No. _____

IN THE

Supreme Court of the United States

CARA O'CALLAGHAN AND JENEÉ MISRAJE,

PETITIONERS,

V.

MICHAEL V. DRAKE, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; TEAMSTERS LOCAL 2010; AND ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

RESPONDENTS.

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

PETITION FOR WRIT OF CERTIORARI

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September 6, 2022

QUESTIONS PRESENTED

Whether a union can trap a government worker into paying dues for longer than a year under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

PARTIES TO THE PROCEEDING

Petitioners, Cara O'Callaghan and Jeneé Misraje, are natural persons and citizens of the State of California.

Respondent Michael V. Drake is a natural person and the President of the University of California. Respondent Robert Bonta is a natural person and the Attorney General of California.[1]

Respondent Teamsters Local 2010 is a labor union representing public employees in the State of California.

RULE 29.6 STATEMENT

As Petitioners are both natural persons, 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:

- *O'Callaghan v. Napolitano*, 19-56271, United States Court of Appeals for the Ninth Circuit. Judgment entered April 28, 2022; rehearing petition denied June 6, 2022.

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[1] Respondents Drake and Bonta are sued in their official capacity and are substituted for previous official-capacity parties Janet Napolitano and Xavier Becerra, who held the same positions when the case was pending below. *See* Fed. R. App. P. 43(c)(2).

- *O'Callaghan v. Napolitano*, No. 2:19-cv-02289-JVS-DFM, United States District Court for the Central District of California. Judgment entered October 4, 2019.

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INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court made clear that unions cannot "shanghai[]" government workers "for an unwanted voyage," collecting money from their paychecks—"unless the employee affirmatively consents" to the collection. 138 S. Ct. at 2466, 2486. This case presents an important question of first impression that should be settled by this Court: whether this prohibition from *Janus* allows unions to trap government workers into paying union dues for longer than one year. Petitioner Cara O'Callaghan was trapped in her union for *almost four years*. Petitioners argue that government workers must be given the option to withhold their "affirmative[] consent" at least once per year. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 315 (2012) ("Giving employees only one opportunity per year to make this choice is tolerable . . . ."). This Court should grant this Petition to decide that extended forced association conflicts with this Court's decision in *Janus*, which gave government workers fundamental rights against compelled speech.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *O'Callaghan v. Napolitano*, No. 19-56271, 2022 U.S. App. LEXIS 11559 (9th Cir. Apr. 28, 2022) and reproduced at App. 1. The order denying en banc review is reported at *O'Callaghan v. Napolitano*, No. 19-56271, 2022 U.S. App. LEXIS 15541 (9th Cir. June 6, 2022) and reproduced at App. 28.

The opinion of the United States District Court for the Central District of California is reported at *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392 (C.D. Cal. Sep. 30, 2019) and reproduced at App. 6.

JURISDICTION

The Ninth Circuit issued its order denying en banc review on June 6, 2022. 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 . . . ."

42 U.S.C. § 1983 provides:

> 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.

Cal. Gov't Code § 1157.12 provides:

Public employers other than the state that provide for the administration of payroll deductions authorized by employees for employee organizations as set forth in Sections 1152 and 1157.3 or pursuant to other public employee labor relations statutes, shall:

(a) Rely on a certification from any employee organization requesting a deduction or reduction that they have and will maintain an authorization, signed by the individual from whose salary or wages the deduction or reduction is to be made. An employee organization that certifies that it has and will maintain individual employee authorizations shall not be required to provide a copy of an individual authorization to the public employer unless a dispute arises about the existence or terms of the authorization. The employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that certification.

(b) Direct employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer 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 employer for any claims made by the employee for deductions made in reliance on that information. Deductions may be revoked only pursuant to the terms of the employee's written authorization.

Cal. Gov't Code § 3583 provides:

> Permissible forms of organizational security shall be limited to either of the following:
> (a) An arrangement pursuant to which an employee may decide whether or not to join the recognized or certified employee organization, but which requires the employer to deduct from the wages or salary of any employee who does join, and pay to the employee organization which is the exclusive representative of that employee, the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the written memorandum of understanding. This arrangement shall not deprive the employee of the right to resign from the employee organization within a period of 30 days prior to the expiration of a written memorandum of understanding.
> (b) The arrangement described in Section 3583.5.

STATEMENT OF THE CASE

Petitioner Cara O'Callaghan was trapped in her union for *almost four years*. She and Petitioner Jeneé Misraje repeatedly advised Respondent Teamsters Local 2010 (the "Union") that it did not have their "affirmative consent" to withdraw dues from their paychecks, but those requests were denied.

O'Callaghan is the finance manager of the Sport Club program, employed by the University of California, Santa Barbara ("UCSB"). App. 7. O'Callaghan was employed by UCSB from 2000 to 2004 and has been continuously employed by UCSB since August 2009.

Id. For almost nine years since returning to UCSB, O'Callaghan did not join the Union but, instead, was forced by California law to pay agency fees, also known as "fair share" fees, to the Union. *Id.*

In anticipation of losing the *Janus* decision and its ability to collect agency fees, the Union changed its tactics towards union holdouts like O'Callaghan. On May 31, 2018, a Union representative came to O'Callaghan's workplace and solicited her to join the Union, and her experience confirms these changes in tactics. First, the Union replaced the one-year commitment found in earlier membership agreements with a provision to ensure that any new signer would be trapped into paying dues for years into the future. App. 8. Importantly, the Union drafted the language in O'Callaghan's agreement in such a way that the actual time period to which government workers were agreeing to have union dues withdrawn from their paychecks was concealed. *Id.* Second, the Union sent out a wave of union recruiters "and pressured workers to join the Union" to trap them into paying the union for years to come. Am. Compl. ¶ 16. In O'Callaghan's case, this pressure occurred less than a month before this Court issued the *Janus* decision. Third, the Union told O'Callaghan only of the law in effect at the time, which forced her to pay the union whether she signed up or not, and it withheld from her information of the impending *Janus* decision, which was poised to free her from having to pay anything to the Union. App. 8. The Union did not inform her that she was waiving a constitutional right. *Id.* at 7-8. Based on this incomplete and intentionally misleading information, O'Callaghan signed the membership application. *Id.* at 7.

On June 27, 2018, the very day this Court issued the *Janus* decision, the State of California enacted a law solidifying this new union practice of trapping government workers into multiyear union membership agreements. Cal. Gov't Code § 1157.12.

Also on June 27, 2018, this Court decided *Janus* and held that the deduction of union fees from government employees without their "affirmative consent" violates the First Amendment. 138 S. Ct. at 2486. The Court further held that "affirmative consent" requires a "waiver" of First Amendment rights that is "freely given" and must be shown by "clear and compelling" evidence. *Id.*

On July 25, 2018, after learning of the *Janus* decision, O'Callaghan sent a letter to the Union resigning her membership and another letter to UCSB requesting that it stop deducting union dues from her paycheck. App. 8. In response, the Union sent O'Callaghan a letter stating that she was free to resign her membership at any time; however, her payroll deductions would continue until she gave notice pursuant to the terms of the collective bargaining agreement between the Union and UCSB. *Id.* The Union letter did not explain what those terms were. *Id.* The terms required notice to be written and sent via U.S. mail to both the Union and UCSB during the thirty days prior to the expiration of the agreement, which would not occur until March 31, 2022—almost *four years* from the time of her request. *Id.* This time period represented the maximum entrapment time period allowed under California law. Cal. Gov't Code § 3583.

On October 16, 2018, Liberty Justice Center sent a letter to UCSB demanding that it immediately stop deducting union dues from O'Callaghan's paycheck. App

8. On October 24, 2018, UCSB referred the Liberty Justice Center letter to the Union via e-mail. *Id.* On November 9, 2018, the Union confirmed to UCSB via e-mail that it should continue to deduct union dues from O'Callaghan's paycheck. *Id.* On November 29, 2018, UCSB sent a letter to Liberty Justice Center stating that it would continue to deduct union dues from O'Callaghan's paycheck. *Id.* UCSB continued to deduct approximately forty-one dollars ($41) per month from O'Callaghan's paychecks and sent the money to the Union. *Id.* at 9.

Meanwhile, Petitioner Misraje is an administrative assistant in the Geography Department at the University of California, Los Angeles ("UCLA"), where she has been employed since May 2015. *Id.* On July 27, 2015, Misraje signed an application joining the Union. *Id.* On August 8, 2018, Misraje sent a letter to the Union requesting to withdraw her union membership. *Id.* On August 9, 2018, the Union responded to Misraje via e-mail that she would be dropped as a full member of the Union but that she could only end the deduction of union dues from her paycheck during an annual time window. *Id.*

On August 27, 2018, Misraje sent an e-mail to the Union, requesting that it immediately terminate her union membership and stop deducting dues from her paycheck, and she sent an email to UCLA requesting that it stop deducting union dues from her paycheck. *Id.* The same day, UCLA responded that it could not grant her request because all such requests must come through the Union under California law, and the Union repeated its response that Misraje was no longer a Union member but could not end deduction of her union dues until an unspecified future time period. *Id.*

Misraje made similar requests to both the Union and UCLA and received similar responses between October 11, 2018, and December 7, 2018. *Id.* at 10. The terms of Misraje's union membership application dictate that notice to end dues deductions must be written and sent to both the Union and UCLA "at least sixty (60) days, but not more than seventy-five (75) days" before the anniversary date of when she signed the agreement. Am. Compl. ¶ 40. No one spelled out for her the exact dates of this short 15-day window. *Id.* at ¶ 28. UCLA continued to deduct approximately fifty-three dollars ($53) per month from Misraje's paychecks for union dues and remitted them to the Union. App 10.

On March 27, 2019, O'Callaghan and Misraje filed this lawsuit against Regents of the University of California; the Union; and Xavier Becerra, in his official capacity as Attorney General of California. The Complaint asserted seven counts, addressing two issues in violation of their rights to free speech and association: 1) the deduction of Union dues from Petitioners' paychecks without their affirmative consent and 2) the Union's status as Petitioners' exclusive representative.[2] Am. Compl. ¶¶ 45-87.

On June 14, 2019, Petitioners filed a First Amended Complaint, substituting then-University California President Janet Napolitano for the Regents of the University of California. Each of the Respondents filed motions to dismiss, and on September 30, 2019, the District Court granted the motions to dismiss. App. 26. On October 4, 2019, the District Court

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[2] Petitioners do not appeal the exclusive representation question.

entered judgment disposing of the case in its entirety. *Id.* at 4-5. The district court dismissed Petitioners' claims on the grounds that an affirmative "good faith" defense shields private defendants from Section 1983 liability if they relied in good faith on a statute later held unconstitutional. *Id.* 21.

Petitioners then timely appealed to the Ninth Circuit. While this case was pending in the Court of Appeals and after briefing was completed, the Ninth Circuit issued a decision that ruled against a similar *Janus* claim for government workers in the state of Washington, whose union escape windows occurred once a year. *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). Earlier, the Ninth Circuit had issued a decision foreclosing Petitioners' exclusive representation claim. *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019). However, neither case addressed multiyear agreements like that signed by O'Callaghan. Petitioners filed a supplemental brief in the Ninth Circuit addressing the two decisions, arguing that while *Belgau* controlled the outcome in that circuit as to short-term union agreements like Misraje's, it did not answer the question as to the propriety and enforceability of O'Callaghan's four-year window period. *See* 9th Cir. Dkt. 37.

In response, the Teamsters immediately attempted to dodge this important issue and evade review by informing O'Callaghan that she was released from her agreement and would be sent a check for the dues she had paid. *See* 9th Cir. Dkt. 44. O'Callaghan treated this unilateral action by the union as a settlement offer and rejected it; therefore, she retains her claim for damages in this case. Concurrently, on December 9, 2020, the Union filed a motion to dismiss the appeal

claiming that its gamesmanship had mooted the case, in an effort to protect their multiyear entrapment policy from this Court's scrutiny. *Id.* This unilateral action by the Teamsters came 20 months after the case was filed, more than a year after the district court's final judgment, and nearly nine months after primary briefing was complete in the Ninth Circuit. The Ninth Circuit rightfully rejected this gimmickry, denying the Teamsters' motion in a footnote. App 2, fn. 1.

The Ninth Circuit then heard oral argument on the merits of the case on February 8, 2022. However, the court grouped this case with other cases challenging public-sector union opt-out windows—all but one of which involved only a one-year entrapment period—and heard oral argument for all of them together.[3]

On April 28, 2022, the panel issued its opinion dismissing the claims pursuant to *Belgau* and *Danielson*. App. 1-3. The three-page opinion did not address—whether to accept or reject—O'Callaghan's argument regarding multiyear entrapment. *Id.* Instead, the Court stated only that Petitioners "affirmatively agreed to join the Union . . . including terms limiting when they could withdraw authorization." *Id.* at 2. Because the opinion did not grapple with whether such agreements may trap employees into paying dues for longer than a year, Petitioners filed a petition for panel rehearing, or in the alternative, rehearing en banc,

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[3] The other case to raise the question of the maximum length of union entrapment is *Savas v. Cal. State Law Enf't Agency,* No. 20-56045, 2022 U.S. App. LEXIS 11564 (9th Cir. Apr. 28, 2022). Plaintiffs in that case file their petition for certiorari to this Court the same day as this Petition.

asking the Ninth Circuit to address that important and distinct issue. On June 6, 2022, the Court of Appeals denied the rehearing petition, and Petitioners ask this Court to answer this question of first impression.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition to settle this important question of first impression of the enforceability of multiyear entrapment periods in government union agreements post-*Janus*.

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 were previously allowed. As a result of changes made to union membership agreements after *Janus*, thousands of government workers are now subject to long entrapment periods, prohibiting them from exercising their First Amendment rights under *Janus* for years.

Petitioners' claim here represents a particularly good vehicle for this Court's consideration because the four-year window to which O'Callaghan was subjected tests the outer bounds of any claim a union could have to impose membership and dues payments on workers even after they withdraw their consent required by *Janus*. Both under the prior agency fee regime and after *Janus*, courts have sometimes approved escape window periods of a year or less, on the theory that

"[g]iving employees only one opportunity per year to make this choice [whether to join the union or be an agency fee payer] is tolerable if employees are able at the time in question to make an informed choice." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315 (2012). But allowing unions to withhold information and trick employees into long-term obligations undermines the promise of *Janus*, leaving unsuspecting workers again "shanghaied for an unwanted voyage." *Janus*, 138 S. Ct. at 2466.

Protecting the rights of employees requires courts to look seriously at the procedures used by the Union because "the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement." *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). A procedural apparatus that provides only a brief—unidentified and unadvertised—period every four years to make a decision, whether informed or not, denies O'Callaghan "a fair opportunity to identify the impact of the governmental action on [her] interests." *Id*. Indeed, if left unchecked by this Court, other membership applications could specify even longer periods of entrapment, thus eroding the rights protected by this Court in *Janus*.

As clarified in *Janus*, courts subject multiyear window periods to heightened First Amendment scrutiny. Even prior to *Janus*, the agency fee notices required by *Hudson* were provided annually, to attempt to give workers a meaningful choice. Other legal authorities have followed suit by applying this one-year rule. In a similar case decided in the District of New Jersey, the court expressed skepticism at trapping government workers into paying union dues for even six months.

See Smith v. N.J. Educ. Ass'n, No. 18-10381 (RMB/KMW), 2019 U.S. Dist. LEXIS 205960, at *19 (D.N.J. Nov. 27, 2019). The *Smith* decision addressed the constitutionality of a New Jersey statute requiring dues deductions to continue for up to one year after union resignation. In that case, the union agreements allowed members to cease dues deductions two times a year: once in January and once in July. *Id.* at *6. While it did not ultimately reach the issue of the constitutionality of what it deemed the "draconian" statute, the court nonetheless offered its opinion of such an annual entrapment period:

> If it were enforced as written, the Member Plaintiffs are correct that the [law]'s revocation procedure would, in the absence of a contract providing additional opt-out dates and a more reasonable notice requirement (as is present here), unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union.

Id. at *19-*20.[4]

Indeed, the federal rule governing private sector bargaining has long limited such agreements to one year. 29 U.S.C. § 186(c)(4) provides that a union membership agreement "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever

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[4] The unpublished Third Circuit decision on appeal affirmed the district court opinion, while not addressing the portion of the opinion at issue, as it found the plaintiff there lacked standing to challenge the New Jersey statute. *Fischer v. Governor of N.J.*, 842 F. App'x 741, 751 (3d Cir. 2021).

occurs sooner." This represents the clear understanding of Congress that, for an employee to have a meaningful choice, he or she must have a reasonable opportunity to assess whether that choice will be in the person's interest.

Nor is the opinion in *Smith* an aberration in articulating judicial limits on union revocation periods. Courts have held for decades that onerous entrapment periods longer than a year infringe the rights of employees. In the private-sector context, this Court has recognized that the right to resign union membership "at any time . . . protects the employee whose views come to diverge from those of his union." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 (1985). In *McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp. 2d 522 (M.D. Pa. 2007), a case where plaintiff union members wished to resign after their union voted in favor of a strike action they opposed, the court noted this Court's holding in *Pattern Makers' League* and went on to state that because the 3-year "maintenance of membership" provision "locks plaintiffs into union membership for the duration of the CBA – the only way plaintiffs can resign from the union is to leave their employment." 491 F. Supp. 2d. at 527. That court further stated that "union members who are unable to resign unilaterally because of a 'maintenance of membership' provision" have a reasonable likelihood of success in their claim to the First Amendment right not to associate held by non-members. *Id.*; *see also Debont v. City of Poway*, No. 98CV0502, 1998 WL 415844 (S.D. Cal. Apr. 14, 1998)

(holding 8-year membership concurrent with CBA violates right of member to resign when he changes his mind after several years in the union).

Indeed, the Federal Labor Relations Authority issued an opinion following *Janus* clarifying that it would no longer allow federal employees to be tied to a union for longer than one year. The FLRA determined that "it would assure employees the fullest freedom in the exercise of their rights under the Statute if, after the expiration of the initial one-year period . . . an employee had the right to initiate the revocation of a previously authorized dues assignment at any time that the employee chooses." *In re Petition of Office of Personnel Management*, 71 FLRA No. 571 (Feb. 14, 2020). As the concurrence from Member Abbott elaborated:

> The Court's decision in *Janus* leads me to one conclusion – once a Federal employee indicates that the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be "freely given" and the earlier election can no longer serve as a waiver of the employee's First Amendment rights. Thus, restricting an employee's option to stop dues withholding – for whatever reason – to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights.

Id. at 575 (Abbott, M., concurring).

The FLRA decision is consistent with the opinions of at least three State Attorneys General. The Attorney General of Texas, in assessing the impact of *Ja-*

nus, reached the conclusion that "a one-time, perpetual authorization is inconsistent with the Court's conclusion in *Janus* that consent must be knowingly and freely given." Att'y Gen. of Texas Op. No. KP-0310, May 31, 2020, at 3. As the opinion explains, "Organizations change over time, and consent to membership should not be presumed to be indefinite." *Id.* (citing *Knox*, 567 U.S. at 315).

The Attorney General of Indiana, likewise, found that "[t]o ensure an employee's consent is up-to-date, as required for it to be a valid waiver of the employee's First Amendment rights, an employee must be provided a regular opportunity to opt-in and opt-out." Att'y Gen. of Indiana Op. No. 2020-5, June 17, 2020, at 6. He went on to say that workers should be able to opt out at any time, and for opt-in, "we think it is reasonable that such a waiver be obtained annually." *Id.*

This is consistent also with the opinion of the Attorney General of Alaska, who determined that, "[i]n order to secure clear and compelling evidence of a knowing waiver, the State should also provide for a regular 'opt-in' period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages." Att'y Gen. of Alaska Op. dated Aug. 27, 2019 at 12.

The Attorney General of Texas concluded his opinion by adopting exactly the position that Petitioners ask this Court to adopt—one year is as long as the Constitution will allow:

> [T]he Court in *Janus* did not articulate the appropriate interval in lieu of a one-time consent

> that extends indefinitely for employee deductions. The period of time for which employee consent to a payroll deduction validly operates therefore remains an open question. However, a court would likely conclude that consent is valid for one year from the time given and is sufficiently contemporaneous to be constitutional.

Att'y Gen. of Texas Op. No. KP-0310, May 31, 2020, at 4 (citing *Knox*).

A holding requiring regular intervals to proactively renew one's membership follows this Court's general approach to the waiver of constitutional rights. The Court in *Janus* characterized the decision to pay money to a union as a "waiver" of the right not to belong or pay money to a union, citing *Johnson v. Zerbst* and its progeny. 138 S. Ct. at 2486 (citing 304 U.S. 458 (1938)). Certain standards must be met for a person to properly waive a constitutional right. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. at 464. Second, the waiver 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 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, 681 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

Most importantly, waiver of a constitutional right "should not, once uttered, be deemed forever binding." *United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988). This principle has been recognized in multiple decisions. *See, e.g., United States v. Groth*, 682 F.2d 578, 580 (6th Cir. 1982); *United States v. Lee*, 539 F.2d 606, 610 (6th Cir. 1976); *Zemunski v. Kenney*, 984 F.2d 953, 954 (8th Cir. 1993); People v. Crayton, 48 P.3d 1136, 1146 (Cal. 2002) (collecting authorities); *Wilson v. Horsley*, 974 P.2d 316, 322 (Wash. 1999).

Many recent cases recognize that waiver of one's constitutional rights can become stale due to the passage of time or intervening events; in those instances, citizens must be given a new opportunity to make an informed choice regarding waiver. *United States v. Hinkley*, 803 F.3d 85, 92 (1st Cir. 2015); *United States v. Van Phong Nguyen*, 608 F.3d 368, 375 (8th Cir. 2010); *United States v. Pruden*, 398 F.3d 241, 246 (3d Cir. 2005); *State v. Miah S. (In re Miah S.)*, 861 N.W.2d 406, 412-13 (Neb. 2015) (collecting cases). The Court of Appeals has recognized many times that a waiver of constitutional rights is stale after the passage of "appreciable time." *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995). The rule sought by Petitioners here follows the reasoning of those cases because it ensures the right to reevaluate the waiver of a constitutional right after the passage of time.

When union membership is irrevocable for years upon years, and dues self-perpetuate by union fiat, with no requirement of notice when one's opt-out window is coming open, consent is not contemporaneous. This situation violates the constitutional requirement under *Janus* that government workers must give their "affirmative consent."

The court below failed to grapple with this long-simmering legal argument and left the question unanswered as to how long is too long to trap government workers. Indeed, it failed even to acknowledge its own statements to the contrary of its holding in this case. The Ninth Circuit's *Belgau* opinion does not stand for the proposition that unions can trap government workers into paying union dues indefinitely. The *Belgau* decision is explicit that government workers can only be trapped into paying union dues "subject to a *limited* payment commitment period." 975 F.3d at 952 (emphasis added). But in this case, the court below failed to answer the question of how limited the commitment period must be. As the Ninth Circuit explained in *Belgau*, "[t]he dangers of compelled speech animate *Janus*." *Belgau*, 975 F.3d at 950. The dangers of compelled speech rise exponentially beyond a year because, over the course of three or four years, the Union speaks for workers on issues that were not even contemplated when the adhesion contracts were first signed.

During oral argument in *Belgau*, Judge McKeown made reference to the fact that the plaintiffs in *Belgau* only suffered a constitutional deprivation for less than a year: "What about that period after they decide they want to give up the ship, and then they're kind of held hostage 'til the end of that one-year period? Are they not in a compelled situation there?" *Belgau*, Video R., Dec. 10, 2019, at 17:31-17:45.[5] Judge McKeown at oral argument intimated that plaintiffs were being compelled to subsidize speech that they disagreed with,

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[5] *Available at* https://www.ca9.uscourts.gov/media/video/?20191210/19-35137/ (last retrieved Aug. 31, 2022).

but she ultimately wrote the *Belgau* decision in favor of the defendants because this time period was "limited" to one year. She continued this line of questioning with the State of Washington defendants, who also premised their defense on the fact that the constitutional deprivation lasted less than one year:

> McKeown, J: "What about that—that kind of no-man's-land after you revoke, but you can't really get out?"
>
> Alicia Young, Deputy Solicitor General, State of Washington: "That is a limited time period, and it's essentially when the employee joins the union and avails themself of union member benefits. They've agreed to, essentially, a one-year commitment--or a financial commitment. It's no different than if the employee had paid the annual membership dues on day one of signing up for the member--for the union--or had agreed to do it over a twelve-month installment, which is essentially what happened here.
>
> Christen, J.: "An open enrollment period, right?"
>
> Ms. Young: "Sure."
>
> McKeown, J: "It is, but the difference, of course, is if you don't want to pay the money, you ought to be able to get out."

Id. at 26:15-26:58.

Thus, the state defendants in *Belgau* compared the union agreement to an annual contract paid in monthly installments, and Judge Christen compared the opt-out period to an annual enrollment period for

changing one's employee benefits and paycheck deductions. But the reasons for allowing a one-year benefit contract do not apply beyond one year. The justification implied in the *Belgau* oral argument is that unions need to be able to make annual decisions regarding their budgeting and, therefore, cannot have members withdrawing their financial support throughout the year. But no party in *Belgau* argued that workers could be trapped into paying union dues for longer than a year. This question remained unresolved, and no lower court can properly address it without guidance from this Court as to how far the holding in *Janus* extends.

Because the district court in this case had insufficient direction from this Court on the question, it dismissed the case without permitting Petitioners discovery into the reason why the length of the union membership application changed between that signed by Misraje and O'Callaghan. However, in a similar case, discovery did confirm that another California government union changed its membership application in anticipation of the impending *Janus* decision. *See Wolf v. University Professional and Technical Employees*, N. D. Cal. Case No. 3:19-cv-02881-WHA, ECF No. 78-2 at 8-9, Deposition of Jamie McDole at 18, 22 (union president admitted her union's opt-out period was restricted in anticipation of the *Janus* decision to prevent employees from exercising their rights under *Janus*). This Court should take this case to ensure that unions can no longer utilize such fraudulent inducement to deprive government workers of the First Amendment rights that this Court recognized just four years ago.

Despite this Court's teaching, lower courts have almost universally been hostile to the rights recognized in *Janus*. As this case and the other pending petitions exemplify, this Court's intervention is necessary to clarify that *Janus* meant what it said: unions may not take money from government workers without their affirmative consent.

CONCLUSION

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

Respectfully submitted,

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