No. 23-1214

IN THE SUPREME COURT OF THE UNITED STATES

TANISHIA HUBBARD,

Petitioner,

—V.—

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015, *ET AL.*,

Respondents.

KRISTY JIMENEZ,

Petitioner,

—V.—

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 775, *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 PETITION

James V. F. Dickey
Counsel of Record
Douglas P. Seaton
UPPER MIDWEST LAW CENTER
12600 Whitewater Dr., Suite 140
Minnetonka, MN 55343
James.Dickey@umlc.org
(612) 428-7002

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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 litigates for individual liberty and against government overreach, special interest agendas, Constitutional violations, and public union corruption and abuses.

These cases concern UMLC because they demonstrate violations of public employees' constitutional rights. UMLC has worked with public employees whose unions violated their First Amendment rights by coercing waiver under threat of unemployment or by outright forgery. UMLC has litigated on behalf of these employees for the full recognition of the procedural and substantive rights guaranteed by the First Amendment and this Court's *Janus* decision.

UMLC is currently litigating a similar case awaiting oral argument in the Eighth Circuit. *Todd v. AFSCME, Council 5*, 571 F. Supp. 3d 1019 (D. Minn. 2021), *appeal docketed* Dec. 1, 2021 (8th Cir. No. 21-3749). In *Todd*, the plaintiff-appellant, Marcus Todd, did not sign a dues checkoff form, yet it was used to deduct dues from his paycheck in favor of a public-sector union.

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[1] All parties received timely notice of this brief per Supreme Court Rule 37.2. 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.

SUMMARY OF ARGUMENT

Two wrongs shouldn't make a right. Yet under the Ninth Circuit's reasoning in these cases, had union representatives simply forged Mark Janus' signature on a union dues checkoff form and falsely instructed his government employer to take union dues from his paycheck, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. 878 (2018), would have resulted in a win for the union and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) would still fully stand.

Under the Ninth Circuit's reasoning, federal courts are incapable of vindicating employees' constitutional rights when unions engage in an extra measure of illegality—forging employee signatures—when using state-created procedures to seize payments for union speech from those employees without their consent.

Not only is this "get out of federal court free" card inconsistent with this Court's recent holding in *Lindke v. Freed* that "*[m]isuse* of power, possessed by virtue of state law, constitutes state action." 601 U.S. 187, 199 (2024) (emphasis in original) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), but it undermines federal courts' "unflagging" obligation to decide constitutional cases. *See Deakins v. Monaghan*, 484 U.S. 193, 206 (1988) (White and O'Connor, JJ., concurring).

Again, two wrongs shouldn't make a right. But they seem to, at present. Unless this Court grants these petitions, misapplication of the state-action doctrine will keep shielding public-sector unions from federal court review of their deprivation of employee First Amendment rights. The Court should therefore grant review.

REASONS FOR GRANTING THE PETITION

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

Since the Court decided *Janus*, incidents of union representatives allegedly forging union dues checkoff forms have proliferated.[2] And thus far, the lower courts have failed to hold unions responsible for these violations of employee constitutional rights through forgery.

As the decisions below indicate, one problem is some courts' (but not others') interpretation of the "state action" doctrine. The Ninth[3] and Eighth

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[2] *See, e.g., Parde v. SEIU*, No. 23-55021, 2024 U.S. App. LEXIS 11457 (9th Cir. May 10, 2024); *Wright v. SEIU*, 48 F.4th 1112 (9th Cir. 2022); *Zielinski v. SEIU,* No. 20-36076, 2022 U.S. App. LEXIS 26102 (9th Cir. Sep. 19, 2022); *Ochoa v. Pub. Consulting Grp., Inc.,* 48 F.4th 1102 (9th Cir. 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 Emps.*, 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 (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 Ninth Circuit has somehow held that "private payment processors" can be state actors for purposes of suits by employees to recover dues unconstitutionally taken from them, but not public-sector unions telling the government to take those dues as allowed by state law. *See Wright*, 48 F.4th at 1123 n.8 (distinguishing *Ochoa* on state-action grounds).

Circuits have split from the Seventh,[4] Third,[5] and Sixth[6] Circuits. The latter courts have recognized that 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. *See Janus II*, 942 F.3d at 361. The former have held, in the context of forgery, that there is no joint action because forgery is itself illegal. *See Wright*, 48 F.4th at 1123.

But as discussed below, forgery changes nothing about the existence of a joint-actor relationship with the state. It is just a different (although more obviously unconstitutional) means of carrying out the state-union partnership. It is a "misuse" of the joint-state-actor relationship, per *Lindke*.

The petitioners' consolidated cases clearly show the existence of state procedural schemes and the union's joint participation with the State in these schemes. These arrangements make the unions state actors. And unless this Court corrects the Ninth Circuit's

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[4] *Janus v. AFSCME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus II*") (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)) (holding that the union "was a joint participant with the state in the agency-fee arrangement").

[5] *Lutter v. JNESO*, 86 F.4th 111, 126–28 & 127 n.17 (3d Cir. 2023) (finding employee sufficiently stated First Amendment injury, and corresponding state action, based on the deduction of dues without consent).

[6] *Littler v. Ohio Assoc. of Pub. Sch. Emps.*, 88 F.4th 1176, 1182 (6th Cir. 2023) (stating that while there was no state action in the circumstances alleged, if the circumstances were as alleged here below—"[h]ad Littler challenged the constitutionality of a statute pursuant to which the state withheld dues"—then "the 'specific conduct' challenged would be the state's withholdings, which would be state action taken pursuant to the challenged law.").

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.

UMLC represents Marcus Todd in a similar case pending in the Eighth Circuit. Todd started working for Minnesota's Department of Human Services ("DHS") in 2014.[7] 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.[8] Pay the union, or pay the union more.

So, under this coercion, Todd joined the union (unlike Hubbard and Jimenez who never did join).[9] 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.[10] 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

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[7] Compl. ¶ 10, *Todd*, 571 F. Supp. 3d at 1023 (No. 21-CV-637-SRN-ECW).

[8] *Id.* at ¶ 11.

[9] *Id.* at ¶¶ 12, 18, 23. Whereas Todd was initially coerced into union membership in 2014, several years before the 2018 forgery, "[n]either [Hubbard nor Jimenez] ever signed a membership card or in any way authorized union dues deductions." Pet. 2. All three, however, were victims of union forgeries.

[10] *Id.*

his consent via agency fees—rights *Janus* would eventually confirm.[11]

Then, about the exact same time *Janus* was decided, in June or July 2018, the union began scrambling to "paper" its memberships by getting DHS employees to sign paper "Welcome Cards."[12] 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.[13] Todd never signed anything.[14] But, as in Hubbard's and Jimenez'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.[15] From then on, the union fraudulently had Todd's dues deducted from his paychecks.[16]

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.[17] 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.[18] Even after Todd specifically informed the union that the dues checkoff on

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[11] *Id.*

[12] *Id.* ¶ 14.

[13] *Id.* ¶¶ 15–17.

[14] *Id.* ¶¶ 18–21.

[15] *Id.*

[16] *Id.* ¶ 22.

[17] *Id.* ¶¶ 24–29.

[18] *Id.*

which it was relying was a forgery, the union continued to deduct Todd's dues.[19]

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 by forgery*.[20] That is, the union had a right to rely on its own forgery—and the state system making that reliance possible—to deduct dues from Todd's paycheck against his express wishes.

Todd, on the other hand, had no rights in the union's eyes—no right to demand back his illegally deducted dues and no right against compelled subsidy of an organization with whom he disagreed, politically and 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.[21]

The lower court[22] in *Todd*, following the Ninth Circuit and related district court decisions, held that the act of forgery itself insulated the union from Section 1983 claims because deductions based on a forgery could not be state action. *Todd*, 571 F. Supp. 3d at 1029–30 (collecting cases). 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.

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[19] *Id.*

[20] *Id.* ¶ 29 & Ex. 6.

[21] *Id.* ¶ 26.

[22] Mr. Todd's case is awaiting oral argument at the 8th Circuit. *See Todd*, 571 F. Supp. 3d 1019 (D. Minn. 2021), *appeal docketed* Dec. 1, 2021 (8th Cir. No. 21-3749).

Lower courts have evaded the obvious constitutional problems that union forgery-plus-deduction presents by choosing the state-action "exit" to these cases. These courts thus say victims like Hubbard, Jimenez, and Todd cannot vindicate their constitutional right not to subsidize a public-sector union in federal court. *Contra Janus,* 585 U.S. at 930. This evasion guts the *Janus* decision in the real world.

The Court should grant the Petition to ensure that two wrongs by public-sector unions and their agents do not trample employees' First Amendment rights.

II. Unions Are State Actors When They Take Money From Employees Only Because State Law Authorizes Them to Do So.

Lower courts, including both the Ninth Circuit here and the Eighth Circuit, have repeatedly misapplied *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), to erroneously conclude that a union does not act under color of state law even where it directs a public employer to deduct union dues from public employees' paychecks pursuant to a state-law right. *See Wright*, 48 F.4th at 1121–25; *Hoekman v. Educ. Minn.,* 41 F.4th 969, 978 (8th Cir. 2022) (deciding the union was not a state actor by mislabeling government union action taken jointly with the public employer as related to a purely private agreement).

Below, the Ninth Circuit cited to *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), and *Wright* to conclude that petitioners' claims against their respective unions "fail for lack of state action." App. 2a, 4a. In *Wright*, 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 was not a right or privilege created by the State,

Wright, 48 F.4th at 1122, and (2) the union was not a joint actor with the State "because Oregon did not 'affirm[], authorize[], encourage[], or facilitate[] unconstitutional conduct' by processing dues deductions," *id.* at 1123 (quoting *Belgau*, 975 F.3d at 947).

Wright and *Belgau* were wrong. Forgery is a classic "*[m]isuse* of power, possessed by virtue of state law," which by definition "constitutes state action." *Lindke*, 601 U.S. at 199 (emphasis in original) (quoting *Classic*, 313 U.S. at 326). Once again, two wrongs don't make a right; under the *Lugar* analysis, a forgery doesn't eliminate state action. Instead, it makes the private misuse of state-conferred power all the worse. Federal courts—the vanguards of federal constitutional rights—are all the more needed to exercise their "unflagging" obligation to decide constitutional cases. *See Deakins*, 484 U.S. at 206 (White and O'Connor, JJ., concurring).

In this case, when SEIU gave government employers the names of employees who had allegedly authorized deductions from employee paychecks, SEIU was exercising a special State-created procedural scheme to invoke State power to have those dues seized from the petitioners. A "procedural scheme created by statute obviously is the product of state action." *Lugar,* 457 U.S. at 941. Further, SEIU jointly acted with the states when it willfully participated with the states 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").

Without this State-created right and without the State's joint action, SEIU would have had neither the ability nor the authority to seize funds from the petitioners' paychecks. California and Washington seized the petitioners' funds at the behest of SEIU using state law procedures. App. 41a–43a (California); App. 44a–47a (Washington). That the union fraudulently placed petitioners' names on the lists provided to the respective states 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.

Put differently, *Lugar* 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 schemes created by Washington and California laws obviously are the product of state action.' Similarly, as this Court held in *Railway Employees' Department v. Hanson*: "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." 351 U.S. 225, 232 (1956).

But even if one were to grant that *Belgau* was correct on this point (it was not), Wright's, Hubbard's, and Jimenez's cases are distinct, and the Ninth Circuit was wrong to import *Belgau*'s reasoning into these cases.

Here, at no time did Hubbard or Jimenez 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 Hubbard and Jimenez and their unions, *contra Belgau*, 975 F.3d at 947, because they *never signed anything*. Rather, the unions, by forging the petitioners' signature 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 Ninth Circuit's misapplication of *Lugar* 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.

The Ninth Circuit's decision also highlights a problem with the States themselves turning over their power to public unions and then playing Sergeant Schultz from *Hogan's Heroes*: "I see nothing, I hear nothing, I know nothing." The Court should grant review to fix this problem.

In Washington's and California's statutory frameworks, 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. App. 41a (Washington), 45a (California). 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*. 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 insure that "government treads with sensitivity in areas freighted with First Amendment concerns." *Id.* at 303, fn. 12 (citing Henry 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. But imposing a simple procedural check on the government employer—the entity which actually makes the deductions—is sensible and makes unintentional First Amendment violations in this theater nearly impossible.

The procedural safeguards necessary for the State to satisfy due process are not burdensome Byzantine administrative additions. Rather, 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 ask 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 has imposed similar requirements on the government in other circumstances where fragile

constitutional rights are at heightened risk of waiver. Take, for one, 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*, 585 U.S. at 930. 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 Court should take up the Petition in part 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 writ of certiorari.

Respectfully submitted,

James V. F. Dickey
Counsel of Record
Douglas P. Seaton
UPPER MIDWEST LAW CENTER
12600 Whitewater Dr., Suite 140
Minnetonka, MN 55343
James.Dickey@umwlc.org
(612) 428-7002

Counsel for Amicus Curiae

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