No. 20-1751

In the Supreme Court of the United States

SUSAN FISCHER, ET AL.,

Petitioners,

v.

PHIL MURPHY, GOVERNOR OF NEW JERSEY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider a challenge to a statute brought against a state actor who has no role in enforcing the statute, where the statute did not injure Petitioners, and where a judgment in Petitioners' favor would not benefit them.

2. Whether the First Amendment is violated when dues are deducted from the pay of a public employee who voluntarily joined a union and affirmatively authorized union dues to be deducted for the relevant time period.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

INTRODUCTION

Although Petitioners present this as a straightforward case involving the constitutionality of New Jersey labor law after *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), nothing could be further from the truth. Petitioners, two public school teachers, say that the Third Circuit has allowed New Jersey to force them to pay money to a union over their objection. But that is not what the unanimous panel's unpublished opinion did, and certainly not what the state statute requires. Certiorari should be denied.

First, Petitioners misunderstand this case, and so they overlook the profound vehicle problems that bar this Court's review. Most importantly, the panel below did not speak to the constitutionality of the challenged law—the Workplace Democracy Enhancement Act—but instead found Petitioners lack Article III standing to attack it. And for good reason: although Petitioners claim that the WDEA restricts when they can give notice that they wish to terminate union dues payments, and when that notice can take effect, the undisputed record shows that Petitioners were able to give notice *outside* of that period. Petitioners have no injury from a state law that was never applied to them, and certainly none that could be redressed by an injunction against that statute. Because the panel rested its decision on basic standing law, this case is a profoundly flawed vehicle for resolving Petitioners' constitutional claims on the merits.

Not only that, but other jurisdictional problems—even beyond the ones identified by the panel—bar this Court from reviewing the question presented. For one,

this case is moot. Petitioners are seeking prospective relief against a state law that addresses the timing for union members to stop paying dues, but Petitioners are no longer union members and have no intention of becoming members again. Because the law cannot be applied to them in the future, there is therefore no basis for them to seek an injunction. For another, the instant suit violates sovereign immunity rules: Petitioners named the Governor as a defendant, but he has no role in enforcing the law against them, and they failed to name the agency that does. Under *Ex Parte Young*, this federal action cannot go forward.

Second, even looking beyond these dispositive vehicle problems (and there is no reason to look beyond them), Petitioners present a splitless case unworthy of certiorari. Petitioners say that the First Amendment gives them the unfettered right to stop paying union dues, even when they make a contractual commitment to pay such dues for a set time. But although the State cannot require them to pay fees to a union, it can hold them to their contractual promises, in this context as in any other. Every single circuit and district court to review the issue has reached that conclusion, and this Court just recently declined to review the very same question. Given the continued unanimity, there is no basis to treat this petition differently.

Finally, this petition would not justify review even without these vehicle problems and absence of a split, because the issue is unimportant and the decision below is correct. As to the former, there is no reason to think that this unpublished Third Circuit decision will have any bearing on other state laws, and Petitioners overlook the distinctions between New Jersey law and

the law in other states. Not only that, but Petitioner errs when claiming that this unpublished decision could or will affect other New Jersey employees—especially when the precise issues presented will hardly ever arise going forward. And in any event, the decision below both as to standing and the merits is faithful to precedents and principles repeatedly relied on by this Court. There is no error in need of correction—and no other basis for certiorari.

STATEMENT OF THE CASE

1. Petitioners Susan Fischer and Jeanette Speck are public school teachers employed by the Township of Ocean Board of Education (the School Board). CA3 App. 57, 72. At the start of their employment, each Petitioner voluntarily joined the Township of Ocean Education Association (TOEA), the local union affiliate of the New Jersey Education Association (NJEA). CA3 App. 57, 72. As members, Petitioners enjoyed various benefits and privileges. Petitioners were entitled to free legal assistance in employment proceedings and to complimentary life insurance benefits. CA3 App. 129. They had access to several benefit programs, including income protection plans, supplemental life insurance, long-term care insurance, lines of credit, and home financing programs. *Id*. And Petitioners were allowed to vote in union elections and run for union office. CA3 App. 125-126.

Once Petitioners agreed to join the union and reap the benefits of membership, they were faced with another choice: whether to pay their union dues in cash by remitting their dues directly to the union on an annual basis, or to pay the same dues through a payroll deduction. CA3 App. 117. If a union member selected

the deduction method, their employer would automatically deduct dues from their paycheck in ongoing installments over the course of the year and remit them to the union. CA3 App. 117. Each Petitioner chose the payroll deduction option and signed a dues deduction authorization agreement (Dues Deduction Agreement) that provided:

> I hereby request and authorize the disbursing officer of the above school-district to deduct from my earnings, until notified of termination, an amount required for current year membership dues and such amounts as may be required for dues in each subsequent year, all as certified by the affiliated and unified organizations…. This authorization may be terminated only by prior written notice from me effective Jan. 1 or July 1 of any year.

CA3 App. 61, 76. Petitioners thus voluntarily agreed, by contract, to continue paying union dues via payroll deductions unless they provided written notice of termination, with such termination taking effect the earlier of the next January 1 or July 1, but no sooner.

2. In May 2018, the New Jersey legislature enacted the Workplace Democracy Enhancement Act, 2018 N.J. Law Ch. 15 (WDEA or Act). As relevant here, the WDEA guarantees that employees who have chosen to remit union dues through payroll deductions have at least one chance each year to terminate such an agreement. Specifically, the Act provides that public union members "may revoke such authorization by providing written notice … during the 10 days following each anniversary date of their employment" (notice provision). WDEA at § 6, codified at N.J. Stat. Ann. § 52:14-

15.9e. Second, the WDEA states that "[a]n 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" (effective date provision). *Id.*

Importantly, the WDEA does not preclude or eliminate additional revocation opportunities afforded by contract or other law. Thus, if a union member has a separate contractual right to provide notice of revocation—such as by giving notice on January 1 or July 1 of the year—then nothing in the WDEA prevents notice from being accepted at a time other than the minimum 10-day period the Act guarantees. And likewise, a union member's revocation will become effective the earlier of either the WDEA guarantee (thirty days after the employment anniversary) *or* the date afforded to the member by contract. In other words, these state law provisions provide union members with an additional date by which their dues authorization revocation becomes effective, but they do not eliminate contracted-for notice and effective-date periods.

3. In *Janus*, this Court held that collection of representation fees from public employees who declined to join a union violates free speech rights "by compelling them to subsidize private speech on matters of substantial public concern." 138 S. Ct., at 2460. In the wake of that decision, Petitioners gave notice to the NJEA and their employer, the School Board, that they were revoking the prior dues deduction authorization. CA3 App. 119 ¶¶13-15. Their dues deductions "terminated on September 30, 2018, which was the earlier of January 1, July 1, and 30 days after" the anniversary date of their hire. CA3 App. 119 ¶¶14-15.

The "NJEA did not reject or refuse to honor th[e]se revocation requests" even though neither request was submitted within the WDEA's 10-day notice period. CA3 App. 119 ¶16. Rather, the NJEA "accepted and processed the requests" because its "policy" was "to accept revocation requests at any time during the year." Pet. App. 7; see also CA3 App. 119 ¶16. The WDEA 10-day notice requirement thus was not applied to nor "enforced against" Petitioners. Pet. App. 53. Further, the effective date provision of the WDEA inured to Petitioners' benefit in that it allowed them to cease paying dues on September 30—three months earlier than the January 1 date Petitioners had otherwise committed to in their Dues Deduction Agreements.

4. After their dues deductions had fully ceased, Petitioners filed a putative class action lawsuit against Governor Murphy in his official capacity, the NJEA, and the TOEA, alleging these defendants violated *Janus* by collecting union dues from Petitioners even after they revoked their consent. CA3 App.40. Although the WDEA describes the circumstances under which an *employer* may deduct union dues from its employees' salaries on behalf of the union, Petitioners did not name their employer, the School Board, as a defendant. Rather, Petitioners filed suit against the Governor, even though the State does not employ Petitioners and the Governor has no role to play in applying the provisions of the WDEA to them.

In Count I, the only count against a non-union Defendant, Petitioner described the claim as "against the State," CA3 App. 48, demanded a declaratory judgment that the WDEA was "unconstitutional under the

First Amendment," and sought injunctive relief "[p]ermanently enjoin[ing] the State of New Jersey from maintaining and enforcing" the WDEA, CA3 App. 49-50. Against the union defendants, Petitioners sought declaratory relief that the unions violated their First Amendment rights by collecting dues without consent, and injunctive relief enjoining the unions from deducting dues from members who have provided notice that they wish to revoke a prior dues deduction authorization. CA3 App. 50. Following discovery, the parties cross-moved for summary judgment.

5. The district court (Bumb, J.) denied Petitioners' motion for summary judgment, granted Respondents' motions for summary judgment, and denied class certification as moot. Pet. App. 38-39. The court held that Petitioners lacked standing because the WDEA never caused them to suffer injury. Pet. App. 53. The court found that "with discovery now closed, the record indicates that the WDEA's" 10-day notice provision "was not enforced against Plaintiffs." Pet. App. 52-53. Just the opposite: even though Petitioners filed their notice to terminate dues deductions *outside* that 10-day window, their notice was nevertheless accepted. *Id.*

The district court also found—based on its review of the summary judgment record—that the Act's effective date provision in practice *supplemented* the terms of the Dues Deduction Agreements to which Petitioners committed themselves. *Id.* Said another way, because the WDEA date (30 days after the anniversary of their hire) arrived *before* January 1 or July 1, this provision actually allowed Petitioners to "resign their union memberships earlier than they otherwise would have been entitled to." *Id*. That meant Petitioners had

actually only benefited "from the manner in which the [TOEA] applied the WDEA," such that Petitioners suffered no injury and lacked standing to challenge operation of that statute. Pet. App. 55.

The court also rejected Petitioners' argument that their Dues Deduction Agreements were "invalid because they were obtained before *Janus* clarified their First Amendment rights to abstain from paying dues to the union." Pet. App. 49-50. Preliminarily, the court observed, "*Janus* did not concern the relationship of unions and members; it concerned the relationship of unions and non-members." Pet. App. 51. Further, "'the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law.'" Pet. App. 51 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991)). Here, Petitioners plainly "voluntarily agreed to union membership, with full deduction of dues." Pet. App. 49. Thus, the court concluded, "*Janus* does not invalidate the existing contractual relationships between unions and their members." Pet. App. 51.

6. In an unpublished ruling, a Third Circuit panel comprised of Judges Shwartz, Phipps, and Fisher affirmed. The panel concluded that Petitioners "lack[ed] standing to challenge the WDEA's 10-day notice" provision. Pet. App. 13. Consistent with "NJEA's policy," the union had actually "accepted" and processed Petitioners' revocation notices even though they "were not submitted during the 10 days following the employee's anniversary date of hire." Pet. App. 7. So Petitioners could not have suffered an injury-in-fact from a provision of the WDEA—the notice provision—that had not been applied to them. Pet. App. 55.

Similarly, the panel found that Petitioners lacked standing "to challenge the WDEA's requirement that an employee wait until 30 days 'after [her] anniversary date of employment' before dues revocation will be effective." Pet. App. 16. As to Petitioners, the application of the WDEA's effective date resulted in the termination of their union dues payments "three months earlier than what would have been possible under their membership agreements standing alone," saving the two Petitioners "from paying three months of unwanted union dues." Pet. App. 16-17. The WDEA's effective date provision therefore "conferred a benefit" on Petitioners, and it followed that Petitioners were "unable to establish" either the causation or redressability elements of standing when seeking to challenge that provision's terms. Pet App. 17.

Finally, the court rejected Petitioners' claim that *Janus* provided them a right to terminate union membership agreements at any time in contravention of the Dues Deduction Agreements they had signed. Pet. App. 24. The court found that Petitioners "chose to enter into membership agreements … in exchange for valuable consideration," and "a party cannot avoid its independent contractual obligations simply because [of] a change in the law" after the agreement is signed. Pet. App. 22, 23-24. As the panel held, "*Janus* does not abrogate or supersede Plaintiffs' contractual obligations, which arise out of longstanding, common law principles of 'general applicability.'" Pet. App. 24 (quoting *Cohen*, 501 U.S., at 670).

Judge Phipps concurred in the judgment, agreeing the district court had properly dismissed the case. Pet. App. 25. While Judge Phipps thought Petitioners had

Article III standing to challenge the WDEA, he nevertheless "agree[d] with the Majority's rejection of the former union members' challenges to their membership agreements," and he also agreed that "neither declaratory nor injunctive relief is appropriate for their challenges to the WDEA." Pet. App. 33-34.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to resolve the constitutionality of the WDEA. A series of vehicle problems—including standing, mootness, and sovereign immunity—would prevent this Court from reaching that issue in this case. But even if Petitioners overcame that hurdle, and they cannot, this case would be a poor candidate for review: it presents a splitless question, with limited impacts, on which a unanimous Third Circuit panel properly applied First Amendment principles and precedents. This Court should deny certiorari, as it recently did in *Belgau v. Inslee*, No. 20-1120 (June 21, 2021), which presented the same question.

I. This Case Is A Poor Vehicle To Review The Questions Presented.

Lack of standing, Article III mootness, and sovereign immunity render this case an unsuitable vehicle for addressing the merits question in this case. Each vehicle problem alone would prove fatal to review; together, they are overwhelming.

1. Although Petitioners frame this as a case about the validity of the WDEA, Petitioners lack standing to challenge the statute. As discussed more fully above, see pp.4 - 5, the WDEA has two provisions concerning dues revocation. First, the "WDEA permits public employees to revoke their authorization for the payroll

deduction of their union dues during an annual ten-day period following the anniversary dates of their employment"—referred to as the notice provision. Pet. App. 13. Here, however, this notice provision "was not enforced against" Petitioners. Pet. App. 53. The "undisputed evidence" is that the NJEA, consistent with its policy, "accepted and processed [Petitioners'] July 2018 revocation notices—even though those notices were submitted earlier than the ten-day notice period." Pet. App. 15; see also CA3 App. 119 ¶6. Because this provision did not affect Petitioners whatsoever, Petitioners cannot "establish[] that they suffered (or are likely to suffer) an 'injury-in-fact'" and therefore "lack standing to challenge its constitutionality." Pet. App. 53; see also Pet. App. 4.

A second provision of the WDEA provides that an employee's "revocation of authorization for the payroll deduction of employee organization fees shall be effective on the 30th day after the anniversary of employment"—referred to as the effective date provision. N.J. Stat. Ann. § 52:14-15.9e. While this provision was applied to Petitioners, it had the *salutary* effect of enabling them to stop paying dues on September 30, 2018, "earlier than they otherwise would have been entitled to under … the terms of the Union Dues Authorization Forms (January 1, 2019)." Pet. App. 53. That is to say, while the Dues Authorization Agreement Petitioners had voluntarily signed provided that dues would cease on the earlier of January 1 or July 1, the WDEA provided an additional opportunity that actually worked to the *benefit* of Petitioners, whose anniversary dates of employment were in late August. Pet. App. 6-7. "Effectively, the statute's thirty-day provision saved the

Plaintiffs from paying three months of unwanted union dues." Pet. App. 17. Because "the WDEA's thirty-day provision conferred a benefit on" Petitioners, they cannot meet the injury-in-fact prong of the standing analysis, and have no right under Article III to challenge it in federal court. Pet. App. 17.

For similar reasons, Petitioners' injury is also not redressable. As the Third Circuit explained, a declaration that confirms Petitioners can give their notice of union dues termination outside of the WDEA window would make no difference, as Petitioners already *did* give notice outside of the WDEA window, and that notice was accepted. Pet. App. 15. And as to the effective date provision, here the "invalidation of the statute would leave these Plaintiffs bound by the effective date in their respective membership agreements, each of which requires them to pay union dues for a *longer period* than required under the WDEA." Pet. App. 18 (emphasis added). So Petitioners' alleged injury—payments to a union beyond the date Petitioners wanted to terminate them—cannot be redressed by an injunction against the WDEA, and would have put them in a worse position. It follows that Petitioners "lack Article III standing to challenge" these two provisions of the WDEA. Pet. App. 20. That leaves this case a tremendously weak vehicle in which to address the constitutionality of the WDEA itself.

2. Even if Petitioners had standing, the claims are moot. A live dispute "must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Here, the relief Petitioners seek against the State is prospective: an injunction against applying particular provisions

of the WDEA against them in the future. CA3 App. 49-50. By Petitioners' admission, however, dues were last deducted from their paychecks in September 2018 and Petitioners are no longer union members. See Decl. of Petitioner Speck ¶¶5, 8 (CA3 App. 73); Decl. of Petitioner Fischer ¶¶5, 8 (CA3 App. 58). Therefore, by their own terms, the WDEA and the Dues Deduction Agreement, which govern only revocation of dues deductions for union members, no longer apply to Petitioners. See N.J. Stat. Ann. § 52:14-15.9e.

There is also no risk that the WDEA will apply to them in the future. After all, Petitioners cannot be returned to union membership and Petitioners cannot have any further dues deducted without their consent. So, because Petitioners have not alleged that they intend to re-join the applicable unions and authorize further dues deductions, there is no risk that Petitioners will involuntarily make dues payments in the future, or that the WDEA will come into play. And since there are no ongoing effects that can be remedied via the judicial process, Petitioners' case is moot and the Court lacks jurisdiction. See, *e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.").

No exception to mootness exists. As this Court has held, a case "must be dismissed as moot" if the named plaintiffs' claims are moot and the district court's denial of class certification has not been overturned on appeal. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980); see also *Bd. of School Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975) (case is moot if the named plaintiffs' claims are moot and the district

court neither identified nor certified a class). And here the district court in fact denied Petitioners' motion for class certification, Pet. App. 59, and Petitioners never appealed the denial. Not only that, but the very premise of Petitioners' claims—that they only "bec[a]me or remained a member of the NJEA or authorized the deduction of union dues from my wages" because of the prior "representation fee requirement," Fischer Decl. ¶4 (CA3 App. 58); Speck Decl. ¶4 (CA3 App. 73)—no longer applies to union members prospectively. After all, because representation fees ended three years ago in the wake of *Janus*, an employee who had previously joined the union to avoid representation fees has had ample time to withdraw—meaning that there is no realistic possibility that employees will be similarly situated to Petitioners in the future.

In short, Petitioners claims are moot and no exception to mootness doctrine applies. That offers another fatal obstacle to reviewing the provisions of the WDEA that Petitioners seek to challenge here.

3. Even if Petitioners somehow maintained standing to challenge portions of the WDEA that never injured them, and could demand prospective relief even after terminating union membership, Governor Murphy has sovereign immunity.[1] In *Ex Parte Young,* the Court held that "[i]n making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that

[1] Although Governor Murphy did not raise sovereign immunity below, he may raise it before this Court. See *Edelman v. Jordan,* 415 U.S. 651, 677 (1974) ("the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court").

such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State" in violation of the Eleventh Amendment. 209 U.S. 123, 157 (1904). The Court noted the "'Governor ... as the executive of the State was, in a general sense, charged with the execution of all its laws,'" but rejected the notion that such general enforcement provided a necessary "connection" to override his immunity. *Id.* (quoting *Fitts v. McGhee*, 172 U.S. 516, 530 (1899)). A contrary rule, the Court averred, would allow "the constitutionality of every act passed by the legislature [to] be tested by a suit against the Governor," which is inconsistent "with the fundamental principle that [States] cannot, without their assent, be brought into any court at the suit of private persons." *Id.*, at 157 (citation omitted); see also *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 957, 964-66 (CA10 2021) (affirming on immunity grounds dismissal of Governor in post-*Janus* dues deduction case where Governor had no "particular duty" under, and "do[es] not enforce," the state law), *pet. for cert. filed* May 18, 2021 (No. 20-1606).

Ex Parte Young proves fatal. In short, the instant Complaint does not contain any allegations connecting the Governor to enforcement of the WDEA or Dues Deduction Agreement against Petitioners. Rather, Petitioners focus their allegations on both the NJEA and School Board. Petitioners allege that they notified the NJEA and the School Board that they "revoked their dues authorization and did not consent to any further deduction of union dues." CA3 App. 44 ¶23. It was the NJEA and the School Board—not the Governor—that allegedly "refused to honor" a "request that union dues not be deducted." CA3 App. 44 ¶24. Indeed the School

Board "deducted union dues," and the NJEA "collected them." CA3 App. 45 ¶29. The Governor is mentioned only twice in the Complaint: in the caption as a defendant sued in his official capacity, and in the designation of parties section. CA3 App. 41 ¶6. Petitioners further betray that the Governor is a mere stand-in for the State when they allege in Count I that their claim is "against the State of New Jersey." CA3 App. 47; see also CA3 App. 40 (alleging without specificity that the "State of New Jersey is defying *Janus* and enforcing a law"); CA3 App. 49-50 (demanding court "[p]ermanently enjoin the State of New Jersey from maintaining and enforcing" the WDEA).

Nor is this deficiency merely a matter of pleading, as the Governor "has no duty" to enforce the WDEA or Dues Deduction Agreement against Petitioners and so he "could not properly be made part[y] to the suit." *Ex Parte Young*, 209 U.S., at 158. The WDEA describes the circumstances under which the *employer* may deduct union dues from its employees' salaries on behalf of the union. See N.J. Stat. Ann. § 52:14-15.9e. Here, however, as the Third Circuit found, the School Board (not the Governor) employs Petitioners, but the School Board was not named in the suit. Pet. App. 7; see also N.J. Stat. Ann. § 18A:16-1 (mandating "each board of education ... shall determine and fix ... compensation" of its teachers); *id.* § 18A:29-4.1 (establishing that boards of education adopt salary policies, including schedules, for teachers).

Reflecting this reality, the School Board—not the Governor—bargained with the union and entered into a collective negotiations agreement. See 2018 Agreement Between Twp. Of Ocean Bd. Of Ed. & Twp. Of

Ocean Ed. Ass'n, available at https://tinyurl.com/m5hxppvd, at Art. VI (governing salaries) & Art. IX (reciting dues deduction notice and termination procedures).[2] Similarly, Petitioners' declarations and exhibits demonstrate that they directed their efforts to revoke dues authorization to the School Board, which employed them, and to the NJEA. See Speck Decl. and Exhs. (CA3 App. 72-88); Fischer Decl. and Exhs. (CA3 App. 57-71). Not a single such communication was directed to the Governor. As the Third Circuit noted, Petitioners "offered no evidence" the Governor was "responsible for TOBOE's [i.e., School Board's] communications or that [he] otherwise intended or threatened to enforce" the WDEA against them. Pet. App. 15. And that holds true for the entire putative class, which consists only of employees who belonged to the NJEA, CA3 App. 45, a union that includes no employees in the state executive branch. See New Jersey Office of Public Finance, Official State Bond Disclosure Statement (Apr. 22, 2021) at I-48 (listing New Jersey state employees and their unions), available at https://tinyurl.com/2aaur5ef. The Governor thus plays no role in enforcing this statute as to any of them.

Standing, mootness, and immunity all render this case a particularly poor vehicle to address union members' revocation of their dues deductions. Especially in light of the denial of a recent petition raising the same issue, these vehicle problems are fatal.

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[2] Petitioners submitted portions of their collective negotiations agreement to the Third Circuit, but not the entire agreement. See CA3 App. 78-80. For completeness, the State is providing this link to the entire agreement.

II. No Circuit Split Exists.

Even assuming that this case presented a proper vehicle for considering Petitioners' claims, certiorari would still be unwarranted. Recently, this Court denied a petition that presented the same questions. See *Belgau v. Inslee*, 975 F.3d. 940, 944 (CA9 2020), *cert. denied,* ___ S. Ct. ___, No. 20-1120 (Mem.) (June 21, 2021). No split has since emerged that would justify a new approach: as Petitioners concede, every circuit to address union dues deduction agreements after *Janus* has found that they violate neither the First Amendment nor precedent. See Pet. 9 (agreeing that the Seventh, Ninth, and Tenth Circuits reached "same conclusion" as the panel below).

Begin with *Belgau*, a case in which this Court has already (and recently) denied review. 975 F.3d, at 940. Those plaintiffs raised a claim similar to the one here: that *Janus* freed them of any duty to pay union dues, even dues to which they contractually committed. *Id.*, at 951. The panel denied that claim, explaining that while *Janus* meant payments to unions by nonmembers could not be compelled, "[t]he First Amendment does not support [e]mployees' right to renege on their promise to join and support the union … in the context of a contractual relationship." *Id.*, at 950. That reflected basic first principles; "[w]hen 'legal obligations ... are self-imposed,' state law, not the First Amendment, normally governs." *Id.*, at 950 (quoting *Cohen*, 501 U.S., at 671). Because these were employees "who affirmatively signed up to be union members," *id.*, at 944, a "swelling chorus of courts recogniz[ed] that *Janus* does not extend" to this situation, *id.,* at 951; see also, *e.g., id.*, at 951 n.5 (collecting cases).

The Seventh Circuit likewise agrees with the decision below. See *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724 (CA7 2021), *petn. for cert. filed* May 18, 2021 (No. 20-1603). Judges Sykes, Flaum, and Rovner had little trouble unanimously siding with *Belgau* and concluding that "[n]othing in *Janus* suggests that its holding regarding union-related deductions from nonmembers' wages also applies to similar financial burdens on union members" who "freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union." *Id.*, at 732. As the panel explained, the "common law of contracts is a 'law of general applicability' that applies broadly, rather than targeting any individual, and does not offend the First Amendment." *Id.*, at 731 (quoting *Cohen*, 501 U.S. at 670). Looking at the Third Circuit panel decision in this case, the panel identified "no reason to disagree" with its analysis, and instead "agree[d] … that the First Amendment does not provide … a right to renege on [one's] bargained-for commitment to pay union dues." *Id.*; see also *id.,* at 730 (recognizing that no case is to the contrary).

Finally, the Tenth Circuit also concluded that "*Janus* concerned non-member agency fees and has nothing to do with [an employee] agreeing to pay dues for his union membership." *Hendrickson*, 992 F.3d, at 963. Relying on the same precedents and principles as *Belgau*, *Bennett*, and the decision below, a unanimous panel confirmed that the "First Amendment does not preclude the enforcement of 'legal obligations' that are bargained-for and 'self-imposed' under state contract law." *Id.*, at 964 (quoting *Cohen*, 501 U.S., at 671).

Not only is there no conflict among the circuits, but Petitioners cannot even identify any dissenting opinions or district court opinions that adopt their view. See, e.g., *Laspina v. SEIU Pa. State Council*, 985 F.3d 278, 281 (3d Cir. 2021); *Oliver v. SEIU Loc. 668*, 830 F. App'x 76, 77 (3d Cir. 2020) (other Third Circuit panels unanimously adopting the same reasoning as below); *Belgau*, 975 F.3d, at 951 n.5 (collecting district court decisions); *Mendez v. Cal. Teachers Ass'n*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020) (recognizing that "every court to consider the issue has concluded[] *Janus* does not preclude enforcement of … dues deduction authorization agreements"); *Allen v. Ohio Civil Serv. Emps. Ass'n*, 2020 WL 1322051, *12 (S.D. Ohio Mar. 20, 2020) (describing "the unanimous post-*Janus* district court decisions" on this issue). In other words, Petitioners seek a splitless grant to overturn a consensus view that "*Janus* does not extend a First Amendment right to avoid paying union dues when those dues arise out of a contractual commitment" voluntarily agreed to by union members. Pet. App. 23.

Because the lack of a split has only persisted (and the unanimity has only deepened) since the Court recently denied certiorari on this question, the same result—denial—should obtain here.

III. This Case Does Not Otherwise Warrant Certiorari.

This is not the rare splitless case that nevertheless warrants certiorari. Because New Jersey's scheme differs in critical respects from those in other states, and even within New Jersey employees have had years to revoke their union membership since *Janus*, the consequences of the Third Circuit's unpublished decision

are limited. And in any event, that decision reflects a faithful application of this Court's precedent.

A. Petitioners Overstate The Consequences Of The Decision Below.

The unpublished decision below concluded that Petitioners lacked Article III standing to challenge two provisions of a single state statute, and that Petitioners' First Amendment challenge to their Dues Deduction Agreement fails. Nothing about this case makes it any more important than the analogous petition that this Court recently denied. *Supra* at pp.10. Indeed, the impact of the decision below, if it has any at all beyond this case, will be limited.

Petitioners seek to inflate the importance of their petition by citing eleven states that have enacted statutes that purportedly contain provisions similar to the WDEA's 10-day notice provision. See Pet.2, n.1. That runs into a number of problems. For one, the decision below did not address the validity of the notice provision; instead, it simply found that Petitioners lacked standing because the notice provision was not applied to them. But for another, an examination of the statutes cited reveals critical differences, such that even if the Third Circuit had rendered a merits decision as to the WDEA, it would hardly have national implications, let alone dispositive effect on other laws.

Indeed, almost half of the laws Petitioners describe merely defer to whatever revocation-notice period is in the employees' dues authorization agreement, rather than (as in the case of the WDEA) providing an additional period during which dues authorizations can be revoked. See, *e.g.,* Cal. Gov't Code § 1157.12 (dues "deductions may be revoked only pursuant to the terms

of the employee's written authorization"); Nev. Rev. Stat. § 288.505(1)(b) (dues "may be revoked only in the manner prescribed in the authorization"); N.Y. Civ. Serv. Law § 208(1)(b)(i) (revocation required to be "in accordance with the terms of the authorization"); Or. Rev. Stat. § 243.806(6) (dues deductions "shall remain in effect until the public employee revokes the authorization in effect in the manner provided by the terms of the agreement"); Wash. Rev. Code § 41.80.100 (dues "authorization remains in effect until expressly revoked by the employee in accordance with the terms and conditions of the authorization"). In other words, under these state laws, employees simply have to follow their contracts—and none of Petitioners' claims about the WDEA's First Amendment implications will bear on the validity of those provisions.

Not only do Petitioners exaggerate the impact of the Third Circuit's fact-bound and Article III-focused unpublished decision on other states, but they exaggerate its implications even within New Jersey. Importantly, the decision below concerns a small and diminishing number of public employees. As a preliminary matter, the record reflects that most employees in the NJEA have opted to continue paying dues in the wake of *Janus*. See CA3 App. ¶¶1, 2, 5; see also *Harris v. Quinn*, 573 U.S. 616, 651 (2014) (noting that "it may be presumed that a high percentage of" public union members "are willingly paying union dues"). But more importantly, to the degree that any employee previously joined a union because the alternative was representation fees, she has now had multiple years to terminate dues after *Janus*. That means both that any employees hired after *Janus* have had the opportunity to decide whether or not to join a union (and pay dues)

with the benefit of this Court's decision, and employees who were employed since before *Janus* have had myriad opportunities to cease deductions. Simply put, there is no reason that anyone prospectively is going to find themselves in Petitioners' alleged position; *i.e.,* litigating over their ability to withdraw from pre-*Janus* commitments to pay dues. An issue that affected few people even when this suit was filed in 2018 thus impacts vanishingly smaller numbers of employees—if it affects any employees at all—today.

B. The Decision Below Is Correct.

1. The Third Circuit panel properly rejected Petitioners' challenge to the WDEA on fact-intensive jurisdictional grounds.

As the majority correctly held, under the particular circumstances of this case, Petitioners lacked Article III standing to challenge either of the WDEA's potentially relevant provisions. Pet. App. 15-19. First, the "undisputed evidence" was that NJEA did "not enforce [] against" Petitioners the WDEA's 10-day notice provision. Pet. App. 15, 53; CA3 App. 119 ¶16. That is to say, NJEA "accepted and processed" Petitioners' notices of revocation notwithstanding that Petitioners submitted them outside the window specified in N.J. Stat. Ann. § 52:14-15.9e. Pet. App. 15; CA3 App. 119 ¶16. Relying on this Court's decision in *Lujan*, the majority held that, in the absence of any actual or even "threatened" harm, Petitioners could not establish injury-in-fact. Pet. App. 15 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

In a similar vein, the panel found that Petitioners lacked standing to challenge the effective date provi-

sion. Pet. App. 4. Pursuant to Dues Deduction Agreements they voluntarily entered into, Petitioners' revocation of their deductions could not become effective until January 1, 2019. Pet. App. 16. The WDEA, however, "allowed these Plaintiffs to terminate the payment of union dues on September 30, 2018—three months earlier than what would have been possible under their membership agreements standing alone." Pet. App. 16-17. In other words, on the particular facts of this case, Petitioners *benefited* from this law: "Effectively, the statute's thirty-day provision saved the Plaintiffs from paying three months of unwanted union dues." Pet. App. 17. Because the "WDEA's thirty-day provision conferred a benefit on" Petitioners, Petitioners could not establish the causation or redressability prongs of Article III standing. Pet. App. 17 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Said another way, a court order enjoining the WDEA would mean that the revocation of dues deductions could only take effect *later*.[3]

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[3] Although Judge Phipps concurred separately and expressed a different view of the parties' standing, Judge Phipps nevertheless recognized that the appeal presented a poor opportunity to weigh in on the WDEA. See Pet. App. 25-34. After all, he found, because Petitioners were bound by Dues Deductions Agreements that would have imposed the same or stricter obligations as the WDEA—and because their challenge to those agreements failed on the merits—"the issue of the constitutionality of the WDEA has lost the immediacy and reality needed for declaratory relief." Pet. App. 33. And the same issue arose in the context of a request for injunctive relief: a victory for Petitioners on the claim against the WDEA would not "prevent an irreparable injury here—especially after the membership agreements have been found licit—and thus this situation does not warrant 'the strong medicine of [an] injunction.'" Pet. App. 33 (quoting *Steffel v. Thompson*, 415

Moreover, although the Third Circuit did not reach this question, the WDEA is also plainly constitutional. The gravamen of Petitioners' challenge is that a court must read the WDEA to restrict the notice and effective date periods when employees can stop deducting their union dues and then hold that as-construed provision unconstitutional. The problem for Petitioners, however, is that neither the State nor other Respondents have read or applied the law in that way, and Petitioners were not held to it in practice. To the contrary, Respondents agreed the WDEA "does not compel all public employers to reject all efforts to revoke payroll deduction authorizations that do not meet [the WDEA's] window requirements." CA3 App. 123. "Rather," the WDEA "represents a floor to ensure that every public employee in New Jersey, regardless of the contract between the member and her union, has at least one window period every year to revoke" dues. CA3 App. 123. And so in practice, the NJEA (the relevant union) "accept[s] requests to terminate membership and revoke dues deduction at any time," and "deductions will cease the earliest of three dates: January 1st, July 1st, or 30 days following the member's anniversary of employment." CA3 App. 123.

Said another way, to prevail in this case, Petitioners would need to convince this Court to adopt a more restrictive construction of a state statute that is both adverse to Petitioners' interests and inconsistent with the State's position—all in an attempt to hold the law unconstitutional. That is antithetical to how statutory

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U.S. 452, 466 (1974)). That makes this a poor vehicle even to consider any standing questions, too.

interpretation and constitutional avoidance are supposed to work. See, *e.g., Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (noting if a law is "susceptible of more than one construction," courts "construe the statute to avoid constitutional problems if it is fairly possible to do so"). And it is made worse by the fact that Petitioners are asking for an opinion on a "conflict" between a *state* law and the First Amendment that is "hypothetical." *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020); see *id.* (noting that "warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a state's law"). Strikingly, Petitioners offer no support at all for the curious position that a state law should be interpreted to restrict their rights, in a way they believe renders it more vulnerable to attack. So even were Petitioners to have standing—and they do not—the challenge would fail on the merits.

2. The Third Circuit's unpublished holding that Petitioners were bound by their voluntary Dues Deduction Agreements is also the correct application of this Court's precedents, including *Janus*.

The Third Circuit rightly held Petitioners have no First Amendment rights to renege on their contractual obligations to pay dues for a fixed period of time. Pet. App. 23-24. As this Court has reasoned, "the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen*, 501 U.S., at 672. Put another way, the Constitution is not violated if an individual has to comply with a contract as "[t]he parties themselves … determine the scope of their legal obligations, and any restrictions … are self-imposed." *Id.*

A "well-established line of decisions" therefore holds that "generally applicable" contract "laws do not offend the First Amendment." *Id.*, at 669; see also *id.*, at 672 (explaining enforcement of a contract over First Amendment objection "is no more than the incidental, and constitutionally insignificant, consequence of applying ... a generally applicable law that requires those who make certain kinds of promises to keep them"). Petitioners did not have to commit to paying dues until the earlier of January 1 or July 1 after giving notice of revocation, but they once made that deal, Petitioners had to abide by it.

Consistent with these fundamental principles, the Third Circuit panel correctly determined that "*Janus* does not abrogate or supersede [Petitioners'] contractual obligations." Pet. App. 24. As a general matter, intervening decisions typically "do not relieve parties from their pre-existing contractual obligations." Pet. App. 21. As this Court long ago explained, "the rights of the parties must necessarily be determined by the law as it was when the contract was made" and "subsequent" changes would not invalidate that contract. *Koshkonong v. Burton,* 104 U.S. 668, 679 (1881); see also *Norfolk & W. Ry. v. American Train Dispatchers' Assoc.*, 499 U.S. 117, 130 (1991) (laws that exist when contract is made "form a part" of the contract, and this "principle embraces" not only those that affect the construction of the contract, but also those that "affect its enforcement or discharge"); 11 Richard A. Lord, Williston on Contracts § 30:23 (4th ed. 1990) (noting that "changes in the law subsequent to the execution of a contract are not deemed to be part of [the] agreement unless its language clearly indicates such to have been [the] intention of the parties").

Janus does not change that analysis. See Pet. App. 23-24 & n.18. *Janus* held that "[n]either an agency fee nor any other payment to the union may be deducted from a *nonmember's* wages ... unless the employee affirmatively consents to pay." 138 S. Ct., at 2486 (emphasis added). This Court noted that "compelled subsidization of private speech seriously impinges on First Amendment rights" and "demean[s] … free and independent individuals." *Id.*, at 2464. But no such First Amendment problem is implicated here. Unlike the petitioner in *Janus* who never consented to wage-deductions for union fees, *id.*, at 2461, Petitioners here agreed to join the union, have dues deducted, and pay such dues until providing "prior written notice … effective Jan 1 or July 1 of any year," CA3 App. 61, 76, in exchange for benefits from the union. As this Court put it, when employees agree to pay union fees, they "are waiving their First Amendment rights" and there is no violation whatsoever. *Janus*, 138 S. Ct. at 2486. In short, "*Janus* does not extend a First Amendment right to avoid paying union dues" if they arise out of a contractual commitment. Pet. App. 23.

Petitioners' attempts to distinguish *Cohen* and its progeny lack merit. Preliminarily, it is not clear how a contract between a union member and her union is a public contract instead of a private one. Pet. 17. But even if the Dues Deduction Agreements are public, *Cohen* did not draw such distinctions. 501 U.S., at 671. Rather, *Cohen* held that when the "parties themselves … determine the scope of their legal obligations," such restrictions are "self-imposed," and it does not offend the First Amendment to "require those making promises to keep them." *Id.* And there is nothing unusual

about Petitioners' agreements; "'temporarily irrevocable payment authorizations are common and enforceable in many consumer contracts—e.g., gym memberships or cell phone contracts—and … under state contract law those provisions should be similarly enforceable" in Dues Deduction Agreements. *Fisk v. Inslee*, 759 F. App'x 632, 633-34 (CA9 2019).[4]

The panel's unanimous and unpublished ruling is consistent with every lower court to consider the question, with this Court's precedent, and with *Janus* itself. It does not justify certiorari.

[4] Petitioners also attempt to distinguish *Cohen* on the basis that "government employers do not deduct union dues from employees' wages pursuant to a law of general applicability," but rather "pursuant to narrow state payroll deduction laws." Pet. 18. But Petitioners confuse the state law that authorizes payroll deductions for union dues, N.J.S.A. 52:14-15.9e, with basic contract law that governs enforcement of Petitioners' agreements. Contract law is "generally applicable" in that it does not "target or single out" any individual or class but rather is "applicable to the daily transactions of all" people. See *Cohen*, 501 U.S., at 671. That is the principle governing this case.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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