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, AFL-CIO; AFSCME LOCAL 672; AND MOLINE-COLE VALLEY SCHOOL DISTRICT NO. 40,

Respondents.

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

BRIEF OF THE FREEDOM FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Freedom Foundation (the Foundation) is a 501(c)(3) nonprofit organization working to advance individual liberty, free enterprise, and limited government. The Foundation regularly files *amicus curiae* briefs with this Court in cases concerning the First Amendment rights of public employees. *See, e.g.*, *Thompson v. Marietta Education Association, et al*., 972 F.3d 809 (6th Cir. 2020), cert. denied, 20-1019 (2021); *Janus v. AFSCME*, *Council 31*, 138 S. Ct. 2448 (2018); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016).

The Foundation focuses on public sector union reform through litigation, legislation, education, and community activation. The Foundation works to protect the rights of union-represented public employees and regularly assists employees in understanding and exercising those rights. This includes representing public employees in litigation against unions and public employers who have violated employees' rights regarding union membership and dues payment. The Foundation has also notified tens of thousands of public employees of their rights and has assisted many of them in exercising those rights by contacting unions on their behalf and litigating against those unions when necessary. As a result, the Foundation has unique insight into the abuses suffered by public employees at the hands of their government employers

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[1] Pursuant to Rule 37.2, all parties received timely notice and have consented to the filing of this brief, *amicus* affirms that no party's counsel authored this briefing in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

and exclusive representatives. Given the Foundation's mission, it has an interest in the Court accepting review of the instant case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition poses the important question of whether the First Amendment waiver standard this Court laid down in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018), requiring that public employees give their affirmative consent before any dues or fees are deducted from their pay for union purposes, can be rendered a dead letter by the application of contract law.

The lower courts' application of a contract law standard rather than a waiver standard to determine if states and unions have acquired affirmative consent from nonunion public employees before they deduct union dues from those employees' wages not only deviates from *Janus*, but also ignores the realities of modern compulsory unionism. It is well-established that governments impose "inherently compelling pressures" on employees by granting unions powerful privileges that infringe upon individual employees' rights. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973) (a heightened waiver standard is necessary to protect constitutional rights when there are "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."). These privileges include exclusive representation, with its accompanying benefits, and union control of the dues deduction authorization and revocation procedures—each of which constitutes a significant infringement on employees' First Amendment rights. These exclusive privileges grant unions

leverage which pressures employees into signing "voluntary" dues deduction authorization agreements that significantly restrict when nonunion employees can exercise their First Amendment right not to subsidize a union's political speech ("Dues Agreements"). These pressures cast serious doubt on the voluntariness of any contract executed in their shadow. Indeed, this Court already acknowledged that the procedures used to collect money from objecting nonunion employees "must satisfy a high standard." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 313 (2012). Instead, lower courts have incorrectly adopted the *lowest* possible standard in this context: a contract law standard.

These state-bestowed privileges allow unions to continue the "abuse" of First Amendment rights that public employees experienced under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *See Janus*, 138 S. Ct. at 2460. These abuses include a violation of employees' privacy by states which disclose employees' sensitive personal information to unions, which unions use to bombard bargaining unit members (both members and nonmembers) with aggressive, deceptive, and often coercive membership solicitations and political campaigning. Unions also abuse their privilege of controlling government payroll deductions by instructing public employers to deduct union dues from employees' wages without consent, often based on Dues Agreements containing employee signatures forged by a union. Unions also employ abusive tactics during employer mandated training and orientation sessions, where union representatives aggressively seek employee signatures on Dues Agreements.

The public sector union-employee relationship is a far cry from a normal contract law context, and a knowing and voluntary waiver standard is the only mechanism individual employees have to defend against the pressures of powerful state-favored unions—the right to confront these pressures with full knowledge of their rights and voluntarily say "no." This Court rightfully required public employers and unions to show clear and compelling evidence that employees waived their First Amendment rights before union payments are deducted from employees' wages. *Id*. at 2486. Unfortunately, lower courts have failed to apply this standard and thereby incentivize and facilitate the continuing abuse of public employees' First Amendment rights. Considering the exceptional importance of employees' constitutional right to be free from compelled subsidization of private political speech with which they disagree and the widespread application of the restrictive practices discussed herein, review by this Court is necessary to clarify the scope and reach of the *Janus* waiver standard.

The petition should be granted.

ARGUMENT

I. Lower courts' application of mere contract law to union dues deduction agreements which restrict when nonunion employees can exercise their *Janus* rights conflicts with *Janus*' requirement that government employers and unions satisfy a constitutional waiver standard before they deduct union dues from nonunion employees' wages.

In *Janus*, this Court overruled *Abood's* compelled fee regime *and* went further to require "clear and compelling evidence" of a freely given waiver of constitutional rights before public employers and unions deduct union dues from employees' wages. *See Janus*, 138 S. Ct. at 2460, 2486. The lower courts, including the Seventh Circuit below,[2] have confused this waiver standard in favor of a contract law standard. *See* Pet. App. at 11-12.[3] However, application of a contract law standard to determine if nonunion public employees consented to dues payments deviates from the requirements of *Janus* and incentivizes states and unions to continue abusing employees' First

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[2] *Bennett v. AFSCME Council 31*, No. 20-1621, 991 F.3d 724, 730-31 (7th Cir. 2021).

[3] *See also Troesch v. Chi. Teachers Union, Loc. Union No. 1, AFT*, No. 1:20-cv-02682, 2021 WL 2587783 (7th Cir. Apr. 15, 2021) (not reported); *Fischer v. Gov. New Jersey*, 842 Fed. Appx. 741, 753 (3rd Cir. 2021) (non-precedential opinion), petition for cert. filed No. 20-1751 (June 14, 2021); *Belgau v. Inslee*, 975 F.3d 940, 950–52 (9th Cir. 2020), petition for cert. denied No. 20-1120 (June 21, 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961–62, 964 (10th Cir. 2021), petition for cert. filed No. 20-1606 (May 18, 2021).

Amendment rights in ways that would be prevented by a constitutional waiver standard.

"More than mere contract law . . . is involved" when analyzing contracts containing restrictions on constitutional rights. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 183 (1972). The differences between a waiver standard and a contract law standard are significant, as are the policies underlying each. A constitutionally sufficient waiver requires that parties know of the right in question and voluntarily and intelligently waive that right. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (cited in *Janus*, 138 S. Ct. at 2486); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion) (cited in *Janus*, 138 S. Ct. at 2486). Further, "courts indulge every reasonable presumption against the waiver of fundamental rights" and "do not presume acquiescence in the loss of fundamental rights." *Johnson*, 304 U.S. at 464.[4]

The reason to apply a waiver standard to establish consent to the subsidization of public sector unions by objecting nonunion employees is obvious: "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . ." *Janus*, 138 S. Ct. at 2464.[5] If employees are to be subjected to these "demeaning" compelled union payments over their objections, they at least must have

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[4] Enforcement of a waiver also cannot be against public policy. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

[5] *See also Janus*, 138 S. Ct. at 2464 (compelling someone to propagate ideas with which she disagrees is "sinful and tyrannical" and it is "a significant impingement on First Amendment rights" when public employees are required to subsidize a union that "takes many positions during collective bargaining that have powerful political and civic consequences.") (internal quotations and citations omitted)).

knowingly, voluntarily, and intelligently waived their right to be free of such compulsion. *Id*. at 2486.

The sole purpose of the irrevocable dues payment clauses enforced by the government in this case is to compel *nonunion* public employees "to furnish contributions of money for the propagation of opinions which [they] disbelieve[] and abhor[] . . .", *id*. at 2464, after they resign union membership and object to their subsidization of the union and its speech. *See* Pet. at 6. The lower court's analysis here, therefore, *should* have been straightforward: since the government is deducting union dues from a nonmembers' wages over her objections, the government needed to show by "clear and compelling evidence" that she "waiv[ed] [her] First Amendment right[]" *not* to be subjected to such payments without [her] affirmative consent. *See Janus*, 138 S. Ct. at 2486. The court below should have determined whether there was clear and compelling evidence that petitioner knowingly, voluntarily, and intelligently waived her right as a nonunion employee to be free of any and all compelled political speech, that petitioner's consent was acquired using a constitutionally-sound procedure, *see infra* at 14-18, and that enforcement of the waiver was not against any public policy. To date, no lower court has performed this analysis. *See supra* at 5 n.3.

As a result, the lower courts have applied "mere contract law" and have gutted this Court's *Janus* decision and allowed states and unions to continue violating thousands of public employees' First Amendment rights.

II. A constitutional waiver standard protects employees' First Amendment rights from infringement by the powerful, well-funded, and sophisticated unions which benefit from infringing those rights.

Individual employees *need* the protection afforded by a waiver standard because states use their coercive powers to grant unions privileges that impinge upon employees' First Amendment rights. These privileges give unions enormous leverage over employees and make it difficult to learn of and exercise their fundamental constitutional rights. Government employers create these privileges by statute and collective bargaining agreements ("CBAs") with unions which impose on employees exclusive representation, its accompanying privileges, and union control of dues deduction authorization and revocation procedures ("Deduction Procedures").

These state-granted privileges create "inherently compelling pressures," which burden employees' First Amendment rights and cast doubt on the voluntariness underlying any contract employees may execute in their shadow. *See Bustamonte*, 412 U.S. at 247 (a heightened waiver standard is necessary to protect constitutional rights when there are "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."). The union-employee relationship in the public sector is about as far from normal contract law as east is from west. Lower courts' decisions to apply mere contract law in the public employment context ignores the enormous imbalance of power, knowledge, and sophistication between the union and the individual employee.

First, compelled exclusive representation infringes employees' rights. It requires all employees in a bargaining unit be represented exclusively by a union, regardless of union membership or preference. The union then acts as a politically powerful lobbying organization seeking to influence public employment policy.[6] Exclusive representation "confers many benefits" on unions and "results in a tremendous increase in the power" of unions over employees. *Janus*, 138 S. Ct. at 2467. It grants unions "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944). The exclusive representative's power necessarily entails "the loss of individual rights." *Am. Commc'ns Ass'n v. Douds,* 339 U.S. 382, 401 (1950). As such, this Court has acknowledged that exclusive representation is "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus*, 138 S. Ct. at 2478.

Second, exclusive representation is accompanied by privileges used by unions as leverage in political and union membership campaigns. These government-decreed privileges include "obtaining information about employees" and having dues "deducted directly from employee wages." *Id*. At 2467. Government employers must give employees' personal phone numbers, email addresses, and home addresses to unions, regardless of employees' union membership status. Employers also commonly give unions sensitive employee information such as date of birth, social

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[6] *All* public sector union speech is inherently political, including but not limited to, core issues such as wages, pensions, benefits, and public sector collective bargaining in general. *See Janus*, 138 S. Ct. at 2480.

security number, gender, marital status, and language preference. Disclosure of this personal information would, in other contexts, violate any number of privacy and identity protection laws. Unions then use that information to bombard employees, including nonmembers, with pro-union messages, high-pressure membership drives, and political campaigning materials—through email, U.S. mail, and aggressive in-person home solicitation. There is precious little knowledge about the employee that a union cannot use as leverage in coaxing employee signatures on Dues Agreements containing irrevocability provisions. *See infra* at 9-10, 19.

Public employers also commonly mandate employee attendance at orientation and training sessions in which employees become a captive audience to union representatives. Unions typically seek access to these sessions in collective bargaining and use them to apply in-person pressure on employees to sign Dues Agreements containing irrevocability clauses. *See infra* at 18-23. Unions also deprive nonmembers of the right to vote on the employment contract—even though the State requires the employment contract to apply to the entire bargaining unit regardless of an individual employee's union membership status.

Third, the relationship created by mandatory exclusive representation regimes between employees and unions is fraught with the dangers courts look for when determining whether a person truly knowingly, voluntarily, and intelligently gave up a constitutional right. These dangers include an imbalance in power and sophistication, a lack of legal counsel, a lack of bargaining, and a host of others. *See D.H. Overmyer*, 405 U.S. at 186-87 (discussing the level of a party's corporate sophistication, the relative bargaining

power between parties, the presence of advising counsel, and whether the agreement was a contract of adhesion); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (noting there was no bargaining over contract terms, the parties possessed vastly different bargaining power, the contract was presented as a take-it-or-leave-it form contract, and the party allegedly waiving her right was not actually aware or made aware of the significance of the purported waiver).

These factors demonstrate the massive advantage unions have over individual employees. Unions are sophisticated, multi-million-dollar organizations that have ample resources to hire counsel to devise language in Dues Agreements that is confusing and intimidating to the typical layperson employee. Dues Agreements containing irrevocability clauses are presented as take-it-or-leave-it form contracts of adhesion. Individual employees rarely hire counsel to assist them in understanding the language, and union representatives rarely explain either the language or employees' rights. Additionally, there is never bargaining over the agreement's terms. Finally, there is simply no equivalent to the leverage provided by the forced association of exclusive representation in the private contracting world. Pretending the union-public employee relationship is the same as that created by private parties meeting on relatively equal bargaining terms and positions ignores the realities of modern compulsory unionism.

Fourth, Dues Agreements also typically automatically renew annually and restrict employees' ability to end paycheck deductions to a narrow time period lasting only a few days a year—usually ranging from ten to thirty days ("Escape Periods"). *See, e.g.*, Pet. at 6. Many of these Escape Periods are based on the date

when employees sign the Dues Agreements, rather than a specific date defined in a CBA. This increases the burden on employees attempting to learn the dates of their Escape Period because Dues Agreements are retained in union files. Additionally, given unique employee Escape Periods, employees cannot communicate about upcoming Escape Periods among themselves. The typical procedure an individual employee must navigate to exercise her *Janus* rights is the following: (1) obtain knowledge of *Janus* rights; (2) email or phone the union to object to continued dues deductions; (3) be ignored by the union; (4) learn about and contact the Freedom Foundation for assistance; (5) send the union a written letter objecting to dues deductions; (6) receive letter from union stating the attempt to stop deductions occurred outside the unique annual Escape Period (and usually informing them of the Escape Period dates);[7] and (7) remember to object again during the Escape Period. This complex, frustrating, and burdensome process discourages many employees from exercising their constitutional rights.[8]

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[7] Frequently, the union also ignores the written letter, resulting in the undersigned attorney sending the union a letter threatening a lawsuit.

[8] Even in the private sector, where the ramifications of compelled political speech are not as severe, the Court has recognized that union membership in the context of compelled exclusive representation and collective bargaining is fundamentally different from normal contract law. *See Pattern Makers' League v. NLRB*, 473 U.S. 95, 113 n.26 (1985) (union membership "contemplates a continuing relationship with changing obligations as the union legislates in monthly meetings or in annual conventions. It creates a complex cluster of rights and duties expressed in a constitution. In short, membership is a special relationship. It is as far removed from the main channel of

Unions' also hold the power to lobby and promote politicians who, after election, support exclusive representation and grant unions privileges which provide leverage over individual employees. Moreover, government employers usually yield to union demands that they abstain from informing employees of their rights, which leaves the union as the sole source of information for employees interested in learning of or exercising their rights. This is clearly "a case of unequal bargaining power [and] overreaching." *Fuentes*, 407 U.S. at 95.

Finally, as is the case here and for thousands of other employees across the country, petitioners signed Dues Agreements containing irrevocability clauses in the shadow of mandatory agency fees required before this Court decided *Janus*. *See* Pet. at 6. At the time they signed the agreements, the State deprived petitioners of the option to choose not to subsidize the union as a nonmember. *Id*. at 19. Such an arrangement is unheard of in the private contracting world (as are most state-bestowed union benefits). Only the most cynical would argue that the decision to buy a house for $200,000 would constitute a "voluntary" decision without duress if the seller could *force* the buyer to live in the house and pay $160,000 for it—especially if the buyer did not want that house in the first place.

In conclusion, the lower courts' adoption of a contract law standard to analyze contracts in the union-public employee context ignores the realities "on the ground" that *actually* affect individual public employees, such as vulnerability to targeted union

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contract law as the relationships created by marriage, the purchase of a stock certificate, or the hiring of a servant.").

messaging; compelled association through exclusive representation; drastic imbalances in power, knowledge, and sophistication; and lack of information regarding post-*Janus* rights. Similar to custodial interrogation in the criminal context, state-granted privileges combined with the forced association of exclusive representation in public employment create an "inherently coercive" environment in which employees' First Amendment rights become "empty formalities in a procedure" tailor-made for union exploitation of public employees. *See Bustamante*, 412 U.S. at 240. Only a knowing, voluntary, and intelligent waiver standard will protect employees' First Amendment rights in the inherently coercive context of public sector employment.

III. Procedural safeguards are necessary to protect nonunion employees' First Amendment rights.

The protection of free speech rights triggers the need for procedural safeguards "to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns" because "[F]irst [A]mendment rights are fragile and can be destroyed by insensitive procedures." *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 303 n.12 (1986) (internal citations and quotations omitted). Indeed, this Court has previously stated that procedural safeguards are necessary to protect nonunion employees' First Amendment right to be free from compelled subsidization of union speech, *see id*., and that procedures used to collect money from objecting nonunion employees "must satisfy a high standard." *Knox*, 567 U.S. at 313. Unfortunately, after *Janus*, states are jettisoning these safeguards in favor of granting wholesale control of government dues Deduction

Procedures to the very unions which benefit from those deductions. Unions use this control to pressure employees and violate their rights. Guidance from this Court is necessary to reverse this trend.

Illinois compelled petitioner to subsidize union speech as a nonunion employee over her objection. *See* Pet. at 6-7. Illinois did so while also subjecting her to significant infringements on her constitutional rights and granting leverage to a union which cut against her rights. *See id.* (exclusive representation, agency fees, and an imbalance of power); *see also supra* at 8-14. Under *Abood*, such schemes had to contain procedural safeguards which "minimize[d] the risk" that nonunion employees might be compelled to subsidize union speech; one such safeguard was a prohibition on union-controlled Deduction Procedures. *Hudson*, 475 U.S. at 301-02, 303, 308. However, Illinois and other states are ignoring this required safeguard when establishing their Deduction Procedures. *See* 115 Ill. Comp. Stat. § 5/11.1(d) ("Unless otherwise mutually agreed by the educational employer and the exclusive representative, employee requests to authorize, revoke, cancel, or change authorizations for payroll deductions for employee organizations shall be directed to the employee organization rather than to the educational employer."); *see also, e.g.*, RCW 41.80.100(2)(g) ("The employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions."). Even if these procedures are constitutional (which they are not), they impose obvious pressure on employees and infringe their First Amendment rights.

For example, in *Hudson*, objecting nonunion employees subjected to exclusive representation and

an agency shop challenged their employer's and union's procedure for deducting union dues from their wages. *See Hudson*, 475 U.S. at 301. The Court invalidated the procedure because, inter alia, it was "entirely controlled by the union, which is an interested party." *Id*. at 308. The Court held that nonunion employees who object to union fee deductions are "entitled to have [their] objections addressed in an expeditious, fair, and objective manner" and that procedures to do so that are "entirely controlled by [a] union" do not satisfy this burden. *Id*. at 307. The Court reasoned that since "the agency shop itself is 'a significant impingement on First Amendment rights,' the government and union have a responsibility to provide procedures that minimize that impingement and which facilitate a nonunion employee's ability to protect his rights." *Id*. at 307 n.20.

Here, although Illinois technically removed its agency shop (i.e., agency fee) statute post-*Janus*, petitioners are still subjected to the "significant [First Amendment] infringement" of exclusive representation, along with state-granted union benefits that cut against their rights. *See Janus*, 138 S. Ct. at 2478; *see also supra* at 8-14. Moreover, the State *did* subject petitioner to an agency shop at the time she signed the Dues Agreement containing the irrevocability clause. *See* Pet. at 6. Yet, rather than "minimize" these infringements by providing a "fair and objective" procedure for objecting nonunion employees such as petitioner, the State exacerbates these infringements by placing the protection of dissenting nonunion employees' First Amendment rights entirely in union hands. *See supra* at 15.

In the post-*Janus* world of public sector employment, an employee's only recourse to challenge allegedly

unlawful dues deductions is to complain to the union benefiting from the deductions and whom the employer must by law obey.[9] Thus, once employees learn of their rights and attempt to exercise them, they are forced to file lawsuits against their own employers and the unions to which they are beholden. Meanwhile, the union continues receiving the disputed wages, since employers can stop deductions only upon union instructions. The intimidating prospect of finding and hiring counsel to sue one's own employer and a well-funded politically powerful union chills employees' exercise of rights because employees are often unwilling to chance this risky and cumbersome process

Finally, *Hudson's* procedural requirements harmonize with the principle that "nonmembers should not be required to fund a union's political and ideological projects unless they choose to do so after having a 'fair opportunity' to assess the impact of paying" for a union's political speech. *Knox*, 567 U.S. at 314-15. To impose such a requirement, employees must be "able at the time in question to make an informed choice". *Id*. at 315. Given the sea-change in labor law *Janus* ushered in, there is simply no way petitioner's pre-*Janus* decision to obligate herself to pay future union fees as a nonmember was an "informed choice," due to the massive difference between (i) union non-membership before *Janus* (which resulted in paying agency fees), and (ii) non-membership after *Janus* (which results in paying nothing to a union). If something as minimal

[9] Common sense should tell us that this procedure is akin to placing the proverbial fox in charge of the henhouse. As demonstrated *infra* at 18-24, unions leverage these incredible privileges to deceive and pressure employees into signing Dues Agreements containing dues payment irrevocability clauses.

as a union's special assessment to fund political activities was enough to trigger the need for a new procedural safeguard, i.e., another opportunity for the employee to make the decision whether to finance such speech, as it did in *Knox*, then certainly *Janus* triggered a similar procedural requirement here—at least with respect to employees who signed the Dues Agreements pre-*Janus*. *Id*.

Hudson's procedural safeguards are desperately needed post-*Janus*, and this Court did not overrule *Hudson sub silentio* in *Janus*. Rather, this Court *expanded* employees' right not to subsidize a union's political speech to include *all* of a public sector union's speech, instead of just so-called "non-chargeable" expenses. *See* 138 S. Ct. at 2486. Thus, compelling subsidization of union speech from nonunion employees is a greater infringement under *Janus* than under *Abood*. It makes little sense to conclude that the pre-*Janus* procedural protections required by the First Amendment to protect nonunion employees' rights no longer apply post-*Janus*, because it means nonunion employees enjoy fewer procedural rights after *Janus* than before, despite the fact that the harm caused by compelled union fees is greater.

IV. Unions commonly abuse state-granted privileges to induce employees into signing Dues Agreements that restrict when employees can exercise their *Janus* rights.

The Freedom Foundation has witnessed firsthand how government-mandated union privileges result in the abuse of individual employees' rights, especially with respect to partial-public in-home health care workers in Washington ("Individual Providers" or "IPs" subsidized by Medicaid to care for the disabled and/or elderly in their homes). The Court freed these

partial-public employees from *Abood's* agency fee regime when it decided *Harris v. Quinn* in 2014. However, faced with the prospect of dwindling coffers, unions resorted to underhanded high-pressure tactics to maintain their revenue flow. The Foundation helped many of these employees exercise their rights in the face of abuse wrought by their appointed exclusive representative, SEIU 775. What follows are only a few examples of this abuse.

Unions commonly use employees' personal information to bombard employees with membership solicitations via email, phone calls, U.S. mail and aggressive in-person home visits. These tactics are often coercive, deceptive, and harassing, but employees can do little to stop the unwanted solicitations. In a complaint filed with the Washington Attorney General's Office, a husband recounted how an "adversarial" union organizer came to his home demanding to know why his wife, an IP, was not a union member. The complainant described the visit as "harassment" and "extremely threatening." Another IP filed a similar complaint describing frequent union phone calls as making him feel like he was "being stalked."[10]

Additionally, unions utilize the employer's payroll system to deduct dues from employees' wages.[11] In 2017, exclusive representatives of bargaining units of partial-public employee home caregivers for Medicaid clients represented about 350,000 caregivers and

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[10] The complaints were filed with the Consumer Protection Division of the Washington Attorney General's Office on January 27, 2015 (p. 39), and July 21, 2011 (p. 17), respectively. https://www.freedomfoundation.com/wp-content/uploads/2019/01/AG-CPD-SEIU-775-complaints.pdf (last visited August 26, 2021).

[11] *See, e.g.,* RCW 41.56.113.

collected almost $150 million in dues from their wages (across the country).[12] Caregivers' lack of control over the Dues Procedures facilitates abuse as union organizers employ any means necessary to secure an employee's signature on a Dues Agreement or obtain an employee's oral consent to dues deductions.

For example, IP Cindy Ochoa filed a federal lawsuit against SEIU 775 after a union organizer forged her signature on a union membership form, triggering unauthorized and irrevocable union dues deductions from her wages.[13] *Ochoa v. SEIU Local 775*, No. 2:18-CV-00297-TOR (E.D. Wash. 2019). IPs in Minnesota have reported similar forgeries.[14] Such forgery accusations are occurring all over the West Coast. *See Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *1 (D. Or. Jan. 6, 2021), *appeal docketed*, No. 21-35133 (9th Cir. Feb. 19, 2021); *Zielinski v. SEIU Loc. 503*, 499 F.Supp.3d 804807 (D. Or. 2020), *appeal docketed*, No. 20-36076 (9th Cir. Dec. 15, 2020); *Schiewe v. SEIU Loc. 503*, No. 3:20-cv-00519-JR, 2020 WL 5790389, *1–2 (D. Or. Sept. 28, 2020), *appeal docketed*, No. 20-35882 (9th Cir. Oct. 9, 2020); *Wright v. SEIU Loc. 503*, 491 F.Supp.3d 872, 875 (D. Or. 2020), *appeal docketed*, No. 20-35878 (9th Cir. Oct. 8, 2020); *Semerjyan v. SEIU Loc. 2015*, 489 F.Supp.3d 1048, 1053 (C.D. Cal. 2020), *appeal docketed*, No. 21-

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[12] Maxford Nelsen, Getting Organized at Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity, Freedom Foundation (July, 2018), available at https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf.

[13] Caleb Jon Vandenbos, *Victim of Union Forgery Files Lawsuit*, Freedom Foundation (Oct. 1, 2018), https://www.freedomfoundation.com/litigation/victim-of-union-forgery-files-lawsuit/.

[14] Nelsen, *supra* note 12.

55104 (9th Cir. Feb. 9, 2021); *Yates v. Wash. Fed'n of State Emps.*, 466 F.Supp.3d 1197, 1201 (W.D. Wash. 2020), *appeal docketed*, No. 20-35879 (9th Cir. Oct. 8, 2020); *Quezambra v. United Domestic Workers of Am. AFSCME Loc. 3930*, 445 F.Supp.3d 695, 700 (C.D. Cal. 2020), *appeal docketed*, No. 20-55643 (9th Cir. June 23, 2020). Additionally, SEIU 775 staff anonymously reported being directed by supervisors to "solicit and lie" to secure Dues Agreements from IPs telephonically.[15]

Public employers also often facilitate additional union access to employees. For example, Article 2.6 of SEIU 775's CBA with the State obligates the State to distribute union membership forms at IP orientations, Article 2.7 obligates the state to include union material in IPs' pay envelopes, and Article 2.8(B) requires the state's payroll website to display union messages when IPs login.[16]

Finally, since *Harris*, many unions representing partial public employees have secured the ability, through CBA or statute, to solicit newly-hired employees for union membership in person at state-mandated orientation or training sessions.

In Washington state, Article 2.3(B) of the CBA governing IPs guarantees SEIU 775 thirty minutes

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[15] Maxford Nelsen, *Six Ways SEIU 775 Is Getting Around Harris v. Quinn*, Freedom Foundation (May 18, 2016), https://www.freedomfoundation.com/labor/six-ways-seiu-775-is-getting-around-harris-v-quinn/.

[16] Collective Bargaining Agreement: The State of Washington and Service Employees International Union Local 775, 2017-2019, *available at* https://ofm.wa.gov/sites/default/files/public/labor/agreements/21-23/nse_homecare775.pdf (last visited August 26, 2021).

with new IPs "in non-public areas" during their contracting appointment.[17] In addition, Article 15.13(A) gives the union up to thirty minutes with IPs taking state required basic training.[18]

In public records obtained by the Freedom Foundation, employees of the Washington Department of Social and Health Services ("DSHS") describe SEIU 775's abuse of IPs during these captive-audience meetings. One employee described a union complaint to the state after a DSHS employee "not only stayed during the [union] presentation but spoke up in response to IPs who were looking at her for help when they were being pushed into signing up [for union membership]."[19]

In other documents, DSHS staff describe union organizers as "'aggressive,' 'forceful,' 'incredibly rude,' 'unprofessional,' 'coercive,' 'demanding,' and 'bullying.'"[20] State workers further report that IPs feel "'pressured,' 'misled,' 'tricked,' 'coerced,' 'intimidated' and 'forced' into signing" Dues Agreements.[21] In one case, DSHS staff reported a caregiver was reduced to

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[17] *Id*.

[18] *Id*.

[19] Maxford Nelsen, *DSHS Aiding SEIU Misinformation of Home Care Workers*, Freedom Foundation (Feb. 8, 2017), https://www.freedomfoundation.com/labor/dshs-aiding-seiu-misinformation-of-home-care-workers/.

[20] Maxford Nelsen, DSHS Allowing SEIU to Continue Exploiting Caregivers, Freedom Foundation (Jan. 29, 2018), https://www.freedomfoundation.com/labor/dshs-allowing-seiu-continue-exploiting-caregivers/.

[21] *Id.*

tears by the high-pressure tactics of two SEIU 775 organizers.[22]

In another email, a DSHS employee detailed "how an IP had called to explain, 'how she was poorly treated by the Union' [and] . . . 'bullied.'"[23] The employee was now hearing complaints first hand after having previously heard "horror stories" about IPs fleeing when "Union reps were trying to 'force them to sign up to have extra money taken out of their checks and/or donate.'"[24]

Another email described how the union's captive audience meetings with IPs disrupted the orientation process by pressuring IPs for immediate signatures on union cards, not disclosing the contributions were recurring, and generating "frustration, confusion, and . . . anger" with the contracting process.[25]

Despite these accounts of abuse and pleas for direction from DSHS staff, management informed employees that, "As a best practice, staff should not be present during union presentation[,] that way they don't feel compelled to ask questions or provide clarification."[26]

In addition to Washington, exclusive representatives of bargaining units of partial-public employee caregivers arranged for similar captive-audience

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[22] *Id.*

[23] Maxford Nelsen, Records Show Continued SEIU Harassment of Caregivers, Freedom Foundation (July 5, 2018), https://www.freedomfoundation.com/labor/records-show-continued-seiu-harassment-of-caregivers/.

[24] *Id.*

[25] Nelsen, *supra* note 16.

[26] Nelsen, *supra* note 15.

meetings in Oregon, California, Illinois, Ohio, Massachusetts, Connecticut, and Minnesota. Reports of caregivers being harassed by union organizers in such settings have emerged from these states as well.[27]

CONCLUSION

Public employees face immense pressure to give up their First Amendment right to be free of compelled subsidization of union political speech. Mere contract law does not adequately protect the employees who face these pressures every day in their workplace. Only the knowing, voluntary, and intelligent waiver standard this Court laid down in *Janus* will adequately protect the vital First Amendment rights at stake when government uses its coercive power to protect unions and provide them leverage over individual employees.

This case provides the Court with the opportunity to correct lower courts' interpretation of *Janus* on a matter of exceptional importance: whether public employees will *actually* enjoy the protections provided by the waiver standard the Court recognized in *Janus*. The Court should grant review in this case to re-direct the lower courts on this matter: without clear and compelling evidence that nonunion public employees knowingly, voluntarily, and intelligently waived their First Amendment right against compelled union subsidization, employers and unions cannot deduct union dues from nonunion employees' wages.

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[27] Nelsen, *supra* note 12.

The petition should be granted.

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