No. 20-1603

IN THE
Supreme Court of the United States

SUSAN BENNETT,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE JOANNE TROESCH AND IFEOMA NKEMDI IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018), this Court held that no payment to a union may be deducted from a nonmembers' paycheck unless a government employee "affirmatively consents" to waive her First Amendment rights not to pay money to a union.

The question presented is:

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*?

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INTEREST OF THE AMICUS CURIAE[1]

Joanne Troesch and Ifeoma Nkemdi are Chicago public school employees who were compelled, over their objections, to subsidize a union and its speech. The educators have an interest in this case because their pending petition for certiorari effectively concerns the same Seventh Circuit decision and presents a related question to this Court. *See* Pet. for Writ of Cert., *Troesch v. Chi. Teachers Union, Loc. 1*, No. 20-1786 (U.S. June 23, 2021).

Troesch and Nkemdi allege, on behalf of themselves and proposed classes of employees, that the Chicago Board of Education and Chicago Teachers Union, Local 1 are violating employees' First Amendment rights by: (1) prohibiting employees from exercising their right to stop subsidizing union speech except during a one-month escape period; and (2) seizing payments for union speech from objecting employees who resigned their union membership. *See* Pet. for Writ of Cert. 6, *Troesch*, No. 20-1786. The educators assert this conduct is unconstitutional under *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448, 2486 (2018), absent clear and compelling evidence they and similarly situated employees waived their First Amendment right to not subsidize the union's speech.

The Seventh Circuit summarily affirmed a district court order dismissing Troesch and Nkemdi's complaint because this case controlled the outcome of

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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 party's counsel authored any part of the brief and no one other than Amicus funded its preparation or filing.

their appeal. *See Troesch,* No. 21-1525, 2021 WL 2587783, at *1 (7th Cir. Apr. 15, 2021), *pet. for cert. filed*, No. 20-1786 (U.S. June 23, 2021) (citing *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021)). Much like *Troesch*, *Bennett* concerns whether a school district and union violated Petitioner Susan Bennett's First Amendment rights by taking union dues from her wages—both when she was a union member and after she resigned her union membership—without proof she waived her First Amendment rights. 991 F.3d at 728–29. The Seventh Circuit held, contrary to this Court's decision in *Janus*, 138 S. Ct. at 2846, that government employers and unions do not need proof of a constitutional waiver to extract union dues or fees from employees, including even those who resign their union membership. 991 F.3d at 731–32. The court held it is sufficient if there is a contract that purports to authorize government dues deductions and restrictions on when employees can stop those deductions. *Id*.

Bennett, Troesch, and Nkemdi are petitioning this Court to review related questions arising from *Bennett*. Bennett's petition presents the question of "[w]hether 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*?" Pet. (i). Troesch and Nkemdi's petition focuses on whether the government and unions can restrict when employees can exercise their right to not subsidize union speech and presents the following question:

> 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?

Pet. for Writ of Cert. (i), *Troesch*, No. 20-1786.

SUMMARY OF ARGUMENT

The Court's review is warranted because the Seventh Circuit's decision conflicts with *Janus* and permits severe restrictions on employee speech rights. This case and *Troesch* present ideal vehicles for the Court to comprehensively address whether government employers need proof that employees waived their First Amendment rights to seize payments for union speech from employees and to restrict their right to stop subsidizing union speech.

ARGUMENT

1. The Seventh Circuit misconstrued *Janus* when holding that government employers need only proof of contractual assent, as opposed to proof of a constitutional waiver, to extract union payments from employees. *Bennett*, 991 F.3d at 731–32. This Court recognized in *Janus* that "[b]y agreeing to pay [union dues or fees], nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." 138 S. Ct. at 2486. The Court thus held that, to prove employees affirmatively consent to financially supporting a union, a "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)). The Seventh Circuit deviated from that holding by replacing this Court's constitutional waiver requirement with its own lesser contract requirement.

The Seventh Circuit's decision to not require proof of a constitutional waiver is especially untenable with respect to the union payments seized from Bennett *after* she resigned her union membership in November 2018. *See* Pet. 6–7. The Respondent school district and union compelled Bennett to continue to subsidize the union, over her express objections, until a fifteen-day escape period that opened on July 27, 2019. *Id*. If *Janus'* waiver requirement applies to any circumstance, it must apply when the government seizes monies for union speech from nonmember employees over their express objections. Unless the nonmembers waived their First Amendment rights, these seizures violate 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).

The Seventh Circuit erred in reasoning that Bennett was not compelled to subsidize union speech because years earlier she contractually agreed to pay union dues until the escape period. *See Bennett*, 991 F.3d at 732–33. This flawed reasoning requires disregarding the fact that Bennett (1) expressly objected to supporting the union financially in November 2018 and (2) sued to stop the school district and union from seizing union dues from her wages in April 2019. *See* Pet. 6–

7. Bennett clearly was compelled to subsidize the union against her will between November 2018 and late July 2019.

The Seventh Circuit's flawed rationale also wrongfully assumes that a contract is sufficient to prove Bennett consented to restrictions on when she could exercise her First Amendment rights under *Janus*. It is almost axiomatic that proof of a waiver of constitutional rights is required to establish that an individual agreed to waive for a time period her First Amendment speech rights.

It takes more than a contract to prove that an individual waived his or her First Amendment rights. The Court held in *Janus* that "a waiver cannot be presumed," but "must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). The Court cited three precedents holding an effective waiver requires proof of an "'intentional relinquishment or abandonment of a known right or privilege.'" *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. 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 sometimes are stated 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), and that its enforcement not be against public policy, *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

The Seventh Circuit should have used this waiver standard to evaluate whether Bennett agreed to restrict when she could cease subsidizing the union and

its speech. The Seventh Circuit acted contrary to *Janus,* and to this Court's constitutional-waiver precedents, by holding that a contract analysis controls whether employees are bound to restrictions on their First Amendment rights.

2. The Court should correct the Seventh Circuit's error because its decision, and similar decisions by other lower courts, threaten to undermine the free speech rights of millions of employees. At least sixteen states—Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, New Mexico, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Washington—authorize government employers to deduct union payments from employees' wages and to enforce restrictions on when employees can stop those deductions. *See* Pet. for Writ of Cert. at 2–3, *Troesch*, No. 20-1786.

These restrictions generally prohibit employees from stopping government deductions of union dues except during ten-to-thirty-day annual escape periods. *Id.* at 3. Well over four million public-sector employees are likely subject to these or worse restrictions on when they can exercise their First Amendment rights under *Janus*. *Id.* at 21–22.

"[C]ompelled subsidization of private speech seriously impinges on First Amendment rights" and "cannot be casually allowed." *Janus*, 138 S. Ct. at 2464. The Seventh Circuit's decision casually allows governments and unions to compel dissenting employees to subsidize union speech. Under *Bennett* and similar decisions, all government employers and unions have to do is include language in their dues deduction forms

that require employees to continue to financially support the union even if they later object to so doing.

The Court should not permit governments and unions to so easily restrict employee speech rights under *Janus*. To safeguard those rights, the Court should instruct lower courts to enforce *Janus'* waiver holding. The requirement that a constitutional waiver must be "knowing" and "intelligent" will ensure that employees are notified of their constitutional rights, allowing them to make informed decisions about whether to subsidize union speech. That purported waivers are unenforceable if against public policy will limit the ability of governments and unions to impose onerous restrictions on employees, such as those that prohibit employees from exercising their First Amendment rights for 350-51 days of each year.

3. This case and *Troesch* are excellent vehicles to clarify when evidence of a constitutional waiver is required under *Janus*. The petitions in both cases effectively concern the same Seventh Circuit decision. While the legal issues in the two cases overlap, their focus differs. This case focuses on whether governments and unions need proof that employees waived their First Amendment rights to deduct payments for union speech from their wages. *Troesch* focuses on whether governments and unions need proof of a waiver to prohibit employees from stopping those deductions—i.e., to continue to seize monies for union speech from dissenting employees who resigned their union membership or who want to do so. Taken together, the petition here and that in *Troesch* provide the Court with an opportunity to comprehensively address the constitutional standards that govern when

payments for union speech can be extracted from public employees' wages.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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