No. 18-1120

IN THE

Supreme Court of the United States

THERESA RIFFEY, ET AL.,

PETITIONERS,

V.

J.B. PRITZKER, GOVERNOR OF ILLINOIS, ET AL.,

RESPONDENTS.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF OF MARK JANUS AND THE LIBERTY JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Under *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), do individuals from whom union fees were seized without their consent have to prove contemporaneous subjective opposition to that union to establish a First Amendment injury and damages?

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INTEREST OF THE *AMICI CURIAE*[1]

Mark Janus is a former Illinois public employee whose rights under the First Amendment were at the core of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Since the vindication of his rights by this Court, Mark has traveled the nation telling his story, hoping to educate other public-sector workers about their choice of whether or not to join a union.

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. The Liberty Justice Center is particularly interested in the impact of this case on its ongoing litigation in *Janus v. AFSCME* concerning its client Mark Janus's ability to recover the fees he was forced to pay to AFSCME. *See Janus v. AFSCME*, Case No. 15-C-1235, 2019 WL 1239780 (N.D. Ill. March 18, 2019). The Center has also filed a class-action on behalf of other Illinois public workers seeking to recover the fees that were unconstitutionally taken from them by AFSCME. *See Leitch v. AFSCME*, Case No. 1:19-cv-02921 (N.D. Ill. filed May 1, 2019).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amici funded its preparation or submission. Counsel timely provided notice to all parties of its intention to file this brief and counsel for each party consented.

SUMMARY OF ARGUMENT AND INTRODUCTION

We start from a fundamental principle of the First Amendment: "[I]ndividuals should not be compelled to subsidize private groups or private speech." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 321 (2012). In this case individuals were compelled to subsidize a private group and its private speech: their earnings from their hard work were garnished and handed over to Respondent SEIU under a statutory scheme permitting the majority of employees at their workplace to vote for union representation, such that the minority's First Amendment rights were steamrolled.

That statutory scheme has since been ruled invalid, and these individuals now want back the money that was wrongfully taken from them. Judge Manion got it right in his opinion on reconsideration below:

> The injury occurs in extracting fees without first obtaining affirmative consent. *C.f. Janus*, 138 S. Ct. at 2486. . . . [T]his injury is suffered regardless of whether the non-member employee opposed supporting the union through fair-share fees, so long as he or she had no opportunity to express consent to such fees.

Riffey v. Rauner, Petition Appx. 11a-12a (7th Cir. 2018) (Manion, J., concurring).

Judge Manion correctly recognizes that the Seventh Circuit's rationale would flip *Janus* on its head. Instead of requiring the union to show it had secured a waiver from a public worker, their standard shifts the

burden onto the worker to show he objected to the union. This inversion undercuts the core of *Janus's* closing holding, which draws on classic principles of constitutional law that protect individual rights. *Janus* ends by recognizing that the choice to join a union is an affirmative choice to waive the First Amendment right *not* to join, and such waiver cannot be presumed, must be given freely, and must be shown by clear evidence. *Janus*, 138 S. Ct. at 2486.

The Seventh Circuit's ruling below jettisons *Janus* and instead imposes a new requirement for workers before they can recover for the wrongs done to them: these workers must show they were "subjectively opposed to paying the fees." *Riffey v. Rauner*, Petition Appx. 19a (7th Cir. 2017); *see also Riffey v. Rauner*, Petition Appx. 44a (N.D.Ill. 2016) ("to prove injury, and the complete constitutional tort, plaintiffs must prove contemporaneous subjective opposition to the compelled payments."). The court below therefore prescribed a "highly individualized . . . exploration of not only each person's support (or lack thereof) for the Union, but also to what extent the non-supporters were actually injured." *Riffey*, Petition Appx. 9a.

This new requirement not only violates *Janus's* final mandate requiring that the union prove its members' affirmative consent, but it runs counter to this Court's general doctrine around waiver of constitutional rights, which imposes the burden on the party asserting waiver to prove waiver, *not* on the rightholder to prove non-waiver.

ARGUMENT: CORRECTLY PLACING THE BURDEN OF PROVING WAIVER

Janus closes:

> 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, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *see also Knox*, 567 U. S., at 312-313, 132 S. Ct. 2277, 183 L. Ed. 2d 281. 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, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (plurality opinion); *see also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U. S. 666, 680-682, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486. By ending as it does, *Janus* nestles the right to decline to join a union in the broader doctrine around waiver of constitutional

rights, which finds its foundation in *Johnson v. Zerbst*, 304 U. S. 458 (1938).

Though *Johnson* was a criminal case, and its progeny fall primarily in that field as well, the principles around waiver of constitutional rights transcend the civil/criminal categories and apply across the board. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (waiver of rights in a contracts case); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978) (waiver of rights in an administrative-law matter); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (waiver of rights in a class-action case); *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987) (waiver of rights in an immigration case); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (waiver of rights in government contracts); *Isbell v. County of Sonoma*, 21 Cal. 3d 61, 68-69 (1978) (waiver of rights in a debtor/creditor case).

"Waiver cannot be presumed." *Janus*, 138 S. Ct. at 2486. Stated differently, non-waiver of constitutional rights is the baseline, until waiver can be proven. *See Barker v. Wingo*, 407 U.S. 514, 525 (1972) (courts should "indulge every reasonable presumption against waiver" and should "not presume acquiescence in the loss of fundamental rights.").

And it is the responsibility of the party asserting the waiver to prove the waiver, *not* the responsibility of the right-holder to prove he did not waiver his rights. Normally, this means the government must show waiver against a criminal defendant. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("[I]t is incumbent

upon the State to prove an intentional relinquishment of a known right or privilege.").

Thus, when considering waiver of the right against self-incrimination and the right to counsel, the *Miranda* Court stated that "a heavy burden *rests on the government* to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (emphasis added). *See Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010). What is true for Fifth and Sixth Amendment rights is true in other contexts as well: the State bears the burden of proving waiver. *See, e.g., State v. Yong Shik Won*, 137 Haw. 330, 369 (2015) (Fourth Amendment rights).

And what is true in criminal cases is also true in civil cases, because the principles behind waiver of constitutional rights do not change between categories. *See D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185 (1972). For instance, the California Supreme Court has held that just as the State bears the burden of proving waiver in the criminal context, the creditor bears the burden to prove waiver of due-process rights by a debtor. *Isbell*, 21 Cal. 3d at 68-69.

The Seventh Circuit's decision below ignores *Janus* and the cases it relies on with respect to waiving a constitutional right. *Janus* directs lower courts to implement its terms in line with *Johnson v. Zerbst* and the larger doctrine around waiver of constitutional rights. *Johnson* and its descendants rightly put the burden of showing waiver on the party asserting waiver. *Janus*, read in the context in which it places

itself, puts the burden of showing affirmative consent on the public employer and union asserting that they have secured consent to a waiver for First Amendment rights.

If the burden to show affirmative consent rests with the union not the worker, then the Seventh Circuit was wrong to shift the burden onto the worker in this case. In order to prove damages, the Seventh Circuit would require that one provide evidence that he or she did not want to support the union. In other words, the 7th Circuit would assume waiver unless an employee provided evidence that he or she did not waive that right. That is contrary to *Janus*.

The story of amicus Mark Janus illustrates the problems with the Seventh Circuit's subjective-opposition standard. Janus "refused to join the Union because he opposes 'many of the public policy positions that [it] advocates,' including the positions it takes in collective bargaining." *Janus*, 138 S. Ct. at 2461. Yet Mr. Janus did not vocally oppose the union fee at "the time it was paid," *Riffey*, Petition Appx. 18a, because Illinois state law at the time did not give him a choice in the matter. 5 ILCS § 315/6. He registered his objection in the same manner as the class members in this case: by choosing to pay the agency fee rather than full membership dues. He did not write an angry epistle to the union leadership, expounding a thorough airing of grievances. Even though it is obvious now that Mr. Janus opposes the union, he took no affirmative act to put that opposition on the record at the time the fee was paid beyond simply his choice to pay the fee rather than choosing full membership.

The choice to pay an agency fee rather than full union dues was the manifestation of his dissent "affirmatively be[ing] made known to the union by the dissenting employee." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961). To require a further vocalization and explanation of his objection is to foreclose him and virtually all others from recovering for this injury to their First Amendment rights. It switches the burden from the union having to show his affirmative consent to waiving his rights to him having to show his affirmative objection to waiving his rights. That is not the doctrine of *Johnson* or *Janus*.

CONCLUSION

Rather than requiring the union to prove the employee's affirmative consent to an exaction, the opinion below would require employees to prove affirmative objection. This is the opposite of the holding from *Janus*, and is in conflict with the doctrine of *Johnson*.

Respectfully submitted,

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