No. 19-1104

In The Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* GOLDWATER INSTITUTE, CATO INSTITUTE, AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Are public-sector workers who were forced to pay union fees in violation of their fundamental First Amendment rights entitled under 42 U.S.C. § 1983 to refunds of the money wrongfully taken from them, regardless of a union's purported good faith in committing the violations?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of freedom of speech. The Institute has litigated and won important victories for free speech, including *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different contribution limits on different classes of political donors violated Equal Protection Clause). The Institute has appeared frequently as *amicus curiae* in free-speech cases before this Court and others. *See*, *e.g.*,

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intention to file this brief and have consented. Pursuant to Supreme Court Rule 37.6, counsel for *amici* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amici*, their members, or counsel, made a monetary contribution to fund its preparation or submission.

Janus. v. AFSCME, 138 S. Ct. 2448 (2018); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Mackinac Center for Public Policy is a Michigan-based non-profit, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective-bargaining laws.

This case interests *amici* because of their commitment to the Constitution's broad protections for the freedom of speech, including commercial speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Mark Janus is not the only person who seeks to recover fees he was wrongfully forced to pay to a public-sector union before this Court decided

Janus v. AFSCME, 138 S. Ct. 2448 (2018). In dozens of class-action and individual lawsuits pending across the country, government employees who were forced to subsidize unions' political speech are asking federal courts to order unions to disgorge their ill-gotten gains. Unfortunately for those workers, courts are consistently rejecting their claims, typically citing the same putative "good-faith defense" the Seventh Circuit relied on in ruling against Petitioner.

Although that good-faith defense is not well-founded, *see* Petition at 11–21, the lower courts' unanimity on the issue is unlikely to change without correction by this Court. Lower courts have expressed reluctance to require unions to refund wrongfully taken fees without explicit direction from this Court. And a court might find it particularly inequitable to make a particular union refund workers' fees—and suffer the potentially severe financial consequences—after many other unions have already been let off the hook. Fortunately, because all, or nearly all, cases that have presented this issue are still pending in district or appellate courts, it is not too late for the Court to ensure that unions that inequitably profited from violations of workers' fundamental First Amendment rights are held accountable. Justice demands that the Court do so by granting certiorari and reversing the lower Court's decision.

ARGUMENT

I. Other lawsuits seeking refunds of union fees wrongfully taken from government workers show that a decision in this case would affect thousands of people's ability to be compensated for constitutional injuries they have suffered.

This case stands to affect many thousands of people's ability to be compensated for violations of their fundamental First Amendment rights. In addition to this case, at least 37 class-action lawsuits and at least three other lawsuits (listed in the Appendix) seek refunds of union agency fees that workers were unconstitutionally forced to pay before *Janus*.

In many of the class actions, the size of the class of former agency-fee payers is unknown to anyone other than the union. Unlike unions that represent private-sector workers, a union that only represents public-sector workers is not required to file annual LM-2 forms—which would show, among other things, how many people paid agency fees to the union—with the U.S. Office of Labor Management Standards. *See* 29 U.S.C. § 402(e) (excluding state and local governments from the Labor-Management Reporting and Disclosure Act's definition of an "employer"); 29 C.F.R. § 403.2 (requiring labor organizations subject to the Act to file LM-2 forms).

Still, it is certain that many of the classes of non-members are large. In one case in which a class was certified, the union admitted that the class consisted

(as of 2013) of 34,786 agency-fee payers. Declaration of Brian Caldiera in Support of SEIU Local 1000's Opposition to Plaintiffs' Motion for Class Certification ¶ 11,[2] *Hamidi v. SEIU Local 1000*, No. 2:14-cv-00319, 2019 WL 5536324 (E.D. Cal. Oct. 25, 2019).

The defendant unions in several of the cases do file LM-2 forms, which makes it possible to estimate the number of individuals whose rights are at stake in those cases. For example, in *Prokes v. AFSCME Council No. 5*, No. 0:18-cv-2384 (D. Minn. filed Aug. 14, 2018), the defendant union's LM-2 form for 2018[3]—the last year in which non-members were forced to pay fees—shows that it had 8,322 agency fee payers. That almost certainly understates the size of the class because it is likely that, due to job turnover, additional individuals paid agency fees earlier in the limitations period. Recent LM-2 forms filed by defendants in some of the other class actions also allow one to conservatively estimate the sizes of those classes. *See Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019) (6,997 agency-fee payers)[4]; *Ogle v. Ohio Civil Serv. Employees Ass'n*, 951 F.3d 795 (6th Cir. 2020) (3,180 agency-fee payers)[5]; *Leitch v. AFSCME Council 31*, No. 1:19-cv-02921 (N.D.

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[2] https://www.courtlistener.com/recap/gov.uscourts.caed.263919/gov.uscourts.caed.263919.37.0.pdf.

[3] 2017 LM-2 of AFSCME Leadership Council 5 (File No. 543-153), https://bit.ly/34pLetr.

[4] 2018 LM-2 of AFSCME Leadership Council 28, Washington Federation of State Employees (File No. 544-112), https://bit.ly/2V3nAhS.

[5] 2018 LM-2 of AFSCME Local 11, Ohio Civil Service Employees Association (File No. 540-644), https://bit.ly/39N6zxQ.

Ill. Jan. 30, 2020) (minute entry granting motion to dismiss), *appeal docketed*, No. 20-1379 (7th Cir. Mar. 5, 2020) (7,047 agency-fee payers) [6]; *Penning v. SEIU Local 1021*, No. 4:19-cv-03624, ___ F. Supp. 3d ___, 2020 WL 256126 (N.D. Cal. Jan. 16, 2020), *appeal docketed*, No. 20-15226 (9th Cir. Feb. 13, 2020).[7]

One can reasonably assume that the classes in lawsuits against other large unions that represent tens or hundreds of thousands of government employees likewise include thousands of former agency-fee payers. A survey of 10 large public-sector unions found that those unions lost a combined 309,612 agency-fee payers as a result of *Janus*—all of whom could be entitled to the same relief Petitioner seeks. Rebecca Rainey & Ian Kullgren, *1 Year After Janus, Unions Are Flush*, Politico, May 17, 2019.[8] It has been estimated that the California Teachers Union, a defendant in a class action brought on behalf of non-members who were forced to pay it,[9] had approximately 28,000 agency-fee payers before *Janus*. *See* Jana Kasperkevic,

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[6] 2017 LM-2 of AFSCME Leadership Council 31 (File No. 51-506), https://bit.ly/2RfppqY.

[7] 2018 LM-2 of SEIU Local 1021 (File No. 543-658), https://bit.ly/2xQgpBK.

[8] https://www.politico.com/story/2019/05/17/janus-unions-employment-1447266.

[9] *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019), *appeal docketed*, No. 19-56164 (9th Cir. June 18, 2019).

California's Right-to-Work Fight Forces Unions to Prove Their Relevance, Guardian, Oct. 5, 2015.[10]

In addition to the cases seeking refunds of agency fees—which, under *Janus*, were indisputably taken in violation of these non-members' First Amendment rights—at least 15 class actions and 11 other cases (listed in the Appendix)[11] seek refunds of dues paid by government employees who signed union membership agreements before *Janus*. According to these lawsuits, these workers were forced to choose between paying union dues and paying agency fees. They were not advised of their First Amendment right to pay nothing, meaning that they did not and could not have provided the knowing, voluntary, affirmative consent to pay that *Janus* requires, 138 S. Ct. at 2486, before money is taken from a worker's paycheck and given to a union. *See*, *e.g.*, *Smith v. N.J. Educ. Ass'n*, Nos. 18-10381, 18-15628, ___ F. Supp. 3d ___, 2019 WL 6337991, *6 (D.N.J. Nov. 27, 2019), *appeal docketed sub nom. Fischer v. Gov. of N.J.*, No. 19-3914 (3d Cir. Dec. 18, 2019).

Those cases present the additional unresolved issue, not presented here, of whether *Janus* affects the rights of people who signed union membership agreements before the Court decided that case. Nevertheless, some courts considering (and rejecting) such claims have also relied, in whole or in part, on the

[10] https://www.theguardian.com/us-news/2015/oct/05/friedrichs-supreme-court-california-teachers-union-fight-dues-right-to-work.

[11] As the Appendix shows, there is overlap between the class actions seeking refunds of agency fees and those seeking refunds of dues because some cases seek both.

good-faith defense at issue here in rejecting the plaintiffs' claims. *See*, *e.g.*, *Few v. United Teachers L.A.*, No. 2:18-cv-09531-JLS-DFM, 2020 WL 633598, *6 (C.D. Cal. Feb. 10, 2020); *Grossman v. Haw. Gov't Emps. Ass'n/AFSCME Local 152*, No. 18-cv-00493-DKW-RT, ___ F. Supp. 3d ___, 2020 WL 515816, *6 (D. Haw. Jan. 31, 2020), *appeal docketed*, No. 20-15356 (9th Cir. Mar. 3, 2020); *Cooley v. Cal. Statewide Law Enforcement Ass'n*, 385 F. Supp. 3d 1077, 1080–81 (E.D. Cal. 2019), *appeal docketed*, No. 19-16498 (9th Cir. July 31, 2019); *Babb*, 378 F. Supp. 3d at 871–72, 876–77. Many, if not all, of the classes of members in cases seeking dues refunds include tens or hundreds of thousands of people. *See*, *e.g.*, *Mendez v. Cal. Teachers Ass'n*, 419 F. Supp. 3d 1182 (N.D. Cal. 2020), *appeal docketed*, No. 20-15394 (9th Cir. Mar. 6, 2020) (325,000 members)[12]; *Belgau v. Inslee*, 359 F. Supp. 3d 1000 (W.D. Wash. 2019), *appeal docketed*, No. 19-35137 (9th Cir. Feb. 20, 2019) (36,293 members)[13]; *Anderson v. SEIU Local 503*, 400 F. Supp. 3d 1113 (D. Or. 2019), *appeal docketed*, No. 19-35871 (9th Cir. Oct. 16, 2019) (67,806 members).[14]

The courts considering all of these cases would benefit from this Court's guidance on the question presented in this case. And, as shown below, the need for guidance is vital and urgent.

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[12] Kasperkevic, *supra*.

[13] 2018 LM-2 of AFSCME Leadership Council 28, Washington Federation of State Employees, *supra*.

[14] 2018 LM-2 of AFSCME State Council 75 (File No. 528-285) (44,975 members); 2018 LM-2 of SEIU Local 503 (File No. 519-355) (22,831 members), https://bit.ly/2RfpUBm.

II. This case presents an important issue that the Court should address immediately.

As the Court recognized in *Janus*, compelling workers to subsidize a union's political speech "seriously" and unjustifiably "impinges on First Amendment rights." 138 S. Ct. at 2464. That is true regardless of the amount of the subsidy. Long before *Janus*, the Court, quoting Madison and Jefferson, recognized "the tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986). "The amount at stake for each individual dissenter does not diminish this concern." *Id.* Therefore, if the Court does not take this case and reject the good-faith defense that the Seventh Circuit endorsed, Petitioner and others who have been forced to subsidize unions' political speech will have no remedy for their serious, indisputable constitutional injuries.

Despite the importance of the rights at stake and the merit of Petitioner's argument against the unions' purported good-faith defense, lower courts have consistently rejected workers' claims seeking refunds of agency fees. *See* Appendix at 1a-6a. After the first district courts rejected these claims based on the good-faith defense others soon followed, some simply citing the earlier (non-binding) decisions with little analysis of their own. *See*, *e.g.*, *Casanova v. Int'l Ass'n of Machinists, Local 701*, No. 1:19-cv-00428 (N.D. Ill. Sept. 11, 2019) (minute entry granting motion to dismiss), *aff'd*, No. 19-2987 (7th Cir. Feb. 11, 2020) (summary affirmance);

Aliser v. SEIU Cal., 419 F. Supp. 3d 1161, 1163–64 (N.D. Cal. 2019); *Hough v. SEIU Local 521*, No. 18-cv-04902-VC, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), *1, *appeal docketed*, No. 19-15792 (9th Cir. Apr. 18, 2019); *Bermudez v. SEIU Local 521*, No. 18-cv-04312-VC, 2019 WL 1615414, *1 (N.D. Cal. Apr. 16, 2019).

Unless this Court directs them to do otherwise, lower courts are likely to remain unanimous in their acceptance of the unions' good-faith defense. Many courts share the attitude expressed in one district court opinion that, "where the Supreme Court has reversed a prior ruling but not specified that the party before it is entitled to retrospective monetary relief, it seems unlikely that lower courts should even consider awarding retrospective monetary relief based on conduct the Court had previously authorized." *Bermudez*, 2019 WL 1615414 at *1. Further, the more courts refuse to award plaintiffs damages in these cases, the less likely any court will be to grant any plaintiff relief. A court might find it especially inequitable to make one particular union refund workers' fees—which, in a class action, could have severe financial consequences—after many other unions have already escaped liability.

Therefore, there is no reason to expect a circuit split to develop on the question this case presents. There is a compelling reason why the Court should take up the issue now rather than in a later case: all, or nearly all, cases that have presented this issue are still pending in district or appellate courts. Granting certiorari in this case will efficiently resolve the crucial

questions and allow the Court to ensure that unions that have inequitably enjoyed a "considerable windfall" from "violation[s] of the First Amendment," *Janus*, 138 S. Ct. at 2486, will be held accountable, and that workers will have equally the redress for those violations to which they are entitled.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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