No. 23-1111

In the

Supreme Court of the United States

GLENN LAIRD,
Petitioner,
v.
UNITED TEACHERS LOS ANGELES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Do nonmember public employees who have rescinded their prior consent to union dues deductions enjoy the same right to freedom from compelled speech as employees who never affirmatively consented?

2. When a public sector labor union uses the authority of state law to divert former union members' wages for political speech without their affirmative consent, is the union acting under "color of law"?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute also files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

The Buckeye Institute is a leading advocate for the protection of public employees' First Amendment rights not to associate with public sector unions and their right to be free from government-compelled speech.

SUMMARY OF ARGUMENT

When this Court decided *Janus* v. AFSCME in 2018, it definitively held that the First Amendment

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

protected public employees from being compelled to "subsidize private speech on matters of substantial public concern" without their prior affirmative consent. *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 886 (2018). This Court explained that "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.* at 892. Unions and governments cannot compel "free and independent individuals to endorse ideas they find objectionable." *Id.* at 893. But *Janus* did not address—nor could it have addressed—every aspect of the compulsory relationship between public employees and the public sector unions that comprise their statutorily mandated bargaining units.

Public sector unions concerned about the potential loss of membership thus urged a narrow view of *Janus*, arguing that state action and the consequent First Amendment issue existed only for plaintiffs like Mark Janus, who had resigned his union membership years before bringing suit and was, therefore challenging only the continued payment of "fair share fees." See *id.* at 886–887; *Belgau* v. *Inslee*, 975 F.3d 940 (9th Cir. 2020).

An employee who joins a union and agrees to pay dues for a set term but later decides to leave the union is thus contractually bound to continue paying dues for the duration of the term. The Ninth Circuit adopted these arguments in *Belgau* v. *Inslee*, and the other circuits soon followed suit. Those employees, the Ninth Circuit held, had voluntarily waived their First Amendment rights under *Janus* when they joined the

union and were bound to pay dues by the terms of their alleged contracts with their unions.

But while *Belgau* has seemingly become the law of the land, the *Belgau* court provided scant legal analysis to support what has now become the near universality of its holding. The Ninth Circuit may have simply decided the case based on the facts before it—but as the facts in this case show—a broad reading of *Belgau* to apply to all union membership contracts is untenable, and guidance from this Court is warranted.

Belgau stands on two wobbly legs. The first is that a private contract bargaining away a constitutional right is presumptively valid. In practice, as evident from this case, this has come to mean that a union need only utter the magic incantation "private contract," and all further analysis ceases, as if courts were somehow not in the business of determining the meaning and validity of private contracts. The second is the fallacy that the enforcement of a private contract never involves any state action.

As to the first leg, court indifference to a private contract rests on the assumption that the contract and the constitutional waiver contained in it are actually valid. This case—where Mr. Laird crossed out the portion of his union membership contract that would limit his ability to leave the union without continuing to pay dues—provides an example where examination of the private contract and allowing the plaintiff to assert his contractual rights and defenses requires a different result, and *Belgau's* perfunctory private contract analysis is inadequate. Simply put, while *Belgau* may be correct that courts should not interfere

with the parties' private choices regarding fundamental rights, courts have a duty to intervene when those contracts fail the basic tests of validity under contract law or the waiver is not "knowing, intelligent, and voluntary." See *D.H. Overmyer Co., Inc. of Ohio* v. *Frick Co.*, 405 U.S. 174, 185 (1972); *S.E.C.* v. *ACI Investors, Protective Ass'n*, 99 F.3d 1146 (9th Cir. 1996) (requiring "knowing, intelligent, and voluntary" waiver of First Amendment rights).

Moreover, courts routinely decline to enforce contractual obligations—even valid ones—where doing so offends public policy. Given the significant public policy interest in preventing compelled speech, courts purporting to follow *Belgau* should engage in true analysis of the interplay of the interests of the individual, the state, and the union. This case provides an excellent vehicle to reassert that requirement.

As to the second wobbly leg, courts have rightly opined that the government's indifference to or acceptance of private arrangements is not state action. See *Wright* v. *Serv. Employees Internatl. Union Local 503*, 48 F.4th 1112, 1123 (9th Cir. 2022) ("[P]erforming an administrative task does not render [the State] and [SEIU] joint actors." (alteration in original) (quoting *Belgau*, 975 F.3d at 948)), *cert. denied*, 143 S.Ct. 749. But, "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Warren* v. *Fraternal Order of Police, Ohio Labor Council, Inc.*, 593 F.Supp.3d 666, 673–674 (N.D. Ohio 2023) (quoting *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478 (1988)). Here, the enforcement of the union membership contract and the duty to continue to pay

dues are inextricably linked to state actors.

First, the employees are compelled to abide by the statutorily mandated collective bargaining agreement as it pertains to their relationship with the employer—and the union. Second, the law requires the public employer to serve as the union's collection agent and gives the union significant leverage in any dispute over the validity of a membership contract. Finally, *Belgau* and its progeny have glossed over the fact that judicial enforcement of the private membership contract is itself a form of state action, just as judicial action in a libel case was in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). Court enforcement of an obligation, whether that obligation arises contractually or under the common law of torts, implicates state action—but even more so when the union mandates the form of the contract and is not the result of a fair and open negotiation between the parties to the contract.

Accordingly, this Court should grant the petition to examine the scope of *Belgau* and provide a more complete analysis of the interaction between private union membership contracts, principles of waiver under contract law, and the First Amendment.

ARGUMENT

I. Contractual Waiver of First Amendment Rights

Citizens can waive or bargain away their rights, even fundamental rights enshrined in the Constitution. But this right to surrender one's rights is not without judicial safeguards. Courts "indulge every reasonable presumption against waiver of

fundamental constitutional rights" and "do not presume acquiescence in the loss of fundamental rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (internal citations omitted). In other words, fundamental rights are different from other rights. The waiver of a fundamental right must be "voluntary, knowing, and intelligent." *Miranda* v. *Arizona*, 384 U.S. 436 (1966); see also *Colorado* v. *Spring*, 479 U.S. 564, 572 (1987). And while the doctrine of constitutional waiver arose in the criminal law context, courts have applied the "voluntary, knowing, and intelligent" requirement to First Amendment rights as well. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967); see also *Leonard* v. *Clark*, 12 F.3d 885, 889–890 (9th Cir. 1993); *Erie Telecommunications, Inc.* v. *City of Erie, Pa.*, 853 F.2d 1084, 1094 (3rd Cir. 1988).

The *Belgau* court did not examine the validity of the constitutional waiver. In fairness, that question was not squarely before the Ninth Circuit then because Belgau did not raise the validity of her membership contract or her First Amendment waiver. But here—as in numerous other cases that have applied *Belgau*—the plaintiff has raised the issue. And the uncontested facts show that Mr. Laird expressly rejected the terms of the membership agreement that would require him to continue to pay dues if he resigned from the union. Pet. App. at 10a.

But even setting aside Mr. Laird's efforts to prevent a waiver of his First Amendment rights, the process by which the First Amendment waiver is achieved in union membership cases raises significant questions over whether that waiver is actually

voluntary, knowing, and intelligent. Determining whether there has been an intelligent waiver of a fundamental right "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the [waiving party]." *Johnson*, 304 U.S. at 464.

In examining those particular facts and circumstances, courts have considered the extent to which the waiving party was aware of his or her rights, whether the waiver was the product of a negotiation, and whether the waiving party had counsel. See *Nat'l Abortion Fed'n* v. *Ctr. For Med. Progress*, No. 15-cv-03522, 2016 WL 454082 (N.D. Cal. Feb. 5, 2016) (knowing, voluntary and intelligent waiver of First Amendment rights found where parties signed exhibition agreement in exchange for the right to attend meetings); *Leonard*, 12 F.3d at 890 (waiver found where counsel advised union in negotiating agreement, objected to the agreement, but still signed); *Democratic Nat. Committee* v. *Republican Nat. Committee*, 673 F.3d 192, 205 (M.D. Pa 2016) (finding waiver "where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations"). These hallmarks of a voluntary, knowing, and intelligent waiver, however, are conspicuously absent in the union membership contracts and dues authorizations at issue here.

Union membership contracts are typically the size of a postcard. They are replete with small print and are often unclear regarding when a member can "opt

out" of the union without having to continue to pay dues. The opt-out window is often tied to the renewal date of a collective bargaining agreement (CBA), which is not provided in the postcard agreement. A new union member is thus required to find the CBA renewal date from some other source. Indeed, the typical union postcard membership agreement does not even reveal the amount of dues to be paid or the consideration that the new member can expect to receive in return for them. See, *e.g.*, Pet. App. at 9a. The contracts that *Belgau* treated as the product of reasoned bargaining are typically nothing more than blanket authorizations for the public employer to deduct whatever dues the union instructs for as long as it instructs.

A court does not engage in improper paternalism when it examines the validity of a contract it is asked to enforce—rather, it is fulfilling its duty. The *Belgau* court and the courts following *Belgau's* example did not live up to this judicial responsibility. Rather, *Belgau's* perfunctory dismissal of the plaintiff's First Amendment claim as a contractual waiver of a constitutional right did not take into account the fundamentals of contract law. First, a valid contract must be formed. Every first-year law student learns that to be valid and enforceable, a contract must evidence an offer, an acceptance, a meeting of the minds and the exchange of mutual consideration. See *Davis* v. *TMC Restaurant of Charlotte, LLC*, 854 Fed. Appx. 518, 520 (4th Cir. 2021) ("[T]he well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." (citation omitted)). And nearly every state recognizes the contractual concepts

of mutual mistake, unconscionable contracts of adhesion, unjust enrichment, and unreasonable penalties (vs. liquidated damages). When these contractual defects are present, courts must consider if there was a true voluntary, knowing, and intelligent waiver of the First Amendment.

Mr. Laird—in a rare act of independence in these contracts of adhesion, actually altered the terms of the checkoff card before turning it in. The union made no effort to reject his alteration. Now, the union wants to ignore that alteration and have the court enforce the "contract" as though there were no alterations. But, the court cannot dismiss these basic contractual formation concepts. And this is not just a one-off that this Court should dismiss as inconsequential. Perhaps this particular alteration is, but federal courts need to look to state contract laws as they consider if an employee properly waived his or her First Amendment rights. Neither the *Belgau* court nor the court in this case have paused to consider whether this manner of waiver is, in fact, voluntary, knowing, and intelligent.

This Court should grant the petition to clarify that lower courts cannot assume the validity of such a waiver of fundamental rights with an incantation of "the employee waived his rights." Individual First Amendment rights merit more respect.

To that same end, this Court has held that even if a party is found to have validly waived a constitutional right, the Court will not enforce it "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). The countervailing public policy here is

nothing less than freedom from compelled speech, which must be balanced against the unions' interest in continuing to receive dues payments from former members to whom it is no longer providing services. Neither *Belgau* nor any case applying it has looked at whether a contract that requires continued speech by a party, after that party has expressly renounced the speech, outweighs the unions' interest in receiving dues.

The *Janus* Court was effusive in recognizing that freedom of speech and the concomitant freedom from being compelled to speak is a fundamental public policy of this nation:

> Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

Janus, 585 U.S. at 893 (internal citations omitted).

But the *Janus* Court went even further to note the particular evil visited on citizens by compelled speech, citing Thomas Jefferson's observation that "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.* (quoting A Bill for Establishing Religious Freedom, *in* 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted)). The Court explained

that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Id*. (citing *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 633 (1943)).

The right to be free from compelled speech is thus important enough that preventing it might trump a contractual duty. Indeed, a contract to engage in future speech is inherently problematic. A public employee may well join a union in agreement with its public positions only to learn later that the union is using his dues to fund speech that he finds not only objectionable but abhorrent. Because the union's speech may change from day to day, members are asked to waive their conscience rights preemptively. This sort of waiver can hardly be voluntary, knowing, or intelligent, however, because union members have no way of knowing when they join a union what speech or ideas they will be compelled to endorse.

Likewise, an employee who initially joins a union in solidarity with its political views may change his or her mind on those issues. Neither *Belgau* nor the cases relying on it have analyzed whether constitutional waiver, assuming it was valid and enforceable when entered into, is perpetual. Union membership contracts bear some similarities to gym memberships, cell phone plans, and cable TV contracts in that they are often difficult to escape. Subscribers tend to be stuck with their choice for the duration of the contract.

The difference—considering that constitutional rights, particularly, are weightier than mere economic rights—is that continuing to pay for an unused gym membership or other subscription typically does not require gym members to "betray their convictions" or "endorse ideas they find objectionable." See *Janus*, 585 U.S. at 893.

II. Automatic dues deduction in the enforcement of contracts constitutes state action.

Belgau rightly begins from the premise that state action is a prerequisite for any First Amendment claim. Yet neither the *Belgau* court—nor the Ninth Circuit's decision relying on it in this case—explained *why* no state action is present in the public union dues collection scheme. This Court has highlighted the necessity of conducting a robust factual review to identify state action when such action might not be obvious at first blush:

> When governmental action is alleged there must be cautious analysis of the quality and degree of Government relationship to the particular acts in question. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

Columbia Broadcasting Sys., Inc. v. *Democratic Nat. Committee*, 412 U.S. 94, 115 (1973) (quoting *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)).

But instead of conducting this cautious analysis, the Ninth Circuit and the circuits that have followed its lead skip that step and begin from the conclusion that "[t]he First Amendment does not support Employees' right to renege on their promise to join and support the union" because "[t]his promise was made in the context of a contractual relationship between the union and its employees." *Belgau,* 975 F.3d at 950. From there, the *Belgau* court reasoned that the state's role in union membership cases was merely "to permit the private choice of the parties, a role that is neither significant nor coercive." *Id.* at 947. While the government's role in most private contracts may be minimal, the *Belgau* court seemed to gloss over the significant role played by the state in union membership contracts.

Unlike other private contracts, CBAs are foisted upon employees. Whether or not an employee joins the union, the employee is bound by the CBA as it pertains to the relationship between the employee and the employer. See, *e.g.*, Cal. Gov. Code § 3544. Like it or not, if you want to be a teacher in California, California mandates that you are compensated pursuant to the CBA, and the CBA governs any dispute you have with your employer—whether or not you are a member of the union. And when it comes to joining or quitting the union, your choices are similarly limited. There is no negotiation as to the terms of membership. Those terms are in the union's bylaws or constitution.

The union membership contract is the fruit of the CBA, and its form and content are almost certainly dictated by the CBA. Unfortunately, unions keep their

bylaws and constitutions secret, so no one seems to know their content. Certainly, the unions do not present them to the prospective union members before they join the union and keep them hidden from union members even after they join. The union membership contract is typically a form document—usually in the form of a postcard, which the employee signs, and by which the employee joins the union and authorizes the employer to make automatic deductions from the employee's paycheck and has highly restrictive terms for canceling that authorization. But, the employee typically is not even given a copy of that "contract" after it is signed by the union—if the union ever does sign it.

Nevertheless, the school district—a government entity—both guarantees and enforces the union membership contract. First, the public employer acts as the collector and guarantor of union dues through mandatory salary deductions of union dues. Through state action, typically a state statute, or CBA, or both, the public employer has the authority to deduct dues as directed by the union. In any other contract dispute, a party who disputes the contract's validity, alleges a breach by the other party, or even chooses to engage in a unilateral economic breach of the contract, has the option to stop performing. Yet, if a dispute arises over the validity of a union membership contract or an employee attempts to opt out, the employee cannot simply stop payment. The public employer will continue to withdraw dues as if a garnishment order were already in place. Thus, the state effectively is acting as the union's surrogate.

Next, the *Belgau* position that a union contract is

merely a private contract with no state involvement ignores the role played by state courts in enforcing contracts. Over fifty years ago, this Court held that judicial relief in the form of damages for libel was state action and triggered First Amendment scrutiny. *New York Times Co.* v. *Sullivan*, 376 U.S. at 265. In *Sullivan*, the Court not only secured important protections for freedom of the press but, in so doing, rejected the notion that the First Amendment (as applied through the Fourteenth Amendment) required action by the executive or legislative branches to trigger state action. Rather, judicial action also constitutes state action. Indeed, *Sullivan* rejected the argument that the "Fourteenth Amendment is directed against State action and not private action" and explained why "that proposition" had "no application to this case:"

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (internal citations omitted).

If the judicial enforcement of a remedy for a common law tort constitutes state action for the

purposes of the First Amendment, why would the judicial enforcement of a contract requiring speech be any different? In the context of a public sector union, money is not merely money. It is also necessarily speech. Compelled payment, whether the duty arises contractually or statutorily, is compelled speech.

Indeed, while few courts have examined the subject, some have held that the enforcement of a contract or the equivalent quasi-contract theory regulating speech is state action. Specifically, in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), this Court held that a state court's enforcement of a promissory estoppel claim implicated the First Amendment. In *Cohen*, a confidential source who had been promised anonymity by a newspaper sued under a promissory estoppel theory when the newspaper broke its promise and revealed his identity. *Id*. at 663. The Minnesota Supreme Court held that the "enforcement of the promise of confidentiality under a promissory estoppel theory would violate the newspaper's First Amendment rights." *Id.* at 667.

This Court reversed on the basis that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. For example, a media organization could not rely on the First Amendment to immunize it from illegally "breaking into an office or dwelling to gather news." *Id.* But, the *Cohen* Court made clear that while the First Amendment did not bar the promissory estoppel claim, the court's action in hearing the case was plainly state action. The Court reasoned that because the parties' legal obligations

would be enforced through the official power of the Minnesota courts, "that is enough to constitute 'state action' for purposes of the Fourteenth Amendment." *Id.* at 668.

The *Belgau* court relied on *Cohen's* holding finding no First Amendment violation but ignored its holding that the court's hearing a promissory estoppel claim was state action. Compare *Belgau*, 975 F.3d at 948–949 with *Cohen*, 501 U.S. at 668 ("These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, which is enough to constitute 'state action' for purposes of the Fourteenth Amendment."). Under *Cohen*, the judicial interpretation and enforcement of a contract is thus state action. See also *Ruzicka* v. *Conde Nast Publications, Inc.,* 733 F.Supp. 1289, 1295 (D.Minn. 1990), *aff'd and remanded*, 939 F.2d 578 (8th Cir. 1991) (finding state action relating to the enforcement of a contract because "[t]he differences between tort and contract law do not justify a different result in this case").

Regardless, *Belgau's* reliance on *Cohen* for the proposition that enforcement of otherwise neutral laws does not offend the First Amendment simply because it makes the job of the press more difficult is placed in the compelled speech context. Four Justices dissented in *Cohen*, pointing out that "there is nothing talismanic about neutral laws of general applicability because such laws may restrict First Amendment rights just as effectively as those directed specifically at speech." *Cohen*, 501 U.S. at 677 (Souter, J. dissenting). The dissenters also rejected the notion of a "self-imposed" restriction based on the newspaper's

voluntary promise of confidentiality because the requirements for waiver had not been met. *Id.* (Souter, J. dissenting). The dissenting view is especially relevant here where the purported generally applicable law of contracts is directed specifically at speech. Here, the union relies on the union membership contract to force former members to continue to speak through their dues. State action and the First Amendment's protections are thus always implicated in public union membership.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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