No. _____

IN THE

Supreme Court of the United States

ISAAC WOLF,

PETITIONER,

V.

UNIVERSITY PROFESSIONAL & TECHNICAL EMPLOYEES, COMMUNICATIONS WORKERS OF AMERICA LOCAL 9119;

MICHAEL V. DRAKE, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; AND

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Whether a union can trap a public worker into paying dues without the "affirmative consent" required by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

PARTIES TO THE PROCEEDING

Petitioner, Isaac Wolf, is a natural person and citizen of the State of Massachusetts.

Respondent Michael V. Drake is a natural person and the President of the University of California. Respondent Rob Bonta is a natural person and the Attorney General of California.

Respondent University Professional & Technical Employees, Communications Workers of America Local 9119, is a labor union representing public employees in the State of California.

RULE 29.6 STATEMENT

As Petitioner is a natural person, no corporate disclosure is required under Rule 29.6.

STATEMENT OF RELATED CASES

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

- *Wolf v. Shaw,* No. 20-17333, United States Court of Appeals for the Ninth Circuit. Judgment entered September 16, 2021.
- *Wolf v. UPTE,* No. 3:19-cv-02881-WHA United States District Court for the Northern District of California. Judgment entered October 20, 2020.

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INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that unions cannot collect money from government workers' paychecks without their affirmative consent. Petitioner, Isaac Wolf ("Wolf"), notified his employer, the University of California (the "University") that it did not have his consent to deduct union dues from his paycheck. For months afterward, the University and the University Professional & Technical Employees ("UPTE" or the "Union") worked jointly to continue to deduct union dues from Wolf without his consent, limiting the exercise of his First Amendment rights to an arbitrary annual window of the Union's choosing.

The District Court ruled that Wolf had no right to a return of the dues taken by the Union, on the basis that *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), decided during the pendency of his case, foreclosed his claims. On appeal in the Ninth Circuit, Wolf conceded that the Ninth Circuit's opinion in *Belgau* controlled the outcome in that circuit, while still asserting his view that *Belgau* was in error. The Ninth Circuit summarily affirmed the decision below, citing *Belgau*.

Government employees like Wolf have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so. *Janus*, 138 S. Ct. at 2486. This Court in *Janus* required such affirmative consent to be "freely given" through a "waiver" of First Amendment rights that must be shown by "clear and compelling" evidence. *Id.* This Court also requires that a "waiver" of a constitutional right must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405

U.S. 174, 185-86 (1972). When he signed a union membership agreement prior to the *Janus* decision, Wolf could not have knowingly waived a right that this Court had not yet recognized. He signed his agreement in April 2018. *Janus* was decided in June 2018. In July 2018, Wolf explicitly told his employer that it did not have his affirmative consent to withhold union dues. Trapping Wolf in the union until an annual escape period and continuing to deduct union dues violated Wolf's rights to Free Speech and Freedom of Association under *Janus*.

This Court should grant this Petition to answer the important question as to whether *Janus* means what it said: that unions cannot fund their political speech by taking money from non-consenting employees.

OPINIONS BELOW

The summary affirmance of the United States Court of Appeals for the Ninth Circuit is reported at *Wolf v. Shaw,* No. 20-17333, 2021 U.S. App. LEXIS 28039 (9th Cir. Sep. 16, 2021) and reproduced at App. 1.

The opinion of the United States District Court for the Northern District of California is reported at *Wolf v. Univ. Prof'l & Tech. Emp.*, No. C 19-02881 WHA, 2020 U.S. Dist. LEXIS 203109 (N.D. Cal. Oct. 29, 2020) and reproduced at App. 2.

JURISDICTION

The Ninth Circuit issued its decision on September 16, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

Section 1983, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Wolf was employed as a process engineer at the University of California's Lawrence Berkeley National Laboratory beginning in March 2018. App. 3. On April 10, 2018, Wolf signed a form authorizing the Union to withhold union dues from his paycheck. *Id.*

The Membership Application provided that "If I [Wolf] resign or have resigned my union membership and the law no longer requires nonmembers to pay a

fair share fee, I nevertheless agree voluntarily to contribute my fair share by paying a service fee in an amount equal to dues. I direct UC to deduct this service fee from my monthly pay and to transfer that money to UPTE. I understand that this voluntary service fee authorization shall renew each year on the anniversary of the date I sign below, unless I mail a signed revocation letter to UPTE's central office, postmarked between 75 days and 45 days before such annual renewal date." *Id.* at 4. This draconian language was added to UPTE membership agreements for the very purpose of trapping employees in the Union in anticipation that *Janus* would give them freedom from paying the Union without it. *See Wolf v. UPTE,* N. D. Cal. Case No. 3:19-cv-02881-WHA, ECF No. 78-2 at 8-9, Deposition of Jamie McDole pages 18 and 22 ("the Janus case we knew would potentially allow people to not pay into the union. Not having any sort of control of when there was a drop would put the -- the functioning of the union in jeopardy"). At the time he signed a union dues deduction authorization, Wolf was not informed that he had the constitutional right to pay nothing to the Union.

On June 27, 2018, the Supreme Court issued its decision in *Janus,* holding that the binary choice to which Wolf had been subjected was unconstitutional. *See* 138 S. Ct. at 2486. On July 2, 2018, Wolf sent an email to his employer resigning his membership and requesting that union dues cease being deducted from his paycheck immediately. On November 3, 2018, Wolf sent a letter to the Union resigning his membership and requesting that union dues cease being deducted from his paycheck immediately. App. 5. In response, the Union maintained that he could only cancel his membership and payroll deduction during the "annual

cancellation period" prior to his renewal date. *Id.* On January 30, 2019, during the "annual cancellation period", Wolf sent an email with a letter to the Union resigning his membership and requesting that union dues cease being deducted from his paycheck immediately, and finally in February 2019 UPTE sent an email to Wolf confirming that his dues deduction had ceased. *Id.*

On May 24, 2019, Wolf filed suit, asking for a refund of dues paid, as well as an injunction and declaration that the California statutes that authorized dues deductions were unconstitutional as applied to employees in his circumstance who had signed dues authorizations before their rights were recognized in *Janus*. App. 5. During the pendency of this action, Wolf left his employment, rendering his prospective relief claims moot. App. 6. He continues to maintain his damages claim for a refund of dues taken from his paycheck.

On September 16, 2020, the Ninth Circuit issued a decision that controlled the outcome of his case in that circuit. In *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), the Court held that *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted" pursuant to a dues deduction authorization. *Id.* at 19, 20.

Finding that *Belgau* controlled, the District Court ruled against Wolf on October 29, 2020. App. 11-12 Wolf timely appealed, but the appeal was stayed while this Court considered a petition for certiorari in *Belgau*. On June 21, 2021, this Court denied the cert. petition in *Belgau*. *See* No. 20-1120 (U.S. June 21, 2021).

Given the binding circuit precedent, Wolf filed an unopposed motion for summary affirmance in light of *Belgau*, which the Ninth Circuit granted. App. 1.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition to address key legal questions as to the application of *Janus* to numerous cases pending in courts around the county.

This Court's "decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* was a gamechanger in the world of unions and public employment." *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020). It has, unsurprisingly, led to a significant amount of litigation around the nation, in almost every state and circuit where agency fees had previously been allowed. As of this filing, Petitioner is aware of at least four other petitions currently pending with this Court raising the same fundamental of question. *See Bennett v. AFSCME Council 31* (No. 20-1603); *Hendrickson v. AFSCME Council 18* (No. 20-1606); *Fischer v. Murphy* (No. 20-1751); *Troesch v. CTU* (No. 20-1786). Petitioner is also aware of another petition involving similar claims set to be filed the same day as his own. *See Grossman v. HGEA*, No. _____ (9th Cir. No. 20-15356). And more are coming. In the Ninth Circuit alone, Petitioner is aware of 15 cases that raise the same or similar issues.[1] Certiorari petitions for

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[1] *See Few v. United Teachers of Los Angeles,* No. 20-55338*; O'Callaghan v. Teamster Local 2010,* No. 19-56271; *McCollum v. NEA-Alaska*, No. 19-35299;

several of these cases will be filed with this Court in the coming days. Around the country, the story is much the same.[2]

Despite this Court's teaching, the courts below have almost universally been hostile to the rights recognized in *Janus*. As exemplified by this case and the other pending petitions, this Court's intervention is

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Hough v. SEIU Local 521, No. 19-15792*; Babb v. California Teachers Ass'n,* No. 19-55692; *Wilford v. NEA, AFT, and CTA, CFT, et al.,* No. 19-55712*; Smith v. Superior Court, County of Contra Costa,* No. 19-16381*; Martin v. California Teachers Association,* No. 19-55761*; Imhoff v. California Teachers Association,* No. 19-55868*; Cooley v. California Statewide Law Enforcement Ass'n,* No. 19-16498*; Allen v. Santa Clara County Correctional,* No. 19-17217; *Hamidi v. SEIU,* No. 19-17442*; Anderson v. SEIU Local 503,* No. 19-35871*; Cook v. Brown,* No. 19-35191; *Carey v. Inslee*, No. 19-35290.

[2] *See, e.g., Pellegrino v. New York State United Teachers*, No. 18CV3439NGGRML, 2020 WL 2079386 (E.D.N.Y. Apr. 30, 2020); *Adams v. Teamsters Union Local 429*, No. 1:19-CV-336, 2020 WL 1558210 (M.D. Pa. Mar. 31, 2020); *Lutter v. JNESO et al*, No. 1:19-cv-13478 (D. N.J. 2020); *Zeigler v. AFSCME Council 13, et al.*, No. 2:20-cv-00996 (W.D. Pa); *Baro v. AFT*, No. 1:20-cv02126 (N.D. Ill.); *Mandel v. SEIU Local 73*, No. 1:18-cv-08385 (N.D. Ill.); *Nance v. SEIU*, No. 1:20-cv-03004 (N.D. Ill. 2020); *Troesch v. CTU*, No. 1:20-cv-02682 (N.D. Ill.); *Hoekman v. Ed. Minn.*, No. 18-cv-1686 (D. Minn.); *Prokes v. AFSCME 5*, No. 0:18-cv-2384 (D. Minn.).

necessary to clarify that it meant what it said in *Janus*: unions may not take money from employees without their affirmative consent.

II. *Janus* requires clear and convincing evidence of a voluntary, knowing, and intelligent waiver to prove affirmative consent.

This Court in *Janus* explained that payments to a union could be deducted from a non-member's wages only if that employee "affirmatively consents" to pay:

> Neither an agency fee *nor any other payment* to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the *employee* affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted) (emphasis added).

The Ninth Circuit in *Belgau* claimed that the holding in *Janus* is limited in application to agency fee payers. 975 F.3d at 944. But this Court was clear that the rule it was articulating applied to employees like Wolf: it required all "employees" to "freely give[ ]" their "affirmative[ ] consent" to "any . . . payment" made to a union. *Id.* And any waiver of an employee's First Amendment right to pay nothing to the union must be "shown by 'clear and compelling' evidence." *Id.*

Certain standards must be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185-86 (1972). Finally, this Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

In Wolf's case, he could not have waived his First Amendment right not to join or pay a union when he signed the union agreement at issue. First, neither the Union nor his employer informed him of his right not to pay a union because, at the time he signed his union membership application, this Court had not yet issued its decision in *Janus*. Second, neither the Union nor his employer informed him of his right not to pay a union because such a right was prohibited by the collective bargaining agreement in place at the time. Therefore, Wolf had no choice but to pay the Union and could not have voluntarily, knowingly, or intelligently waived his First Amendment right.

Because a court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.,* 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence" that employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. In addition, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (citing *Aetna*

Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937)).

The union application Wolf signed did not provide a clear and compelling waiver of his First Amendment right not to join or pay a union because it did not expressly state that he had a constitutional right not to pay a union and because it did not expressly state that he was waiving that right.

Nor can the Union rely on the extant case law at the time Wolf signed his union authorization. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), this Court explained that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

By this rule, the Union's liability for dues paid by Wolf extends backward before *Janus*, limited only, if at all, by a possible statute of limitations defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to

expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

Under *Harper* and these precedents, the Union has no basis to hold Wolf to his union authorization or to keep the monies it seized from his wages before this Court put an end to this unconstitutional practice. Wolf is entitled to a refund of these dues.

After the decision in *Janus*, the Union maintained that Wolf could only end his dues deduction during an arbitrary window of the Union's choice, despite Wolf's repeated requests to stop the dues deduction from his paycheck. The union dues authorization application signed by Wolf before *Janus* cannot meet the standards set forth for waiving a constitutional right, as required in *Janus*. 138 S. Ct. at 2484. Therefore, the Union cannot hold employees like Wolf to a time window to withdraw their union membership based on these invalid authorizations.

Since being informed of his constitutional rights by the *Janus* decision, Wolf did not sign any additional union authorization application. Therefore, he has never knowingly waived his constitutional right to pay nothing to the union and has never given the union the "affirmative consent" required by the *Janus* decision.

This Court should grant certiorari in this case to ensure that lower courts are properly applying its decision in *Janus* to employees like Wolf, who never knowingly waived his right to pay nothing to the Union.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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