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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF ALASKA, ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Alaska, Alabama, Arizona, Arkansas, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia.[1] In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that state employees have a First Amendment right not to be compelled to subsidize union speech. That is because forcing individuals to subsidize speech with which they disagree violates 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). Unions thus cannot extract dues unless there is "clear and compelling" evidence that the state employee waived his or her First Amendment rights. *Janus*, 138 S. Ct. at 2486.

But *Janus* has been ignored. Across the country public-sector unions have resisted *Janus*'s instructions and devised new ways to compel state employees

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[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for Petitioners and Respondent Board of Education of the City of Chicago received notice of the intent of amici curiae to file this brief on July 3, 2021, and counsel of record for Respondent Chicago Teachers Union received notice on July 14, 2021. All parties consent to the filing of this brief.

to subsidize union speech. Unions place onerous terms on dues forms that prohibit state employees from opting out of paying dues except during narrow (and undisclosed) windows during the year. Unions refuse to inform state employees that they have a First Amendment right not to pay union dues. And unions refuse to stop collecting dues despite unequivocal employee demands. The result is that tens of thousands of state employees across the country are having dues deducted to subsidize union speech without any evidence that they waived their First Amendment rights. *See generally First Amendment Rights and Union Dues Deductions and Fees*, Off. of the Att'y Gen., 2019 WL 4134284 (Alaska A.G. Aug. 27, 2019) ("Alaska AG Op.").

This case implicates these precise concerns. Respondents—the Chicago Board of Education ("Board") and the Chicago Teachers Union ("CTU"), a public-sector union—took dues from Petitioners' wages without proof that the employees waived their First Amendment right not to subsidize the union's speech. The Seventh Circuit's decision upholding their actions warrants this Court's review.

SUMMARY OF THE ARGUMENT

The Court should grant certiorari because the decision below squarely conflicts with *Janus v. AFSCME, Council 31*. This Court in *Janus* gave clear instructions to public-sector unions and States: No employee can be forced to subsidize union speech—through "an agency fee [or] any other payment"—

unless the employee has waived his or her First Amendment rights. 138 S. Ct. at 2486. That waiver must be "freely given and shown by 'clear and compelling' evidence," and such a waiver "cannot be presumed." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality op.)). "Unless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met." *Id.*

Yet the Seventh Circuit ignored these instructions. Following its decision in *Bennett v. Council 31 of the AFSCME, AFL-CIO*, 991 F.3d 724 (7th Cir. 2021), the court of appeals summarily affirmed the district court's decision forcing Petitioners to subsidize union speech. App. 2-3. According to *Bennett*, *Janus*'s protections apply only to *some* state employees and only to *certain types* of deductions—specifically, "nonmember[s]" who were forced to pay "'agency fees.'" App. 33-34. Under *Bennett*'s reasoning, all that a State or union needs to deduct union dues is *some* evidence that at some point in the past the employee joined the union or promised to pay dues. App. 31-34.

That cannot be right. When constitutional rights are at stake, this Court requires "clear and compelling" evidence of waiver precisely to protect individuals from unwittingly relinquishing their fundamental freedoms. This is especially true of purported waivers of First Amendment rights, as the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publ'g*, 388 U.S. at 145

(plurality op.) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)). The Seventh Circuit's decision leaves state employees defenseless to stop compelled dues deductions that subsidize speech with which they disagree.

This erroneous interpretation of *Janus* is not unanimously shared. The States of Alaska, Texas, and Indiana, and a member of the U.S. Federal Labor Relations Authority have all recognized that *Janus*'s protections apply to all employees and to all types of compelled financial support to public-sector unions. These legal opinions are sound and directly refute the Seventh Circuit's constrained interpretation of *Janus*. They also reflect differing legal views on a profound constitutional question of exceptional importance to both States and public employees. These opinions are right, and the Seventh Circuit's is wrong. The Court should grant certiorari.

ARGUMENT

I. The Seventh Circuit improperly limited the First Amendment's protections to "nonmembers" paying "agency fees."

The First Amendment protects "'both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The right to "eschew association for expressive purposes is likewise protected." *Id.*; *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate."). Forcing

individuals to "mouth support for views they find objectionable violates [these] cardinal constitutional command[s]." *Janus*, 138 S. Ct. at 2463.

"Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns." *Id.* at 2464. As Thomas Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Id.* (cleaned up). This Court has therefore repeatedly recognized that a "'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Id.* (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310-11 (2012)).

That does not, of course, mean that state employees cannot financially support a union. First Amendment rights, like most constitutional rights, can be waived. But there is a "presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (citation omitted) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). That is because "[c]ourts 'do not presume acquiescence in the loss of fundamental rights.'" *Knox*, 567 U.S. at 312 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). This is

especially true when it comes to the waiver of First Amendment freedoms. Courts will not find a waiver of First Amendment rights "in circumstances which fall short of being clear and compelling" because the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publ'g*, 388 U.S. at 145 (plurality op.) (quoting *Palko*, 302 U.S. at 327).

In *Janus*, this Court made clear that these longstanding waiver rules apply no differently in the context of compelled subsidies to public sector unions. *Janus*, 138 S. Ct. at 2486. In laying down a roadmap for future cases, this Court relied on a long list of its prior decisions addressing the waiver of constitutional rights. Going forward, this Court warned, public employers, like the Board here, may not deduct "an agency fee *nor any other payment*" unless "the employee affirmatively consents to pay." *Id.* (emphasis added). The Court stressed that employees must waive their First Amendment rights, and "such a waiver cannot be presumed." *Id.* (citing *Zerbst*, 304 U.S. at 464; *Knox*, 567 U.S. at 312-13). Rather, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 U.S. at 145 (plurality op.)). Accordingly, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met." *Id.*

The Seventh Circuit's analysis thus should have been straightforward. Petitioners informed the Board that they objected to dues deduction, but the

union believed that the employees had already agreed to pay the dues. App. 7-8. The Seventh Circuit should have reversed and held that the Board could not deduct dues from Petitioners unless there was "'clear and compelling' evidence" that the employees had waived their First Amendment rights. *Janus*, 138 S. Ct. at 2486.

But the Seventh Circuit did not do that. Instead, it summarily affirmed the trial court, following its decision in *Bennett*. App. 2-3. According to the Seventh Circuit, a public employer can deduct union dues from employees even if it has no "clear and compelling" evidence that the employee waived his or her First Amendment rights. App. 31-34. Evidence of prior membership in a union is enough. *Id.* That is because, the Seventh Circuit believed, this Court in *Janus* had narrowly limited its holding and corresponding constitutional protections to only "nonmember[s]" forced to pay "'agency fees.'" App. 31-34. This is wrong.

While *Janus* involved a nonmember, that decision placed prohibitions on public employers generally and has clear application to members and nonmembers alike. As it often does, this Court "laid down broad principles" dictating States' obligations when deducting dues and fees from all employees. *Agcaoili v. Gustafson*, 870 F.2d 462, 463 (9th Cir. 1989). This Court made clear that state "employees" cannot be compelled to subsidize the speech of a union with which they disagree. *Janus*, 138 S. Ct. at 2486. Although "employees" can waive this First Amendment

right, "such a waiver cannot be presumed," and it must be shown by "'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 U.S. at 145). The outcome in *Janus* was simply an application of these broader principles.

The Seventh Circuit, however, "'strip[ped] content from principle by confining the Supreme Court's holding[] to the precise facts before [it].'" *Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994). Under the Seventh Circuit's decision, the government can take money from employees' paychecks to give to a union—and thus force the employees to subsidize the speech of a private actor with whom they may disagree—without the employees ever knowingly and voluntarily waiving their First Amendment rights. That directly contradicts the reasoning of *Janus*.[2]

Even assuming the "clear and compelling" waiver standard is limited to nonmembers (which it is not), the Seventh Circuit still should have applied it to Petitioners. Petitioners *were not members* when they tried to stop their dues deduction. After the *Janus* decision, Petitioners "resign[ed] their membership in CTU effective immediately," and the union "accepted [their] resignations." App. 7-8. But CTU insisted that the Board's deduction of union dues would

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[2] A State, of course, "has the right to 'speak for itself' . . . and to select the views that it wants to express." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (citation omitted). But that is not what the Board has done here.

continue until September 1, 2020, because of the union's August escape-period restriction. App. 8.

The Seventh Circuit believed that *Janus*'s protections did not apply because Petitioners had already "voluntarily agreed to pay" by signing the union's dues deduction form. App. 2. But this reasoning is circular. It assumes that constitutional rights are automatically waived if they are relinquished through a contract. That is wrong. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (no waiver of constitutional rights where "[t]here was no bargaining over contractual terms between the parties," the parties were not "equal in bargaining power," and the purported waiver was on a "printed part of a form sales contract and a necessary condition of the sale"). Indeed, in *Janus*, this Court did not hold that agency fees could be deducted from nonmembers' paychecks if there is some indication that the employee agreed to it. To the contrary, the Court held that when nonmembers "are waiving their First Amendment rights," such a waiver "cannot be presumed," and the waiver must be "shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145 (plurality op.)); *see also* Alaska AG Op., 2019 WL 4134284, at *5-7 (describing the contours of the "clear and compelling" waiver standard).

The Seventh Circuit opinion nullifies these constitutional requirements for waiver. The constitution requires evidence that Petitioners, among other things, "knowingly" waived their First Amendment rights under *Janus*, but no such evidence exists in

this case. *See* App. 16-17. Nor could this evidence exist, since Petitioners signed their agreements to pay dues before *Janus* was issued in June 2018. *See, e.g.*, *Curtis Publ'g Co.*, 388 U.S. at 142-45 (plurality op.) (finding that a magazine publisher did not knowingly waive a First Amendment defense because the publisher could not have "waived a 'known right' before it was aware of the [Supreme Court] decision" recognizing the defense).

As Petitioners note, many union escape-periods can be as short as ten days each year. *See, e.g.*, *Woods v. Alaska State Emps. Ass'n*, 496 F. Supp. 3d 1365, 1368 (D. Alaska 2020). Indeed, some dues deduction forms require an opt-out *precisely* during this ten-day period, which is different for each employee. For example, one form in Alaska requires the dues authorization to be "'irrevocable . . . for a period of one year from the date of execution . . . and for year to year thereafter'" unless the employee gives "'the Employer and the Union written notice of revocation *not less than ten (10) days and not more than twenty (20) days* before the end of any yearly period.'" *Id.* (emphasis added). These draconian escape-periods have serious consequences. Employees subject to these types of restrictions (like Petitioners here) are "powerless to revoke the waiver of their right against compelled speech" if they later disagree with the union's speech or lobbying activities. Alaska AG Op., 2019 WL 4134284, at *8. In the Seventh Circuit (and other circuits), *see* Pet. 7, employees will be forced to "see their wages docked each pay period for the rest of the year

to subsidize a message they do not support." Alaska AG Op., 2019 WL 4134284, at *8.

At bottom, freedoms of speech and association are critical to our democratic form of government, the search for truth, and the "individual freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-634, 637 (1943); *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982). Given the importance of these rights, this Court has long refused "to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publ'g*, 388 U.S. at 145 (plurality op.). The Seventh Circuit's opinion disregarded these fundamental principles.

II. The Seventh Circuit's opinion conflicts with multiple States' interpretations of *Janus*.

The Seventh Circuit's opinion also conflicts with the decisions of State Attorneys General, as well as a member of the U.S. Federal Labor Relations Authority, who have issued legal opinions in line with Petitioners' arguments here.

The State of Alaska. In August 2019, Alaska's Attorney General, in response to a request from Governor Mike Dunleavy, issued a legal opinion concluding that the State of Alaska's "payroll deduction process is constitutionally untenable under *Janus*." Alaska AG Op., 2019 WL 4134284, at *2. Although the plaintiff in *Janus* was a nonmember who was objecting to paying a union's agency fee, the Attorney General recognized that "the principle of the Court's

ruling . . . goes well beyond agency fees and non-members." *Id.* at *3. The Court in *Janus* held that the First Amendment prohibits public employers from forcing any employee to subsidize a union in any way, whether through an agency fee or otherwise. *Id.* at *3-4.

The Attorney General explained: "Members of a union have the same First Amendment rights against compelled speech that non-members have, and may object to having a portion of their wages deducted from their paychecks to subsidize particular speech by the union (even if they had previously consented)." *Id.* at *3. Thus, "the State has no more authority to deduct union dues from one employee's paycheck than it has to deduct some lesser fee or voluntary non-dues payment from another's." *Id.* In both cases, "the State can only deduct monies from an employee's wages if the employee provides affirmative consent." *Id.* That was why, as the Attorney General explained, "the Court in *Janus* did not distinguish between members and non-members of a union when holding that '[u]nless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met.'" *Id.* (quoting *Janus*, 138 S. Ct. at 2486) (emphasis in original).

Following Supreme Court guidance governing the waiver of constitutional rights in other contexts, the Alaska Attorney General concluded that an employee's consent to have money deducted from his paycheck was constitutionally valid only if it met three requirements. The employee's consent must be:

(1) "free from coercion or improper inducement"; (2) "'knowing, intelligent . . . [and] done with sufficient awareness of the relevant circumstances and likely consequences'"; and (3) "reasonably contemporaneous." *Id.* at *5-6 (citation omitted).

In turn, the Attorney General identified three basic problems with the State of Alaska's payroll deduction process. First, because unions design the form by which an employee authorizes the State to deduct his pay, the State could not "guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the unions' speech." *Id.* at *7 (emphasis in original). Nor could the State ensure that its employees knew the consequences of their decision to waive their First Amendment rights. *Id.*

Second, because unions control the environment in which an employee is asked to authorize a payroll deduction, the State could not ensure that an employee's authorization is "'freely given.'" *Id.* For example, some collective bargaining agreements require new employees to report to the union office within a certain period of time so that a union representative can ask the new employee to join the union and authorize the deduction of union dues and fees from his pay. *Id.* Because this process is essentially a "black box," the State had no way of knowing whether the signed authorization form is "'the product of a free and deliberate choice rather than coercion or improper inducement.'" *Id.* (citation omitted).

Third, because unions often add specific terms to an employee's payroll deduction authorization requiring the payroll deduction to be irrevocable for up to twelve months, an employee is often "powerless to revoke the waiver of [his] right against compelled speech" if he later disagrees with the union's speech or lobbying activities. *Id.* at *8. This is especially problematic for new employees, who likely have no idea "what the union is going to say with his or her money or what platform or candidates a union might promote during that time." *Id.* An employee, as a consequence, may be forced to "see [his] wages docked each pay period for the rest of the year to subsidize a message [he does] not support." *Id.*

To remedy these First Amendment problems, the Attorney General recommended that the State implement a new payroll deduction process to comply with *Janus*. *See id.* Specifically, the Attorney General recommended that the State have employees provide their consent directly to the State, instead of allowing unions to control the very conditions in which they elicit an employee's consent. *Id.* The Attorney General recommended that the State implement and maintain an online system and draft new written consent forms. *Id.* He also recommended that the State allow its employees to regularly have the opportunity to opt-in or opt-out of paying union dues. *Id.* at *8-9. This process would ensure that each employee's consent is up to date and that no employee is forced to subsidize speech with which he or she disagrees. *Id.*

The State of Texas. After the Alaska Attorney General issued his opinion, the Texas Attorney General issued a legal opinion reaching similar conclusions. *See Application of the United States Supreme Court's Janus Decision to Public Employee Payroll Deductions for Employee Organization Membership Fees and Dues*, Att'y Gen. of Tex., Op. No. KP-0310, 2020 WL 7237859 (Tex. A.G. May 31, 2020). According to the Texas Attorney General, after *Janus*, "a governmental entity may not deduct funds from an employee's wages to provide payment to a union unless the employee consents, by clear and compelling evidence, to the governmental body deducting those fees." *Id.* at *2. The Texas Attorney General recommended that the State create a system by which "employee[s], and not an employee organization, directly transmit to an employer authorization of the withholding" to ensure the employee's consent was "voluntary." *Id.* The Texas Attorney General also recommended that the employer explicitly notify employees that they are waiving their First Amendment rights. *Id.*

The State of Indiana. The following month, the Indiana Attorney General released a similar opinion. *See Payroll Deductions for Public Sector Employees*, Off. of the Att'y Gen., Op. No. 2020-5, 2020 WL 4209604 (Ind. A.G. June 17, 2020). According to the Indiana Attorney General, after *Janus*, "[t]o the extent the State of Indiana or its political subdivisions collect union dues from its employees, they must provide adequate notice of their employees' First Amendment rights against compelled speech in line with the

requirements of *Janus*." *Id.* at *1. Such notice "must advise employees of their First Amendment rights against compelled speech and must show, by clear and compelling evidence, that an employee has voluntarily, knowingly, and intelligently waived his or her First Amendment rights and consented to a deduction from his or her wages." *Id.* Finally, "to be constitutionally valid, a waiver, or opt-in procedure, must be obtained from an employee annually." *Id.*

The Federal Labor Relations Authority. In addition to these States, a member of the U.S. Federal Labor Relations Authority has reached similar conclusions. *See Decision on Request for General Statement of Policy or Guidance*, Off. of Pers. Mgmt. (Petitioner), 71 F.L.R.A. 571, 574-75 (Feb. 14, 2020) (Abbott, concurring). The Federal Labor Relations Authority was recently asked by the Office of Personnel Management to decide whether *Janus* required federal agencies to, upon receiving an employee's request to revoke a previously authorized union-dues assignment, process the request as soon as administratively feasible. *Id.* at 571. Although the FLRA ultimately did not reach the issue, one of its members, James Abbott, wrote separately to provide his views on *Janus*. He explained that if *Janus* did not apply to such a situation, it would mean that "once a Federal employee elects to authorize dues withholding, the employee loses any and all rights to determine when, how, and for what reasons the employee may stop those dues." *Id.* at 574. But the whole "theme of *Janus* is that an employee has the right to support, or to stop supporting, the union by paying, or to stop paying, dues." *Id.*

Thus, Member Abbott concluded, "restricting an employee's option to stop dues withholding—for whatever reason—to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights." *Id.* at 575.

These authorities demonstrate that the Seventh Circuit's opinion conflicts with *Janus* and the First Amendment principles that underlie the Court's decision. Petitioners here, like Mr. Janus, are entitled to the First Amendment's protections against compelled speech.

CONCLUSION

Amici respectfully request that this Court grant the petition for a writ of certiorari.

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