No. ___

IN THE
Supreme Court of the United States

JOANNE TROESCH AND IFEOMA NKEMDI,
Petitioners,

v.

CHICAGO TEACHERS UNION, LOCAL UNION NO. 1, AMERICAN FEDERATION OF TEACHERS, AND THE BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. MORRIS
MORRIS & DE LA ROSA
6171 N. Sheridan Rd.
Suite 312
Chicago, IL 60660
(312) 927-4680
mdlrusuk@aol.com

WILLIAM MESSENGER
Counsel of Record
FRANK D. GARRISON
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org
Counsel for Petitioners

QUESTION PRESENTED

In 2018, the Court in *Janus v. AFSCME, Council 31* held that public employees have a First Amendment right not to subsidize union speech. 138 S. Ct. 2448, 2486 (2018). The Court also held that governments and unions violate that right by seizing union dues or fees from employees unless there is clear and compelling evidence the employees waived that constitutional right. *Id.*

Illinois and many other states are resisting *Janus*'s holding by prohibiting employees who signed dues deduction forms from exercising their right to stop subsidizing union speech except during short escape periods—generally only ten to thirty days each year. The Seventh Circuit below, as well as the Third, Ninth, and Tenth Circuits, have upheld these restrictions, finding the government does *not* need proof of a waiver to restrict when employees can exercise their First Amendment rights under *Janus*, but that proof of employee contractual consent is enough to allow the government to seize union dues from employees over their objections.

The question presented is:

Under the First Amendment, to seize payments for union speech from employees who provide notice they are nonmembers and object to supporting the union, do governments and unions need clear and compelling evidence those employees knowingly, intelligently, and voluntarily waived their First Amendment rights and that enforcement of the purported waiver is not against public policy?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners JoAnne Troesch and Ifeoma Nkemdi were the Plaintiff-Appellants in the court below.

Respondents, Chicago Teachers Union, Local No. 1, American Federation of Teachers and The Board of Education of the City of Chicago, were Defendants-Appellees below.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

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

1. *Troesch v. Chicago Teachers Union, Local No. 1,* No. 21-1525, U.S. Court of Appeals for the Seventh Circuit. Judgment Entered April 15, 2021.

2. *Troesch v. Chicago Teachers Union, Local No. 1*, No. 20-cv-2682, U.S. District Court for the Northern District of Illinois. Judgment Entered February 26, 2021.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

OPINIONS BELOW

The district court's opinion and order dismissing Petitioners' complaint for failure to state a claim is reported at __ F. Supp. 3d __, 2021 WL 736233 and reproduced at Pet.App.4. The Seventh Circuit summarily affirmed that judgment in an unreported order reproduced at Pet.App.1.

JURISDICTION

The Seventh Circuit issued its order on April 15, 2021. Pet.App.1. On March 19, 2020, the Court extended to 150 days the deadline for filing any petition for a writ of certiorari due after that date. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution and Illinois's Education Labor Relations Act Section 11.1, 115 Ill. Comp. Stat. § 5/11.1 (as amended by P.L. 101-0620, eff. Dec. 20, 2019) are reproduced at Pet. App. 41.

STATEMENT OF THE CASE

A. Legal background

1. In 2018, the Court in *Janus v. AFSCME, Council 31*, held that public employees have a First Amendment right not to subsidize union speech and that governments and unions violate that right by taking payments for union speech from employees without their affirmative consent. 138 S. Ct. 2448, 2486 (2018). The Court recognized that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and

such a waiver cannot be presumed." *Id.* The Court thus held that, to prove employees consent to financially supporting 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)).

Unfortunately, rather than complying with *Janus*, many states are resisting the Court's decision by curtailing the free speech rights it recognized. This includes by prohibiting public employees who authorized payroll deductions of union dues from exercising their right to stop subsidizing union speech except during limited escape periods.

Specifically, twelve states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington—amended their dues deduction laws to require government employers to continue deducting union payments from employees who authorized dues deductions unless the employees provide a revocation notice during a window period set either by law or in a payroll deduction form.[1] Government employers in at least five other states, including Alaska, New Mexico, Ohio, Minnesota, and Pennsylvania, also enforce

---

[1] *See* Cal. Gov't Code § 1157.12; Cal. Educ. Code §§ 45060; Colo. Rev. Stat. § 24-50-1111(2); Conn. Publ. Act 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); Wash. Rev. Code § 41.80.100(d).

escape-period restrictions under those states' preexisting dues deduction laws.[2]

The escape periods when employees can stop government deductions of union dues are usually just ten to thirty days each year.[3] Some restrictions are longer. Illinois law authorizes "a period of irrevocability that exceeds one year." 115 Ill. Comp. Stat. § 5/11.1(a) (Pet.App.41). California, Ohio, and Pennsylvania have prohibited certain state employees from stopping dues deductions until escape periods that opened only at the end of collective bargaining agreements that had durations of several years.[4]

Employees subject to these restrictions are effectively prohibited from exercising their First Amendment right to stop paying for union speech for 335–55 days each year, if not longer. Employees who want to stop financially supporting a union outside of the pre-

---

[2] *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. Feb. 17, 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 v. AFSCME Council 18*, 992 F.3d 950, 964 (10th Cir. 2021), *petition for cert. filed* No. 20-1606 (May 14, 2021); *Weyandt v. Pa. State Corr. Officers Ass'ns,* No. 1:19-cv-1018, 2019 WL 5191103, at *2 (M.D. Pa. Oct. 15, 2019).

[3] *See, e.g.*, cases cited *supra* at n.2; 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).

[4] *See Savas v. Cal. State L. Enf't Agency*, 485 F. Supp. 3d 1233, 1235 (S.D. Cal. 2020); *Allen*, 2020 WL 1322051, at *2; *Weyandt*, 2019 WL 5191103, at *2.

scribed escape period are compelled by their government employer to continue to financially support the union and its speech until the escape-period restriction is satisfied.

2. This case concerns Illinois's restrictions on when employees can exercise their *Janus* rights. In December 2019, the State amended Section 11.1 of Illinois's Education Labor Relations Act ("IELRA") to require public educational employers to enforce escape periods as short as ten-days. 115 Ill. Comp. Stat. § 5/11.1 (as amended by P.L. 101-0620, eff. Dec. 20, 2019) (Pet.App.41–46).[5] Section 11.1(a) now states:

> There is no impediment to an employee's right to resign union membership at any time. However, notwithstanding any other provision of law to the contrary regarding authorization and deduction of dues or other payments to a labor organization, the exclusive representative and an educational employee may agree to reasonable limits on the right of the employee to revoke such authorization, including a period of irrevocability that exceeds one year. An authorization that is irrevocable for one year, which may be automatically renewed for successive annual periods in accordance with the terms of the authorization, and that contains at least an annual 10-day period of time during which

[5] Illinois amended its law governing state employees to impose similar restrictions on when those employees can stop state deductions of union dues. 5 Ill. Comp. Stat. § 15/6(f) (as amended by P.L. 101-0620, eff. Dec. 20, 2019)

> the educational employee may revoke the authorization, shall be deemed reasonable.

Id. at § 5/11.1(a) (Pet.App.41–42). IELRA Section 11.1(c)(1) mandates that dues "deductions shall remain in effect until . . . the educational employer receives notice that an educational employee has revoked his or her authorization in writing in accordance with the terms of the authorization." *Id.* at § 5/11.1(c)(1) (Pet.App.42). Employee requests to cancel dues deductions, however, must be directed to the union, which "shall be responsible for initially processing and notifying the educational employer of proper requests or providing proper requests to the employer." *Id.* at § 5/11.1(d) (Pet.App.43).

B. Proceedings below

1. Petitioners JoAnne Troesch and Ifeoma Nkemdi are employed by the Board of Education of the City of Chicago ("Board"). Pet.App.6. Collective bargaining agreements between the Board and the Chicago Teachers Union, Local 1 ("CTU")—which cover roughly 24,000 educational employees—include an escape-period restriction that provides that "employee[s] may terminate the dues check off . . . during the month of August by submitting written notice to the BOARD and the Union." *Id.*

In September 2017, Troesch and Nkemdi signed dues deduction forms that incorporated the Board and CTU's prohibition on employees stopping union dues deductions outside of August. Pet.App.7. When they signed those forms, Troesch and Nkemdi did not know they had a constitutional right not to financially support CTU. *Id.* Nothing on the dues deduction forms

notified Petitioners of their rights or stated that they were agreeing to waive them. *Id.*

In October 2019, after learning of their First Amendment rights under *Janus*, Troesch and Nkemdi sought to exercise those rights by sending letters to the Board and CTU resigning their union membership and objecting to dues deductions. Pet.App.7–8. CTU responded and acknowledged the resignations, but explained the Board's deduction of union dues would continue until September 1, 2020 under the August escape-period restriction. Pet.App.8.

2. In May 2020, Troesch and Nkemdi sued the Board and CTU on behalf of themselves and two proposed classes of similarly situated employees. *Id.* They allege the Board and CTU violate the First Amendment by maintaining and enforcing their August escape-period restriction and by seizing union dues from employees who become nonmembers and object to supporting CTU. *Id.* Troesch and Nkemdi also allege IELRA Section 11.1 is unconstitutional to the extent that it authorizes restrictions on employees' exercising their First Amendment rights and authorizes seizures of union dues from objecting employees who did not knowingly, intelligently, or voluntarily waive their constitutional rights. Pet.App.9.

The district court dismissed Petitioners' complaint for failure to state a claim. Pet.App.4–17. The court held the Board and CTU did not violate Troesch and Nkemdi's constitutional rights by seizing union dues from them over their objections because they contractually consented to the August revocation restriction. Pet.App.11–15. The court responded to Petitioners'

point that they never knowingly, intelligently, or voluntarily waived their rights under *Janus* by stating that they "'waiv[ed] their First Amendment rights' simply '[b]y agreeing to pay,'" Pet.App.16 (quoting *Janus*, 138 S. Ct. at 2486), and by declaring that "*Janus* "'had no effect' on employees' pre-existing obligations 'to pay fees pursuant to voluntarily signed membership agreements,'" *id.* (quoting *Bennett v. AFSCME Council 31*, __ F. Supp. 3d. __, No. 4:19 C 4087, 2020 WL 1549603, at *3 (C.D. Ill. Mar. 31, 2020), *affirmed* 991 F.3d 724 (7th Cir. 2021), *petition for cert. filed* No. 20-1603 (May 18, 2021)).

The Seventh Circuit summarily affirmed the lower court's judgment based on its prior decision in *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), *petition for cert. filed* No. 20-1603 (May 18, 2021). Pet. App.1–2. In *Bennett*, the Seventh Circuit agreed with the Third and Ninth Circuit's conclusions that proof of a constitutional waiver is not required under *Janus* for the government and unions to extract union dues from employees if there exists a *contract* that purports to authorize those deductions. *Id.* at 731–32 (Pet.App.29–31); s*ee Fischer v. Gov. New Jersey,* 842 Fed. Appx. 741, 753 (3rd Cir. 2021) (non-precedential opinion), *petition for cert. filed* No. 20-1751 (June 14, 2021); *Belgau v. Inslee*, 975 F.3d 940, 950–52 (9th Cir. 2020), *petition for cert. denied* No. 20-1120 (June 21, 2021); *see also Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961–62, 964 (10th Cir. 2021), *petition for cert. filed* No. 20-1606 (May 18, 2021) (similar conclusion). This includes even when those employees are not union members. *Bennett*, 991 F.3d at 732–33 (Pet.App.31–32). The Seventh Circuit reasoned that

"the First Amendment 'does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law.'" *Id.* at 731 (Pet.App.30) (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991)). The court thus concluded that an employee who contractually "consented to pay dues to the union, regardless of the status of her membership . . . does not fall within the sweep of *Janus*'s waiver requirement." *Id.* at 733 (Pet.App.34).

Troesch and Nkemdi now file this petition for certiorari to present to this Court the important question of whether governments and unions need clear and compelling evidence that employees waived their First Amendment rights, or just proof of a contract, to seize payments for union speech from objecting nonmembers. The Court's resolution of this question will largely determine the extent to which governments and unions can restrict employees' speech rights under *Janus*.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to make clear that it meant what it said in *Janus*: governments and unions cannot seize payments for union speech from employees unless those employees waive their right not to subsidize that speech. 138 S. Ct. at 2486. The Court's holding has particular force when, as here, the employees have provided notice they are nonmembers and oppose supporting the union financially. Unless these dissenting employees earlier waived their First Amendment right to stop subsidizing union speech, it certainly is unconstitutional for the government and unions to compel those objecting nonmembers to continue to pay for union speech.

The Seventh Circuit and three other appellate courts deviated from *Janus* by replacing this Court's constitutional waiver requirement with their own lesser contract requirement. This lesser standard eliminates the protections a waiver requirement provides to employees. This includes that purported waivers by employees 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); *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

It is important that the Court correct the lower courts' failure to enforce *Janus*'s waiver requirement because their alternative contract standard gives governments and unions wide latitude to severely restrict employees' First Amendment rights. All governments or unions have to do is to write any restrictions they desire into their dues deduction forms. There is no need to ensure that employees who sign those forms know of their rights under *Janus*. There are few limits on how burdensome governments and unions can make their restrictions—as shown by the disturbing prevalence of escape-period restrictions that prohibit employees from exercising their right not to subsidize union speech for 335 to 355 days each year. If this Court does not reject the holdings of the Third, Seventh, Ninth, and Tenth Circuits, millions of public employees will remain subject to onerous restrictions on their First Amendment rights.

The Court should not allow the fundamental speech rights it recognized in *Janus* to be hamstrung in this way. The Court should grant the petition to instruct lower courts to enforce *Janus*'s waiver requirement.

This requirement will, in turn, ensure that governments and unions cannot enforce escape-period restrictions against dissenting employees unless there is clear and compelling evidence the employees knowingly, intelligently, and voluntarily waived their First Amendment rights and that enforcement of that waiver is not against public policy.

I. The Seventh Circuit's Decision Conflicts with *Janus*.

A. *Janus* held that governments and unions must have clear and compelling evidence of a constitutional waiver to seize union dues from employees.

1. In *Janus*, the Court held the following standard governs when the government and unions can constitutionally take union dues or fees from employees:

> 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* [v. *SEIU Local 1000*, 567 U.S. 298, 312–13 (2012)]. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publ'g 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, 680–682 (1999).

> Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S. Ct. at 2486.

The Court's waiver requirement makes sense. Given employees have a First Amendment right not to pay for union speech, it follows that the government must have proof employees waived that right to constitutionally take payments from them for union speech. Over a dozen state attorneys general and the Federal Labor Relations Authority correctly interpret *Janus* in this manner. *See* Amicus Br. for the State of Alaska et al., pp. 9–15, *Belgau v. Inslee*, No. 20-1120 (U.S. Mar. 18, 2021); *Decision on Request for General Statement of Policy or Guidance, Off. of Pers. Mgmt.* (Petitioner), 71 F.L.R.A. 571 (Feb. 14, 2020).

2. The need for a waiver is especially apparent when the government and unions prohibit employees from stopping dues deduction for periods of time. Employees cannot be prohibited from exercising their First Amendment right not to subsidize union speech for a time period unless those employees validly waived their constitutional right for that period.

Without proof of a waiver, the government necessarily violates dissenting 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 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 v. Quinn*, 573 U.S. 616, 656 (2014). 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 compel objecting nonmembers to subsidize union speech under an escape-period restriction.

B. Lower courts are defying *Janus* by substituting a contract standard for the waiver standard this Court required.

The Third, Seventh, Ninth, and Tenth Circuits gutted *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. *Fischer*, 842 Fed. Appx. at 753; *Bennett*, 991 F.3d at 732–33 (Pet.App.29–31); *Belgau*, 975 F.3d at 951–52; *Hendrickson*, 992 F.3d at 961–62, 964. Those courts held it is sufficient if those employees contractually consent to restrictions on their First Amendment rights. The courts thus substituted their own *contract* requirement for the constitutional *waiver* requirement this Court set forth in *Janus* to govern when governments and unions can seize payments for union speech from employees.

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 are both untenable.

1. The Seventh, Third, and Ninth Circuits found evidence of a constitutional waiver to be unnecessary because employees who contractually consent to pay union dues until an escape period are, supposedly, not

compelled to subsidize union speech in violation of their First Amendment rights. *Bennett*, 991 F.3d at 732–33 (Pet.App.29–31); *Fischer*, 842 Fed. Appx. at 753 n.18; *Belgau*, 975 F.3d at 951–52. 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 prerequisite 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, Troesch and Nkemdi had union dues seized from their wages *after* they provided notice that they were nonmembers and opposed those seizures. Pet.App.7–8. To say that these dissenting employees were not compelled to subsidize CTU's speech would require ignoring that Troesch and Nkemdi affirmatively stated they opposed financially supporting CTU and were forced to do so against their express wishes. *Id.*

For such employees, 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 *Janus* held unconstitutional. When *Janus* was decided, Illinois's law required gov-

ernment employers to deduct from nonconsenting employees' wages *reduced* union fees that excluded monies used for some political purposes. 138 S. Ct. at 2486. Illinois's post-*Janus* revocation law requires that government employers deduct *full* union dues, including monies used for partisan political purposes, from employees who object to these seizures outside an annual ten-day revocation period. Pet.App.41. 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 Seventh 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 Seventh 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 Bennett*, 991 F.3d at 730–31 (Pet.App.29–31); *Fischer*, 842 Fed. Appx. at 753 n.18; *Belgau*, 975 F.3d at 950; *Hendrickson*, 992 F.3d at 964. 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 IELRA Section 11.1(a), which requires educational employers to deduct union dues "in accordance with the terms of an employee's written authorization." 115 Ill. Comp. Stat. § 5/11.1(a). Pet.App.41. It also is clear from the Board and CTU's dues deduction form, which states that the signatory agrees to "voluntarily authorize and direct *my Employer* to deduct from my pay each period" union dues. Pet.App.7 (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 supra* at 2 n.1 (citing several state dues deduction laws). Here, IELRA Section 11.1 specifies in exacting detail when educational employers must deduct union dues from employees' wages. Pet.App.41–46.

Finally, unlike the conduct at issue in *Cohen*, it is beyond peradventure that it violates the First Amendment for the government and unions to seize union dues or fees from nonconsenting employees. *Janus*, 138 S. Ct. at 2486. And that is what the Board and CTU did to Troesch, Nkemdi, and putative class members: They seized payments for CTU from those employees' wages after they resigned their union membership and objected to financially supporting CTU. Thus, unlike in *Cohen*, a waiver analysis must be conducted here because, absent proof these employees waived their First Amendment rights to stop subsidizing CTU's speech, the Board and CTU's seizures undoubtedly were unconstitutional.

C. The lower courts' holdings are inconsistent with this Court's requirement that constitutional waivers must be knowing, intelligent, voluntary, and not against public policy.

Unless corrected by this Court, the decision by several courts to substitute a lower contractual standard for *Janus*'s constitutional-waiver standard will have profound and negative implications for employees' First Amendment rights. That lower standard per-

mits governments and unions to impose onerous restrictions on unwitting employees that would never pass muster under the Court's constitutional-waiver standard.

1. The standard to establish a waiver of constitutional rights is exacting. "'[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). The 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." *Rumery*, 480 U.S. at 392 (footnotes omitted).

2. The results here and in other cases that upheld escape-period restrictions on stopping dues deductions would be very different if lower courts had enforced the constitutional-waiver standard *Janus* requires. The Respondents here cannot satisfy any criteria for proving that Troesch or Nkemdi waived their First Amendment right to stop subsidizing CTU's speech until an escape period was satisfied.

a. Petitioners did not knowingly or intelligently waive their 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 employees who signed dues deduction forms had a full awareness of their 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 the Board and CTU's forms notified Petitioners of their right not to support CTU financially or stated that they were agreeing to waive that right. Pet.App.7. On their face, the forms do not prove Petitioners knowingly or intelligently waived their rights under *Janus*.

In fact, employees who signed dues deduction forms before *Janus*, such as Troesch and Nkemdi, could not have knowingly or intelligently waived their First Amendment right not to subsidize union speech because that right had yet to be recognized. *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. Petitioners did not voluntarily waive their 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 Troesch and Nkemdi signed dues deduction forms in 2017, they had no choice but to subsidize CTU and its speech under Illinois's agency fee law. *See Janus*, 138 S. Ct. at 2459–60. Petitioners and similarly situated employees could not have waived a right they were never afforded.

The situation is akin to a hypothetical in which a court instructs defendants that their only options are to plead guilty to one of two charges, and that they cannot plead innocent. No one would say that defendants who pled guilty to a charge voluntarily waived their right to plead innocent. They were never given that option. The same logic applies to employees who acquiesced to dues deductions 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." *Rumery*, 480 U.S. at 392 (footnote omitted). The August escape-period restriction found in the Board and CTU's dues deduction forms is unenforceable under this standard.

The policy weighing against prohibiting employees from exercising their rights under *Janus* for eleven

months 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. The Court held in *Knox* that unions have no constitutional entitlement to monies from dissenting employees. 567 U.S. at 313 (citing *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007)). The 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, especially those of thirty-days or less, are unenforceable as against public policy.

In sum, under a proper constitutional-waiver analysis, the Board and CTU could not lawfully enforce their escape-period restriction against Troesch and Nkemdi because they never waived their First Amendment right to stop subsidizing CTU and its speech. A court conducting 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 dues deductions. If enforced, *Janus*'s waiver requirement would prohibit governments and unions from restricting employees' exercise of their rights under *Janus* unless employees knowingly, intelligently, and voluntarily consented 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 require lower courts to enforce *Janus*'s waiver requirement.

II. This Case Is Exceptionally Important for Millions of Public Employees Who Are Subject to Escape-Period Restrictions.

The 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*, Illinois and eleven other states amended their dues-deductions laws to require government employers to enforce escape-period restrictions—California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington. *See supra* at 2–3. Public employers in at least five other states also enforce such restrictions, including Alaska, Minnesota, New Mexico, Ohio, and Pennsylvania. *Id.* In 2020, there were an estimated 4,767,211 public-

sector union members in those states alone.[6] Thus, roughly 4.7 million public employees are likely subject to, or could be subjected to, restrictions on when they can exercise their First Amendment right to stop subsidizing union speech.

These restrictions are onerous and prohibit employees from exercising their rights under *Janus* except during escape periods that are often as short as ten-to-thirty days per year. *See supra* at 3. Employees who want to exercise their free speech rights outside the escape period by providing notice that they are non-members, 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, and not only for a few days. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." *Id.* at 2463. "Com-

---

[6] *See* Barry T. Hirsch & 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/State_U_2020.htm (data for 2020 that estimates 4,767,211 public-sector employees in the seventeen states noted above).

pelling 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 restriction 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 comparable 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 thirty-day period.

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. Yet the Third, Seventh, Ninth, and Tenth Circuits gave states and unions a green light to severely restrict when employees may exercise their First Amendment rights not to subsidize union speech. The courts did so by holding *Janus*'s waiver requirement inapplicable whenever employees sign contracts authorizing government deductions of union dues. *Fischer*, 842 Fed. Appx. at 753; *Bennett*, 991 F.3d at 732–33 (Pet.App.29–31); *Belgau*, 975 F.3d at 951–52; *Hendrickson*, 992 F.3d at 964.

Under this lesser 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 not to financially support the 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 v. Alaska State Emps. Ass'n,* 496 F. Supp. 3d 1365, 1368 (D. Alaska 2020) (dues deduction form with ten-day escape-period restriction). 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 deserve greater protections than this. And the 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.

The Court's waiver requirement 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 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 if 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 for 335 to 355 days of every year.

The Court should not permit governments and unions, with the blessing of several appellate courts, to hamstring the First Amendment right it recognized in *Janus*. To protect employees' ability to freely exercise their speech rights, it is critically important that the Court instruct the lower courts that they must enforce *Janus*'s waiver requirement.

III. This Case Is an Excellent Vehicle to Clarify that a Waiver Is Required for Governments and Unions to Seize Payments for Union Speech from Objecting Employees.

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 fact pattern that has become all too common

since *Janus*: a state requiring public employers to enforce escape-period restrictions that are written into employees' dues deduction forms. *See supra* at 2–3. The Court's resolution of this case would establish a legal rule applicable to a common tactic that states and unions are using to resist this Court's holding in *Janus*.

Second, the facts of this case are straightforward and cleanly present the legal question. Illinois expressly authorizes public employers and unions to restrict when employees can stop government dues deductions. 115 Ill. Comp. Stat. § 5/11.1 (Pet.App.41–46). The Board and CTU restrict employees from stopping dues deductions outside of August in both their collective bargaining agreement and dues deduction forms. Pet.App.7. The Board and CTU enforced their restriction against Petitioners by seizing dues from their wages after they resigned their union membership and objected to supporting CTU financially. Pet.App.7–8. Without more, the Board and CTU's seizures of payments for CTU's speech violated Petitioners' First Amendment rights under *Janus*, 138 S. Ct. at 2486. The legal issue of whether, to avoid this result, the Board and CTU need evidence Petitioners waived their rights is squarely presented.

Finally, this case effectively presents for this Court's review similar decisions by four appellate courts to replace *Janus*'s waiver requirement with a contract requirement. The Seventh Circuit summarily affirmed the district court's judgment based on *Bennett*, Pet.App.2, where the Seventh Circuit agreed with the Third and Ninth Circuit that *Janus*'s waiver requirement does not apply whenever employees contractu-

ally consent to restrictions on stopping dues deductions. *Bennett*, 991 F.3d at 731–32 (Pet.App.29–31); *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 in which to do it.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

JOSEPH A. MORRIS
Morris & De La Rosa
6171 N. Sheridan Rd.
Suite 312
Chicago, IL 60660
(312) 927-4680
mdlrusuk@aol.com

WILLIAM MESSENGER
Counsel of Record
FRANK D. GARRISON
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Petitioners

JUNE 21, 2021