No. 20-1786

In The Supreme Court of the United States

JOANNE TROESCH AND IFEOMA NKEMDI,

Petitioners,

v.

CHICAGO TEACHERS UNION, LOCAL UNION NO. 1, AMERICAN FEDERATION OF TEACHERS, AND THE BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case because of its history of studying the political activity of public-sector unions. Landmark has compiled instances of apparently unreported political activity by a national teachers' union and its state affiliates in referrals to the Internal Revenue Service and other federal and state administrative agencies.

Landmark urges this Court to grant the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018), set up a new framework to protect the First Amendment rights of public-sector workers, but unions

[1] The parties consented to the filing of this brief. Counsel for *Amicus Curiae* provided notices to counsel for parties of its intent to file this brief on July 28, 2021. All parties consented on July 28, 2021. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae, its members, or its counsel* made a monetary contribution to its preparation or submission.

and union-friendly states are trying to evade it. In *Janus*, this Court overturned longstanding precedent to protect workers from coerced financial support of public-sector unions. The old standard under *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), had led to "practical problems and abuse." *Janus*, 138 S. Ct. at 2460. Since First Amendment rights are at stake, *Janus* now requires a waiver "freely given and shown by 'clear and compelling' evidence" before fees can be extracted from nonmembers. *Id*. at 2486 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion). Yet dues are still being extracted from nonmembers like Petitioners against their will because circuit courts of appeals are focusing on the wrong issue: the existence of membership agreements.

Petitioners resigned from the Chicago Teachers Union and tried to stop the automatic deduction of union dues from their paychecks. But they are being held to the short opt-out windows within the authorization forms that were executed prior to *Janus*. The Seventh Circuit Court of Appeals joined the trend of other circuits to find that this contractual agreement negates any need for analysis of whether a waiver occurred. *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724 (7th Cir. 2021), *petition for cert. filed* (No. 20-1603) (May 18, 2021)

The circuit courts are wrong. A constitutional waiver must be made freely and knowingly. As recognized in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), this Court's judgments apply retroactively. Petitioners' membership agreements executed before

Janus was issued therefore cannot serve as proof of a waiver of their constitutional rights.

ARGUMENT

I. In contrast to *Abood*'s vague and "unworkable" framework, *Janus v. AFSCME, Council 31* created an unambiguous standard for the protection of workers' rights that Respondents violated by continuing to extract union dues from former members without their consent.

In *Janus*, the Court overruled *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) to protect the First Amendment rights of public-sector workers. The prior standard in *Abood* to protect agency fee payers from being compelled to support union activity that was not germane to collective bargaining had led to "practical problems and abuse." *Janus*, 138 S. Ct. at 2460. In *Janus*, the Court noted that *Abood* had "a vagueness problem," that its ruling was "unworkable," and the line that had taken the Court "over forty years to draw" had no supporters and had proved "impossible to draw with precision." *Id.* at 2481–82. A long line of cases after *Abood*—where public-sector unions and their state supporters impinged the rights of dissenting workers—gave warning of the Court's growing dissatisfaction with *Abood*'s underlying analysis and holding. *See Knox v. SEIU Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014);

Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016).

Thus, the Court spoke plainly with an unambiguous standard for both states *and* public-section unions: "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Janus*, 138 S. Ct. at 2486. "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." *Id.* Consent was further clarified. "By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* Instead, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967)). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The *Janus* Court concluded, "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Janus*, 138 S. Ct. at 2486.

A. *Janus* should apply to former union members as well as agency fee payers.

In September 2017, before the opinion in *Janus* was issued, Petitioners signed Membership Agreements to become members of CTU. Pet. App. 7. These agreements included a provision for the automatic

deduction of dues from their payrolls that was only revocable during the month of August. *Id.* In October 2019, after becoming aware of the *Janus* ruling, Petitioners gave notice to the CTU and the Board of Education that they were resigning their union membership. *Id.* at 7–8. CTU acknowledged their resignations the following month, but the Board of Education continued to deduct full union dues from their paychecks until September, 2020.

Strictly speaking, the CTU and the Board of Education violated the Petitioners' rights under the *Janus* standard. They continued to deduct union dues from Petitioners even after the Petitioners resigned their union memberships. In the opinion below, *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724 (7th Cir. 2021), the Seventh Circuit found that since *Janus* did not directly address former union members like Petitioners, it didn't apply. "*Janus* said nothing about union members who . . . freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union." *Id.* at 732. Under their approach, there is no *Janus* protection available for workers who have changed their political beliefs or who are reacting to the union's change in policy if they have previously signed a membership agreement with a short opt-out window. But neither workers' political beliefs nor union positions on public policy are static. Former members forced to continue paying dues can find themselves just as opposed to union speech as workers who had never joined the union. Given the weighty First Amendment concerns of

coerced support of political beliefs that were discussed in *Janus* and prompted the holding, the Seventh Circuit's reading does not make sense. *See Janus*, 138 S. Ct. at 2462–65.

B. The circuit court replaced *Janus*'s proof of waiver requirement with proof of contract through a misapplication of *Cohen v. Cowles Media Co*.

In *Bennett*, the Seventh Circuit followed the reasoning adopted by the Third and Ninth Circuits to uphold the extraction of dues from former members, citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). *Bennett*, 991 F.3d at 731. In *Cohen*, newspaper publishers broke confidentiality agreements with a source who lost his job as a result. In response to a promissory estoppel-based theory, the publishers asserted that publication of the source's name was protected by the First Amendment. The *Cohen* Court disagreed, holding that the First Amendment does not create "a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen*, 501 U.S. at 672. Key to the Court's reasoning was the fact that the state's promissory estoppel doctrine "is a law of general applicability" that did not "target or single out the press." *Id.* at 670. Instead, it "is generally applicable to the daily transactions" of all the state's citizens. *Id.*

Cohen has little relevance to the facts in this case, however. First, there was no issue of waiver by the

newspaper publishers in *Cohen*. Furthermore, the relationship between unions, government and public-sector workers are the subject of statutes with very specific focus, not laws of general applicability. They involve the government, not purely private conduct. A section within the Illinois statutes, 115 Ill. Comp. Stat. § 5/11.1, part of the extensive Illinois Educational Labor Relations Act, 115 Ill. Comp. Stat. § 5/1 et seq., expressly authorizes government entities and public-sector unions to restrict workers' ability to stop paying union dues. Unions themselves are "basically a creation of statute, endowed with statutory rights and obligations for the purpose of performing, as a sort of governmental agency, certain specific aims of governmental policy." Jan K. Wanczycki, *Union Dues and Political Contributions Great Britain, United States, Canada—A Comparison*, Relations Industrielles/ Industrial Relations, Vol. 21, No. 2 (Apr. 1966), at 200–01. An authorization by workers to have the government deduct their paychecks for the benefit of a public-sector union is hardly a private agreement.

The circuit court thus replaced *Janus*'s requirement of clear and compelling evidence of waiver with the existence of a contract. This focus on the contract was improper. The existence of a membership agreement authorizing the deduction of dues does not establish that the public-sector workers knowingly relinquished their rights.

Furthermore, under the Seventh Circuit's framework, unions will retain control over workers' rights—the same group who had impinged workers' rights

repeatedly and triggered a slew of litigation in the years after *Abood*. In fact, cases have emerged where the signatures on membership agreements were allegedly forged. *See Amicus* Br. for the Goldwater Institute et al., pp. 5–9, *Belgau v. Inslee*, No. 20-1120 (Mar. 18, 2021). By allowing unions to set onerous opt-out terms with union members, the circuit courts have revived the potential for "practical problems and abuse" that *Janus* sought to correct.

II. The retroactive application of judgments means the membership agreement did not dispel the need for proof of Petitioners' knowing and intelligent waiver of their rights under *Janus*.

"The strong presumption is that statements of law in judgments that announce new rules or overturn old ones apply to conduct predating that judgment." Richard S. Kay, "*Retroactivity and Prospectivity of Judgments in American Law*," 62 Am. J. Comp. L. Supp. 37, 38 (2014). As held in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993),

> When 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. . . .

Id. at 97.

Professors William Baude and Eugene Volokh anticipated some of the issues for unions after *Janus* in *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 201–03 (2018) and concluded it was likely unions could be sued under 42 U.S.C. § 1983 for agency fees collected before *Janus*. "Of course unions will have to change their future behavior, but *Janus* may also lead to liability *now* for money they collected *last year*." *Id.* at 201. Their theory for union liability after *Janus* has three elements. First, the Court's decisions have retroactive application under *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Second, under *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), state actors, for purposes of Section 1983 claims, can be both state officials and those who are significantly aided by them. The private debt collectors in *Lugar* are analogous to public-sector unions collecting fees. "The state statutes authorizing the collection of agency fees are unconstitutional state action, just as in *Lugar*. And the unions 'invoked the aid of state officials' to collect those fees, just as in *Lugar*." Baude & Volokh, at 201 (footnotes omitted). Third, unions are not granted the qualified immunity defense available in Section 1983 case for government defendants. *Id.* at 202.

But the retroactivity of *Janus* should require proof of waiver not just for agency fees but for union dues as well. Public employees have a right not to subsidize union speech. *Janus*, 138 S. Ct. at 2486. That right is violated if dues or fees are taken without clear and compelling evidence that public employees waived that right. *Id.* Holding workers to short opt-out windows

in membership agreements executed before *Janus* is unfair. Not only are they held to a lower standard, proof of contract, not proof of waiver, it places them in an impossible situation. How can someone knowingly waive a constitutional right before the Supreme Court rules that the right exists?

According to Professor Kay, the principle of retroactivity arose in federal civil cases in part because of "the inequity of making the applicability of a rule turn solely on which litigant happened to reach the Court first." Kay, at 49. Addressing the unfairness of this policy, Justice Harlan wrote, "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review." *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting). Many public-sector workers challenged the *Abood* standard over the years and it would be unfair to apply it only to Mr. Janus and not the Petitioners.

It should be noted that this principle of retroactivity applies to judgments and not legislation. The Seventh Circuit cited Williston on Contracts and *Fla. E. Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1129–30 (7th Cir. 1994), for the proposition that "the legal framework that existed at the time of a contract's execution must bear on its construction" and that "a subsequent change in the law cannot retrospectively alter the parties' agreement." *Bennett*, 991 F.3d at 731. The

Seventh Circuit's reliance on these authorities in an attempt to hold the former union members to their membership agreements was misplaced.

Addressing the difference between retroactivity of judgments and legislation, Professor Kay explained, "This seeming inconsistency derives from the 'declaratory' theory of adjudication—legislatures make new law but courts only find and declare pre-existing law." Kay, at 38. Although state courts may limit retroactivity in light of the likely reliance on the prior state of the law as occurs in contract and property, this is distinct from federal courts' interpretation of the Constitution. *See* Kay, at 41. As Justice Scalia wrote, "Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment).

Thus, workers who became union members and signed authorizations for payroll deductions before the Court's ruling in *Janus* could not have given true consent if they were unaware of their rights. Certainly, the Petitioners withdrew their consent when they resigned from the union in the wake of *Janus*. To hold former members to a contract that impinges their First Amendment rights after the *Janus* Court so vehemently denounced the compulsion of speech does not make sense.

Ultimately, holding workers to the contract after they resign from the union until a short escape window is met is hard to justify. Changing payroll deductions does not impose so heavy an administrative burden that it can only be done a few weeks a year. The short escape window imposed on the Petitioners by contract and sanctioned by statute appears to be nothing more than a way to maximize dues out of unwitting workers.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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