Case No. 21-1366

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LINDA HOEKMAN, et al.,

Plaintiff – Appellant

v.

EDUCATION MINNESOTA, et al.,

Defendants - Appellees

On Appeal from the United States District Court of Minnesota, No. 18-cv-01686

BRIEF *AMICI CURIAE* OF FREEDOM FOUNDATION AND JOSEPH JOHNSON IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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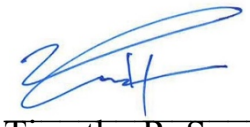
CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and Rule 26.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit, Freedom Foundation, a non-profit organized under the laws of Washington State, and Joseph Johnson, an individual, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.



Timothy R. Snowball

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Freedom Foundation (the Foundation) is a 501(c)(3) nonprofit, nonpartisan organization working to advance individual liberty, free enterprise, and limited, accountable government. To promote this mission, the Foundation regularly files *amicus curiae* briefs on First Amendment and compelled speech issues. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016). The Foundation works to protect the rights of union members and non-members alike, regularly assisting employees in understanding and exercising those rights. The Foundation is active in Minnesota and other states where public sector workers are forced to associate with unions against their will and has an interest in the Court's disposition of this case.

Joseph Johnson has been employed with the State of Minnesota as a Heavy Equipment Mechanic since 2008. On January 26, 2021, Mr. Johnson submitted a letter to AFSCME, Minnesota Council 5, in which he made clear that a previous authorization card did not represent his affirmative consent to the continued withdrawal of union dues, and he resigned his membership. His request was denied, and Minnesota and AFSCME have continued to deduct money for use in AFSCME's

[1] In accordance with Fed. R. App. P. 29, all parties to this appeal have consented to the filing of this *amici curiae* brief, and *Amici* affirm that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amici* made a monetary contribution to this brief's preparation or submission.

speech without his affirmative consent. As such, Mr. Johnson has an interest in the Court's disposition of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on one fundamental question: is a waiver of First Amendment rights necessary before public employers deduct union dues or fees from their employees' wages? The answer is yes.

In *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), the Supreme Court held that before any money can be taken for the purpose of funding union speech employees must affirmatively consent in the form of a valid waiver of their First Amendment rights, confirmed by "clear and compelling" evidence. *Id.* Not to be dissuaded from funding their favored political speech at all costs, however, public sector unions and their allies in government shifted their focus. Instead of overtly compelling speech through agency fee laws, forbidden by the holding in *Janus*, they shifted their focus to the supposed enforcement of union membership and dues authorization agreements. It does not matter that employees had signed dues deduction authorization cards before the Supreme Court issued *Janus*, that employees do not know their rights when they agree to pay dues, or that employees later resign membership and withdraw their consent. Government employers will keep seizing those employees' lawfully earned wages to fund unions political speech.[2] This interpretation of *Janus*, embraced by the district court below, strips it

[2] All public sector union speech is political speech, including collective bargaining. *Janus*, 138 S. Ct. at 2460.

of its precedential import and renders it a dead letter for the many public employees, including the Appellants in this case.

The decision of the district court should be reversed for two primary reasons. First, deduction schemes entirely controlled by unions with a direct pecuniary interest in seeing those payments continue violates the First Amendment rights of public workers. The First Amendment imposes special procedural requirements on public employers seizing union fees from non-members. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.12 (1986). Second, union membership agreements and dues authorizations are insufficient to waive First Amendment rights. The Supreme Court never intended to limit *Janus* to only non-members. Signing an agreement before the Court has even recognized the scope of a right cannot serve as a valid waiver because union agreements also lack all the required elements for effective waivers of constitutional rights. This includes the required judicial presumption against waiver, knowledge of the waiver, voluntariness, and timeliness. Finally, even if these agreements were valid waivers (they are not), they should be void as a matter of public policy, as they have the purpose and effect of waiving public workers' First Amendment rights without proper consent.

ARGUMENT

A. Deduction Schemes Entirely Controlled By Unions Violate the First Amendment

The First Amendment imposes special procedural requirements on public employers seizing union fees from non-members. *See Hudson*, 475 U.S. at 303 n.12 ("Procedural safeguards often have a special bite in the First Amendment context.").

Thus, the Supreme Court held that non-union employees who object to union fee deductions are "entitled to have [their] objections addressed in an expeditious, *fair*, and *objective* manner." *Id*. at 308 (emphasis added). This procedural safeguard is necessary to "minimize the risk" that non-union employees' money "might be used for impermissible purposes", such as spending nonmembers' money on political speech with which the employee disagrees. *Id*. at 309.

Government deductions of union fees from dissenting employees' lawfully earned wages is fraught with First Amendment infringements. *See Hudson*, 475 U.S. at 301 (exclusive representation and union fees from objecting employees infringe "an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."). Hence in Hudson, the U.S. Supreme Court prohibited union dues deduction schemes "entirely controlled by the Union, which is an interested party." 475 U.S. at 308. *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 v. SEIU, Local 1000*, 567 U.S. 298, 314-15 (2012). To impose such a requirement, employees must be "able at the time in question to make an informed choice…" *Id*. at 315.

If something as minimal as a union's special assessment, which was at issue in *Hudson*, is enough to trigger the need for a new opportunity to make that decision, certainly a paradigm-shifting case like *Janus* triggers the same or similar

requirement. Government wage seizure procedures used to deduct union fees from objecting non-member employees that are entirely controlled by the union, like the procedure at issue here, are not "fair" or "objective" and violate the First Amendment. Minnesota has devised a procedure whereby it seizes union fees from the lawfully earned wages of non-union employees who have objected to subsidizing a union's political speech and sends those monies to the union for this very purpose. The state imposes this procedure on non-consenting employees and subjects them to significant infringements on their constitutional rights. In order to "minimize the risk" that employees might be compelled to subsidize union speech a state may not facilitate such seizures using a procedure controlled entirely by a union. *Hudson*, 475 U.S. at 301-302.

It makes no substantive difference that the previous agency fee provision was removed with the *Janus* decision. First, at the time Appellants entered into their membership agreements the agency fee provisions were in full effect and they were faced with the unconstitutional choice to either pay those fees against their will or agreement to join and pay full membership dues. Second, the exclusive representation regime still applicable to the Appellants is itself a "serious impingement on First Amendment rights." *Janus*, 138 S. Ct. at 2464. The procedure for deducting dues and fees from non-consenting employees such as the Appellants is entirely controlled by the union and is, therefore, unconstitutional.

B. Union Membership Agreements are Insufficient to Waive First Amendment Rights

1. The First Amendment protects non-members and members.

Asserting that *Janus* does not apply to union members who signed authorizations prior to the *Janus* decision, or who have since resigned, simply begs the question of whether a waiver is necessary *before* money is taken from their lawfully earned wages for the purposes of funding union speech. It is.

Under Appellee's reasoning, *any* indication that a public employee may have at some point become a union member in the past would be sufficient to meet *Janus's* requirements. But this cannot be the case. The right to refrain from union activity may prohibit agreements that are permissible under general contract law principles. *Pattern Makers' League of N. Am., AFL-CIO v. N.L.R.B*., 473 U.S. 95, 113 (1985) (many rules, "although valid under the common law of associations, run afoul" of the right to refrain from union activity). Union membership by itself does not demonstrate an employee knowingly waived her right against compelled speech or, if an employee agreed to union membership prior to *Janus* in the shadow of an agency fee regime, that such a decision was truly voluntary.

In *Janus*, the Court begins with the assumption that the "compelled subsidization of private speech seriously impinges on First Amendment rights," 138 S. Ct. at 2464. Finding no justifications for this infringement in the public sector, the Court concludes that an employer can deduct union payments from an employee's wages only if that employee "affirmatively consents" by waiving his or her First Amendment right against compelled speech. *Id*. at 2486. While the Court declined

lay down a specific framework for how the "clear and compelling" standard is best confirmed, there is no indication this holding was intended to be limited by previous union membership agreements. Especially those agreements signed before the Court decided *Janus*. *Id*. (stressing that public employers may not deduct "an agency fee *nor any other payment*" unless "the employee affirmatively consents to pay.") (emphasis added).

But the district court below contends that the First Amendment rights affirmed in *Janus* do not apply to individuals who previously signed union membership agreements. This reasoning is circular. Members' money is being deducted and given to the union based on prior authorizations, a waiver of First Amendment rights is required in order for this scheme to be constitutional, therefore the prior agreements must be sufficient waivers. This is a *non sequitur*. Where a right is not yet judicially recognized, it cannot knowingly be waived prior to the recognition. *Curtis Publ'g Co. v Butts*, 388 U.S. 130, 145 (1967); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (waivers of constitutional rights must be made with full understanding of the consequences); *Hawknet, Ltd. V. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2nd Cir. 2009) (explaining that "the doctrine of waiver demands conscientiousness, not clairvoyance, from parties," and a party will not be held to have waived newly recognized rights); *GenCorp, Inc. v. Olin Corp*., 477 F.3d 368, 374 (6th Cir. 2007) ("The intervening-change-in law exception to our normal waiver rules, by contrast, exists to protect those who, despite due diligence, fail to prophesy a reversal of

established adverse precedent."); *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981).

When the Supreme Court decides a rule of federal law, as it did in *Janus*, "that rule is the controlling interpretation of federal law and must be given full retroactive effect…regardless of whether such events predate or postdate [the] announcement of the rule." *Harper v. Virginia Dep't of Tax'n,* 509 U.S. 86, 97 (1993). The First Amendment rights affirmed in *Janus* apply to the Appellants with as much force as if they had never signed any agreements in the first place. Minnesota has no more authority to deduct union dues from a non-consenting employee's lawfully earned wages than it does to take an employee's money and send it to a political party. The First Amendment rights at stake are the same.

Instead, Appellees and public unions across the country attempt to justify their continuing violation of the First Amendment by relying on a single sentence contained in a footnote in *Janus* which stated that "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *See Janus*, 138 S. Ct. at 2485, n.27. Rather than interpret this simple passage to mean that exclusive representation regimes could continue undisturbed, the district court's decision below means that union membership, rather than a waiver, is a catch-all for the obligation of objecting nonmembers to continue paying any kind of nonmember fee to a union for *any* length of time. In other words, under Appellee's interpretation of *Janus*, an employee's

one-time decision to join a union strips him or her of any First Amendment protection for as long as the union or state law requires, without limitation.

2. Union contracts lack the necessary requirements for effective waiver.

In *Janus* the Court cited to a long line of decisions detailing the requirements for a valid waiver of First Amendment rights. *See Janus*, 138 S. Ct. at 2486 (citing *Knox*, 567 U.S. at 312-13; *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *Curtis Publ'g Co*., 388 U.S. at 145; *Johnson v Zerbst*, 304 U.S. 458, 464 (1938)). *See also Opinion Letter of Atty Gen. of Alaska Michael J. Dunleavy*, 2019 WL 4134284, at *5-7 (Aug. 27, 2019) (describing requirements of the "clear and compelling" waiver standard). Boilerplate union membership agreements fall far short of these standards.

First, a waiver of the First Amendment right against compelled speech "cannot be presumed." *Janus*, 138 S. Ct. at 2486. Instead, courts are required to "indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Sav. 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); *see also Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Here, continuing to deduct union dues, even after an employee has made clear that they do not consent, is to make this very impermissible presumption.

Second, the waiver of First Amendment rights must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely

consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A waiver is only knowing and intelligent when an individual has "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). As noted above, individuals that entered into membership agreements before *Janus* could not possibly have been aware they were waiving a First Amendment right, because the Supreme Court itself had not yet articulated it. Relatedly, individuals entering into membership agreements post-*Janus* which do not so much as mention the First Amendment, or the effect of the purported waiver, did not make a knowing and intelligent waiver. At the very least pre-*Janus* agreements are not "clear and convincing" evidence that the signer had knowledge of the effect of the agreement.

Third, valid constitutional waivers must be voluntary. *See Janus*, 138 S. Ct. at 2486 ("the waiver must be freely given"); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Voluntary waivers are "the product of a free and deliberate choice rather than coercion or improper inducement." *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007). Here, Appellants could not have voluntarily waived their First Amendment rights when, at the time they did so, they were presented with an unconstitutional choice: pay full union dues as a member or pay the union agency fees as a non-member. This lack of choice rendered the purported waiver non-voluntary and not valid.

Fourth and last, waivers of constitutional rights must also be current. Thus, in order to prevent waivers from becoming "stale," courts have recognized that timeliness must considered in assessing whether a waiver is valid. *See Knox v Service Employees International Union, Local 1000*, 567 U.S. at 315-316; *Miranda v. Arizona*, 384 U.S. 436, 467-72 (1966); *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010). Afterall, the circumstances that lead an individual to waive a fundamental right are not static and may change with changed circumstances. *See Knox*, 567 U.S. at 315. Purported waivers affected through union agreements entered into one, two, three or more years ago, which automatically renew without any participation by the employee, are not current. A union may change its bargaining position, or take controversial public positions, but an employee must be able to assert their constitutional rights in response to those actions.

3. Union membership agreements are void as a matter of public policy.

Even if the Court is persuaded that this case concerns the interpretation of private contracts rather than burdens placed on the exercise of First Amendment rights or that the membership agreements here constitute waivers, "[t]here are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386 (2011). A contract that "contravenes some recognizable public policy is void." *Kelley as Tr. For PCI Liquidating Tr. v. Boosalis*, 974 F.3d 884, 894 (8th Cir. 2020); see also *United States v. Mezzanatto*, 513 U.S. 196, 215 (1995) (waivers that contravene public policy also void).

A contract is void against public policy if "it is injurious to the interests of the public." *Id*. A court's finding that a contract violates public policy may be rooted in statutes, or in the state or federal Constitution. *Muschany v. United States*, 324 U.S. 49, 66 (1945) ("[T]here must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to [public] policy."). Examples of contracts held to be void for public policy purposes include agreements that encouraged violations of federal tax laws, *McBrearty v. U.S. Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982), that required another's permission before conferring with a regulatory agency, *McKesson Corp. v. Grisham*, 2015 WL 9238962, at *10 (W.D. Ark. Dec. 17, 2015), and coercive or burdensome forum selection clauses, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 601 (1991) (Stevens, J., dissenting).

The union agreements here are also void for public policy reasons.

The sole purpose of the irrevocability provisions in the membership agreements is to compel objecting, non-union employees to fund a union's political speech against their will. Regardless of whether this Court applies contract law or waiver law, the circumstances under which the membership agreements were signed are, at best, suspect and, at worst, coercive. Obviously, the Union knew about *Janus* and attempted to leverage compelled agency fees as long as it could until the Supreme Court decided *Janus* in an attempt to prevent employees from exercising their newly recognized rights after *Janus*. There is no evidence the union made any attempt to inform employees of their rights. Rather, the Union, together with the

public employer, worked to trick employees into signing away rights employees did not know they would soon have.

Unions are supposed to protect the interests of all the employees it represents in the bargaining unit, members, and nonmembers. That duty is concomitant with the privilege of exclusive representation. Here, unions clearly abused at that privilege. The agreements are as void as the consciences of the union executives who orchestrated this plan.

CONCLUSION

As summed up by Thomas Jefferson: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."[3] At bottom, the freedom of speech is 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). Given the importance of these rights, the Supreme 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. The decision of the district court should be reversed.

Dated: April 16, 2021.

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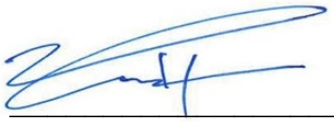
[3] Thomas Jefferson, *Virginia Statute for Religious Freedom* (June 18, 1779).

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 3319 words and 281 lines, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).



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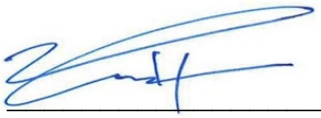
CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2021, I electronically filed the foregoing Amici with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.



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