey*, 842 F. App'x 741 (3d. Cir. 2021), *petition for cert. filed*, No. 20-1751 (U.S. June 11, 2021), that this Court's decision in *Janus* did not effectively invalidate the dues-deduction authorization in Petitioner's membership agreement. Pet. App. 13. After observing that "*Janus* said nothing about union members who, like Bennett, freely chose to join a union and voluntarily authorized the deduction of union dues," Pet. App. 13, the court held that "Bennett does not fall within the sweep of *Janus's* waiver requirement." Pet. App. 16.

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 Seventh 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.

Petitioner provides no good reason for this Court to review the decision below. She concedes that there is no circuit split. To the contrary, three other courts of appeals 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 Seventh Circuit below, every court to address a claim like Petitioner's has recognized that *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), did not invalidate voluntary dues authorization agreements by employees like Petitioner 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, this case is not a proper vehicle to determine the viability of Section 1983 dues-deduction claims predicated on facts quite different from those here, such as where an employee alleges that a union forged her signature on a membership agreement. Here, Petitioner has acknowledged that she chose to join the Union and chose to sign the membership agreement, which clearly set forth Petitioner's obligation to pay union dues subject to an annual revocation period.

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 Petitioner's arguments.

As Petitioner acknowledges, there have been "dozens of cases filed by government employees who joined the union prior to the *Janus* decision" who have contended that it violated the First Amendment for the dues-deduction provisions of their membership agreements to be enforced. Petition at 10. In each of these cases, the court has held that the deduction of union dues did not violate the public employee's First Amendment rights, when, as here, the employee had 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 four different courts of appeals, all of which have issued opinions joining 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 945. *See also* Pet. App. 13 ("*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."); *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); *Fischer*, 842 F. App'x at 753 & n.18 (3d Cir. 2021) ("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."), *petition for cert. filed*, No. 20-1751 (U.S. June 11, 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*, 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 question presented here, this Court should not grant certiorari.

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

Notwithstanding that the lower courts have uniformly rejected the arguments that Petitioner has pressed in this case, Petitioner asks this Court to grant her Petition because, she asserts, "the lower courts have failed to implement this Court's holding

in *Janus*." Petition at 8. Even taken at face value, this would not be sufficient to grant certiorari, as "the misapplication of a properly stated rule of law" generally does not warrant this Court's review. *See* Court Rule 10. In all events, there is no conflict between the Seventh 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. Petitioner is a public employee who voluntarily became a union member, expressly and affirmatively agreed to pay membership dues, and received membership rights and benefits in return. Petitioner did not experience any violation of her First Amendment rights when her employer made the dues deductions she 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.

Petitioner erroneously contends that *Janus* imposed a new, multi-factor "waiver" analysis whenever a public employee elects to join a union and pay membership dues. Petition at 9–12. As the lower courts uniformly have recognized, *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 Janus*, 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)).

Petitioner's 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 the 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. Petitioner has never disputed that she entered into an agreement enforceable under generally applicable principles of Illinois contract law, by which she 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 the newspaper's First Amendment rights in *Cohen*, the enforcement of Petitioner's contractual agreement to pay union dues did not violate her First Amendment rights either. Private parties often enter into contracts that restrict their constitutional rights—such as arbitration agreements and nondisclosure agreements—and the government routinely honors those commitments.

The passage from *Janus* on which Petitioner relies 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 in-

> cludes 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). Petitioner contends that, despite this Court's express references to an "agency fee" and "nonmembers," this paragraph

of *Janus* "was explicitly referring to a situation different from that of Janus and other agency-fee payers." Petition at 13. In other words, as Petitioner would have it, this Court concluded its *Janus* opinion—which held that *nonmembers* like Mr. Janus cannot be required 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* agreements can be enforced.

Contrary to Petitioner's argument, this Court did not conclude *Janus* by addressing a situation entirely different from the one before it. Rather, the passage on which Petitioner relies expressly pertains to individuals who did not consent to join a union (like Mr. Janus) and expressly *distinguishes* those who did consent (like Petitioner). 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).[3]

[3] Like *Knox*, the three 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

As the lower courts unanimously have recognized, *Janus* did not constrain voluntary dues payments but "made clear that a union may collect dues when an 'employee affirmatively consents to pay.'" Pet. App. 15 (quoting *Janus*, 138 S. Ct. at 2486). Here, Petitioner chose to join the Union by signing a membership and dues authorization agreement. In that agreement, Petitioner "clearly and affirmatively consent[ed]," *Janus*, 138 S. Ct. at 2486, to pay annual union dues by payroll deduction.

Petitioner also contends that the dues-deduction provisions in her membership agreement were invalidated because this Court's later decision in *Janus* changed the consequences of a public employee's decision not to join a union. Petition at 15–16. 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 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

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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); *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)).

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. 12 ("a subsequent change in the law cannot retrospectively alter the parties' agreement") (citation omitted); *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 Petitioner to escape her prior contractual agreement to pay union dues.

III. There is no other justification for this Court's intervention.

In light of the fact that all of the lower courts—including the Seventh Circuit below—have held that it does not violate the First Amendment for dues to be deducted from an employee's paychecks pursuant to the clear terms of a membership agreement that she signed, Petitioner spends much of her Petition focusing on circumstances that are not presented by this case. Petition at 16–22. For example, she discusses a case pending in a district court where the plaintiff allegedly was under a misimpression that she was required to join a union, asserting that the plaintiff in that case "may not have a constitutional claim" as a result of the Seventh Circuit's decision below. Petition at 17. She also references other cases where plaintiffs have alleged that a union forged their signature on a membership agreement. Petition at 20–21.

It is unlikely that there is an actionable federal constitutional claim against a union for conduct such as this, but that is for reasons separate and independent from any issue addressed by the decision below. Under this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940 (1982), a private party does not act under color of state law—as is required to be held liable for a constitutional violation under Section 1983—when it takes an action that is "unlawful under state law." To the extent that a union makes a misrepresentation to a public employee about whether union membership is mandatory, the union likely has violated state labor laws that protect the right to refrain from joining a labor union. *See, e.g.*, 115 ILCS 5/3(a). And forgery is also unlawful under state law; indeed, in Illinois, it is a felony offense. *See* 720 ILCS 5/17-3.

Here, by contrast, Petitioner has acknowledged that she understood the terms of the membership agreement and that she chose to sign it. Her argument is only that the agreement cannot be enforced because she signed it before this Court invalidated agency-fee requirements for nonmembers in *Janus*. Petition at 15. This case is thus not a proper vehicle for this Court to consider whether there may be a federal constitutional remedy for forgery or other allegedly wrongful conduct by a labor union.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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