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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This Court has made clear that the First Amendment guarantees public employees a right not to subsidize a union and its speech. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). To protect this right, this Court held that public employers cannot deduct, and unions cannot collect, money from employees absent clear and compelling evidence those employees waived their First Amendment right to eschew funding union speech. *Id.* Even so, narrow escape windows dictated by the terms of union authorization cards or collective bargaining agreements—often leaving employees as little as ten or fifteen specified days per calendar year to opt out of such funding—restrict employees' ability to effectively leave the union and stop paying union dues.

In this case, and others like it, employees who joined the union before *Janus*, but sought to leave the union and cease dues deductions after this Court's decision, are constrained by such escape windows, and, therefore, must continue to pay union dues. But employees who joined a union prior to *Janus* have not affirmatively consented to waiving their *Janus* rights. Rather, at the time they signed a union card and dues deduction agreement they were required to pay the union either in the form of membership dues or nonmember agency fees. Because these employees could not have freely, voluntarily, or knowingly waived their right not to pay the union when they signed dues deduction authorization cards, as *Janus* requires, they cannot be forced to continue to pay union dues.

This end-around *Janus* and its underlying principles has been endorsed by the Third, Seventh, Ninth

and Tenth Circuits, which have gutted this Court's *Janus* holding by permitting onerous restrictions on former union member employees' ability to exercise their constitutional rights. *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 Appx. 741, 753 (3rd Cir. 2021) (non-precedential opinion), *petition for cert.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); *Troesch v. Chi. Teachers Union, Local Union No. 1*, No. 21-1525, 2021 WL 2587783 (7th Cir. 2021), *petition for cert. filed* No. 20-1786 (June 23, 2021); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 731-33 (7th Cir. 2021), *petition for cert. filed* No. 20-1603 (May 14, 2021); *Belgau v. Inslee*, 975 F.3d 940, 950-52 (9th Cir. 2020), *petition for cert. filed* No. 20-1120 (Feb. 11, 2021), *cert. denied sub nom. Belgau, Melissa, et. v. Inslee, Gov. of WA, et al.*, No. 20-1120, 2021 WL 2519114 (U.S. 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 14, 2021). Specifically, these decisions hold that state actors do not need evidence of a constitutional waiver to seize union dues from employees who, prior to the *Janus* decision, signed a dues deduction authorization or union membership agreement subject to an opt-out window. *Id.*

This Court should grant the petition to correct the lower courts' misapplication of *Janus* and make clear that nonmembers who consent to pay a public sector union, including nonmembers seeking to join the union, may only have dues withheld by their government employer if there is clear and compelling evidence that they have voluntarily, knowingly, and intelligently waived their First Amendment right to not pay money to the union.

I. This Court should correct the lower courts' misapplication of *Janus*, which undermines the Court's protection of public employees' First Amendment rights.

Prior to *Janus*, public-sector workers were subject to what *Janus* deemed an unconstitutional choice: paying money to the union as a member in the form of dues or paying money to the union as a nonmember in the form of agency or fair-share fees. Given these "options," some chose to join the union. Naturally, following *Janus*, many of these workers, including Ms. Bennett, sought to leave the union and cease all union payments in light of their newly recognized rights. However, the union cards and dues deduction agreements they signed contained narrow opt-out windows. These escape periods limit workers' ability to cease payments to as small as a 10-day annual window. Consequently, plaintiffs like Bennett have been forced to pay union dues after revoking their membership and seeking to stop payments to the union.

In this case, Ms. Bennett argued that the affirmative consent waiver requirement set forth by this Court in *Janus* applied equally to her because she never waived her First Amendment right not to make payments to the union in the first place. Nor could her union card or dues deduction agreement constitute a waiver of her right not to pay the union, because at the time she became a union member, she was unaware of the right to pay no money to the union. Rather, she was required to pay money to the union either as a member or as a nonmember—an unconstitutional "choice" under *Janus*. Therefore, Ms. Bennett and other pre-*Janus* workers who became members

under similar conditions, could not have freely or voluntarily waived their right not to fund union speech. Put another way, consent in its true form was impossible given this Hobson's choice of subsidizing the union in one form or another and the fact that their right to be free from forced union subsidization had not yet been expressly recognized by this Court.

A. Constitutional waiver requirements set forth in *Janus* apply to employees like Bennett who joined the union prior to this Court's decision in *Janus*.

AFSCME asserts that the Seventh Circuit in this case faithfully applied this Court's decision in *Janus*. AFSCME BIO 10. The lower courts held, and Respondents assert that "*Janus* did not change the law governing the formation and enforcement of voluntary contracts between unions and their members." BIO AFSCME BIO 10.

However, in *Janus*, this Court held:

> Neither 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is

> taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted).

According to this Court, waiver applies to "an agency fee [or] *any other payment to the union* . . . deducted from a nonmember's wages." *Janus*, 138 S. Ct. at 2486 (emphasis added). But the lower courts held that this waiver does not apply "whenever a public employee elects to join a union and pay membership dues" because, the relationship between unions and their members was not at issue in *Janus*. AFSCME BIO 10. AFSCME asserts that this "waiver" passage from *Janus* concerns only nonmembers—employees who, like Mr. Janus, never joined the union and never affirmatively authorized membership dues deductions. AFSCME BIO 11.

But employees are not born union members. They become union members by signing a union membership card. Before Ms. Bennett signed the union membership card, she was a nonmember. Because all employees are nonmembers when they first sign a union membership card and authorize dues deductions, the waiver language quoted above applies any time a public employer withholds any money from an employee's paycheck on behalf of a union.

This Court in *Janus* made this clear when it held that "[b]y *agreeing to pay*, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Janus*, 138 S. Ct. at 2486 (emphasis added). This sentence clearly applies to an employee in Bennett's position: one that has agreed to pay money to the union. Yet, the Seventh Circuit's opinion reaches the exact opposite conclusion. *Bennett,* 991

F.3d at 724 ("Having *consented to pay* dues to the union, regardless of the status of her membership, [a worker] does not fall within the sweep of *Janus*'s waiver requirement.") (emphasis added). In *Janus*, this Court held that an employee consenting to pay the union justified waiver analysis. The Seventh Circuit concluded the opposite: consenting to pay was the reason *Janus* waiver analysis does *not* apply. The Seventh Circuit's decision in this case is inconsistent with this Court's decision in *Janus*.

The Court's requirement that "by agreeing to pay" waiver analysis applies, clearly *does not* apply to an employee in Mr. Janus's position. Mr. Janus *never agreed to pay the union* and never waived his First Amendment rights. The only way an employee in Janus's position—a nonmember of the union—could voluntarily pay money to a union would be for that employee to join the union. Thus, the only way for the second sentence of the *Janus* waiver analysis to apply—where a nonmember agrees to pay a union—is when a nonmember employee agrees to pay money to the union by signing the union card and dues deduction authorization and becoming a member. That is exactly the position Ms. Bennett is in. When she was a nonmember, she signed the union card and dues deduction authorization, which meant she agreed to pay money to the union. By doing so, this Court said that employees like Ms. Bennett are waiving their First Amendment rights. The Court held that waiver cannot be presumed—in other words, waiver analysis must apply.

The Seventh Circuit and AFSCME also heavily rely on this Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S 663, 672 (1991) for the proposition that

the First Amendment does not permit Ms. Bennett to renege on her union membership agreement. AFSCME BIO 7. In *Cohen*, an informant provided confidential information to a newspaper based on a promise that it would keep the informant's identity confidential. *Cohen*, 501 U.S. at 665–66. When the newspaper published a story including informant's name, he sued under state promissory estoppel law. *Id*. at 666. The *Cohen* Court found that the First Amendment right to publish truthful information does not provide an exception to liability in a state court action for breach of the promise of confidentiality. *Id*. at 672.

However, the question in this case, is whether the union membership contract itself validly constituted a waiver of Ms. Bennett's rights. *Cohen* does not stand for the proposition that AFSCME or the Seventh Circuit contend—that under waiver analysis signing a contract *always* results in one waiving one's constitutional rights. Ms. Bennett does not deny that one can make a knowing waiver of First Amendment rights. She simply denies that she made any such knowing waiver when signing the union membership agreement. Thus, the Seventh Circuit's decision not only ignores clear language in *Janus*, but in order to prevent Ms. Bennett from accessing the protection of her *Janus* rights, the Seventh Circuit misapplied this Court's decision in *Cohen*.

The clear language of this Court's decision in *Janus* shows that waiver analysis must apply to employees like Ms. Bennett—inquiring whether Plaintiffs' signing of the union membership card and dues-deduction authorization, constituted a proper waiver of their First Amendment rights. Yet, the Seventh Circuit and other lower courts have declined to apply

waiver to Ms. Bennett and other employees who joined the union before this Court's decision in *Janus*. The Seventh Circuit's decision finding that waiver analysis does not apply to Ms. Bennett, and similar lower court decisions, must be overturned because they effectively remove language from this Court's decision in *Janus* setting forth a standard for protecting public employees' First Amendment rights in the context of the public-sector labor system in the states. Without it, public sector unions and their political allies will continue to take actions that undermine this Court's holding in *Janus*. (*See, e.g.*, Br. of Goldwater Institute and Cato Institute as Amici Curiae).

B. Pre-*Janus* dues deduction authorizations alone are incapable of meeting the requirements for a valid constitutional waiver.

This Court has long held that certain standards must be met for a person to properly waive his or her constitutional rights. Waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waiver must also be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185-86 (1972). Because a court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Pub. Utils. Com.*, 301 U.S. 292, 307 (1937), the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. at 2484. In addition, "'[c]ourts indulge every reasonable

presumption against waiver of fundamental constitutional rights.'" *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

Bennett could not have voluntarily, knowingly, or intelligently waived her First Amendment rights under *Janus* when she signed a union membership card and dues deduction authorization because, at the time, this Court had not yet issued its decision in *Janus*. Thus, she had no knowledge of the rights she was purporting to waive in the first place. Moreover, it was impossible for her and workers like her to voluntarily waive their First Amendment right under *Janus* because they were forced into an unconstitutional choice: pay union dues as a member or pay agency fees to the union as a nonmember. As a result, the "contracts" signed by Bennett and similarly-situated workers are incapable of meeting the requirements of a *Janus* waiver. Unions and government employers therefore had no right to continue to withhold money from these workers' paychecks following *Janus* by limiting their withdrawal from the union to an arbitrary window specified in the union membership and dues deduction authorization.

This Court should grant the petition in this case to find that Bennett, and those similarly situated to her, could not have waived her First Amendment rights under *Janus* simply by signing the union card and dues deduction authorization prior to this Court's *Janus* decision. When Bennett agreed to join and pay the union, she was a nonmember. Thus, under *Janus*, waiver analysis applies to Bennett and her pre-*Janus*

"contract" with the union fails to waive her constitutional right to refrain from funding union speech. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

II. This case raises important issues and is an excellent vehicle to resolve those issues.

The Court in *Janus* set forth a standard for protecting public employees' First Amendment rights in the context of the public-sector labor system in the states. That standard required the lower courts to apply waiver analysis before a public employer withholds any money from an employee on behalf of a public-sector union.

The Seventh Circuit and other lower courts, however, have limited this Court's analysis, contrary to its language, to apply only where a plaintiff was an agency-fee payer. AFSCME BIO 11. But as explained, above, and in the Petition, this significantly limits the application of the Court's holding in *Janus* and is contrary to its language. *See* Pet. 8–16; *supra*. 4–8.

Without this Court's intervention, no constitutional scrutiny will be applied to government employees' decisions to join the union, contrary to what this Court stated in *Janus*. That means unions will have every incentive to ensure that government employees remain ignorant of this Court's decision in *Janus*, and will make every effort to ensure that employees imme-

diately join the union without knowledge of their *Janus* rights, since this Court and the lower courts will have refused to safeguard this right by applying waiver analysis. *See* Pet. 16–22; Br. of Goldwater Institute and Cato Institute as Amici Curiae (providing examples of measures taken to ensure employees remain ignorant of this Court's *Janus* decision).

AFSCME maintains that these issues are not of importance by implying that there is no state action involved in these cases and the examples that Petitioner and amici provide. AFSCME BIO 16. But as long as AFSCME continues to get the benefit of both state law and its collective bargaining agreement with a government employer that requires that employer to withhold money from employees on behalf of the union, state action will exist. "When private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus v. AFSCME Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus II*") (*quoting Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988). "[A] private entity can qualify as a state actor in a few limited circumstances—including . . . when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Thus, contrary to AFSCME's assertion, this case, and the other cases and examples cited by Petitioner and amici involve state action, and are affected by the lower court's refusal to apply waiver analysis, as made clear by this Court in *Janus*.

This petition is an excellent vehicle for this Court to grant review because it is illustrative of the dozens of other cases where plaintiffs, like Bennett, have alleged that dues have been withheld from their paychecks without their affirmative consent, and it

presents the issue in a straightforward manner without other concerns such as mootness.

CONCLUSION

For the reasons stated above and, in the Petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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