Case No. 23-1823

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANDERSON FEDERATION OF TEACHERS, et al.,

Plaintiffs-Appellees,

v.

TODD ROKITA,

Defendant-Appellant.

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL FILED WITH CONSENT OF ALL PARTIES

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Case No. 1:21-cv-1767-SEB-DML, Hon. Sarah Evans Barker, presiding

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases, and it files amicus briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. The Institute has appeared frequently as counsel for parties or as amicus curiae in cases implicating speech and associational rights. *See, e.g., Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) (reversing dismissal of First Amendment challenge to mandatory bar association membership); *Boudreaux v. Louisiana State Bar Ass'n.*, 3 F.4th 748 (5th Cir. 2021); *Schell v. Oklahoma Sup. Ct. Justices*, 11 F.4th 1178 (10th Cir. 2021). The Institute has devoted particular attention to government subsidies for special interests such as unions. *See, e.g., Borgelt v. City of Austin,* No. 22-1149 (Tex.

[1] The parties have consented to the filing of this amicus brief. Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amicus or its counsel, financially contribute to preparing or submitting this brief.

Sup. Ct. filed Feb. 6, 2023) (challenging union release time under Texas Gift Clause); *Gilmore v. Gallego,* No. CV-23-0130-PR (Ariz. Sup. Ct filed May 18, 2023) (same under Arizona Gift Clause). Institute scholars have also published extensive research on education policy, particularly the stranglehold that teachers unions and the public education establishment have on children, parents, and educators. *See, e.g.,* Matt Beienburg, *De-Escalating the Curriculum Wars: A Proposal for Academic Transparency in K-12 Education*, Goldwater Institute (Jan. 14, 2020).[2]

The Institute believes its litigation experience and public policy expertise will aid this Court in considering the appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to freely associate, as protected by the First Amendment, rests on the foundation of affirmative consent. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (affirmative consent required for any payment to a union). From the "I do's" of marriage to the underpinnings of our very nation, *see* Declaration of Independence, 1 Stat. 1 (1776), mutual consent has been the touchstone of nearly every form of free human association, whether small or large. This is because the right to *refuse* to associate is a critical safeguard of individual conscience—as well as a properly functioning democratic process.

[2] https://www.goldwaterinstitute.org/policy-report/curriculum-wars/.

Following *Janus*—and in the wake of COVID-19 era malfeasance on the part of school employee organizations nationwide—Indiana wisely recognized that more was needed to ensure that membership in, and payments to, public education labor unions was truly consensual—at least when the government participates in the subsidization of the organizations by granting access to state payroll deduction systems. These additional safeguards were well within the state's proper role as a means of safeguarding the right to dissent and ensuring that public sector education unions actually speak for those individuals they claim to speak for.

Rather than welcome these developments, the unions view these safeguards as a threat to their associational rights. But of course, even if the requirements of SEA 251[3] and SEA 297 result in less associational *revenue*—because union "members" voluntarily opt out when given a meaningful choice—the union's position is evidence that the state is honoring associational *rights*, not burdening them (as the district court erroneously held). *See, e.g., Anderson Fed'n of Teachers v. Rokita*, No. 1:21-cv-01767-SEB-KMB, 2023 WL 2712267 at *13 (S.D. Ind. Mar. 30, 2023). The right of association belongs not only to an organization, but to all individuals who may wish to associate, abstain from associating, or *disassociate*. The new statutory requirements ensure that the rights of employees are respected

[3] The references to SEA 251 and SEA 297 apply to the current versions of the relevant statutes, codified at Indiana Code § 20-29-5-6(c)–(e).

and that their consent to join and subsidize a union is shown by "'clear and compelling evidence.'" *Janus*, 138 S. Ct. at 2486 (citations omitted).

Importantly, the district court did *not* find that the statutes compel or inhibit either speech or association: "The challenged statutes here *do not restrict teachers' rights* to choose to join a union or to associate with that union, or otherwise prohibit teachers from paying their dues and/or prohibit or restrict teachers' unions from collecting and freely spending that money." *Rokita*, 2023 WL 2712267 at *13 (emphasis added). Rather, the new statutory provisions "are best and most fairly described as measures that 'trim[] a state subsidy *rather than infringe[] a First Amendment right*.'" *Id.* (emphasis added) (quoting *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 898 (9th Cir. 2018)).

Bizarrely, however, the court then concluded that, even though there were *no underlying speech or associational rights violations*, SEA 251 and SEA 297 were nevertheless unconstitutional because they discriminated based on viewpoint. *Id.* at **14–15.

In doing so, the court confused viewpoint-based discrimination and speaker-based discrimination, the latter of which, of course, is permissible in the context of government subsidization. *Int'l Union of Operating Eng'rs, v. Daley*, 983 F.3d 287, 299 (7th Cir. 2020) ("'[S]peaker-based discrimination is permissible when the state subsidizes speech.'" (quoting *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 646

(7th Cir. 2013)). This is because special interests—including unions—have no constitutional right to taxpayer money. *See S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) (distinguishing between payroll deductions for charitable deductions and unions and noting that "the First Amendment does not impose an affirmative obligation on the state to assist the program of the association by providing payroll deduction services").

Even if the district court is correct that strict scrutiny applies, the State of Indiana narrowly tailored its statutes here to serve compelling governmental interests.

ARGUMENT

I. The district court improperly concluded that SEA 251 and SEA 297 discriminate based on viewpoint.

SEA 251 and SEA 297 impose conditions on the use of government payroll systems by "school employee organizations," regardless of the organizations' membership requirements, political objectives, or viewpoints—or the viewpoints of their members. "School employee organization" is defined as "an organization that: (1) has school employees as members; and (2) as one (1) of its primary purposes, represents school employees in dealing with their school employer." Ind. Code § 20-29-2-14.

The district court concluded that because the statutes at issue allegedly "apply *solely* to teachers choosing to pay their union dues through payroll deduction, not to

any other category of public employee(s) in Indiana," that the statutes discriminate based on the unions' and/or union members' viewpoint(s). *Rokita*, 2023 WL 2712267 at **14–15. This was incorrect.

First, the district court wrongly assumed that the new statutory protections only affect teachers. *Id.* at *11 (describing SEA 251 and SEA 297 as "an obvious effort to deter and discourage teachers—and only teachers—from joining and paying dues to their unions"). The statutes protect all school employees—not just teachers (union-supporting or otherwise). This includes school administrators, blue collar workers, and other non-teacher employees who may or may not wish to form or join a "school employee organization." Each different type of employee or employee organization may and likely does hold distinct viewpoints and perspectives. *See* Ind. Code § 20-29-5-1(a) (allowing "school employees within certain groups" to constitute units or bargaining units); *Id*. § 20-19-5-1(b) (allowing the parties to agree on the appropriate unit as long as the organization represents "at least twenty percent (20%) of the school employees in a proposed unit). Even different types of teachers may not have the same interests, or belong to the same type of organization. *See DeKalb Cnty. E. Cmty. Sch. Dist. v. DeKalb Cnty. E. Educ. Ass'n*, 513 N.E.2d 189, 192 (Ind. App. 1987) (noting that joint agreement at issue provided for four categories of teachers and concluding that special education co-op teachers who did

not teach within the district were not part of school employee organization bargaining unit).

Second, it is unclear whose viewpoint(s) and which viewpoint(s) the court referred to: all school employee organizations' collective viewpoint(s)? One union's viewpoint(s)? The union members' viewpoint(s)? The only potential "viewpoint" the court expressly mentioned is that the *teachers* involved were "union-supporting," *Rokita*, 2023 WL 2712267 at *13–14, or "pro-union." *Id.* at *14. It assumed that all teachers who join unions do so because they espouse a "pro-union" viewpoint, as opposed to feeling pressured or coerced to join, and it did not point to any particular viewpoints expressed collectively by the unions themselves on any particular policy issue.

Of course, people join and remain in unions for many reasons—including reasons far removed from agreement with the unions' viewpoint. Research suggests, in fact, that public sector employees tend to join or remain members of unions *despite* their disagreement with unions' views. *See* Alexander Hertel-Fernandez & Ethan Porter, *Why Public Union Members Support Their Unions: Survey and Experimental Evidence*, 100 Social Forces 375 (2021) (finding union members motivated to vote by professional benefits and community, but not legal protections

or political representation).[4] Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or nonmembers from opposing union political activities. *See* Friedrich 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). Workers often feel either compelled to join the union, or to stifle their beliefs, lest their disagreement incur retaliation by union leaders or coworkers. And it is particularly important to enforce First Amendment protections in environments where heavy peer pressure might otherwise prevent the free expression of ideas. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) ("'[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" (citation omitted)).

Moreover, statutes that deduct funds from employees' paychecks to fund unions create what the courts have called "inertia" in favor of these unions. *See Seidemann v. Bowen*, 499 F.3d 119, 126 (2nd Cir. 2007); *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp.2d 498, 506 (E.D. Va. 2000). In other words, because these statutes make it more trouble than it's worth for a dissenting employee to object or to seek a refund, these statutes give the union a "considerable

[4] https://www.russellsage.org/reports/why-public-sector-union-members-support-their-unions-survey-and-experimental-evidence.

windfall," *Janus*, 138 S. Ct. at 2486 —at a minimum, an interest-free loan taken without consent from employees, and at most, a direct transfer of wealth against the employee's will.

The many social, political, career-related, and other motives that cause public sector educators to join or remain members of unions, and the fact that not all unions are identical in their viewpoints, objectives, purposes, etc., is why the statute defining "school employee organization" simply states that *one* of the purposes of a school employee organization must be to represent employees before a school employer. Ind. Code § 20-29-2-14. The statute does not require a school employee organization, or school employee organizations collectively, to have a particular viewpoint. Nor does the statute limit membership in such an organization only to school employees that unreservedly support all the organization's viewpoints or purposes. School employee organizations undoubtedly have a variety of purposes, some of which are likely not uniform across groups. Members might choose to join merely for the employment representation benefits. Others may be more interested in the association's political objectives. Some might have an interest in both, or neither. Regardless of the reason(s), if school employees form or join an association that "represents school employees [before a] school employer," *id.*, that organization is subject to the new statutory safeguards—regardless of any other activities the union engages in or any viewpoints it expresses.

Tellingly, the unions here did *not* assert a First Amendment retaliation claim, which would have required proof that they engaged in constitutionally protected activity (here, presumably, speech on a particular viewpoint), that adverse government action was taken in response, and that a retaliatory motive was a "but-for" cause of the action, "meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). Not only did the court below fail to identify any particular viewpoint against which the state was discriminating, but nothing here indicates that SEA 251 and SEA 297 would not have been enacted if any of the unions' viewpoints were different. If anything, the statutes were spurred by the unions' *conduct*, and the amendments likely would have been enacted following *Janus* and the COVID-19 pandemic anyway, even if a retaliatory motive existed on the part of some legislators (which, again, has not been alleged or established).

In addition to improperly concluding that the statutes discriminate on the basis of viewpoint; the district court also dismissed Defendant-Appellant's proper assertion that what the legislature did in SEA 251 and SEA 297 was discriminate merely between *speakers* in the context of taxpayer-funded subsidies. It did so by claiming that Indiana "singl[ed] out one specific group whose identity and viewpoints are sufficiently intertwined to be synonymous," such that "the speaker/viewpoint distinction [was] as a practical matter … illusory." *Rokita*, 2023

WL 2712267 at *14. The first part of that claim is wrong for the reasons stated above. The second part may have some truth to it, in the sense that the speaker/viewpoint distinction may not always be clear, but that does not resolve this case, because this case involves taxpayer-funded subsidies and speaker-based conditions on those subsidies.

Choosing to subsidize a particular speaker, whether an association or an individual, is inherently "discriminatory," in the sense that to discriminate is to distinguish or differentiate one thing from another. Subsidies are inherently and necessarily discriminatory in that sense; even if it were possible to subsidize everyone and everything, that would be equivalent to subsidizing no one and nothing. And because public resources are limited, their allocation necessarily involves discriminating between recipients.

For that reason, courts have held that the government may pick and choose recipients of subsidies based in part on messages, without transgressing the First Amendment. *See, e.g., Walker*, 705 F.3d at 646. *See also* Appellant's Br. at 14–15 (discussing *Walker*).

Just as in *Walker*, Indiana engaged in permissible speaker-based discrimination by curtailing[5] access to a government subsidy, namely "use of the

[5] Here, the legislature amended pre-existing sections of the law that applied only to school employee organizations. *See Rokita*, 2023 WL 2712267 at *3. Thus, any changes made to Article 29 would naturally apply exclusively to school employee

state's payroll systems to collect union dues." 705 F.3d at 645. The distinction in *Walker* between "public safety employees" and "general employees" is sufficiently analogous to the distinction here between "school employee organizations" and other types of labor organizations because the distinction is not based on viewpoint, but on ***the type of employee the organization represents***.

"[T]he First Amendment does not impose an affirmative obligation on the state to assist the program of the association by providing payroll deduction services." *Campbell*, 883 F.2d at 1257. In *Campbell*, the South Carolina Education Association and some of its members alleged that a statute allowing payroll deductions for another allegedly "similarly situated" but "less controversial" public sector union—and not the teachers union—violated the First and Fourteenth Amendments. *Id.* at 1253. The Fourth Circuit rejected this assertion and held that "refusal to authorize payroll deductions … need only be rationally related to the furtherance of a legitimate governmental interest." *Id.* at 1263. States can restrict those services—which are a type of subsidy in themselves—based on the speaker seeking access to them. Here, Indiana has properly placed additional, constitutional conditions[6] on access to its payroll deduction services by school employee

organizations, even if those changes were included as part of a larger hypothetical (and non-severable) package.

[6] The unconstitutional conditions doctrine cannot apply here (nor has it been raised) because, as the district court found before its "viewpoint discrimination" detour, here there is no violation of the unions' or union members' speech or associational rights.

organizations. As the Supreme Court said in *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007), "[t]he notion that [a] modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive."

Moreover, the Supreme Court previously rejected a contention that preferential access to a nonpublic forum by different labor organizations constituted viewpoint discrimination. In *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 49 (1983), it explained that a policy giving one union and not another access to a school mail system did not violate the First Amendment because it was more accurately characterized as "based on the *status* of the respective unions rather than their views." The justices elaborated:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

See, e.g., Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013) ("[T]he unconstitutional conditions doctrine … vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."). Even if it did apply, however, the statute would easily pass muster. That test compares the burden on the individual's rights with the state interest in imposing that burden. *See, e.g., id.* The burden here serves the state's compelling interest in ensuring that public school employees are not forced to surrender their First Amendment rights, *cf. Janus*, 138 S. Ct. at 2459–60, and the burden on the union is minimal: it consists merely of ensuring that those rights are respected.

Id. The same is true here for state and school payroll systems. That the district court failed even to cite *Perry* is further evidence that its conclusion that the statutes at issue here discriminate based on viewpoint was reversible error.

II. Even if strict scrutiny applies, the State narrowly tailored SEA 251 and SEA 297 to meet compelling governmental interests.

A. Indiana has compelling interests in preventing interference with the educational process and preserving public resources.

Even if strict scrutiny applies,[7] SEA 251 and SEA 297, taken together, still pass constitutional muster.

To survive strict scrutiny, the government must "'prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (citation omitted).

Obviously the government has a compelling interest in ensuring that its citizens receive a basic education. *Murphy v. State of Ark.*, 852 F.2d 1039, 1041 (8th Cir. 1988); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972). Most states, including Indiana, have constitutionalized this compelling interest:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to

[7] Because differential access to government payroll systems does not burden a fundamental right, the statute "need only rationally further a legitimate state purpose." *Perry*, 460 U.S. at 54.

> provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Ind. Const. art. 8 § 1. Likewise, in the legislative findings section of the statute modified here, the legislature declared that "[t]he citizens of Indiana have a fundamental interest in the development of harmonious and cooperative relationships between school corporations and their certificated employees," and that "[t]he state has a basic obligation to protect the public by attempting to prevent any material interference with the normal public school educational process." Ind. Code § 20-29-1-1. Additionally, "the government has a 'compelling' interest in preventing … the waste of public resources … ." *Erickson v. U.S. ex rel. Dept. of Health and Human Servs.*, 67 F.3d 858, 863 (9th Cir. 1995).

SEA 251 and SEA 297 directly serve these interests because they ensure that everyone's speech and associational rights are protected. The protection of these rights results in better labor relations, which prevents interference with the educational process. They also prevent the waste of public resources. When resources that would otherwise fund education are diverted to other recipients—particularly private special interests such as unions—the government is on solid ground in reining in subsidies and focusing on its constitutional mandates and role as a public fiduciary.

B. Taken together, SEA 251 and SEA 297 are narrowly tailored.

"Generally, 'a statute is narrowly tailored only if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy.'" *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989)). "[W]hile a regulation does not have to be a perfect fit for the government's needs, it cannot substantially burden more speech than necessary." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1040 (7th Cir. 2002) (citing *Ward*, 491 U.S. at 800).

Here, the question of narrow tailoring can easily be answered by the fact that there is *zero* burden on unions' or union members' speech or associational rights, as the district court acknowledged. Loss of a subsidy, or more accurately here, placing constitutional conditions on a subsidy, does not substantially burden speech or associational rights.

But even to the extent that somehow the unions' and/or union members' First Amendment rights are burdened at all, that burden is narrowly tailored to ensure that membership in and payments to school employee organizations are voluntary. And any differentiation in treatment between school employee organizations and other types of labor organizations is justified by the unique context of education, particularly in light of the events during the COVID-19 pandemic.

i. The provisions are aimed solely at ensuring affirmative consent for membership and dues payments.

SEA 251 and SEA 297 are designed to protect the voluntary nature of the right of association when the state devotes its coercive powers to the aid of a private entity—here, using its payroll systems to subsidize unions.

The statutes codify "the right to resign from, and end any financial obligation to, a school employee organization at any time." Ind. Code § 20-29-5-6(c)(1). Without the right to *disassociate*, the right to associate means little. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association … plainly presupposes a freedom not to associate."); *see also Janus*, 138 S. Ct. at 2463 ("The right to eschew association for expressive purposes is … protected."). In fact, the Supreme Court has recognized the centrality of the right to resign from a union. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (union members' freedom to leave the union and escape union rule meant rule was not coercive). The statute also makes the right to resign nonwaivable by school employees, Ind. Code § 20-29-5-6(c)(1), which makes sense, as association with *any* private organization should not, and constitutionally cannot, be a one-way ticket.

The next provision requires an authorization-for-withholding form, which must include specific information about the school employee and the union, to be signed and "submitted directly to the school employer by the school employee." *Id.* § 20-29-5-6(c)(2). The school employer must confirm the authorization with the

school employee by email or, if email is not available then by "other means it deems appropriate," before starting any deduction. *Id.* These requirements ensure that the source of the dues deduction authorization is the school employee and not the union or any other source. This is a wholly appropriate way to serve the interest described in *Janus* as constitutionally mandatory: to ensure that public sector employees' constitutional rights are respected.

The State also requires that the authorization form contain a statement informing the school employee of their "First Amendment right, as recognized by the United States Supreme Court, to refrain from joining and paying dues to a union (school employee organization)." *Id*. § 20-29-5-6(c)(3). The form states that "membership and payment of dues are voluntary" and explains that the employee "may not be discriminated against for … refusal to join or financially support a union." *Id.* The disclosure statement makes clear that the union dues to be deducted are set by union bylaws, and that authorization—the employee's consent—can be revoked at any time. *Id.* This government-issued warning is tailored to school employee organizations specifically, and it is designed to ensure that school employees' consent to join and financially support a union is both affirmative and informed—a concept that, again, *Janus* characterized as sacrosanct.

The statute requires annual renewal of dues deduction authorizations. *Id*. § 20-29-5-6(c)(4). This ensures that consent is not only affirmative up front, but that it is

ongoing and continuous. It also helps schools maintain accurate records and guarantee that former or non-union-members are not unknowingly subsidizing a school employee organization.

In addition to the annual expiration of withholding authorizations, employees may halt the withholding of dues at any time by submitting a written or email request to the employer. *Id*. § 20-29-5-6(c)(5). The school employer must then inform the union within a reasonable time to ensure that dues are not withheld beyond the start of the employee's subsequent pay period. *Id.* These provisions are a fully justified response to a tactic unions often exploit, of making it as difficult as possible to quit a union membership or withdraw from dues deduction authorizations. This is often done by inserting restrictive annual or biannual opt-out windows into their collective bargaining agreements, often only a week or two in length. *See* Parker Jackson, *Goldwater Demands Tucson Unified School District Stop Trapping Its Employees in Unions*, Goldwater Institute (January 18, 2023)[8]; *see also Savas v. Cal. State Law Enforcement Agency*, No. 20-56045, 2022 WL 1262014 at *1–2 (9th Cir. 2022) (upholding so-called "maintenance of membership requirement"), *cert denied* 143 S. Ct. 2430 (May 1, 2023). Raising the bar for resignation—like devices for making it as hard as possible for dissenters to receive refunds—is a tactic for effectively

[8] https://www.goldwaterinstitute.org/goldwater-demands-tucson-unified-school-district-stop-trapping-its-employees-in-unions/.

nullifying workers' rights: by trapping workers into the union, the union can maximize its own power at the expense of dissenters. This is just compelled association and compelled subsidization of speech under a new disguise. *See* Parker Jackson, *Goldwater Tells Federal Agency to Protect Workers' Rights from Union Power Grab*, Goldwater Institute (January 25, 2023).[9]

The statute also requires school employers to provide annual notices to school employees of their constitutional right to resign and cease union payments, as well as notice of the annual amount of dues owed. Ind. Code § 20-29-5-6(c)(6). Like the provisions above, it is constitutionally proper for a state to inform its own employees of their constitutional rights, and of the amount of money to be withheld through the state's own payroll deduction system. Such a notice requirement imposes a minimal burden on the union—and there is no more precisely tailored way to ensure that workers are informed of their rights at the correct time and in the correct manner.

The attorney general, here the Defendant-Appellant, must also annually notify school employers of the provisions in subsection (c) of the statute, including the authorization form and state-issued warning. *Id*. § 20-29-5-6(d). The state can obviously direct one of its own public officials to provide such notice.

[9] https://www.goldwaterinstitute.org/goldwater-tells-federal-agency-to-protect-workers-rights-from-union-power-grab/.

And finally, the statute accomplishes additional narrow tailoring by making the warning on the authorization form required only for "collective bargaining agreement[s] or contract[s] entered into, renewed, modified, extended, or amended after June 30, 2022." *Id*. § 20-29-5-6(e).

These provisions precisely target the evils of compelled or otherwise nonconsensual association and subsidization. Nothing in the statute bars the union from expressing itself or from raising money through *voluntary* tactics, nor exceeds the goal of ensuring that school employees are fully informed of their rights.

ii. School employee organizations are distinct from other types of labor organizations because of the state constitutional interests involved, the proximity school employees have to minors, and the conduct of school employee organizations during the COVID-19 pandemic.

Not only is the speaker-based distinction in SEA 251 and SEA 297 rational, even if school employee organizations' viewpoints are implicated, treating these unions differently from other types of unions is a form of permissible narrow tailoring due to the unique position these organizations hold in our society.

Teachers' unions differ greatly from other unions for several relevant reasons. Ind. Code § 20-29-1-1(4) ("The relationship between school corporation employers and certificated school employees is not comparable to the relationship between private employers and employees … .").

First, school employees are charged with helping the state carry out its educational obligations under the Indiana Constitution. *See* Ind. Const. art. 8 § 1; Ind. Code § 20-29-1-1(4)(A) ("A public school corporation is not operated for profit but to ensure the citizens of Indiana rights guaranteed them by the Constitution of the State of Indiana."). Other types of public employees do not have a similar constitutional charge; for example, there is no constitutional right to the assistance of firefighters or even a constitutional right to police protection. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005). Second, school employees are in almost constant proximity to the rising generation. The government must take great care to ensure that minors are not negatively impacted by union malfeasance, labor unrest, or political propagandizing to students. And third, during the COVID-19 pandemic, teachers' unions specifically engaged in conduct that both impeded educational objectives and directly harmed minor students.

This last point merits additional explanation. As the pandemic lengthened from two weeks to more than two years, teachers unions across the country engaged in catastrophic efforts to extend school closures and quarantines well beyond what scientific data and reason could justify. *See, e.g.,* Matt Beienburg, *How the Education Establishment Botched COVID-19 and Boosted the School Choice*

Movement, Discourse (April 11, 2022).[10] This occurred in Indiana as well as other states. M.J. Slaby & Arika Herron, *'Exhausted and Broken': Coronavirus Quarantines Lead to Severe Shortages of Teachers, Subs*, Indianapolis Star (Nov. 20, 2020) ("The Indiana State Teachers Association is calling on schools to scale back or pause in-person instruction … .").[11] Even as the pandemic waned, some teachers unions—including at least one of the Plaintiff-Appellees—continued to strongarm public employers in an effort to extract concessions during contract negotiations. Classes for Anderson Community Schools, for example, were outright canceled for at least two days in November 2021 because "15%–20% of teachers engag[ed] in an illegal concerted job action by calling off work … ." during contract negotiations between the school district and the Anderson Federation of Teachers. *Anderson Community Schools Closed Due to Excessive Amount of Staff Absences*, Fox59 (Nov. 3, 2021).[12]

[10] https://www.discoursemagazine.com/politics/2022/04/11/how-the-education-establishment-botched-covid-19-and-boosted-the-school-choice-movement/.
[11] https://www.indystar.com/story/news/education/2020/11/20/covid-19-indiana-quarantines-lead-shortage-teachers/6354626002/.
[12] https://fox59.com/news/anderson-community-schools-closed-due-to-excessive-amount-of-staff-absences/.

The results of these school closures are clear: "Devastating losses in math and reading." John Bailey, *Quarantines, Not School Closures, Led to Devastating Losses in Math and Reading*, AEI (January 4, 2023) (cleaned up).[13]

Illegally organizing to keep public schools closed is, in effect, a conspiracy to deprive Indiana children of their constitutional rights. *See* Ind. Const. art. 8 § 1 (public schools are to be "open to all"). This goes beyond lobbying on a matter of public policy and constitutes an outright effort to bar the state from fulfilling its constitutional duties to "encourage" and "provide" *open* public schools. *See, e.g., Meredith v. Pence*, 984 N.E.2d 1213, 1220–21 (Ind. 2013) (discussing state duties under Indiana Constitution's Education Clause). The state is more than warranted in taking steps to prevent a repeat of such occurrences.

The legislature rationally concluded that teachers unions' actions constituted a direct threat to—indeed, an ongoing disruption of—constitutional rights and imperatives. Given the scale of that disruption, the modest limits imposed by SEA 251 and SEA 297 easily pass even the narrowest tailoring requirement.

[13] https://www.aei.org/op-eds/quarantines-not-school-closures-led-to-devastating-losses-in-math-and-reading.

CONCLUSION

The Court should vacate the district court's order as it pertains to Plaintiff-Appellees' associational rights claim and direct the district court to enter judgment in favor of Defendant-Appellant.

Date: July 19, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Date: July 19, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 202, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Parker Jackson*
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