No. 20-1786

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

BRIEF OF GOLDWATER INSTITUTE AND CATO INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONERS

ILYA SHAPIRO
TREVOR BURRUS
SPENCER DAVENPORT
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

JACOB HUEBERT*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amici Curiae Goldwater Institute and Cato Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

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 it files amicus briefs when its or its clients' objectives are directly implicated.

Goldwater devotes substantial resources to defending the constitutional principles of free speech and freedom of association. Specifically relevant here, its litigators represent attorneys challenging mandatory association and compelled subsidies for speech in several cases, including *Boudreaux v. La. State Bar Ass'n*, No. 20-30086, ___ F.4th ___, 2021 WL 2767318 (5th Cir. July 2, 2021); *Schell v. Chief Justice & Justices of the Oklahoma Supreme Court*, No. 20-6044, ___ F.4th ___, 2021 WL 2657106 (10th Cir. June 29, 2021); and *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. Feb. 26, 2021) (reversing dismissal of First Amendment challenge to mandatory bar association membership), *petition for cert. filed*, No. 20-1678 (June 2, 2021).

---

[1] Rule 37 Statement: The parties have consented to the filing of this brief. Amici gave counsel of record for all parties timely notice of their intention to file this brief. Counsel for amici affirms that no counsel for any party authored any of this brief and that no person or entity, other than amici, their members, or counsel funded its preparation or submission.

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*.

This case concerns amici because of its importance to the freedoms of speech and association. Amici appear often in this Court and others in free-speech cases. *See*, *e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018), held that the government may not deduct any payment to a union from an employee's paycheck unless the employee has affirmatively consented to pay and there is "clear and compelling" evidence that the employee "freely" waived his or her First Amendment right *not* to pay. In this case, the lower court concluded that the existence of union membership agreements, which the Petitioners signed before the Court decided *Janus*, constituted sufficient evidence of valid waivers and thus warranted dismissal of the Petitioners' First Amendment challenge to the deduction of union dues from their paychecks. App-15. "[I]ndeed," the district court

said, it is "'difficult to imagine' clearer and more compelling evidence of [valid] waivers than [employees'] own signed agreements." *Id.* (citation omitted).

But a signed union membership agreement, standing alone, is *not* clear or compelling evidence that an employee freely waived his or her First Amendment right not to pay a union. This is most obviously true where, as here, employees signed their agreements before the Court decided *Janus*, in a jurisdiction where it was impossible to exercise their right not to pay either fees or dues to a union before *Janus*. *See* Pet. 18. Yet it is also true of agreements signed after *Janus*. Often, employees are not informed of their First Amendment rights before they are presented with a union membership agreement. And all too often, that is by design, as states and unions have taken steps to prevent employees from learning of their *Janus* rights before they sign a union membership agreement.

The Court should grant certiorari to make clear that a signed membership that does not clearly advise an individual of his or her First Amendment rights under *Janus*, standing alone, does not constitute the clear and compelling evidence necessary to show that an employee's ostensible waiver of his or her First Amendment rights was knowing and voluntary.

ARGUMENT

A union membership agreement alone cannot establish a valid First Amendment waiver because public-sector employers and unions commonly seek to prevent employees from learning of their rights under *Janus* before they sign membership agreements.

In *Janus*, the Court held that the government may not deduct any payment to a union from someone's paycheck unless the person "affirmatively consents to pay." 138 S. Ct. at 2486. An agreement to pay a union is a waiver of the individual's First Amendment right not to pay, and "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* "[S]uch a waiver cannot be presumed." *Id.*

Moreover, an individual's waiver of First Amendment rights is valid only if the individual knows of the right and freely, intentionally chooses to abandon it. *See Patterson v. Illinois*, 487 U.S. 285, 292 (1988). That means that an individual must be informed of his or her rights before he or she can validly waive them. *Cf. id.* at 292–93 (validity of waiver turned on whether individual was "made sufficiently aware" of constitutional right). For workers to validly waive their right not to support a union, someone must inform them of that right.

Since *Janus*, however, public-sector employers and unions have taken steps to prevent workers from learning of their First Amendment rights under *Janus* before they sign union membership agreements.

Courts cannot assume—as the lower courts here did, App-15—that a signed union membership agreement that does not advise an individual of his or her First Amendment rights, standing alone, constitutes a valid waiver of that individual's right not to give money to a union.

One way states have prevented workers from learning of their rights under *Janus* (or *Harris v. Quinn*, 573 U.S. 616 (2014), which protects care providers who receive government subsidies from being compelled to pay union fees) is by enacting laws that provide unions with workers' complete contact information—typically including their home addresses and personal phone numbers and email addresses, and sometimes including even their social security numbers—while prohibiting all others from obtaining their contact information (sometimes even their names). For example, after the Court decided *Harris*, public-sector unions in Washington State drafted and successfully promoted a ballot measure barring anyone from obtaining the contact information of care providers protected by *Harris*—except a union that has been certified or recognized as providers' exclusive representative. *See Boardman v. Inslee*, 978 F.3d 1092, 1123–24 (9th Cir. 2020) (Bress, J., dissenting) (citing Wash. Rev. Code §§ 42.56.640(2), 42.56.645(1)(d), 43.17.410(1)), *petition for cert. filed*, No. 20-1334 (Mar. 24, 2021). That law was enacted for the express purpose of preventing interested individuals and organizations from contacting providers about their rights under *Harris*. *See id.* at 1124–26.

Other states have enacted similar laws to give unions exclusive access to the contact information of employees, care providers, or both. *See*, *e.g.*, Cal. Gov't Code §§ 3558, 6254.3; Haw. Rev. Stat. § 89-16.6(a), (d); 5 Ill. Comp. Stat. 140/7.5(oo), (pp), 315/6(c), (c-5); 26 Me. Rev. Stat. Ann. § 975(2); Md. Code, State Pers. & Pens. §§ 3-208, 3-2A-08; Md. Code, Educ. § 6-407; Md. Code, General Provisions §§ 4-311(b)(3), 4331; N.J. Stat. Ann. 34:13A-5.13(c), (d); N.Y. E.O. 183 (June 27, 2018); N.Y. Civ. Serv. Law §§ 208(4)(a), 209-a(1)(h); 3 Vt. Stat. Ann. §§ 909(c), 910, 1022(c), 1023; 16 Vt. Stat. Ann. §§ 1984(c), 1985; 21 Vt. Stat. Ann. §§ 1646, 1738(c), 1739; 33 Vt. Stat. Ann. § 3619; *see also* Or. Rev. Stat. §§ 192.355(3), 192.363, 192.365, 243.804(4)(a) (giving unions access to employees' contact information but allowing others to obtain it only if they "show by clear and convincing evidence that the public interest requires disclosure").

Many union-friendly state governments not only give unions employees' contact information but also give unions the right to meet with new employees shortly after they are hired, either at new employee orientation sessions or in group or individual meetings. *See*, *e.g.*, Cal. Gov't Code § 3556 (giving union "mandatory access to . . . new employee orientations"); 5 Ill. Comp. Stat. 315/6(c-10)(1)(C) (giving union opportunity to meet with new employees for an hour) (enacted December 2019); 26 Me. Rev. Stat. Ann. § 975(1)(c) (giving union right to meet with new employees for at least 30 minutes); Md. Code Ann., State Pers. & Pens. § 3-307(b)(3), (5) (giving union 20

minutes to "collectively address all new employees . . . during a new employee program" and authorizing state to "encourage," but not mandate, attendance); Md. Code, Educ. §§ 6-407.1, 6-509.1(a)(1) (giving unions access to "new employee processing" in schools); Mass. Gen. Laws Ann. ch. 150E, § 5A(b)(iii) (giving union right to meet with new employees for at least 30 minutes); N.J. Stat. Ann. 34:13A-5.13(b)(3) (giving union "right to meet with newly hired employees . . . for a minimum of 30 and a maximum of 120 minutes"); N.Y. Civ. Serv. Law § 208(b), (c) (giving union rights to meet with new employees and "mandatory access" to new employee orientations); Or. Rev. Stat. § 243.804(1)(b)(B) (giving union right to meet with new employees for 30 to 120 minutes); Wash. Rev. Code § 41.56.037 (giving union right to meet with new employees for at least 30 minutes, with employee attendance not mandatory).

The purpose of those meetings is not to inform employees of their right to choose whether to join a union. Instead, the meetings facilitate unions' persuasion of new employees to sign union membership agreements. Indeed, unions and their supporters openly admit that this is a primary purpose of the meetings and the reason unions lobbied for legislation requiring them. *See*, *e.g.*, Adam Ashton, '*Everything Is at Stake': California Unions Brace for a Supreme Court Loss*, Sacramento Bee (Oct. 24, 2017), https://bit.ly/3ezQYXH ("Union leaders say the law that gives them access to new employee orientation is particularly significant [as a means of mitigating *Janus*'s anticipated effect on

membership]."); Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 Cal. L. Rev. 1821, 1873–74 (2019); Michael Wasser, Jobs with Justice Education Fund, *Making the Case for Union Membership: The Strategic Value of New Hire Orientations*, Sept. 2016, https://bit.ly/3BkvgAy. And unions seek to have the meetings last as long as possible—the New Jersey and Oregon statutes cited above expressly allow them to last as long as two hours—because "[r]esearch finds that in-person orientations lasting at least one hour are most effective at increasing member commitment." Karla Walter, *State and Local Policies to Support Government Workers and Their Unions*, Center for American Progress Action (June 17, 2018), https://bit.ly/3kzVDg0.

Further evincing the state's intent to prevent individuals from becoming informed of their First Amendment rights, California enacted legislation prohibiting disclosure of the dates, times, and places of new employee orientations to anyone except employees, the union, and vendors providing services at the meetings, so that no one could be outside the meetings to advise attendees of their rights before they enter. Cal. Gov't Code § 3556 (amended on the day *Janus* was decided, June 27, 2018); *see also* Aaron Tang, *Life After* Janus, 119 Colum. L. Rev. 677, 701 (2019) (pro-union scholar noting that "[s]uch efforts seem likely to help stem the tide of membership losses"). Even where the law does not expressly prohibit disclosure of such meetings' times and locations, it is practically impossible for people who wish to inform workers of their

rights to obtain that information through public-records requests before the meeting occurs—especially given governments' common delays in responding to such requests and unions' efforts to obstruct them. *See*, *e.g.*, *Boardman*, 978 F.3d at 1123 (Bress, J., dissenting) (describing unions' obstruction of requests for providers' contact information, which resulted in the information being "outdated by the time [the requesting organization and individuals] finally received them").

In addition, some states have responded to *Janus* by enacting statutes that affirmatively prohibit or discourage public employers from advising workers of their right not to join or pay a union. For example, Illinois officials responded to the state's loss in *Janus* by enacting a law that prohibits public-sector employers from advising employees of their rights, mandating that they "refer all inquiries about union membership to the exclusive bargaining representative [i.e., the union]." 5 Ill. Comp. Stat. 5/14(c-5), 315/10(d) (amended to include these provisions Dec. 20, 2019); *see also* Joe Tabor, *Illinois House Passes Bill to Make It Harder for Public Employees to Leave Unions, Recover Fees*, Illinois Policy (Oct. 29, 2019), https://bit.ly/2UmMn4m (describing this and other features of the legislation).

Other states, anticipating or responding to *Janus*, have enacted laws prohibiting public employers from either discouraging union membership or encouraging union resignation—with the obvious intention that employers would therefore say nothing about union membership to avoid violating the law. *See* Cal. Gov't Code §§ 3550, 3553 (amended to include this rule on

the day *Janus* was decided, June 27, 2018); N.J. Stat. Ann. 34:13A-5.14 (effective May 18, 2018). One month before *Janus*, New Jersey enacted a financial penalty for violations, requiring a public employer to reimburse a union for "any losses suffered . . . as a result of the public employer's unlawful conduct." N.J. Stat. Ann. 34:13A-5.14(c). On the day *Janus* was decided, California enacted a statute requiring employers to meet and confer with the union before sending employees any notice about their *Janus* rights. And if the union does not approve the message's content, the statute also allows the union to distribute a message together with the employer's notice. Cal. Gov't Code § 3553; *see also* Ben Bradford, *California Unions Have Prepared for* Janus, CapRadio, June 27, 2018, https://bit.ly/3hOL7ja (describing urgency to pass bill in anticipation of *Janus*).

Even where the law does not expressly prohibit or discourage it, public-sector employers generally have little incentive to inform employees of their rights.[2] An

[2] There are exceptions. Michigan recently adopted a rule requiring the state personnel director to remind workers annually of their right not to pay union dues or fees and requiring workers to agree annually to union paycheck deductions. Mich. Civ. Serv. Comm'n R. 6-7.2 (2020), https://tinyurl.com/7p974z4d. Also, several state attorneys general have found dues deductions based on a union's reporting alone to be unconstitutional under *Janus* and have therefore recommended that their respective states collect union dues only after advising employees of their First Amendment rights and obtaining their consent directly. *See* Letter from Alaska Attorney General Kevin G. Clarkson to Gov. Michael J. Dunleavy (Aug. 27, 2019), https://tinyurl.com/y4t6yjpz; Op. Att'y

official might fear that a union would charge the employer with an unfair labor practice if it were to provide employees with information on how to avoid joining, or how to resign from, the union. Even putting that threat aside, it might be easier for an employer to avoid potential conflicts with a union by saying nothing on the issue as the manager typically has nothing to gain, and something to lose, by acting against the union's interests. Some managers might themselves be union members or supporters who would prefer that employees not exercise their right not to join the union. *Cf.* R. Theodore Clark, Jr., *Politics & Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. Cin. L. Rev. 680, 684 (1975) (noting that the government employees who bargain with unions often are themselves union members). And, of course, managers might not inform providers or employees of their rights because they, too, do not understand *Janus*, or because it is simply easier to do things as they have always been done. *See* Daniel DiSalvo, *The Future of Public-Employee Unions*, Nat'l Affairs (Spring 2020), https://bit.ly/36MeXi3 ("Human resource departments often just hand out union cards to new hires to be signed with other benefits materials.").

Many public-sector employers not only fail to advise employees of their rights; they also fail to directly obtain a worker's consent before deducting union dues from his or her paychecks. Instead, they allow unions to solicit and retain union membership agreements

---

Gen. Ind. 2020-5 (2020), https://tinyurl.com/39j4cvkx; Op. Att'y Gen. Tex. KP-0310 (2020), https://bit.ly/2V0GXvy f.

from employees—implicitly entrusting the unions to ensure that the agreements constitute knowing and voluntary waivers of workers' First Amendment rights—and then simply accept the union's representations about which employees are and are not members. Several union-friendly state governments codified this common practice in response to *Janus*. *See* 5 Ill. Comp. Stat. 315/6(f-20), (f-25) (dues authorization to be made to union, which is then to communicate it to employer); N.J. Stat. Ann. 52:14-15.9e (employer and union authorized to agree that employees may only request dues deductions from union; employee's electronic signature suffices); N.Y. Civ. Serv. Law § 208(1)(b) (union entitled to dues deduction "upon presentation [to the employer] of dues deduction authorization cards").

Once a union has claimed an individual as a member in this way, the employee could be—like the Petitioners here—legally locked into paying union dues for years. Some union-allied state governments have enacted legislation making it difficult for (supposed) union members to stop paying dues. Hawaii, for example, has enacted a statute that provides that employees may only ask the union (not the state) to cease dues deductions during the 30-day period before the anniversary of the employee's initial dues authorization. Haw. Rev. Stat. § 89-4(c). In New Jersey, an employee who has signed a union membership agreement has just *10 days* each year during which he or she may request an end to dues deduction. N.J. Stat. Ann. 52:14–15.9e. Illinois has authorized (retroactively) union

membership agreements that include irrevocable dues authorizations lasting longer than one year with a 10-day opt-out window. 5 Ill. Comp. Stat. 315/6(f). And even where statutes do not mandate or specifically authorize it, many collective bargaining or union membership agreements—like the bargaining and membership agreements here, App-6–7—include similar automatic renewals and short opt-out windows.[3] *See also* Pet. at 2 & n.1 (listing statutes authorizing dues deductions unless an employee provides a revocation notice during a period set by law or a payroll deduction form).

What if an individual paying dues seeks to stop because his or her apparent "consent" was not informed or freely given, as Petitioners did? These states have disclaimed any responsibility, asserting that these are private disputes between individuals and the union—even as the state continues to take dues from the individuals' paychecks on the union's behalf pursuant to state law. *See* Pet. 14–16. The Ninth Circuit even found (unlike the lower courts here, App-11 n.4) that such unauthorized dues deductions do not even constitute "state action" that could support a constitutional claim. *See Belgau v. Inslee*, 975 F.3d 940, 946–49 (9th Cir. 2020); *see also*, *e.g.*, *Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *3 (D. Or. Jan. 6,

[3] Since *Janus*, numerous lawsuits have challenged these agreements (so far unsuccessfully), particularly those entered before *Janus*, for impermissibly burdening workers' exercise of their First Amendment rights. *See*, *e.g.*, *Bennett v. Council 31, AFCSME*, 991 F.3d 724, 729–33 (7th Cir. 2021).

2021) (one of numerous district court decisions applying *Belgau* to find no state action where state deducted dues based on forged signatures on union membership agreements), *appeal docketed*, No. 21-35133 (9th Cir. Feb. 19, 2021). Thus, individuals have no constitutional remedy for union dues deductions made without their informed consent. That means that to enjoy the right not to pay dues in the absence of a valid First Amendment waiver, a person must be informed of his or her rights *before* he or she signs a union membership agreement.

Officials have taken these measures that inhibit workers' ability to exercise their First Amendment rights to benefit the public-sector unions that fund their campaigns for office. It is in the interest of politicians who rely on funding from public-sector unions to sustain and increase the flow of membership dues to the unions so the unions' contributions will likewise continue or increase. Indeed, the unionization of the in-home care providers whose rights were upheld in *Harris* illustrates how union-backed politicians use laws to increase union membership and revenue and thus sustain the flow of union funds to their campaigns. *See* Jacob Huebert, Harris v. Quinn*: A Win for Freedom of Association*, 2013-2014 Cato Sup. Ct. Rev. 195, 208–09 (describing Illinois' cycle of unions contributing to the campaigns of officials who, in turn, unionize more groups. Such officials have no incentive to inform workers of their right not to pay a union, and they have acted on their strong incentive to prevent workers' exercise of that right.

For these reasons, among others, a union membership agreement that does not notify the individual of his or her First Amendment rights is not clear or compelling evidence that a public-sector employee validly waived his or her First Amendment right not to pay money to a union. The lower court's decision in this case, which accepted a pre-*Janus* union membership agreement as conclusive evidence of a waiver in ruling on a motion to dismiss, therefore was erroneous. If uncorrected, the decision will allow unions and their allies in government to succeed in their efforts to prevent workers from exercising the rights that *Janus* is supposed to protect.

CONCLUSION

To ensure that governments and unions respect the First Amendment rights that *Janus* upheld, the petition for certiorari should be *granted*.

Respectfully submitted,

ILYA SHAPIRO
TREVOR BURRUS
SPENCER DAVENPORT
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

JACOB HUEBERT*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amici Curiae
Goldwater Institute and Cato Institute