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

REPLY BRIEF OF PETITIONER

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REPLY

Petitioner Brett Hendrickson submits this Reply to the Briefs in Opposition of Respondent AFSCME Council 18 (AFSCME) and Respondents Governor Michelle Lujan Grisham and Attorney General Hector Balderas (the "State Defendants" or "the State") (collectively, "Respondents").

Respondents' arguments, if accepted by this Court, would strike at the heart of the rights recognized in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). Under their interpretation of *Janus*, unions are free to trap nonconsenting workers in long term agreements—in this case a year, but there is no limiting principle that prevents longer term lock-ups. These union applications completely vitiate employee rights under *Janus with no notice*, without the employees having any understanding that they are waiving their right not to support the union. Moreover, any worker who does attempt to challenge these policies would see the doors to the courthouse shut to them, as the time required to reach this Court would see all but the most draconian lock-up periods expire and, therefore, be mooted before courts have the opportunity to review them.

This Court should grant the Petition to clarify the law and resolve the division of opinion among the circuits as to whether unions are allowed to moot *Janus* claims in this way.

I. The Tenth Circuit Decision is inconsistent with *Janus*.

Respondents' core argument on the merits is that Hendrickson consented to restrict his ability to end his union dues deduction to only two weeks a year when he signed his union membership application. AFSCME Br. at 9, State Br. at 16. Hendrickson concedes that he signed the application, but since he was not fully informed when he did so, it cannot constitute the consent required by *Janus*. *See* Pet. at 10. Respondents' arguments to the contrary betray the same misunderstanding of *Janus* that the Tenth Circuit (and several other circuits) have endorsed. This Court should grant the Petition to clarify that *Janus* requires the clear and knowing waiver that is absent in this case.

Respondents invoke *Cohen v. Cowles Media Co.*, 501 U.S 663, 672 (1991). State Br. at 16, AFSCME Br. at 7-8. But in *Cohen* the newspaper contracted away its right to publicize with full knowledge of its First Amendment rights, which had been long established by prior case law. There was no intervening change in law that recognized a right that the newspaper could not have previously asserted. Hendrickson does not deny that one can make a knowing waiver of First Amendment rights. He simply denies that he made any such knowing waiver.

AFSCME's analysis allows for Hendrickson to be considered a nonmember with continuing dues obligations, but that violates the holding in *Janus*, that nonmembers cannot be forced to pay anything to the union. *See* 138 S. Ct. at 2486. AFSCME states that Hendrickson could "resign his union membership at any

time, but he would continue to have union dues deducted from his paycheck" until he revoked his authorization during the two-week escape window. AFSCME Br. at 3. In fact, Hendrickson did resign his union membership, yet union dues continued to be deducted from his paycheck until late January, 2019. *Id.* at 6. This attempted separation between the requirement to pay the union and union membership is exactly what was enjoined in *Janus*: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages . . . ." *Janus*, 138 S. Ct. at 2486 (emphasis added). AFSCME attempts to recast *Janus* as a decision that was simply about non-member agency fee payers. ASFCME Br. at 12. But under *Janus* it is "employees" who must consent to the withholding of money from the union: "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." 138 S. Ct. at 2486. In this case, Hendrickson did not clearly and affirmatively consent to waiving his First Amendment right to pay nothing to the Union because that right had not yet been recognized.

The passage AFSCME cites from *Janus* is not to the contrary: it refers to "nonmembers" in the context of that case. AFSCME Br. 12. But Hendrickson *was* a nonmember at the relevant time: when he signed his union membership application. AFSCME is missing the temporal applicability of the waiver requirement to Hendrickson's situation. Hendrickson's argument is that when he was a nonmember of the Union in 2007, agreeing to pay dues to the Union required him to waive his First Amendment right to pay nothing to the Union. This he did not do.

Janus is clear that workers must not only consent to waive their First Amendment rights not to pay union dues, but they must "clearly and affirmatively consent before any money is taken from them." Janus, 138 S. Ct. at 2486. Janus further explains:

> 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.

Id. (internal citations omitted). Hendrickson's consent was not "freely given" because he was not informed of his right to pay nothing at all to the Union. That right had not yet been recognized by the Supreme Court. Therefore, the waiver of that right "cannot be presumed." *Janus*, 138 S. Ct. at 2486. Hendrickson could not possibly have waived a right that he did not know existed.

In arguing that Hendrickson's membership agreement constituted affirmative consent, Respondents misunderstand what "affirmative consent" means in this context. It is not simply affirmative consent to membership by signing a membership card. *Janus* requires Respondents to show that Hendrickson affirmatively consented to *waive his First Amendment rights*. *Janus*, 138 S. Ct. at 2486. Hendrickson's membership application does not show that he did so "by clear and compelling evidence." *Id.* (citations and quotation marks omitted).

The undisputed wording of the union agreements that Hendrickson signed shows that the agreements were executed without Hendrickson's knowledge of his rights. Since there was no such knowledge, there could

not have been a knowing waiver of those rights. Because the right not to pay fees or dues to a union had not been announced by the Supreme Court, Hendrickson could not have known that he was waiving that constitutional right; therefore, he could not have "freely given" his "affirmative consent" as required by the *Janus* decision. 138 S. Ct. at 2486. As this Court has said, waiver of such a right must be freely given in a manner that is voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Because the alleged waiver was not voluntary, knowing, and intelligently made, the agreements cannot bind Hendrickson.

Respondents rely on *United States v. Brady*, 397 U.S. 742, 748 (1970), State Br. at 18-19, AFSCME Br. at 13, in which a criminal defendant was held to his plea agreement. But a guilty plea is part of an adjudication: "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Brady*, 397 U.S at 748. The finality of judgments is not something a court undermines lightly, and so in that context the Court determined that it could "see no reason on this record to disturb the judgment of those courts [who entered judgment against the defendant]." *Id.* at 749. There is nothing like that in this case. Hendrickson does not ask that this Court find its way around *res judicata*—only that it clarify one cannot unknowingly waive one's First Amendment rights.

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II. This Court should grant the petition to resolve the division between the circuits as to whether a union can unilaterally moot *Janus* claims.

This Court should also grant the Petition because the decision below is inconsistent with the Ninth Circuit as regards a union's ability to moot a worker's claim and, thereby, avoid review of its unconstitutional policies. *See* Pet. at 13; *Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020); *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019). Respondents' attempts to paper over this division of authority falls short.

In brief, "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)). Respondents continue to assert the legality of their policy to postpone dues deduction revocations, and they enforce it against all other New Mexico employees who have not taken the time to sue.

Respondents attempt to play down the division of authority between the Tenth and Ninth Circuits on the basis that, in *Belgau* and *Fisk*, the plaintiffs sought a class action. But as explained in the Petition, the class allegations were not the basis of the Ninth Circuit's reasoning, and since no class had been certified in either case, the class *cannot* have been a basis to avoid mootness under this Court's precedents. Pet. at 19-20.

The State argues that the "capable of repetition, but evading review" exception to mootness should not apply because Hendrickson himself cannot prove he will have dues taken in the future. State Br. at 9. But as explained in the Petition, at 15, this argument is

not consistent with how this Court has addressed the doctrine of mootness. By stating that women sometimes get pregnant, the State attempts to waive away the fact that Jane Roe was not required to prove that *she* would experience a future pregnancy. *Roe v. Wade*, 410 U.S. 113, 125 (1973). Furthermore, employees sometimes sign union agreements. Therefore, even under the State's own logic, *Roe v. Wade* is applicable to this situation. Both situations represent a recognition that the future is indeterminant. As long as Respondents maintain their policy of trapping workers in Union membership, Hendrickson remains at risk.

Similarly, union members in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) could not say they would be subject to a future special assessment by the union, but the case was determined not to be moot even after the union had sent notice of a full refund of the assessment. AFSCME attempts to distinguish *Knox* in a footnote on the premise that "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." AFSCME Br. at 15 n.6; *see also* State Br. at 14. But the adequacy of the notice in *Knox* was only a secondary basis for the holding. Before the Court considered notice, it held that the case was one of voluntary cessation: "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. As in *Knox*, Respondents here continue to defend their unconstitutional policy, and that policy should be granted its day in Court.

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CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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