No. 21-_____

IN THE

Supreme Court of the United States

MARK R. SMITH,
Petitioner,
v.
KATE BIEKER, CHIEF EXECUTIVE OFFICER, SUPERIOR COURT, COUNTY OF CONTRA COSTA; AFSCME LOCAL 2700; ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents.

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

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October 2021

QUESTIONS PRESENTED

In *Janus v. AFSCME, Council 31*, this Court held that public employees have a right to refuse to subsidize union speech, that "States and public-sector unions may no longer extract agency fees from nonconsenting employees," that "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," and that "the waiver must be freely given and shown by 'clear and compelling' evidence." 138 S.Ct. 2448, 2486 (2018) (citations omitted), *overruling Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Furthermore, while "most personal constitutional rights may be waived," *Class v. U.S.*, 138 S.Ct. 798, 808 (2018) (Alito, J., dissenting), this Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted). Thus, "To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the 'high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson*....'" *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010) (Scalia, J.), *citing Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

California, like many other states, resists *Janus*'s holding by enforcing "waivers" obtained prior to *Janus*'s restoration of public employees' full First Amendment rights, and by vesting sole authority to

determine the validity of dues checkoff revocations in entities financially benefitting from compelled fees or dues seizures: public-employee labor unions. The Ninth Circuit below — along with the Third, Seventh, and Tenth Circuits — have upheld this and similar restrictions, holding that the State does *not* require evidence of a waiver to restrict employees' exercise of their First Amendment rights under *Janus*, and that proof of an employee's contractual consent is sufficient to continue government fees or dues seizures from his wages despite his resignation and objection.

The questions presented are:

1. May a State, consistent with the First and Fourteenth Amendments, seize for union speech payments from an employee who has notified the State that he is a nonmember and objects to supporting union speech?

2. May a State, consistent with the First and Fourteenth Amendments, seize for union speech payments from an employee absent clear and compelling evidence that he knowingly, intelligently, and voluntarily waived his First Amendment right under the standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Mark R. Smith was the Plaintiff-Appellant in the courts below.

Respondents Kate Bieker, Chief Executive Officer of the Superior Court of the County of Contra Costa,

and AFSCME Local 2700, were Defendants-Appellees below.

Respondent Xavier Becerra, Attorney General of the State of California, intervened as a Defendant-Appellee below in his official capacity, and his successor, Rob Bonta, is substituted as Defendant-Appellee by operation of Rule 25(d), FED. R. CIV. P.

In addition to the parties listed in the caption, the other party to the proceedings below was the Superior Court of California for the County of Contra Costa, an instrumentality of the State of California, was initially named as a Defendant below, and was dismissed upon stipulation pursuant to Rule 41(a)(1)(A)(ii), FED. R. CIV. P.

CORPORATE LISTING

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

1. *Smith v. Bieker*, No. 19-16381, U.S. Court of Appeals for the Ninth Circuit. Judgment Entered 29 July 2021; and

2. *Smith v. Bieker*, No. 3:18-v-05472-VC, U.S. District Court for the Northern District of California. Judgment Entered 14 June 2019.

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Respondent.

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

Petitioner Mark R. Smith respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on 29 July 2021.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Appendix ("App.") A, *infra* 1a, is unreported and designated as "not for publication," but appears at 854 Fed.Appx. 937 (Mem), 2021 WL 3214768 (9TH CIR. 2021). The decision of the United States District Court for the Eastern District of California, App. B, *infra* 4a, granting in part

Defendants' Motion to Dismiss and Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, is unreported but appears at 2019 WL 2476679 (N.D. CAL. 2019).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on 29 July 2021. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. *See* Apps. C & D, *infra* 10a &11a. This case also involves provisions of the Trial Court Employment Protection and Governance Act, CAL. GOVT. CODE ANN. § 71600 *et seq.*, and specifically § 71632.5 thereof, *see* App. E, *infra* 12a, and CAL. GOV'T. CODE §§ 1157.3 &1157.10. *See* App. F, *infra* 16a.

STATEMENT OF THE CASE

A. Legal Background

This Court's decision in *Janus v. AFSCME, Council 31*, vindicated public employees' First Amendment right to refuse to subsidize union speech, and held that governments and unions violate that right by seizing from public employees' wages payments for union speech without their affirmative consent. 138 S.Ct.

2448, 2486 (2018), *overruling Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). This Court recognized that, "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* Thus, to prove employees' consent to supporting financially 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)).

As with many unions exercising their authority to extract forced dues from represented public employees (which has long been recognized as "imping[ing] seriously upon interests in free speech and association protected by the First Amendment" under *Abood*, 431 U.S. at 255 (Powell, J., concurring)), Respondent AFSCME Local 2700 ("Local 2700") obtained from Petitioner Mark R. Smith ("Smith"), a public employee, union membership coerced in the shadow of a then-enforceable forced-unionism scheme, CAL. GOVT. CODE § 71632.5, App. D at 15a, an agreement in which Smith purportedly surrendered his right to terminate at will the obligation to pay union dues. Like many states resisting this Court's decision in *Janus*, California impedes its public employees' ability to exercise their right to terminate subsidies to union speech except pursuant to the terms of agreements signed under coercion and/or in ignorance of the scope of their First Amendment right to refrain fully established/restored in *Janus*.

Employment relations between California courts and labor unions representing their employees is governed by the Trial Court Employment Protection and Governance Act ("TCEPGA"), CAL. GOV'T. CODE § 71600 *et seq.*; App. D at 12a-15a, which grants to

labor unions certified by the State monopoly-bargaining powers over bargaining units of trial court employees. The TCEPGA also authorizes forced-unionism (or "agency shop" agreements). CAL. GOV'T. CODE § 71632.5; App. E at 15a.[1] Such an agreement was entered into governing Smith's employment.

In *Janus*, this Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees," and that "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." 138 S.Ct. at 2486 (citations omitted). However, the Court went on to specify that "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." *Id.* (citations omitted).

The Questions Presented addresses whether *Janus* permits a public employer and a union to rely upon pre-*Janus* "consent," obtained when public employees

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[1] "Under an 'agency shop' arrangement, a union that acts as exclusive bargaining representative may charge non-union members ... a fee for acting as their bargaining representative." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 303 n.10 (1986); *see also Abood*, 431 U.S. at 232. Such schemes in public-sector employment were declared unlawful in *Janus*, 138 S.Ct. at 2486, as a violation of the First Amendment.

were under an apparently-enforceable forced-unionism regime, to ascribe "knowing, intelligent, and voluntary" waiver of their First Amendment right to be fully free from paying subsidies for union political speech.

B. Facts

Smith is employed by the Superior Court of California, County of Contra Costa ("Court"), in a bargaining unit exclusively represented by Local 2700. Respondent Kate Bieker ("Bieker") is the Court Executive Officer, and is generally responsible for all of its day-to-day administrative operations, including the enforcement of and/or compliance with its agreements, including labor agreements. Local 2700 is a "recognized employee organization," recognized as the exclusive representative under the TCEPGA for collective bargaining purposes of all employees in the relevant bargaining unit, including Smith. CAL. GOVT. CODE § 71601(h); App. D at 12a. Pursuant to Rule 5.1(a)(1)(B), FED.R.CIV.P., Respondent Attorney General of California intervened to defend the constitutionality of relevant state statutes.

Acting in concert under color of state law — the TCEPGA — Local 2700 and the Court entered into a memorandum of understanding ("MOU") controlling the terms and conditions of Smith's (and others') employment which was in effect all times material hereto prior to 30 November 2018. Pursuant to the TCEPGA, CAL. GOVT. CODE § 71632.5, App. D at 15a, the MOU contains an agency shop (or "Union Security") article purporting to require Smith, and all

bargaining unit employees, to either become and/or remain members of Local 2700, or in the alternative, pay an "agency" or "agency shop" fee to Local 2700 in an amount not exceeding monthly dues.

Smith's membership relationship with Local 2700 changed over time. Smith executed **one** union membership card at the outset of his employment, on 4 January 2016. That card also purported to be a union dues checkoff authorization card, which included a provision of irrevocability — "regardless of whether [Smith was or remained] a member of the Union" — of not less than one year, limiting revocation to a ten-day annual period measured from the date of its execution, "not less than ten (10) days and not more than (20) days before the end of any yearly period." Dist. Ct. ECF No. ("ECF No.") 63-4 at 2.

However, this document tells only one part of Smith's relationship with Local 2700 and Bieker's deduction of monies from his wages for the union's benefit. Smith executed three separate Authorizations for payroll deductions of membership dues or service fees with Bieker. ECF Nos. 63-5 at 2 (dated 1/4/16), 63-6 at 2 (dated 9/23/16), & 63-7 at 2 (dated 6/26/2017). Each was honored and treated as authoritative by Bieker and by Local 2700. Each specifically stated that they "shall be in full force and effect *until I revoke it in writing*...." (emphasis added). The first was executed contemporaneously with Smith's membership application, ECF No. 63-4 at 2, reflecting his election of "Union Membership." ECF No. 63-5 at 2.

Smith executed a second Authorization on 23 September 2016, altering his status to "Service Fee" payer. ECF No. 63-6 at 2. Bieker, through one of her agents, "followed up with the Union and confirmed that we need only update your current Union enrollment form .... and check the Service Fee option." It was honored by Bieker, and a reduced "Service Fee" in an amount less than full union dues was deducted thereafter from Smith's wages. By making this change, Smith resigned his union membership, and Local 2700 accepted his resignation.

Smith executed a third Authorization on 26 June 2017, altering his status to "Union Membership." ECF No. 63-7 at 2. This third Authorization was likewise honored by Bieker and Local 2700, who thereafter deducted union membership dues from Smith's wages. Smith never executed a new union membership card when he rejoined Local 2700 on 26 June 2017.

This is where Smith's status stood, until on or about 28 June 2018, when — after learning of the restoration of his full First Amendment rights in *Janus* — he informed Bieker of his resignation from union membership, and inquired as to how he might stop deductions of union dues from his wages. Smith restated his resignation from membership in Local 2700 again on 3 July 2018, this time informing both Bieker and Local 2700 of his action. Local 2700 treated Smith's resignation from union membership as effective on 3 July 2018.

However, in lieu of honoring Smith's resignation and directing Bieker to terminate union dues

deductions, Local 2700 placed impediments to the termination of his dues obligations, demanding that he sign "a form acknowledging the rights that they were forfeiting by resigning from Union [*sic*] membership," and thereafter transmitted to Smith a form on 19 and 20 August 2018, demanding that he complete a "union opt out form" as a precondition to rescission of his membership. Notwithstanding Smith's resignation from membership in Local 2700, Bieker persisted in deducting union dues from his wages, terminating them only at the end of November 2018, upon expiration of the MOU.

C. Proceedings Below

On 6 September 2018, two months after this Court's decision in *Janus*, Smith filed this lawsuit alleging that the continued seizure of union dues from his wages notwithstanding his resignation and revocation of his dues checkoff authorization violated his rights under the First and Fourteenth Amendments to the United States Constitution as explained in *Janus*.

Smith initially sought and was denied a temporary restraining order and/or a preliminary injunction ending dues deduction, upon Local 2700's submission to the District Court of the membership card he signed in 2016. The District Court determined that Smith had entered into an irrevocable agreement to pay dues, that compliance with that contract was paramount and unimpeded by this Court's decision in *Janus*, and that

the union's escrow of the seized dues was adequate to protect his rights.

The Attorney General of the State of California sought and was granted upon consent intervention to defend the constitutionality of the challenged State statutes. ECF No. 45.

After discovery, Bieker filed a Motion to Dismiss for Lack of Jurisdiction, and the other parties filed cross-Motions for Summary Judgment. The Court issued its Memorandum and Order denying Smith's Motion for Summary Judgment, and granting Defendants' Motions, on 14 June 2019. App. B.

The District Court rejected Smith's statutory challenge to the TCEPGA's forced-unionism provisions, CAL. GOV'T CODE § 71632.5, holding that he lacked standing, and his claim would have been moot because Defendants had abandoned enforcement of the statute. App. B at 4a. The District Court likewise rejected Smith's constitutional challenge to California statutes amended by Senate Bill 866 as moot, "for the reasons given in *Babb v. California Teachers Association*, No. 8:18-cv-00994-JLS-DFM, 2019 WL 2022222, at *17 (C.D. CAL. 8 May 2019)."[2] App. B at 6a. In *Babb*, the Central District of California dismissed a challenge to CAL. EDUC. CODE § 45060, also vesting sole responsibility for the processing of payroll deduction revocations in the beneficiaries of those deductions: public-employee labor unions. The *Babb* court found that (1) once the revocation had been honored, the

[2] *Babb* is now officially reported at 378 F.Supp.3d 857 (C.D. CAL. 2019).

challenge was moot; and (2) the challenged statute did not violate the First Amendment in any case, because:

> *Janus* does not hold that employees have the right to resign from a union however they want, regardless of state laws that prescribe clear, common-sense procedures for doing so. Submitting a writing to the Union Defendants to halt payroll deductions is not a burdensome requirement. Because the deductions go to the Union Defendants, it makes sense that the halting of such deductions must be communicated to the Union Defendants rather than the school districts. Moreover, as the Union Defendants note, "[m]ost actions of legal significance, including registering to vote, voting itself, filing court papers, and the like, must be done in writing."

Babb, 378 F.Supp.3d at 886 (record reference omitted); *but see Pattern Makers League v. NLRB*, 473 U.S. 95, 106 (1984) (striking down restrictions on resignation under the National Labor Relations Act, 29 U.S.C. § 141 *et seq*.); *cf. Debont v. City of Poway*, 1998 WL 415844 (S.D.CAL. 14 April 1998) (issuing preliminary injunction against union and city attempting to limit individual's right to resign); *see also McCahon v. Pennsylvania Turnpike Comm'n*, 491 F.Supp.2d 522, 526-27 (M.D.PA. 2007) (state-law maintenance of membership provision likely unconstitutional).

Finally, the District Court held that Smith was "not entitled to a refund of the dues that were deducted from his paychecks [after his resignation from union

membership]," holding that his constitutional rights were not violated because the deductions were "authorized by Smith's membership agreement." App. B at 6a. The District Court proceeded to specifically reject "Smith's four arguments for getting out of this contractual obligation," as follows:

a. Smith's contention "that *Janus* entitles him to elect to stop paying dues to the union at the drop of a hat" (and apparently, that *Janus* "automatically undo[es] the membership agreement") was rejected because "*Janus* did not concern the relationship of unions and members; it concerned the relationship of unions and non-members," *id.* at 7a;

b. Smith's contention that "the agreement was invalid at its inception because Smith couldn't have knowingly waived a right that he didn't yet have (namely, the right to avoid paying union fees as a non-member)" was rejected because "changes in intervening law — even constitutional law — do not invalidate a contract," citing *Brady v. United States*, 397 U.S. 742, 757 (1970), and *Dingle v. Stevenson*, 840 F.3d 171, 174-76 (4TH CIR. 2016), App. B at 7a-8a;

c. Smith's contention that his initial membership was invalid *ab initio* because "at the time he joined, a union representative encouraged him to sign up, saying that the benefits of joining outweighed the discount he would get by declining membership and instead paying agency fees," because "on its face and as a matter of law, the representative's statement — as described by Smith — doesn't amount to an improper threat, fraud or duress," App. B at 8a; and

d. Smith's contention that the union surrendered its right to enforce its contract when it had, in the period between its execution and his resignation in July 2018, declined to enforce it, because "Smith would have to show that he detrimentally relied on the acquiescence. *See* 13 Williston on Contracts § 39:35 (4th ed.)," he didn't "present any evidence of any such reliance," and "provides no evidence that the union's alleged acquiescence to his past breach caused him to believe he could quit at any time, contrary to the membership agreement's terms, without consequences." App. B at 8a.

Upon this analysis, the District Court denied Smith's Motion for Summary Judgment, and granted Defendants' Motions, *id.* at 4, entering judgment on 14 June 2019. ECF No. 76.

Smith timely noticed his appeal on 12 July 2019. ECF No. 78.

On 27 July 2021, the United States Court of Appeals summarily affirmed the District Court's judgment based upon its prior decision in *Belgau v. Inslee*, 975 F.3d 940, 946-49 (9TH CIR. 2020), *cert. denied* 141 S.Ct. 2795 (2021), in a memorandum, formulaically and perfunctorily holding that "the deduction of union membership dues arose from the private membership agreement between AFSCME Local 2700 and Smith, and "private dues agreements do not trigger state action and independent constitutional scrutiny." App. A at 2a-3a, *citing Belgau*, 975 F.3d at 946-49. The Court then goes on to state that "We do not consider matters not specifically

and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9TH CIR. 2020)," without further explanation. App. A at 3a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to vindicate its clear holding in *Janus*: governments and unions cannot seize payments for union speech from employees unless those employees knowingly, intelligently, and voluntarily waive their right not to subsidize that speech. 138 S.Ct. at 2486. This holding has particular force when, as here, the employee has effectively resigned from union membership and opposes supporting the union financially, and that any "consent" obtained from him was obtained years before this Court restored public employees' full free choice in *Janus*. Unless Smith had knowingly, intelligently, and voluntarily waived his First Amendment right to stop subsidizing union speech, it certainly is unconstitutional for the government and unions to compel him to continue to pay for union speech. Knowing, intelligent, and voluntary consent was, of course, impossible under the defunct regime of *Abood*, and only became possible once his full First Amendment rights were restored and acknowledged in *Janus*. An earlier-obtained "consent" and/or "waiver" could not, by definition, be knowing, intelligent, and voluntary, since no one — and certainly not Smith — could have known that the legal authority to extract money from him for a union's benefit would soon end.

The Ninth Circuit and three other appellate courts have defied *Janus* by substituting a lesser, contract requirement for this Court's constitutional waiver requirement.[3] This lower standard eliminates the protections provided to employees under *Janus*, which provides that employees' waivers of their First Amendment rights must be knowing, intelligent, and voluntary, and enforcement of that waiver cannot be against public policy. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972), *citing Brady*, 397 U.S. at 748; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). Indeed, these courts' standards violate among the earliest of this Court's standards for a valid waiver, "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), cited in *Janus* itself. 138 S.Ct. at 2486.

The Court should correct the lower courts' refusal to enforce *Janus*'s standard for ascertaining an individual's waiver because their alternative contract standard gives unconstitutionally broad latitude to restrict and impede public employees' constitutional rights. Absent application of this Court's familiar formulation of the preconditions — knowing,

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[3] App. A at 1a-2a, *citing Belgau*, *supra*; *Bennett v. AFSCME Council 31*, 991 F.3d 724, 731 (7TH CIR. 2021), *cert. filed* No. 20-1603 (18 May 2021); *Fischer v. Gov. New Jersey,* 842 Fed.Appx. 741, 753 (3D CIR. 2021) (non-precedential opinion), *cert. filed* No. 20-1751 (14 June 2021); *see also Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961-62, 964 (10TH CIR. 2021), *cert. filed* No. 20-1606 (18 May 2021) (similar conclusion).

intelligent, and voluntary — for a valid waiver of constitutional rights, public employees have been, and will continue to be, subject to a wide variety of impediments to the exercise of their rights, without regard to whether they have been informed of their rights under *Janus*. Rejection of the holdings of the Third, Seventh, Tenth, and — in this case and others — Ninth Circuits is necessary to protect millions of public employees against serious impediments to the exercise of their First Amendment rights.

This Court has regularly granted review to consider various questions related to forced-unionism provisions pursuant to monopoly bargaining statutes in both the private and public sectors. *See Janus*, *supra*; *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984); *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Locke v. Karass*, 555 U.S. 207 (2009); *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014). This case constitutes another necessary examination of the methods used by state and local governments to compel union speech from their public employees.

Review is appropriate in this case in two ways. First, because the Ninth Circuit has demonstrated an utter lack of fidelity to this Court's evolving standards addressing the compelled speech represented by forced-unionism schemes, as well as behavior which

"objectively chills speech" under the now-abandoned forced-unionism regime of *Abood*, found unconstitutional in *Janus*. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6TH CIR. 2019); *see also McGlone v. Bell*, 681 F.3d 718, 731 (6TH CIR. 2012). And second, because the Ninth Circuit has disregarded this Court's longstanding standards for the manner in which the lower courts are required to ascertain and adjudicate the validity of waiver of fundamental constitutional rights.

I. The Ninth Circuit's Decision Conflicts with *Janus* and Decisions Governing Waivers of Constitutional Rights.

A. *Janus* establishes the standards governing when governments and unions can constitutionally take union dues or fees from employees.

In *Janus*, this Court was quite specific in the standards required to adjudicate the validity of government and union collection of union dues or fees:

> 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*,

> 567 U.S., at 312-13. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing 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, 680-82 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S.Ct. at 2486.

This Court's waiver requirement is inevitable in this context. Employees have a First Amendment right to refuse to pay or refrain from financially supporting union speech. *Janus*, 138 S.Ct. at 2478 ("public-sector agency-shop arrangements violate the First Amendment").[4] It therefore follows that the government must possess proof that an employee has waived that right in order for the government constitutionally to extract from their wages monies for union speech.[5]

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[4] This right arises from the fact that both the government grant of a monopoly on bargaining, and the government's collection or seizure of dues or fees from employees' wages, are unarguably "state action" within the meaning of 42 U.S.C. § 1983.

[5] Over a dozen state Attorneys General and a member of the Federal Labor Relations Authority correctly understand *Janus* to require such proof. *See* Amicus Br. for the State of Alaska *et al., pp. 9-15, Belgau v. Inslee, No. 20-1120 (U.S. 18 Mar. 2021); Decision on Request for General Statement of Policy or Guidance, Off. of Pers. Mgmt.* (Petitioner), 71 F.L.R.A. 571, 575-75 (14 Feb. 2020) (Abbott, concurring).

The need for clarity is especially acute where, as here, the government and union prohibit or delay employees from terminating dues deduction. Employees cannot be required to continue subsidizing union speech — thus being delayed in exercising their First Amendment right to refuse to do so — unless those employees validly waived their constitutional right for that period. Where, as here, an employee was treated as though he waived that his First Amendment right to terminate dues seizures when he could not have known the full scope of his right to do so — because *Abood* said it didn't exist — it is impossible to imagine how it might have been "knowing and intelligent," and therefore could not have been "voluntary" by hypothesis.

Without proof of a waiver, the government necessarily violates 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/resigning and object to supporting the union will nevertheless have payments for union speech seized from their wages. These seizures 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*, 573 U.S. at 656. 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 compelled an objecting nonmember to subsidize union speech under an escape-period restriction.

This Court granted certiorari in *Hudson* "'to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). In this case and others, the Ninth Circuit and other courts of appeals view their mission as devising a way of preventing the effective and immediate exercise of rights restored by this Court's decision in *Janus*.[6] Due regard for the First Amendment freedom against compelled speech vindicated by this Court in *Janus* will have no teeth against those who would impede its exercise if the restrictions such decisions impose continue unmolested.

The Ninth Circuit's conclusion hearkens back to the "balancing and reasonable accommodation" of the union's interest in collecting fees against a class of nonmembers' interests in not being forced to subsidize the union's political activities. *See Knox v. Service Employees Intern'l Union, Local 1000*, 628 F.3d 1115, 1119-20 (9TH CIR. 2010), *rev'd*, 567 U.S. 298 (2012). But a test has twice been thoroughly rejected by this Court. *Davenport*, 551 U.S. at 185; *see also Knox*, 567

[6] The District Court's contempt for Smith's First Amendment rights was palpable in its reference to his argument that "*Janus* entitles him to elect to stop paying dues to the union at the drop of a hat." App. B at 7a. Another construction might have been that "*Janus* entitles him to elect to stop paying dues to the union [when the Supreme Court restored his right to do so fully]."

U.S. at 313, *citing Davenport*. Nevertheless, like a bad penny, this "balancing test" keeps turning up.

This Court reversed the Washington Supreme Court's decision that the statutory affirmative-consent requirement violated the First Amendment, because the state court had mistakenly "believed that our agency-fee cases ... balanced the constitutional rights of unions and of nonmembers." *Id.* at 184-85. This Court flatly and unanimously rejected that type of balancing, because "[t]hose cases were not balancing constitutional rights in the manner respondent suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." *Id.* Citing *Davenport*, 551 U.S. at 185, this Court in *Knox* likewise held that "Contrary to the view of the Ninth Circuit panel majority, we did not call for a balancing of the 'right' of the union to collect an agency fee against the First Amendment rights of nonmembers." 567 U.S. at 313. "Far from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights." *Id.*, *citing Hudson*, 475 U.S. at 303.

B. Lower courts are defying *Janus* by substituting for the constitutional waiver standard a lesser standard rooted in contract analysis.

Like the Third, Seventh, and Tenth Circuits, *Fischer*, 842 Fed.Appx. at 753; *Bennett*, 991 F.3d at 732-33; *Hendrickson*, 992 F.3d at 961-62, 964, the Ninth Circuit has eviscerated *Janus*'s 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 under escape-period restrictions. App. A at 2a-3a, *citing Belgau*, 975 F.3d at 951-52. In *Belgau*, the Ninth Circuit held it sufficient that employees, when in the dark about *Janus*'s impending restoration of their full First Amendment rights, contractually consented to restrictions on asserting their First Amendment rights. The courts thus substituted their own *contract* standard for the constitutional *waiver* standard mandated in *Janus* to govern when governments and unions can continue deductions from employees for monies for union speech.

The Court should reject the lower courts' holdings because they conflict with *Janus*, 138 S.Ct. at 2486. The lower courts' two rationales for not enforcing *Janus*'s waiver requirement cannot be sustained or squared with *Janus*.

1. Like the Third, Seventh, and Tenth Circuits, the Ninth Circuit found evidence of a constitutional waiver to be 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. App. A at 2a-3a, *citing Belgau*, 975 F.3d at 951-52; *Bennett*, 991 F.3d at 732-33; *Fischer*, 842 Fed.Appx. at 753 n.18; *Hendrickson*, 992 F.3d at 961-62, 964. 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 necessary precondition 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*.

Most glaringly, the lower courts' rationale ignores the dispositive fact that escape-period restrictions compel *objecting* employees who no longer wish to support a union financially, or who never freely chose to do so in the first place, to continue supporting it until the escape period is satisfied. Here, union dues was seized from Smith's wages *after* his resignation from union membership and objection to those seizures. App. B at 6a. To conclude that Smith was not compelled to subsidize Local 2700's speech requires ignoring that Smith affirmatively asserted his opposition to supporting financially Local 2700 and was forced to do so against his will. *Id.*

For employees like Smith, 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 struck down by *Janus* as unconstitutional. When *Janus* was decided, Illinois's 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. As demonstrated by the facts of this case, California law allows government employers to deduct full union dues, even those barred under the *Abood*/*Hudson* legal regime.

Indeed, California's post-*Janus* revocation law vests *sole* authority in determining the validity of dues checkoff revocations in public employees unions, requires that such requests to change or alter an authorization be communicated *solely* to the relevant union, and requires that government employers deduct *full* union dues, including monies used for partisan political purposes, from employees who object to these seizures outside of the terms of a prior authorization. App. E at 15a-16a. 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*'s waiver requirement applies in any circumstance, it applies when employees are prohibited from exercising their First Amendment rights to stop subsidizing union speech. The Ninth 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 Ninth Circuit and other 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 Belgau*, 975 F.3d at 950; *Bennett*, 991 F.3d at 730-31; *Fischer*, 842 Fed.Appx. at 753 n.18; *Hendrickson*, 992 F.3d at 964; *see also* App. B at 7a. But *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 violate employees' First Amendment rights 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 the terms of the California Government Code, which requires public employers to "honor employee authorizations for the deductions" of union dues. CAL. GOV'T. CODE § 1157.3(e). It also is clear from the Court/Local 2700's dues deduction form, which states that the signatory agrees to "AUTHORIZE *SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY* TO DEDUCT BI-WEEKLY FROM MY WAGES AN AMOUNT IN ACCORDANCE WITH THE SCHEDULE OF THE DUES, SERVICE FEES AND/OR ASSESSMENTS...." ECF Nos. 63-5 at 2, 63-6 at 2, & 63-7 at 2 (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*, *e.g.*, CAL. GOV'T. CODE § 1157.12; CAL. EDUC. CODE §§ 45060; COLO. REV. STAT. § 24-50-1111(2); CONN. PUBL. ACT CAL. GOV'T. 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(a); 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); and WASH. REV. CODE § 41.80.100(d). Here, CAL. GOV'T. CODE § 1157.3(e) specifies in detail when public employers must deduct union dues from employees' wages.

Finally, unlike *Cohen*, it is beyond question that it violates the First Amendment for governments and unions to seize union dues or fees from nonconsenting employees. *Janus*, 138 S.Ct. at 2486. And that is what Bieker did to Smith: she seized payments for Local 2700 from Smith's wages after he resigned his union membership and objected to supporting financially Local 2700. Thus, unlike *Cohen*, a waiver analysis must be conducted here because, absent proof Smith knowingly, intelligently, and voluntarily waived his First Amendment rights to stop subsidizing Local 2700's speech, Bieker's and Local 2700's seizures undoubtedly were unconstitutional.

II. The Ninth Circuit's Holding Is Inconsistent with this Court's Requirement that Constitutional Waivers Must Be Knowing, Intelligent, and Voluntary.

Unless corrected by this Court, the decisions below and by several other courts to substitute for *Janus*'s constitutional-waiver standard a lower contractual standard will have profound negative impacts upon employees' First Amendment rights. A lower standard permitting governments and unions to impose onerous restrictions on unwitting employees is at odds with the Court's constitutional-waiver standard generally, as well as being contrary to *Janus* specifically.

1. Establishing a waiver of constitutional rights is subject to exacting standards. "'[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). This 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 holding 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). The Court has sometimes formulated these criteria 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." *Town of Newton*, 480 U.S. at 392 (footnotes omitted).

2. The result below and in other cases upholding restrictions on resignations and their logical consequence (ending dues deductions) would be very different if lower courts had enforced the

constitutional-waiver standard required by *Janus*. Respondents here cannot satisfy any criteria to demonstrate that Smith waived his First Amendment right to stop subsidizing Local 2700's speech until an escape period was satisfied.

a. Smith did not knowingly or intelligently waive his 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. Burbine,* 475 U.S. 412, 421 (1986). To prove that an employee signing dues deduction forms had a full awareness of his 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 Bieker's or Local 2700's forms notified Smith of his right not to support Local 2700 financially or stated that Smith was agreeing to waive that right. ECF Nos. 63-4 at 2, 63-5 at 2, 63-6 at 2, & 63-7 at 2. On their face, the forms do not prove Smith knowingly or intelligently waived his rights under *Janus*.

Most importantly, employees signing dues deduction forms before *Janus*, such as Smith, could not have knowingly or intelligently waived their First Amendment right not to subsidize union speech because that right had yet to be recognized/restored. *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. Smith did not voluntarily waive his 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 constitutional right not to subsidize union speech because they were not given that option. When Smith signed his union membership/dues deduction form in 2016, and even when he changed them later in that year, and again in 2017, he had no choice but to subsidize Local 2700 and its speech under California's agency fee law. *See Janus*, 138 S.Ct. at 2459-60. Smith could not have waived a right he was never afforded.

The situation is akin to a discussion in 1969 of a Federal constitutional right to abortion or to same-sex marriage. To be sure, they might have been fascinating and even contentious and emotional discussions, but at the time, according to this Court, those "rights" didn't exist. *But see Roe v. Wade*, 410 U.S. 113 (1973) (finding Federal constitutional right to obtain an abortion); *Obergefell v. Hodges*, 576 U.S. 644 (2015). Similarly, Smith was never given the option to remain a nonmember and have nothing seized from his wages for the benefit of Local 2700. The same logic applies to employees who acquiesced to dues deductions prior to *Janus*, 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. A purported waiver is unenforceable if the "interest in its enforcement is outweighed in the

circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton*, 480 U.S. at 392 (footnote omitted). The annual escape-period restriction imposed by the Local 2700 dues deduction form is unenforceable under this standard.

The policy weighing against prohibiting employees from exercising their rights under *Janus* for 355 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 enforcing severe restrictions on when employees can exercise their First Amendment rights to stop paying for union speech. This Court has twice held that unions have no constitutional entitlement to monies from dissenting employees. *Knox*, 567 U.S. at 313 (citing *Davenport*, 551 U.S. at 185). This 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. Escape-period restrictions are unenforceable as against public policy.

Under a proper constitutional-waiver analysis, Bieker and Local 2700 could not lawfully enforce their escape-period restriction against Smith because he never waived his First Amendment right to stop subsidizing Local 2700 and its speech. Application of 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 deductions of union dues. If faithfully enforced, *Janus*'s waiver requirement prohibits governments and unions from restricting employees' exercise of their rights under *Janus* unless employees knowingly, intelligently, and voluntarily consent 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 direct the lower courts to enforce faithfully *Janus*'s waiver requirement.

III. This Case Is Exceptionally Important to Millions of Public Employees Subject to Similar Restrictions.

This Court's review is urgently needed because governments 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 governments 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*, California and eleven other states — Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington — amended their dues-deductions laws to require government employers to enforce escape-period restrictions. *See supra* at 25-26. Indeed, so enthusiastic were California's elected officials to protect union income that its law was passed and signed into law on the very day that this Court handed down *Janus*. CAL. GOV'T. CODE § 1157.10 (SB 866, § 9, eff. 27 June 2018); App. F at 16a-17a. Public employers in at least five other states also enforce such restrictions, including Alaska, Minnesota, New Mexico, Ohio, and Pennsylvania.[7] In 2020, there were approximately 4.77 million public-sector union members in those seventeen states alone.[8] Thus,

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[7] *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. 17 Feb. 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*, *supra*; *Weyandt v. Pa. State Corr. Officers Ass'n,* No. 1:19-cv-1018, 2019 WL 5191103, at *2 (M.D. PA. 15 Oct. 2019).

[8] *See* Hirsch, Barry T. , & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 Indus. & Labor Rels. Rev. 349-54 (2003) (updated annually at unionstats.com); https://www.unionstats.com/_U_2020.htm (data for 2020 that estimates 4,767,211 public-sector employees in the seventeen states noted above). The data shows (continued...)

approximately 4.77 million public employees are likely subject to, or could be subjected to, restrictions on when they can exercise their First Amendment right to terminate their subsidies of union speech.

These restrictions are onerous and prohibit employees from exercising their rights under *Janus* except during escape periods. Here, that period was on an arbitrary date and limited to just ten days.[9] Employees who want to exercise their free speech rights outside the escape period by providing notice that they are nonmembers (*i.e.*, resigning from union membership), 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, 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; it is not, as here, a Christmas star shining for only a

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[8] (...continued)
that there are approximately 7.17 million public-sector union members nationwide.

[9] *See, e.g.*, cases cited *supra* at n.8; 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).

few days arbitrarily set by a labor union, or a state legislature. "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 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 analogous 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 period. So it should also be with labor organizations operating with a state-granted monopoly.

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. Nevertheless, the Ninth Circuit, following the errors of the Third, Seventh, and Tenth Circuits, has licensed states and unions to restrict severely when employees may exercise their First Amendment rights not to subsidize union speech. They did so by holding *Janus*'s waiver requirement inapplicable whenever employees sign contracts authorizing government deductions of union dues. App. A at 2a-3a, citing *Belgau*, 975 F.3d at 951-52; *see also Fischer*, 842 Fed.Appx. at 753; *Bennett*, 991 F.3d at 732-33; *Hendrickson*, 992 F.3d at 964.

Under this less-rigorous contract standard, governments and unions can easily restrict when and how employees may exercise their First Amendment rights under *Janus* simply by writing restrictions into the fine print of their dues deduction forms. There is no requirement that governments or unions notify employees presented with those forms of their constitutional right to refrain entirely from supporting financially a 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,* 496 F. Supp. 3d at 1368 (dues deduction form with ten-day escape-

period). 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 are due greater regard and deserve greater protections than this. This Court provided for such protections in *Janus* when it held that, to take payments for union speech from employees, governments and unions must have clear and compelling evidence those employees waived their First Amendment rights. 138 S.Ct. at 2486.

As in its prior waiver jurisprudence, this Court's waiver requirement in *Janus*, rigorously enforced, 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 who are presented with restrictive dues deduction authorizations to 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 are also permitted to make a free choice. That purported waivers are unenforceable as against public policy will curtail the ability of governments and unions to impose onerous restrictions on employees, such as those that prohibit employees from exercising their constitutional rights on only a few days each year.

The Court should not permit governments and unions, with the blessing of several appellate courts, to kneecap the First Amendment right it recognized/

restored in *Janus*. To protect employees' ability to exercise freely their speech rights, it is critically important that the Court instruct the lower courts that they must scrupulously enforce *Janus*'s waiver requirement.

IV. This Case Is an Excellent Vehicle to Clarify *Janus*'s Waiver Requirement in Recognition that the Sea Change in Striking Down Public Sector Forced-Unionism Requirements Allows Membership Coercively Obtained in Their Shadow to Be Terminated.

This case presents an ideal vehicle to establish that governments need proof that employees waived their constitutional rights to restrict when employees can stop subsidizing union speech.

First, this case presents a common fact pattern since *Janus*: a statute requiring public employers to enforce escape-period restrictions that are written into employees' dues deduction forms. *See* App. F at 16a-17a. The Court's resolution of this case would establish a legal rule applicable to a common tactic used by some states and unions to resist this Court's holding in *Janus*.

Second, the facts of this case are straightforward and cleanly present the legal questions. California specifically commands public employers to rely solely on public-sector labor unions to ascertain employee intent and communicate employees' decisions to public employers. CAL. GOV'T. CODE § 1157.10; App. F at 16a-

17a. Local 2700 sets the standard for its "window period" not at some specific, easily ascertainable period, but ties that date to the anniversary date of the employee's signature on a membership/dues checkoff authorization form, or the termination of a collective bargaining agreement. Bieker and Local 2700 enforced their restriction against Smith by seizing dues from his wages after he resigned his union membership and objected to supporting Local 2700 financially. Without more, these seizures of payments for Local 2700's speech violated Smith's First Amendment rights under *Janus*, 138 S.Ct. at 2486. The legal issue of whether Bieker and Local 2700 must prove with evidence that Smith knowingly, intelligently, and voluntarily waived his constitutional rights is squarely presented.

Finally, this case effectively presents for this Court's review not fewer than four similar decisions by four appellate courts to replace *Janus*'s waiver requirement with a contract requirement. The Ninth Circuit summarily affirmed the district court's judgment based on *Belgau*, App. A at 2a-3a, where it agreed with the Third, Seventh, and Tenth Circuits that *Janus*'s waiver requirement does not apply whenever employees contractually consent to restrictions on stopping dues deductions. *Bennett*, 991 F.3d at 731-32; *Fischer*, 842 Fed.Appx. at 753; *see Hendrickson*, 992 F.3d at 964 (similar conclusion). If the Court wants to correct the uniform error of these four courts, and clarify that governments and unions need evidence of a constitutional waiver to restrict

employees' rights under *Janus*, this case is an excellent vehicle to do so.

CONCLUSION

For the reasons stated above, certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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October 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK R. SMITH, Plaintiff-Appellant, v. KATE BIEKER, Chief Executive Officer, Superior Court, County of Alameda; AFSCME LOCAL 2700, Defendants-Appellees, ROB BONTA, Attorney General, Intervenor-Defendant-Appellee.	No. 19-16381 D.C. No. 3:18-cv-05472-VC MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from The United States District Court for the Northern District of California Vince Chhabria, District Judge, Presiding

Submitted July 19, 2021[**]

Before: SCHROEDER, SILVERMAN, and MURGUIA, Circuit Judges.

Mark R. Smith appeals from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging a First Amendment claim arising out of union membership dues. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's decision on cross-motions for summary judgment. *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). We may affirm on any ground supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008). We affirm.

Summary judgment on Smith's First Amendment claim against AFSCME Local 2700 was proper because the deduction of union membership dues arose from the private membership agreement between AFSCME Local 2700 and Smith, and "private dues agreements do not trigger state action and independent constitutional scrutiny." *Belgau v. Inslee*,

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

975 F.3d 940, 946-49 (9th Cir. 2020), *cert. denied,* No. 20-1120, 2021 WL 2519114 (June 21, 2021) (discussing state action).

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2020).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARK R. SMITH, Plaintiff, v. KATE BIEKER, et al., Defendants.	Case No. 18-cv-05472-VC **ORDER GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION AND GRANTING INTERVENOR'S AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT** Re: Dkt. Nos. 50, 62, 63, 64, 65

Bieker's motion to dismiss for lack of jurisdiction is granted, and the defendants' and intervenor's motions for summary judgment are granted. Smith's motion for summary judgment is denied.

1. Smith does not have standing to seek a declaratory judgment regarding the constitutionality of California Government Code Section 71632.5, and even if he did, the claim would be moot.

There is no standing because section 71632.5

was not enforced against Smith at any time relevant to this lawsuit. That provision permitted state trial courts to establish agency shop arrangements that required employees who opted not to join the union to nonetheless pay a service fee. Smith's lawsuit, however, stems from him commitment to pay membership dues, not from his public employer's enforcement of now-unconstitutional agency shop arrangement.

And in any event the claim would be moot because neither the State nor the Superior Court plans to enforce section 71623.5 in the wake of *Janus v. American Federation of State, City, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Everyone acknowledges the statute is no longer constitutional. The day *Janus* was handed down, the General Counsel of the State's Public Employment Relations Board announced that the Board would no longer enforce any statutes that require non-union members to pay agency fees (this decision was later officially adopted by the Board on October 11, 2018.) *See* De La Torre Declaration ¶ ¶ 3-7, Dkt. No. 65-3. The next day, Smith's employer also announced it would no longer deduct agency fees. *See* Stone Declaration ¶ 11, Ex. A, Dkt. Nos. 52, 52-1. Because the State and the defendants stopped enforcing the provision before this lawsuit was filed in September 2018, there is no need to entertain Smith's argument that the voluntary cessation doctrine governs. *See Sze v. I.N.S.*, 153 F. 3d 1005, 1008 (9th Cir. 1998) ("For the exception to apply...the [defendant's] voluntary cessation 'must have arisen *because of* the litigation.'"

(quoting *Public Utilities Comm'n v. F.E.R.C.*, 100 F. 3d 1451, 1460 (9th Cir. 1996) (emphasis in original)). Regardless, enforcement of the provision is not reasonably expected to recur, for the reasons stated in *Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1338-40 (W.D. Wash. 2018). *See also Bermudez v. Service Employees Int'l Union, Local 521*, No. 18-CV-04312-VC, 2019 WL 1615414, at *1 (N.D. Cal. Apr. 16, 2019); *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1225-27 (W.D. Wash. 2019); *Cook v. Brown*, 364 F. Supp. 3d 1184, 1187-90 (D. Or. 2019).

2. Smith's constitutional challenge to the California statutes that were amended by Senate Bill 866 is also moot, for the reasons given in *Babb v. California Teachers Association*, No. 8:18-cv-00994-JLS-DFM, 2019 WL 2022222, at *17 (C.D. Cal. May 8, 2019). As of November 30, 2018, by operation of the membership agreement between Smith and the union, the Superior Court no longer deducts dues from Smith's paycheck. Again, the voluntary cessation doctrine does not apply because the Superior Court stopped deducting fees by operation of the contract, not because it was responding to Smith's litigation. *Cf. ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) (concluding that expiration of contract by its own terms is not *voluntary* cessation). And in any event, enforcement of the provision is not reasonably likely to start up again.

3. As a matter of law, Smith is not entitled to a refund of the dues that were deducted from his paychecks from July 2018 (when he resigned) through November 2018. Assuming for argument's sake only

that the union's conduct could be "state action" for purposes of a section 1983 claim,[1] Smith's constitutional rights were not violated by the union's insistence on continuing to collect dues from him for a few more months after he resigned. The continued collection of dues until the next revocation period (which in this case was November 30, 2018) was authorized by Smith's membership agreement. None of Smith's four arguments for getting out of this contractual obligation created a genuine issue of fact:

a) Smith contends that *Janus* entitles him to elect to stop paying dues to the union at the drop of a hat. But *Janus* did not concern the relationship of unions and members; it concerned the relationship of unions and non-members. Besides, "the First Amendment does not confer...a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991); *see also Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019); *Belgau*, 359 F. Supp. 3d at 1009.

b) Smith argues that even if *Janus* doesn't automatically undo the membership agreement, the agreement was invalid at it's inception because Smith couldn't have knowingly waived a right that he didn't yet have (namely, the right to avoid paying union fees as a non-member). But changes in intervening law - even constitutional law - do not invalidate a contract. *See Brady v. United States*, 397 U.S. 742, 757 (1970);

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[1] *But see Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1012-15 (W.D. Wash. 2019).

Dingle v. Stevenson, 840 F. 3d 171, 174-76 (4th Cir. 2016).

c) Smith also argues that the membership agreement was invalid at its inception because at the time he joined, a union representative encouraged him to sign up, saying the benefits of joining outweighed the discount he would get by declining membership and instead paying agency fees. *See* Smith Deposition at 41, Dkt. No. 62-6. On its face and as a matter of law, the representative's statement - as described by Smith - doesn't amount to an improper threat, fraud, or duress. *See Int'l Technologies Consultants, Inc. v. Pilkington PLC*, 137 F.3d 1382, 1390 (9th Cir. 1998); Restatement (Second) of Contracts § 175 (1981).

d) Smith argues that the union gave up its right to enforce the contract in 2018 because previously, between September 2016 and July 2017, it had declined to enforce the agreement against him. To argue that the union's inaction in the face of Smith's past breach constitutes a waiver of its rights to enforce the contract, Smith would have to show that he detrimentally relied on the acquiescence. *See* 13 Williston on Contracts § 39:35 (4th ed.). He doesn't present evidence of any such reliance. He rejoined the union in July 2017 knowing that he would have to pay the full dues amount to receive the union's benefits. And when he re-signed the union in July 2018, he did so in reaction to the rights he thought *Janus* gave him. *See* Smith Deposition at 13, Dkt. No. 63-3 Smith provides no evidence that the union's alleged acquiescence to his past breach caused him to believe

he could quit at any time, contrary to the membership agreement's terms, without consequences.

IT IS SO ORDERED.

Dated: June 13, 2019

VINCE CHHABRIA
United States District Judge

APPENDIX C

UNITED STATES CONSTITUTION

First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . .
> abridging the freedom of speech, . . . or
> the right of the people peaceably to
> assemble, and to petition the
> Government for a redress of grievances.

APPENDIX D

UNITED STATES CONSTITUTION

Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

Trial Court Employment Protection and Governance Act, CAL. GOV'T. CODE § 71600 *et seq.* (West)

§ 71601 — Definitions

For purposes of this chapter, the following definitions shall apply:

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(b) "Employee organization" means either of the following:

(1) Any organization that includes trial court employees and has as one of its primary purposes representing those employees in their relations with that trial court.

(2) Any organization that seeks to represent trial court employees in their relations with that trial court.

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(h) "Recognized employee organization" means an employee organization that has been formally acknowledged to represent trial court employees by the county under Sections 3500 to 3510, inclusive, prior to the implementation date of this chapter, or by the trial court under former Rules 2201 to 2210, inclusive, of the California Rules of Court, as those rules read on April 23, 1997, Sections 70210 to 70219, inclusive, or Article 3 (commencing with Section 71630).

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(k) "Trial court" means a superior court.

(l) "Trial court employee" means a person who is both of the following:

(1) Paid from the trial court's budget, regardless of the funding source. For the purpose of this paragraph, "trial court's budget" means funds from which the presiding judge of a trial court, or is or her designee, has authority to control, authorize, and direct expenditures, including, but not limited to, local revenues, all grant funds, and trial court operations funds.

(2) Subject to the trial court's right to control the manner and means of his or her work because of the trial court's authority to hire, supervise, discipline, and terminate employment. For purposes of this paragraph only, the "trial court" includes the judges of a trial court or their appointees who are vested with or delegated the authority to hire, supervise, discipline, and terminate.

(m) A person is a "trial court employee" if and only if both paragraphs (1) and (2) of subdivision (l) are true irrespective of job classification or whether the functions performed by that person are identified in Rule 10.810 of the California Rules of Court. "Trial court employee" includes those subordinate judicial officers who satisfy paragraphs (1) and (2) of

subdivision (l). The phrase "trial court employee" does not include temporary employees hired through agencies, jurors, individuals hired by the trial court pursuant to an independent contractor agreement, individuals for whom the county or trial court reports income to the Internal Revenue Service on a Form 1099 and does not withhold employment taxes, sheriffs, temporary judges, and judges whether elected or appointed. Any temporary employee, whether hired through an agency or not, shall not be employed in the trial court for a period exceeding 180 calendar days except that for court reporters in a county for the first class, a trial court and a recognized employee organization may provide otherwise by mutual agreement in a memorandum of understanding or other agreement.

§ 71631 — Employee organizations; rights of trial court employees

Except as otherwise provided by the Legislature, trial court employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Trial court employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the trial court.

§ 71632.5 — Negotiations of agency shop agreements; effective date of agreements; rescission; financial reporting

(a) Notwithstanding any other provision of law, rule, or regulation, an agency shop agreement may be negotiated between a trial court and a recognized employee organization that has been recognized as the exclusive or majority bargaining agent.... As used in this article, "agency shop" means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of that organization for the duration of the agreement or a period of three years from the effective date of the agreement, whichever comes first....

APPENDIX F

CAL. GOV'T. CODE § 1157.3 (West) — Dues of public employees' organization or bona fide association

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(b) The public employer shall honor employee authorizations for the deductions described in subdivision (a). The revocability of an authorization shall be determined by the terms of the authorization.

CAL. GOV'T. CODE § 1157.10 (SB 866, § 9, eff. 27 June 2018) — Administration procedures; deductions, cancellations or changes; state employees of public agencies not under uniform payroll system

Payroll deductions for state employees of public agencies, other than those under the uniform payroll system, shall be administered by the appropriate officer of the public agency. In administering payroll deductions the officer shall do all of the following:

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(g) Make, cancel, or change a deduction not later than the month subsequent to the month in which the request is received, except that a

deduction for an employee organization can be revoked only pursuant to the terms of the employee's written authorization. Employee requests to cancel or change deductions for employee organizations shall be directed to the employee organization, rather than to the public agency. The employee organization shall be responsible for processing these requests. The public agency shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed, and the employee organization shall indemnify the public agency for any claims made by the employee for deductions made in reliance on that information. All deductions, cancellations, or changes shall be effective when made by the public agency.