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## Miranda for Janus: The Government's Obligation to Ensure Informed Waiver of Constitutional Rights

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# **MIRANDA FOR JANUS: THE GOVERNMENT'S OBLIGATION TO ENSURE *INFORMED* WAIVER OF CONSTITUTIONAL RIGHTS**

*Deborah J. La Fetra\**

*Overturning forty years of precedent, the Supreme Court held in Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018), that public employees have a First Amendment right to refrain from joining or subsidizing a union because the union may use their money to speak on a wide range of inherently political matters, including speech with which they may disagree. Therefore, the state may deduct dues from employee paychecks and transfer the money to the union only if employees affirmatively waive their First Amendment rights. As a matter of constitutional due process, this means that the choice to subsidize the union depends on employees' knowledge that their First Amendment rights are implicated. Yet, in response to Janus, California enacted a law that effectively stands as an obstacle to workers' full exercise of their First Amendment rights by giving unions—not employers—the authority to inform employees that they have a constitutional right not to join the union. This law serves as a model for other states' existing and proposed legislation. Workers cannot exercise a right they do not know they have, and the state cannot abdicate its duty to ensure a knowing and voluntary waiver of constitutional rights. Both the First Amendment and due process demand more. Modeled on the principles underlying Miranda v. Arizona, 384 U.S. 436 (1966), this article argues that the Fourteenth Amendment's Due Process Clause requires the government employer, prior to deducting union dues from paychecks, to provide adequate information about workers' First Amendment rights such that employees are capable of making a knowing and voluntary waiver, if they so choose.*

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\* Senior Attorney, Pacific Legal Foundation. Ms. La Fetra thanks Larry Salzman, Jim Manley, Erin Wilcox, Hannah Marcley, Tim Snowball, and Brian Hodges for their helpful comments and suggestions.

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## INTRODUCTION

Information is knowledge, knowledge is power, and power is money.<sup>1</sup>

On June 27, 2018, the Supreme Court held in *Janus v. American Federation of State, County, and Municipal Employees (AFSCME), Council 31*,<sup>2</sup> that public employees cannot be forced to pay dues to a union.<sup>3</sup> The Court reasoned that collective bargaining with a government agency is inherently political because it involves tax dollars and government budgets.<sup>4</sup> Public employees have a First Amendment right to avoid being forced to subsidize political speech against their will.<sup>5</sup> “Unless employees *clearly and affirmatively consent* before any money is taken from them,” deducting union dues from a nonmember’s wages violates the First Amendment.<sup>6</sup> Prior to *Janus*, for more than forty years, silence, or “doing nothing” was not enough to keep an employee from subsidizing the union. Under this former understanding of First Amendment law, states could permit public employee unions to impose opt-out schemes, in which the unions could impose membership and deduct dues from employees’ paychecks without the employees’ affirmative consent.<sup>7</sup> But *Janus* now prohibits such opt-out schemes.<sup>8</sup> Under the law as now understood, the key point is that public workers have a choice: join the union or don’t; pay union dues

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1. See *United States v. Charles George Trucking Co.*, 823 F.2d 685, 689 (1st Cir. 1987); *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 510 (7th Cir. 1994).

2. 138 S. Ct. 2448 (2018).

3. *Id.* at 2456 (“The State’s extraction of agency fees from nonconsenting public-sector employees violates the First Amendment.”).

4. *Id.* at 2473 (noting, for example, that a public employee union’s request for a raise “could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services” and, therefore, greatly enlarges the category of union speech that is of public concern).

5. *Id.* at 2464 (compelling people to subsidize the speech of other private speakers “coerce[s] them into betraying their convictions”).

6. *Id.* at 2486 (emphasis added). The Court’s full explanation and context for this holding is: 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. Rather, to be effective, the waiver must be freely given and shown by “clear and compelling” evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

*Id.* (citations omitted).

7. See *Mitchell v. L.A. Unified Sch. Dist.*, 963 F.2d 258, 260, 263 (9th Cir. 1992) (dissent is not presumed).

8. *Janus*, 138 S. Ct. at 2486.

or don't. Workers who value the union's services will join; those who do not value those services will not.

However, most public workers are unaware this choice exists<sup>9</sup> and the unions have every financial incentive to keep that information secret.<sup>10</sup> But what about the government employers? They cannot deduct union dues from employee wages without asking employees if they "clearly and affirmatively consent" to the deduction.<sup>11</sup> But can state agencies even inform their workers that they have a constitutional right to work without union membership or paying union dues? Not in California.

Former California Governor Edmund G. (Jerry) Brown, Jr. signed Senate Bill 866 (SB 866) on the day *Janus* was decided.<sup>12</sup> SB 866 forbids public agencies from communicating with their employees about union membership and dues and gives to the public employee unions the sole responsibility for obtaining consent for dues deductions.<sup>13</sup> The law allows only union representatives to address new employees at their orientation meetings and forbids public agencies from disclosing to anyone other than the union and the new employees the time and place of such meetings.<sup>14</sup> California agencies may not send email or any other "mass communication" to workers regarding union membership or dues without the union's approval of the content or simultaneously with the union's own mass communication (paid for by the

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9. See, e.g., *Hoekman v. Educ. Minn.*, 335 F.R.D. 219, 229 (D. Minn. 2020) ("[Plaintiff] joined the union because, she asserts, she was not given the option to be a 'fair share' fee payer; accordingly, she believed she had no choice in the matter."). Unions have long pressured employees to join without incurring any legal liability. See, e.g., *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 277–78 (1974) (union may legally post a list of non-members and label non-members as "scabs" to persuade non-members to join).

10. See Rick Karlin, *NYSUT Has Fewer Payers Post-Janus Decision*, TIMES UNION (Dec. 3, 2018), <https://www.timesunion.com/news/article/NYSUT-has-fewer-payers-post-Janus-13439737.php> [<https://perma.cc/2FJ6-W5GJ>] (noting a 6 percent drop in New York's largest union's membership post-*Janus*); Jennifer Mueller, *How the Janus Ruling Might Doom Public Pensions Next*, SLATE (July 18, 2018, 4:17 PM), <https://slate.com/news-and-politics/2018/07/how-the-janus-ruling-might-doom-public-pensions-next.html> [<https://perma.cc/QBN8-JN6B>]; see also Daniel DiSalvo, *Public-Sector Unions After Janus: An Update*, MANHATTAN INST. (Feb. 14, 2019), <https://www.manhattan-institute.org/public-sector-unions-after-janus> [<https://perma.cc/3CXK-SK7Q>] (noting financial impact of loss of agency shop fee payers and works who choose to resign their union membership).

11. *Janus*, 138 S. Ct. at 2486.

12. CAL. S., HISTORY OF SENATE BILL NO. 866, 2017–2018 Reg. Sess. (Cal. 2018), [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201720180SB866](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB866) [<https://perma.cc/8WNP-RN4M>]. As "urgency" legislation, the law went into effect immediately.

13. CAL. GOV'T CODE § 1157.12 (West Supp. 2018).

14. *Id.* § 3556.

employer).<sup>15</sup> These laws are intended to keep public workers ignorant of their constitutional rights so that when the union representative hands them a membership card and says “sign here,”<sup>16</sup> they do so without understanding that they have a choice, much less the consequences of that choice.

SB 866 unconstitutionally infringes upon California public employees’ due process right to receive the information necessary to give a clear and affirmative waiver of their First Amendment rights. Because there can be no legitimate state interest (much less, an important or compelling one) in deliberately keeping government employees ignorant of their rights, a state law that limits access to information so that it is available only from a public employee union with no obligation to provide it (or interest in doing so) is unconstitutional. SB 866 effectively places potentially insurmountable obstacles before citizens seeking to understand their constitutional rights. This is a wholly illegitimate purpose that should not save a statute even under rational basis review, much less the “exacting” review typically applied in First Amendment union dues cases.<sup>17</sup>

We don’t tolerate this type of constitutional gamesmanship in other contexts. For example, when the government forecloses on tax-delinquent property, the notice requirements of due process require the government to act *affirmatively* to make it as likely as possible that property owners are made aware that they are in danger of losing their rights. In *Jones v. Flowers*,<sup>18</sup> the Supreme Court held that when a tax sale threatens to deprive an owner of real property, due process requires that “when mailed notice of a tax sale is returned unclaimed, *the State* must take additional reasonable steps to attempt to provide

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15. *Id.* § 3553.

16. This is similar to unions’ oft-proposed but never enacted federal “card-check” legislation to amend the National Labor Relations Act to require employers to recognize a union when the employer is presented with evidence of majority support for union recognition via card check. *See, e.g.*, H.R. 1409, 111th Cong. § 2 (2009); S. 560, 111th Cong. § 2 (2009). Opponents successfully argued that card-check organizing would “allow unions to coerce employees into unwanted union representation, and, thus, that such a system will not protect employees who wish to exercise their true will regarding union representation.” Rafael Gely & Timothy Chandler, *Organizing Principles: The Significance of Card-Check Laws*, 30 ST. LOUIS U. PUB. L. REV. 475, 478 (2011) (citations omitted).

17. *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 321–22 (2012); *cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (due process does not permit laws that “operate as a substantial obstacle to a woman’s choice to undergo an abortion”).

18. 547 U.S. 220 (2006).

notice to the property owner before selling his property”<sup>19</sup> and the notice must be “such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>20</sup>

Most famously, the Supreme Court held in *Miranda v. Arizona*<sup>21</sup> that when a police officer wants to question a criminal suspect in custody, the officer must explain that the suspect “has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”<sup>22</sup> It doesn’t matter that the suspect may already know his rights, or that his friends may be advising him to keep quiet and call a lawyer.<sup>23</sup> The *state itself* is obligated to inform the suspect of his constitutional rights so that they are not waived out of ignorance.<sup>24</sup> The state’s act of informing the suspect of his constitutional rights is a necessary predicate to the suspect effecting a waiver of these rights: a “clear and unequivocal” waiver that must be made “voluntarily, knowingly, and intelligently.”<sup>25</sup> Moreover, *Miranda* requires the state to accept invocation of a waiver at any time—even if the suspect answers some questions, the police must cease their

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19. *Id.* at 225 (emphasis added). When the state sells the debt to a private investor, the investor also receives the mandate to deliver proper notice. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932–34 (1982).

20. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950); *see also Echavarria v. Pitts*, 641 F.3d 92, 94–95 (5th Cir. 2011) (“When the government has knowledge that notice was not effected, it cannot ‘simply ignore’ that information.”). Outside of the real estate context, multiple Circuit courts rely on *Jones* to require additional steps after failed attempts at notice in cases involving property interests including \$1,500 in cash, personal property, denial of government applications, and revocation of licenses. *See, e.g., Rodríguez v. Drug Enf’t Admin.*, 219 F. App’x 22, 23–24 (1st Cir. 2007) (*Jones* required additional notice of administrative forfeiture of \$1,905); *Echavarria*, 641 F.3d at 95 (*Jones* applies to forfeiture of bondsman’s \$1,500); *Rendon v. Holder*, 400 F. App’x 218, 219 (9th Cir. 2010) (additional reasonable steps required to notify immigrant of denial of application for legalization); *United States v. One Star Class Sloop Sailboat*, 458 F.3d 16, 23 n.7, 25 (1st Cir. 2006) (applying *Jones* to civil forfeiture of sailboat); *Crum v. Vincent*, 493 F.3d 988, 992–93 (8th Cir. 2007) (*Jones* applies to state’s deprivation of physician’s medical license without due process); *Yi Tu v. Nat’l Transp. Safety Bd.*, 470 F.3d 941, 945–46 (9th Cir. 2006) (additional steps required to notify pilot of suspension of his pilot’s license).

21. 384 U.S. 436 (1966).

22. *Id.* at 444. This “constitutional decision” cannot be overruled by an act of Congress or any state law. *See Dickerson v. United States*, 530 U.S. 428, 432, 438 (2000).

23. *Miranda*, 384 U.S. at 468 (“[T]he expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.”).

24. *Id.* (“For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise.”).

25. *Id.* at 444, 467–68.

interrogation immediately once the suspect invokes his right to remain silent or to ask for a lawyer.<sup>26</sup>

Before making deductions from employee paychecks to transfer to public employee unions, the state has a constitutional duty to ensure that each individual employee clearly and affirmatively waived his or her First Amendment right to refrain from joining or financially supporting the unions.<sup>27</sup> In this Article, I propose that this duty requires government employers to adopt a *Miranda*-style rule of mandatory disclosure to ensure that government employees have sufficient information to choose whether to waive their First Amendment rights. Part I describes the *Janus* ruling and the California legislation enacted to blunt its impact. Part II explores the contours of the due process requirement of informed, affirmative consent and what this means in the context of waiving constitutional rights. Part III proposes *Miranda-for-Janus*, a neutral explanation of public employees' First Amendment rights that is a necessary First Amendment corollary to the need to provide informed, affirmative consent to waive those rights. Part IV addresses the intersection of constitutional waiver rights and contract law, particularly related to the existence of a collective bargaining agreement that, by its terms, presumes a waiver rather than seeking affirmative consent. Finally, Part V proposes language that public employers may use to ensure that all employees have adequate information to choose whether to “clearly and affirmatively” waive their First Amendment rights.

## I. *JANUS*'S NEW HOPE AND THE CALIFORNIA UNIONS STRIKE BACK

### A. *The Janus Decision*

On June 27, 2018, the Supreme Court held in *Janus v. AFSCME Council 31*,<sup>28</sup> that the government cannot require public employees to pay union dues or agency shop fees (mandatory union service fees paid by non-members) without the employees “clearly and affirmatively” waiving their First Amendment right to refrain from supporting the union. *Janus* overturned an Illinois statute that authorized public employee unions to deduct money from workers' paychecks regardless of whether those employees were members of the union or consented

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26. *Id.* at 437–74.

27. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2248, 2486 (2018).

28. *Id.* at 2486.



to the deduction.<sup>29</sup> The Court quoted Thomas Jefferson's powerful exhortation 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"<sup>30</sup> and recognized that compelling individuals to subsidize the speech of private organizations like unions "seriously impinges" their First Amendment rights and "cannot be casually allowed."<sup>31</sup> Therefore, the government must demonstrate by "clear and compelling evidence" that the waiver is "freely given" before any money is taken from workers' paychecks.<sup>32</sup> In so doing, *Janus* overturned forty years of case law that authorized agency shop fees in public sector employment.<sup>33</sup>

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29. *Id.* at 2461 (citing 5 ILL. COMP. STAT. 315/6(e), 315/3(g) (2021) (Illinois Public Labor Relations Act)). *Janus* addressed First Amendment rights in the context of public sector employment. *See, e.g.*, *Rizzo-Rupon v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO Dist. 141*, Loc. 914, 822 F. App'x 49, 50 (3d Cir. 2020); *Popp v. Air Line Pilots Ass'n, Int'l*, No. 19-CV-61298, 2020 WL 2213155, at \*2 (S.D. Fla. Mar. 24, 2020).

Public-sector unions are qualitatively different from private-sector unions. Unlike their private-sector counterparts, the wages, benefits, working conditions, and opportunities for which *public-sector* unions negotiate are provided exclusively by the *government*, and are paid for exclusively through tax dollars. *See Janus*, 138 S. Ct. at 2474–77 (noting that matters set for collective bargaining with public sector unions are inherently political and "overwhelmingly of substantial public concern" because they involve policy choices and the allocation of scarce resources—tax dollars). Because the government employer is inherently monopolistic—its "customers" are forced to pay—the consequences of public sector union bargaining are unlike the consequences of such bargaining in the competitive private-sector market, where the bottom-line consequences of collective bargaining (the purchase price of the company's product or service) set the ultimate boundaries of what workers can demand from management. If management and unions reach an unsustainable bargain in the private sector, the company will fail. But government never goes out of business. *See* Mark Klock, *Janus v. AFSCME: Triumph of Free Speech or Doom for Unions?*, 2019 MICH. ST. L. REV. 979, 1030–32.

However, the West Virginia Supreme Court in *Morrisey v. West Virginia AFL-CIO*, 842 S.E.2d 455, 475, 478 (W. Va. 2020), invoked the principles underlying *Janus* in upholding right-to-work legislation against a union's claim that it violated its freedom of association under the state constitution. *See also* *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988) (National Labor Relations Act precludes private employers from requiring workers in the bargaining unit who do not want to be union members to pay any portion of the union dues that is used for activities other than negotiating and administering collective bargaining agreements).

30. *Janus*, 138 S. Ct. at 2464 (alteration in original) (quoting *A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed., 1950) (emphasis and footnote omitted)).

31. *Id.* The Court observed that free speech is "essential to our democratic form of government" and "furthers the search for truth." *Id.* When the government compels speech, "individuals are coerced into betraying their convictions," a situation that is "always demeaning." *Id.*

32. *Id.* at 2486 (internal quotation marks omitted).

33. *Id.* at 2457–59, *overruling* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). *Janus* rejected the justifications underlying *Abood*, holding that compelled subsidization cannot be justified by a state's interest in "labor peace," or "the risk of 'free riders.'" *Janus*, 138 S. Ct. at 2466, 2469. Courts have consistently applied *Janus* prospectively, declining to permit public employees to recover fees paid prior to June 27, 2018, on the grounds that unions relied on *Abood* in good

As a result, public employees can no longer be compelled, as a condition of employment, to join or not to join, or to pay dues to a union.<sup>34</sup> However, many public employees join unions and pay dues without knowing they have a choice,<sup>35</sup> a fact that California's response to *Janus* capitalizes on.

### *B. California's Legislative Response*

On the day that *Janus* was decided, California Governor Jerry Brown signed SB 866<sup>36</sup> into law.<sup>37</sup> To discourage public employees

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faith. On January 25, 2021, the Supreme Court rejected six petitions for certiorari asking whether a “good faith defense” exists to claims brought under 42 U.S.C. § 1983. *See* Order List, 592 U.S. — (Jan. 21, 2021) (slip op., at 3, 6), [https://www.supremecourt.gov/orders/courtorders/012521zor\\_3f14.pdf](https://www.supremecourt.gov/orders/courtorders/012521zor_3f14.pdf) [<https://perma.cc/L56U-5YH9>] (denying certiorari in *Janus v. American Fed'n of State, County and Municipal Emps., Council 31*, No. 19-1104; *Mooney v. Ill. Educ. Ass'n*, No. 19-1126; *Danielson v. Inslee*, No. 19-1130; *Casanova v. Int'l Ass'n of Machinists, Loc. 701*, No. 20-20; *Lee v. Ohio Educ. Ass'n*, No. 20-422; *Ogle v. Ohio Civ. Serv. Ass'n*, No. 20-486). Yet workers continue to send a steady stream of petitions to the High Court, seeking relief. *See* Petition for Writ of Certiorari at i, *Bennett v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, AFL-CIO*, No. 20-1603 (May 14, 2021) (asking “[w]hether an employee’s signature on a union membership card and dues deduction authorization by itself authorizes a government employer and public-sector union to withhold union dues or other fees from an employee’s wages consistent with this Court’s affirmative consent waiver requirement set forth in *Janus*?”), petition denied, 142 S. Ct. 424 (2021); Petition for Writ of Certiorari at i, *Troesch v. Chi. Tchrs. Union, Loc. Union No. 1*, No. 20-1786 (June 21, 2021) (same), petition denied, 142 S. Ct. 425 (2021); Joint Petition for Writ of Certiorari at i, *Brice v. Cal. Faculty Ass'n*, No. 21-480 (Sept. 23, 2021) (good faith defense), petition denied, 142 S. Ct. 587 (2021); Petition for a Writ of Certiorari at i, *Wolf v. Univ. Pro. & Tech. Emps., Commc'ns Workers of Am. Loc. 9119*, No. 21-612 (Oct. 21, 2021) (asking “[w]hether a union can trap a public worker into paying dues without the ‘affirmative consent’ required by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)”), petition denied, 142 S. Ct. 591 (2021).

34. The right to refrain from joining a union was acknowledged prior to *Janus* in *Abood*, 431 U.S. at 234, and *Cumero v. Public Employment Relations Board*, 778 P.2d 174, 190 (Cal. 1989) (applying California law), but non-members were nonetheless required to subsidize the unions’ activities that were deemed related to its core purposes. *Id.* Non-members, denominated “agency shop fee payers,” remained subjected to payroll deductions almost equivalent to full union dues. *See, e.g., Davenport v. Wash. Educ. Ass'n*, 197 P.3d 686, 710 (Wash. Ct. App. 2008); *Seidemann v. Bowen*, 499 F.3d 119, 122 (2d Cir. 2007). Given the almost non-existent difference between the agency shop fees and full union dues and the pressure brought to bear by the union, few workers resisted union membership.

35. *See* Op. Alaska Att’y Gen. 10–11 (Aug. 27, 2019), [http://law.alaska.gov/pdf/opinions/opinions\\_2019/19-002\\_JANUS.pdf](http://law.alaska.gov/pdf/opinions/opinions_2019/19-002_JANUS.pdf) [<https://perma.cc/ZL9B-LYQC>] (“[S]ome collective bargaining agreements require new employees to report to the union office within a certain period of time, where a union representative presents the new hire with the payroll deduction form” and that the State has no way of knowing what information the employee is provided “at the critical moment the employee is confronted with the decision whether to waive his or her First Amendment rights.”).

36. S.B. 866, 2017–2018 Reg. Sess. (Cal. 2018).

37. The unions planned well in advance for the ruling in *Janus*, which, as noted, was forecast as early as 2012 in *Knox*. *See, e.g., Laurel Rosenhall, California Unions Planning Next Steps If Janus Ruling Goes Against Them*, S.F. CHRON. (Mar. 4, 2018, 1:41 PM), <https://www.sfchronicle.com/politics/article/California-unions-planning-next-steps-if-Janus-12726938.php> [<https://perma>

from asserting their First Amendment rights under *Janus*, SB 866 prohibits public employees from talking to their own employers about payroll deductions, union membership, or their rights under the *Janus* decision.<sup>38</sup> Instead, they are required to speak to a private third-party (the union) that does not process or control the payroll,<sup>39</sup> and is driven by its own political agenda.<sup>40</sup> Public employers must rely on the unions' representation of employees' opt-in decisions with only a very limited ability to see the "clear and affirmative" waiver required by *Janus*.<sup>41</sup> SB 866 applies to all public agencies in California—over 880,000 workers.<sup>42</sup>

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.cc/NY5N-GLZ6] (noting multiple pending and successful bills to counter the anticipated ruling in favor of objecting employees in *Janus*, including legislation to give union members "release time" from their jobs to recruit new members; shielding union members' contact information from public information requests to prevent third parties from reaching them; and ensuring unions exclusive access to new employee orientation).

38. CAL. GOV'T CODE §§ 3550, 3553 (West 2019); *see also* Memorandum from Ellie R. Austin, Assistant Gen. Counsel, Sch. & College Legal Servs. of Cal., & Sarah Hirschfeld-Sussman, Schools Legal Counsel, Sch. & College Legal Servs. of Cal., to Superintendents/Presidents/Chancellors, Member Community College Districts, at 3, 5 (June 28, 2018), <https://sclscal.org/wp-content/uploads/2018/06/06-2018CC-Janus-v.-American-Federation-of-State-County-and-Municipal-Employees-ERASHS.pdf> [<https://perma.cc/3A9H-N8KU>].

39. The state Controller has this responsibility for state employees, subject to information provided by human resources personnel. *See* CAL. CONST. art. XVI, § 7; *McLean v. State*, 377 P.3d 796, 805 (Cal. 2016). SB 866 instructs unions to advise the Controller whether it has obtained consent from public employees. The Controller may then convey the information to the employees' payroll processor. The union need not provide any documentary evidence of consent. CAL. GOV'T CODE § 1153(g), (h).

40. Most fundamentally, unions exist to promote the economic interests of their members, starting with negotiation of wages and benefits and extending to a wide variety of government policies that affect, even tangentially, the unionized workforce. For example, the California Teachers Association (CTA) defines its mission as: "to protect and promote the well-being of its members, to improve the conditions of teaching and learning, to advance the cause of free, universal, and quality public education, to ensure that the human dignity and civil rights of all children and youth are protected, and to secure a more just, equitable, and democratic society." CALIFORNIA TEACHERS ASSOCIATION, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (FORM 990) 1 (2012), <http://www.guidestar.org/FinDocuments/2013/940/362/2013-940362310-0a7b7b1f-90.pdf> [<https://perma.cc/65K7-UTYP>]. As a practical matter, the CTA advocates on issues touching virtually every aspect of public policy, including "racism, classism, linguisticism, ableism, ageism, heterosexism, religious bias and xenophobia." *Social Justice*, CAL. TCHRS. ASS'N, <https://www.cta.org/our-advocacy/social-justice> [<https://perma.cc/4U23-3UR6>].

41. CAL. GOV'T CODE § 1153(b), (h) ("Employee requests to cancel or change deductions for employee organizations shall be directed to the employee organization, rather than to the Controller.").

42. CAL. GOV'T CODE § 1150; Michael Maciag, *States with Most Government Employees: Totals and Per Capita Rates*, GOVERNING (Mar. 21, 2014), <https://www.governing.com/archive/states-most-government-workers-public-employees-by-job-type.html> [<https://perma.cc/28WM-MG35>] (citing 2014 ASEP Datasets & Tables: Federal Government Civilian Employment and Payroll Data, U.S. CENSUS BUREAU (Mar. 29, 2016), <https://www.census.gov/data/datasets/2014/econ/apes/annual-apes.html> [<https://perma.cc/U8RX-PKEG>]).

SB 866 prevents California public employers from conveying to their employees even the existence of the *Janus* decision. For example, American Federation of State County and Municipal Employees (AFSCME) Local 3299 filed an unfair labor practice charge with the state Public Employment Relations Board against the Regents of the University of California because it “circulated documents regarding the impact of the United States Supreme Court’s decision” in *Janus* that explained that the university would no longer deduct agency shop fees from the paychecks of employees who were not union members.<sup>43</sup> The Board held that the communications, consisting of a letter and “Frequently Asked Questions” document that accurately described the *Janus* holdings, violated SB 866.<sup>44</sup>

Although some of the decision appears even-handed, the Board revealed its pro-union bias by describing the *Janus* decision itself as “inherently destructive” of protected rights.<sup>45</sup> Consistent with that premise, the Board broadly defined the statute prohibition on employer action that is reasonably likely to “deter or discourage” employee free choice to cover any action that “tend[s] to influence” such choice, regardless of whether the action or communication actually did deter or discourage any employees from exercising their rights to “(1) authorize union representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees.”<sup>46</sup>

The Board chastised the university for quickly issuing its communication, indicating a desire that its employees should hear the news first from the university rather than the unions.<sup>47</sup> Worse,

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43. Am. Fed’n of State, Cnty. & Mun. Emps. Loc. 3299 v. Regents of the Univ. of Cal., Pub. Emp. Rels. Bd. Decision No. 2755-H, at 2 (Mar. 1, 2021), <https://perb.ca.gov/wp-content/uploads/decision-2755h.pdf> [<https://perma.cc/ZU2V-W5BY>].

44. *Id.* at 48, 60. The decision describes the university’s communications as “relatively truthful” but does not identify any false or misleading statements. *Id.* at 48. Instead, the Board complained that the university did not provide sufficient “context,” that is, the unions’ interpretation and assessment of *Janus*. *Id.* at 42.

45. *Id.* at 46 n.34 (“To the extent an act is inherently destructive, it is the *Janus* decision.”). This reflects the legislative history of SB 866 that “was focused on removing the public employer from the relationship between employees and the union.” *Id.* at 27–28 n.23 (quoting Teamsters’ counsel at oral argument).

46. *Id.* at 21. The Board relied on *Teamsters Local 2010 v. Regents of the University of California*, 253 Cal. Rptr. 3d 394, 398 (Ct. App. 2019), which held that an employer “deterred” organizing by issuing a communication that was “not coercive, in that [the employer] professed neutrality on the issue of unionization, couched the communication in terms of providing employees with facts, and did not threaten employees with reprisals if they unionized” because the communication nonetheless attempted to “influence” employees.

47. Am. Fed’n of State, Cnty. & Mun. Emps. Loc. 3299 v. Regents of the Univ. of Cal., *supra* note 43, at 44.

according to the Board, the university directed its employees to itself as their primary source of information about union membership status.<sup>48</sup> Because the university established no business necessity to justify its communications that were likely to influence employees choices related to union membership and dues, the Board held that the university therefore violated SB 866 and committed an unfair labor practice.<sup>49</sup>

In sum, SB 866 ensures that, for the vast majority of public employees, their only source of information about their First Amendment rights implicated by union membership will come from the unions themselves.<sup>50</sup> Because the unions have every financial incentive to withhold that information, and many do actually withhold it by presenting a combination membership and dues deduction form without comment about the First Amendment,<sup>51</sup> most public employees are left

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48. *Id.* at 42. Unlike other statutes, SB 866 contains no “free speech safe harbor” for employers. *Id.* at 28–29.

49. *Id.* at 60. The Board issued a cease and desist order, ordered the university to remove and rescind its communications of June 28, 2018, and ordered it to meet and confer with the union regarding the content of a mass communication and/or distribute the union’s communications on *Janus* to all employees. *Id.* at 61.

50. The Public Employment Relation Board’s decision disclaimed that the university was entirely prohibited from communicating with its employees about *Janus*, but immediately limited that statement by noting that any such communication would have to be crafted with union participation or sent simultaneously with a union communication. *Id.* at 53 n.38. Laws echoing some of SB 866’s provisions have passed in Washington, New Jersey, Illinois, and Massachusetts. *See, e.g.*, S.B. 1784, 101st Gen Assemb. (Ill. 2019). Among its provisions, the Illinois law grants the unions the exclusive ability to authorize cessation of dues deductions, 5 ILL. COMP. STAT. 315/6 (f-15)(1), contains an automatic renewal provision except for a 10-day window period during which the employee may ask the union to cease making deductions, 5 ILL. COMP. STAT. 315/6 (f), and gives the union exclusive access to employees’ personal contact information. 5 ILL. COMP. STAT. 315/6 (2021). If the employer receives a request for such information under the state’s public records act request, it must inform the union. 5 ILL. COMP. STAT. 315/6 (c-5) (2021); *see also* N.J. STAT. ANN. § 34:13A-5.11 (West 2018) (limiting right to revoke authorization for dues deductions, prohibiting communication between government employers and their employees about the employees’ First Amendment rights related to union membership, granting unions exclusive access to employees’ personal information and to meet personally with employees); Shira Schoenberg, *Lawmakers Grant Public Unions More Power; Group Threatens Lawsuit*, MASSLIVE (Sept. 19, 2019, 5:20 PM), <https://www.masslive.com/news/2019/09/lawmakers-grant-public-unions-more-power-group-threatens-lawsuit.html> [<https://perma.cc/6VZ2-FWLb>].

51. *See Union Membership & Dues Deduction Authorization Form*, ASEA/AFSCME Local 52, <https://www.afscmelocal52.org/member> [<https://perma.cc/99C7-QL4E>] (stating, in whole, “YES! I choose to be a union member. I understand my membership supports the organization advocating for my interests as a bargaining unit member and as an individual. ASEA negotiated labor contracts result in better wages, benefits and working conditions. Union strength is a reflection of its membership. Being a member makes the union more effective for everyone. ASEA membership is opt-in and paying union dues is not a condition of employment. By submitting this form I choose to be a union member.”); *see also* SERV. EMPS. INT’L UNION, LOC. 1000, MEMBERSHIP APPLICATION 1, <https://www.seiu1000.org/sites/main/files/file-attachments/membershipform.pdf>

without the ability to make a choice about union membership or any kind of understanding of that choice's implications for their constitutional rights.

## II. THE WAIVER OF FIRST AMENDMENT RIGHTS REQUIRES VOLUNTARY, INFORMED, AFFIRMATIVE CONSENT

In *Johnson v. Zerbst*,<sup>52</sup> the Supreme Court established the basic parameters of a constitutional waiver. Waiver is “an intentional relinquishment or abandonment of a known right or privilege,”<sup>53</sup> and whether such a relinquishment or abandonment has occurred depends “in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct” of the person who chooses whether to waive a constitutional right.<sup>54</sup> *Zerbst* applies where a State bears the burden of showing a waiver of constitutional rights.<sup>55</sup>

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[<https://perma.cc/SRH3-GXFP>] (“With my signature below, I hereby apply for membership in SEIU Local 1000 and hereby agree to abide by the SEIU Local 1000 bylaws and policy file. In becoming a member, I authorize the establishment with the appropriate agency the withholding from my pay or retirement allowance of dues and any benefit deductions. I understand that my membership rights are set forth in the SEIU Local 1000 policy file, which is subject to amendment by the union, and any applicable memorandum of understanding between SEIU Local 1000 and the state of California, and that a copy of the policy file and applicable memoranda of understanding are always available for my review. Membership includes transfers to certain co-affiliates of the union.”); TEAMSTERS LOC. UNION 8, MEMBERSHIP AND DUES DEDUCTION AUTHORIZATION CARD, [https://www.ibtlocal8.org/docs/Membership%20and%20Dues%20Deduction%20Authorization%20Card%202018\\_103118.pdf](https://www.ibtlocal8.org/docs/Membership%20and%20Dues%20Deduction%20Authorization%20Card%202018_103118.pdf) [<https://perma.cc/P2BP-ZHWG>] (“Effective immediately, I hereby voluntarily authorize and direct Penn State to deduct from my pay each and every month, regardless of whether I am or remain a member of the Union, the amount of dues and assessments certified by the Union, and as they may be adjusted periodically by the Union. I further authorize Penn State to remit such amount and direct such amounts so deducted to be turned over each month to the secretary/treasurer of such local union for and on my behalf. I recognize that neither this authorization nor its continuation is a condition of my employment. This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of the Union, for a period of one year from the date of execution of this authorization or until the termination date of the collective bargaining agreement between Penn State and the Union, whichever occurs sooner, and for the years to come, unless I give Penn State and the Union written notice of revocation during the fifteen (15) days before the annual anniversary date of this authorization or, during the fifteen (15) days before the date of termination of the collective bargaining between Penn State and the Union, whichever occurs sooner.”).

52. 304 U.S. 458 (1938).

53. *Id.* at 464.

54. *Id.*

55. *Moran v. Burbine*, 475 U.S. 412, 421, 450 (1986) (Stevens, J., dissenting) (“[T]he burden of proving the validity of a waiver of constitutional rights is always on the *government*.” (citing cases)); *see also* *Faretta v. California*, 422 U.S. 806, 835 (1975) (right to the assistance of counsel at trial); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (right to confront adverse witnesses); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272 (1942) (right to trial by jury).

Requirements to waive constitutional rights are the same in both civil and criminal contexts.<sup>56</sup> *Janus*, citing *Zerbst*, requires the state to present “clear and compelling evidence”<sup>57</sup> that employees’ authorization to deduct dues and fees, a waiver of the employee’s rights against compelled speech, is “freely given.”<sup>58</sup> In order for waiver to be meaningful, notice of the right must also be combined with a meaningful opportunity to exercise that right.<sup>59</sup> An employee, therefore, must be

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56. See *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972); *Gete v. Immigr. & Naturalization Serv.*, 121 F.3d 1285, 1293 (9th Cir. 1997) (principles governing waiver of constitutional rights apply equally in criminal and civil context); *W.B. v. Matula*, 67 F.3d 484, 497 (3d Cir. 1995) (same); *United States v. Loc. 1804–1, Int’l Longshoremen’s Ass’n, AFL-CIO*, 44 F.3d 1091, 1098 (2d Cir. 1995) (same); *K.M.C. Co. v. Irving Tr. Co.*, 757 F.2d 752, 756 (6th Cir. 1985) (same); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 946 n.5 (5th Cir. 1981). *Mosley* also serves as precedent for the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981); see also *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (noting that waivers in the criminal context where personal liberty is involved are parallel to civil cases involving a property right); *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n*, 301 U.S. 292, 307 (1937) (heavy burden against the waiver of constitutional rights in civil cases); *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937) (same).

57. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018). The “clear and compelling” language in *Janus* comes from *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); however, some courts use “clear and convincing” or even conflate both. See, e.g., *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000) (quoting *Gete*, 121 F.3d at 1293). In the First Amendment context, the two phrases appear synonymous. See *In re C.B.S., Inc.*, 570 F. Supp. 578, 584 (E.D. La. 1983) (holding “clear and compelling” evidence required that a person understood his First Amendment rights and intentionally relinquished them); *Ray v. Mangum*, 788 P.2d 62, 66 (Ariz. 1989) (using “clear and convincing” and “clear and compelling” interchangeably).

58. *Janus*, 138 S. Ct. at 2486. Where the state creates and facilitates a system of payroll deductions for union dues and fees that infringes on employees’ First Amendment rights, the process must survive exacting scrutiny. *Id.* at 2465 (“[A] compelled subsidy must ‘serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.’”). By requiring clear and compelling evidence, the Court set a higher standard than that required to show voluntary consent in the context of waiving Fourth Amendment rights to permit a warrantless search. See, e.g., *United States v. Blomquist*, 976 F.3d 755, 758 (6th Cir. 2020) (“The government bears the burden of demonstrating by a preponderance of the evidence, through clear and positive testimony, that the consent was voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.” (citations omitted)); *United States v. Sallis*, 920 F.3d 577, 582 (8th Cir. 2019) (government must show, by preponderance of the evidence, that consent was freely given); cf. *Florida v. Royer*, 460 U.S. 491, 497 (1983) (“mere submission” will not meet state’s burden). This is consistent with the foundational dividing line between the First and Fourth Amendments; namely, that, in the Fourth Amendment context, “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’” a standard which “is judged by balancing [the search’s] intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests,” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (citation omitted), while the First Amendment abhors “ad hoc balancing of relative social costs and benefits.” *United States v. Stevens*, 559 U.S. 460, 470 (2010); accord, e.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

59. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); see also *Mazdabrook Commons Homeowners’ Ass’n v. Khan*, 46 A.3d 507, 521 (N.J. 2012) (ostensible waiver of homeowner’s

presented with and understand “the nature of the right being abandoned and the consequences of the decision to abandon it.”<sup>60</sup> The failure to provide information necessary to make an informed, knowing waiver unconstitutionally burdens public employees’ First Amendment rights.

### A. *The Waiver Must Be Voluntary*

An employee’s waiver of constitutional rights is voluntary only if the employee made “a free and deliberate choice” without “coercion or improper inducement.”<sup>61</sup> The mere presence of choice does not eliminate the possibility of compulsion.<sup>62</sup> “The legitimacy of a choice largely depends on the coerciveness of the proffered alternatives.”<sup>63</sup> Among other things, courts must vigilantly protect workers from “stealthy encroachments,” “subtly coercive” tactics to sway a person’s volition, and “the possibly vulnerable subjective state of the person who consents.”<sup>64</sup>

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right to post signs before getting homeowner association board approval, “without any idea about what standards would govern the approval process,” could not “constitute a knowing, intelligent, voluntary waiver of constitutional rights”).

60. *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (citation omitted); *Berghuis v. Thompkins*, 560 U.S. 370, 382–83 (2010) (The waiver inquiry “has two distinct dimensions”: waiver must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” (citation omitted)); *see also* *J.D.B. v. North Carolina*, 564 U.S. 261, 269–70 (2011) (“[I]f a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a ‘prerequisite[e]’ to the statement’s admissibility as evidence in the Government’s case in chief, that the defendant ‘voluntarily, knowingly and intelligently’ waived his rights.” (alteration in original) (citations omitted)).

61. *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007).

62. *See Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1126 (D. Haw. 2001) (candidate’s signing away his First Amendment rights on a Code of Fair Campaign Practices was not voluntary because failure to sign meant the candidate would be branded as someone who would not “uphold basic principles of decency, honesty, and fair play”); *Simmons v. United States*, 390 U.S. 377, 394 (1968) (“[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.”).

63. *Deering v. Brown*, 839 F.2d 539, 542–43 (9th Cir. 1988); *see also* *Nat’l Lab. Rels. Bd. v. Forest City/Dillon-Tecon Pac.*, 522 F.2d 1107, 1109 (9th Cir. 1975) (noting that when an employer prematurely recognizes a union as exclusive representative with a union security clause, this constitutes “joint employer-union coercion” and deprives an employee of a choice whether to join or not without the need for threats or “other coercive tactics”).

64. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973). Unfortunately, when unions are entrusted with obtaining constitutional waivers, some choose to engage in fraud rather than permit employees to exercise legitimate choice. *See Schiewe v. Serv. Emps. Int’l Union Loc. 503*, No. 20-CV-00519, 2020 WL 5790389, at \*2 (D. Or. Sept. 28, 2020) (public employee plaintiff alleged that union forged her name on union membership application, resulting in deduction of wages without her consent); *Zielinski v. Serv. Emps. Int’l Union Loc. 503*, 499 F. Supp. 3d 804, 809 (D. Or. 2020), *appeal filed*, No. 20-36076 (9th Cir. Dec. 15, 2020) (public employee claimed constitutional harm



In *Miranda*, the Court explained at length that in-custody interrogation presents significant psychological factors that effectively pressure suspects into waiving their rights.<sup>65</sup> These need not rise to the level of “physical coercion or patent psychological ploys.”<sup>66</sup> Instead, the Court referred to any police strategies that lacked “appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.”<sup>67</sup>

As a practical matter,<sup>68</sup> public employees in California are entirely reliant on union membership information provided to them by the very union that enjoys exclusive representation rights over the workforce.<sup>69</sup> Typically, unions provide little information about their

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stemming from union’s forgery of the employee’s signature on documents authorizing dues deductions); *Yates v. Wash. Fed’n of State Emps.*, 466 F. Supp. 3d 1197, 1203–04 (W.D. Wash. 2020), *appeal filed sub nom.* AFSCME Council 28 (WFSE), No. 20-35879 (9th Cir. filed Oct. 10, 2020) (same); *Quezambra v. United Domestic Workers of Am.* AFSCME Loc. 3930, 445 F. Supp. 3d 695, 706 (C.D. Cal. 2020) (same). The Supreme Court noted unions’ disregard for individual employees’ rights in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 314–15 (2012), in which, 25 years after the Court established minimum procedures to protect dissenters’ rights in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 304 (1986), unions still sought to evade the necessity of acquiring permission to take money from employee paychecks for explicit political advocacy. Particularly galling, the advocacy in *Knox* was support of a ballot initiative indented to restrict the rights of nonunion public employees. *Knox*, 567 U.S. at 316.

65. *Miranda v. Arizona*, 384 U.S. 436, 448–56 (1966) (describing an array of tactics intended to pressure, intimidate, trick, or otherwise induce a confession).

66. *Id.* at 457.

67. *Id.*

68. As discussed *infra* note 131 and accompanying text, public employees may obtain information by happenstance—talk radio or a podcast or comments by a friend or relation—but California government employers and agencies have yet to provide any information directly to public employees, even under the circumstances narrowly permitted by SB 866.

69. “Exclusive representation” means that the union negotiates and enforces a collective bargaining agreement that covers every employee in the bargaining unit, regardless of whether individual employees are union members or not. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220–23 (1977). While unions have claimed that exclusive representation statutes enable “free riding” by non-union members who nonetheless “benefit” from union membership, *Janus* viewed exclusive representation as a boon that unions “avidly” seek because it “confers many benefits” such as “giv[ing] the union a privileged place in negotiations over wages, benefits, and working conditions”—making it the only entity that the government is “required by state law to listen to”—thus resulting in a “‘tremendous increase in the power’ of the union.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2467 (2018) (citation omitted). A union with exclusive representation status also enjoys exclusive access to on-site communications facilities whereby the government (upon the request of the union during contract negotiations) may bar information from rival unions or organizations that oppose unionization. *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 55 (1983); *see also id.* at 70 n.12 (Brennan, J., dissenting).

finances and internal workings that would permit a run-of-the-mill employee to understand how their union dues are spent.<sup>70</sup>

The most obvious place an employee would go to ask such questions is the human resources office, which answers questions on every other topic regarding compensation and benefits.<sup>71</sup> Only with regard to union membership and First Amendment rights must California state and local employers withhold information necessary for employees to make a meaningful choice. Instead, employees are referred to self-interested third parties: public employee unions.<sup>72</sup> California education reporter Michael Antonucci explains the increasingly narrow hoops that teachers must jump through to resign from the California Teachers Association (the state's largest public employee union): Once a California Teachers Association member submits a request to resign during the short window period, in writing, with an original signature, delivered via U.S. Mail or in person to the union local's headquarters, the local officer will "identify the most compelling person to hold a one-on-one conversation with the member. . . . The benefits of

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70. See ROBERT P. HUNTER ET AL., *THE MICHIGAN UNION ACCOUNTABILITY ACT: A STEP TOWARD ACCOUNTABILITY AND DEMOCRACY IN LABOR ORGANIZATIONS 1* (2001), <http://www.mackinac.org/archives/2001/s2001-02.pdf> [<https://perma.cc/EX9C-9LGK>] ("[U]nions, set up to empower workers, provide far less financial information to their members—whose mandatory fees support them—than a publicly held corporation must . . . provide to its shareholders."). Unions generally face nominal financial disclosure requirements. *Id.* at 3; see also Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Disputes with First Amendment Values*, 14 WM. & MARY BILL RTS. J. 1309, 1396–97 (2006) (detailing lack of information provided and the resulting fact that workers do not enforce their constitutional rights).

71. See *Frequently Asked Questions*, CAL. DEP'T OF HUM. RES., <https://www.calhr.ca.gov/pages/faqs.aspx> [<https://perma.cc/V4T4-JRPG>] (addressing all manner of benefits programs, workers' compensation, and labor relations *except* as relates to employees' First Amendment rights); CAL. STATE CONTROLLER'S OFF., *DEDUCTION PROGRAM HANDBOOK 22–31*, [https://www.sco.ca.gov/Files-PPSD/deduction\\_program\\_handbook\\_1119.pdf](https://www.sco.ca.gov/Files-PPSD/deduction_program_handbook_1119.pdf) [<https://perma.cc/5NDU-2RDD>] (detailing procedures for employees to request "voluntary miscellaneous payroll deductions"); see also *Faculty and Staff: Benefits*, UC SAN DIEGO, <https://blink.ucsd.edu/HR/benefits/index.html> [<https://perma.cc/3EMU-LKSS>] (last updated Sept. 23, 2020, 1:38 PM); *Faculty & Staff: Compensation*, UC SAN DIEGO, <https://blink.ucsd.edu/HR/comp-class/compensation/index.html> [<https://perma.cc/BG96-HX27>] (last updated Oct. 14, 2021, 3:24 PM).

72. *Cf. Sentinel Offender Servs., LLC v. Glover*, 766 S.E.2d 456, 467 (Ga. 2014) (state may contract with a private company to perform probation services so long as the state provides adequate supervision to ensure that individuals receive all due process protections); *Little Rock Fam. Planning Servs. v. Rutledge*, 398 F. Supp. 3d 330, 415 (E.D. Ark. 2019) ("States may not outsource their duty to protect the constitutional rights of their citizens." (citing *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016))).

collective bargaining and advocacy should be discussed, and all the member benefits that will be lost should be shared.”<sup>73</sup>

Under these conditions, many workers infer from the unions’ communications that they are required to support the union as a condition of their employment.<sup>74</sup>

Such meetings may be considered analogous to attorneys’ in-person solicitation of clients in hospital rooms or at accident sites, which are prohibited by ethical codes because they tend to “breed[] undue influence,”<sup>75</sup> or to the “inevitably seductive effect of repeated assurances that the interrogator is there ‘to help.’”<sup>76</sup> When it comes to *employers*, courts frequently infer the presence of implicit pressure. For example, one-on-one meetings by employers with employees to *discourage* union activities are prohibited by the National Labor Relations Act.<sup>77</sup> Federal labor law also finds implicit pressure—and an unfair labor practice—if employers offer a pay raise or propose settling grievances during a union organization drive.<sup>78</sup>

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73. See Michael Antonucci, *Antonucci: What Does It Take to Resign from a California Teachers Union?*, LA SCH. REP. (July 17, 2019), <http://laschoolreport.com/antonucci-what-does-it-take-to-resign-from-a-california-teachers-union/> [<https://perma.cc/W9VL-NVPM>]; see also Boardman v. Inslee, 978 F.3d 1092, 1130 (9th Cir. 2020) (Bress, J., dissenting) (by giving a public employee union, and only the union, “exclusive access to critical information,” the union can then “engage in core political speech with in-home care workers, including speech that promotes the Unions themselves”).

74. There are any number of reasons why employee preferences may diverge from those of the union leadership. Some workers may want to bargain “as individuals rather than to have to pool that leverage and deal with the elected leaders of some representative.” Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103, 124 (2001). Some workers may object to associating with a union that exhibits hostility to part-time work, *Conley v. Mass. Bay Transp. Auth.*, 539 N.E.2d 1024, 1028 (Mass. 1989), or that calculates seniority differently depending on whether interim breaks in service were due to pregnancy or other reasons, *Lynn Tchrs. Union, Loc. 1037 v. Mass. Comm’n Against Discrimination*, 549 N.E.2d 97, 101 (Mass. 1990), or that metes out informal “discipline” that affects an employee’s economic interests in order to “protect the interests of the union or its membership,” *Breninger v. Sheet Metal Workers Int’l Ass’n Loc. Union No. 6*, 493 U.S. 67, 97 (1989) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

75. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977).

76. *State v. Luckett*, 981 A.2d 835, 846 (Md. Ct. Spec. App. 2009) (rejecting “unspoken inducement to waive the right to counsel”).

77. See, e.g., *Charter Commc’ns, Inc. v. Nat’l Lab. Rels. Bd.*, 939 F.3d 798, 812 (6th Cir. 2019).

78. See, e.g., *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 234 Cal. Rptr. 3d 88, 161–62 (2018) (pay raise created an “inference of direct dealing,” an unfair labor practice); *Charter Commc’ns, Inc.*, 939 F.3d at 812–13 (employer cannot solicit grievances during a union organization drive because of the “implied suggestion” that problems can be resolved without the union); see also Daniel V. Johns, *Promises, Promises: Rethinking the NLRB’s Distinction Between Employer and Union Promises During Representation Campaigns*, 10 U. PA. J. BUS. & EMP. L. 433, 435 (2008) (“Union representation campaigns are perhaps the only type of elections that prohibit

The implicit pressure presents a potentially coercive situation.<sup>79</sup> At best, the unions' omission of any reference to employees' First Amendment rights discourages employees from thinking about them. As such, a state relying on a union's say-so can never be confident that employees voluntarily consent to waive their rights.

*B. The Waiver Must Be Informed by Knowledge of the Relevant Rights and the Consequences of Waiving Them*

*Janus* holds that any waiver of First Amendment rights must be made “clearly” by “affirmative consent” that is “freely given” by employees “before any money is taken from them.”<sup>80</sup> That is, public employees must be informed about their First Amendment rights *as a necessary precondition* to making an informed decision as to whether to join or subsidize a public employee union.<sup>81</sup> An affirmative waiver of First Amendment rights must be based on *actual* knowledge of the

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one party [employers] from explaining to voters exactly what the consequences of their vote for that party will be.”).

79. Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members and non-members from opposing union political activities. *See* 1 MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES 626 (1970); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 274 (1960); LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS 44–46 (2004). This is why nonconformists must rely on the Constitution for protection. *See, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (finding the judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process).

80. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (emphasis added); *see also* *Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993) (First Amendment rights may be waived only if the waiver is “knowing, voluntary and intelligent.”); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) (“[C]onstitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent.”); *cf.* CAL. RULES OF PROF’L CONDUCT r 1.0.1 (2018) (The California Supreme Court defines “informed consent” as “agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.”).

81. *See* Kimberly S. Webster, *Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers’ Right to Know Their Rights?*, 6 NE. U. L.J. 435, 435 (2014) (“A right does not exist in any meaningful sense unless people know about it and have the means to exercise it.”); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 158 (1990) (“To translate abstract legal rights on the books into practical guarantees in the workplace, the employee needs to be informed what his rights are . . . .”); Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 438 (1995) (“Ignorance of the law disempowers people. It prevents them from seeking redress for legal wrongs, and also causes them to shy away from taking actions to which they are legally entitled.”).

content and consequences of the waiver.<sup>82</sup> A waiver is “knowing [and] intelligent” when “done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>83</sup>

This is consistent with *Miranda*, which holds that “[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.”<sup>84</sup> As the *Miranda* Court explained:

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. . . . It is only through an awareness of these *consequences* that there can be any assurance of real understanding and intelligent exercise of the privilege.<sup>85</sup>

Courts have held that someone cannot waive a “known” right if the right itself was “unknown” prior to a particular Supreme Court opinion defining that right.<sup>86</sup> In *Curtis Publishing Co. v. Butts*,<sup>87</sup> a First Amendment case in which a college athletic director sued a newspaper publisher for libel after it printed an untrue story that he tried to “fix” a game, the defendant publisher asserted a defense on appeal based on the newly decided *New York Times v. Sullivan* case.<sup>88</sup> The plaintiff

82. See *Bayo v. Napolitano*, 593 F.3d 495, 504 (7th Cir. 2010) (refusing to substitute a “*presumption* of knowledge for the requirement of *actual* knowledge” as “it would render all waivers of constitutional rights signed without coercion valid, regardless of whether the signatory understood a single word on the page”); *Nose v. Att’y Gen. of U.S.*, 993 F.2d 75, 78–79 (5th Cir. 1993) (same).

83. *Brady v. United States*, 397 U.S. 742, 748 (1970) (factors for determining when a guilty plea waives the right against self-incrimination); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) (“[C]onstitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent.”); *Erie Telecomms., Inc. v. City of Erie*, 659 F. Supp. 580, 584 (W.D. Pa. 1987).

84. *Miranda v. Arizona*, 384 U.S. 436, 470 (1966).

85. *Id.* at 469 (emphasis added); see also *Walker v. Peppersack*, 316 F.2d 119, 127–28 (4th Cir. 1963) (holding that a criminal defendant could not have waived the rule protecting against unconstitutional searches when the search occurred prior to the Supreme Court’s decision in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), because “it is clear that he did not intentionally abandon a known right since there was no such right for him to abandon . . . before the Supreme Court’s decision” (emphasis omitted)).

86. See *Walker*, 316 F.2d at 127–28 (holding that a criminal defendant could not have waived the rule protecting against unconstitutional searches when the search occurred prior to the Supreme Court’s decision in *Mapp*, 367 U.S. at 655); see also *Felter v. S. Pac. Co.*, 359 U.S. 326, 336 (1959) (“[W]e doubt whether the right to revoke [wage assignment for union dues] could be waived at all in advance of the time for its exercise . . .”).

87. 388 U.S. 130 (1967).

88. *Id.* at 143; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that “[t]he constitutional guarantees [of freedom of speech and press] require . . . a federal rule that prohibits

argued that the publisher waived the defense by not raising it before trial.<sup>89</sup> The Supreme Court plurality rejected this argument and explained the effect of a new Supreme Court decision, *New York Times Co. v. Sullivan*, on the defendant publisher's purported waiver.<sup>90</sup>

[A]s a general matter, we think it inadvisable to determine whether a “right or privilege” is “known” by relying on information outside the record concerning the special legal knowledge of particular attorneys. . . . We think that it was our eventual *resolution* of *New York Times*, rather than its facts and the arguments presented by counsel, which brought out the constitutional question here. *We would not hold that Curtis waived a “known right” before it was aware of the New York Times decision.*<sup>91</sup>

The First Amendment context was a key factor in the decision. The Court noted that “the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the ‘matrix, the indispensable condition, of nearly every other form of freedom.’”<sup>92</sup> Thus, the Court concluded, “[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.”<sup>93</sup> The *Janus* decision relies explicitly on *Curtis Publishing* to delineate the requirements of a constitutional waiver.<sup>94</sup> This principle applies in the context of labor law as well. In *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Rafferty*,<sup>95</sup> plaintiffs were union members who angered the union leadership by circulating

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a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

89. *Curtis Publ’g Co.*, 388 U.S. at 142.

90. *Id.* at 144–45. It was of little import that the particular attorneys involved might have foreseen the result in *Sullivan* given their specific knowledge of the litigation as it unfolded. *Id.* at 144.

91. *Id.* at 144–45 (emphasis added).

92. *Id.* at 145 (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

93. *Id.*

94. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018); see also *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.” (first citing *Curtis Publ’g Co.*, 388 U.S. at 143; and then citing *Polites v. United States*, 364 U.S. 426, 433 (1960))); *Hawket, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (a party will not be held to have waived newly protected rights because “the doctrine of waiver demands conscientiousness, not clairvoyance, from parties”).

95. 348 F.2d 307 (9th Cir. 1965).

pamphlets and creating dissention by challenging the leadership's proposals.<sup>96</sup> They were expelled by the union and they sued to restore their full union membership.<sup>97</sup> The court held, "it is clear that the offenses charged against the appellees were protected activities under the Landrum-Griffin Act for which the Union could not, as a matter of law, penalize the appellees."<sup>98</sup> The court addressed rights asserted *after* a relevant case, *Salzhandler v. Caputo*,<sup>99</sup> established rights, adopting and quoting the district court ruling:

At the time the agreement was signed plaintiffs were presumed to know the provisions of Sections 1 and 13 of Article XIII of the Union constitution, the provisions of which are as stated in the charges against plaintiffs . . . . The *Salzhandler* case was not decided until April 18, 1963, so the court infers that plaintiffs were not aware of the rule as announced in that case to wit: that the making of false and libelous statements concerning a member or officer of a Union may not subject a member to expulsion on a finding by the governing board of said Union that such statements were untrue, slanderous or libelous. *It is therefore concluded that the agreement was signed when the plaintiffs were not aware of their rights with respect to the distribution as accomplished by them of circulars containing false and untruthful statements as to officers of the Union. It follows that the agreement did not constitute a waiver of the rights of plaintiffs as announced in the Salzhandler case and plaintiffs are not estopped to assert said rights in the instant matter.*<sup>100</sup>

The Supreme Court suggested the type of information and knowledge relevant to a waiver of First Amendment rights in *Knox v. SEIU, Local 1000*.<sup>101</sup> In that case, the union deducted money from agency shop fee payer paychecks mid-year, for the purpose of advocating against two ballot initiatives.<sup>102</sup> Unlike the opt-out procedure then in place for annual dues, the union did not give the workers an opportunity to opt-out of the mid-year deduction, nor did it give them

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96. *Id.* at 310.

97. *Id.* at 309.

98. *Id.* at 312.

99. 316 F.2d 445 (2d Cir. 1963).

100. *Rafferty*, 348 F.2d at 313-14 (emphases added).

101. 567 U.S. 298 (2012).

102. *Id.* at 315.

any information relevant to making a choice whether to do so.<sup>103</sup> In the context of that case, which concerned only political activities as defined under *Abood*, the critical information withheld from workers was how the union intended to use the funds.<sup>104</sup>

The Court explicitly tied this holding to the constitutional requirement that employees must provide *informed* consent to the union’s deductions:

Giving employees only one opportunity per year to make this choice is tolerable if employees are able at the time in question to make *an informed choice*. But a nonmember cannot make *an informed choice* about a special [mid-year] assessment or dues increase that is unknown when the annual notice is sent.<sup>105</sup>

In the post-*Janus* world, information that public employees need to know to make an informed decision is that they have constitutional rights relating to union membership and dues that give them the option of continuing their employment without joining or subsidizing the union. Unions can and do fail to provide the information or opportunity necessary to make an informed decision whether to waive<sup>106</sup> and a union’s “restrictive resignation scheme is undoubtedly a factor in weighing the pros and cons of union membership.”<sup>107</sup> Under the communications blackout mandated by SB 866, however, California cannot satisfy *Janus*’s requirement that it only deduct dues after a knowing waiver has been provided.

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103. *Id.* at 314.

104. *Id.* at 315. Among other things, the Court noted that workers may have favored one or both of the targeted initiatives or may simply have not wanted to delegate to the union how to allocate the workers’ dollars on political matters.

105. *Id.* (emphases added).

106. In fact, public employee unions have a long, documented history of failing to provide adequate information regarding dues payments. *See Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 877–78 (W.D.N.C. 2000) (noting the “woeful inadequacy and downright arrogance of the union’s practices and procedures” that halved the amount of the dues reduction to which nonmembers were entitled).

107. *Lutter v. JNESO*, No. 19-13478, 2020 WL 7022621, at \*5 (D.N.J. Nov. 30, 2020); *see also Knox*, 567 U.S. at 315 (noting that a non-union member’s choice to support a union’s political activities, through electing to pay dues or a special assessment, may change “as a result of unexpected developments” in the union’s political advocacy).



### C. *The Waiver Must be Affirmative, Not Presumed*

If public employees wish to waive their First Amendment right to refrain from subsidizing a union, they may do so. But the waiver of constitutional rights cannot be presumed.<sup>108</sup> As *Janus* explains:

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.<sup>109</sup>

To comply with the Constitution, therefore, public employers must obtain affirmative consent from workers before deducting money from their paychecks and redirecting that money to the public employee unions.<sup>110</sup> This standard is often referred to in shorthand as “opt-in” as opposed to “opt-out.” That is, an employee must “opt-in”—affirmatively choose—to join and subsidize the union.<sup>111</sup>

### D. *The Waiver Must Be Reasonably Contemporaneous*

Neither the invocation nor waiver of a constitutional right exists in perpetuity.<sup>112</sup> For example, in *Maryland v. Shatzer*,<sup>113</sup> a criminal suspect invoked his right to an attorney during an initial interview with the police, at which point the police terminated the interview.

108. See *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (“[A] waiver of constitutional rights in any context must, at the very *least*, be clear.”); *Barker v. Wingo*, 407 U.S. 514, 525 (1972) (“[P]resuming waiver of a fundamental right from inaction[] is inconsistent with this Court’s pronouncements on waiver of constitutional rights.”); *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 109–10 (Tex. App. 2003) (courts cannot find waiver “by implication”); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (“Presuming waiver from a silent record is impermissible.”); *Spiller v. State*, 182 N.W.2d 242, 243 (Wis. 1971) (“[S]ilence as consent is not a reasonable inference when affirmative acts of consent and approval are required.”); *State v. Coita*, 568 A.2d 424, 425 (Vt. 1989) (silent acquiescence, instead of an affirmative indication of consent, provides no evidence that someone “thought about the decision”).

109. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

110. *Id.*

111. The Supreme Court required “opt-in” for mid-year special assessments by a union to finance political activism in *Knox v. Service Employees International Union, Local 1000*, and acknowledged that “opt-out” for annual agency shop fees raised troubling constitutional questions. *Knox*, 567 U.S. at 314–15 (holding the union’s procedure to opt-out of mid-year assessments to be an “aggressive use of power” that was “indefensible”). Annual assessments were not at issue in *Knox*.

112. See *United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988) (“The continuity of consent, however, is only a presumption. . . . Like the waiver of some other constitutional rights, it should not, once uttered, be deemed forever binding.”).

113. 559 U.S. 98, 101 (2010).

However, in a later interview, the suspect waived his rights and consented to a polygraph test, after which he made several inculpatory statements.<sup>114</sup> When he sought to have the statements excluded from the subsequent criminal trial, the Supreme Court held that his invocation of rights during the first interview expired between the first interview and the second interview.<sup>115</sup> Just as an invocation of rights can expire, so too can a waiver grow stale over time.

This requirement of a fresh waiver takes on heightened importance after a significant change in the law. In the criminal context, when looking at the “totality of the circumstances,” the state may need to repeat *Miranda* warnings when intervening events give the impression that a defendant’s rights have changed in a material way since the defendant was previously advised of his rights.<sup>116</sup> The length of time that either invocation or waiver of constitutional rights remains operative depends on the circumstances.<sup>117</sup> Because waivers must be informed, “a second waiver may be required if the original waiver insufficiently disclosed the nature” of a protected interest.<sup>118</sup>

In *Knox*, the Supreme Court noted that the circumstances that an employee would consider in deciding whether to waive First Amendment rights are likely to change over time—not only the actions and

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114. *Id.* at 101–02.

115. *Id.* at 110. While the interrogations in *Shatzer* were interrupted by two years, the Court noted that two *weeks* suffices to render a waiver stale. *Id.* at 111–12; *see also* United States v. Nordling, 804 F.2d 1466, 1471 (9th Cir. 1986) (repeat *Miranda* warnings required when an “appreciable time” elapses between interrogations).

116. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (“A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights.”); *cf.* United States v. Rodriguez-Preciado, 399 F.3d 1118, 1128–29 (9th Cir. 2005) (interval of 16 hours to 3 days does not necessarily require a second warning, depending on the circumstances).

117. *See* Wyrick v. Fields, 459 U.S. 42, 47 (1982) (per curiam); *see also* State v. Prue, 153 A.3d 551, 561 (Vt. 2016) (whether *Miranda* warnings have gone stale requires consideration of the “totality of the circumstances”) (citation omitted). Factors may include:

- (1) the length of time between the giving of the first warnings and the subsequent interrogation;
- (2) whether the warnings and the subsequent interrogation were given in the same or different places;
- (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers;
- (4) the extent to which the subsequent statement differed from any previous statements;
- (5) the apparent intellectual and emotional state of the suspect.

*In re Miah S.*, 861 N.W.2d 406, 413 (Neb. 2015) (internal ellipses omitted) (quoting State v. McZorn, 219 S.E.2d 201, 212 (N.C. 1975), *judgment vacated in part in* McZorn v. North Carolina, 428 U.S. 904 (1976)).

118. *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1082 (C.D. Cal. 2015) (invalidating client’s open-ended general waiver of a conflict of interest); *see also* Carter v. McCarthy, 806 F.2d 1373, 1376 (9th Cir. 1986) (defendant not fully aware of the consequences of his guilty plea did not make a “voluntary and intelligent” waiver).

positions of the union, but also the employee's own beliefs or opinions.<sup>119</sup> As the attorneys general of Indiana, Alaska, and Texas have opined,<sup>120</sup> *Janus's* requirement that the state obtain "clear and compelling" evidence of each employee's affirmative, informed waiver therefore "demands some periodic inquiry into whether a public employee wishes to continue to waive—or reclaim—his or her First Amendment rights."<sup>121</sup>

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119. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 315 (2012) (an employee's choice to support a union may change "as a result of unexpected developments" in the union's political advocacy).

120. State attorneys general are the only judicial officers to date to issue opinions on the need for contemporaneous, renewed waivers. Dozens of public employees who signed union cards prior to *Janus* have filed lawsuits in federal courts across the country, seeking to be released from their union membership and freed from the unions' taking dues from their paychecks. However, union defendants effectively moot the cases by accepting their resignations and returning the dues deducted from their paychecks, plus interest. Having provided to the employee-plaintiffs all the monetary relief they seek, federal courts unanimously hold that the plaintiffs lack standing to pursue *any* claims against the unions, including related constitutional claims seeking declaratory and injunctive relief. Therefore, no court has yet ruled on the temporal issue. *See, e.g., Diamond v. Pa. State Educ. Ass'n*, 399 F. Supp. 3d 361, 386 (W.D. Pa. 2019) (citing *Hartnett v. Pa. State Educ. Ass'n*, 390 F. Supp. 3d 592, 601 (M.D. Pa. 2019) (holding that in light of *Janus*, a similar claim seeking relief is moot since "[p]laintiffs face no realistic possibility that they will be subject to the unlawful collection of 'fair share' fees")); *Lamberty v. Conn. State Police Union*, No. 15-cv-378, 2018 WL 5115559, at \*9 (D. Conn. Oct. 19, 2018), *appeal dismissed*, 828 F. App'x 49 (2d Cir. 2020) (explaining that *Janus* mooted a challenge to the constitutionality of agency fees because "there is nothing for [the court] to order [the d]efendants to do now"); *Yohn v. Cal. Tchrs. Ass'n*, No. SACV 17-202, 2018 WL 5264076, at \*4 (C.D. Cal. Sept. 28, 2018) (granting the union's motion to dismiss on mootness grounds after the union complied with *Janus*); *Danielson v. Inslce*, 345 F. Supp. 3d 1336, 1339–40 (W.D. Wash. 2018), *aff'd*, 945 F.3d 1096 (9th Cir. 2019) (finding that *Janus* mooted a controversy when the State of Washington stopped collecting agency fees post-*Janus*). Plaintiffs' efforts to seek class certification to avoid mootness on these grounds have failed because of the difficulty of defining a class and identifying lead plaintiffs who are representative of varying subclasses. *See, e.g., Hoekman v. Educ. Minn.*, 335 F.R.D. 219, 240 (D. Minn. 2020) (rejecting "reluctant" and "reluctant-uninformed" union member subclasses).

121. Official Opinion No. 2020-5, at 5, Op. Att'y Gen. of Ind. (June 17, 2020); *see id.* at 6 ("[T]he State or a political subdivision must also provide for a regular opt-in period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages. To ensure constitutional validity, we think it is reasonable that such a waiver be obtained annually."); Op. Alaska Att'y Gen., *supra* note 35, at 7 (same); *id.* at 12 ("Requiring consent to be renewed on an annual basis would ensure that consents do not become stale (due to intervening events, including developments in the union's speech that may cause employees to reassess their desire to subsidize that speech and promotes administrative and employee convenience by integrating the payroll deduction process with other benefits-elections employees are asked to make at the end of every calendar year."); *see also* Official Opinion No. KP-0310, at 3, Op. Att'y Gen. of Tex. (May 31, 2020), <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf> [<https://perma.cc/JM95-AY84>] ("[A] one-time, perpetual authorization is inconsistent with the Court's conclusion in *Janus* that consent must be knowingly and freely given. Organizations change over time, and consent to membership should not be presumed to be indefinite." (citation omitted)).

### III. *MIRANDA* FOR *JANUS*

A special constitutional rule along the lines of the *Miranda* warning is warranted in this context because public employee unions enjoy a unique elevated status as a government partner with exclusive rights to represent all employees in a bargaining unit, whether those employees wish to be represented or not. Because the severe potential infringement of employees' First Amendment rights requires informed consent in the public union context, the state has an elevated duty to ensure that employees have sufficient knowledge of their options before being asked to waive their rights and join a public-employee union. In this limited context of being asked to join a public-employee union, the government has a special duty to ensure informed consent.

By ceding the process of eliciting public employees' consent to payroll deductions of union dues and fees to the union itself, and unquestioningly accepting union-procured consent forms, the state has no way of ascertaining—let alone by “clear and compelling evidence”—that those consents are knowing, intelligent, and voluntary before it makes the deductions.<sup>122</sup> The constitutional injury is even greater when the union obtains the waiver in conditions entirely unknown to the state and then declares it irrevocable for years.<sup>123</sup> In

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122. Public employees may learn of their rights from other sources, through outreach efforts by public interest organizations or talk radio or conversations with their friends. This has no bearing on the *state's* constitutional obligations. See *Miranda v. Arizona*, 384 U.S. 436, 471–72 (1966) (“As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.”). See *supra* notes 55–56 and accompanying text.

123. Many unions limit the ability of employees to waive their rights to a short window at the end of a contract. See, e.g., *Grossman v. Haw. Gov't Emps. Ass'n/AFSCME Loc. 152*, No. 18-CV-00493, 2020 WL 515816, at \*3 (D. Haw. Jan. 31, 2020) (union members may resign only within an annual 30-day window prior to the anniversary date of the employee's union membership), *aff'd*, 854 F. App'x 911 (9th Cir. 2021), *cert. denied*, No. 21-597, 2021 WL 5763142 (Dec. 6, 2021); *Fischer v. Murphy*, 842 F. App'x 741, 745 (3d Cir. 2021) (10 day revocation period), *cert. denied*, 142 S. Ct. 426 (2021) (mem.); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 955 (10th Cir. 2021) (annual two-week revocation period), *cert. denied*, 142 S. Ct. 423 (2021) (mem.); *Louisville City Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Emps. (OAPSE)/AFSCME Loc. 4 AFL-CIO*, No. 19-CV-1509, 2020 WL 1930131, at \*2 (N.D. Ohio Apr. 21, 2020) (noting annual ten-day window to revoke union membership). If a public entity and a union agree to contract extensions, that short window may be postponed indefinitely. See *id.* (one-year contract extension provided two seven-day revocation window periods); see also *SERV. EMPs. INT'L UNION LOC. 1021, EXTENSION AGREEMENT AND AMENDMENT OF MOU BETWEEN THE NORTHERN CALIFORNIA PUBLIC SECTOR REGION, LOCAL 1021 OF THE SERVICE EMPLOYEES INTERNATIONAL UNION, CTW AND THE COUNTY OF ALAMEDA 1* (Mar. 13, 2019), [https://www.seiu1021.org/sites/main/files/file-attachments/alameda-county\\_ext\\_agrmnt\\_12.15.2019-12.10.2022.pdf?1557863810](https://www.seiu1021.org/sites/main/files/file-attachments/alameda-county_ext_agrmnt_12.15.2019-12.10.2022.pdf?1557863810) [htt

short, state laws that empower public employee unions to set the terms and unilaterally define the circumstances under which employees may waive their First Amendment rights cannot satisfy the constitutional protections mandated by *Janus*.<sup>124</sup> These laws instead place the state in a position where it is willfully blind to the burdens placed on the First Amendment rights of its own employees. In fact, empowering public employee unions, who have *no* constitutional right to “*other people’s* money,”<sup>125</sup> with control over the fundamental constitutional rights of workers to choose how to spend their earnings, creates an unjust inversion of constitutional protection.<sup>126</sup> Constitutional law does not permit this injustice.

Public employees have a due process right to receive information *from their government employer* necessary to make an effective waiver of their First Amendment rights.<sup>127</sup> In California, neither the State Department of Human Resources nor the Public Employee Relations Board nor the public employee unions have provided *any* information to public employees about their newly recognized First

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ps://perma.cc/T668-LV9F] (extending terms and conditions of previous MOU that include union security, agency shop (98 percent of union dues and initiation fees), and payroll deduction provisions that would otherwise be invalid under *Janus*); *Victory! San Bernardino Courts Ratifies Contract Extension*, SEIU 721 (Dec. 20, 2018), <https://www.seiu721.org/2018/12/victory-san-bernardino-courts-ratifies-contract-extension.php> [<https://perma.cc/7RJ5-84JB>]; 85 Fed. Reg. 41,169, 41,169 (July 9, 2020) (to be codified at 5 C.F.R. pt. 2429).

124. One California public employee union, University Professional and Technical Employees (UPTe), an affiliate of the Communications Workers of America, not only offers a short ten-day window to revoke membership, but also requires workers to provide a copy of a photo ID to make the revocation effective. When Amber Walker’s revocation request was denied for failure to provide photo ID, she filed a class action lawsuit challenging the requirement. *UC Irvine Lab Assistant Sues State of California over Policy Allowing Union Officials to Seize Dues in Violation of First Amendment*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND. (Aug. 2, 2021), <https://www.nrtw.org/news/uc-irvine-janus-upte-08022021/> [<https://perma.cc/FBU7-SPVP>].

125. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 187 (2007).

126. *See Knox v. Serv. Emps. Int’l Union*, Loc. 1000, 567 U.S. 298, 321 (2012) (as between public employee unions and workers, the party that should bear the risk of losing money must be “the side whose constitutional rights are not at stake”—that is, the unions).

127. The duty originates with the state, but as with the due process notice requirements discussed *supra* notes 17–19 and accompanying text, the state may delegate the duty to the private entity that stands to benefit from the waiver. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (the Fourteenth Amendment provides a “judicial obligation” to “assure that constitutional standards are invoked ‘when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains’” (citation omitted)); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932–33 (1982) (“[C]onstitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the State act jointly with a creditor in securing the property in dispute.”).

Amendment rights as they relate to union dues deductions.<sup>128</sup> State law prevents public interest organizations from obtaining employee contact information to facilitate efforts to notify employees about their rights.<sup>129</sup> Government premises are closed to private organizations that seek to inform public employees about their rights.<sup>130</sup> Public employees are left to discover their First Amendment rights solely through happenstance<sup>131</sup> and are therefore left ignorant about the existence and consequences of waiving their constitutional rights that are a necessary prerequisite to exercising a valid waiver.

“Due process is not met by a procedure which accords a fundamental right only to the already informed, or which engenders unnecessary obstacles to the right’s fulfillment.”<sup>132</sup> There is no legitimate, much less compelling, state interest in restraining the conveyance of information about individuals’ constitutional rights. Considered under “exacting” scrutiny, any interests capable of being asserted by California fall far below what would be required to satisfy the standard.

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128. Searches of the websites for these agencies and the SEIU and AFSCME reveal nothing to inform the public generally or employees specifically about employees’ First Amendment rights or the waiver requirement. Although S.B. 866, 2017–2018 Reg. Sess. (Cal. 2018), permits government employers and the unions to collaborate on “mass communications” to inform employees of their rights, the author is unaware of any instance in which this actually has occurred.

129. A split panel of the Ninth Circuit upheld a similar Washington law in *Boardman v. Inslee*, 978 F.3d 1092, 1113–19 (9th Cir. 2020), holding that a ballot initiative amending the state’s public records act to permit public employee unions to obtain personal information of in-home care providers, but no one else, did not violate First Amendment’s prohibition on viewpoint discrimination or Equal Protection Clause. In dissent, Judge Bress would have held the initiative to violate the First Amendment because “[t]he State is effectively using an information embargo to promote the inherently ‘pro-union’ views of the incumbent unions, while making it vastly more difficult for those with opposing views—and particularly those with views opposite unions—to reach their intended audience.” *Id.* at 1120 (Bress, J., dissenting). A petition for writ of certiorari was denied. *Boardman v. Inslee*, 142 S. Ct. 387 (2021) (mem.) (Justices Thomas, Alito and Gorsuch would have granted the petition).

130. See *Freedom Found. v. Wash. Dep’t of Ecology*, 840 F. App’x 903, 904 (9th Cir. 2020) (state agency welcomes union representatives to speak to employees about union membership and dues while forbidding representative of an organization on the premises to hand out leaflets explaining the *Janus* decision); see also *id.* at 907 (Callahan, J., dissenting) (considering this as likely unconstitutional viewpoint discrimination).

131. See *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 331 (1964) (Black, J., dissenting) (“happenstance” cannot supplant constitutional rights); *United States v. Unimex, Inc.*, 991 F.2d 546, 551 (9th Cir. 1993) (constitutional rights “could not properly be left to rely” on “fortuities”); *United States v. Dockery*, 447 F.2d 1178, 1195 (D.C. Cir. 1971) (where disclosure of information is a necessary component of a constitutional right, the fortuity of a *voluntary* disclosure will not suffice).

132. *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 114 (N.C. 1980) (schools must *affirmatively* notify indigent students and their parents that fee waivers or reductions are available and explain how the students or parents may apply for a partial or complete exemption from fee requirements).

*Knox v. Service Employees International Union, Local 1000*<sup>133</sup> held that those who choose not to join unions possess the same First Amendment rights as union members to express their views:

Public-sector unions have the right under the First Amendment to express their views on political and social issues without government interference. *See, e.g., Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). But employees who choose not to join a union have the same rights. *The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals.*<sup>134</sup>

The right to choose not to associate with, or to resign from, an organization such as a union invokes basic rights of freedom, a matter of public concern. “The right to associate freely is not mentioned in the text of the First Amendment, but has been derived over time as implicit in and supportive of the rights identified in that amendment.”<sup>135</sup>

A law deliberately silencing state employers with the object of leaving employees ignorant of their rights, particularly when motivated to advance a political agenda<sup>136</sup> (as public employee unions inherently do), is a wholly illegitimate purpose that cannot survive even rational basis review. In *Dent v. West Virginia*,<sup>137</sup> the Supreme Court examined a law regulating the medical profession and wrote that “[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance

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133. 567 U.S. 298 (2012).

134. *Id.* at 321–22 (emphasis added).

135. *Jacoby & Meyers, LLP v. Presiding Justs. of the First, Second, Third & Fourth Dep'ts, App. Div. of the Sup. Ct.*, 852 F.3d 178, 185 (2d Cir. 2017); *see also* *Mulhall v. UNITE HERE Loc. 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (“Just as ‘[t]he First Amendment clearly guarantees the right to join a union,’ *Hobbs v. Hawkins*, 968 F.2d 471, 482 (5th Cir. 1992), it ‘presupposes a freedom not to associate’ with a union, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).” (citations omitted)).

136. *González v. Douglas*, 269 F. Supp. 3d 948, 973 (D. Ariz. 2017) (government official’s censoring of a school’s curriculum to advance a political agenda violated the students’ First Amendment rights to receive the information).

137. 129 U.S. 114 (1889).

and incapacity as well as of deception and fraud.”<sup>138</sup> A state’s interest is in eradicating ignorance, not promoting it.<sup>139</sup>

The state’s additional interest in granting exclusive access to unions to enable them to bolster their membership and consequent dues payments also fails as a justification. In *Arkansas Writers’ Project, Inc. v. Ragland*,<sup>140</sup> the Supreme Court explained that “an interest in raising revenue, ‘standing alone, . . . cannot justify the special treatment . . . for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available.’”<sup>141</sup> As *Janus* explained, the First Amendment demands that the state provide an opportunity for employees to make *informed* decisions. In this circumstance, the government must “open the channels of communication rather than . . . close them.”<sup>142</sup>

#### IV. WAIVERS MADE BY CONTRACT MUST COMPLY WITH DUE PROCESS

Employees may waive constitutional rights by entering into contracts, such as a union membership contract, so long as the waiver is voluntary, affirmative, and knowing.<sup>143</sup> Although the speech and association rights protected by the First Amendment are not an overarching license to violate a contract,<sup>144</sup> a collective bargaining agreement

138. *Id.* at 122; *see also* *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) (“Secrecy of judicial action can only breed ignorance . . .”).

139. *See Dent*, 129 U.S. at 122 (a law regulating the medical profession is legitimate where it works to secure people “against the consequences of ignorance and incapacity as well as of deception and fraud”); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (First Amendment freedoms are “essential if vigorous enlightenment [is] ever to triumph over slothful ignorance”); *cf.* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977) (striking down disciplinary rule that prohibited lawyers from truthfully advertising the prices of routine legal services because the rule “serve[d] to inhibit the free flow of commercial information and to keep the public in ignorance”).

140. 481 U.S. 221 (1987).

141. *Id.* at 231 (quoting *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 586 (1983) (first omission in original)).

142. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

143. *See Lake James Cmty. Volunteer Fire Dep’t, Inc. v. Burke Cnty.*, 149 F.3d 277, 280 (4th Cir. 1998) (citing cases); *Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 969 (9th Cir. 2011) (per curiam) (holding public employee did not knowingly waive due process rights because the agreement “contains no express waiver of a pre-termination hearing or of the right to due process”).

144. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).



must give way to constitutional claims of individuals.<sup>145</sup> In *Sambo's Restaurants, Inc. v. City of Ann Arbor*,<sup>146</sup> the city revoked the plaintiff restaurant's sign permits and argued that Sambo's had waived its right to challenge the revocation.<sup>147</sup> The Sixth Circuit had to decide whether Sambo's waiver of First Amendment rights was valid, employing the "clear and compelling" evidence test and "indulg[ing] every reasonable presumption against a waiver"—the same tests demanded by *Janus*.<sup>148</sup> The city argued that a contract that Sambo's voluntarily signed in 1972, waiving First Amendment rights, bound the restaurant and prevented any future First Amendment claims.<sup>149</sup> The court disagreed.<sup>150</sup> Critically, the company could not have earlier asserted its First Amendment rights because the relevant commercial speech rights were not recognized at that point in time.<sup>151</sup> When Sambo's became "an unwitting beneficiary of [the] new constitutional doctrine" announced in *Virginia State Board of Pharmacy II*<sup>152</sup> protecting its commercial speech, it was entitled to invoke its newly recognized First Amendment rights. Prior to *Virginia*, Sambo's "did not have First Amendment commercial speech rights in 1972 which it could waive."<sup>153</sup> Because "waiver, at the least, is the relinquishment of a known right," Sambo's pre-*Virginia* "waiver" was ineffective.<sup>154</sup>

In *Fuentes v. Shevin*,<sup>155</sup> the Supreme Court considered whether consumer contracts that provided for summary repossession of goods waived the consumers' constitutional right to procedural due

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145. See *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (rejecting union's position that settlement of discrimination claims would violate the seniority terms of an existing collective bargaining agreement).

146. 663 F.2d 686 (6th Cir. 1981).

147. *Id.* at 688–89.

148. *Id.* at 690.

149. *Id.* at 689.

150. *Id.* at 693.

151. *Id.* at 692.

152. *Id.* at 693; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

153. *Sambo's Restaurants, Inc.*, 663 F.2d at 693.

154. *Id.* (emphasis added); see also *In re Micron Tech., Inc.*, 875 F.3d 1091, 1097 (Fed. Cir. 2017) (party cannot be penalized for raising waiver issue only after a Supreme Court decision changing the controlling law makes the issue available); *United States v. Reader's Dig. Ass'n*, 464 F. Supp. 1037, 1048 (D. Del. 1979) (no waiver of First Amendment rights in consent order where the rights at issue were not recognized until five years after the consent order was issued); *Freedom From Religion Found. Inc. v. Abbott*, No. A-16-CA-00233, 2017 WL 4582804, at \*4 (W.D. Tex. Oct. 13, 2017) (no waiver of First Amendment rights where plaintiff signed contract that did not address constitutional rights and the parties did not negotiate or discuss the terms prior the plaintiff signing the "stock form").

155. 407 U.S. 67 (1972).

process.<sup>156</sup> The Court held there was no waiver.<sup>157</sup> Among other things, the contracts “did not indicate *how* or *through what process*” the seller could repossess the goods.<sup>158</sup> Moreover, the parties were not equal in bargaining power and there was, in fact, no bargaining over the contractual terms between the parties.<sup>159</sup> Because waivers of constitutional rights must be made with full understanding of the consequences,<sup>160</sup> the purported waiver in the contract was invalid.<sup>161</sup> Thus, the issue in the public employee union context is not whether employees know that the membership card serves as an agreement to subsidize the union; the issue is whether they know that they possess a First Amendment right to pay nothing to the union—while retaining their jobs—and that they were waiving that right. Payroll deduction forms provide no evidence that employees acted with a full awareness of their First Amendment rights as required by *Janus*.<sup>162</sup>

Finally, the unions’ anticipation of the new rules reduces their interests in maintaining the status quo.<sup>163</sup> Contracts made to protect the previous status quo when the legal framework has changed cannot outweigh the law’s legitimate ends.<sup>164</sup> Otherwise, as Justice Holmes observed, a person whose rights “are subject to state restriction [could]

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156. *Id.* at 94.

157. *Id.* at 96.

158. *Id.* at 95–96.

159. *Id.* at 95.

160. *Cf. Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986) (“Constitutional protections of due process mandate that an accused’s guilty plea be voluntary and intelligent.” The accused must have “a full understanding of what the plea connotes and its consequence.” (quoting *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969))); *see also United States v. Basulto-Pulido*, 219 F. App’x 717, 719 (9th Cir. 2007) (“A waiver is not considered and intelligent when the record contains an inference that the petitioner is eligible for relief from deportation, but the Immigration Judge fails to advise . . . of this possibility and [to provide an] opportunity to develop the issue.” (omission and alteration in original) (citation omitted)).

161. *Patterson v. Illinois*, 487 U.S. 285, 292 (1988).

162. *See supra* note 51 (quoting several union membership and dues deductions forms). Contracts that provide for an unconstitutional waiver of First Amendment rights have an illegal purpose. *See Writers Guild of Am., W., Inc. v. Fed. Comm’n’s Comm’n*, 423 F. Supp. 1064, 1144 n.133 (C.D. Cal. 1976), *judgment vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979); *see also Mazdabrook Commons Homeowners’ Ass’n v. Khan*, 46 A.3d 507, 522 (N.J. 2012) (holding under state constitution’s free speech clause that “restrictive covenants that unreasonably restrict speech—a right most substantial in our constitutional scheme—may be declared unenforceable as a matter of public policy” (quoting *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 929 A.2d 1060, 1076 (N.J. 2007))). Beyond the federal constitution and laws, California courts will void contracts that violate federal public policy developed in court cases. *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948) (public policy may be found in “applicable legal precedents”). State law cannot impose liability for conduct that federal law requires. *See, e.g., Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 486–87 (2013).

163. *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 994 (2d Cir. 1997).

164. *Id.*

remove them from the power of the State by making a contract about them.”<sup>165</sup>

### V. “YOU HAVE THE RIGHT....”

A union membership card that states, without elaboration, that membership and dues payment is voluntary, cannot suffice to waive First Amendment rights.<sup>166</sup> A *Janus* disclosure warning must ensure a knowing, intelligent waiver based on an understanding of the rights to be waived and the consequences of that waiver. While the Constitution does not require any “talismanic incantation” to ensure a proper waiver,<sup>167</sup> there are simple, clear ways for public employers to inform their employees. The Texas and Indiana Attorneys General propose to include this language as part of an annually renewed public employee union membership agreement and dues deduction form:

I recognize that I have a First Amendment right to associate, including the right not to associate. My rights provide that I am not compelled to be a member of a labor organization. I am not compelled to pay a labor organization any money as a condition of employment, and I do not have to sign this consent form. However, I am waiving this right and consent to union membership. I also consent to having union dues deducted from my paycheck. My consent may be revoked at any time, resulting in the immediate termination of any financial agreement to pay the union dues, fees, or any other form of payment.<sup>168</sup>

This language succinctly and effectively conveys the nature of the right, the consequences of waiver, and ensures that waivers do not exist in perpetuity.

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165. *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *see also* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (regarding Sixth Amendment waiver of assistance of counsel, a “waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”).

166. A federal district court considering a pre-*Janus* checkoff agreement form held that the agreement disclosed the “essential nature” of the right to avoid joining the union and could not be expected to anticipate the later invalidation of agency shop fees in *Janus*. *Allen v. Ohio Civ. Serv. Emps. Ass’n AFSCME*, No. 19-CV-3709, 2020 WL 1322051, at \*10 (S.D. Ohio Mar. 20, 2020). Post-*Janus* obligations demand more.

167. *See* *California v. Prysock*, 453 U.S. 355, 359 (1981) (“*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures.”).

168. Official Opinion No. 2020-5, *supra* note 121, at 4 (quoting and adopting language in Official Opinion No. KP-0310, *supra* note 121, at 3).

## CONCLUSION

Public employees cannot waive their First Amendment rights and choose to subsidize the union without an opportunity to do so while being informed and understanding the consequences of waiving those rights—that is, an understanding that the union may use their money to fund union speech on a wide range of inherently political matters, including speech with which they may disagree. California’s SB 866—and similar legislation in other states—stands as an obstacle to workers’ full exercise of their First Amendment rights as articulated in *Janus*. Public employees are denied the ability to obtain truthful information about their rights after *Janus* from their employers, and instead must approach union representatives with zero incentive to provide full and accurate information. The Constitution does not permit the state and unions to bank on employees possibly being made aware, through their own efforts, of the nature and effect of the waiver.<sup>169</sup> Without actual evidence that a waiver of First Amendment rights was knowing and voluntary, the state employer cannot proceed as if it received a valid waiver. Only through a *Miranda*-style disclosure can states ensure that their employees are making an informed choice to join and subsidize public employee unions.

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169. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 144 (1967).

