No. ___

IN THE
Supreme Court of the United States

SUSAN FISCHER AND JEANETTE SPECK,
Petitioners,

v.

GOVERNOR OF NEW JERSEY; NEW JERSEY EDUCATION ASSOCIATION; TOWNSHIP OF OCEAN EDUCATION ASSOCIATION,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL P. LAFFEY
222 Highway 35
Red Bank, NJ 07701
(732) 642-6784

WILLIAM MESSENGER
Counsel of Record
AARON B. SOLEM
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org
Counsel for Petitioners

QUESTIONS PRESENTED

In 2018, the Court in *Janus v. AFSCME, Council 31* held that public employees have a First Amendment right not to subsidize union speech. 138 S. Ct. 2448, 2486 (2018). The Court also held that governments and unions violate that right by seizing union dues or fees from employees unless there is clear and compelling evidence the employees waived that constitutional right. *Id.*

New Jersey and many other states are resisting *Janus'* holding by prohibiting employees who signed dues deduction forms from exercising their right to stop subsidizing union speech except during short escape periods—generally only ten to thirty days each year. The Third Circuit below, as well as the Seventh, Ninth, and Tenth Circuits, have upheld these restrictions, finding the government does *not* need proof of a waiver to restrict when employees can exercise their First Amendment rights under *Janus*, but that proof of employee contractual consent is enough to allow the government to seize union dues from employees over their objections.

The questions presented are:

1. Under the First Amendment, to seize payments for union speech from employees who provide notice they are nonmembers and object to supporting the union, do governments and unions need clear and compelling evidence those employees knowingly, intelligently, and voluntarily waived their First Amendment rights and that enforcement of that waiver is not against public policy?

2. Do Petitioners have standing to challenge New Jersey Statutes Annotated Section 52:14-15.9e?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Susan Fischer and Jeanette Speck were the Plaintiff-Appellants in the court below.

Respondents, who were Defendant-Appellees in the court below, were Phil Murphy, in his official capacity as Governor of New Jersey, New Jersey Education Association, and Township of Ocean Education Association.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

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

1. *Smith v. New Jersey Education Association*, No. 19-3995, U.S. Court of Appeals for the Third Circuit. Judgment Entered January 15, 2021.

2. *Smith v. New Jersey Education Association*, No. 18-10381,U.S. District Court for the District of New Jersey. Judgment Entered November 27, 2019.

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OPINIONS BELOW

The district court's opinion and order granting summary judgment to the defendants is reported at 425 F. Supp. 3d 366 and reproduced at Pet.App.35. The Third Circuit affirmed that judgment in an unpublished opinion reported at 842 Fed. Appx. 741 and reproduced at Pet.App.2.

JURISDICTION

The Third Circuit issued its opinion on January 15, 2021. Pet.App.2. On March 19, 2020, the Court extended to 150 days the deadline for filing a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment and New Jersey Statute Annotated Section 52:14-15.9e are reproduced at Pet.App.60.

STATEMENT OF THE CASE

A. Legal background

1. In 2018, the Court in *Janus v. AFSCME, Council 31*, held that public employees have a First Amendment right not to subsidize union speech and that governments and unions violate that right by taking payments for union speech from employees without their affirmative consent. 138 S. Ct. 2448, 2486 (2018). The Court recognized that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* The Court thus held that, to prove employees consent to financially supporting a union, a "waiver must be freely given and shown by 'clear and compelling' evidence."

Id. (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

Unfortunately, rather than complying with *Janus*, many states are resisting the Court's decision by curtailing the free speech rights it recognized. This includes by prohibiting public employees who authorized payroll deductions from exercising their right to stop subsidizing union speech except during limited escape periods.

Specifically, twelve states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington—amended their dues deduction laws to require government employers to continue deducting union payments from employees who authorized dues deductions unless the employees provide a revocation notice during a window period set either by law or in a payroll deduction form.[1] Government employers in at least five other states, including Alaska, New Mexico, Ohio, Minnesota, and Pennsylvania, also enforce

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[1] *See* Cal. Gov't Code § 1157.12; Cal. Educ. Code §§ 45060; Colo. Rev. Stat. § 24-50-1111(2); Conn. Publ. Act No. 21-25, § 1(a)(i-j); Del. Code Ann. tit. 19, § 1304; Haw. Rev. Stat. Ann. § 89-4(c); 5 Ill. Comp. Stat. § 315/6(f); 115 Ill. Comp. Stat. § 5/11.1(c); Mass. General Laws ch.180 § 17A; Nev. Rev. Stat. § 288.505(1)(b); N.J. Stat. Ann. §52:14-15.9e; N.Y. Civ. Serv. Law § 208(1)(b); Or. Rev. Stat. § 243.806(6); Wash. Rev. Code § 41.80.100(d).

escape-period restrictions under those states' preexisting dues deduction laws.[2]

The escape periods for when employees can stop government deductions of union dues are usually just ten to thirty days each year.[3] Some restrictions are much longer. California, Ohio, and Pennsylvania prohibited certain state employees from stopping dues deductions until escape periods that opened only at the end of collective bargaining agreements that had durations of several years.[4]

Employees subject to these restrictions are effectively prohibited from exercising their First Amendment right to stop paying for union speech for 335-55 days of each year, if not longer. Employees who want to stop financially supporting a union outside of the

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[2] *See, e.g.*, *Woods v. Alaska State Emps. Ass'n*, 496 F. Supp. 3d 1365, 1368 (D. Alaska 2020); *Hoekman v. Educ. Minn.*, No. 18-cv-01686, 2021 WL 533683, at *2 (D. Minn. Feb. 17, 2021), appeal filed No. 21-1366 (8th Cir. 2021); *Allen v. Ohio Civ. Serv. Emps. Ass'n AFSCME, Local 11*, No. 2:19-cv-3709, 2020 WL 1322051, at *2 (S.D. Ohio Mar. 20, 2020); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 964 (10th Cir. 2021), *petition for cert. filed* No. 20-1606 (May 14, 2021); *Weyandt v. Pa. State Corr. Officers Ass'ns,* No. 1:19-cv-1018, 2019 WL 5191103, at *2 (M.D. Pa. Oct. 15, 2019).

[3] *See, e.g.*, cases cited *supra* at n.2; N.J. Stat. Ann. § 52:14-15.9e (authorizing ten-day period); 5 Ill. Comp. Stat. § 315/6(f) (same); Del. Code Ann. tit. 19, § 1304 (authorizing fifteen-day period).

[4] *See Savas v. Cal. State L. Enf't Agency*, 485 F. Supp. 3d 1233, 1235 (S.D. Cal. 2020); *Allen*, 2020 WL 1322051, at *2; *Weyandt*, 2019 WL 5191103, at *2.

prescribed escape period are compelled by their government employer to continue to financially support the union and its speech until the escape-period restriction is satisfied.

2. This case concerns New Jersey's restriction on when employees can exercise their *Janus'* rights. Roughly one month before the Court issued *Janus*, New Jersey preemptively moved to undermine the employee rights the Court would soon recognize by enacting the Workplace Democracy Enhancement Act ("WDEA"), P.L. 2018, ch.15, § 6, eff. May 18, 2018. On top of requiring compulsory union orientations for employees and other measures, the WDEA amended the State's dues deduction statute, New Jersey Statutes Annotated Section ("N.J. Section") 52:14-15.9e.

Before the statute's amendment, it provided that employees who wanted to stop government dues deductions could submit a revocation notice that "shall be effective to halt deductions as of the January 1 or July 1 next succeeding the date on which notice of withdrawal is filed." Pet.App.40. The WDEA amended the statute to limit further when employees could exercise their rights:

> Employees who have authorized the payroll deduction of fees to employee organizations may revoke such authorization by providing written notice to their public employer *during the 10 days following each anniversary date of their employment*. Within five days of receipt of no-

> tice from an employee of revocation of authorization for the payroll deduction of fees, the public employer shall provide notice to the employee organization of an employee's revocation of such authorization. An employee's notice of revocation of authorization for the payroll deduction of employee organization fees *shall be effective on the 30th day after the anniversary date of employment*.

N.J. Section 52:14-15.9e (as amended by P.L. 2018, c.15, § 6, eff. May 18, 2018) (emphasis added) (Pet.App.61). In short, New Jersey now permits public employees who signed dues deduction forms to exercise their First Amendment right to stop subsidizing union speech only once per year—the thirtieth day after the anniversary date of their employment—and only by providing a notice of revocation during a prescribed ten-day period.

B. Proceedings below.

1. Petitioners Susan Fischer and Jeanette Speck are or were teachers employed by the Township of Ocean Board of Education ("Township") in Monmouth County, New Jersey. Pet.App.6-7. In 1999 and 2001, respectively, they signed forms authorizing their employer to deduct from their wages dues for the New Jersey Education Association ("NJEA") and its affiliates. *Id.* Under then-existing New Jersey law, the forms restricted Petitioners from stopping the deductions except by providing a revocation notice that

would become effective the earlier of January 1 or July 1. *Id*.

In July 2018, shortly after this Court decided *Janus*, Petitioners notified the NJEA and the Township that they resigned their union membership and opposed dues deductions. Pet.App.7. NJEA accepted their resignations. *Id*. The Township, however, refused to stop deducting dues from Petitioners' wages because they provided notice outside the ten-day escape period mandated by New Jersey law. *Id*. at 44. In early September 2018, during what they calculated to be their ten-day period, Petitioners again notified the Township they opposed having union dues deducted from their wages. *Id*. Under N.J. Section 52:14-15.9e, even their second revocation request could not be honored until the "30th day after the anniversary date of employment." *Id*. at 61. NJEA dues were thus deducted from Petitioners' wages, over their objections, until September 30, 2018. *Id*. at 44.

2. In November 2018, Petitioners filed this lawsuit on behalf of themselves and a proposed class of public educators who also had NJEA dues seized from their wages after they provided notice that they opposed those deductions. Petitioners allege that N.J. Section 52:14-15.9e's escape-period restriction is unconstitutional and it violates the First Amendment for the

NJEA to seize union dues from employees over their objections. Pet.App.9.

The district court granted Respondents summary judgment in a joint decision that also addressed similar claims made by different plaintiffs in *Smith v. New Jersey Education Ass'n*, No. 18-10381. Pet.App. 32-34. The district court characterized N.J. Section 52:14-15.9e's ten-day revocation period as a "draconian requirement" that, "in the absence of a contract providing additional opt-out dates and a more reasonable notice requirement (as is present here), unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union." Pet.App.52. The court also stated, albeit in dicta, that "even if the WDEA's revocation procedure was incorporated into a contract, such as the Union Dues Authorization Form, it would be unconstitutional if it were the public employee's sole method to resign membership." *Id.* at 54 n.2.

However, the district court held the restriction found in the dues deduction forms Fischer and Speck signed in 1999 and 2001—which specified that dues deductions could be stopped only on January 1 or July 1—to be enforceable despite *Janus*. Pet.App.51-52. The court thus concluded that Petitioners lacked standing to challenge N.J. Section 52:14-15.9e because its escape period allowed the Petitioners to stop dues deductions earlier (in late September) than they

would have been able to under the dues deduction forms (on January 1). Pet.App.54-55.

The Third Circuit affirmed the lower court's judgment in an unpublished opinion. Pet.App.4. The court agreed that Petitioners lacked standing to challenge N.J. Section 52:14-15.9e because its escape period supposedly left them in a better position than they would have been under the escape period in their dues deduction forms, which required Petitioners to pay union dues until January 1. Pet.App.15-16.

The Third Circuit premised its standing determination on its conclusion that the forms' restriction was enforceable, despite *Janus*, because the forms amounted to a contract. Pet.App.21-24. The court declared "*Janus* does not abrogate or supersede Plaintiffs' contractual obligations," and "*Janus* does not give Plaintiffs the right to terminate their commitments to pay union dues unless and until those commitments expire under the plain terms of their membership agreement." *Id*. at 24 (footnote omitted).

Turning to *Janus'* waiver requirement, the Third Circuit ruled that "[b]ecause enforcement of Plaintiffs' membership agreements does not violate the First Amendment given that those agreements are enforceable under laws of general applicability . . . we reject Plaintiffs' argument that Defendants were required to obtain an affirmative First Amendment waiver from Plaintiffs before deducting union dues from their

paychecks." Pet.App.24 n.18.[5] The Third Circuit thus held that proof of a *contract*, rather than proof of a *waiver* of First Amendment rights, permits the government and unions to restrict when employees can exercise their rights under *Janus*.

The Third Circuit is not alone in substituting a contract requirement for the waiver requirement this Court specified in *Janus*. 138 S. Ct. at 2486. The Seventh, Ninth, and Tenth Circuit similarly held that proof of a waiver is not required under *Janus* for the government and unions to extract dues from objecting nonmembers if there exists a contract that purports to authorize those deductions. *See Bennett v. AFSCME Council 31*, 991 F.3d 724, 731-33 (7th Cir. 2021), *petition for cert. filed* No. 20-1603 (May 14, 2021); *Belgau v. Inslee*, 975 F.3d 940, 950-52 (9th Cir. 2020), *petition for cert. filed* No. 20-1120 (Feb. 11, 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961-62, 964 (10th Cir. 2021), *petition for cert. filed* No. 20-1606 (May 14, 2021). A number of district courts have also reached the same conclusion. *See Belgau*, 975 F.3d at 951 n.5 (collecting cases).

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[5] Judge Phipps, concurring in part and concurring in the judgment, agreed with the majority's merits holding that the revocation restriction in the dues deduction forms were enforceable despite *Janus*. Pet.App.33-34. Judge Phipps, however, disagreed that this holding deprived the Petitioners of standing to challenge N.J. Section 52:14-15.9e because standing should not turn on a merits determination. Pet.App.32. Judge Phipps believed, instead, that the Court's merits holding deprived the Petitioners of a viable remedy against N.J. Section 52:14-15.9e. *Id*. at 33.

Petitioners now file this petition for certiorari to present to this Court the important question of whether states and unions need clear and compelling evidence that employees waived their First Amendment rights, as opposed to proof of a contract, to seize payments for union speech from objecting nonmembers. The Court's resolution of this question will largely determine the extent to which states and unions can restrict employees' speech rights under *Janus*.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to make clear that it meant what it said in *Janus*: governments and unions cannot seize payments for union speech from employees unless the employees waive their right not to subsidize that speech. 138 S. Ct. at 2486. This holding has particular force when the employees in question have provided notice they are nonmembers and oppose supporting the union financially. Unless these dissenting employees earlier waived their First Amendment right to stop subsidizing union speech, it certainly is unconstitutional for the government and unions to compel those objecting nonmembers to continue to pay for union speech.

The Third Circuit and three other appellate courts deviated from *Janus* by replacing this Court's waiver requirement with their own lesser contract requirement. This lesser standard eliminates the protections a waiver requirement provides to employees. This includes that purported waivers by employees of their First Amendment rights must be knowing, intelligent,

and voluntary, and enforcement of the waiver not be against public policy. *See D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972); *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

It is important that the Court correct the lower courts' failure to enforce *Janus'* waiver requirement because their alternative contract standard gives states and unions wide latitude to severely restrict employees' First Amendment rights. All states or unions have to do is to write any restrictions they desire into their dues deduction forms. There is no need to ensure that employees who sign those forms know of their rights under *Janus*. There are few limits on how burdensome states and unions can make their restrictions—as shown by the disturbing prevalence of escape-period restrictions that prohibit employees from exercising their right not to subsidize union speech for 335 to 355 days of each year. If this Court does not reject the holdings of the Third, Seventh, Ninth, and Tenth Circuits, millions of public employees will remain subject to onerous restrictions on their First Amendment rights.

The Court should not allow the fundamental speech rights it recognized in *Janus* to be hamstrung in this way. The Court should grant the petition to instruct lower courts to enforce *Janus'* waiver requirement. This requirement will, in turn, ensure that states and unions cannot enforce escape-period restrictions against dissenting employees unless there is clear and compelling evidence the employees knowingly, intelli-

gently, and voluntarily waived their First Amendment rights and that enforcement of that waiver is not against public policy.

I. The Third Circuit's Decision Conflicts with *Janus*.

A. *Janus* held that states and unions must have clear and compelling evidence of a constitutional waiver to seize union dues from employees.

1. In *Janus*, the Court announced the following standard to govern when the government and unions can take union dues or fees from employees:

> 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. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *Knox* [v. *SEIU Local 1000*, 567 U.S. 298, 312-13 (2012)]. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any

> money is taken from them, this standard cannot be met.

138 S. Ct. at 2486.

The Court's waiver requirement makes sense. Given employees have a First Amendment right not to pay for union speech, it follows that the government must have proof employees waived that right to constitutionally take payments from them for union speech. Over a dozen state attorneys general and the Federal Labor Relations Authority correctly interpret *Janus* in this manner. *See* Amicus Br. for the State of Alaska et al., pp. 9-15, *Belgau v. Inslee*, No. 20-1120 (U.S. Mar. 18, 2021); *Decision on Request for General Statement of Policy or Guidance*, *Off. of Pers. Mgmt.* (Petitioner), 71 F.L.R.A. 571 (Feb. 14, 2020).

2. The need for a waiver is especially apparent when the government and unions prohibit employees from stopping dues deduction for periods of time. Employees cannot be prohibited from exercising their First Amendment right not to subsidize union speech unless those employees knowingly waived their constitutional right for that time period.

Without proof of a waiver, the government necessarily violates dissenting employees' First Amendment rights by compelling them to subsidize union speech until an escape period is satisfied. Employees who provide notice outside the escape period that they are nonmembers and object to supporting the union will nevertheless have payments for union speech seized from their wages. These seizures will violate

the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). The need for clear and compelling evidence that employees waived their First Amendment rights under *Janus* is manifest when, as here, the government and a union compel objecting nonmembers to subsidize union speech pursuant to escape-period restrictions.

B. Lower courts are defying *Janus* by substituting a contract standard for the waiver standard this Court required.

The Third, Seventh, Ninth, and Tenth Circuits gutted *Janus'* waiver requirement by holding that proof of a waiver is *not* required for the government and unions to seize union dues from objecting, nonmember employees pursuant to escape-period restrictions. Pet.App. 24 n.18; *Bennett*, 991 F.3d at 732-33; *Belgau*, 975 F.3d at 951-52; *Hendrickson*, 992 F.3d at 961-62, 964. Those courts held it is sufficient if those employees contractually consent to restrictions on their First Amendment rights. *Id*. The courts thus substituted their own *contract* requirement for the *waiver* requirement this Court set forth in *Janus* to govern when states and unions can seize payments for union speech from employees.

The Third Circuit's decision should be reversed because it conflicts with *Janus*, 138 S. Ct. at 2486. The court's two rationales for not enforcing *Janus'* waiver requirement are both untenable.

1. The Third Circuit first reasoned that evidence of a constitutional waiver is unnecessary because employees who contractually consent to pay union dues until an escape period are not compelled to subsidize union speech in violation of their First Amendment rights. Pet.App.24 n.18; *see Bennett*, 991 F.3d at 732-33; *Belgau*, 975 F.3d at 951-52. This rationale ignores that *Janus* requires evidence of a waiver to establish employee consent to paying for union speech—i.e., a waiver is a prerequisite to proving consent. 138 S. Ct. at 2486. Without evidence employees waived their right not to subsidize union speech, the government has not satisfied this Court's "standard" that "employees [must] clearly and affirmatively consent before any money is taken from them." *Id*.

The Third Circuit's rationale also ignores the dispositive fact that Fischer and Speck had union dues seized from their wages *after* they provided notice that they were nonmembers and opposed those seizures. Pet.App.6-7. For the Third Circuit to say that these dissenting employees were not compelled to subsidize NJEA's speech, Pet.App.24 n.18, ignores that Fischer and Speck affirmatively stated they opposed financially supporting NJEA and were forced to do so against their express wishes.

The very purpose and effect of escape-period restrictions are to compel employees who no longer wish to support a union financially, or who never freely chose to do so in the first place, to continue to support it until the escape period is satisfied. For such employees, escape-period restrictions are effectively an

agency shop requirement—a requirement that employees pay union dues or fees as a condition of their employment—with a limited duration.

In some ways, escape-period requirements are worse than the agency-fee law *Janus* held unconstitutional. Illinois' law required government employers to deduct from nonconsenting employees' wages *reduced* union fees that excluded monies used for some political purposes. 138 S. Ct. at 2486. New Jersey's revocation law requires that government employers deduct *full* union dues, including monies used for partisan political purposes, from employees who object to these seizures outside its escape period. N.J. Stat. Ann. § 52:14-15.9e (Pet.App.61). For employees who do not want to support union expressive activities, escape-period restrictions can be more harmful to their speech rights than an agency shop requirement.

If *Janus'* waiver requirement applies in any circumstance, it applies when employees are prohibited from exercising their First Amendment rights to stop subsidizing union speech. The Third Circuit's conclusion that no waiver is required for the government and unions to continue to seize dues from nonmembers over their express objections cannot be reconciled with this Court's holding in *Janus*.

2. The other justification the Third, Seventh, Ninth, and Tenth Circuits set forth for not requiring evidence of a waiver is the proposition that state enforcement of a private agreement pursuant to a law of general applicability does not violate the First Amendment

under *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). *See* Pet.App.23; *Bennett*, 991 F.3d at 730-31; *Belgau*, 975 F.3d at 950; *Hendrickson*, 992 F.3d at 964. *Cohen* has no application here because this case does not concern a private agreement being enforced by a law of general applicability. It concerns government seizures of monies for union speech that clearly violate the First Amendment under *Janus*.

Cohen concerned a promissory estoppel action against a newspaper based on an alleged breach of a private contract. 501 U.S. at 666. The Court found that enforcing a promissory estoppel law against the newspaper for that breach did not violate the newspaper's First Amendment rights because it was "a law of general applicability." *Id.* at 669–70. The Court did not need to address whether the newspaper waived its First Amendment rights because it found those rights were not violated in the first place.

The situation here is nothing like that in *Cohen*. *First*, dues deduction forms purporting to authorize the government to deduct union dues from employees' wages are not "private" agreements, but are agreements *with government employers*. *See Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018) (recognizing that "[a]dues-checkoff authorization is a contract between an employer and employee for payroll deductions" and that "[t]he union itself is not a party to the authorization"). It is the government that both deducts union dues from public employees' wages and enforces restrictions on stopping those deductions. This is clear from New Jersey's dues

deduction statute, which authorizes deductions when a public employee "indicate[s] in writing . . . *to the proper disbursing officer* his desire to have any deductions made from his compensation . . ." Pet.App.60 (emphasis added). The statute also provides that employees "may revoke such authorization by providing written *notice to their public employer* during the 10-days following each anniversary date of their employment." *Id*. at 61 (emphasis added).

Second, government employers do not deduct union dues from employees' wages pursuant to a law of general applicability, like the promissory estoppel law in *Cohen*. *See* 501 U.S. at 669-70. They do so pursuant to narrow state payroll deductions laws that specify under what circumstances governmental employers shall deduct union dues from employees' wages. *See supra* at 2 n.1 (citing several state dues deduction laws). Here, N.J. Section 52:14-15.9e specifies when government employers in New Jersey must deduct union dues from employees' wages, including deducting union dues from dissenting employees who provide notice of revocation outside the specified ten-day escape period. Pet.App.60-61.

Finally, unlike with the conduct at issue in *Cohen*, it is beyond peradventure that it violates the First Amendment for the government and unions to seize union dues or fees from nonconsenting employees. *Janus*, 138 S. Ct. at 2486. And that is what New Jersey public employers and NJEA did to the Petitioners and putative class members: They seized payments for NJEA from those teachers' wages after they resigned

their union membership and objected to financially supporting the NJEA. Thus, unlike in *Cohen*, a waiver analysis must be conducted here because, absent proof these teachers waived their First Amendment rights to stop subsidizing NJEA's speech, the seizures undoubtedly were unconstitutional.

C. The lower courts' holdings are inconsistent with this Court's requirement that constitutional waivers must be knowing, intelligent, voluntary, and not against public policy.

Unless corrected by this Court, the decision by several courts to substitute a lower contract standard for the constitutional-waiver standard this Court announced in *Janus* will have profound and negative implications for employees' First Amendment rights. That lower standard permits governments and unions to impose onerous restrictions on unwitting employees that would never pass muster under the Court's constitutional-waiver standard.

1. The standard to establish a waiver of constitutional rights is exacting. "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson*, 304 U.S. at 464 (footnotes omitted). The Court invoked this principle in *Janus,* holding that "a waiver cannot be presumed," but "must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145).

The Court then cited to three precedents that held an effective waiver requires proof of an "'intentional relinquishment or abandonment of a known right or privilege." *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Johnson*, 304 U.S. at 464); *see Curtis Publ'g*, 388 U.S. at 143-45 (applying this standard to an alleged waiver of First Amendment rights). These criteria are sometimes stated as requiring that a waiver must be "voluntary, knowing, and intelligently made." *D. H. Overmyer*, 405 U.S. at 185; *see Fuentes v. Shevin,* 407 U.S. 67, 94-95 (1972) (same); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (similar). Along with these criteria, a purported waiver is unenforceable as against public policy "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392 (footnotes omitted).

2. The results here and in other cases that upheld restrictions on when employees can stop government dues deductions would be very different if lower courts had enforced the constitutional waiver standard *Janus* requires. The Respondents here cannot satisfy any criteria for proving that Fischer or Speck waived their First Amendment right to stop subsidizing NJEA's speech.

a. Petitioners' did not knowingly or intelligently waive their First Amendment rights. These criteria require that a party have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Moran v. Bur-*

bine, 475 U.S. 412, 421 (1986). To prove that employees who signed dues deduction forms had a full awareness of their constitutional right not to subsidize union speech, the government must prove employees were notified of that right. Dues deduction forms seldom include that crucial information. Here, nothing on Petitioners' forms notified them of their right not to support the NJEA financially, or stated that they were agreeing to waive that right.[6] On their face, the forms do not prove Petitioners knowingly or intelligently waived their rights under *Janus*.

In fact, employees who signed dues deduction forms years before *Janus*, such as Fischer and Speck, could not have knowingly or intelligently waived their First Amendment right not to subsidize union speech because that right had yet to be recognized. *See Curtis Publ'g*, 388 U.S. at 143-45 (holding a defendant did not knowingly waive a First Amendment defense at trial because the defense was recognized only after the trial had concluded).

b. Petitioners did not voluntarily waive their First Amendment rights. This criterion requires a purported waiver be "freely given." *Janus*, 138 S. Ct. at 2486. Dissenting employees required to subsidize union speech when they signed dues deduction forms could not have voluntarily waived their right not to subsidize union speech because they were not given

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[6] *See* C.A. App. at 61, 76, ECF No. 21, *Fischer v. NJEA*, No. 19-3914 (3d Cir. Apr. 7, 2020).

that option. When Petitioners signed dues deduction forms in 1999 and 2001, they had no choice but to subsidize NJEA and its speech under New Jersey's agency fee law. *See* Pet.App.39. Petitioners and similarly situated employees could not have waived a right they were never afforded.

The situation is akin to a hypothetical in which a court instructs defendants that their only options are to plead guilty to one of two charges, and that they cannot plead innocent. No one would say that defendants who pled guilty to a charge voluntarily waived their right to plead innocent. They were never given that option. The same logic applies to employees who acquiesced to dues deductions when their only options were to subsidize the union either by paying union dues or agency fees.

c. Escape-period restrictions are against public policy. The district court was correct to describe New Jersey's ten-day escape-period restriction as "draconian" and to find it would be unconstitutional "even if the . . . revocation procedure was incorporated into a contract, such as the Union Dues Authorization Form." Pet.App.52, 54 n2. This is because "interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392 (footnote omitted).

The policy weighing against prohibiting employees from exercising their rights under *Janus* for 355-56 days of each year is of the highest order: employees' First Amendment right not to subsidize speech they

do not wish to support. *See Janus*, 138 S. Ct. at 2463-64. "[C]ompelled subsidization of private speech seriously impinges on First Amendment rights" and "cannot be casually allowed." *Id.* at 2464. In *Curtis Publishing*, the Court rejected an alleged waiver of First Amendment freedoms, finding that "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." 388 U.S. at 145.

There is no countervailing interest in severely restricting when employees can exercise their First Amendment rights to stop paying for union speech. The Court held in *Knox* that unions have no constitutional entitlement to monies from dissenting employees. 567 U.S. at 313 (citing *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007)). The Court further held that union financial self-interests in collecting monies from dissenting employees—even monies to which the union arguably was entitled under state law—do not outweigh dissenting employees' First Amendment rights. *Id.* at 321.

Under a proper constitutional-waiver analysis, the restrictions on stopping dues deduction required under N.J. Section 52:14-15.9e—both before it was amended by the WDEA and after it was amended by the WDEA—could not be enforced against the Petitioners and other dissenting New Jersey educators. A court conducting a constitutional-waiver analysis would therefore make all the difference in this case.

The same is true in other cases that challenge restrictions on when employees can stop government dues deductions. If enforced, *Janus'* waiver requirement would prohibit states and unions from restricting employees' exercise of their rights under *Janus* unless employees knowingly, intelligently, and voluntarily consented to the restrictions. And the restrictions could not be so onerous as to be against public policy. This salutary result is why it is important that the Court require lower courts to enforce *Janus'* waiver requirement. *See infra* 25-30.

D. The Court should take the second question presented if it takes the first question.

The Third Circuit found Petitioners lack standing to challenge N.J. Section 52:14-15.9e based on the premise that the escape-period restriction in their dues deduction forms was enforceable and required Petitioners to pay union dues until January 2019. Pet.App. 16-17. The Third Circuit's premise is incorrect for the reasons just stated—that restriction is unenforceable because Petitioners did not waive their First Amendment right to stop subsidizing NJEA and its speech. Deprived of that false premise, the court's standing decision collapses.

Since Fischer and Speck did not waive their First Amendment rights under *Janus*, they were free to exercise those rights at times of their choosing. They chose to resign from NJEA and object to dues deductions in July 2019. Pet.App.7. Fischer and Speck thereafter had monies for NJEA's speech seized from

their wages until late September because N.J. Section 52:14-15.9e mandates that employees only can stop dues deductions on the thirtieth day after their anniversary of employment by giving notice during an earlier ten-day period. *See supra* at 6. Fischer and Speck were thus injured as a direct result of N.J. Section 52:14-15.9e's escape-period restriction.

In short, the Court's resolution of the first question presented will control the answer to the second question. If the Court takes the first question, it also should take the second for the sake of completeness.

II. This Case Is Exceptionally Important for Millions of Public Employees Who Are Subject to Escape-Period Restrictions.

The Court's review is urgently needed because states and unions are severely restricting when millions of employees can exercise their First Amendment rights under *Janus*, and a growing number of courts are allowing them to get away with it. To rein in these abuses, the Court should make clear that states and unions cannot compel dissenting employees to subsidize union speech absent proof the employees waived their First Amendment rights.

1. To resist this Court's holding in *Janus*, twelve states amended their dues-deductions laws to require government employers to enforce escape-period restrictions—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington. *See supra* at 2-3. Public employers in at least five other

states also enforce such restrictions, including Alaska, Minnesota, New Mexico, Ohio, and Pennsylvania. *Id*. In 2020, there were an estimated 4,767,211 public-sector union members in those states alone.[7] Thus, roughly 4.7 million public employees are likely subject to, or could be subjected to, restrictions on when they can exercise their First Amendment right to stop subsidizing union speech.

These restrictions are onerous and prohibit employees from exercising their rights under *Janus* except during escape periods that are often as short as ten days per year. *See supra* at 3. Employees who want to exercise their free speech rights outside the escape period, by providing notice that they are nonmembers and that they object to dues deductions, are compelled to continue to subsidize union speech until the escape period is satisfied.

This compulsion infringes on fundamental speech and associational rights. The Court reiterated in *Janus* that "'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty,

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[7] *See* Barry T. Hirsch and David A. Macpherson, Union Membership and Coverage Database from the Current Population Survey: Note, *Indus. & Labor Rels. Rev.*, Vol. 56 No. 2, January 2003, pp. 349-54 (updated annually at unionstats.com); https://www.unionstats.com/State_U_2020.htm (data for 2020 that estimates 4,767,211 public-sector employees in the seventeen states noted above).

can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" 138 S. Ct. at 2463 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) (emphasis omitted). That fixed star shines throughout the year, and not only for ten days. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." *Id.* at 2463. "Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* at 2464. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* (quoting A Bill for Establishing Religious Freedom, 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). The sole effect of an escape-period restriction is to compel employees who no longer want to contribute money to propagate union speech to continue to do so.

The Court would never tolerate such restrictions on First Amendment rights in similar constitutional contexts. For example, the Court in *Janus* found an individual subsidizing a public-sector union comparable to subsidizing a political party because both entities engage in speech on matters of political and public concern. 138 S. Ct. at 2484. The Court would not permit states to continue to seize contributions for a favored political party from dissenting employees unless they object to those seizures during an arbitrary ten-day period mandated by statute.

The Court in *Janus* also found "measures compelling speech are at least as threatening" to constitutional freedoms as measures that *restrict* speech, if not more so, because "individuals are coerced into betraying their convictions." *Id.* at 2464. The Court would not countenance states prohibiting individuals from speaking about union or public affairs except during annual ten-day periods. To compel individuals to subsidize union speech concerning public affairs unless they object in that limited period is an equally egregious violation of their First Amendment rights.

2. Yet the Third, Seventh, Ninth, and Tenth Circuits gave states and unions a green light to severely restrict when employees may exercise their First Amendment rights not to subsidize union speech. The courts did so by holding *Janus'* waiver requirement inapplicable whenever employees sign contracts authorizing government deductions of union dues. Pet.App.24 n.18; *Bennett*, 991 F.3d at 732-33; *Belgau*, 975 F.3d at 951-52; *Hendrickson*, 992 F.3d at 964.

Under this lesser contract standard, states and unions can easily restrict when and how employees may exercise their First Amendment right under *Janus* simply by writing restrictions into the fine print of their dues deduction forms. There is no requirement that states or unions notify employees presented with those forms of their constitutional right not to financially support the union. There are few impediments to states and unions including oppressive restrictions in the forms, such as a requirement that employees

cannot stop state dues deductions except during annual ten-day escape periods. *See, e.g.*, *Woods v. Alaska State Emps. Ass'n,* 496 F. Supp. 3d 1365, 1368 (D. Alaska 2020) (dues deduction form with ten-day escape-period restriction). Employees can unwittingly sign their First Amendment rights away for a year or more without having any idea they are doing so.

First Amendment speech and associational rights deserve greater protections than this. And the Court provided for such protections in *Janus* when it held that, to take payments for union speech from employees, states and unions must have clear and compelling evidence those employees waived their First Amendment rights. 138 S. Ct. at 2486.

The Court's waiver requirement will protect employee speech rights and end the worst abuses of those rights. The requirement that a waiver must be "knowing" and "intelligent" will require that employees presented with restrictive dues deduction authorizations be notified of their constitutional rights, allowing them to make informed decisions about whether to subsidize union speech. The "voluntary" criteria for a waiver will ensure that employees also are permitted to make a free choice. That purported waivers are unenforceable if against public policy will curtail the ability of states and unions to impose onerous restrictions on employees, such as those that prohibit employees from exercising their constitutional rights for 335 to 355 days of every year.

The Court should not permit states and unions, with the blessing of several appellate courts, to hamstring the First Amendment right it recognized in *Janus*. To protect employees' ability to freely exercise their new found speech rights, it is critically important that the Court instruct the lower courts that they must enforce *Janus'* waiver requirement.

III. This Case Is a Suitable Vehicle to Clarify That a Waiver Is Required for States and Unions to Seize Payments for Union Speech From Objecting Employees.

This case squarely presents the question of whether *Janus* requires proof of a constitutional waiver for governments and unions to extract monies for union speech from dissenting employees. The Third Circuit unambiguously held that *Janus'* waiver requirement does not apply when employees contractually consent to such restrictions, stating that "*Janus* does not abrogate or supersede Plaintiffs' contractual obligations." Pet.App.24. There are no jurisdictional hurdles to the Court evaluating the merits of that holding, for "Defendants do not dispute that Plaintiffs have standing to pursue their challenges to the membership agreements." *Id*. at 21 n.15. This case is a suitable vehicle for resolving the important first question presented.

The non-precedential nature of the Third Circuit's opinion is no reason to deny review because the legal issue here impacts more than just the parties to the case. States and unions are widely resisting the

Court's holding in *Janus* by prohibiting employees from exercising their speech rights except during short escape periods. The Seventh, Ninth, and Tenth Circuits have, in precedential opinions, upheld these onerous restrictions on the same grounds as the Third Circuit here. If the Court wants to correct the lower courts' uniform errors and clarify that evidence of a waiver is required to restrict employees' rights under *Janus*, it can do so in this case.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

MICHAEL P. LAFFEY
222 Highway 35
Red Bank, NJ 07701
(732) 642-6784

WILLIAM MESSENGER
Counsel of Record
AARON B. SOLEM
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION
8001 Braddock Rd., Suite 600
Springfield, VA, 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Petitioners

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