

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

**AMICI CURIAE BRIEF OF
JASON KOHUTE AND CAROL SHANER
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

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

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

The question presented is:

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

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INTEREST OF THE *AMICI CURIAE*¹

Jason Kohute and Carol Shaner are former members of a large Pennsylvania public-sector union, who resigned their memberships and revoked authorization for union dues to be deducted from their wages. But instead, the Commonwealth of Pennsylvania, their employer, forced them to continue to subsidize the speech and activities of the union via payroll deduction, because the union took the position that an escape-period restriction in their membership applications limited when they could terminate dues deductions.

Amici curiae desire to share their stories, and the stories of other public employees represented by undersigned counsel, of how governments and unions in multiple states have seized payments from employees in reliance on these escape-period restrictions. These union nonmembers object to supporting their unions and have no say in how their money is used, yet had dues seized from their paychecks, despite having resigned.

Thus, this *amicus* brief provides the story of *amici curiae*'s experiences with actions like those challenged in the Petition, along with other examples from the Commonwealth of Pennsylvania and the State of New York, for the benefit of this Court.

¹ Pursuant to this Court's Rule 37.2(a), Petitioners and Respondents have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the date of filing of the *Amici Curiae*'s intention to file this brief.

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 one other than the *Amici Curiae* and their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This Court should grant the Petition because the issue it raises implicates the rights of millions of workers across the country, including over a million public employees in Pennsylvania and New York. Like petitioners, *amici curiae* and countless other public sector workers have found their desire to end their association with and financial support of a public-sector union thwarted, due to a union's invocation of an escape-period restriction. Because public employees currently lack clear guidance on whether union officials can use opaque language in a membership application to limit their rights, this case is of importance to workers across the country.

Escape-period restrictions severely limit when public employees can exercise their fundamental First Amendment rights for up to 95% of each year. Instead, *amici curiae*, like other public employees, found their requests to end financial support of a union denied, while their public employer, the Commonwealth of Pennsylvania, sided with the union's decision that dues deductions should continue.

Given the First Amendment rights already at stake, public employers' decisions to defer to a union's deployment and interpretation of its membership application are especially problematic in practice. *Amici curiae* have argued that the language enforced against them is ambiguous, while the union claims it automatically renews and requires re-notification even after acknowledging that the employees are no longer union members. And other public employees have had union officials and public employers ignore their resignation requests, or enforce language against them that they allege they never even saw.

Ultimately, escape-period restrictions undermine decades of this Court's precedent, which has long recognized a nonmember's right, at a minimum, not to fund a public union's political and ideological expenditures. Yet *amici curiae* were forced to pay the full amount of dues as nonmembers, continuing to fund political and ideological speech with no protections, despite not being union members.

This Court should grant the Petition for Writ of Certiorari to reaffirm the fundamental constitutional principle that public employees who choose to end their association with a public-sector union have the right and freedom not to subsidize a union's speech and activities.

REASONS FOR GRANTING THE PETITION

I. The Petition Seeks Clarity as to the Rights of Millions of Public Employees Across the Country

In Pennsylvania and New York alone, there are over 1.2 million public-sector union members.² This Court's recent decisions mean that these employees have the right not to financially support a union, if they choose to be nonmembers. Yet across the country, including in Pennsylvania and New York, governments and unions are utilizing escape-period restrictions to force employees to continue financing the union after their memberships end. Thus, public employees like *amici curiae* who, in the wake of *Janus v. AFSCME*,

² See Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 *Indus. & Labor Rels. Rev.* 349–54 (2003) (updated annually at unionstats.com and reporting 334,809 public employee union members in Pennsylvania and 873,988 public employee union members in New York as of 2020).

Council 31, 138 S. Ct. 2448 (2018), sought to end their financial support of a union, have found their efforts thwarted. Government employers routinely side with union officials, and their interpretation of union membership applications, in denying requests to end the deduction of dues. Public employees across the country, therefore, need this Court’s guidance on whether, or under what circumstances, they can be forced to pay money to a union, even when they are no longer union members.

A. Escape-Period Restrictions Impermissibly Restrict When and How Millions of Public Employees Can Exercise Their First Amendment Rights

Public employees who are not members of a union have a right not to subsidize union speech and cannot be forced to contribute dues or fees to a union “unless the employee affirmatively consents to pay” by “waiving their First Amendment rights.” *Janus*, 138 S. Ct. at 2486. The Court added that “such a waiver cannot be presumed,” but “must be freely given and shown by ‘clear and compelling’ evidence.” *Id.* (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

Amici curiae, and many other similarly situated public employees, have been recognized as nonmembers of a union. Yet they have been and continue to be forced to financially support a union. These employees need clarity on how their First Amendment rights can be harmonized with the decisions of their public employers and unions that force them into ongoing payments as nonmembers.

While the *Janus* decision imposed a constitutional waiver requirement so that nonmembers must consent

to pay a union, *amici curiae* are nonmembers who had money deducted from their paychecks after they ended their memberships and clearly stated their opposition to financially supporting their union. Yet dues deductions continued unchanged, due to their union's interpretation of language in the membership application they signed years earlier.

Mr. Kohute and Ms. Shaner signed a membership application to their union, AFSCME, Council 13, which imposed a narrow escape period to revoke authorization for deduction of dues from their wages to "the fifteen (15) days before the annual anniversary date of this authorization." See Def. AFSCME Council 13's Mot. to Dismiss Ex. 8 at 3, *Fultz, et al. v. Am. Fed'n of State, Cnty. and Mun. Emps., Council 13, et al.*, No. 1:20-cv-02107-JEJ (M.D. Pa. Apr. 5, 2021), ECF No. 24-10. When *amici curiae* chose to resign their memberships, in 2020, Council 13 informed them that, while the union would recognize and treat them as nonmembers, they could not end the deduction of dues from their wages. And their public employer, the Commonwealth of Pennsylvania, opted to follow the union's interpretation rather than *amici curiae*'s direction to cease union dues deductions.

Amici curiae are not alone in being denied their requests to end financial support of a union. Public employees in New York have raised similar issues in complaints filed within the last year resulting from the denial of the decision to end support for a union. See, e.g., Compl., *Krawczyk v. N.Y. State United Tchrs., et al.*, No. 5:21-cv-00635-GTS-ML (N.D.N.Y. June 2, 2021), ECF No. 1.

As a result of these escape-period restrictions, *amici curiae* could not exercise their rights to stop funding a union when they chose. Instead, their union was

able to use the Commonwealth to deduct financial support for months after *amici curiae* resigned their union memberships. This delay tactic effectively narrowed the employees' ability to exercise their right not to fund the union to one 15-day window; essentially, they did not have the option to end forced union dues payments for 95% of the year. See First Am. Compl. ¶¶ 55–65, *Fultz, et al. v. Am. Fed'n of State, Cnty. and Mun. Emps., Council 13, et al.*, No. 1:20-cv-02107-JEJ (M.D. Pa. Mar. 1, 2021), ECF No. 18.

B. Public Employers' Deference to Union Officials' Uses of Membership Application Language Further Threatens Public Employees' Constitutional Rights

The public employers of Petitioners and *amici curiae* decided to side with their unions over the employees in determining when deduction of dues should cease. But factual scenarios alleged by public employees challenging state employers' enforcement of window periods highlight why this Court should grant the petition and examine this practice.

For both Mr. Kohute and Ms. Shaner, as alleged in their Complaint, while Council 13 recognized their resignations from the union, it planned to have the Commonwealth keep deducting union dues from their paycheck indefinitely. First Am. Compl. ¶¶ 45–47, *Fultz*, No. 1:20-cv-02107-JEJ. And *amici curiae* were told that they would need to re-notify Council 13 during the window period if they wanted to end the deduction of their dues when their 15-day window did arrive. *Id.* at ¶ 56. However, even though dues deductions continued, union officials acknowledged that *amici curiae* were no longer union members and were not entitled to union member rights. *Id.* at ¶ 57.

As *amici curiae* have argued, the enforcement of the window period by the Commonwealth and union is especially threatening to constitutional rights due to its ambiguous and uncertain language regarding the window period. The language refers to an “annual anniversary date of this authorization”—but does not define what that date is—while also referencing dates tied to the CBA. *See, e.g.*, Def. AFSCME Council 13’s Mot. to Dismiss Ex. 8 at 3, *Fultz*, No. 1:20-cv-02107-JEJ. And the authorization for the deduction purports to automatically renew “for the years to come.” *See, e.g., id.*

Complaints filed by other public employees have raised additional issues resulting from the public employer’s decision to defer to the union’s preference on enforcing escape-period restrictions. Melanie Rorabaugh resigned from her union, SEIU Local 668, but received no response for five months. When she followed up and sent in her resignation letter a second time, the union responded, claiming that she had missed the escape period they identified—which had passed less than a month before her second letter and well after her first letter. *See* Compl. ¶¶ 22–28, *Rorabaugh v. Serv. Emps. Int’l Union, Loc. 668, et al.*, No. 4:20-cv-02463-MWB (M.D. Pa. Dec. 30, 2020), ECF No. 1.

And when Donna Yanoski resigned from SEIU Healthcare Pennsylvania in 2020 and sent a formal resignation letter directing the union to cease her dues deductions immediately, she discovered, as alleged in her complaint, that a union official had typed her electronic signature onto a membership application with escape-period restrictions—even though she had never seen the membership application. Compl. ¶¶ 23–33, *Yanoski v. Serv. Emps. Int’l*

Union, Healthcare Pa., et al., No. 1:21-cv-00414-JPW (M.D. Pa. Mar. 5, 2021), ECF No. 1.

Thus, in a variety of circumstances and across the country, public employees are forced to support a union when their public employer defers to how a union deploys language in membership applications. This Court should grant the petition to consider the risk this practice poses to public employees' First Amendment rights.

C. Escape-Period Restrictions Allow Governments and Unions to Force Non-Member Public Employees to Pay Hundreds of Dollars Against Their Will Toward Political and Ideological Projects

This Court has already made clear that nonmembers have a choice when it comes to financial support of a public-sector union. Yet their public employer and union blocked *amici curiae's* exercise of their rights, because they did not act within a window set by the union. Instead, and indefinitely, the union secured the Commonwealth's deduction of full union dues from their paychecks.

For decades, this Court has recognized the particular risk to First Amendment rights that arises from compelling support from public employees for the political speech of a union. *Chi. Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 301–02 (1986). Yet, here, the union recognized *amici curiae* as nonmembers—but, nevertheless, continued to take the full amount of dues from their wages. Thus, *amici curiae* financed all of the activities of the union, despite their expressed objections, and with even fewer protections

than nonmembers have historically had for how the money seized from them would be used.

Because the use of escape-period restrictions has created a world in which nonmembers of a union are once again forced to fund the union's activities, including political speech—this time with no protections, disclosures, or limits on the uses of those funds, this Court should step in to clarify the rights of nonmembers of a union.

CONCLUSION

Throughout the country, public employees have asserted their rights as nonmembers to end financial support for a union, as recognized by this Court, only to have their public employer and public-sector union rely on escape-period restrictions to deny them. Public employees need clarity on how their First Amendment rights can be harmonized with such actions.

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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