No. 20-1120

In The
Supreme Court of the United States

MELISSA BELGAU, *et al.*,

Petitioners,

v.

JAY INSLEE, in his official capacity as Governor of the State of Washington, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF GOLDWATER INSTITUTE AND NATIONAL TAXPAYERS UNION AS AMICI CURIAE SUPPORTING PETITIONERS

JACOB HUEBERT*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amici Curiae Goldwater Institute & National Taxpayers Union

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether it violates the First Amendment for a state and union to seize union dues or fees from employees' wages without clear and compelling evidence that the employees waived their First Amendment right not to subsidize a union and its speech.

2. Whether a union acts under color of state law for purposes of 42 U.S.C. § 1983 when it collectively bargains with a state to authorize and enforce restrictions on public employees' First Amendment right *not* to subsidize a union and its speech.

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IDENTITY AND INTEREST OF AMICI 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 it or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. Specifically relevant here, Institute litigators represent attorneys challenging a mandatory association in several cases, including *Crowe v. Oregon State Bar*, Nos. 19-35463, 19-35470, ___ F.3d ___, 2021 WL 748511 (9th Cir. Feb. 26, 2021) (reversing dismissal of First Amendment challenge to mandatory bar association membership); *Boudreaux v. Louisiana State Bar Association*, No. 20-30086 (5th Cir. filed Feb. 19, 2020) (pending); and *Schell v. Oklahoma Supreme Court Justices*, No. 20-6044 (10th Cir. filed Apr. 2, 2020) (pending). The Institute has also litigated and won important victories for other aspects of free

[1] The parties have consented to the filing of this amicus brief. Amici curiae gave counsel of record for all parties notice of its intention to file this brief at least 10 days before the brief's due date. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than amici, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

speech, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F.Supp.3d 685 (E.D. Ky. 2016) (scheme imposing different campaign contribution limits on different classes of donors violated Equal Protection Clause). The Institute has appeared frequently as amicus curiae in this Court and other courts in free-speech cases. *See*, *e.g.*, *Janus v. AFSCME*, 138 S.Ct. 2448 (2018); *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018).

Founded in 1969, National Taxpayers Union ("NTU") is a nonpartisan non-profit organization that advocates for free enterprise, limited government, simple taxation, and transparency on both the state and federal levels. For decades, we have supported policies that empower workers and advance the free market principles that have created economic prosperity for our nation and its citizens.

Because Amicus has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many courts considering this issue, and because any decision will significantly impact taxpayers, Amicus has an institutional interest in this Court's ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

If it stands, the lower court's decision won't only harm the First Amendment rights of people like Petitioners who signed union membership agreements under the duress of state coercion before this Court decided *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). As Petitioners observe, it will also harm the rights of people who signed (or will sign) membership agreements after *Janus*, but without sufficient knowledge of their First Amendment right not to sign. Pet. 25–28. And there are still others who will have no federal remedy for a union's violations of their First Amendment rights: people who *never signed a union membership agreement at all*, who are nonetheless forced to pay public-sector union dues as "members" despite *Janus*'s recognition of their right not to.

In fact, district courts are already applying the Ninth Circuit's decision in this case to dismiss First Amendment claims by government employees or subsidy recipients alleging that a public-sector union *forged their signatures* on membership agreements and that the government deducted union dues from their paychecks as a result. *See infra* at 5-9. Following the Ninth Circuit's reasoning in this case, these courts have said that the unions' forgeries, and the resulting dues deductions, are a private matter and entail no state action—even though the government collects dues from the victims without confirming that they actually consented to pay.

That result is contrary to *Janus*, which requires the government to have clear and compelling evidence that an individual has affirmatively consented to pay a union before it collects money from him or her on the union's behalf. *Janus*, 138 S.Ct. at 2486. A scheme under which the government simply takes a union's word for it that individuals are members, and fails to independently verify that an individual actually wishes to pay union dues before giving his or her money to the union, does not provide the government with the constitutionally mandated clear and compelling evidence of a First Amendment waiver. The collection of dues in the absence of that protection for employees' right not to subsidize a union—and the union's role in that collection—therefore does constitute state action, just as the collection of agency fees in the absence of required First Amendment safeguards constituted state action in *Janus*.

The decision below empowers public-sector unions to evade *Janus*—and even the pre-*Janus* restraints on their ability to force workers to subsidize their political speech—by falsely claiming that individuals are members, placing the burden on those individuals to bring tort claims in state court (with no prospect of receiving attorney fees under 42 U.S.C. § 1988) to seek relief. That is insufficient to give government employees the protection for their First Amendment rights that *Janus* promises.

The Court therefore should grant certiorari to ensure that states and unions respect the First

Amendment rights this Court said they must protect in *Janus*.

ARGUMENT

I. District courts are applying the Ninth Circuit's decision in this case to dismiss First Amendment claims by individuals who allege that the government is taking union dues from them based on *forged signatures*.

District courts are already applying the Ninth Circuit's reasoning in this case to dismiss First Amendment claims by individuals who allege that the government has deducted union dues from their paychecks based on a union *forging their signatures* on membership agreements.

The plaintiffs in these cases are (or were) public-sector employees or subsidy recipients represented by a public-sector union, who allege that they never signed union membership agreements, that the government nonetheless deducted union dues from their paychecks, and that those deductions were the result of a union's forgery of their signatures (sometimes electronically) on union membership agreements. *See Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *1 (D. Or. Jan. 6, 2021), *appeal docketed*, No. 21-35133 (9th Cir. Feb. 19, 2021); *Zielinksi v. SEIU Local 503*, No. 3:20-cv-00165-HZ, ___ F.Supp.3d ___, 2020 WL 6471690, *1 (D. Or. Nov. 2, 2020), *appeal docketed*, No.

20-36076 (9th Cir. Dec. 15, 2020); *Schiewe v. SEIU Local 503*, No. 3:20-cv-00519-JR, 2020 WL 5790389, *1–2 (D. Or. Sept. 28, 2020), *appeal docketed*, No. 20-35882 (9th Cir. Oct. 9, 2020); *Wright v. SEIU Local 503*, No. 6:20-cv-00520-MC, ___ F.Supp.3d ___, WL 5797702, *1 (D. Or. Sept. 28, 2020), *appeal docketed*, No. 20-35878 (9th Cir. Oct. 8, 2020); *Semerjyan v. SEIU Local 2015*, No. CV 20-02956 AB (ASx), ___ F.Supp.3d ___, 2020 WL 5757333 (C.D. Cal. Sept. 25, 2020), *appeal docketed*, No. 21-55104 (9th Cir. Feb. 9, 2021); *Yates v. Wash. Fed'n of State Emps.*, 466 F.Supp.3d 1197, 1201 (W.D. Wash. 2020), *appeal docketed*, No. 20-35879 (9th Cir. Oct. 8, 2020); *Quezambra v. United Domestic Workers of Am. AFSCME Local 3930*, 445 F.Supp.3d 695, 702 (C.D. Cal. 2020), *appeal docketed*, No. 20-55643 (9th Cir. June 23, 2020).

In all of these cases, with substantially identical analyses, the district courts dismissed the plaintiffs' First Amendment claims against their unions for failure to state a claim, concluding that the Ninth Circuit's reasoning in this case compelled the conclusion that the plaintiffs had not alleged state action that could give rise to a violation of the First and Fourteenth Amendments.[2] The most recent of these decisions concluded, like the others, that "as in *Belgau*, the source of the alleged constitutional harm [was] not a State

[2] *Yates* and *Quezambra* were decided shortly before the Ninth Circuit issued its decision in this case, but they applied substantially identical reasoning. *Quezambra* cited the district court decision that the Ninth Circuit affirmed. 445 F.Supp.3d at 704, 706 (citing *Belgau v. Inslee*, 359 F.Supp.3d 1000, 1013, 1014 (W.D. Wash. 2019)).

statute or policy but the particular private agreement between [the union] and Plaintiff"—notwithstanding the plaintiff's allegation that she "did not see, review or sign a membership card before she was illegally forced to pay union dues" and that she therefore had no "private agreement" with the union. *Jarrett*, 2021 WL 65493 at *3; *see also Zielinski*, 2020 WL 6471690 at *3; *Schiewe*, 2020 WL 5790389 at *2; *Wright*, 2020 WL 5797702 at *3; *Semerjyan*, 2020 WL 5757333 at *5–6 & n.3; *Yates*, 466 F.Supp.3d at 1204; *Quezambra*, 445 F.Supp.3d at 705–06.

These courts, like the Ninth Circuit in this case, concluded that government officials did not provide "significant assistance" to the unions despite their collection of dues at the unions' direction—and despite the fact that these unions were able to extract wealth from the plaintiffs only by virtue of the government's intercession. The courts observed that state officials did not shape the terms of the putative membership agreements, or participate in or know of the unions' forgery, and that state law did not authorize unions to engage in forgery. The plaintiffs' allegations that the government should have provided safeguards to ensure that it only took dues from people who had actually affirmatively consented to pay, these courts said, did not establish state action that could support a constitutional claim. *See Jarrett*, 2021 WL 65493 at *3; *Zielinksi*, 2020 WL 6471690 at *3; *Schiewe*, 2020 WL 5790389 at *3; *Wright*, 2020 WL 5797702 at *3–4; *Semerjyan*, 2020 WL 5757333 at *5; *Yates*, 466 F.Supp.3d at 1204; *Quezambra*, 445 F.Supp.3d at 705–06.

Under this reasoning, even government officials are not engaging in state action when, pursuant to state law, they seize money from individuals' paychecks at the union's direction. *See Quezambra*, 445 F.Supp.3d at 705–06 (dismissing First Amendment claims against state and county officials because "officials' mere deduction of dues from the wages of individuals identified and reported to the state as voluntary Union members cannot be characterized as state action causing a constitutional deprivation").

The plaintiffs in these cases also brought one or more state law claims to recover the dues wrongfully taken from them. In each case, after dismissing the plaintiffs' First Amendment claims, the court declined to exercise supplemental jurisdiction over any state law claims and dismissed them without prejudice. *Jarrett*, 2021 WL 65493 at *5; *Zielinksi*, 2020 WL 6471690 at *5; *Schiewe*, 2020 WL 5790389 at *5; *Wright*, 2020 WL 5797702 at *4; *Semerjyan*, 2020 WL 5757333 at *7; *Yates v. Wash Fed'n of State Emps.*, No. 3:20-cv-05082-BJR, 2020 WL 5607631, *3 (W.D. Wash. Sept. 16, 2020) (separate order dismissing remaining claims); *Quezambra*, 445 F.Supp.3d at 705–06.

Arguably, these decisions correctly applied precedent because they simply followed the Ninth Circuit's reasoning in this case to its logical conclusion: that, by outsourcing the identification of union members to the unions themselves, governments that collect dues on unions' behalf may turn a blind eye to unions' coercion, fraud, and forgery, and completely absolve themselves (as well as the unions) of any constitutional

responsibility to ensure that unwilling individuals are not made to subsidize unions and their speech. These decisions are, however, incompatible with *Janus* and the First Amendment.

II. The Ninth Circuit's decision is incompatible with the protection for First Amendment rights that *Janus* requires.

The Ninth Circuit's reasoning in this case and the district court decisions that have applied it are contrary to the protection for First Amendment rights that *Janus* demands. Indeed, they create a loophole by which individuals can have *less* protection for their rights than they had before *Janus*.

Janus stated that "[n]either an agency fee nor any other payment to [a] 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." 138 S.Ct. at 2486. This Court said that governments "cannot . . . presume[]" that nonmembers intend to waive their First Amendment right not to pay a union, and that "to be effective, [a] waiver must be freely given and shown by 'clear and compelling' evidence" that the individual has "clearly and affirmatively consent[ed]" to pay. *Id.*

Under the dues-collection schemes lower courts upheld in this case and in the forgery cases, however, the government collects dues from individuals *without* clear and compelling evidence that they have clearly and affirmatively consented to pay. The government

simply relies on unions' assertions that individuals are members, which does not constitute clear and compelling evidence of consent because it does not tell the government whether an employee had "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," *Patterson v. Illinois*, 487 U.S. 285, 292 (1988), or whether the employee's ostensible consent was freely given.[3] *Cf., e.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972) (waiver was valid where evidence showed party was sophisticated and represented by counsel, and waiver was *not* part of a contract of adhesion); *Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993) (waiver was valid where evidence showed entity was advised by counsel before voluntarily signing the agreement and the waiver "resulted from the give-and-take of negotiations between parties of relatively equal bargaining strength").

Of course, hearsay is not generally considered reliable evidence, even by the ordinary standard—let alone when courts are applying the heightened "clear and compelling" standard—which is why it is not

[3] Several state attorneys general have found dues deductions based on a union's reporting alone to be unconstitutional under *Janus* and have therefore recommended that their respective states collect union dues only after advising employees of their First Amendment rights and obtaining their consent directly. *See* Letter from Alaska Attorney General Kevin G. Clarkson to Gov. Michael J. Dunleavy (Aug. 27, 2019), https://tinyurl.com/y4t6yjpz; Op. Att'y Gen. Ind. 2020-5 (2020), https://tinyurl.com/39j4cvkx; Op. Att'y Gen. Tex. KP-0310 (2020), https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf.

generally admissible in court proceedings. And the proliferation of forgery cases since *Janus*, and of cases in which wrongful dues deductions have been attributed to union error, bolsters the intuitive conclusion that a union's self-interested hearsay is especially unreliable. *See*, *e.g.*, *Fischer v. Governor of N.J.*, Nos. 19-3914, 19-3995, 2021 WL 141609, *7 (3d Cir. Jan. 15, 2021) (union continued taking dues from a former member after his resignation "[d]ue to an administrative error"); *Ochoa v. SEIU Local 775*, No. 2:18-CV-0297-TOR, 2019 WL 4918748, *2 (E.D. Wash. Oct. 4, 2019) (plaintiff first had dues deducted from her subsidy checks due to forgery and, after that was resolved, was one of "'. . . approximately 87 individual [subsidy recipients] who likely had dues deductions taken without affirmative consent' as a result of discrepancies in the lists [the state] received from SEIU 775").

The forgery cases illustrate the absurdity and unworkability of the position that some courts, including the lower court here, have adopted: that, because *Janus* only referred to the rights of "nonmembers," it does not prescribe the waiver standard for deductions of dues from the paychecks of people who (supposedly) are members. *See*, *e.g.*, App. 18a–20a; *Bennett v. Council 31, AFSCME*, No. 20-1621, ___ F.3d ___, 2021 WL 939194, *6 (7th Cir. Mar. 12, 2021) (rejecting First Amendment claim based on pre-*Janus* union membership "agreement" because "[n]othing in *Janus* suggests that its holding regarding union-related deductions from nonmembers' wages also applies to similar

financial burdens on union members"); *Fischer*, 2021 WL 141609, *8 (reaching the same conclusion).

These courts have nonsensically concluded that *Janus* protects public-sector employees who are not union members from being forced to pay union fees but does not equally protect them against being forced (by union coercion or deception) to be members who can be required to pay dues. This allows unions to escape *Janus*'s waiver requirement by simply asserting that someone agreed to be a member. That has been the unions' tactic—and their most obviously absurd one—in the forgery cases, where courts have characterized the dispute as a private one arising out of a "membership agreement," even though the plaintiffs have alleged that the unions *lied* about the existence of any agreement. *See*, *e.g.*, *Jarrett*, 2021 WL 65493 at *3. Under the Ninth Circuit's reasoning in this case, even a *false* union assertion that someone was a member at some point in the past takes that person from having strong First Amendment protection against forced union subsidies—as he or she presumably would, under *Janus*, if the union did not claim him or her as a member, and the state characterized its deductions as an agency fee—to having *no* constitutional remedy against the union for forced subsidies.

Remarkably, the Ninth Circuit's reasoning leaves individuals with *less* protection against wrongful dues deductions and forced association than they had before *Janus*. Prior to *Janus*, the Court required public-sector unions that received compulsory agency fees to limit their infringement of First Amendment rights by

establishing safeguards that would (theoretically) allow nonmembers to challenge the use of their fees for political and ideological activities that were not germane to collective bargaining. *See Chi. Teachers Union v. Hudson*, 475 U.S. 292, 301–310 (1986). Those safeguards were a mandatory prerequisite to the collection of agency fees; the state's collection of fees on a union's behalf in the absence of such safeguards violated nonmembers' First Amendment rights. *Id.* at 310 (safeguards were "constitutional requirements for [a u]nion's collection of agency fees"). *Janus*, however, recognized that individuals have a right to avoid paying for *any* union activity, whether "germane" or not, which the government cannot justify violating. 138 S.Ct. at 2480–86.

Yet, under the Ninth Circuit's reasoning, *Janus*'s great (theoretical) increase in protection for individuals' First Amendment rights also eliminated the need for governments and unions to implement *any* safeguards before taking union payments from an individual's paycheck, because this does not qualify as government action in the first place. This is despite the fact that a wrongful deduction of dues from a worker's paycheck entails a greater infringement of First Amendment rights than an excessive agency fee did before *Janus*, as it results in an individual being forced to subsidize *all* of a union's germane and nongermane activity *and* to be associated with the union as a member.

That is the opposite of how it should be: if anything, *Janus*'s recognition of the severe First

Amendment injury that mandatory union payments inflict should require states to provide *stronger* procedural safeguards to ensure that, in collecting dues, they do not force anyone to pay a union against his or her wishes. *Cf. Crowe v. Or. State Bar*, Nos. 19-35463, 19-35470, ___ F.3d ___, 2021 WL 748511, *15 (9th Cir. Feb. 26, 2021) (VanDyke, J., dissenting in part) ("Given [*Janus*], it is hard for me to see how something less than *Hudson*'s safeguards could [now] suffice in the context of compulsory bar membership dues."). *Janus* would lose much of its force—and, for individuals wrongly added to the union's membership list, would be a step *backward* with respect to protection of First Amendment rights—if the state action doctrine allowed public-sector unions and their allies in government to make an end run around it in this way.

The ability to pursue common law claims against a union in state court—the only alternative these lower courts have left open to victims of union forgery—is no substitute for being able to bring a claim in federal court under the First and Fourteenth Amendments and 42 U.S.C. § 1983. The obvious reason is because individuals simply shouldn't have to go to state court: plaintiffs who allege wrongful collection of union dues allege precisely the First Amendment injury the Court condemned in *Janus*, and are entitled to the same relief to which anyone alleging a federal constitutional injury is entitled.

But in addition, § 1983 exists in part so people whose federal rights have been harmed will not have to seek recourse in courts that are part of the same

state government that is violating their rights. *See Allen v. McCurry*, 449 U.S. 90, 98–99 (1980) (noting that "one strong motive behind [§ 1983's] enactment was grave congressional concern that state courts had been deficient in protecting federal rights"); *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (noting that Congress enacted § 1983 in part because "state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights"); *Monroe v. Pape*, 365 U.S. 167, 180 (1961) ("It is abundantly clear that one reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.").

Also, 42 U.S.C. § 1988 entitles plaintiffs who prevail on a § 1983 claim to an award of reasonable attorney fees and costs, which is intended "to encourage individuals" whose rights are violated "to seek judicial relief," *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968), "facilitates litigation by plaintiffs," "encourages them to reject half-measure compromises," and "gives defendants strong incentives to avoid arguable civil rights violations in the first place." *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., concurring in part). Many states, however, do not mandate (and typically do not allow) awards of attorney's fees to plaintiffs who prevail on

common law claims. So the elimination of a federal constitutional remedy for wrongful union dues deductions would remove an important check on states' and unions' ability to violate individuals' rights.

CONCLUSION

The decision below, and the many district court decisions following it, are actually *reducing* the protections provided by *Janus*. The *Janus* decision promised protections for individual rights that will evaporate if courts do not apply it to hold public-sector unions accountable for fraudulently conscripting and, with the state's help, taking money from "members" who want nothing to do with them. To ensure that governments and unions respect the First Amendment rights that *Janus* upheld, the petition for certiorari should be *granted*.

Respectfully submitted,

JACOB HUEBERT*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amici Curiae
Goldwater Institute & National Taxpayers Union