Nos. 20-1603 & 20-1786

In The
Supreme Court of the United States

SUSAN BENNETT,

Petitioner,

v.

AFSCME, COUNCIL 31, AFL-CIO, et al.,

Respondents.

JoANNE TROESCH, et al.,

Petitioners,

v.

CHICAGO TEACHERS UNION, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

No. 20-1603, *Bennett v. AFSCME, Council 31, AFL-CIO*:

Whether an employee's signature on a union membership card and dues deduction authorization by itself authorizes a government employer and public-sector union to withhold union dues or other fees from an employee's wages consistent with this Court's affirmative consent waiver requirement set forth in *Janus*?

No. 20-1786, *Troesch v. CTU*:

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?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other things, PLF litigates in defense of the right of workers not to be compelled to make payments to support political or expressive activities with which they disagree. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995). PLF also has participated as amicus curiae in virtually all of this Court's cases involving labor unions compelling workers to support political speech from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Janus v. American Fed'n of State, Cty., and Mun. Emp's., Council 31*, 138 S. Ct. 2448 (2018). PLF supports these petitions because it believes the Constitution requires states to fulfill an affirmative obligation to ensure that public employees have sufficient information and opportunity to exercise their First Amendment right to refrain from subsidizing a public employee union.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners are public employees challenging state and union policies that block them from exercising

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[1] Pursuant to this Court's Rule 37.2(a), all parties received notice of Pacific Legal Foundation's intent to file this brief more than 10 days in advance and consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

their First Amendment right to stop paying union dues unless they make their request during a short annual "escape period" ranging from 15–30 days. The unions are willing to accept employees' resignations from membership but consider employees bound to continue paying dues regardless of membership status until the designated escape period. *Bennett* App. 2a; *Troesch* App. 8. The state continues to deduct union dues until the union releases the employees. This joint effort undermines *Janus*, which held that a public employer may not deduct union dues without a public employee's affirmative consent that effects a clear and knowing waiver of the employees' First Amendment rights. 138 S. Ct. at 2486. An Illinois district court dismissed both cases on the grounds that the plaintiffs had signed dues deduction cards prior to *Janus* and the Seventh Circuit affirmed. *Bennett* App. 3a, 12a–16a; *Troesch* App. 2–3.

The reasoning of the Seventh Circuit extends beyond cards signed prior to *Janus*. New and existing employees who are ignorant of their constitutional rights regarding union membership and subsidization may sign cards and only subsequently discover that they are bound to pay union dues for a full year. Or employees may become disenchanted with a union's political goals and no longer desire membership. *See Knox v. Service Emp. Int'l Union, Local 1000*, 567 U.S. 298, 315 (2012) (workers' choice to fund union activities may change as developments warrant). With the power of the state behind them, however, public employee unions continue to bind unwilling employees to associations and speech that they oppose, and take hundreds of dollars from the employees' paychecks to fund the offensive speech. The First Amendment cannot countenance this

infringement and *Janus* provides a roadmap to avoid it. However, the courts below did not follow the directions.

Janus adopted the constitutional waiver requirements of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (Waiver is "an *intentional* relinquishment or abandonment of a *known* right or privilege.") (emphasis added), cited in *Janus*, 138 S. Ct. at 2486. States must provide an opportunity for employees to make *informed* decisions. In this circumstance, the government must "open the channels of communication rather than [] close them." *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). An increasing number of post-*Janus* statutes and regulations effectively close channels of communication that would permit the state (or independent, state-designated third parties) to present information to public employees that is unfiltered by union preferences. Allowing the state to garnish employee wages based on a unilaterally presented union membership form and dues deduction authorization, without any disclosure of the constitutional rights about to be waived, unconstitutionally diminishes the rights of public workers to exercise their First Amendment rights.

Far too many states are abdicating their responsibility to ensure that their employees are not deprived of their constitutional rights without the employees' express, clear consent. This Court should grant the petitions in these related cases to reaffirm that the rules governing constitutional waivers apply in the context of public employee union dues.

ARGUMENT

I

THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISIONS REQUIRING *INFORMED* CONSENT TO WAIVE CONSTITUTIONAL RIGHTS

A. Due Process Requires States To Provide Sufficient Notice of Constitutional Rights

By permitting the State to make payroll deductions to support inherently political public employee unions, employees are waiving their First Amendment rights to refrain from subsidizing the unions. And because waivers "cannot be presumed," to be effective, the waiver must be "freely given" as affirmative consent demonstrated by "clear and compelling evidence." *Janus*, 138 S. Ct. at 2486 (cleaned up). That is, employees do *not* join and subsidize a union by default; affirmative consent based on a full understanding of the legal consequences of the waiver must precede any state-facilitated payment of dues. However, *Janus*'s promise is largely unfulfilled due to lower courts' misunderstanding of what constitutes a valid waiver, the requirements for which are mandated by the notice requirements of due process.

This Court elaborated on the general due process requirements in the context of government foreclosure of tax-delinquent property. In that circumstance, due process requires the government to act *affirmatively* to make it as likely as possible that property owners are made aware that they are in danger of losing their rights. When a tax sale threatens to deprive an owner

of real property, due process requires that "when mailed notice of a tax sale is returned unclaimed, *the State* must take additional reasonable steps to attempt to provide notice to the property owner before selling his property." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (emphasis added). The notice must be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). *See also Echavarria v. Pitts*, 641 F.3d 92, 94–95 (5th Cir. 2011) ("When the government has knowledge that notice was not effected, it cannot 'simply ignore' that information.").

In the foreclosure context, when the state sells a property owner's tax debt to a private investor, the investor also receives the mandate to deliver proper notice. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (the Fourteenth Amendment provides a "judicial obligation" to "assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains'"); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 932–34 (1982). Similarly here, when the state delegates to public employee unions the ability to tell the state treasurer or controller to deduct union dues from employee paychecks, the unions must also step into the shoes of the state for the purpose of providing constitutionally required notice.[2]

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[2] Outside of the real estate context, multiple Circuit courts rely on *Jones* to require additional steps after failed attempts at notice in cases involving property interests including $1,500 in

The most well-known notice requirement arose in *Miranda v. Arizona*, which held that a police officer who wants to question a criminal suspect in custody must explain that the suspect "has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 436, 444 (1966).[3] It doesn't matter that the suspect may already know his rights, or that his friends may be advising him to keep quiet and call a lawyer. *Id.* at 468. The *state itself* is obligated to inform the suspect of his constitutional rights so that

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cash, personal property, denial of government applications, and revocation of licenses. *See, e.g., Rodriguez v. Drug Enforcement Administration*, 219 F. App'x 22, 23–24 (1st Cir. 2007) (*Jones* required additional notice of administrative forfeiture of $1,905); *Echavarria*, 641 F.3d at 95 (*Jones* applies to forfeiture of bondsman's $1,500); *Rendon v. Holder*, 400 F. App'x 218, 219 (9th Cir. 2010) (additional reasonable steps required to notify immigrant of denial of application for legalization); *United States v. One Star Class Sloop Sailboat*, 458 F.3d 16, 23 n.7, 25 (1st Cir. 2006) (applying *Jones* to civil forfeiture of sailboat); *Crum v. Vincent*, 493 F.3d 988, 992–93 (8th Cir. 2007) (*Jones* applies to state's deprivation of physician's medical license without due process); *Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941, 945–46 (9th Cir. 2006) (additional steps required to notify pilot of suspension of his pilot's license).

[3] Requirements to waive constitutional rights are the same in both civil and criminal contexts. *See Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972); *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972) (noting that waivers in the criminal context where personal liberty is involved are parallel to civil cases involving a property right); *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937) (heavy burden against the waiver of constitutional rights in civil cases); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (same); *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997); (principles governing waiver of constitutional rights apply equally in criminal and civil context).

they are not waived out of ignorance. *Id.* at 468 ("For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise."). The state's act of informing the suspect of his constitutional rights is a necessary predicate to the suspect effecting a waiver of these rights; a "clear and affirmative" waiver that must be made "voluntarily, knowingly, and intelligently." *Id.* Moreover, *Miranda* requires the state to accept invocation of a waiver at any time—even if the suspect answers some questions, the police must cease their interrogation immediately once the suspect invokes his right to remain silent or to ask for a lawyer. *Id.* at 445.

The common thread between *Jones* and *Miranda* and countless other due process cases is that the *government* has an affirmative obligation to ensure that it does not deprive people of their constitutional rights through waiver unless they understand the nature and consequences of the potential loss. "Due process is not met by a procedure which accords a fundamental right only to the already informed, or which engenders unnecessary obstacles to the right's fulfillment." *Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 619 (1980) (schools must *affirmatively* notify indigent students and their parents that fee waivers or reductions are available and explain how the students or parents may apply for a partial or complete exemption from fee requirements).

B. The Waiver of First Amendment Rights Requires Voluntary, Informed, Affirmative Consent

In *Johnson v. Zerbst*, 304 U.S. 458, this Court established the basic parameters of a constitutional waiver. Waiver is "an intentional relinquishment or abandonment of a known right or privilege," *id.* at 464, and whether such a relinquishment or abandonment has occurred depends "in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct" of the person who chooses whether to waive a constitutional right. *Id. Zerbst* applies where, as here, a state bears the burden of showing a waiver of constitutional rights. *Moran v. Burbine*, 475 U.S. 412, 450 (1986) ("[T]he burden of proving the validity of a waiver of constitutional rights is always on the government."). The Constitution does not permit the state to bank on employees possibly being made aware, through their own efforts, of the nature and effect of the waiver. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 144 (1967).

"In order for waiver to be meaningful, notice of the right must also be combined with a meaningful opportunity to exercise that right." *Miranda*, 384 U.S. at 479.[4] An employee, therefore, must be presented with and understand "the nature of the right being abandoned and the consequences of the decision to

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[4] *See also Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 506 (2012) (Ostensible waiver of homeowner's right to post signs before getting homeowner association board approval, without "any idea about what standards would govern the approval process" could not "constitute a knowing, intelligent, voluntary waiver of constitutional rights.").

abandon it." *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (citation omitted). The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berguis v. Thompkins*, 560 U.S. 370, 382–83 (2010). The failure to provide information necessary to make an informed, knowing waiver unconstitutionally burdens public employees' First Amendment rights.

Public employees must be informed about their First Amendment rights *as a necessary precondition* to making an informed decision as to whether to join or subsidize a public employee union. *Janus*, 138 S. Ct. at 2486; *see also* Kimberly S. Webster, *Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers' Right to Know Their Rights?*, 6 Ne. U. L. J. 435, 435 (2014) ("A right does not exist in any meaningful sense unless people know about it and have the means to exercise it."); Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 Harv. J. on Legis. 431, 438 (1995) ("Ignorance of the law disempowers people. It prevents them from seeking redress for legal wrongs, and also causes them to shy away from taking actions to which they are legally entitled.") (citations omitted). An affirmative waiver of First Amendment rights must be based on *actual* knowledge of the content and consequences of the waiver. *See Bayo v. Napolitano*, 593 F.3d 495, 504 (7th Cir. 2010) (refusing to substitute a "*presumption* of knowledge for the requirement of *actual* knowledge"

as "it would render all waivers of constitutional rights signed without coercion valid, regardless of whether the signatory understood a single word on the page."); *Nose v. Attorney Gen. of United States*, 993 F.2d 75, 78–79 (5th Cir. 1993) (same).

A waiver is "knowing [and] intelligent" when "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (factors for determining when a guilty plea waives the right against self-incrimination); *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) ("Constitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent."). This Court suggested the type of information and knowledge relevant to a waiver of First Amendment rights in *Knox*, 567 U.S. at 314. In that case, state law allowed the union to deduct money from agency shop fee payer paychecks mid-year, for the purpose of advocating against two ballot initiatives. *Id.* at 315. Unlike the opt-out procedure then in place for annual dues, the union did not give the workers an opportunity to opt-out of the mid-year deduction, nor did it give them any information relevant to making a choice whether to do so. *Id.* at 314. In the context of that case, which concerned only the narrow range of political activities as defined under *Abood*, the union withheld from workers the critical information of how the union intended to use the funds. *Id.* Among other things, the Court noted that workers may have favored one or both of the targeted initiatives or may simply have not wanted to delegate to the union how to allocate the workers' dollars on political matters. *Id.* at 315–16.

The Court's holding in *Knox* is explicitly tied to the constitutional requirement that employees must provide *informed* consent to the union's deductions: "Giving employees only one opportunity per year to make this choice is tolerable if employees are able at the time in question to make *an informed choice*. But a nonmember cannot make *an informed choice* about a special [mid-year] assessment or dues increase that is unknown when the annual notice is sent." *Id.* at 315. In the post-*Janus* world, the information that public employees need to know to make an informed decision is that they have constitutional rights relating to union membership and dues that give them the option of continuing their employment without joining or subsidizing the union. The Seventh Circuit in these cases failed to ensure that public workers are provided that necessary information and they therefore could not have effectively waived their First Amendment rights.

II

UNIONS DO NOT AND WILL NOT PROVIDE EMPLOYEES WITH A BALANCED EXPLANATION OF THE FIRST AMENDMENT RIGHTS THEY ARE ASKED TO WAIVE

Public employee unions have every financial incentive to withhold information about constitutional waivers. Unions can and do fail to provide the information or opportunity necessary to make an informed decision whether to waive constitutional rights and a union's imposition of a restrictive resignation scheme is itself a factor that workers may weigh in deciding whether they wish to join the union or not. When union representatives present applications for membership to employees, those

applications make no mention of the First Amendment or *Janus*. As a representative sampling, consider ASEA/AFSCME Local 52's Union Membership & Dues Deduction Authorization Form:[5]

> YES! I choose to be a union member. I understand my membership supports the organization advocating for my interests as a bargaining unit member and as an individual. ASEA negotiated labor contracts result in better wages, benefits and working conditions. Union strength is a reflection of its membership. Being a member makes the union more effective for everyone. ASEA membership is opt-in and paying union dues is not a condition of employment. By submitting this form I choose to be a union member.

Other unions, such as SEIU Local 1000, have a Membership Application Form[6] that doesn't even acknowledge the voluntary opt-in nature of union membership, directing workers to "the SEIU Local 1000 policy file, which is subject to amendment by the union, and any applicable memorandum of understanding between SEIU Local 1000 and the state of California," and asking the worker to acknowledge only that "a copy of the policy file and applicable memoranda of understanding are always available for my review." Under union pressure to sign, how many workers will demand to review the policies and memoranda that are otherwise concealed? Teamsters Local Union 8's Membership

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[5] https://www.afscmelocal52.org/member (visited Aug. 3, 2021).
[6] https://www.seiu1000.org/sites/main/files/file-attachments/membershipform.pdf (visited Aug. 3, 2021).

and Dues Deduction Authorization Card[7] asks workers to sign that they "voluntarily authorize" payment of dues with the understanding that "[t]his voluntary authorization and assignment shall be irrevocable, *regardless of whether I am or remain a member of the Union*" except for a 15-day escape period of the type present in the Petitioners' cases. All these unions share a common practice of asking workers to "voluntarily" join a union on a form devoid of information that purportedly allows workers to exercise *informed* consent to waive their First Amendment rights. Indeed, the forms typically are presented with general onboarding paperwork, none of which contains any indication that workers waive constitutional rights by signing.

The public employee unions are acting in their self-interest (as does any other voluntary organization). Unions promote an identifiable "pro-union" viewpoint that benefits the unions both as institutions[8] and as a social movement. For example, the California Teachers Association (CTA) defines its mission as: "to protect and promote the well-being of its members, to improve the conditions of teaching and learning, to advance the cause of free, universal, and quality public education, to ensure that the human dignity

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[7] https://www.ibtlocal8.org/docs/Membership%20and%20Dues%20Deduction%20Authorization%20Card%202018_103118.pdf (visited Aug. 3, 2021).

[8] *See Boardman v. Inslee*, 978 F.3d 1092, 1130 (9th Cir. 2020) (Bress, J., dissenting) (an incumbent union's view is that it "should stay in power"), *cert. pending* No. 20-1334; *N.L.R.B. v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974) ("[I]t is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative.").

and civil rights of all children and youth are protected, and to secure a more just, equitable, and democratic society." Dep't of the Treasury, Internal Revenue Service, *Form 990 (California Teachers Association).*[9] The CTA advocates on issues touching virtually every aspect of public policy, including "racism, classism, linguicism, ableism, ageism, heterosexism, religious bias and xenophobia." Cal. Teachers Ass'n, *Our Advocacy: Social Justice.*[10] This is no anomaly. Yet public employees in many states are entirely reliant on union membership information provided to them by the very unions that enjoy exclusive representation rights over the workforce and use that position to pursue political and social goals. *See Janus*, 138 S. Ct. at 2467.

Unions have long pressured employees to join without incurring any legal liability. *See, e.g.*, *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 277 (1974) (union may legally post a list of non-members and label non-members as "scabs" to persuade non-members to join). By effectively leaving it entirely to the unions to decide whether and how to advise workers of their rights, the state ensures that most workers remain uninformed.[11] This is not a mere by-

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[9] https://www.guidestar.org/profile/94-0362310 (visited Aug. 3, 2021).

[10] https://www.cta.org/our-advocacy/social-justice (visited Aug. 3, 2020).

[11] This is consistent with public employee unions' long, documented history of failing to provide adequate information regarding dues payments. *See Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 877 (W.D.N.C. 2000) (noting the "woeful inadequacy and downright arrogance of the union's practices and

product; it is the goal. In California, for example, state law prohibits public employers from communicating with workers about their First Amendment rights. Cal. Gov't Code §§ 3550, 3553. When the University of California sent a letter to employees accurately describing the holdings of the *Janus* decision, the union filed an unfair labor practice claim with the Public Employee Relations Board, which ruled in favor of the union. California Public Employment Relations Board Unfair Practice Case Nos. SF-CE-1188-H, SF-CE-1189-H, and SF-CE-1192-H, PERB Decision at 1, 6–9 (Mar. 1, 2021).[12] Attorneys serving public agencies in the state advise them to make no mention of *Janus* or First Amendment rights whatsoever.[13] This Court need not—and should not—turn a blind eye to this reality. *See McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (government action is properly viewed by one "familiar with the history of the government's actions and competent to learn what history has to show" such that a court will not "turn a blind eye to the context" in which a policy is enacted).

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procedures" that halved the amount of the dues reduction to which nonmembers were entitled). *See generally* Deborah J. La Fetra, Miranda *for* Janus*: The Government's Obligation to Ensure Informed Waiver of Constitutional Rights*, 55 Loyola L.A. L. Rev. __ (forthcoming Spring, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825917.

[12] https://perb.ca.gov/wp-content/uploads/decision-2755h.pdf.

[13] *See, e.g.*, Ellie R. Austin and Sarah Hirschfeld-Sussman, School & College Legal Services of California, Legal Update, at 3, 5 (June 28, 2018), https://sclscal.org/wp-content/uploads/2018/06/06-2018CC-Janus-v.-American-Federation-of-State-County-and-Municipal-Employees-ERASHS.pdf.

CONCLUSION

The petitions for writs of certiorari should be granted.

DATED: August, 2021.

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