No. 20-1606

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

**RESPONDENTS MICHELLE LUJAN GRISHAM
AND HECTOR BALDERAS' RESPONSE TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Is Petitioner's claim of a circuit split regarding mootness illusory; that is, would Petitioner's claim for prospective relief be moot in all circuits, given that Petitioner is no longer a union member and is no longer paying dues and thus is no longer affected by the contractual window period for terminating his dues deductions?

Is the legality of a two-week window for public employees to withdraw from a union, pursuant to a contract into which the employee entered freely, a question of state contract law, rather than a question of the First Amendment, based on this Court's decision in *Cohen v. Cowles Media*?

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INTRODUCTION

The Petition is fatally flawed for several reasons. The portion of Petitioner's Complaint for which Petitioner seeks certiorari concerns the contractual window period for terminating Petitioner's union dues deductions, which Petitioner claims is unconstitutional. The Tenth Circuit correctly upheld the District of New Mexico's dismissal of Petitioner's claims, holding that the claims for declaratory and injunctive relief were moot, and that the claim for damages was meritless because Petitioner voluntarily entered into a valid contract to pay the dues.

It is well-settled across all circuits and this Court that Petitioner's claims for prospective relief are moot. While Petitioner argues that there is a circuit split on the issue of mootness between the Tenth Circuit's decision and some recent Ninth Circuit precedent, this claim is illusory. The Ninth Circuit decisions concern putative and certified class actions, both of which are encompassed by a narrow exception to mootness. Petitioner, by contrast, did not plead his claim as a class action. The Tenth Circuit's decision was fully in compliance with this Court's decisions regarding mootness. Without a circuit split, or an inconsistency with this Court's established precedents, there are no grounds to grant certiorari on the question of mootness.

Moreover, contrary to Petitioner's contentions, the Tenth Circuit did not simply declare the case to be moot, even though there was an active damages claim. Rather, the Tenth Circuit held that Petitioner's claim

for damages was barred on the grounds that Petitioner voluntarily entered into a contract, and that the First Amendment does not allow such a contract to be breached. While Petitioner cites this Court's teachings in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) as grounds for certiorari, this case is entirely distinguishable from *Janus*. While *Janus* concerned an employee who was required to pay non-member agency fees against his will, Petitioner was a voluntary union member who willingly entered into a contract with the union. Thus, the enforceability of the contract between Petitioner and the union, and thus Petitioner's damages claims, presented a question of New Mexico state law, rather than federal Constitutional law. Every court to consider the issue has rejected Petitioner's argument that *Janus* invalidated voluntary union membership agreements. The Petition should therefore be denied in its entirety.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner is an employee of the New Mexico Human Services Department who, prior to this Court's decision in *Janus*, was a member of the union that represents his state employee bargaining unit, the American Federation of State, County and Municipal Employees ("AFSCME"), Chapter 18. Petitioner brought suit on November 30, 2018 against AFSCME Council 18 and the Human Services Department. Petitioner

amended his Complaint on March 15, 2019, replacing the Human Services Department as a Defendant with Governor Lujan Grisham and Attorney General Balderas. Petitioner's Complaint, as amended, consisted of two causes of action. The first sought prospective relief and damages based on the annual two-week window period for termination of dues deductions; Petitioner contends that this limitation is unconstitutional, even though he agreed to it in his union membership agreement. The second sought invalidation of the New Mexico statutory provision that makes a union democratically chosen by a bargaining unit the exclusive representative of that bargaining unit. While the Tenth Circuit upheld the dismissal of both of these causes of action, Petitioner only seeks certiorari regarding the first cause of action.

Specifically, Petitioner alleges that he is entitled to a refund of his union dues, on the theory that he would not have joined the union if non-members had not, at that time, been required to pay non-member agency fees. Petitioner also seeks declaratory and injunctive relief, arguing that the two-week window for terminating dues deductions in his membership agreement is unconstitutional. As set forth below, and based on well-settled legal principles, Petitioner's claims are without merit.

B. Petitioner Joined the Union of his Own Volition

Contrary to Petitioner's contentions, *Janus* is inapplicable to the instant case because *Janus* concerned fair share agency fees that non-members were required to pay, whereas Petitioner was an actual union member who joined of his own volition.

Petitioner first became a union member in 2004, and, with the exception of a period of time between 2006 and 2007 when he held a position outside of the bargaining unit, he remained in the union until December of 2018. App. at 4-5. Petitioner signed agreements to join the union on at least three occasions. *Id.* In his most recent agreement, Petitioner agreed to pay membership dues through payroll deduction, subject to cancellation during a two-week window in December of each year. *Id.* at 5. Petitioner did not contend that he was required by his employer to become a union member or enter into a membership agreement; New Mexico has never required union membership as a condition of state employment. *Id.* at 47.

Quite simply, Petitioner admits in his Complaint that, at the time that *Janus* was decided, he was not a non-member paying "fair share" agency fees. Rather, Petitioner was a union member paying union dues. *Janus* did not have any effect on these Union dues, so his rights and obligations were unaffected by the decision.

C. Petitioner is no Longer a Member of the Union and is no Longer Paying Dues

Once *Janus* was decided, the State of New Mexico immediately complied with the decision and notified all state employees that non-union members would no longer be required to pay agency fees. In his Complaint, Petitioner claims that he sent an email to the New Mexico State Personnel Office asking if and when he could terminate his union membership and cease paying union dues. App. at 5-6. Petitioner was told that he would have to refer to the collective bargaining agreement regarding his request to cease payroll deductions. *Id.* at 6.

On December 6, 2018, during the annual two-week revocation period, the union informed Petitioner that his resignation had been processed and that he was no longer required to pay union dues. *Id.* at 6. While, for a short period of time, the State Personnel Office continued to erroneously deduct union dues from Petitioner's paycheck, these amounts were refunded. *Id.* at 6-7.

Petitioner avers that he decided to quit the union because *Janus* was decided. However, the timing of his departure from the union is irrelevant. As noted above, Petitioner was a voluntary union member, rather than a payor of non-member fair share fees. Thus, this Court's decision in *Janus* was not applicable to him. Petitioner's contractual obligations to the union only allowed him to terminate his dues deductions during the two-week period. At this point, Petitioner is no longer a union member and no longer paying dues, so

his claim for injunctive and declaratory relief is moot. Moreover, the union dues that Petitioner has already paid were paid as an obligation under a valid and enforceable contract. Therefore, Petitioner is not entitled to any damages.

D. Petitioner Mischaracterized the Tenth Circuit's Decision, as the Determination Affirmed the Dismissal of the Damages Claims and that of the Claims for Prospective Relief on Separate, Independently Valid Grounds

Finally, in his Petition, Petitioner made a fundamental mischaracterization regarding the procedural background of the instant case. While he asserted claims for damages and claims for prospective relief, these claims were dismissed on separate, wholly appropriate grounds. The procedural background of the case is as follows: On January 22, 2020, the U.S. District Court for the District of New Mexico entered its Order granting the State Defendants' Motion to Dismiss, as well as a separate Motion for Summary Judgment filed by AFSCME. App. at 43-79. This Order held, *inter alia*, that Petitioner's claims for injunctive and/or declaratory relief regarding dues deductions are moot. *Id.* at 53-55. Moreover, the District Court rejected Petitioner's claim for damages on the merits. *Id*. at 55-64.

Petitioner appealed the order of the District Court to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the District Court's Order in its entirety.

Petitioner contends that "[t]he 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." Petition at 6. However, this is a misleading description of the Tenth Circuit's decision. In actuality, the Tenth Circuit stated that "we affirm the district court's dismissal of Count 1 because Mr. Hendrickson's request for prospective relief is moot, and his request for retrospective damages relief fails on the merits." App. at 10.

Thus, the Tenth Circuit did consider the merits of the case, to the extent that it concerned Petitioner's claim for damages, so Petitioner has mischaracterized the Tenth Circuit's decision. As set forth below, certiorari is inappropriate because the Tenth Circuit correctly upheld the dismissal of the claim for prospective relief as moot. Contrary to Petitioner's contention, this holding is not at odds with the Ninth Circuit's decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020) and it is in line with this Court's prior jurisprudence regarding mootness. Moreover, the dismissal of the claim for damages was dismissed on New Mexico state contract law grounds. Given this Court's well-settled position that the First Amendment does not give individuals the right to avoid contractual obligations, these obligations are a state law issue, and not suitable grounds for certiorari.

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT'S HOLDING THAT PETITIONER'S CLAIMS FOR PROSPECTIVE RELIEF ARE MOOT IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE COURT'S PRECEDENTS

Contrary to Petitioner's contention, certiorari is inappropriate as to the Tenth Circuit's determination that Petitioner's claims for prospective relief are moot. As Petitioner admits, he is no longer a member of the Union and no longer paying dues. Accordingly, the Tenth Circuit was correct in its determination that his claim for prospective relief is moot. While Petitioner argues that there exists a circuit split between the Ninth and Tenth Circuits on this issue, no actual circuit split exists. Further, while Petitioner introduces authority from other circuits as well as this Court, this authority demonstrates the determination of mootness by the Tenth Circuit is fully consistent with well-settled jurisprudence on the issue.

A. There is no Circuit Split Between the Decision Below, the Ninth Circuit's Decision in *Belgau v. Inslee*, or With any Other Court of Appeals Decision

The Tenth Circuit did not create a circuit split with the Ninth Circuit when it held that Petitioner's claims for prospective relief were moot. It is well-settled,

across all circuits and this Court, that "[u]nder Article III of the constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Moreover,

> [a] case becomes moot—and therefore no longer a "Case" or "Controversy" for purposes of Article III—"when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights."

Already, LLC, v. Nike, Inc., 568 U.S. 85, 91 (2013) (citations omitted).

Because Petitioner is no longer a member of the Union, there is no controversy regarding his particular legal rights going forward. Petitioner does not dispute that he is no longer a union member. However, he argues that the "capable of repetition, yet evading review" exception to mootness is applicable. However, it is well-settled that, under most circumstances, as noted by this Court in 1975, in order to meet the "capable of repetition yet evading review" exception, there must be "a reasonable expectation that the *same complaining party* [will] be subject to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)

(emphasis added). This condition is clearly not met in the instant case.

While Petitioner argues that he "could have some need arise for union membership in the future," such a possibility is too speculative to allow for a reasonable expectation. *See, e.g.*, *Thulen v. AFSCME N.J. Council 63*, 844 Fed. Appx. 515, 519 (3rd Cir. Unpublished Opinion Feb. 10, 2021), citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). A claim regarding the withdrawal period is universally considered moot when brought by any former union member. Moreover, Petitioner's specific complaint concerns the fact that he joined the union prior to the *Janus* decision. The repetition of such a claim is not only speculative, it is logically impossible.

Petitioner focuses on a claimed "circuit split," in which the Ninth Circuit held in a similar case that, despite the fact that the named Plaintiffs were no longer union members, the case was not moot. *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 2021 WL 2519114 (2021). However, Petitioner ignores a fundamental difference between *Belgau* and the instant case, in that *Belgau* was a putative class action, which allowed the *Belgau* Court to apply a very narrow exception to mootness. It was that fundamental difference between the cases, rather than any jurisprudential difference between circuits, that resulted in the different determination regarding mootness.

Belgau concerned a class action, and was decided on that basis, as "a controversy may exist between a

named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Belgau*, 975 F.3d at 949, citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Plaintiff is correct in that *Belgau* concerned a class action that had not yet been certified, but this Court has extended the principle discussed in *Sosna* to putative class action classes. *Gerstein v. Pugh*, 420 U.S. 103, 110, n.11 (1975). However, while class certification is not necessary to avoid mootness, it is at least necessary for the plaintiff to plead the case as a putative class action. Petitioner did not do so.

Further, other Ninth Circuit opinions conclusively demonstrate that this case would have still been dismissed on the grounds of mootness had it been brought in that circuit. In cases that fall outside of the narrow *Sosna/Gerstein* exception, the Ninth Circuit has consistently held, as is required, that, in order for the "capable of repetition, yet evading review" exception to apply, "there must be a 'reasonable expectation' that the same complaining party will be subject to the same injury again." *Ctr. for Biol. Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007); *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996); *see also Confed. Tribes of Siletz Indians of Or. v. State of Or.*, 910 F. Supp. 486, 490 (D. Or. 1995) (requiring potential injury to same plaintiff for mootness exception); *Dzu Cong Tran v. Napolitano*, 497 Fed. Appx. 724, 726 (9th Cir. Unpublished Disposition Oct. 25, 2012) (claim mooted when there was no motion for class certification, and named plaintiffs would not later be subjected to the

same immigration procedure at issue in the future). Quite simply, the issues pertaining to mootness in the instant case would not have been decided differently in the Ninth Circuit. Accordingly, there is no circuit split, so certiorari is inappropriate.

Similarly, *Lutter v. JNESO*, 2020 WL 7022621 (D.N.J. Slip Copy Nov. 30, 2020), cited by Petitioner, is not indicative of any dispute among the Circuits regarding this mootness issue. It is true that the cited *Lutter* opinion declined to dismiss a former union member's claims as moot. However, this opinion was entirely interlocutory; the Court requested additional briefing and reserved final judgment for a later time. 2020 WL 7022621 at *5. The *Lutter* Court subsequently held that the plaintiff's claims for prospective relief did not present a live controversy, as, like Petitioner, the plaintiff was no longer a union member. *Lutter v. JNESO*, 2021 WL 2201313 (D.N.J. Slip Copy June 1, 2021). Accordingly, the ruling in *Lutter* is entirely consistent with the ruling below.

B. The Tenth Circuit's Decision Regarding Mootness is Consistent With This Court's Prior Jurisprudence

Petitioner's citations to this Court's decisions about mootness, specifically *Roe v. Wade*, 410 U.S. 113 (1973), and *Knox v. SEIU*, Local 1000, 567 U.S. 298 (2012), are similarly unhelpful to him. In *Roe*, this Court held that the plaintiff's claims were not moot

because the plaintiff *herself* might become pregnant again. *Id*. at 125 (emphasis added).

Thus, *Roe*, unlike the instant case, concerned a reasonable expectation that "the same complaining party will be subject to the same injury again," as is required to avoid mootness. While Petitioner notes that the plaintiff in *Roe* did not submit an affidavit of her intention to get pregnant again, such an affidavit was not necessary in that case. Surely Petitioner is aware that women frequently become pregnant without the specific intent to do so. Whereas, Petitioner cannot enter into a union agreement without specific intent, and cannot, in the future, enter into a pre-*Janus* union agreement under any circumstances. Accordingly, *Roe* is immaterial to the instant case.

Similarly, *Knox* concerned different issues than the ones currently before the Court. In *Knox*, the plaintiffs were not seeking prospective relief. Rather, the plaintiffs sought damages, which were ordered by the District Court. While the union offered a refund, which would cover all of the damages sought, this Court held that the manner in which the refund was offered was not compliant with the District Court's order. Rather, the Supreme Court held that the union had not complied with an order of the District Court earlier in the case:

> The District Court ordered the SEIU to send out a "proper" notice giving employees an adequate opportunity to receive a full refund. Petitioners argue that the notice that the SEIU sent was improper because it includes a

> host of "conditions, caveats, and confusions as unnecessary complications aimed at reducing the number of class members who claim a refund." In particular, petitioners allege that the union has refused to accept refund requests by fax or e-mail and has made refunds conditional upon the provision of an original signature and a Social Security number. As this dispute illustrates, the nature of the notice may affect how many employees who object to the union's special assessment will be able to get their money back. The union is not entitled to dictate unilaterally the manner in which it advertises the availability of the refund.

567 U.S. at 308.

Because the union may not have fully complied with the Court order, there was still a live controversy, so the case was not moot. *Id.* at 307-08. In *Knox*, there was still relief that could have been offered by this Court because some class members may not have been able to obtain the refund. In the instant case, however, Petitioner is no longer a union member and no longer paying dues, so he has no interest in prospective relief. Quite simply, certiorari is inappropriate, because the claim for prospective relief is moot and is not encompassed by any exceptions to mootness.

II. CERTIORARI IS INAPPROPRIATE BECAUSE THE TENTH CIRCUIT'S REJECTION OF PETITIONER'S DAMAGES CLAIMS IS CONSISTENT WITH *JANUS*, AND THE PROPRIETY OF THE LIMITED WITHDRAWAL PERIOD IS GOVERNED BY STATE CONTRACT LAW, RATHER THAN THE FIRST AMENDMENT

Moreover, even assuming, *ad arguendo*, that Petitioner's claims for prospective relief are not moot, certiorari is still inappropriate as to those claims because the withdrawal period in question is a matter of state contract law, rather than the First Amendment. For this reason, certiorari is also inappropriate as to the Tenth Circuit's upholding of the dismissal of Plaintiff's claim for damages.

The Tenth Circuit affirmed the dismissal of Petitioner's claim for damages on the grounds that "Mr. Hendrickson's claim against the Union for retrospective relief on Count 1 fails on the merits because his dues were deducted under valid contractual agreements." App. at 14. In so doing, it noted that it "join[ed] the swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union dues." *Id.* at 19. Petitioner admits that there is no circuit split on this issue. Petition, at 9. To be sure, circuit and district courts have universally rejected the idea that there is a "right" to breach voluntary union membership agreements. Moreover, State Respondents disagree with Petitioner that such a "right" was

recognized in, or even anticipated by, the *Janus* decision.

Janus concerned the agency fees paid by nonmembers to a union. Once a union was designated as the exclusive representative of a bargaining unit, "[e]mployees who decline to join the union are not assessed full union dues but must instead pay what is generally called an 'agency fee,' which amounts to a percentage of the union dues." 138 S. Ct. at 2460. The Court cited the fact that these agency fees were compelled as the reason why they were unconstitutional, stating that "because the ***compelled*** subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." *Id.* at 2464 (emphasis added).

However, in the instant case, it is not a compelled agency fee that is at issue. Rather, Petitioner was a voluntary union member who paid dues pursuant to a contract into which he willingly entered. Petitioner paid his dues and received the benefits of union membership in exchange. This contract contained a provision limiting the period of time during which a union member can withdraw from the union, and Petitioner was bound by that provision. It is well-settled 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).

In *Cohen*, a political insider agreed to provide newspaper reporters with information relating to a

candidate on the condition that the newspapers protected the insider's anonymity. 501 U.S. at 665. The newspapers mentioned the insider by name, breaking their promise. *Id.* at 666. This naming of the insider was something that the papers certainly had a First Amendment right to disclose absent a promissory obligation not to do so. The court held that the First Amendment did not bar a promissory estoppel claim by the insider. *Id.* at 671-72.

The instant case is indistinguishable from *Cohen*. Like the defendant in *Cohen*, Petitioner entered into a contract with a private organization, in this case the union. Thus, he was bound by the terms of his contract. While, under *Janus*, Petitioner would have the right to not subsidize the Union in the absence of a promissory obligation, his contractual relationship with the Union eliminates this right, and clearly places his dispute under the purview of New Mexico contract law, rather than federal Constitutional law.

Further, many types of contracts, not just those involving a union, sometimes result in a party subsidizing speech that the party no longer wishes to subsidize. If an individual purchases a newspaper subscription, he does not have the right to cancel the subscription before it expires if the newspaper publishes an editorial with which he disagrees. Moreover, a tenant cannot simply cancel his lease if he finds out that the landlord supports a political candidate whom the tenant opposes. The expansion of *Janus* sought by Petitioner would have the effect of rendering many types

of contracts voidable, and bring the federal courts into an area traditionally regulated by the states.

Accordingly, the Tenth Circuit was correct when it stated that:

> 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.

App. at 19.

Similarly, the Ninth Circuit was correct when it held that "[t]he First Amendment does not support Employees' right to renege on their promise to join and support the union. This promise was made in the context of a contractual relationship between the union and its employees. When 'legal obligations . . . are self imposed,' state law, not the First Amendment, normally governs." *Belgau*, 975 F.3d at 950, citing *Cohen*, 501 U.S. at 671.

Finally, while Petitioner claims that, absent the agency fees found unconstitutional in *Janus*, he would not have joined the union, this claim is immaterial. Again, Petitioner joined the union of his own volition. A change in a law that may have been a factor in his decision to enter a contract does not render the contract voidable. *See*, *e.g.*, *Brady v. U.S.*, 397 U.S. 742 (1970).

Brady demonstrates the frivolity of Petitioner's argument. In *Brady*, the petitioner, Robert Brady, had been prosecuted under a criminal kidnapping statute. Brady entered into a plea agreement at a time when the statute under which he was prosecuted provided for the possibility of the death penalty upon a jury's recommendation, a possibility that did not exist under the plea agreement. *Brady*, 397 U.S. at 743-44. The defendant was sentenced to 50 years, which was later reduced to 30. *Id.*

Subsequent to Brady's plea, this Court held that the death penalty provisions of the statute were unconstitutional. *Brady*, 397 U.S. at 745-47. Brady argued that his plea agreement should be vacated. However, this Court disagreed, stating that a voluntary plea agreement 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. *Id.* at 757. If Brady was not allowed to vacate his guilty plea despite a change of the law that was ancillary to the four corners of the plea agreement, then Petitioner is certainly bound by the conditions of his union contract.

Quite simply, as Petitioner admits, there is no circuit split or other conflict of law pertaining to the issue of the constitutionality of the revocability period. It is undisputed that this revocability period is constitutional. Moreover, there is good reason why there is no dispute as to the constitutionality of the revocability period: the contract at issue was a valid contract between an individual and a union. As such, it is

governed by state contract law, rather than the First Amendment. Accordingly, certiorari is inappropriate.

CONCLUSION

Based on the foregoing, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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