No. 20-1606

IN THE
Supreme Court of the United States

BRETT HENDRICKSON,
Petitioner,

v.

AFSCME COUNCIL 18, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT AFSCME COUNCIL 18

SHANE C. YOUTZ
JAMES A. MONTALBANO
STEPHEN CURTICE
YOUTZ & VALDEZ, P.C.
900 Gold Avenue S.W.
Albuquerque, NM 87102
(505) 244-1200

SCOTT A. KRONLAND
Counsel of Record
EILEEN B. GOLDSMITH
STEFANIE L. WILSON
ALTSHULER BERZON LLP
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

Counsel for Respondent AFSCME Council 18

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTIONS PRESENTED

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

2. Whether a public employee's claim for prospective relief regarding union dues deductions is moot when those deductions have ceased, there is no likelihood the deductions will resume, and no exceptions to mootness apply.

CORPORATE DISCLOSURE STATEMENT

Respondent AFSCME Council 18 has no parent corporation, and no company owns any stock in Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Background 2

B. Proceedings below 6

REASONS FOR DENYING THE PETITION 7

I. The lower courts unanimously have rejected petitioner's argument that *Janus* invalidated voluntary union membership agreements 9

II. The Tenth Circuit's opinion faithfully applies this Court's precedents 11

III. The second question presented is also not worthy of review 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 4, 5

Allen v. Ohio Civil Service Employees Association AFSCME, Local 11, 2020 WL 1322051 (S.D. Ohio Mar. 20, 2020).....10

Anderson v. SEIU Local 503,
400 F.Supp.3d 1113 (D. Or. 2019) 10

Babb v. California Teachers Association,
378 F.Supp.3d 857 (C.D. Cal. 2019).....11

Belgau v. Inslee,
975 F.3d 940 (9th Cir. 2020), *cert. denied,* 2021 WL 2519114 (U.S. June 21, 2021).....1, 9, 15

Bennett v. Council 31 of the AFSCME, AFL-CIO,
991 F.3d 724 (7th Cir. 2021) 9, 11

Brady v. United States,
397 U.S. 742 (1970) 13

Cohen v. Cowles Media Company,
501 U.S. 663 (1991) 1, 7, 11, 12

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 12

Coltec Industries, Inc. v. Hobgood, 280 F.3d 262 (3d Cir. 2002).....13

Cooley v. California Statewide Law Enforcement Association, 2019 WL 331170 (E.D. Cal. Jan. 25, 2019).....11

Creed v. Alaska State Employees Association/AFSCME Local 52, 472 F.Supp.3d 518 (D. Alaska 2020) 10

Curtis Publishing Company v. Butts, 388 U.S. 130 (1967) 13

Durst v. Oregon Education Association, 450 F.Supp.3d 1085 (D. Or. 2020) 10

Fischer v. Governor of New Jersey, 842 F. App'x 741 (3d Cir. 2021).....9

Fisk v. Inslee, 759 F. App'x 632 (9th Cir. 2019).....15

Fisk v. Inslee, 2017 WL 4619223 (W.D. Wash. Oct. 16, 2017).....4, 15

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 14

Hernandez v. AFSCME California, 424 F.Supp.3d 912 (E.D. Cal. 2019).....10

Hoekman v. Education Minnesota,
519 F.Supp.3d 497 (D. Minn. 2021) 10

Janus v. AFSCME, Council 31,
138 S.Ct. 2448 (2018) ..... *passim*

Johnson v. Zerbst,
304 U.S. 458 (1938) 12

Knox v. SEIU, Local 1000,
567 U.S. 298 (2012) 13, 16

Labarrere v. University Professional & Technical Employees, CWA 9119,
493 F.Supp.3d 964 (S.D. Cal. 2020) 10

LaSpina v. SEIU Pennsylvania State Council,
985 F.3d 278 (3d Cir. 2021) 9

Loescher v. Minnesota Teamsters Public & Law Enforcement Employees Union, Local No. 320,
441 F.Supp.3d 762 (D. Minn. 2020) 10

Lutter v. JNESO,
2021 WL 2201313 (D.N.J. June 1, 2021) 16

Lutter v. JNESO,
2020 WL 7022621 (D.N.J. Nov. 30, 2020) 16

Mendez v. California Teachers Association,
419 F.Supp.3d 1182 (N.D. Cal. 2020) 10

Molina v. Pennsylvania Social Service Union,
__ F.Supp.3d __, 2020 WL 2306650 (M.D. Pa. May 8, 2020).....10

New York Times Company v. Sullivan,
376 U.S. 254 (1964) 13

O'Callaghan v. Regents of University of California,
2019 WL 2635585 (C.D. Cal. June 10, 2019).....10, 11

Oliver v. SEIU Local 668,
830 F. App'x 76 (3d Cir. 2020) 9, 10

Polk v. Yee,
481 F.Supp.3d 1060 (E.D. Cal. 2020).....10

Puckett v. United States,
556 U.S. 129 (2009) 13

Quirarte v. United Domestic Workers AFSCME Local 3930,
438 F.Supp.3d 1108 (S.D. Cal. 2020).....10

Seager v. United Teachers Los Angeles,
2019 WL 3822001 (C.D. Cal. Aug. 14, 2019).....10

Smith v. Superior Court, County of Contra Costa,
2018 WL 6072806 (N.D. Cal. Nov. 16, 2019).....10

Troesch v. Chicago Teachers Union, Local Union No. 1, American Federation of Teachers,
__ F.Supp.3d ___, 2021 WL 736233 (N.D. Ill. Feb. 25, 2021) 10

United States v. Sanchez-Gomez,
138 S.Ct. 1532 (2018) 15

Wagner v. University of Washington,
2020 WL 5520947 (W.D. Wash. Sept. 11, 2020) 10

Woods v. Alaska State Employees Association/AFSCME Local 52, AFL-CIO,
496 F.Supp.3d 1365 (D. Alaska 2020) 10

Yates v. America Federation of Teachers, AFL-CIO,
2020 WL 6146564 (D. Or. Oct. 19, 2020) 10

Statutes

5 U.S.C. § 7115 3

29 U.S.C. § 186 ..... 3, 4

39 U.S.C. § 1205 3

42 U.S.C. § 1983 6

45 U.S.C. § 152 4

N.M. Stat. Ann. § 10-7E-9(G) 4

Other Authorities

Justice Department's Opinion on Checkoff,
22 LRRM 46–47 (1948).....4

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. The Tenth Circuit's decision below joins the unanimous consensus on this issue, which follows from 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). This Court recently denied review of a petition presenting the same question presented here about the enforceability of union membership agreements. *See Belgau v. Inslee*, No. 20-1120, 2021 WL 2519114 (U.S. June 21, 2021). In light of the unanimous consensus in the lower courts, there is no reason for this Court's intervention.

Petitioner also asks the Court to grant review to decide whether the Tenth Circuit correctly held that his claim for prospective relief is moot because he has no personal stake in obtaining prospective relief. Contrary to petitioner's contention, however, there is no circuit conflict to resolve. The allegedly conflicting decisions were putative class actions and applied a limited exception to mootness applicable only in the class action context. Petitioner did not plead his claim as a class action, so no mootness exception applied. Therefore, this question also is not worthy of the Court's review, and the petition should be denied.

STATEMENT OF THE CASE

A. Background

1. Respondent AFSCME Council 18 (the "Union") is the democratically chosen representative for a bargaining unit of New Mexico state employees. App. 46. The New Mexico Public Employee Bargaining Act "gives public employees the right to join—or not to join—a labor organization." *Id.* "New Mexico has never required membership in the Union as a condition of public employment." *Id.* at 47 (internal quotation marks omitted).

Petitioner is a state employee. He first signed an agreement to join the Union as a member and to authorize the deduction of union dues from his paycheck in 2004. App. 4. He signed another union membership and dues-deduction authorization agreement in 2007, upon his return to the bargaining unit from a brief period in a non-represented position. *Id*. Petitioner signed his third union membership and dues-deduction authorization agreement in 2017. *Id.*

Petitioner's 2017 agreement, which was substantially the same as his two prior agreements, stated, immediately above his signature:

> I accept membership in AFSCME Council 18. I request and authorize the State of New Mexico to deduct union dues from my pay and transmit them to AFSCME Council 18. The amount of dues deduction shall be the amount approved by AFSCME's membership as set forth in the AFSCME constitution and certified in writing

> to my employer. 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. 4–5.[1]

Pursuant to this agreement, petitioner "was able to resign his union membership at any time, but he would continue to have union dues deducted from his paycheck unless he gave the Union and the State written notice of revocation of his dues deduction authorization during the first two weeks of December in each calendar year." App. 48 (internal quotation marks, alterations omitted). In exchange for his agreement to become a union member and pay union dues for a one-year period, petitioner received "rights and benefits that are not enjoyed by nonmembers, such as the right to vote on ratification of a collective bargaining agreement," and he "availed himself of those benefits." App. 17 n.16 (internal quotation marks, alterations omitted).

The provision in petitioner's membership agreements stating that dues deductions would be irrevocable for one-year periods 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.

---

[1] The collective bargaining agreement did not designate any other revocation period, so the operative terms of petitioner's dues-deduction authorization were as stated in the agreements he signed. App. 6 n.4.

§ 186(c)(4); 45 U.S.C. § 152, Eleventh (b).[2] A one-year irrevocability period for a union member's dues authorization "provides [the union] with financial stability by ensuring a predictable revenue stream" and allowing it to "make long-term financial commitments without the possibility of a sudden loss of revenue," and prevents individuals "from gaming the [u]nion's system of governance" by "pay[ing] dues for only a month to become eligible to vote in a [u]nion officer election" or access a members-only benefit "and then reneg[ing] on all future financial contributions." *Fisk v. Inslee*, 2017 WL 4619223, at *3 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F. App'x 632 (9th Cir. 2019).

Petitioner did "not allege that he was coerced" into signing any of his three membership and dues-deduction authorization agreements. App. 59.

2. Before June 27, 2018, New Mexico law and this Court's precedent permitted public employers to require employees who are not union members to pay agency fees to their bargaining unit's union representative. App. 47; N.M. Stat. Ann. § 10-7E-9(G); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Under *Abood*, agency fees could be collected to cover the nonmembers' share of union costs germane to collective bargaining representation, but not to cover a union's political, ideological, or membership activities. 431 U.S. at 235–36. The collective bargaining

[2] 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 Department's Opinion on Checkoff, 22 LRRM 46–47 (1948).

agreement between the State and AFSCME Council 18 provided for the collection of agency fees, which were less than union dues. App. 47.

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 must pay agency fees as a condition of employment "violates the First Amendment and cannot continue." *Id.* at 2486. The State and AFSCME Council 18 immediately complied with *Janus* by ceasing collection of agency fees. App. 49. *Janus* did not involve voluntary union membership agreements, and the Court explained that, beyond eliminating compulsory nonmember agency fees, "States can keep their labor-relations systems exactly as they are." 138 S.Ct. at 2485 n.27.

3. On August 9, 2018, petitioner emailed his employer the question, "Are we able to withdraw as full members now or do we have to wait for a certain amount of time?" App. 5. Petitioner's email did not request to stop his dues payments. *Id.* Petitioner's employer referred him to the collective bargaining agreement. App. 6.

Petitioner did not contact the Union to request to terminate his membership or dues deductions at any time before filing his complaint on November 30, 2018. App. 6, 49. On December 6, 2018, the Union wrote to petitioner stating:

> It has come to our attention through the filing of a lawsuit that you wish to resign your union membership and cancel your authorization for the deduction of membership dues. We have no

> prior record that you made any such request to the union. Nevertheless, we have processed your resignation from membership. Additionally, your dues authorization provides that it is revocable during the first two weeks of December each year. Accordingly, we are notifying your employer to stop further membership dues deductions.

App. 6. On December 8, 2018, petitioner faxed a letter to the Union confirming he wished to "opt out of being a member." *Id.*

Petitioner's employer did not immediately stop his payroll deductions, prompting the Union to request again in writing on January 9, 2019, that the State "cease dues deductions for [petitioner] immediately." App. 7. Petitioner's dues deductions stopped, and he received a refund for the amounts deducted after the December 2018 window—a total of $33.96. App. 7 n.5.

B. Proceedings below

Petitioner filed his suit against the Union and state officials under 42 U.S.C. § 1983, alleging that dues deductions made pursuant to his own dues deduction authorization agreements violated his First Amendment rights. App. 8. Petitioner sought to recover the dues he had paid and also sought prospective relief to prevent further dues deductions. *Id.* at 8–9.[3]

---

[3] Petitioner's complaint also challenged the New Mexico law providing for a system of exclusive representative collective bargaining. The lower courts rejected that claim, and the petition does not seek certiorari with respect to that issue.

The district court granted summary judgment to the Union and granted the state officials' motion to dismiss. App. 44. The district court held that petitioner's claim for prospective relief did not present a live controversy because his dues deductions already had ended. App. 53. The district court also rejected petitioner's claim for damages. The district court reasoned that "[i]t is [petitioner]'s voluntary choice—on three separate occasions—to contract with the Union that defeats his claim..... As part of the contract, he knowingly agreed that he could only revoke his dues deduction authorization during a two-week opt-out window." App. 59 (citation omitted).

The Tenth Circuit affirmed. The Tenth Circuit held that petitioner's claims for injunctive and declaratory relief are moot. App. 11–13 & nn.9–10. The Tenth Circuit further held that petitioner's "request for retrospective damages relief for his back dues fails on the merits under basic contract principles." App. 14. The Tenth Circuit explained that petitioner's "arguments that *Janus* retroactively voids his membership agreements have no merit because he entered valid contracts when he joined the Union" and "[a] change in law that alters the original considerations for entering an agreement does not allow retroactive invalidation of that agreement." App. 17–19.

REASONS FOR DENYING THE PETITION

In *Cohen v. Cowles Media Co.*, this Court held that "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." 501 U.S. at 672. The Tenth Circuit simply applied that

established principle to hold that the enforcement of a public employee's own voluntary, affirmative written agreements 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 Tenth Circuit's decision. Petitioner concedes that three other circuits and more than two dozen district courts have joined the Tenth Circuit in unanimously rejecting indistinguishable claims. Like the Tenth Circuit, every other court to address the issue has recognized that *Janus*—which invalidated a statutory requirement that public employees pay mandatory agency fees to a union as a condition of public employment if the collective bargaining agreement provided for such fees—did not address or invalidate voluntary dues authorization agreements by employees who choose to become union members.

Petitioner is wrong that there is a circuit split on the issue whether his claims for prospective relief are moot. The cases petitioner relies upon apply a limited exception to mootness doctrine that applies only to class actions (including prior to class certification). Petitioner did not bring this suit as a putative class action, so the Tenth Circuit correctly held that petitioner's prospective relief claims are moot because he lacks any personal stake in obtaining prospective relief. There is no circuit split to resolve.

For these reasons, the petition should be denied.

I. The lower courts unanimously have rejected petitioner's argument that *Janus* invalidated voluntary union membership agreements.

Petitioner asks the Court to grant review to decide whether "a union can trap a public worker into paying dues" without "affirmative consent." Pet. i. But that scenario is not presented here. Petitioner voluntarily chose to become a union member and signed membership agreements on three separate occasions. In those agreements, petitioner affirmatively and unambiguously agreed to pay union dues. *See supra* at 2–3. The lower courts unanimously have "recogniz[ed] that *Janus* does not extend a First Amendment right to avoid paying union dues" that a public employee voluntarily agrees to pay as part of a contract through which the employee received the benefits of union membership. App. 19 (quoting *Belgau v. Inslee*, 975 F.3d 940, 951 (9th Cir. 2020), *cert. denied*, 2021 WL 2519114 (U.S. June 21, 2021)).

In addition to the Tenth Circuit's opinion below, three other circuits have joined that unanimous consensus. *See Belgau*, 975 F.3d at 951 (9th Cir. 2020); *Bennett v. Council 31 of the AFSCME, AFL-CIO*, 991 F.3d 724, 730–33 (7th Cir. 2021), *petition for cert. filed*, No. 20-1603 (U.S. May 18, 2021); *Fischer v. Governor of N.J.*, 842 F. App'x 741, 753 & n.18 (3d Cir. 2021) (unpublished), *petition for cert. filed*, No. 20-1751 (U.S. June 16, 2021); *see also LaSpina v. SEIU Pa. State Council*, 985 F.3d 278, 287 (3d Cir. 2021); *Oliver v. SEIU Local 668*, 830 F. App'x 76, 80 (3d Cir.

2020) (unpublished). Dozens of district courts have reached the same conclusion.[4]

---

[4] *See, e.g.*, *Mendez v. Cal. Tchrs. Ass'n*, 419 F.Supp.3d 1182, 1186 (N.D. Cal. 2020), *aff'd*, 854 Fed. App'x 920 (9th Cir. 2021); *Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME, Local 11*, 2020 WL 1322051, at *12 (S.D. Ohio Mar. 20, 2020), *appeal dismissed*, 2020 WL 4194952 (6th Cir. July 20, 2020); *Troesch v. Chicago Tchrs. Union, Local Union No. 1, Am. Fed'n of Teachers*, __ F.Supp.3d ___, 2021 WL 736233, at *4–5 (N.D. Ill. Feb. 25, 2021), *aff'd*, 2021 WL 2587783 (7th Cir. Apr. 15, 2021); *Hoekman v. Educ. Minn.*, 519 F.Supp.3d 497, 508–509 (D. Minn. 2021); *Molina v. Pa. Soc. Serv. Union*, *Serv. Emps. Int'l*, __ F.Supp.3d __, 2020 WL 2306650, at *7–8 (M.D. Pa. May 8, 2020); *Loescher v. Minn. Teamsters Pub. & Law Enf't Emps.' Union, Local No. 320*, 441 F.Supp.3d 762, 772–73 (D. Minn. 2020), *appeal dismissed*, 2020 WL 5525220 (8th Cir. May 15, 2020); *Woods v. Alaska State Emps. Ass'n/AFSCME Local 52, AFL-CIO*, 496 F.Supp.3d 1365, 1372–73 (D. Alaska 2020), *aff'd*, 2021 WL 3746816 (9th Cir. Aug. 11, 2021); *Yates v. Am. Fed'n of Teachers, AFL-CIO*, 2020 WL 6146564, at *1 (D. Or. Oct. 19, 2020); *Wagner v. Univ. of Wash.*, 2020 WL 5520947, at *5 (W.D. Wash. Sept. 11, 2020); *Labarrere v. Univ. Prof'l & Tech. Emps., CWA 9119*, 493 F.Supp.3d 964, 971–72 (S.D. Cal. 2020); *Polk v. Yee*, 481 F.Supp.3d 1060, 1071 (E.D. Cal. 2020); *Creed v. Alaska State Emps. Ass'n/AFSCME Local 52*, 472 F.Supp.3d 518, 524–31 (D. Alaska 2020), *aff'd,* 2021 WL 3674742 (9th Cir. Aug. 16, 2021); *Durst v. Or. Educ. Ass'n*, 450 F.Supp.3d 1085, 1090–91 (D. Or. 2020), *aff'd,* 854 F. App'x 916 (9th Cir. July 29, 2021); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F.Supp.3d 1108, 1118–19 (S.D. Cal. 2020); *Hernandez v. AFSCME Cal.*, 424 F.Supp.3d 912, 923–24 (E.D. Cal. 2019), *aff'd*, 854 F. App'x 923 (9th Cir. July 29, 2021); *Smith v. Super. Ct., Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2019); *Anderson v. SEIU Local 503*, 400 F.Supp.3d 1113, 1115–16 (D. Or. 2019), *aff'd*, 854 F. App'x 915 (9th Cir. July 29, 2021); *Seager v. United Tchrs. L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019), *aff'd*, 854 F. App'x 927 (9th Cir. July 29, 2021); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019); *Babb v. Cal. Tchrs. Ass'n*, 378 F.Supp.3d 857, 876–77 (C.D. Cal. 2019); *Cooley*

Petitioner fails to identify any contrary judicial authority. Given the lower courts' unanimity, there is no reason for this Court to intervene.

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

Petitioner urges that review should be granted because the Tenth Circuit misinterpreted the *Janus* decision. Pet. 9–12. This contention does not provide a sufficient justification for review and, in any event, petitioner is incorrect. *Janus* did not implicitly overrule *Cohen v. Cowles Media* and impose a new, heightened "waiver" analysis before union membership agreements can be enforced. *Janus* held only that agency fee requirements for public employees are not consistent with the First Amendment. 138 S.Ct. at 2486. 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.

Indeed, *Janus* "made clear that a union may collect dues when an 'employee affirmatively consents to pay.'" *Bennett*, 991 F.3d at 732 (quoting *Janus*, 138 S.Ct. at 2486). It is undisputed here that petitioner chose to join the Union, signed three membership and dues authorization agreements, and received membership rights and benefits in return. *Supra* at 2–3. In those agreements, petitioner "clearly and

---

v. Cal. Statewide Law Enf't Ass'n, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019).

affirmatively consent[ed]," *Janus*, 138 S.Ct. at 2486, to dues payments.

The passage from *Janus* on which petitioner relies concerns workers who never joined the union ("nonmembers") and never affirmatively authorized membership dues deductions (and never received consideration in return):

> 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.

138 S.Ct. at 2486 (emphases added, citations omitted). The Court cited "waiver" cases in this passage not to tacitly overrule *Cohen*, but to make clear that the States cannot presume from nonmembers' *inaction* that they wish to support a union.[5] As stated above,

---

[5] Petitioner relies on the four "waiver" cases *Janus* cited, but these cases concerned whether waiver could be found solely from inaction. *See Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938) (addressing whether pro se defendant had 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

petitioner here voluntarily and affirmatively chose to become a union member and to sign three membership and dues-deduction authorization agreements.

Petitioner also contends that his otherwise-valid membership and dues-deduction agreements were invalidated because this Court's later decision in *Janus* changed the options available to nonmembers going forward. Pet. 10–11. As the Tenth Circuit recognized, however, 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. 2002); *see also* App. 18–19. 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 in part to 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); *see also* App. 26 ("*Brady* shows that even when a 'later judicial decision[]' changes the 'calculus' motivating an agreement, the agreement does not become void or voidable.").

---

engaging in activity that Congress decided to regulate); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315, 322 (2012) (nonmembers of union could not be deemed to consent to union political assessment through their silence); *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)).

Similarly, petitioner's reliance on cases such as *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), which hold that Supreme Court decisions apply retroactively, is misplaced. Pet. 11–12. As an initial matter, *Janus* addressed only mandatory agency fees, not voluntary membership agreements. Those retroactivity cases also are not on point because, consistent with the authorities cited above, they do not retroactively void private contracts that were entered into in exchange for consideration.

In sum, petitioner's misguided criticism of the Tenth Circuit's analysis provides no basis for granting review. There also is an additional reason why the Court's intervention is not warranted. Petitioner's "arguments are all variations on his contention that he can apply *Janus* retroactively to void his membership agreements." App. 20. It has now been three years since the *Janus* decision, and public employees who joined the Union before *Janus* have had multiple opportunities to revoke their membership agreements. Thus, the issue presented here has become even less significant because of the passage of time.

III. The second question presented is also not worthy of review.

Petitioner also seeks review of the Tenth Circuit's ruling that his claim for prospective relief is moot. Pet. i. But the Tenth Circuit simply applied well-settled law in holding that petitioner's claim for prospective relief is moot because he is no longer bound by any dues-deduction agreement and therefore lacks the requisite "personal stake" in prospective relief. App. 12–13. The lower courts thoroughly explained why

petitioner's claim is moot and why no exceptions to the mootness doctrine apply. App. 53–55 (distinguishing the same cases petitioner relies on here); *see also id.* at 13 n.10.

Contrary to petitioner's contention (Pet. 13–20), the Tenth Circuit's mootness analysis does not create a conflict with the Ninth Circuit's analysis in *Belgau* and *Fisk v. Inslee*, 759 F. App'x 632 (9th Cir. 2019) (unpublished). *Belgau* and *Fisk*—unlike this case—were putative class actions. The Ninth Circuit applied a "limited" exception to mootness doctrine for "inherently transitory, pre-certification class-action claim[s]" that allows federal courts to exercise jurisdiction "*even though the claim of the named plaintiff has become moot*." *Belgau*, 975 F.3d at 949 (emphasis supplied) (citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975) and *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)); *Fisk*, 759 F. App'x at 633 (same reasoning).

This line of cases does not create "a freestanding exception to mootness outside the class action context," but, rather, states a rule that is "tied … to the class action setting from which it emerged." *United States v. Sanchez-Gomez*, 138 S.Ct. 1532, 1538–39 (2018). Thus, there is no "conflict." Because Petitioner's case was not pled as a class action, it was controlled by different mootness principles than those that applied in *Belgau* and *Fisk*.[6]

---

[6] Petitioner also relies on *Knox v. SEIU, Local 1000* (Pet. 15). But the issue in *Knox* was whether a claim for retrospective relief had been fully satisfied, not whether a claim for prospective relief had become moot. *See* 567 U.S. at 307–08. Petitioner's reliance on the unpublished district court opinion in *Lutter v. JNESO*,

Petitioner makes the bizarre accusation that the Union engaged in "gamesmanship" to moot his claim for prospective relief. Pet. 14. To the contrary, his claim for prospective relief became moot because his dues deductions ended, at his request, in accordance with his own membership and dues authorization agreement. Petitioner's First Amendment claim also did not evade review; rather, his refund claim was rejected on the merits.

For all these reasons, the second question presented is not worthy of review.

CONCLUSION

The petition for certiorari should be denied.

2020 WL 7022621 (D.N.J. Nov. 30, 2020) (Pet. 16–18), is similarly misplaced. That opinion reserved a ruling on the mootness issue. *Id.* at *5. The district court later held that the plaintiff lacked standing to seek prospective relief because she—like petitioner here—was no longer a union member or paying dues. *Lutter v. JNESO*, 2021 WL 2201313, at *1 (D.N.J. June 1, 2021).

Respectfully submitted,

SHANE C. YOUTZ
JAMES A. MONTALBANO
STEPHEN CURTICE
YOUTZ & VALDEZ, P.C.
900 Gold Avenue S.W.
Albuquerque, NM 87102
(505) 244-1200

SCOTT A. KRONLAND
Counsel of Record
EILEEN B. GOLDSMITH
STEFANIE L. WILSON
ALTSHULER BERZON LLP
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151
skronland@altber.com

Counsel for Respondent AFSCME Council 18

September 24, 2021