No. 20-1621

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUSAN BENNETT,

Plaintiff-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO; AFSCME LOCAL 672; MOLINE-COLE VALLEY SCHOOL DISTRICT NO. 40; ATTORNEY GENERAL KWAME RAOUL, in his official capacity; and ANDREA R. WAINTROOB, chair, JUDY BIGGERT, GILBERT O'BRIEN JR., LYNNE SERED, and LARA SHAYNE, members, of the Illinois Educational Labor Relations Board, in their official capacities;

Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of Illinois
No. 19-cv-04087
Hon. Sara Darrow

AMICI CURIAE BRIEF OF JOANNE TROESCH, IFEOMA NKEMDI, AND HYDIE NANCE.

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DISCLOSURE STATEMENT

1. The full name of every party the undersigned attorney represents in the case: Amici Curiae Joanne Troesch, Ifeoma Nkemdi, and Hydie Nance.

2. The name of all law firms whose partners or associates have appeared on behalf of the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court: the National Right to Work Legal Defense Foundation.[1]

3. If the party or amicus is a corporation: not applicable.

Dated: June 2, 2020.

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[1] The National Right to Work Legal Defense Foundation is technically not a law firm, but a legal aid foundation.

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Dated: June 2, 2020.

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INTEREST OF THE AMICI

With the consent of all parties under Federal Rule of Appellate Procedure 29(a)(2),[3] Joanne Troesch, Ifeoma Nkemdi, and Hydie Nance submit this amici curiae brief because they have cases pending within this Circuit that concern an issue similar to that presented here: can the government and unions restrict individuals' exercise of their First Amendment right to stop subsidizing union speech under *Janus v. AFSCME Council 31,* 138 S. Ct. 2448 (2018)? Joanne Troesch and Ifeoma Nkemdi, who are Chicago public school employees, are challenging a policy that prohibits employees from exercising their rights under *Janus* except in August of each year. *See* Compl., ECF 1, *Troesch v. Chicago Teachers Union*, 20-cv-2682 (N.D. Ill. May 4, 2020). Hydie Nance, who is a personal assistant in Illinois' Home Services Program, is challenging a policy under which Illinois and a union will continue to seize union dues from objecting personal assistants unless they provide notice of their objection to the union with a photo identification. *See* Compl., ECF 1, *Nance v. SEIU Illinois Indiana*, 20-cv-3004 (N.D. Ill. May 20, 2020). The Court's answer to the first question presented here could affect the outcome of Troesch's, Nkemdi's, and Nance's cases. They thereby submit this amicus brief to urge the Court, in its decision here, to make clear that the government and unions cannot restrict employees' First Amendment right under *Janus* to stop paying for union speech unless the government can prove the employees' validly waived their constitutional right.

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[3] No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than the amicus curiae contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

In June 2018, the Supreme Court in *Janus* held that public employees have a First Amendment right not to subsidize union speech. 138 S. Ct. at 2486. Unfortunately, rather than move to comply with the Court's decision, many governmental bodies and unions are attempting to resist *Janus* by severely restricting when employees can exercise their right to stop subsidizing union speech. This includes the State of Illinois. In the wake of *Janus*, Illinois amended its laws to authorize ten-day "escape period" restrictions that prohibit public employees from stopping government dues deductions except during annual ten-day periods. *See* 5 Ill. Comp. Stat. § 315/6(f); 115 Ill. Comp. Stat. § 5/11.1(a).

Such government-enforced escape periods necessarily lead to government seizures of monies for union speech from nonmember employees who no longer want to subsidize that speech (and perhaps never wanted to at all). These government seizures violate employees' First Amendment rights under *Janus*, unless the government can prove the employees knowingly waived their rights.

Janus held that "[t]o be effective, [a] waiver must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2468 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)). The criteria for a constitutional waiver are well established: it must be knowingly, intelligently, and voluntarily made and its enforcement cannot be against public policy. *See infra* Section D.

As Appellant Susan Bennett argues, *Janus* requires proof of a waiver of First Amendment rights for the government to first take money from employees for union

speech. The amici agree, but further submit that such a waiver certainly is required for the government to continue to take money for union speech from employees who later object to subsidizing that speech. The Court should thereby hold that the government and unions cannot restrict employees' exercise of their First Amendment right to stop paying for union speech without proof the employees knowingly, intelligently, and voluntarily agreed to that restriction on their constitutional rights and that the enforcement of the restriction is not against public policy.

ARGUMENT

A. Illinois and Other Governments Are Resisting the Supreme Court's Holding in *Janus* by Severely Restricting When Employees Can Stop Government Dues Deductions.

1. In *Janus*, the Supreme Court held the First Amendment guarantees employees a right to not subsidize union speech. 138 S. Ct. at 2486. The Court also held that the government and unions will violate that right by deducting union dues or fees from employees' wages without proof that the employees waived their First Amendment to not subsidize union speech. *Id.*

Several states responded to the Supreme Court's decision (in some cases preemptively) by passing laws severely restricting when employees can exercise their right not to subsidize union speech. As noted, Illinois amended its laws to authorize annual escape period for stopping government dues deductions as short as ten days. *See* 5 Ill. Comp. Stat. § 315/6(f); 115 Ill. Comp. Stat. § 5/11.1(a). New Jersey passed a law that also permits employees to stop government dues deductions during only ten days per year. N.J. Stat. Ann. §52:14-15.9e. Delaware permits employees to stop the deduction

of union dues from their wages during a fifteen-day annual escape period or the period set on the authorization. Del. Code Ann. Tit. 19, § 1304. Hawaii authorizes a thirty-day annual escape period. Haw. Rev. Stat. Ann. § 89-4(c). Under these laws, employees can be prohibited from exercising their First Amendment rights under *Janus* for 335 to 355 days of the year.

Governmental bodies and unions also turned to enforcing similar or even worse independently adopted escape-period restrictions. This includes so-called "maintenance of membership" clauses that prohibit employees from stopping dues deductions for the term of a collective bargaining agreement, which often is three years or more. *See, e.g. Weyandt v. Pennsylvania State Corr. Officers Associations*, No. 1:19-CV-1018, 2019 WL 5191103, at *2 (M.D. Pa. Oct. 15, 2019). In Illinois, since before 2017, the Chicago Board of Education and Chicago Teachers Union have restricted educational employees, such as Amici Troesch and Nkemdi, from stopping dues deduction except in August of each year. *See* Compl. ¶¶ 14-17, ECF 1, *Troesch v. Chicago Teachers Union*, 20-cv-3004 (N.D. Ill. May 20, 2020). Likewise here, since 2017 or earlier, AFSCME Council 31 and the Board of Education of Moline-Coal Valley School District No. 40 ("School District") have been restricting when employees can stop dues deductions to a fifteen-day escape period. S.A. 19-20.

2. The School District and AFSCME enforced their escape period restriction against Appellant Bennett by continuing to seize union dues from her *after* she resigned her union membership and objected dues deductions in November 2018. *See* S.A. 22-25. Bennett challenges the constitutionality of those and other dues seizures.

Specifically, Bennett asserts that all union dues seized from her between April 26, 2017 (the statute of limitations) and July 29, 2019 (when the deductions stopped) violated her First Amendment rights. *See* App. Br. 6; S.A. 25. The Amici agree, but will focus here solely on the constitutionality of the involuntarily deductions that occurred because of the School District's and AFSCME's escape period restriction—i.e., the dues they seized from Bennett *after* she became a nonmember and objected to those dues deductions in November 2018.

B. Escape Period Restrictions Compel Dissenting Employees to Subsidize Union Speech in Violation of Their First Amendment Rights.

Escape period restrictions significantly abridge fundamental speech and associational rights guaranteed by the First Amendment. In *Janus*, the Supreme Court reiterated that "'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" 138 S. Ct. at 2463 (quoting *West Virginia Bd. Of Ed. V. Barnette*, 319 U.S. 624, 642 (1943)) (emphasis omitted). The Court also recognized that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command," and that "compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns." *Id.* at 2463–64. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* at 2464 (quoting A Bill for Establishing Religious Freedom, 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

The sole effect of government-enforced escape period restrictions is to compel employees who no longer want to contribute money to support union speech—or who never freely chose to do so in the first place—to subsidize that speech until they give notice during the escape period. An employee who, like Bennett, provides notice of her opposition to financially supporting a union outside the escape period will have union dues seized from her against her will. These government seizures of monies from nonconsenting employees violate their First Amendment rights under *Janus*.

In fact, for employees like Bennett or the Amici who object to subsidizing a union and its speech, an escape-period restriction is effectively a union shop requirement—i.e., a requirement that employees pay union dues or fees as a condition of their employment—with a limited duration. And union shop requirements are unconstitutional under *Janus*, 138 S. Ct. at 2486.

In anything, escape-period requirements are worse than the union shop requirement *Janus* held unconstitutional. Illinois' law required public employers to deduct from nonconsenting employees' wages *reduced* union fees that excluded monies used for some political purposes. *See Janus*, 138 S. Ct. at 2486. The School District and AFSCME's policy here is to deduct *full union dues*—which include monies used for partisan political purposes—from nonconsenting employees' wages unless and until an employee provides notice during a fifteen-day period that occurs only once a year. S.A. 3-4. For employees like Bennett who do not want to support AFSCME's expressive activities, this is more injurious to their speech rights than even the conduct *Janus* held unconstitutional.

C. Escape Period Restrictions Are Unconstitutional Unless Employees Waive Their First Amendment Right Not to Subsidize Union Speech.

1. It is clear that escape-period restrictions violate employees' First Amendment right not to subsidize union speech *unless* the government can prove the employees' waived that constitutional right. Without a valid waiver, the government's deduction of union dues from the employees' wages over their objections necessarily violates their First Amendment rights under *Janus*.

Not coincidently, the Supreme Court in *Janus* held that, to deduct payments for union speech from employees' wages, the government must have proof the employees waived their First Amendment right to not subsidize union speech:

> 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. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *Knox,* 567 U.S. 312–313. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S. Ct. at 2486. This waiver requirement makes sense. Given employees have a First Amendment right not to pay for union speech, it follows that employees must waive that right for the government to deduct payments from them for union speech, especially when the employees object to those deductions.

2. In the court below, AFSCME "argue[d] *Janus* held that *nonmembers* could no longer be constitutionally required to pay fair-share fees, but that it had no effect on union *members'* obligations to pay fees pursuant to voluntarily signed membership

agreements." S.A. 7. The argument is incorrect and, even if it were correct, it would be immaterial as for the School District's and AFSCME's seizures of dues from Bennett after she became a nonmember.

First, the notion that *Janus* does not apply to union members makes no sense. *Janus* construed the First Amendment. The First Amendment protects *all* citizens—union members and nonmembers alike. Under *Janus*, every man, woman, and child in the nation has a First Amendment right not to subsidize union speech. 138 S. Ct. at 2486. When the government seizes monies for a union from any individual, the controlling question is the same regardless of whether he or she is a union member: Did the individual knowingly waive his or her First Amendment right under *Janus* not to subsidize that union's speech?

Second, even if the First Amendment only protected nonmembers from being compelled to subsidize union speech (which would be illogical), it is immaterial because escape period restrictions cause government seizure of union dues from nonmembers. Illinois law provides that public employees can resign their union membership at any time, but that the government will continue to deduct dues from those nonmembers until the escape period is satisfied. 5 Ill. Comp. Stat. § 315/6(f); 115 Ill. Comp. Stat. § 5/11.1(a). Here, the parties stipulated that Bennett "could resign her [union] membership at any time." S.A. 21. She notified AFSCME and the School District of her

membership resignation in early November 2018. S.A. 22.[4] Yet union dues were deducted from her wages until July 31, 2019. S.A. 25. In other words, the School District and AFSCME seized union dues from Bennett after she objected and became a *non*-member of the union. Under any interpretation of *Janus*, these seizures of monies for union speech from an objecting *non*member violate the First Amendment absent proof of a valid waiver.

3. The district court implicitly concluded that a mere contract—rather than proof of a constitutional waiver—is enough to bind employees to escape-period restrictions on their First Amendment rights. S.A. 9-10. That defies *Janus*. The Supreme Court did not hold that a contract is sufficient for a state to seize payments for union speech from employees' wages. The Supreme Court held that "to be effective, the *waiver* must be freely given and shown by 'clear and compelling' evidence.'" 138 S. Ct. at 2486 (quoting *Curtis Publishing*, 388 U.S. at 145) (emphasis added).

The formation of a contract does not prove a waiver because the criteria for a waiver are different, greater, and controlled by federal law. *See Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988); *Sambo's Restaurants, Inc. v. Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981). The Third Circuit in *Erie Telecommunications* dis-

[4] The stipulated facts assert that AFSCME "accepted Plaintiff's resignation from union membership on March 4, 2019." S.A. 23. But given that Bennett had a right to resign at any time, when AFSCME deigned to "accept[ ]" her resignation is irrelevant. Her resignation of membership was effective when she provided notice of her intent to resign, which was in November 2018.

cussed at length "Supreme Court jurisprudence on the *contractual waiver* of a constitutional right." It found that "constitutional rights . . . may be *contractually waived* where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." 853 F.2d at 1096 (emphasis added). Put differently, "such waivers must be voluntary, knowing, and intelligent." *Id.* at 1094.

The Supreme Court, this Court, and other courts have repeatedly applied a wavier analysis to agreements in which a party allegedly surrendered constitutional rights. *See, e.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86, (1972); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 543 (7th Cir. 1978); *Democratic Nat'l Comm. V. Republican Nat'l Comm.* ("*DNC*"), 673 F.3d 192, 205-06 (3d Cir. 2012); *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993); *Erie Telecomms.*, 853 F.2d at 1094–95. For example, in *Leonard*, the Ninth Circuit addressed whether a city could enforce a union collective bargaining agreement's term in which the union agreed to restrictions on its First Amendment right to petition the government. 12 F.3d at 886–87. The court did not declare the restriction enforceable per se because it was in a contract. Rather, the court held the restriction enforceable only if the city could prove, by clear and convincing evidence, a knowing, voluntary, and intelligent waiver of First Amendment rights and that public policy permits enforcing that waiver. *Id.* at 889–91. The same analysis is required here to determine if the School District's and AFSCME's restriction on Bennett's First Amendment right to stop subsidizing AFSCME's speech is enforceable.

Cohen v. Cowles Media does not support the contrary proposition that the mere existence of a contract obviates any need for a waiver analysis. 501 U.S. 663 (1991). The plaintiff in *Cohen* did not allege a violation of his First Amendment rights. The plaintiff alleged a defendant newspaper breached a contract. 501 U.S. at 666. The *Cohen* Court found that enforcing a promissory estoppel law against the newspaper for breaching the contract did not violate the newspaper's First Amendment rights because the law was "a law of general applicability." 501 U.S. at 669–70. The Court did not address whether the newspaper waived its First Amendment rights because the state action *did not violate those rights in the first place*.[5]

Unlike in *Cohen*, Bennett does not allege a breach of contract. She alleges that the School District and AFSCME violated her First Amendment rights by seizing union dues from her without sufficient proof of her knowing consent (before November 2019) and then over her express objections (after November 2019). It is beyond peradventure government seizures of monies for union speech from nonconsenting employees violates their First Amendment right under *Janus* not to pay for that speech. The constitutionality of the School District's and AFSCME's seizures of monies from Bennett, and especially those seizures that took place after she resigned her membership in November 2019, thereby turn on whether Bennett waived her First Amendment right to not subsidize AFSCME's speech.

[5] The court of appeals, which found a violation and thus reached that question, held the newspaper waived its First Amendment rights in the confidentiality agreement *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 258 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991).

D. A Valid Waiver Requires Clear and Compelling Evidence That the Waiver Was Knowing, Intelligent, and Voluntary and That Its Enforcement Is Not Against Public Policy.

1. "I[t] is well settled that [constitutional] waivers must be voluntary, knowing, and intelligent . . . and must be established by 'clear' and 'compelling' evidence." *Erie Telecomms*, 853 F.2d at 1094 (citations omitted); *see, e.g.*, *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Kuhn*, 569 F.2d at 543-44. This standard applies to purported waivers of First Amendment rights. *See DNC*, 673 F.3d at 205; *Leonard*, 12 F.3d at 889. In *Curtis Publishing*, the Supreme Court applied a similar standard to find that an alleged waiver of First Amendment rights did not occur. 388 U.S. at 143–45.

Janus itself held that a "waiver must be freely given and shown by 'clear and compelling' evidence," 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145), and cited three cases that used similar formulations to evaluate waivers, *id.* (*Johnson*, 304 U.S. at 464; *Curtis Publ'g*, 388 U.S. at 145; *Col. Savings Bank*, 527 U.S. at 680–82). The Sixth Circuit used a similar standard—whether there was "'an intentional relinquishment or abandonment of a known right or privilege'"—to evaluate whether an employee waived her First Amendment right to challenge a compulsory union fee. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430 (6th Cir. 1990) (quoting *Johnson*, 304 U.S. at 464). In a case about compelled association with a political party, this Court held that standard would apply to the defendant State of Illinois' contention that public employees had waived their First Amendment right not to associate with a political party. *See Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561, 574 & n.25 (7th Cir. 1972).

Even where a purported waiver is knowingly, intelligently, and voluntarily made, it is not enforceable "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *see Leonard*, 12 F.3d at 890 (applying this standard to an alleged waiver of First Amendment rights); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991) (holding a purported waiver unenforceable under this standard).

These are exacting standards: "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Moran*, 475 U.S. at 421 n.32 (quoting *Johnson*, 304 U.S. at 464). Importantly, "the burden of proving the validity of a waiver of constitutional rights is always on the *government*." *Moran*, 475 U.S. at 421 (emphasis in the original).

2. As Bennett points out, *Janus* requires that the government have proof of such a waiver to *start* taking monies for union speech from employees' wages. 138 S. Ct. at 2486. But the government must also have proof of such a waiver to restrict when or how employees' can exercise their constitutional right to *stop* subsidizing union speech. Specifically, for the government to continue to seize monies for union speech from employees who provide notice outside of an escape period that they want to stop subsidizing that speech, the government must have clear and compelling evidence the employees knowingly, intelligently, and voluntarily waived their rights and that enforcement of the escape period is not against public policy.

The employee waiver necessary to first authorize government dues deductions is like that necessary to restrict when employees can stop those deductions, but with a crucial difference. Escape period restrictions can be so oppressive and burdensome to employee exercise of their First Amendment freedoms to be unenforceable even if the employee knowingly and intelligently agreed to that restriction.

Bennett cites several reasons the School District and AFSCME cannot prove that she waived her First Amendment rights. The Amici will only address the two reasons most applicable to the escape period restriction: (1) the School District and AFSCME cannot prove Bennett knew of her First Amendment right to not pay for union speech when she signed the dues deduction form, and (2) to prohibit employees from exercising their First Amendment rights for 350-51 days of each year is such a severe restriction on constitutional freedoms that it is unenforceable.

E. A Knowing and Intelligent Waiver Requires Proof Employees Were Notified of Their First Amendment Rights under *Janus*.

1. For the government to prove that an employee "knowingly" and "intelligently" waived his or her First Amendment right under *Janus* not to subsidize union speech, the employee must have been notified he or she has that right. The knowing and intelligent criteria for a waiver require proof of an "intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464. Put differently, there must be "*a full awareness* of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Moran*, 475 U.S. at 421 (emphasis added). Courts cannot assume that employees fully know their right not to pay for

union speech because, as the Supreme Court said in *Janus*, a waiver of First Amendment rights "cannot be presumed." 138 S. Ct. at 2486.

The School District and AFSCME cannot prove that Bennett or other employees knew of their First Amendment right not to pay for AFSCME's expressive activities because there is simply no evidence that the School District or AFSCME notified Bennett or others of her constitutional right. There is nothing on School District and AFSCME's dues deduction form that informs employees of their right not to financially support AFSCME or that states the employee is agreeing waive that right by signing the form. And without such language, the School District and AFSCME cannot prove that Bennett and other employees "knowingly" or "intelligently" waived their First Amendment right by signing the dues deduction form.[6]

2. The district court failed to address this point. Instead, it addressed only the secondary issue of whether Bennett lacked knowledge of her rights because she signed the dues deduction form before *Janus*. S.A. 9-10. The district court missed the more important point: *the terms* of the School District's and AFSCME's dues deduction form do not prove a knowing and intelligent waiver. This remains true no matter

[6] Note that the relevant question is not whether employees knew they were agreeing to pay union dues or knew of the escape period, but whether employees knew of their *First Amendment right* not to pay for union speech. For example, if a suspect in custody answers a police officer's questions, the constitutional issue is not whether the suspect knew he was answering a police officer's questions. The question is whether he knew he was waiving his constitutional rights against self-incrimination and to assistance of counsel by so doing. If the suspect did not, then it cannot be said that he knowingly or intelligently waived his rights. The same principle applies here: a knowing waiver necessarily requires knowledge of the constitutional right allegedly being waived, which here is employees' First Amendment right not to pay for union speech.

when an employee signed that form. An employee could sign the form today and it would be insufficient on its face to prove a knowing and intelligent waiver.

The district court got it wrong even on the secondary point. Employees cannot knowingly or intelligently waive a constitutional right before that right was recognized by the courts. *See Curtis Publish'g Co.*, 388 U.S. at 143-45 (holding a defendant did not knowingly waive a First Amendment defense at trial because the defense was recognized after the trial had concluded); *Sambo's Rest.*, 663 F.2d at 693 (holding a restaurant owner could not have waived his First Amendment right to engage in certain commercial speech before 1972 because he "had no commercial speech rights protected by the First Amendment in 1972."); *Legal Aid Soc'y v. City of N.Y.*, 114 F. Supp. 2d 204, 227-28 (S.D.N.Y. 2000) (holding a contractor did not knowingly waive a First Amendment right because that right "was not clearly established until after the signing of the agreement").

The district court overstates the law when asserting that plea agreements are enforceable despite changes in the law. S.A. 10. That is not so if the defendant was not informed of essential nature of the plea. In *Bousley v. United States*, 523 U.S. 614, 617-19 (1998), the Supreme Court held a plea agreement would be unintelligently made—and thus invalid— if a later change in the law resulted in the individual being misinformed of essential nature of the charge to which he agreed. The Court distinguished its earlier decision in *Brady v. United States*, 397 U.S. 742 (1970), cited by the district court, which found a change in sentencing law did not invalidate a plea

agreement because the defendant there was "correctly informed as to the essential nature of the charge against him." *Bousley*, 523 U.S. at 619.

The essential element of any dues deduction form is to financially support a union. Bennett and other employees could not knowingly waive their First Amendment right not to support a union financially before the Supreme Court recognized that right in *Janus*. In any event, even if they could, the terms of the School District and AFSCME's dues deduction form still do not prove a knowing or an intelligent waiver.

F. Escape Periods Restricting When Employees Can Object to Paying for Union Speech Are Unenforceable as Against Public Policy.

1. Even where there is a knowing and intelligent waiver by employees, the waiver cannot be enforced "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392. The severe restriction on First Amendment rights inherent in a short annual escape period cannot overcome that high bar.

The policy weighing against prohibiting employees from exercising their *Janus* rights for almost all of each calendar year is of the highest order: employees' First Amendment right not to subsidize speech they do not wish to support. *See Janus*, 138 S. Ct. at 2463–64; *supra* 4–5. In *Janus*, the Supreme Court held that "[b]ecause compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed," and is subject to at least exacting constitutional scrutiny. 138 S. Ct. at 2464. In *Curtis Publishing*, which rejected an alleged waiver of First Amendment freedoms, the Supreme Court recognized that "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued

freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." 388 U.S. at 146.

There is no countervailing *constitutional* interest in prohibiting employees from exercising their First Amendment right to stop paying for union speech. The Supreme Court in *Knox v. SEIU Local 1000* held that unions have no constitutional entitlement to monies from dissenting employees. 567 U.S. 298, 313 (2012). *Knox* also held that union *financial* self-interests in collecting monies from dissenting employees—even monies to which the union arguably was entitled under state law—do not outweigh dissenting employees' First Amendment rights. *Id.* at 321.

2. The escape period restriction before this Court is particularly indefensible. It prohibits employees from exercising their First Amendment right during all but fifteen days of each year—i.e., for 350-51 days of the calendar year. Illinois law authorizes an even shorter escape periods of ten-days per year. *See* 5 Ill. Comp. Stat. § 315/6(f); 115 Ill. Comp. Stat. § 5/11.1(a). These draconian restrictions severely restrict constitutional rights, and would never tolerated in similar contexts.

For example, *Janus* found an individual subsidizing a public sector union to be comparable to subsidizing a political party, because both entities engage in speech on matters of political and public concern. 138 S. Ct. at 2484. This Court would not permit the State of Illinois or other state entity to continue to seize contributions for a favored political party from dissenting employees who object to those deductions outside an arbitrary fifteen-day period.

Janus also found "measures compelling speech at least as threatening" to constitutional freedoms as measures that *restrict* speech, if not more so because "individuals are coerced into betraying their convictions." *Id.* at 2464. The courts would seldom, if ever, countenance a state restricting individuals from speaking about union or public affairs for all but fifteen days of each year. For states to compel individuals to subsidize union speech concerning public affairs for all but two weeks of each year is an equally, if not more so, egregious violation of their First Amendment rights.

There is not even a legitimate, much less a compelling, reason to restrict employees' exercise of their First Amendment rights to a mere fifteen days each year. This is especially true given this escape period *varies* based on when each employee signed the dues deduction form. The School District and AFSCME require employee notices of revocation to be "postmarked not more than 25 days and not less than 10 days before the expiration of the yearly period described above," which is the "date of authorization." S.A. 21–22. Given that employees could sign the authorization form on any day of the year, there could be up to 365 different escape periods opening and closing throughout each year. These varying escape periods belie any notion that this restriction serves an administrative or financial planning purpose.

If anything, escape periods make administering payroll deductions and financial planning harder for the School District or AFSCME. The escape period prohibits employees from providing notice of their desire to stop dues deductions *earlier* than twenty-five days before the anniversary date of the authorization. S.A. 21–2. Logically, even if dues deduction could not be stopped until a later date, the School District

and AFSCME would want the earliest possible notice that an employee wants to stop paying union dues so the entities could plan accordingly.

It is readily apparent the School District and AFSCME's policy of disregarding employee notices of non-consent to dues deductions sent earlier than an arbitrary fifteen-day period exists solely to make it difficult for employees to exercise their First Amendment right to stop subsidizing union speech. That is not a legitimate purpose.

The "public policy harmed by enforcement of the agreement" here—the First Amendment freedom of speech and association— greatly outweighs any ostensible "interest in [the agreement's] enforcement." *Rumery*, 480 U.S. at 392. Even if Bennett knowingly agreed to this severe restriction on her right to stop subsidizing union speech (which she did not), this Court should hold enforcement of this restriction to be unenforceable as against public policy.

CONCLUSION

The judgment of the district court should be reversed.

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CERTIFICATIONS

Certificate of Compliance

I hereby certify that this brief complies with the type limitations provided in Circuit Rule 29. The foregoing brief was prepared using Microsoft Word and contains 5,507 words in 12-point proportionately spaced Century Schoolbook font.

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Certificate of Service

I hereby certify that on June 2, 2020, I electronically filed the foregoing Amici Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh 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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