No. 23-372

IN THE
Supreme Court of the United States

TOREY JARRETT,
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 THE LIBERTY JUSTICE CENTER, THE ILLINOIS POLICY INSTITUTE, AND THE UPPER MIDWEST LAW CENTER AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

1. Is a state-designated exclusive representative a state actor under 42 U.S.C. § 1983 when it directs a public employer to deduct dues from non-union employees who have not affirmatively consented?

2. Are public employees' due process rights violated when the public employer diverts employees' wages to a union with no pre-deprivation procedural safeguards?

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. The Liberty Justice Center represented Mark Janus before this Court in his lawsuit seeking to protect public-sector workers' right to freedom from forced union association, support, or speech. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The Liberty Justice Center has represented public employees who sought to enforce this Court's requirement in *Janus* that public employees provide "affirmative consent" to waive their right before subsidizing a public sector union—the same protection Petitioners seek to enforce in this petition. *See e.g., Ramon Baro v. Lake County Federation of Teachers, Local 504*, 57 F.4th 582 (7th Cir. 2023), *cert. denied* No. 22-1096 (Jun. 12, 2023); *O'Callaghan v. Napolitano*, No. 19-56271, 2022 U.S. App. LEXIS 11559 (9th Cir. Apr. 28, 2022), *cert. denied* No.22-219 (May 1, 2023); *Adams v. Teamsters Local 429*, No. 20-1824, 2022 U.S. App. LEXIS 1615 (3d Cir. Jan. 20, 2022), *cert. denied* No. 21-1372 (Oct. 3, 2022); *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), *cert. denied* No. 20-1603 (Nov. 1, 2021); *Hendrickson v. AFSCME Council*

[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amici funded its preparation or submission. Counsel for both Petitioners and Respondents received notice more than 10 days before its filing that Amici intended to file this brief.

18, 992 F.3d 950 (10th Cir. 2021), *cert. denied* No. 20-1606 (Nov. 1, 2021).

The Illinois Policy Institute is a nonpartisan, nonprofit public policy research and education organization that promotes personal and economic freedom through free markets and limited government. Headquartered in Illinois, the Institute's focus includes budget and tax, good government, jobs and economic growth and labor policy. For years, the Institute heard from government workers frustrated by being forced to give a piece of their paycheck to a highly political union. Those workers included Mark Janus. The Institute coordinated with the National Right to Work Legal Defense Foundation and Liberty Justice Center, who then represented Mr. Janus before this Court.

The Upper Midwest Law Center, like the Liberty Justice Center, has represented public employees who sought to enforce this Court's requirement in *Janus* that public employees provide "affirmative consent" to waive their right before subsidizing a public sector union. *See, e.g.*, *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857 (8th Cir. 2023), *reh'g and reh'g en banc denied* No. 21-3052 (Sept. 12, 2023); *Todd v. AFSCME Council 5*, 571 F. Supp. 3d 1019 (D. Minn. 2021), *appeal filed* 8th Cir. No. 21-3749 (Nov. 29, 2021).

SUMMARY OF ARGUMENT

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018), this Court held that an Illinois law allowing government employers to withhold agency fees from nonconsenting employees on behalf of public-sector unions violated those employees' First Amendment rights. This Court explained that "[n]either an agency fee nor any other payment to the 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by clear and compelling evidence.'" 138 S. Ct. 2448, 2486 (2018) (citations omitted).

Yet, when government employees have brought claims alleging that their employers withheld money from their paychecks on behalf of public-sector unions without the employees' affirmative consent, every federal court to have addressed such claims has ignored the waiver requirement set forth by this Court in *Janus* and held that *Janus* applies solely to its facts.

Petitioners in the five consolidated cases had dues withheld from their paychecks—without their consent—by their government employers on behalf of public-sector unions pursuant to statutes that grant unions the power to certify to employers from which employees' wages they must deduct dues. The unions need not provide evidence that employees have provided consent—let alone affirmative consent—to the deductions. Nonetheless, the Ninth Circuit declined to

apply constitutional scrutiny at all because it held that unions are not "state actors."

The Ninth Circuit's holding is wrong. It is inconsistent with this Court's decision in *Janus*, holding that the union violated Mr. Janus's First Amendment rights when it acted with the government employer to withhold dues from his paycheck for the benefit of the union. It is inconsistent with this Court's precedent, finding that a "procedural scheme created by [a] statute" for the benefit of a private entity amounts to state action. *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"). And it conflicts with a decision of the Seventh Circuit, which held that a union's conduct amounts to state action because the state employer deducted fees from the employees' paychecks on behalf of the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement. *Janus v. AFSCME (Janus II)*, 942 F.3d 352, 361 (7th Cir. 2019).

State and local government employers, at the behest of unions, will continue to deduct union dues from employees regardless of whether employers have evidence that employees have provided affirmative consent to waive their right to not pay a union—and the lower federal courts, by ignoring this Court's holding in *Janus*, have allowed this to happen. Under the Ninth Circuit's holding that no state action occurred, unions will be permitted to ignore this Court's holding

in *Janus* and continue to withhold money from nonconsenting employees' paycheck without any constitutional scrutiny.

Unless this Court intervenes, thousands of state and local government employers across the country will continue to defy *Janus* by deducting money from employees without affirmative consent. This Court should grant the petition to ensure that public employees' First Amendment right to choose whether to subsidize unions' political speech is protected.

ARGUMENT

I. This Court should grant certiorari because the Ninth Circuit's holding is directly contrary to this Court's holding in *Janus* and creates a circuit split with the Seventh Circuit's *Janus II* decision.

In *Janus*, this Court held that an Illinois law allowing government employers to withhold agency fees from nonconsenting employees on behalf of public-sector unions violated those employees' First Amendment rights. 138 S. Ct. 2448, 2486 (2018). By applying the First Amendment, the Supreme Court held by implication that state action existed.

A. The structures set forth in the Oregon, Washington, and California laws at issue in this petition, like the Illinois law at issue in *Janus*, involve state action.

Illinois law, as it existed at the time this Court decided *Janus*, provided that a collective bargaining agreement between a union deemed the exclusive representative and a government employer may include "a provision requiring employees covered by the

agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment" but not to exceed the amount of union member dues. *See Janus*, 138 S. Ct. at 2461 (citing 5 ILCS 315/6(e) (2018)). In *Janus*, AFSCME Council 31 entered into a collective bargaining agreement with the State, Mark Janus's employer, requiring nonmembers like Mr. Janus to pay agency fees. 138 S. Ct. at 2461. This arrangement was sufficient to find state action, as this Court applied First Amendment scrutiny.

Yet the Ninth Circuit, in the consolidated cases in the petition before this Court, found that no state action existed despite the substantially similar legal arrangement created by the states in which these cases occurred. Oregon, Washington, and California each have statutes that grant unions exclusive control to decide from which employees the government employer must withhold dues.

Oregon Revised Statutes § 243.806(7) requires public employers to withhold dues on behalf of a public-sector union solely based on a list of employees provided to it by the union (no actual evidence of employee consent is required). Similarly, Washington Revised Code § 41.80.100 requires a public employer to "rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions" to determine from which employees the employer must withhold dues. *Id*. at § 100(2)(g). The employer must rely solely on the union's list regardless of evidence of employee consent. *Id*. at § 100(2)(c). And California Government

Code § 1157.12(a) requires public employers to "[r]ely on a certification from any employee organization requesting a deduction" without having to provide a copy of an employee's authorization of the dues deduction.

Like the Illinois law at issue in *Janus*, Oregon, Washington, and California law each provides that the public employer must deduct money from an employees' paycheck and remit those funds to the union. The only difference is that, under the Illinois law at issue in *Janus*, the employer was required to withhold an agency fee based on who the union said was *not* a union member. Oregon, Washington, and California require the employer to withhold union dues based on who the union says *is* a member. That difference is irrelevant for purposes of determining whether state action exists.

It was obvious that the Illinois structure for withholding money from employees on unions' behalf at issue in *Janus* was sufficient to show state action—so obvious, in fact, that this Court assumed it. It is also obvious that Oregon, Washington, and California's structures for public employers to withhold dues from employees on union's behalf involve state action.

B. The Ninth Circuit's decisions finding no state action in these cases also contradict Seventh Circuit precedent and thus create a circuit split.

The Ninth Circuit's decisions at issue in the petition finding that the statutory systems for public employers to withhold dues from employees do not involve state action conflict with the Seventh Circuit's

decision in *Janus v. AFSCME (Janus II)*, 942 F.3d 352, 361 (7th Cir. 2019).

In *Janus II*, the Seventh Circuit held that the union "was a joint participant" with the public employer when the employer "deducted fair-share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement." *Id*. "This is sufficient for the union's conduct to amount to state action." *Id*. Thus, the Seventh Circuit held that the union was a proper defendant under Section 1983. *Id*.

In *Janus II*, the union was a joint participant in the Illinois structure for withholding fair-share fees from employees' paychecks because it received the dues that the public employer withheld from employees on its behalf. That standard is clearly met under the cases in the petition before this Court. The Oregon, Washington, and California laws similarly make the unions a "joint participant" when they receive funds withheld by the employer, which they spend on authorized labor management activities.

The Ninth Circuit's decisions finding no state action in these arrangements clearly conflict with the Seventh Circuit's decision finding state action where a union receives money withheld by a public employer from employees on the union's behalf. This Court should grant the petition to resolve this circuit split and hold that the Seventh Circuit's decision is correct and overturn the Ninth Circuit's erroneous decisions.

C. In *Janus*, this Court set forth constitutional requirements that must be met before a public employer may withhold money from an employee on behalf of a union that go beyond the union's assertion that it exists.

In *Janus*, this Court held that the First Amendment protects government employees from being coerced to financially support a public-sector union's political speech. *Janus*, 138 S. Ct. at 2460. In doing so, this Court stated that:

> Neither an agency fee nor any other payment to the 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (some citations omitted).

This makes clear that an employer must have more than mere consent—and certainly more than the union's unsupported claim that consent exists—from

an employee before withholding dues for the benefit of the union. Rather, before deducting dues, a public employer must have clear and compelling evidence that an employee has freely given affirmative consent for the employer to withhold money from the employee's paycheck. *Id.* Where a public employer's only evidence of an employee's consent is a mere assertion from the public-sector union, the employer simply does not have the required clear and compelling evidence of affirmative consent.

Further, a valid waiver of First Amendment rights requires clear and compelling evidence that the individual *knew* of his or her First Amendment rights and chose to waive them. *See id.* (citing *Zerbst*, 304 U.S. at 464 and *Curtis Publishing Co.*, 388 U.S. at 130, requiring knowledge of a constitutional right to waive it); *see also Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (for a waiver of constitutional rights to be effective "it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege"). And government employers cannot presume that their employees have knowledge of their right to not pay money to a union under *Janus*. *Zerbst*, 304 U.S. at 465.

The systems established for withholding dues set forth in Oregon, Washington, and California law—which require public employers to withhold dues from employees on nothing more than the union's say-so—cannot meet the standard established by this Court in *Janus*.

Thus, this Court should grant the petition because the decisions of the Ninth Circuit not only contradict this Court's decision in *Janus* because they find no state action, but also because the statutory schemes

set forth by Oregon, Washington, and California law clearly do not meet the constitutional requirements set forth in *Janus* that must be met before a public employer may withhold money from employees on behalf of a union.

II. This Court should grant certiorari to protect government employees from state-created procedural systems that benefit public-sector unions but violate those employees' constitutional rights.

This Court has long held that "[t]o act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966); *see also Dennis v. Sparks,* 449 U.S. 24, 27 (1980) (a private party is a state actor if he is a "willful participant in joint action with the State or its agents."). Further, a "procedural scheme created by [a] statute" for the benefit of a private entity is the product of state action, and thus subject to constitutional restrains that may be properly addressed in a § 1983 action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

While the use of state sanctioned private remedies or procedures does not rise to the level of state action, "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486 (1988). And, where a government delegates a state responsibility to a private actor, that private actor is engaged in state action. *West v. Atkins*, 487 U.S. 42, 56 (1988). Thus, in *West*, where a state delegated to a

private actor its constitutional obligation to provide medical care to jailed prisoners, the Court held, "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity." *Id.* at 56 n.15 (quoting *Griffin v. Maryland*, 378 U.S. 130, 135 (1964)).

A. The Oregon, Washington, and California state laws at issue in this petition create procedural structures for the benefit of public-sector unions, and the unions' actions under that delegated authority are therefore state action.

Oregon, Washington, and California each have laws that require public employers to withhold dues on behalf of public-sector unions from employees based purely on the unions' uncorroborated say-so. *See* Oregon Revised Statute § 243.806(7), Washington Revised Code § 41.80.100, California Government Code § 1157.12(a). The systems created by these laws clearly meet this Court's standard for constituting state action. Here, the unions are "willful participant[s] in joint activity with the State or its agents." *See Price*, 383 U.S. at 794. The public-sector unions on whose behalf the public employer withholds dues are also clearly "private parties mak[ing] use of state procedures with the overt, significant assistance of state officials." *Tulsa Professional Collection Services, Inc.*, 485 U.S. at 486. These laws are fairly characterized as "procedural scheme[s] created by . . . statute" for the benefit of a private entity. *See Lugar*, 457 U.S. at 941.

Indeed, the unions are so ingrained in the state-created systems by which dues are withheld that the public employers withholding dues are required to withhold dues from an employee at the *sole discretion and uncorroborated say-so* of the union. These laws make unions, rather than the employees themselves, the sole decider of which employees the public employer must withhold dues from. That delegation of government responsibility to ensure there is clear and compelling evidence of an employee's First-Amendment waiver constitutes state action, and it is "irrelevant that [the unions] might have taken the same action . . . in a purely private capacity." *West*, 487 U.S. at 56 n.15 (quoting *Griffin*, 378 U.S. at 135).

By every metric set forth by this Court to determine whether state action exists, the dues deduction schemes set forth in Oregon, Washington, and California law involve state action.

B. State laws giving public-sector unions status as exclusive bargaining agents provide unions with enormous government-sanctioned power and privileges that no other private organizations have.

Many states have laws that require a union to serve as the exclusive bargaining agent of government employees, allowing the union to act for and negotiate agreements covering all employees in the bargaining unit and to represent the interests of all such employees, even employees who choose not to be members of the union. *See Janus*, 138 S. Ct. at 2463.

"By its selection as bargaining representative, [a union] . . . become[s] the agent of all the employees,

charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). This mandatory agency relationship is akin to "the relationship . . . between attorney and client," and to that between trustee and beneficiary. *ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991).

Unlike other agency relationships, however, "an individual employee lacks direct control over a union's actions." *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567 (1990). That is because exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). In this way, "[t]he powers of the bargaining representative are 'comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.'" *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014) (quoting *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944)).

This Court noted that "[d]esignation as exclusive representative thus 'results in a tremendous increase in the power' of the union." *Janus*, 138 S. Ct. at 2467 (citation omitted). Exclusive bargaining status "gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union." *Id.* (citations omitted).

Exclusive-representative unions thus have a large amount of power over individual employees in the bargaining unit—even those who are not union members. Exclusive representatives can, and often do, pursue agendas that do not benefit individuals subject to their mandatory representation. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). Exclusive representatives also can enter into agreements that bind everyone subject to their representation. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Thus, for example, union representatives can waive employees' right to bring discrimination claims against their employer in court by agreeing that employees must submit such claims to arbitration. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Union exclusive-bargaining agents are granted many special privileges that other private entities are never given, such as "obtaining information about employees . . . [and] having dues and fees deducted directly from employee wages," as well as other privileges a union can negotiate with the government employer in the collective-bargaining agreement. *Janus*, 138 S. Ct. at 2467.

Unsurprisingly, given the privileges and benefits states confer on public-sector unions, including the power to speak and contract for individuals against their will, this Court has long recognized that exclusive representation impacts and restricts individual liberties. *See Janus*, 138 S. Ct. at 2463 (finding State laws that require that a union serve as exclusive bargaining agent for its employees "a

significant impingement on associational freedoms that would not be tolerated in other contexts"); *Pyett*, 556 U.S. at 271 (holding "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands"); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (noting "[t]he collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit"); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (holding "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, and that "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union").

Indeed, this Court in *Janus* specifically recognized that exclusive bargaining involves compelled association that would otherwise be constitutionally problematic.[2] *See Janus*, 138 S. Ct. at 2463. "The right to eschew association for expressive purposes is likewise protected." *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) for the proposition that "[f]reedom of association . . . plainly presupposes a freedom not to associate").

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[2] Although this Court has previously justified the mandatory association imposed by exclusive representation laws by relying on the government's interest in workplace "labor peace," *see Abood*, 431 U.S. at 220-21, this Court has since rejected *Abood's* recognition of "labor peace" as a sufficient basis to impinge First Amendment rights. *See Janus*, 138 S. Ct. at 2465-66.

Thus, the systems created by state laws giving public-sector unions the status and benefit of exclusive representative significantly benefits public-sector unions and entangles them with government enough, on its own, to constitute state action. When such systems threaten to violate individual employees' constitutional rights, therefore, constitutional scrutiny through § 1983 is warranted.

C. Many state laws provide numerous benefits and privileges to public-sector unions on top of their exclusive bargaining status.

In addition to exclusive bargaining laws, states have adopted numerous other laws that benefit public-sector unions, particularly after this Court's decision in *Janus*.[3] All too often these laws are at least in part an attempt by unions to use government power to stack the deck in favor of these unions, often at the expense of employees.

Illinois and Minnesota—states of which amici have extensive knowledge—for example have numerous laws that provide benefits and privileges to public sector unions that no other private organization or association could even dream of.

The Illinois Educational Labor Relations Act (IELRA), 115 ILCS 5, applies to public school districts and provides significant benefits to public-sector unions who represent the employees of public school districts. The Illinois Public Labor Relations Act (IPLRA) likewise covers state and local government

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[3] See list of relevant legislation passed from 2018 to present collected here: https://ballotpedia.org/Public-sector_union_policy_in_the_United_States,_2018-present.

employers and provides significant benefits to public-sector unions who represent employees of such employers. And Minnesota's Public Employment Labor Relations Act (PELRA), Minn. Stat. ch. 179A, covers Minnesota government employers and public sector unions.

IELRA, IPLRA and PELRA each provide that a public-sector union selected by a majority of employees in a unit is the exclusive representative of all employees in that unit. 115 ILCS 5/3; 5 ILCS 213/6(c); Minn. Stat. § 179A.12, subd. 10.

In addition, these acts provide unions with other significant benefits. They give such unions access to and information about every employee in the bargaining unit, including the employee's name, job title, worksite location, home address, work telephone number, identification number, home and personal cellular telephone numbers, date of hire, work email address, and personal email address, 115 ILCS 5/3(c)(2); 5 ILCS 213/6(c); 2023 Minn. Laws ch. 53, art. 11, § 16, while prohibiting those employers from disclosing to any other person an employee's home address (including ZIP code and county), date of birth, home and personal phone number, personal email address, any information personally identifying employee membership or membership status in the union and whether the employee pays or authorizes dues to such unions, and emails or other communications between a union and its members. 115 ILCS 5/3(d); 5 ILCS 213/6(c-5); *see also* Minn. Stat. § 13.43; *Greene v. Minn. Bureau of Mediation Servs.*, 948 N.W.2d 675 (Minn. 2020) (refusing access to list of unionized employees to personal care assistants who sought to decertify SEIU). What's

more, in Illinois, if anyone should make any such requests to the public employer, the employer *must* provide a written copy of the request to the exclusive bargaining union—and not the employee (unless the employee is not represented by an exclusive representative). 115 ILCS 5/3(d); 5 ILCS 213/6(c-5).

The IELRA and IPLRA also allow public-sector unions to limit when its members may revoke their dues authorizations. Unions may make dues deduction authorizations of its employees "irrevocable for one year, which may be automatically renewed for successive annual periods" and may limit the time during which the educational employee may revoke the authorization to "at least an annual 10-day period." 115 ILCS 5/11.1(a); 5 ILCS 213/6(f).

Like the laws of Oregon, Washington, and California at issue in this petition, the IELRA, IPLRA, and PELRA provide that the public employer must rely solely on the union for determining which employees to withhold union dues from. 115 ILCS 5/11.1(d); 5 ILCS 213/6(f-20); 2023 Minn. Laws ch. 52, art. 11, § 13.

The IELRA and IPLRA also make it an unfair labor practice for a public employer to, among other things:

- Interfere, restrain, coerce, deter, or discourage an employee from becoming a member of the union, authorizing representation by a union, or authorizing dues or fee deductions to a union.
- Intentionally permit outside third parties to use its email or other communications systems to engage in conduct to deter or

discourage an employee from joining a union or authorizing dues or fee deductions to a union.

- Disclose to any person or entity information about an employee that the employer knows or should know will be used to deter or discourage an employee from joining a union or authorizing dues or fee deductions to a union.

115 ILCS 5/14(a); 5 ILCS 213/10(a). Further, in Illinois, public employers must refer all inquiries about union membership from employees to the union. 115 ILCS 5/14(c-5); 5 ILCS 213/10(d). The employer may only communicate with employees "regarding payroll processes and procedures." 115 ILCS 5/14(c-5); 5 ILCS 213/10(d).

The IELRA and IPLRA thus ensure that the exclusive bargaining agent union is the only party that can communicate with employees in the unit about union membership and dues deduction authorizations. One can probably guess how forthcoming these unions are about the constitutional rights of the employees they represent to not pay money to a union established by this Court in *Janus*.

Minnesota has one more benefit for public-sector unions: under a new law passed in 2023, a "public employer must allow an exclusive representative to meet in person with newly hired employees . . . during new employee orientations or . . . at individual or group meetings." 2023 Minn. Laws ch. 53, art. 11, § 17. Nobody other than the government employer, the employees, and the union may attend. *Id.*

Like many other states, Illinois and Minnesota have enacted an array of laws that systematically benefit and provide public-sector unions with the use of government power—power and benefits that no other private organization could boast. But with power, comes responsibility. When public-sector unions use government power to provide for their own benefit, they may not do so in violation of employees' rights. *See Lugar*, 457 U.S. at 941. The Ninth Circuit would allow the unions to shirk this responsibility, while also ignoring this Court's precedent.

This Court cannot let that happen. This Court should grant the petition to protect the thousands of public employees whose constitutional rights are threatened by the legal schemes created by states giving public-sector unions the use of government for their own benefit.

CONCLUSION

Oregon, Washington, and California have enacted laws allowing public-sector unions to dictate to government who it must withhold money from on the unions' behalf. The Ninth Circuit's holding finding no state action in this scenario is contrary to this Court's decision in *Janus*, as well as its long-established precedent. What's more, it is contrary to the Seventh's Circuit's decision in *Janus II*, creating a circuit split. This Court should grant the petition and make clear that government systems providing the use of government power for the benefit of public-sector unions constitute state action and thus must be subject to constitutional restraints.

November 2, 2023

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