No. 21-575

In the Supreme Court of the United States

FREEDOM FOUNDATION,

Petitioner,

v.

WASHINGTON DEPARTMENT OF ECOLOGY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Does state action that supports speech by public employee unions to public employees advocating union membership and the payment of union dues while disfavoring speech by right-to-work advocates to public employees on the same topic and in the same location constitute viewpoint discrimination in violation of the First Amendment?

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INTEREST OF AMICUS[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice since 1968. To advance its mission, Foundation attorneys have represented workers before this Court in numerous cases involving First Amendment freedoms.[2] This most recently includes *Janus v. AFSCME, Council 31*, where the Court held that public employees have a First Amendment right not to subsidize union speech. 138 S. Ct. 2448, 2486 (2018). The Court further held that government employers and unions violate that right by seizing payments for union speech from employees unless there is clear and compelling evidence the employees waived their constitutional right. *Id*.

Unfortunately, to undermine employees' ability to exercise their First Amendment rights under *Janus*, several states have enacted policies designed to keep employees in the dark about those rights. Here, Washington's Department of Ecology grants incumbent unions special privileges in communicating their viewpoints to employees in its facility while barring right to work advocates from communicating their message

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[1] Rule 37 Statement: All parties received timely notice of Amicus's intent to file this brief and have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Loc. 1000*, 567 U.S. 298 (2012); *Commc'ns Workers v. Beck*, 487 U.S. 735 (1988); *Chi. Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984).

to employees in that facility. The Foundation has an interest in this case because Ecology's discriminatory policy is part of a widespread campaign of resistance by recalcitrant states to this Court's decision in *Janus*—a modern day "massive resistance" to employees' exercise of First Amendment rights.

SUMMARY OF ARGUMENT

For four decades, unions unconstitutionally extracted money for their expressive activities from public employees' wages. It is "hard to estimate how many billions of dollars"[3] unions seized from workers before the Court ended this unconstitutional practice, first for homecare providers in *Harris v. Quinn*, 573 U.S. 616 (2014), and then for public-sector employees in *Janus*.

Several state governments are resisting the Court's holdings in *Harris* and *Janus*, to keep providers and employees' monies flowing to unions and their political advocacy. This includes granting unions special privileges that facilitate their communications with workers, while denying right to work advocates similar privileges. It also includes severely restricting when workers can exercise their First Amendment right to stop subsidizing union speech.

Workers who are not aware of their First Amendment rights under *Janus* cannot freely exercise those rights or protect their rights from undue restrictions. It is thus imperative that the Court not allow states to restrict and distort the information workers receive with discriminatory policies that favor union speech over the speech of right to work advocates.

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[3] *Janus*, 138 S. Ct. at 2486.

ARGUMENT

I. States and Unions Are Resisting This Court's Holdings in *Harris* and *Janus*.

A. To seize payments for union speech from employees under *Janus*, states must have clear and compelling evidence those employees voluntarily, knowingly, and intelligently waived their First Amendment right.

In 2018, the Court held in *Janus* that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486. The Court further held that showing affirmative consent to pay requires proof the employee waived his or her rights. *Id*. The Court explained that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id*. "Rather, to be effective, the waiver 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)).

In so ruling, the *Janus* Court cited three precedents holding an effective waiver requires proof of an "'intentional relinquishment or abandonment of a known right or privilege.'" *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Johnson*, 304 U.S. at 464); *see Curtis Publ'g*, 388 U.S. at 143–45 (applying this standard to an alleged waiver of First Amendment rights). The Court has sometimes formulated these criteria as requiring that a waiver must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972). Of greatest relevance here, the

"knowing" criteria for a waiver of a constitutional right requires that a party 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).

The vitality of *Janus'* waiver requirement is important, especially for employees subject to exclusive union representation, which itself inflicts a "significant impingement on associational freedoms." 138 S. Ct. at 2478. *Janus'* waiver requirement protects workers' ability to exercise freely their First Amendment rights by ensuring that individuals who authorize the government to take payments for union speech from their wages do so voluntarily and with sufficient understanding of their rights. *Janus'* waiver requirement also ensures that states and unions cannot restrict employees' right to stop paying for union speech unless employees knowingly and voluntarily agree to this restriction on their First Amendment freedoms.

B. States are resisting *Janus* by granting unions special privileges that facilitate their communications with employees, while denying similar privileges to others.

1. Instead of seeking to ensure that employees know of their First Amendment rights under *Janus*, several states, including Washington, have enacted policies to distort and limit the information that public employees receive about their right not to subsidize union speech. Namely, states are granting unions special privileges in communicating with employees while depriving organizations with different viewpoints of those same privileges.

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

Additionally, many states have enacted laws affording unions the exclusive privilege of meeting with workers at new employee orientation sessions to solicit them to join and support the union. *See* 5 Ill. Comp. Stat. 315/6(c-10)(1)(C) (giving union opportunity to meet with new employees for an hour either within the first two weeks of employment or at a later date if mutually agreed upon by the employer and the union) (enacted December 2019); 26 Me. Rev. Stat. Ann. § 975(1)(c) (giving union right to meet with new employees for at least 30 minutes not later than 10 calendar days after hiring.); Md. Code Ann., State Pers. & Pens. § 3-307(b)(3), (4), (5) (giving union 20 minutes to "collectively address all new employees in

attendance during a new employee program," allowing a union to "negotiate a period of time that is more than 20 minutes," and authorizing state to "encourage," but not "require" attendance if an employee objects); Md. Code, Educ. § 6-509.1(a)(1) (giving unions at least ten days' notice in advance of "new employee processing" in schools); Mass. Gen. Laws Ann. ch. 150E, § 5A(b)(iii) (giving union right to meet with new employees for not less than 30 minutes, not later than 10 calendar days after the date of hire during new employee orientation); N.J. Stat. Ann. § 34:13A-5.13(b)(3) (giving union "right to meet with newly hired employees . . . for a minimum of 30 and a maximum of 120 minutes, within 30 calendar days from the date of hire"); N.Y. Civ. Serv. Law § 208(b), (c) (giving union rights to meet with new employees and "mandatory access" to new employee orientations); Or. Rev. Stat. § 243.804(1)(b)(B) (giving union right to meet with new employees for 30 to 120 minutes); Wash. Rev. Code § 41.56.037 (giving union right to meet with new employees for at least 30 minutes, with employee attendance not mandatory).

For example, California Government Code § 3556 grants an incumbent union "mandatory access to its new employee orientations" and promises unions "not less than 10 days' notice in advance of an orientation." However, California undermines the possibility that public employees might encounter contrary voices in and around their union orientations by mandating that the "date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation." *Id.*

Such mandatory union orientations are a powerful tool for ensuring that newly hired employees hear only the union's biased message when it solicits them to join the union and authorize their government employer to deduct union dues from their wages. In its "Guide to New Employee Orientation," the American Federation of Government Employees—a union that boasts monopoly representation of over 700,000 workers but claims only 313,000 dues-paying members[4]—states that it "knows from experience that workers form their opinion about the union within the first few days on the job." *AFGE Leader's Guide to New Employee Orientation*, American Federation of Government Employees https://bit.ly/3228wYY (last visited Nov. 17, 2021). The union there observes that "first impressions count," and that "[w]hen the Union passes up an opportunity to meet with new employees, it cedes to management the power to shape the new employee's perceptions…" *Id.* Nowhere in its 16-page coaching manual, which includes detailed negotiation tips for establishing new-hire meetings and union talking points to use on new employees, does the union explicitly mention that employees have an unequivocal First Amendment right to decline union membership under *Janus*.

2. State policies designed to facilitate union speech to employees, while depriving employees of information of their rights under *Janus*, inevitably result in employees agreeing to subsidize union speech that they would not have subsidized had they known of

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[4] *About Us*, American Federation of Government Employees, https://www.afge.org/about-us/ (last visited Nov. 17, 2021).

their First Amendment rights. This result is especially pernicious given that employees who authorize government dues deductions, at a mandatory union orientation or otherwise, often are prohibited from stopping those deductions for a year or more.

In the wake of *Janus*, several states disclaimed this Court's waiver holding and took the position that government employers do *not* need proof of waiver to take payments for union speech from their employees. Specifically, eleven states that filed briefs in *Janus* opposing its ultimate outcome later issued strikingly similar guidance declaring *Janus* inapplicable to government deductions of union dues from employees who sign union membership and dues deduction authorizations.[5] The advisory opinion issued by the Attorney General of Massachusetts is typical, declaring that

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[5] *See* Affirming Lab. Rts. and Obligations in Pub. Workplaces, Cal. Att'y Gen. Op. (undated), https://bit.ly/3CztKu5; Guidance Regarding the Rts. And Duties of Pub. Emps. After *Janus*, Conn. Att'y Gen. Op. (undated), https://bit.ly/3DDcPIp; Guidance Regarding Rts. and Duties of Pub. Emps. after *Janus*, Ill. Att'y Gen. Op. (July 19, 2018), https://bit.ly/3Cl5nQv; Guidance on the Rts. and Duties of Pub. Emps. After Janus, Md. Att'y Gen. Op. (undated), https://bit.ly/3DntPlv; Affirming Labor Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated), https://bit.ly/3oxubzP; Pub. Sector Emps. After Janus, N.M. Att'y Gen. Op. (undated), https://bit.ly/2YTlJCd; Guidance for Pub. Emps., N.Y. Dep't of Lab. (undated), https://bit.ly/3oyQwgs; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Or. Att'y Gen. Op. (undated), https://bit.ly/3Dp7lAO; Guidance on the Rts. and Responsibilities of Pub. Emps. Following Janus, Pa. Att'y. Gen. Op. (undated), rb.gy/mb5ade; Pub. Lab. Rts. and Obligations Following Janus, Vt. Att'y Gen. Op. (undated), https://bit.ly/3Cl4WFR; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Wash. Att'y Gen. Op. (July 17, 2018), https://bit.ly/3kGmING.

"[t]he *Janus* decision does not impact any agreements between a union and its members to pay union dues, and existing membership cards or other agreements by union members to pay dues should continue to be honored."[6]

Many of those same states, to limit employees' ability to exercise their rights under *Janus*, amended their dues deduction laws to require government employers to enforce restrictions on when employees can stop payroll deduction of union dues. This includes California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington.[7] Government employers in New Mexico, Ohio, Minnesota, and Pennsylvania also enforce restrictions on stopping payroll deductions under preexisting state laws.[8] These restrictions typically prohibit employees from stopping payroll deduction of union dues except during a ten or

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[6] Affirming Lab. Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated), https://bit.ly/3oxubzP.

[7] *See* Cal. Gov't Code § 1157.12; Cal. Educ. Code § 45060; Colo. Rev. Stat. § 24-50-1111(2); Conn. Publ. Act No. 21-25, §§ 1(a)(i–j); Del. Code Ann. tit. 19, § 1304; Haw. Rev. Stat. Ann. § 89-4(c); 5 Ill. Comp. Stat. § 315/6(f); Mass. General Laws ch.180 § 17A; Nev. Rev. Stat. § 288.505(1)(b); N.J. Stat. Ann. § 52:14-15.9e; N.Y. Civ. Serv. Law § 208(1)(b); Or. Rev. Stat. § 243.806(6); Wash. Rev. Code § 41.80.100(d).

[8] *See, e.g.*, *Hoekman v. Educ. Minn.*, 519 F. Supp. 3d. 497, 501 (D. Minn. 2021), appeal filed No. 21-1366 (8th Cir. 2021); *Allen v. Ohio Civ. Serv. Emps. Ass'n AFSCME, Local 11*, No. 2:19-cv-3709, 2020 WL 1322051, at *2 (S.D. Ohio Mar. 20, 2020); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 964 (10th Cir. 2021), *petition for cert. denied* (Nov 1, 2021); *Weyandt v. Pa. State Corr. Officers Ass'ns,* No. 1:19-cv-1018, 2019 WL 5191103, at *2 (M.D. Pa. Oct. 15, 2019).

fifteen day annual revocation period.[9] Some restrictions are even more onerous. California prohibits certain state employees from stopping dues deductions for the duration of a multi-year collective bargaining agreement. *See Savas v. Cal. State L. Enf't Agency*, 485 F. Supp. 3d 1233, 1235 (S.D. Cal. 2020), *appeal filed*, No. 20-56045 (9th Cir. 2021).

Without information about their *Janus* rights, employees in such states can unwittingly sign their First Amendment rights away for a year or more without having any idea they are doing so. Discriminatory state policies that support only union solicitation of employees, but not the provision of information to employees about their right not to support a union, inevitably trap employees into financially subsidizing union speech they do not wish to support.

C. It is essential that employees be informed of their First Amendment rights under *Janus*.

As the foregoing demonstrates, Washington Department of Ecology's effort to curtail Freedom Foundation's ability to educate workers about their rights under *Janus* is part of a broader effort by states to distort the marketplace of ideas on this subject and to undermine employees' right not to subsidize union speech. At Ecology's facility, union agents may freely speak to workers and solicit them to support the union, but a right to work advocate may not speak to those workers to inform them of their right not to support a union.

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[9] *See, e.g.*, N.J. Stat. Ann. § 52:14-15.9e (authorizing annual ten-day period for stopping payroll deductions); 5 Ill. Comp. Stat. § 315/6(f) (same and also authorizing "a period of irrevocability that exceeds one year"); Del. Code Ann. tit. 19, § 1304 (authorizing annual fifteen-day period for stopping payroll deductions).

This is a classic case of viewpoint discrimination. It also is a classic case of government rent-seeking. As George Mason University Antonin Scalia Law School Professor Todd J. Zywicki observes, "'[t]he engine of rent-seeking, and hence crony capitalism, is discretion: the power of politicians to draw arbitrary and unprincipled distinctions between similarly situated parties."[10] The First Amendment, however, affords government officials no discretion in matters of a speaker's content.

Once the Department of Ecology opened its atrium to the speech of its preferred union speakers, it should not have closed it to the Freedom Foundation's speech. As Justice Blackmun observed in a case involving a Virginia law prohibiting pharmacists from advertising the price of prescription drugs, "[t]here is, of course, an alternative to [such a] highly paternalistic approach," observed. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976). "That alternative is to assume that…information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id*. The Department of Ecology violated the First Amendment by closing a channel of communication to the Freedom Foundation because it informs workers of their First Amendment right not to subsidize a union.

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[10] Todd J. Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 S. Ct. Econ. Rev. 77 (2016), 88.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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