No. 22-577

In The Supreme Court of the United States

JODEE WRIGHT,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, ET AL.,

Respondents.

CHRISTOPHER ZIELINSKI,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, ET AL.,

Respondents.

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

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

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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. In the past, UMLC has worked with public sector employees whose state-designated unions coerced the waiver of their First Amendment rights either under threat of unemployment or by outright forgery. UMLC has fought on behalf of these employees for the full recognition of the procedural and substantive rights guaranteed by *Janus*.

SUMMARY OF ARGUMENT

The petitioners frame the importance of this case well: the Ninth Circuit's reasoning in this case "leads to the absurd result that *Janus* would have resulted in a win for the union had the union simply forged Mark Janus' signatures on a union membership card." Pet. 9.

[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.

That is astounding, yet true, as the petitioners and UMLC's clients can affirm.

Since the Court decided *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), known incidents of government unions forging dues deduction agreements have exploded in number.[2] Thus far, the lower courts have failed to hold government unions accountable for violating the constitutional rights of their purported "members" through these forgeries.

As the decision below illustrates, the problem in some courts is with the interpretation of the "state action" doctrine.[3] The Ninth Circuit has refused to accept what the Seventh Circuit—and this Court—have

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[2] *See*, *e.g.*, *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102 (9th Cir. 2022); *Jimenez v. SEIU Local 775*, 590 F. Supp. 3d 1349 (E.D. Wash. 2022); *Todd v. AFSCME, Council 5*, 571 F. Supp. 3d 1019 (D. Minn. 2021); *Trees v. SEIU Local 503*, 574 F. Supp. 3d 856 (D. Or. 2021); *Jarrett v. Marion Cnty.*, No. 6:20-cv-01049-MK, 2021 U.S. Dist. LEXIS 4941 (D. Or. Jan. 6, 2021); *Schiewe v. SEIU Local 503*, No. 3:20-cv-00519-JR, 2020 U.S. Dist. LEXIS 178067 (D. Or. Sep. 28, 2020); *Semerjyan v. SEIU Local 2015*, 489 F. Supp. 3d 1048 (C.D. Cal. 2020); *Yates v. Wash. Fed'n of State Emples.*, No. 3:20-cv-05082-BJR, 2020 U.S. Dist. LEXIS 169541 (W.D. Wash. Sep. 16, 2020); *Marsh v. AFSCME Local 3299*, No. 19-cv-02382, 2020 U.S. Dist. LEXIS 133767, 2020 WL 4339880 (E.D. Cal. July 28, 2020); *Quezambra v. United Domestic Workers of Am.*, 445 F. Supp. 3d 695 (C.D. Cal. 2020) (all involving claims of unauthorized deductions based on union forgery).

[3] The problems with the practical application of *Janus* do not end there; cases like *Ochoa* illustrate, courts have erected other barriers public employees must traverse to have the courts recognize their *Janus* rights with regard to constitutional waiver and due process.

recognized: when a union is a joint participant with the State in a "'procedural scheme created by . . . statute'" then the union acts under color of state law. *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus II*") (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)); *see also Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."). These consolidated cases present such a procedural scheme, and the union's joint participation with the State in this scheme makes the union a state actor.

Unless this Court corrects the Ninth Circuit's reasoning below, public employees' First and Fourteenth Amendment rights in the nation's largest judicial circuit will continue to go unprotected, and other circuits could erroneously follow suit, as the *Todd* case decided by the District of Minnesota shows. The Court should grant the Petition to address this problem.

ARGUMENT

I. Union Forgeries of Public Employees' Dues Checkoffs Are a Widespread Problem.

The union's forgeries of Wright's and Zielinski's union documents are not isolated incidents: known incidents of union forgeries have exploded since this Court decided *Janus*, as noted above. UMLC's clients are among them. 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 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, Todd joined the union (unlike Wright and Zielinski who never did join). *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, as in Wright's and Zielinski's cases, 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.

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 demonstrating 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 whom 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.[4]

The lower court in *Todd* actually followed the *Wright* and *Zielinski* district courts and 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. But as Todd and the petitioners here note, it's the state statute and the state processes that enable deductions which give rise to the constitutional violations, not just the forgery.

By insulating government unions from state action, lower courts have failed to address the constitutional problem union forgeries present. These courts thus say victims like Wright, Zielinski, and Todd[5] have no right to procedural safeguards that would verify, "by clear and compelling evidence," that their waivers were obtained "freely," without coercion. *Janus*, 138 S. Ct. at 2486 (internal quotations omitted). But that is exactly what *Janus* calls for and that is just what

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[4] Mr. Todd's case is ongoing. *See Todd v. AFSCME, Council 5*, 571 F. Supp. 3d 1019 (D. Minn. 2021), *appeal filed* Nov. 29, 2021.

[5] Whereas Todd was coerced into union membership, "[n]either [Wright nor Zielinski] ever became an SEIU member or authorized the State to deduct union payments from their wages." Pet. 2. All three, however, were victims of union forgeries. This demonstrates the importance of the government's responsibility to ensure a real *Janus* waiver before making any deduction from an employee's paycheck.

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. Unions Are State Actors When They Act Pursuant to State Law with the Assistance of the State.

Lower courts, including both the Ninth Circuit here and the Eighth Circuit, have repeatedly misapplied *Lugar*'s analysis to erroneously conclude that a union does not act under color of state law even where it (1) obtains consent from an employee for the sole purpose of triggering a state-law right to collect dues through a state employer, and (2) directs the state employer to deduct union dues from employees' paychecks pursuant to that state-law right. *See* Pet. App. A (16a-20a) (9th Circuit Decision); *Hoekman v. Educ. Minn.*, 41 F.4th 969, 978 (8th Cir. 2022) (deciding the union was not a state actor based on *Lugar*'s first prong by mislabeling government union action taken jointly with the State as related to a purely private agreement).

Below, the Ninth Circuit interpreted both prongs of *Lugar* to decide that (1) the union's role in transmitting employee union-dues authorizations to the State is not a right or privilege created by the State, Pet. App. A (17a), and (2) the union is not a joint actor with the State "because Oregon did not 'affirm[], authorize[],

encourage[], or facilitate[] unconstitutional conduct' by processing dues deductions." *Id.* 18a-19a; *Belgau v. Inslee*, 975 F.3d 940, 947 (9th Cir. 2020) (quoting *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013)). Both analyses are in error because the forgery is irrelevant to whether, under the *Lugar* analysis, a union acts under color of state law—it does when it acts pursuant to state law with the assistance of the State. The petitioners frame this argument well, especially their reliance on the Seventh Circuit's state-action analysis from *Janus II*, but a few other items bear noting.

As to *Lugar*'s first prong, when Service Employees International Union, Local 503 ("SEIU"), provided the list of employees who had allegedly authorized the State of Oregon to initiate dues deductions from petitioners' paychecks, SEIU was exercising its special right under its contract with the State through which SEIU had the authority, as exclusive representative, to invoke the State's power to have those dues seized from the petitioners. The SEIU thus used the statutory dues-deduction procedure, and a "procedural scheme created by statute obviously is the product of state action." *Lugar*, 457 U.S. at 941; Or. Rev. Stat. § 243.806(2), (7). Without this right created by the State, SEIU would have had neither the ability nor the authority to seize funds from state employees' paychecks like the petitioners'. As this Court has stated, "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken

'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). That the union fraudulently placed petitioners' names on the list provided to the State in no way defeats the fact that SEIU carried out these deductions by "exercising a right created by the State." *Lugar*, 457 U.S. at 941.

With regard to *Lugar*'s second prong, SEIU jointly acted with the State when, through its contract with the petitioners' state employer, SEIU willfully participated with the State to seize petitioners' wages and transfer them to itself. *See id*. at 937 (stating that a party may be a state actor "because he has acted together with or has obtained significant aid from state officials"); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (stating that a private party is a state actor if he is a "willful participant in joint action with the State or its agents"). The State seized the petitioners' funds at the behest of SEIU using a state law procedure. *See* Or. Rev. Stat. § 243.806(2), (7). As the *Lugar* Court itself stated, "we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." 457 U.S. at 941.

Additionally, the Ninth Circuit's reliance on *Belgau* is entirely misplaced, *see* Pet. App. A (14a), because *Belgau* is wrong and stands contrary to *Lugar*. *Belgau* held that the "ministerial processing of payroll deductions pursuant to Employees' authorizations" is insufficient to make a union and the State joint actors; rather, "the state must have 'so significantly

encourage[d] the private activity as to make the State responsible for' the allegedly unconstitutional conduct" *Belgau*, 975 F.3d at 948 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999)). The Ninth Circuit reprises *Belgau*'s argument below to likewise hold that "'providing a "machinery" for implementing the private agreement by performing an administrative task does not render [the State] and [SEIU] joint actors.'" Pet. App. A (19a) (quoting *Belgau*, 975 F.3d at 948 (citation omitted)).

Lugar, however, directly forecloses *Belgau*'s holding: "[w]hile private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action." *Lugar*, 457 U.S. at 941. By analogy, 'while forgery does not describe conduct that can be attributed to the State, the procedural scheme created by Oregon law obviously is the product of state action.' Then, SEIU works with the State to deduct the dues that it does not have a valid waiver to deduct. The State-union contract itself and the statutes that give it force are the State's "significant encouragement" here because through it the State named SEIU the exclusive representative for state employees like petitioners. As this Court held in *Railway Employees' Department v. Hanson*, 351 U.S. 225, 232 (1956): "The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction."

But even if one were to grant that *Belgau* was correct on this point (it was not), this case is distinct, and the court of appeals below was wrong to import *Belgau*'s reasoning into this case.

Here, at no time did Wright or Zielinski do *anything* to manifest consent for union membership; the State and the union did *everything*. The membership agreements could not have been grounded in a "private decision" between Wright and Zielinski and their union, *see Belgau*, 975 F.3d at 947, because they *never signed anything*. Rather, the union, by forging the petitioners' signatures and presenting their names as subjects for deduction, and the State, by deducting, acted jointly to deprive petitioners of their property under the procedural structure created by state law.

The Court should review this case and address the lower courts' misapplication of *Lugar* with regard to unions acting under color of state law.

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

In Oregon's statutory framework, 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 only gets a list of

names; it does not see the circumstances in which the purported First Amendment waivers were signed. 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 petitioners point 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 Oregon's statutory system, the union acts to provide the government the *prima facie* evidence of constitutional waiver. Pet. 11-12. 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.

The Court has imposed similar requirements on the government 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]." 487 U.S. 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. Like 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*, and *Curtis Publishing* 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.

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: for each employee who allegedly agrees to a dues checkoff, the state employer could send a simple email that asks the employee to confirm his agreement to dues deduction (or give him an opportunity to object prior to deductions beginning) as well as his understanding that this deduction waives his First Amendment rights related to those funds.

Such an email would verify that the employee's signature on his application is authentic and that his 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 he did freely consent. If the signature was fraudulent or obtained through other coercion, the employee could respond to challenge the waiver before the State began dues deductions and deprived him of his money (property) and First Amendment rights (liberty).

The Court should take up the Petition to ensure that State employers fulfill their duties to 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,

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