No. _____

IN THE

Supreme Court of the United States

BRETT HENDRICKSON,

PETITIONER,

V.

AFSCME COUNCIL 18;

MICHELLE LUJAN GRISHAM,
IN HER OFFICIAL CAPACITY AS
GOVERNOR OF NEW MEXICO; AND

HECTOR BALDERAS,
IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF NEW MEXICO,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a union can trap a public worker into paying dues without the "affirmative consent" required by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).
2) Whether a union can moot a claim that it has violated *Janus*' affirmative consent requirements simply by establishing opt-out windows too short to reach appellate review.

PARTIES TO THE PROCEEDING

Petitioner Brett Hendrickson is a natural person and citizen of the State of New Mexico.

Respondent Michelle Lujan Grisham is a natural person and the Governor of New Mexico. Respondent Hector Balderas is a natural person and the Attorney General of New Mexico.

Respondent AFSCME Council 18 is a labor union representing public employees in the State of New Mexico.

RULE 29.6 STATEMENT

As Petitioner is a natural person, no corporate disclosure is required under Rule 29.6.

STATEMENT OF RELATED CASES

The proceedings in other courts that are directly related to this case are:

- *Hendrickson v AFSCME Council 18,* No. 20-2018, United States Court of Appeals for the Tenth Circuit. Judgement entered March 26, 2021.
- *Hendrickson v AFSCME Council 18,* No. 18-CV-1119-RB-LF, United States District Court for the District of New Mexico. Judgement entered January 22, 2020.

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INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that unions cannot collect money from government workers' paychecks without their affirmative consent. Petitioner Brett Hendrickson ("Hendrickson") notified his employer, the State of New Mexico, that it did not have his consent to deduct union dues from his paycheck. For months afterward, the State of New Mexico and the American Federation of State County and Municipal Employees, Council 18 ("AFSCME" or "the Union") worked jointly to continue to deduct union dues from Hendrickson without his consent, limiting the exercise of his First Amendment rights to an arbitrary annual window of the Union's choosing.

The Tenth Circuit, in direct conflict with the Ninth Circuit, ruled that because Hendrickson's withdrawal window occurred during the pendency of this litigation, his claim was now moot. It further ruled that Hendrickson had no right to a return of the dues taken by the Union, despite the fact that he had never provided AFSCME the affirmative consent to dues deductions that *Janus* requires. The Tenth Circuit ruled that the Union agreement Hendrickson signed was sufficient to waive his rights under *Janus*, even though that agreement included no such waiver.

Government employees like Hendrickson have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so. *Janus*, 138 S. Ct. at 2486. This Court in *Janus* required such affirmative consent to be "freely given" through a "waiver" of First Amendment rights that must be shown by "clear and compelling" evidence. *Id.*

This Court also requires that a "waiver" of a constitutional right must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). When he signed a union membership agreement prior to the *Janus* decision, Hendrickson could not have knowingly waived a right that this Court had not yet recognized. In August 2018, Hendrickson explicitly told his employer that it did not have his affirmative consent to withhold union dues. Trapping Hendrickson in the union until an annual escape period and continuing to deduct union dues violated Hendrickson's rights to Free Speech and Freedom of Association under *Janus*.

New Mexico refused to stop deducting union dues from his paycheck, and the Union still has not returned the money it took. Hendrickson's claim for prospective relief is not moot because he has a live damages claim and therefore a right to receive a declaration that the statute was unconstitutional as applied to him. And because the constitutional violation at issue in this case is a two-week escape window that occurs every year, the Tenth Circuit ruling that the occurrence of the window moots the case would allow the Union and the state to constantly evade review of their unconstitutional actions.

This Court should grant the petition to resolve the dispute among the Circuits as to whether unions can avoid *Janus* claims by setting annual windows that are too short to allow appellate review, and to answer the important question as to whether *Janus* means what it said: that unions cannot fund their political speech by taking money from non-consenting employees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), and reproduced at App. 1.

The opinion of the United States District Court for the District of New Mexico is reported at *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014 (D.N.M. 2020), and reproduced at App. 43.

JURISDICTION

The Tenth Circuit issued its decision and judgment on March 26, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

Section 1983, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

> party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Brett Hendrickson has served as an employee of the New Mexico Human Services Department, a public employer, since 2001. App. 46. He is represented in that employment by AFSCME, the union certified as the exclusive representative of his bargaining unit, pursuant to N.M. Stat. Ann. § 10-7E-15(A). *Id*. Prior to June 2018, that employment was subject to a binary choice: employees who were members of Hendrickson's bargaining union were required to either 1) join AFSCME as union members or 2) pay an agency fee (sometimes called a "fair share" fee) to the union in lieu of membership. App. 47.

Hendrickson relied on this false choice, by which he would have had to pay the union either way, and he became a member of the union, signing membership agreements in 2004, 2007, and 2017. App. 4. The 2017 agreement relevant to this Petition stated that "this authorization shall be revocable only during the first two weeks of every December, or such other time as provided in the applicable collective-bargaining agreement." App. 5. Therefore, unless Hendrickson sent a written notice during an arbitrary two-week period set

by the union, his employer would not honor any request to withdraw his authorization of membership dues. *Id.*

On June 27, 2018, this Court issued its decision in *Janus,* holding that the binary choice to which Hendrickson had been subjected was unconstitutional. *See* 138 S. Ct. at 2486. No longer faced with the unconstitutional choice between union dues and agency fees, Hendrickson notified his employer on August 9, 2018, that he wished to withdraw his membership authorization and end the dues deduction. App. 5. But his attempt to assert his First Amendment right was denied. App. 6.

Therefore, Hendrickson filed this case in the District Court on November 30, 2019. *Id.* His First Amended Complaint named AFSCME, as well as New Mexico Governor Michelle Lujan Grisham ("Lujan Grisham"), in her official capacity as the public official ultimately responsible for the policies and practices of the New Mexico Human Services Department and State Personnel Office, and New Mexico Attorney General Hector Balderas ("Balderas"), in his official capacity as the public official responsible for enforcement of the challenged New Mexico statutes. The First Amended Complaint included two counts: Count I challenged the refusal to allow Hendrickson to withdraw from the union and the deduction of dues from his paycheck without his affirmative consent. Count II challenged the Union's status as exclusive representative for bargaining purposes.[1]

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[1] The courts below also dismissed Count II. App. 38, 78. Hendrickson has chosen not to appeal that ruling to this Court, and instead urges the Court to grant the petition for certiorari in *Jade Thompson v. Marietta Education Ass'n*, No. 20-1019.

After the filing of this suit, the Union informed Hendrickson that it would process his resignation and stop taking further dues from him after the second pay period in December 2018. App. 50. Hendrickson's employer initially refused to honor the request because Hendrickson had not met the strict requirements imposed by his union agreement and the collective bargaining agreement. *Id.* Eventually, dues deduction ceased in January 2019, and the dues taken from Hendrickson in December and January were refunded. *Id.* Hendrickson has received no refund of any dues taken prior to December 2018. App. 7.

On May 31, 2019, Hendrickson and AFSCME filed cross motions for summary judgment in the district court. App. 44. On January 22, 2020, the District Court issued its Opinion and accompanying Final Order, denying Hendrickson's motion, and granting the motions of the Union and the Governor and Attorney General. App. 43.

Hendrickson timely appealed to the Tenth Circuit. On March 26, 2021, The Tenth Circuit ruled that, despite Hendrickson's outstanding claim for damages, his claims regarding the Union's window policy were mooted by the Union's decision to release him from membership. App. 13. It also ruled that he was not entitled to a return of his dues because the union agreement he signed was sufficient to waive his First Amendment rights under *Janus*. App. 14.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition to resolve a split between the Tenth and Ninth Circuits and address key legal questions as to the application of *Janus* to numerous cases pending in courts around the county.

This Court's "decision in Janus v. American Federation of State, County, and Municipal Employees, Council 31 was a gamechanger in the world of unions and public employment." *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020). It has, unsurprisingly, led to a significant amount of litigation around the nation, in more or less every state and circuit where agency fees had been previously allowed. As of this filing, one other petition is already pending with this Court from the addressing the same kinds of questions, and in which the Ninth Circuit came to a different result as to one of Petitioner's Questions Presented. *See Belgau v. Inslee*, No. 20-1120. Petitioner is also aware of a third petition involving the similar claims set to be filed the same day as his own. *See Bennett v. AFSCME Council 31*, No. _____ (USCA-7 No. 20-1621). And these petitions are simply the first of many cases that will reach this Court if the questions at bar remain unresolved. In the Ninth Circuit alone, Petitioner is aware of 17 cases, other than *Belgau*, that raise the same or

similar issues.[2] Around the country, the story is much the same.[3]

And the decisions in question have not been uniform. As explained below, the Tenth Circuit's decision on mootness in Petitioner's case is in direct conflict with the ruling of the Ninth Circuit in *Belgau*. While the Tenth Circuit believes that unions may moot claims that they have violated *Janus* rights simply by voluntary cessation or running out the clock, the Ninth Circuit recognized that these sorts of claims are pre-

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[2] *See Few v. United Teachers of Los Angeles,* No. 20-55338*; O'Callaghan v. Teamster Local 2010,* No. 19-56271*; Grossman v. HGEA*, No.20-15356; *Wolf v. University Professional and Technical Employees,* No. 20-17333; *McCollum v. NEA-Alaska*, No. 19-35299; *Hough v. SEIU Local 521,* No. 19-15792*; Babb v. California Teachers Ass'n,* No. 19-55692; *Wilford v. NEA, AFT, and CTA, CFT, et al.,* No. 19-55712*; Smith v. Superior Court, County of Contra Costa,* No. 19-16381*; Martin v. California Teachers Association,* No. 19-55761*; Imhoff v. California Teachers Association,* No. 19-55868*; Cooley v. California Statewide Law Enforcement Ass'n,* No. 19-16498*; Allen v. Santa Clara County Correctional,* No. 19-17217; *Hamidi v. SEIU,* No. 19-17442*; Anderson v. SEIU Local 503,* No. 19-35871*; Cook v. Brown,* No. 19-35191; *Carey v. Inslee*, No. 19-35290.

[3] *See, e.g., Pellegrino v. New York State United Teachers*, No. 18CV3439NGGRML, 2020 WL 2079386 (E.D.N.Y. Apr. 30, 2020); *Adams v. Teamsters Union Local 429*, No. 1:19-CV-336, 2020 WL 1558210 (M.D. Pa. Mar. 31, 2020); *Lutter v. JNESO et al*, No. 1:19-cv-13478 (D. N.J. 2020); *Zeigler v. AFSCME Council 13, et al.*, No. 2:20-cv-00996 (W.D. Pa); *Baro v. AFT*, No. 1:20-cv02126 (N.D. Ill.); *Mandel v. SEIU Local 73*, No. 1:18-cv-08385 (N.D. Ill.); *Nance v. SEIU*, No. 1:20-cv-03004 (N.D. Ill. 2020); *Troesch v. CTU*, No. 1:20-cv-02682 (N.D. Ill.); *Hoekman v. Ed. Minn*., No. 18-cv-1686 (D. Minn.); *Prokes v. AFSCME 5*, No. 0:18-cv-2384 (D. Minn).

cisely the sort for which the exceptions to mootness apply. *Belgau*, 975 F.3d at 949-50. This Court should grant the petition to resolve this conflict.

And despite this Court's teaching, the courts below have almost universally been hostile to the rights recognized in *Janus*. As exemplified by this case, and the other pending petitions, this Court's intervention is necessary to clarify that it meant what it said in *Janus*: that unions may not take money from employees without their affirmative consent.

II. *Janus* requires clear and convincing evidence of a voluntary, knowing, and intelligent waiver to prove affirmative consent.

This Court in *Janus* explained that payments to a union could be deducted from a non-member's wages only if that employee "affirmatively consents" to pay:

> 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. 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. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted).

Certain standards must be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185-86 (1972). Finally, this Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

In Hendrickson's case, he could not have waived his First Amendment right to not join or pay a union when he signed the union agreement at issue. First, neither the Union nor his employer informed him of his right not to pay a union because, at the time he signed his union membership application, this Court had not yet issued its decision in *Janus*. Second, neither the Union nor his employer inform him of his right not to pay a union because such a right was prohibited by the collective bargaining agreement in place at the time. Therefore, Hendrickson had no choice but to pay the Union and did not, and could not have voluntarily, knowingly, or intelligently waived his First Amendment right.

Because a court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.,* 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. In addition, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional

rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

The union application Hendrickson signed did not provide a clear and compelling waiver of his First Amendment right not to join or pay a union because it did not expressly state that he had a constitutional right not to pay a union and because it did not expressly state that he was waiving that right.

Nor can the Union rely on the extant case law at the time Hendrickson signed his union authorization. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), this Court explained that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

By this rule, the Union's liability for dues paid by Hendrickson extends backward before *Janus*, limited only, if at all, by a possible statute of limitations defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th

Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

Under *Harper* and these precedents, the Union has no basis to hold Hendrickson to his union authorization or to keep the monies it seized from his wages before this put an end to this unconstitutional practice. Hendrickson is entitled to a refund of these dues.

After the decision in *Janus*, the Union maintained that Hendrickson could only end his dues deduction during an arbitrary window of the Union's choice, despite Hendrickson's repeated requests to stop the dues deduction from his paycheck. The union dues authorization applications signed by Hendrickson before *Janus* cannot meet the standards set forth for waiving a constitutional right, as required in *Janus*. 138 S. Ct. at 2484. Therefore, the Union cannot hold employees like Hendrickson to a time window to withdraw their union membership based on these invalid authorizations.

Since being informed of his constitutional rights by the *Janus* decision, Hendrickson did not sign any additional union authorization application. Therefore, he has never knowingly waived his constitutional right to pay nothing to the union, and has never given the union the "affirmative consent" required by the *Janus* decision.

III. This Court should resolve the split between the Tenth and Ninth Circuits and hold that Hendrickson's claims are not moot.

The Court below held that Hendrickson was not entitled to a ruling on his claim regarding the escape window because, once he was allowed to stop paying dues, his prospective claims for relief were moot. This ruling is in direct conflict with the Ninth Circuit, which has ruled twice that these sorts of windows claims are not mooted by the window expiring, or the union voluntarily ceasing its conduct as to the Plaintiff. *See Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020); *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019). Moreover, it was wrong as to Hendrickson, since his damages claim means there remains a live controversy over the window period.

In the first instance, the Tenth Circuit's opinion was wrong in that Hendrickson had a live claim for damages—the dues collected from him that have never been returned—and therefore his claim cannot be moot. Hendrickson's requested declaratory relief is simply a predicate of the damages claim: in order to determine whether Hendrickson is entitled to damages, a court necessarily must determine whether the Union's policy violates *Janus*.

Moreover, even the partial return of some or all of the relevant dues, and the expiration or the release of the window requirement should not moot the case. Unions across the country have attempted to avoid judicial review of their unconstitutional policies by dodging lawsuits from employees that challenge their practices. For those like Petitioner who do sue, unions consistently mail theem checks in an attempt to avoid constitutional scrutiny. In a pending case in the Ninth

Circuit, the Teamsters signed an employee up for a *four year* window, and then only relented and let her stop paying dues, sending her a refund check, months after the case was fully briefed and pending in the Court of Appeals. *See O'Callaghan v. Teamsters*, Ninth Circuit Case No. 19-56271. These instances of gamesmanship are not isolated. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their membership without requiring employees to send the notice their policy required). This Court should not allow the Union to avoid judicial review by picking off employees one by one. A "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)). Yet that is precisely what the Tenth Circuit allowed below.

By contrast, in *Belgau* the Ninth Circuit held that "[b]ecause Washington continued to deduct union dues until the one-year terms expired, other persons similarly situated could be subjected to the same conduct. For these reasons, we exercise jurisdiction over Employees' claim against Washington." 975 F.3d at 949-50. This is precisely the scenario faced by workers around the country.

The Ninth Circuit's opinion in *Belgau* followed its earlier unpublished opinion to the same effect in *Fisk*:

> Although no class has been certified and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are

> the sort of inherently transitory claims for which continued litigation is permissible. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three years is "too short to allow for full judicial review." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

Fisk, 759 F. App'x at 633. The Ninth Circuit recognized that claims like Petitioner's would never be addressed by the Court if the Union were allowed to moot them in this way. The unions are doing everything in their power to prevent this Court from ruling on the simple question presented as the first issue in this Petition: Can a union trap government workers into paying dues if they never provided the consent required by *Janus*?

Such avoidance tactics are not new; they are a typical and longstanding strategy by unions to avoid judicial scrutiny. In *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), this Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted dues to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After

> certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Knox, 567 U.S. at 307. In *Knox*, the Court ruled on the merits of the issue because defendants "continue[] to defend the legality" of their practice. *Knox*, 567 U.S. at 307. All the defendants in this case also continue to defend the legality of trapping government workers into paying dues without consent. Both the government defendants and the Union "continue[] to defend the legality" of their practice, and the Union's claim for mootness should be denied. *Knox*, 567 U.S. at 307.

A recent case out of New Jersey rejected this same mootness strategy. Again, the union in that case attempted to moot claims about their window policies by ending deductions—and sending a check (something that was never even done for Hendrickson). The district court explained:

> In short, Defendants' argument is seemingly that unions can: compel membership for up-to 11 months and 20 days from those wishing to resign, collect fees that it may not be entitled to, and avoid court intervention by paying off only those who file lawsuits. But the Third Circuit warned against nearly this exact scenario in [*Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020)]. As noted above, this Court must be "skeptical of a claim of mootness when a defendant . . . assures [the Court] that the case is moot because the injury will not recur, yet maintains that its conduct was lawful all along." *Hartnett*, 963 F.3d at 306. Indeed, the Court must focus "on whether the defendant made that change unilaterally and so may 'return to [its] old ways' later on." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 189). And when Defendants make these mootness arguments, they bear a "heavy burden of persuading the court that there is no longer a live controversy." *Id.* at 305-06 (cleaned up).

Lutter v. JNESO, No. 19-13478 (RMB/KMW), 2020 U.S. Dist. LEXIS 223559, at *13 (D.N.J. Nov. 30, 2020). The court in *Lutter,* addressing the same basic facts, rejected the mootness argument because "[t]he WDEA's resignation restrictions are still enforced today, and Defendants seemingly maintain that the statute is constitutional." *Id.* at *15.

The *Lutter* Court went on to explain that "the WDEA's resignation window may still affect Plaintiff. If Plaintiff desires union representation in the future—or, possibly, the present—the WDEA's restrictive resignation scheme is undoubtedly a factor in

weighing the pros and cons of union membership." *Id.* The same reasoning applies here. It is possible that Petitioner could have some need arise for union membership in the future. It is also possible that the Union could use coercive or deceitful measures to lure Petitioner into membership again.

These principles of law are not novel or unique to post-*Janus* cases: it is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125 (1974), this Court recognized that "[i]t is sufficient . . . that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. Nor was Jane Roe forced to submit an affidavit of her intention to get pregnant again. The Court explained in *Super Tire* that, even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." 416 U.S. at 125. The escape windows that Petitioner was subjected to is a policy of the State of New Mexico, embodied in an agreement it negotiated with the Union and authorized by statute. This policy continues to impact present interests because Respondents continue to enforce it and assert its legality. This continuing direct effect on the behavior of public employees is grounds for declaratory relief.

While the Tenth Circuit did not rely on it, the district court below attempted to distinguish *Fisk* (*Belgau*

had not been decided yet) and other cases Petitioner cite on the basis that the cases were putative class actions. App. 53. This is not true of all the relevant cases—neither *Lutter* nor *Super Tire* mention a class, for instance. But even in those cases that were, the proposed class was not the basis for the ruling because "a class lacks independent status until certified." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165 (2016). The basis for the ruling was the inherent transience of the claim. For example, in *Roe,* this Court was not concerned with the uncertified class; instead, it focused on the length of pregnancy:

> [T]he normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.

410 U.S. at 125. A constitutional violation cannot avoid court scrutiny simply because the relevant time period will run out before the appellate process is complete.

It was precisely this concern with the transience of the claim that guided the Ninth Circuit, assessing the same sort of union opt-out claim presented here, to rule in *Fisk* that "*although no class has been certified* and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible." 759 F.App'x at 633 (emphasis added). *Belgau*, likewise, dealt with "an inherently transitory, pre-certification class-action claim" that justified an exception to usual mootness

principles." 975 F.3d at 949. In both cases, the Ninth Circuit relied on its previous decision in *Johnson v. Rancho Santiago Community College District*, which held that even a three-year duration is "too short to allow for full judicial review." 623 F.3d 1011, 1019 (9th Cir. 2010). Hendrickson's declaratory relief claim would, at most, last only one year. The theory that other putative class members saved the case from becoming moot is a misreading of the clear language of the cases.

Moreover, in *Knox*, there was a class, but that was not the basis for the Court's ruling. Indeed, the union in *Knox* had offered refunds to the *entire class*, so there were no absent class members who hadn't received the money. Instead, the Court explained that the union's refund was irrelevant because "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). This is precisely the scenario Petitioner urges this Court to avoid.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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