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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

This case concerns whether it violates the First Amendment for a government employer and union to compel objecting employees who are not union members to subsidize union speech until they satisfy a restriction on stopping payroll deductions of union dues. This issue is an important one. To resist this Court's holding in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), public employers and unions in Illinois and other states are systematically prohibiting employees from stopping payroll deductions of union dues except during ten-to-thirty day annual periods.

Chicago Teachers Union, Local 1 ("CTU") tries to distract the Court from the issue before it by discussing union members voluntarily paying union dues. CTU Br. (i), 3, 12, 14. But this case concerns dues involuntarily seized from employees who resigned their union membership—i.e., from employees who are "nonmembers" under *Janus*, 138 S. Ct. at 2486.

The Board of Education of the City of Chicago, for its part, claims it did not compel petitioners JoAnne Troesch and Ifeoma Nkemdi to pay for CTU's speech after they became nonmembers. Board Br. 7, 11. The Board ignores that it seized union dues from petitioners' wages after they *expressly objected* to supporting the union financially. Pet.App. 7-8. The Board's seizures violated the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

Janus made clear that government employers and unions cannot seize payments for union speech from

objecting nonmembers absent "'clear and compelling' evidence" they waived their constitutional rights. 138 S. Ct. at 2486 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)). To ensure that employee speech rights are not hamstrung by onerous restrictions on when employees can stop government deductions of union dues, the Court should grant review and instruct the lower courts to enforce *Janus'* waiver requirement.

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

1. The Seventh Circuit defied this Court's holding in *Janus*, 138 S. Ct. at 2486, by declaring that governments and unions do not need clear and compelling evidence of a waiver to seize union dues from employees who become nonmembers and object to those seizures. *Bennett v. AFSCME Council 31*, 991 F.3d 724, 732-33 (7th Cir. 2021) (Pet.App. 29-31), *petition for cert. filed* No. 20-1603 (May 18, 2021). Indeed, even without *Janus'* waiver holding, the lower court should have found that the government cannot restrict employees' exercise of their First Amendment right under *Janus* unless employees waive that right.

Contrary to the false impression CTU tries to create, this case does not concern union members voluntarily paying union dues for membership benefits. It concerns union dues involuntarily seized from petitioners and other employees *after* they resigned their membership in CTU, and thus became ineligible for membership benefits. Pet.App. 7-8. This case involves "nonmembers," just as *Janus* did. 138 S. Ct. at 2486.

Janus does not pertain only to nonmembers who never joined a union, as CTU contends (at 13). *Janus*

pertains equally to employees who become nonmembers by resigning their union membership. Employees who join a union in the past do not forfeit their First Amendment right to stop subsidizing that union's speech in the future. Employees who choose to exercise their right by resigning their membership are as much "nonmembers" under *Janus* as employees who never joined in the first place. 138 S. Ct. at 2486. If anything, petitioners' affirmative act of resigning and objecting only makes their opposition to financially supporting CTU and its speech more apparent.

As nonmembers, petitioners were required to financially support CTU because the Board and CTU's collective bargaining agreement and dues deduction form prohibit employees from stopping dues deductions except in August. Pet.App. 6-7. As a result, petitioners were compelled to pay for union speech that they did not want to subsidize. In fact, the First Amendment injury Troesch and Nkemdi suffered was worse than if the Board and CTU had compelled them to pay agency fees after they became nonmembers because the Board and CTU compelled petitioners to pay full union dues over their objections. *See* Pet. 13-14.

Under *Janus*, the Board and CTU's conduct violated petitioners' First Amendment rights unless they waived those rights. 138 S. Ct. at 2486. Contrary to CTU's claim (at 15), *Janus'* waiver language was meant to do more than merely "make clear that the States cannot presume from nonmembers' *inaction* that they wish to support a union." (emphasis in original). The Court established the evidentiary burden that government employers and unions must satisfy to prove employees consent to supporting a union by holding that "to be effective, the waiver must be freely

given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 U.S. at 145).

Clear and compelling evidence of a waiver under the three precedents cited in *Janus* means proof of an "'intentional relinquishment or abandonment of a known right or privilege." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see Curtis Publ'g*, 388 U.S. at 143-45 (applying this standard to an alleged waiver of First Amendment rights). These criteria are sometimes stated as requiring that a valid waiver must be voluntary, knowing, and intelligently made and its enforcement not be against public policy. *See* Pet. 17.

The Board and CTU cannot satisfy this exacting standard for proving Troesch and Nkemdi waived their First Amendment right to stop subsidizing CTU's speech. Among other things, there is no clear or compelling evidence that petitioners, when they signed dues deductions forms in September 2017, knew they had a First Amendment right not to subsidize union speech or voluntarily and intelligently chose to waive that right. Pet. 18-19.

CTU contends (at 15-16) that proof of a contract satisfies *Janus'* consent requirement. But that contention conflicts with this Court's repeated use of the term "waiver" in *Janus*, 138 S. Ct. at 2486. The Court stated that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights," that "such a waiver cannot be presumed," and that "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*,

388 at 145). The Court in *Janus* clearly required proof of a "waiver," and not proof of a contract.

The two are not equivalent. The criteria for proving a waiver of a constitutional right is different and more exacting than the criteria for proving formation of a contract. For example, a key element to proving a waiver is that an individual must have known of the constitutional right that he or she allegedly waived—i.e., the individual must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Moran v. Burbine,* 475 U.S. 412, 421 (1986); *see Curtis Publ'g*, 388 U.S. at 144-45 (holding that an individual did not waive his First Amendment right because he did not know of that right). That is not an element to proving a contract. Here, even if the Board and CTU's dues deduction form amounts to a contract, it does not amount to clear and compelling evidence of a waiver because nothing on the form proves a signatory knew of his or her First Amendment right not to support CTU or intelligently chose to waive that right.

2. CTU's reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) is misplaced for the reasons discussed in the petition at 14-16, which CTU does not try to rebut. This case does not involve a private agreement like *Cohen*, but restrictions in the Board and CTU's collective bargaining agreement and dues deduction form. This case does not involve a law of general applicability like *Cohen*, but a state labor law that governs when educational employers must deduct union dues from employees' wages. Illinois's Education Labor Relations Act ("IELRA") Section 11.1, 115 Ill. Comp. Stat. § 5/11.1 (as amended by P.L. 101-0620, eff. Dec. 20, 2019) (Pet.App.41–46). Most importantly,

unlike with the conduct in *Cohen*, the state action here—seizures of payments for union speech from objecting nonmembers—violates the First Amendment rights absent proof the employees waived their rights.

Cohen does not stand for the remarkable proposition that "the First Amendment is not implicated by a promise that is enforceable under generally applicable principles of state law." CTU Br. 12; *see Bennett*, 991 F.3d at 732-33 (Pet.App. 30). *Cohen* narrowly found that it did not violate the First Amendment for a state court to enforce a private agreement with a law of general applicability. *Cohen* 501 U.S. at 669. The Court did not turn the Constitution's Supremacy Clause on its head and declare that state contract law supersedes the First Amendment.

There is no rational reason why the existence of a contract would render the First Amendment inapplicable to state actions that otherwise violate individuals' speech rights (like a state compelling an individual to pay for union speech). A valid waiver by an individual of his or her constitutional rights may have that effect, but a waiver is different from a contract.

The Seventh Circuit's misinterpretation of *Cohen*, like its misinterpretation of *Janus*, imperils First Amendment freedoms by substituting a lesser contract analysis for a more rigorous waiver analysis. The Court should clarify its holdings in *Cohen* and *Janus* and firmly establish that states cannot violate individuals' speech rights absent clear and compelling evidence those individuals knowingly, intelligently, and voluntarily waived those rights.

3. The Court should not wait for a circuit split to correct the Seventh Circuit's decision to effectively eliminate *Janus*' waiver requirement. The Third, Seventh, Ninth, and Tenth Circuits got it uniformly wrong in interpreting *Janus* to not require clear and compelling evidence of a waiver for governments and unions to seize payments for union speech from objecting nonmembers. *See* Pet. 12-16. The courts' misinterpretation of *Janus* also is not unanimously shared. At least sixteen State Attorneys General correctly interpret *Janus* to prohibit states from extracting union dues from employees unless those employees waived their First Amendment rights. *See* State of Alaska et al. Amicus Br. 7-10.

The Court did not decline to review the exact question presented here in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), cert denied, No. 20-1120 (June 21, 2021). *Belgau* presented the broader question of whether all deductions of union dues from employees, including from union members, require proof the employees waived their constitutional rights. *See* Pet. (i), 12, *Belgau*, No. 20-1120 (Feb. 11, 2021). According to the respondent union in *Belgau*, the "case . . . does not present a question regarding the timeliness of an objection" to paying union dues. Resp. Wash. Fed'n of State Employees' Br. in Opp. 11, *Belgau*, No. 20-1120 (May 12, 2021). In contrast, this petition presents the narrower question of whether governments and unions need proof of a waiver "to seize payments for union speech from employees who provide notice they are *nonmembers* and *object* to supporting the union." Pet. (i) (emphasis added). Petitioners challenge the

constitutionality of the Board and CTU's policy of prohibiting employees from exercising their right to stop subsidizing union speech except in August. *Id*. at 6.

If *Janus*'s waiver requirement applies in any circumstance, it applies in the circumstance presented here. The Seventh Circuit's conclusion that no waiver is required for the government and unions to seize dues from nonmembers over their objections cannot be reconciled with *Janus* and should be overruled.

II. This Case Is Important Because States and Unions Are Severely Restricting When Employees Can Exercise Their First Amendment Rights Under *Janus*.

The vitality of *Janus'* waiver requirement is profoundly important because states and unions are undermining the speech rights *Janus* recognized by sharply restricting when employees can exercise those rights. Pet. 2-3. A dozen states amended their labor laws to require government employers to enforce restrictions on when employees can stop paying union dues, and at least five other states enforce these restrictions under their pre-existing laws. *Id*. at 2-3.

Illinois' conduct is illustrative. The State amended its labor laws in December 2019 to authorize public employers and unions to establish "limits on the rights the employee to revoke [a dues deduction] authorization, including a period of irrevocability that exceeds on year." 115 Ill. Comp. Stat. § 5/11.1(a) (Pet.App. 41-42). The statute also provides that dues deduction authorizations can be made irrevocable for all but ten-days of each year. *Id*. (Pet.App. 42).

The Seventh Circuit's decision makes it easy for states like Illinois to restrict when employees can exercise their First Amendment rights under *Janus*. The restrictions simply need to be recited in the fine print of employees' dues deduction forms. *See* Pet. 24. The same would not be true if *Janus'* waiver requirement were enforced. An employee's right not to subsidize union speech could not be restricted absent clear and compelling evidence the employee was notified of his or her right and voluntarily and intelligently chose to waive it. *Id.* at 24-25; *see* Pacific Legal Foundation Amicus Br. 8-11. The restrictions also could not be so onerous as to be against public policy. Pet. 29.

It is important that the Court establish that states and unions cannot restrict employees' rights under *Janus* unless employees waive their rights. Otherwise, absent this Court's review, states and unions will continue to hamstring the important First Amendment right this Court recently recognized.

III. This Case Is an Excellent Vehicle to Resolve the Question Presented

This case presents a fact pattern that has become all too common since the Court issued its decision in *Janus*: a government employer and union seizing payments for union speech from objecting employees pursuant to a restriction on when employees can stop payroll deductions of union dues. The case is thus an excellent vehicle for establishing the legal standard applicable to this widely-used tactic for restricting employees' speech rights under *Janus*.

The constitutionality of IELRA Section 11.1 is at issue here, contrary to the Board and CTU's claims. Board Br. 10; CTU Br. 6 n.1. CTU concedes that the

"statute, by its terms, was intended to have retroactive effect." CTU Br. 6 n.1.[1] The statute thus applies to the dues seized from Troesch and Nkemdi before the statute's effective date of December 20, 2019. The statute also governed the Board and CTU's seizures of dues from petitioners *after* the statute's effective date until September 1, 2020. Indeed, CTU reiterated to petitioners in letters dated March 9, 2020 that their requests to stop dues deductions would not be honored until August 2020. Compl. ¶ 24, D. Ct. ECF No. 2 (May 4, 2020).

Petitioners have standing to challenge the constitutionality of IELRA Section 11.1, which authorizes restrictions on when educational employees can stop payroll deductions of union dues. 115 Ill. Comp. Stat. § 5/11.1(a) (Pet.App. 41-42). Even if they did not, the constitutionality of the Board and CTU's restriction is squarely before the Court. This case is a suitable vehicle for clarifying that restrictions on when employees can stop paying for union speech are unenforceable absent "'clear and compelling' evidence" the em-

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[1] IELRA Section 11.1(a) states in relevant part:

> This Section shall apply to all claims that allege that an educational employer or employee organization has improperly deducted or collected dues from an employee without regard to whether the claims or the facts upon which they are based occurred before, on, or after the effective date of this amendatory Act of the 101st General Assembly and shall apply retroactively to the maximum extent permitted by law.

115 Ill. Comp. Stat. § 5/11.1(a) (Pet.App. 42).

ployees subject to them waived their First Amendment rights. *Janus*, 138 S. Ct at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145).

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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