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 THE FREEDOM FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

## IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Freedom Foundation ("Foundation") is a 501(c)(3) nonprofit, nonpartisan organization working to advance individual liberty, free enterprise, and limited, accountable government. Founded in 1991 and based in Olympia, Washington, the Foundation maintains additional offices in Oregon, California, Ohio, and Pennsylvania.

The Foundation focuses on public sector union reform through litigation, legislation, education, and community activation. The Foundation has worked to protect the rights of union-represented public and partial-public employees and regularly assists employees in understanding and exercising those rights. The Foundation has represented public and partial-public employees in litigation against unions and public employers who have violated employees' rights regarding union membership and dues payment. The Foundation has also notified tens of thousands of public employees of their rights and has assisted many of them in exercising those rights by contacting unions on their behalf and, in some cases, litigating against those unions. This includes assisting thousands of partial-public employee home caregivers and family childcare providers on the West Coast in understanding and exercising their rights under *Harris v. Quinn*, 573 U.S. 616 (2014), often providing individualized service as needed. As a result, the Foundation has

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[1] Pursuant to Rule 37.2(a), all parties received timely notice and have consented to the filing of this brief. Pursuant to Rule 37.6, amicus affirms that no party's counsel authored this briefing in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

unique insight into the abuses suffered by public employees at the hands of their government employers and exclusive representatives.

The Foundation also filed the complaint with the Washington Public Disclosure Commission that ultimately led to a separate lawsuit, *Washington v. WEA*, No. 05-1657, which was consolidated with *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007), before this Court. The Foundation also filed amicus briefs supporting the petitioners in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) and *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

## INTRODUCTION AND SUMMARY OF ARGUMENT

The lower courts' application of a contract law standard, rather than a waiver standard, to determine if states and unions have acquired affirmative consent from nonunion public employees before they deduct union dues from those employees' wages not only deviates from *Janus*, but also ignores the realities of modern compulsory unionism, even post-*Janus*. States impose "inherently compelling pressures" on employees by granting unions privileges that infringe upon individual employees' rights. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973). These privileges include exclusive representation, with its accompanying benefits, and union control of the dues deduction authorization and revocation procedures—both of which constitute significant infringements on employees' First Amendment rights. These privileges grant unions leverage which pressures employees into signing "voluntary" dues deduction authorization agreements ("Dues Agreements") that significantly restrict when employees can exercise their right under *Janus* not to subsidize a union's political speech. These

tactics should cast doubt on the knowingness and voluntariness of any supposedly "voluntary" contract executed in their shadow.

Additionally, these state-bestowed privileges allow unions to continue the "abuse" of First Amendment rights that public employees experienced under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *See Janus*, 138 S. Ct. at 2460. These abuses include a violation of employees' privacy by states which disclose employees' sensitive personal information to unions, which unions use to bombard bargaining unit members (both members and nonmembers) with aggressive, deceptive, and often coercive membership solicitations and political campaigning. Unions also abuse their privilege of controlling government payroll deductions by instructing public employers to deduct union dues from employees' wages without consent, often based on Dues Agreements containing employee signatures that have been forged by a union. Unions also employ abusive tactics during employer-mandated training and orientation sessions, where union representatives aggressively seek employee signatures on Dues Agreements.

The public sector union-employee relationship is a far cry from a normal contract law context, and a knowing waiver standard is the only mechanism individual employees have to defend against the pressures of powerful state-favored unions—the right to confront these pressures with full knowledge of their rights and voluntarily say "no." This Court rightfully required public employers and unions to show clear and compelling evidence that employees waived their First Amendment rights before union payments are deducted from employees' wages. *Id.* at 2486. And, as this Court already acknowledged, the

procedures used to collect money from objecting non-union employees "must satisfy a high standard." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 313 (2012). Unfortunately, lower courts have ignored this standard and thereby incentivize and facilitate the continuing abuse of public employees' First Amendment rights under *Janus*. Considering the exceptional importance of employees' constitutional right to be free from compelled subsidization of private political speech with which they disagree, review by this Court is necessary to clarify the scope and reach of the *Janus* waiver standard.

## ARGUMENT

### I. *Janus* requires government employers and unions to satisfy a constitutional waiver standard before they deduct union dues from nonunion employees' wages.

In *Janus*, the Court acknowledged that public employers and unions had been abusing public employees' First Amendment rights for decades under *Abood*. *See Janus*, 138 S. Ct. at 2460 (*Abood* led to "practical problems and abuse."). This abuse, in part, led the Court to overrule *Abood's* compelled fee regime *and* go further by requiring "clear and compelling evidence" of a freely given waiver of constitutional rights before public employers and unions deduct union dues from employees' wages. *Id.* at 2486. The lower courts, including the courts below in this case,[2] have spurned this waiver standard in

[2] *Troesch v. Chi. Teachers Union, Loc. Union No. 1, AFT*, No. 1:20-cv-02682, 2021 WL 2587783 (7th Cir. Apr. 15, 2021) (*not reported*); *Troesch v. Chi. Teachers Union, Loc. Union No. 1, AFT*, No. 1:20-cv-02682, --- F. Supp. 3d ---, 2021 WL 736233 (N.D. Ill. Feb. 25, 2021). *See* Pet. at 5-8.

favor of a contract law standard. *See* Pet. at 6-8*; see also Bennett v. AFSCME Council 31*, 991 F.3d 724, 730-31 (7th Cir. 2021), *petition for cert. filed* No. 20-1603 (May 18, 2021); *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); *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). However, application of a contract law standard to determine if nonunion public employees consented to dues payments deviates from *Janus* and incentivizes states and unions to continue abusing employees' First Amendment rights in ways that application of a constitutional waiver standard would prevent.

1. The difference between a waiver standard and a contract law standard is significant, as are the policies underlying each. "More than mere contract law . . . is involved" when analyzing contracts containing restrictions on constitutional rights. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 183 (1972). A constitutionally sufficient waiver requires that parties know of the right in question and voluntarily and intelligently waive that right. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (cited in *Janus*, 138 S. Ct. at 2486); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion) (cited in *Janus*, 138 S. Ct. at 2486). Further, "courts indulge every reasonable presumption against the waiver of fundamental rights" and "do not presume acquiescence in the loss of fundamental rights." *Johnson*, 304 U.S. at 464. Moreover, enforcement of a waiver cannot be against public policy. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

The reason to apply a heightened waiver standard to establish consent to the subsidization of public sector unions by objecting nonunion employees is obvious: "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . ." *Janus*, 138 S. Ct. at 2464. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical . . . [A] significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences." *Id*. (internal quotations and citations omitted). If employees are to be subjected to these "demeaning" compelled union payments over their objections, they at least must have knowingly, voluntarily, and intelligently waived their right to be free of such compulsion. *Id*. at 2486.

2. The sole purpose of the irrevocable dues payment clauses enforced by the government in this case is to compel *non*union public employees "to furnish contributions of money for the propagation of opinions which [they] disbelieve[] and abhor[] . . ." after they resign union membership and object to their subsidization of the union and its speech. *See* Pet. at 4-6 (petitioners refer to the clauses as "escape period restrictions"). The lower court's analysis here, therefore, *should* have been straightforward: since the government is deducting union dues from nonmembers' wages over their objections, the government needed to show by "clear and compelling evidence" that these nonmembers "waiv[ed] their First Amendment right[]" *not* to be subjected to such payments without their affirmative consent. *See Janus*, 138 S. Ct. at 2486. The court below should have determined

whether there was clear and compelling evidence that petitioners knowingly, voluntarily, and intelligently waived their right as nonunion employees to be free of any and all compelled political speech, that petitioners' consent was acquired using a constitutionally-sound procedure, *see infra* at 13-18, and that enforcement of the waiver was not against any public policy. To date, no lower court has performed this analysis. *See* Pet. at 7-8.

Instead, lower courts have all applied "mere contract law" to make the bare determination that employees agreed to pay union dues—disregarding whether the employees knew of their rights under *Janus*, had the ability to exercise such rights, freely chose to forgo those rights without duress, or whether the state-imposed procedure adequately protected employees' rights. These courts err in doing so and, as a result, have gutted this Court's *Janus* decision and allowed states and unions to violate thousands of public employees' First Amendment rights.

## II. A constitutional waiver standard protects employees' First Amendment rights from the coalition of more powerful, knowledgeable, and sophisticated parties—government employers and unions.

Individual employees need the protection afforded by a waiver standard because unions possess powerful state-granted privileges that impinge upon employees' First Amendment rights. These privileges give unions enormous leverage over employees and make it difficult for these employees to learn of and exercise their fundamental constitutional rights. Government employers create these privileges by statute and collective bargaining agreements ("CBAs") (with unions) which impose on employees exclusive representation,

its accompanying privileges, and union control of dues deduction authorization and revocation procedures ("Deduction Procedures"). These privileges burden employees with "inherently compelling pressures" which should cast doubt on the voluntariness and knowledge underlying any allegedly "voluntary" contract executed by employees in that context. *Bustamonte*, 412 U.S. at 247. Further, the union-employee relationship in the public sector is about as far from normal contract law as east is from west. Lower courts' decisions to apply mere contract law in the public employment context ignores the enormous imbalance of power, knowledge, and sophistication between the union and the individual employee.

1. Compelled exclusive representation requires all employees in a bargaining unit, regardless of union membership, to be represented exclusively by a union–which acts as a politically powerful lobbying organization seeking to influence public employment policy.[3] Exclusive representation "confers many benefits" on unions and "results in a tremendous increase in the power" of unions over employees. *Janus*, 138 S. Ct. at 2467. It grants unions "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944). The exclusive representative's power necessarily entails "the loss of individual [employees'] rights." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950). As such, the Court has acknowledged that exclusive representation is "a significant impingement

[3] *All* public sector union speech is inherently political, including but not limited to, core issues such as wages, pensions, benefits, and public sector collective bargaining in general. *See Janus*, 138 S. Ct. at 2480.

on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2478.

2. This state-decreed exclusive representation grants unions accompanying privileges such as "obtaining information about employees" and having dues "deducted directly from employee wages." *Id*. at 2467. Government employers must give employees' personal phone numbers, email addresses, and home addresses to unions, regardless of employees' union membership status. Employers also commonly give unions sensitive employee information such as date of birth, social security number, gender, marital status, and language preference. Disclosure of this personal information would, in other contexts, violate any number of privacy and identity protection laws. Unions then use that information to bombard employees, including nonmembers, with pro-union messages, high-pressure membership drives, and political campaigning materials—through email, U.S. mail, and aggressive in-person home solicitation. There is precious little knowledge about the employee that a union cannot use as leverage in coaxing employee signatures on Dues Agreements containing irrevocability provisions. *See infra* at 18-23.

Public employers also commonly mandate employee attendance at orientation and training sessions in which employees become a captive audience to union representatives. Unions typically seek access to these sessions in collective bargaining and use them to apply in-person pressure on employees to sign Dues Agreements containing irrevocability clauses. *See infra* at 21-23. Unions also deprive nonmembers of the right to vote on the employment contract—even though the employment contract applies to the entire

bargaining unit regardless of an individual employee's union membership status.

3. The typical relationship between the mandatory exclusive representative and a public employee is fraught with the dangers courts look for when determining whether a person truly knowingly, voluntarily, and intelligently gave up a constitutional right. *See D.H. Overmyer*, 405 U.S. at 186-87 (discussing the level of a party's corporate sophistication, the relative bargaining power between parties, the presence of advising counsel, and whether the agreement was a contract of adhesion); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (noting there was no bargaining over contract terms, the parties possessed vastly different bargaining power, the contract was presented as a take-it-or-leave-it form contract, and the party allegedly waiving her right was not actually aware or made aware of the significance of the purported waiver).

These factors demonstrate the massive advantage unions have over individual employees. Unions are sophisticated, multi-million-dollar organizations that have ample resources to hire counsel to devise language in Dues Agreements that is confusing and intimidating to the typical layperson employee; Dues Agreements containing irrevocability clauses are presented as take-it-or-leave-it form contracts of adhesion; individual employees rarely hire counsel to assist them in understanding the language and union representatives rarely, if ever, explain either the language or employees' rights; and there is never any bargaining over the agreement's terms. Pretending the union-public employee relationship is similar to the private contracting world ignores the realities of modern compulsory unionism in the public sector.

Dues Agreements also typically automatically-renew annually and restrict employees' ability to stop the paycheck deductions to a narrow time period lasting only a few days a year—usually ranging from ten to thirty days ("Escape Periods"). *See, e.g.*, Pet. at 3. Many of these Escape Periods are based on the date when employees sign the Dues Agreements, rather than a specific date defined in a CBA. This increases the burden on employees attempting to learn the dates of their Escape Period because Dues Agreements are retained in union files. Additionally, given unique employee Escape Periods, employees cannot communicate about upcoming Escape Periods among themselves. The typical procedure an individual employee must navigate to exercise his or her *Janus* rights is the following: (1) obtain knowledge of *Janus* rights; (2) email or phone the union to object to continued dues deductions; (3) be ignored by the union; (4) learn about and contact the Freedom Foundation for assistance; (5) send the union a written letter objecting to dues deductions; (6) receive letter from union stating the attempt to stop deductions occurred outside the unique annual Escape Period (and usually informing you of the Escape Period dates);[4] and (7) remember to object again during the Escape Period. This complex, frustrating, and burdensome process discourages many employees from exercising their constitutional rights.

Unions' also hold the power to lobby and promote politicians who, after election, support exclusive representation and grant unions privileges which provide

[4] Frequently, the union also ignores the written letter, resulting in the undersigned attorney sending the union a letter threatening a lawsuit.

leverage over individual employees.[5] Moreover, government employers usually yield to union demands that they abstain from informing employees of their rights, which leaves the union as the sole source of accessible information for employees interested in learning of or exercising their rights. This is clearly "a case of unequal bargaining power [and] overreaching." *Fuentes*, 407 U.S. at 95.

4. Finally, as is the case here and for thousands of other employees across the country, petitioners signed Dues Agreements containing irrevocability clauses in the shadow of mandatory agency fees required before this Court decided *Janus*. *See* Pet. at 5. At the time they signed the agreements, the State deprived petitioners of the option to choose not to subsidize the union as a nonmember. *Id*. at 19. Such an arrangement is unheard of in the private contracting world (as are most state-bestowed union benefits). Only the most cynical would argue that the decision to buy a house for $200,000 would constitute a "voluntary" decision without duress if the seller could force the buyer to pay $160,000 even without buying the

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[5] Even in the private sector, where the ramifications of compelled political speech are not as severe, the Court has recognized that union membership in the context of compelled exclusive representation and collective bargaining is fundamentally different from normal contract law. *See Pattern Makers' League v. NLRB*, 473 U.S. 95, 113 n.26 (1985) (stating union membership "contemplates a continuing relationship with changing obligations as the union legislates in monthly meetings or in annual conventions. It creates a complex cluster of rights and duties expressed in a constitution. In short, membership is a special relationship. It is as far removed from the main channel of contract law as the relationships created by marriage, the purchase of a stock certificate, or the hiring of a servant.").

house—especially if the buyer did not want that house in the first place.

Until the Court issued *Janus* in 2018, public employers and unions compelled employees to pay agency fees for generations. *Janus* ushered in a sea-change in public sector labor law, but there is zero indication that public employers or unions are informing employees of their recently-recognized rights. Most public employers are too afraid of unfair labor practice complaints to "interfere" with union membership drives by informing employees of their constitutional rights and unions rarely inform employees of their rights. Consequently, thousands of public employees across the country who were previously subjected to agency fees by statute do not know of their newly-recognized right to be free of all union subsidization as a nonmember, and unions use their state-granted privileges to maintain the default pre-*Janus* understanding of constitutional rights among members of the bargaining units they represent.

In conclusion, the lower courts' adoption of a contract law standard in this context ignores the realities "on the ground" that *actually* affect individual public employees, such as vulnerability to targeted union messaging; drastic imbalances in power, knowledge, and sophistication; and lack of information regarding post-*Janus* rights.

## III. Procedural safeguards are necessary to protect employees' First Amendment rights.

Another feature of modern unionism which distinguishes it from normal contract law is that states commonly grant wholesale control of Deduction Procedures to unions—who benefit from those dues

through the suppression of employees' First Amendment rights. The protection of free speech rights triggers the need for procedural safeguards "to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns" because "[F]irst [A]mendment rights are fragile and can be destroyed by insensitive procedures." *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 303 n.12 (1986) (internal citations and quotations omitted). Indeed, this Court has previously stated that procedural safeguards are necessary to protect employees' First Amendment right to be free from compelled subsidization of union speech. *See Hudson*, 475 U.S. at 303 n.12.

Even post-*Janus*, states continue to devise schemes which compel dissenting nonunion public employees to subsidize union speech over their objections. *See* Pet. at 2-3. States, including Illinois, do so while also subjecting these employees to significant infringements on their constitutional rights and granting leverage over these employees to unions which cut against employees' rights. *See supra* at 7-13. Under *Abood*, these schemes had to contain procedural safeguards which "minimize[d] the risk" that nonunion employees might be compelled to subsidize union speech; one such safeguard was a prohibition on union-controlled Deduction Procedures. *Hudson*, 475 U.S. at 301-02, 303, 308.

Post-*Janus*, however, states and unions are shedding such safeguards in favor of granting unions exclusive control over Deduction Procedures applicable to both union members and objecting nonmembers. *See* Pet. at 5 ("Employee requests to cancel dues deductions . . . 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.'") (citing 115 Ill. Comp. Stat. § 5/11.1(d) at Pet.App.43); *see also, e.g.*, RCW 41.80.100(2)(g) ("The employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions."). Even if these procedures are constitutional (which they are not), they impose obvious pressure on employees and infringe their First Amendment rights.

1. In *Hudson*, objecting nonunion employees subjected to exclusive representation and an agency shop challenged their employer's and union's procedure for deducting union dues from their wages. *See Hudson*, 475 U.S. at 301. The Court invalidated the procedure because, inter alia, it was "entirely controlled by the union, which is an interested party." *Id.* at 308. The Court held that nonunion employees who object to union fee deductions are "entitled to have [their] objections addressed in an expeditious, fair, and objective manner" and that procedures to do so that are "entirely controlled by [a] union" do not satisfy this burden. *Id.* at 307. The Court reasoned that since "the agency shop itself is 'a significant impingement on First Amendment rights,' the government and union have a responsibility to provide procedures that minimize that impingement and which facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20.

Here, although Illinois technically removed its agency shop (i.e., agency fee) statute post-*Janus*, petitioners are still subjected to the "significant [First Amendment] infringement" of exclusive representation, along with state-granted union benefits that cut against their rights. *See Janus*, 138 S. Ct. at 2478; *see also supra* at 7-13. Moreover, the State *did* subject

petitioners to an agency shop at the time they signed the Dues Agreements containing the irrevocability clauses. *See* Pet. at 19. Yet, rather than "minimize" these infringements by providing a "fair and objective" procedure for objecting nonunion employees such as petitioners, the State exacerbates these infringements by placing the protection of dissenting nonunion employees' First Amendment rights entirely in union hands. *See supra* at 14-15.

In the post-*Janus* world of public sector employment, an employee's only recourse to challenge allegedly unlawful dues deductions is to complain to the union benefiting from the deductions. Only unions can communicate to employees about union membership, dues payments, and employees' rights; only unions can answer questions about the meaning of Dues Agreements language; only unions have the authority to instruct a government employer to start or stop dues deductions from employees' wages. Common sense should tell us that this procedure is akin to placing the proverbial fox in charge of the henhouse. As demonstrated *infra* at 18-23, unions leverage these incredible privileges to deceive and pressure employees into signing Dues Agreements containing dues payment irrevocability clauses.

2. *Hudson's* procedural requirements harmonize with the principle that "nonmembers should not be required to fund a union's political and ideological projects unless they choose to do so after having a 'fair opportunity' to assess the impact of paying" for a union's political speech. *Knox*, 567 U.S. at 314-15. To impose such a requirement, employees must be "able at the time in question to make an informed choice". *Id*. at 315. Given the sea-change *Janus* ushered in, there is simply no way petitioners' pre-

*Janus* decision to obligate themselves to pay future union fees as nonmembers was an "informed choice," due to the massive difference between (i) union non-membership before *Janus* (which resulted in paying agency fees), and (ii) non-membership after *Janus* (which results in paying nothing to a union). If something as minimal as a union's special assessment to fund political activities was enough to trigger the need for a new procedural safeguard, i.e., another opportunity for the employee to make the decision whether to finance such speech, as it did in *Knox*, then certainly *Janus* triggered a similar procedural requirement here—at least with respect to employees who signed the Dues Agreements pre-*Janus*. *Id*.

3. Union control of Deduction Procedures also contributes to the imbalance of power between unions and employees. Unlike the private contracting world in which a consumer could call her bank to stop payment on unauthorized direct debit deductions from a third-party business (requiring *the business* to institute collection procedures), public employees are forced to file lawsuits to challenge their employer's deduction of dues from their wages because employers are commonly required by statute to disregard employee objections to those deductions. *See supra* at 14-15. Meanwhile, the union continues receiving the disputed wages, since employers can stop deductions only upon union instructions. The intimidating prospect of finding and hiring counsel to sue one's own employer and a well-funded politically powerful union chills employees' exercise of rights because employees are often unwilling to chance this risky and cumbersome process.

In *Janus*, the Supreme Court expanded employees' right not to subsidize a union's political speech to

include *all* of a public sector union's speech, instead of just so-called "non-chargeable" expenses. *See* 138 S. Ct. at 2486. Thus, compelling subsidization of union speech is a greater infringement under *Janus* than under *Abood*. It makes little sense to conclude that the pre-*Janus* procedural protections required by the First Amendment to protect nonunion employees' rights no longer apply post-*Janus*, because it means nonunion employees enjoy *fewer* rights after *Janus* than before, despite the fact that (i) the harm caused by compelled union fees is greater, and (ii) the Court recognized an *expansion* of employees' First Amendment rights in *Janus*.

## IV. Unions commonly abuse state-granted privileges to induce employees into signing Dues Agreements that restrict when employees can exercise their *Janus* rights.

The faulty interpretations of *Janus* found in lower court rulings have freed public employers and unions from all the pre-*Janus* restraints courts previously imposed to protect nonunion employees' rights under *Abood's* agency fee regime. Governments and unions are now free to devise any scheme they wish to leverage unions' ability to deceive and pressure employees into signing Dues Agreements containing irrevocability clauses that prevent employees from exercising their *Janus* rights. Not surprisingly, unions are using this freedom to impede employees' free speech rights.

The Freedom Foundation has witnessed these abuses firsthand, especially with respect to notifying partial-public in-home health care workers in Washington of their constitutional rights ("Individual Providers" or "IPs" subsidized by Medicaid to care for the disabled and/or elderly in their homes). The

Court freed these partial-public employees from *Abood's* agency fee regime when it decided *Harris v. Quinn* in 2014. However, faced with the prospect of dwindling coffers, unions resorted to underhanded high-pressure tactics to maintain their revenue flow. The Foundation helped many of these employees exercise their rights in the face of abuse wrought by their appointed exclusive representative, SEIU 775. What follows are only a few examples of this abuse.

1. Unions commonly use employees' personal information to bombard employees with membership solicitations via email, phone calls, U.S. mail and aggressive in-person home visits. These tactics are often coercive, deceptive, and harassing, but employees can do little to stop the unwanted solicitations.

In a complaint filed with the Washington Attorney General's Office, a husband recounted how an "adversarial" union organizer came to his home demanding to know why his wife, an IP, was not a union member. The complainant described the visit as "harassment" and "extremely threatening." Another IP filed a similar complaint describing frequent union phone calls as making him feel like he was "being stalked."[6]

2. Additionally, unions utilize the employer's payroll system to deduct dues from employees' wages.[7] In 2017, exclusive representatives of bargaining units of partial-public employee home caregivers for Medicaid clients represented about 350,000 caregivers and

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[6] The complaints were filed with the Consumer Protection Division of the Washington Attorney General's Office on January 27, 2015 (p. 39), and July 21, 2011 (p. 17), respectively. https://www.freedomfoundation.com/wp-content/uploads/2019/01/AG-CPD-SEIU-775-complaints.pdf (last visited July 2021).

[7] *See*, *e.g.*, RCW 41.56.113.

collected almost $150 million in dues from their wages (across the country).[8] Caregivers' lack of control over the Dues Procedures facilitates abuse as union organizers employ any means necessary to secure an employee's signature on a Dues Agreement or obtain an employee's oral consent to dues deductions.

IP Cindy Ochoa filed a federal lawsuit against SEIU 775 after a union organizer forged her signature on a union membership form, triggering unauthorized and irrevocable union dues deductions from her wages.[9] *Ochoa v. SEIU Local 775*, No. 2:18-CV-00297-TOR (E.D. Wash. 2019). IPs in Minnesota have reported similar forgeries.[10] Such forgery accusations are occurring all over the West Coast. *See Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *1 (D. Or. Jan. 6, 2021), *appeal docketed*, No. 21-35133 (9th Cir. Feb. 19, 2021); *Zielinski v. SEIU Loc. 503*, 499 F.Supp.3d 804807 (D. Or. 2020), *appeal docketed*, No. 20-36076 (9th Cir. Dec. 15, 2020); *Schiewe v. SEIU Loc. 503*, No. 3:20-cv-00519-JR, 2020 WL 5790389, *1–2 (D. Or. Sept. 28, 2020), *appeal docketed*, No. 20-35882 (9th Cir. Oct. 9, 2020); *Wright v. SEIU Loc. 503*, 491 F.Supp.3d 872, 875 (D. Or. 2020), *appeal docketed*, No. 20-35878 (9th Cir. Oct. 8, 2020); *Semerjyan v. SEIU Loc. 2015*, 489 F.Supp.3d 1048, 1053 (C.D. Cal. 2020), *appeal docketed*, No. 21-

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[8] Maxford Nelsen, *Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity*, Freedom Foundation (July, 2018), *available at* https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf.

[9] Caleb Jon Vandenbos, *Victim of Union Forgery Files Lawsuit*, Freedom Foundation (Oct. 1, 2018), https://www.freedomfoundation.com/litigation/victim-of-union-forgery-files-lawsuit/.

[10] Nelsen, *supra* note 8.

55104 (9th Cir. Feb. 9, 2021); *Yates v. Wash. Fed'n of State Emps.*, 466 F.Supp.3d 1197, 1201 (W.D. Wash. 2020), *appeal docketed*, No. 20-35879 (9th Cir. Oct. 8, 2020); *Quezambra v. United Domestic Workers of Am. AFSCME Loc. 3930*, 445 F.Supp.3d 695, 700 (C.D. Cal. 2020), *appeal docketed*, No. 20-55643 (9th Cir. June 23, 2020). Additionally, SEIU 775 staff anonymously reported being directed by supervisors to "solicit and lie" to secure Dues Agreements from IPs telephonically.[11]

3. Public employers often facilitate additional union access to employees. For example, Article 2.6 of SEIU 775's CBA obligates the state to distribute union membership forms at IP orientations, Article 2.7 obligates the state to include union material in IPs' pay envelopes, and Article 2.8(B) requires the state's payroll website to display union messages when IPs login.[12]

4. Since *Harris*, many unions representing partial-public employees have secured the ability, through CBA or statute, to solicit newly-hired employees for union membership in person at state-mandated orientation or training sessions.

In Washington state, Article 2.3(B) of the CBA governing IPs guarantees SEIU 775 thirty minutes with new IPs "in non-public areas" during their

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[11] Maxford Nelsen, *Six Ways SEIU 775 Is Getting Around* Harris v. Quinn, Freedom Foundation (May 18, 2016), https://www.freedomfoundation.com/labor/six-ways-seiu-775-is-getting-around-harris-v-quinn/.

[12] Collective Bargaining Agreement: The State of Washington and Service Employees International Union Local 775, 2017-2019, *available at* https://ofm.wa.gov/sites/default/files/public/legacy/labor/agreements/17-19/nse_homecare.pdf (last visited July 19, 2021).

contracting appointment.[13] In addition, Article 15.13(A) gives the union up to thirty minutes with IPs taking state required basic training.[14]

In public records obtained by the Foundation, employees of the Washington Department of Social and Health Services ("DSHS") describe SEIU 775's abuse of IPs during these captive-audience meetings. One employee described a union complaint to the state after a DSHS employee "not only stayed during the [union] presentation but spoke up in response to IPs who were looking at her for help when they were being pushed into signing up [for union membership]."[15]

In other documents, DSHS staff describe union organizers as "'aggressive,' 'forceful,' 'incredibly rude,' 'unprofessional,' 'coercive,' 'demanding,' and 'bullying.'"[16] State workers further report that IPs feel "'pressured,' 'misled,' 'tricked,' 'coerced,' 'intimidated' and 'forced' into signing" Dues Agreements.[17] In one case, DSHS staff reported a caregiver was reduced to tears by the high-pressure tactics of two SEIU 775 organizers.[18]

In another email, a DSHS employee detailed "how an IP had called to explain, 'how she was poorly

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[13] *Id*.

[14] *Id*.

[15] Maxford Nelsen, *DSHS Aiding SEIU Misinformation of Home Care Workers*, Freedom Foundation (Feb. 8, 2017), https://www.freedomfoundation.com/labor/dshs-aiding-seiu-misinformation-of-home-care-workers/.

[16] Maxford Nelsen, *DSHS Allowing SEIU to Continue Exploiting Caregivers*, Freedom Foundation (Jan. 29, 2018), https://www.freedomfoundation.com/labor/dshs-allowing-seiu-continue-exploiting-caregivers/.

[17] *Id*.

[18] *Id.*

treated by the Union' [and] . . . 'bullied.'"[19] The employee was now hearing complaints first hand after having previously heard "horror stories" about IPs fleeing when "Union reps were trying to 'force them to sign up to have extra money taken out of their checks and or donate.'"[20]

Another email described how the union's captive audience meetings with IPs disrupted the orientation process by pressuring IPs for immediate signatures on union cards, not disclosing the contributions were recurring, and generating "frustration, confusion, and . . . anger" with the contracting process.[21] Despite these accounts and pleas for direction from DSHS staff, management informed employees that, "As a best practice, staff should not be present during union presentation[,] that way they don't feel compelled to ask questions or provide clarification."[22]

In addition to Washington, exclusive representatives of bargaining units of partial-public employee caregivers arranged for similar captive-audience meetings in Oregon, California, Illinois, Ohio, Massachusetts, Connecticut, and Minnesota. Reports of caregivers being harassed by union organizers in such settings have emerged from these states as well.[23]

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[19] Maxford Nelsen, *Records Show Continued SEIU Harassment of Caregivers*, Freedom Foundation (July 5, 2018), https://www.freedomfoundation.com/labor/records-show-continued-seiu-harassment-of-caregivers/.

[20] *Id.*

[21] Nelsen, *supra* note 16.

[22] Nelsen, *supra* note 15.

[23] Nelsen, *supra* note 8.

## CONCLUSION

Nowhere in the private contracting world is one party subjected to the kind of artificial, government-mandated leverage unions possess over individual public employees. The First Amendment must be brought to bear to protect individuals when government uses its immense power to aid unions and establish the uneven playing field between unions and public employees. Public employees' constitutional rights are too important to hand over to the same government employers and unions that spent forty years under *Abood* abusing employees' rights.

This case provides the Court with the opportunity to correct lower courts' interpretation of *Janus* on a matter of exceptional importance across the country: whether public employees will *actually* enjoy the protections provided by the waiver standard the Court recognized in *Janus*. The Court should grant review in this case to re-direct the lower courts on this matter of exceptional importance: without clear and compelling evidence that nonunion public employees waived their First Amendment right against compelled union subsidization, employers and unions cannot deduct union dues from nonunion employees' wages.

Respectfully submitted,

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