No. 22-576

In The
Supreme Court of the United States

CINDY ELLEN OCHOA, an individual,

Petitioner,

v.

PUBLIC CONSULTING GROUP, *et al*.,

Respondents.

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

BRIEF OF UPPER MIDWEST LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF GRANTING THE PETITION

JAMES V. F. DICKEY
Counsel of Record
DOUGLAS P. SEATON
UPPER MIDWEST LAW CENTER
8421 Wayzata Boulevard, Suite 300
Golden Valley, MN 55426
James.Dickey@umlc.org
(612) 428-7002

January 20, 2023

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST[1]

Amicus curiae Upper Midwest Law Center (the "UMLC") is a non-profit, public interest law firm founded in Minnesota in 2019. UMLC's mission is to initiate pro-freedom litigation to protect against government overreach, special interest agendas, constitutional violations, and public union corruption and abuses.

This case concerns UMLC because UMLC has a demonstrated commitment to employees' rights. UMLC has worked and continues to work with public-sector employees whose public-sector unions coerced the waiver of their First Amendment rights either under threat of unemployment or by outright forgery. UMLC fights on behalf of these employees for the full recognition of the procedural and substantive rights guaranteed by *Janus*.

SUMMARY OF ARGUMENT

The State of Washington has given private unions control over employees' First Amendment rights with economic incentive to abuse them, and has statutorily bound itself to blindly follow those directives. The State's procedural safeguards on its statutory process

[1] All parties received timely notice. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

are so lacking that even forgery can happen, with no way to stop the ongoing violation of First Amendment rights. Despite the State of Washington's creation of this sieve for constitutional violations, the Ninth Circuit held that Washington can keep its eyes shut and let violation after violation pass by, so long as it did not specifically intend each violation. In sports, remaining intentionally blind to oncoming goal-scorers is more than just mere negligence; it is throwing the game. The Fourteenth Amendment requires more of the State to protect public employees.

Cindy Ochoa represents one of many who has had to come to the courts seeking vindication for the violation of her First and Fourteenth Amendment rights. She will not be the last to be turned away, denied that vindication, unless this Court takes up her case and addresses the heart of the problem: a current lack of due process for the waiver of First Amendment rights.

Janus promised a new beginning for public employees: no longer could states assume an employee's waiver of her First Amendment right; "[r]ather, to be effective, the waiver must be freely given and shown by clear and compelling evidence." *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (internal quotations omitted). By citing to other historic constitutional waiver cases—*Zerbst*, *Knox, Curtis Publishing*—the Court signaled that employee protection against union coercion is of paramount First Amendment importance. Implicitly, the State has a role to play: to ensure, by clear and compelling evidence, that employees have freely

waived their rights. However, the Ninth Circuit's decision below illustrates the reluctance lower courts have shown to find in *Janus* the procedural safeguards it strongly supports.

The Court should take up the Petition to correct the lower courts' misapprehension of *Janus'* waiver requirements because the First Amendment "is intended to guarantee the preservation of an effective system of free expression," and "deserves the same protections afforded by the presumption against waiver of constitutional rights because it is a fundamental right." Brittany Scott, NOTE: Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract, 46 Hastings Const. L.Q. 451, 464-465 (Winter 2019).

ARGUMENT

I. The Taking of Public Employees' Wages Without Their Consent Is a Widespread Problem.

The State's taking of dues from Cindy Ochoa without her consent is not an isolated incident: known incidents of union forgeries and other takings of employee wages have exploded since this Court decided *Janus*.

Consider, for example, the case of Marcus Todd, whom UMLC currently represents in an ongoing case in the Eighth Circuit. *Todd v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 5*, No. 21-cv-637-SRN-ECW

(D. Minn. 2021); *Todd v. AFSCME, Council 5*, 571 F. Supp. 3d 1019 (D. Minn. 2021), *appeal filed* Nov. 29, 2021. The case relates to forgery, not the administrative debacle presented in this case, but it provides a helpful perspective on current problems with statutory dues-deduction procedures applicable to public employees.

Todd started working for Minnesota's Department of Human Services ("DHS") in 2014. *Id.* (ECF No. 1, Compl. ¶¶ 10-13, 23). At that time he, like so many others, was faced with the unconstitutional choice: (1) join a government union and pay 100% dues, or (2) pay an agency fee of nearly that amount and get no say in the union's use of his fee payments. *Id.* Pay the union, or pay the union more.

So, under this coercion, in 2014, Todd joined the union (unlike Ochoa, who never joined). *Id.* But he never provided informed consent to join the union and he never knowingly or voluntarily waived any right not to be a member of the union. *Id.* In other words, Todd was never adequately informed of his First Amendment right to refuse membership or his right to not have any money taken from him without his consent via agency fees—rights *Janus* would eventually confirm. *Id.*

Then, immediately after *Janus*, in July 2018, the union began scrambling to "paper" its memberships by getting DHS employees to sign paper "Welcome Cards." *Id.* ¶ 14. Todd recalled specifically that when the representatives came to his workplace they

brought paper applications, not iPads or any other electronic device, to sign up employees for union membership. *Id.* ¶¶ 15-17. Todd never signed anything. *Id.* ¶¶ 18-21. But his not signing anything was not enough to convey his unwillingness to join the union: the union simply forged his electronic signature on a dues checkoff in July 2018. *Id.* From then on, the union fraudulently had Todd's dues deducted from his paychecks. *Id.* ¶ 22. The union relied on that forgery to obtain dues deductions. The state employer did nothing to stop it. *See id.*

Todd first learned of the forgery in July 2020, when he sent the union a written notification that he was resigning his union membership and demanding that dues deductions cease. *Id.* ¶¶ 26-29. The union processed Todd's union resignation but refused to stop dues deductions, instructing Todd to send subsequent notice during an opt-out window in May 2021. *Id.* Even after Todd demonstrated that the application on which the union was relying was a forgery, the union continued to deduct Todd's dues. *Id.*

Untroubled by the forged document on which it relied, the union expressed the belief that it had a right to keep Todd's dues, even if they were obtained on the basis of a forgery. *Id.* Ex. 6. That is, the union had a right to rely on its own forgery to deduct his dues. Todd, on the other hand, had no rights—no right to demand back his illegally deducted dues, no right to not be compelled to subsidize the speech of an organization with which he disagreed, politically and now morally. Todd only had the right to escape the union's deduction

scheme during a 15-day window in the spring of the following year.

The lower court in *Todd* held that the act of forgery itself insulates the union from Section 1983 claims because deductions based on a forgery could not be state action. *Todd*, 571 F. Supp. 3d 1019, 1026. In other words, two wrongs make a right. While the *Todd* court did not have occasion to address the government's role in the theft because the case proceeds solely against the union defendant, it is clear that the government did nothing to stop the fraudulent taking of Todd's money. *See Todd*, No. 21-cv-637-SRN-ECW (D. Minn. 2021), Compl. (ECF No. 1).

The lower courts in this case have insulated the frequent union co-defendant, the State, from responsibility for takings of employee wages. This is despite the employer's unique position which would allow it to easily stop the violations. Instead, the State fails to stop the illegal takings by self-inflicted means—but to the court below, that is acceptable because the State 'didn't mean it.'

Under the lower courts' reasoning, victims like Ochoa and Todd[2] have no right to procedural safeguards that would verify, "by clear and compelling evidence," that their waivers were obtained "freely,"

---

[2] Whereas Todd was coerced into union membership, "[t]here is no issue whether Cindy Ochoa ever joined a union, or consented to pay dues. . . ." Pet. 20. This demonstrates the importance of the government's responsibility to ensure a real *Janus* waiver before making any deduction from an employee's paycheck.

without coercion. *Janus*, 138 S. Ct. at 2486 (internal quotations omitted). But that is exactly what *Janus* calls for and that is just what state employers need to implement to address the growing problem of union forgeries.

The Court should grant the Petition to address the State's responsibility to ensure due process in the waiver of employees' First Amendment rights.

II. The State Has a Duty to Verify Its Employees' Constitutional Waivers Where It Has No Direct Knowledge of the Circumstances Supporting Waiver.

In Washington's statutory framework,[3] the union and government employer are in an apparent "cat's paw" relationship: the union tells the State to act, the State acts, and the union takes the money. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011) (discussing Aesop's "cat's paw" fable and its application in the employment context). The State is not even *allowed* to discuss a deduction authorization with an employee who has allegedly consented to it, but rather "shall

[3] Washington's statutory framework in the Revised Code of Washington, section 41-56-113, is similar to Oregon's Revised Statutes, section 243.806(7), in that both provide no form of due process to the employee as to deductions from her paycheck and allow the union to simply dictate to the State that deductions shall be made, with no check or balance. *Compare* Pet. 3-4 (Washington) *with* Pet. 18 (Oregon). *See also Wright v. Serv. Emps. Int'l Union, Local 503*, No. 22-577, Br. of *Amicus Curiae* Upper Midwest Law Center, at 11-16 (Jan. 16, 2023).

rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions." Wash. Rev. Code § 41.56.113(b)(vi). Yet it is the State which set up this arrangement in the first place, and as such it has the duty to protect its employees from violations of their First Amendment rights caused by the procedures it created. This affirmative obligation on the part of state employers predates *Janus*.

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 (1986), the Court held that "[p]rocedural safeguards are necessary to achieve" the protection of the First Amendment rights identified in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Hudson*, the Court weighed whether the Chicago Teachers Union's procedure for sequestering money used for political versus nonpolitical purposes, which in part only allowed for a post-deduction objection, was adequate. 475 U.S. at 296, 305.

The *Hudson* Court held that the infringement on government employees' First Amendment rights occasioned by forced deductions of government union dues "requires that the procedure be carefully tailored to minimize the infringement." *Id.* at 303. The Court then applied "First Amendment scrutiny" to the "challenged Chicago Teachers Union procedure," *id.* at 304, and struck it down because a forced subsidy followed only by the possibility of a refund is inadequate, *id.* at 305-06. Ultimately, the Court required that the union adequately explain the calculation of the agency fee (notice), provide an opportunity to challenge the

calculation (an opportunity to respond), and escrow of the amounts in question. *Id.* at 310. This was necessary to ensure that "government treads with sensitivity in areas freighted with First Amendment concerns." *Id.* at 303 n.12 (citing Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 551 (1970) ("The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures.").

It is true that, in *Hudson*, the strictures prescribed to protect employee First Amendment rights were placed on the union, not the government. 475 U.S. at 310. However, as the petitioner points out, imposing a simple procedural check on the government employer—the entity which actually makes the deductions—is sensible and narrowly addresses the circumstances in which, pursuant to Washington's statutory system, the union provides the government the *prima facie* evidence of constitutional waiver. Pet. 20. Before the government commits the action that potentially infringes the First Amendment rights of the employee, this simple procedural safeguard would stop most, if not all, inadvertent constitutional waivers. It is hard to imagine a lighter "burden" than the petitioner proposes, if it can even be called that:

> A simple system such as an email prior to deductions saying "Union dues will be withdrawn on your next paycheck. If this is correct, you need do nothing. If this is incorrect, please contact _____" could alleviate all due process concerns.

Pet. 20. This minimal safeguard would be effective, and it would not even be as burdensome as those imposed by the Court in other circumstances where fragile constitutional rights are at heightened risk of waiver.

This duty of a government employer to safeguard the rights of employees who are captive to the government's payroll system is akin to a police officer's duty to safeguard the constitutional rights of criminal suspects in custodial interrogation, as decided in *Miranda v. Arizona*, 384 U.S. 436 (1966). It involves the same issue—the threat of coercive rights-waiver—with the same problem—captivity to a system inherently prone to coercive conduct. In *Miranda*, relying on the rights-waiver precedent of *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Court announced that it would be necessary to require prosecutors to "demonstrate[] the use of procedural safeguards effective to secure the privilege against self-incrimination" before using any statements stemming from custodial interrogation. *Miranda*, 384 U.S. at 444. The Court reasoned:

> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Mapp v.*

> *Ohio*, 367 U.S. 643, 685 (1961) (HARLAN, J., dissenting).

Id. at 466.

Consistently, in *West v. Atkins*, 487 U.S. 52, 54 (1988), the Court held that the State had a constitutional obligation to provide certain services to inmates in federal custody even if it contracted those duties to a private party. In *West*, the State "employ[ed] physicians, such as respondent, and defers to their professional judgment, in order to fulfill [its] obligation[s]." *Id.* at 55. But even so, contracting out the duty of caring for prison inmates' medical needs did not obviate the "constitutional duty to provide adequate medical treatment to those in its custody." *Id.* at 56. As in *West*, and under the principles of *Miranda* and *Hudson*, a government employer has an obligation to ensure that its employees have knowingly, intelligently, and voluntarily signed a waiver of their First Amendment rights before acting upon it.

By citing *Zerbst*, *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion), in connection with its holding on the requirement of a freely given waiver, *Janus* clarified that the requirements of First Amendment waiver are on par with the waiver of other constitutional rights. *See Janus*, 138 S. Ct. at 2486. Thus a state employer has a duty to safeguard its employees' First Amendment rights against compelled speech. Failure to do so is itself a violation of the First Amendment. *Hudson*, 475 U.S. at 302.

As quoted above, the procedural safeguards necessary for the State to satisfy due process are not burdensome Byzantine administrative additions. The state employer can fulfill its responsibility to verify its employees' First Amendment waiver with a simple email. An email like the one proposed by the petitioner, Pet. 20, would verify that the employee's signature on her application is authentic and that her apparent consent is real and freely given. The employee's silence (or affirmation) in response to the email would be clear and compelling evidence that she did freely consent. If the signature is fraudulent or obtained through other coercion, the employee can respond as indicated to challenge the waiver before the State begins dues deductions and deprives her of her money (property) and First Amendment rights (liberty).[4]

As the Petition states, until such a simple procedure is instituted, "the only avenue for public employees to protect their constitutional right to be free from compelled speech is filing a federal lawsuit against the State for violation of their Fourteenth Amendment rights." Pet. 20.

The Court should grant the Petition to ensure that public employers begin fulfilling their duties to

---

[4] Such an email would also avert so-called "discrepancies" like that which resulted in the State deducting dues from Ochoa's paycheck for a *second* time without her consent. *See* Pet. App. C (21a-22a).

procedurally safeguard their employees' First Amendment rights.

CONCLUSION

For the foregoing reasons and those in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JAMES V. F. DICKEY
Counsel of Record
DOUGLAS P. SEATON
UPPER MIDWEST LAW CENTER
8421 Wayzata Boulevard, Suite 300
Golden Valley, MN 55426
James.Dickey@umlc.org
(612) 428-7002

Counsel for Amicus Curiae

January 20, 2023