No. _____

IN THE

Supreme Court of the United States

POLLYANNA BURNS; RHONDA TOMOSON; DIANE GOODING,

Petitioners,

—V.—

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 284; INDEPENDENT SCHOOL DISTRICT NO. 191,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the First Amendment waiver requirement identified by the Supreme Court in *Janus* applies to public-sector employees at the time they sign a union dues checkoff form, and then also after they resign membership and seek to stop dues deductions.

(2) Whether unions are state actors under 42 U.S.C. § 1983 when the union acts pursuant to state law to direct a public employer to deduct dues from employees who have not affirmatively consented.

PARTIES TO THE PROCEEDING

Petitioners Pollyanna Burns, Rhonda Tomoson, and Diane Gooding are food service managers who work for Respondent Independent School District 191 ("the District").

Respondent Service Employees International Union Local 284 ("the union") is a local union organization and unincorporated Minnesota association affiliated with the Service Employees International Union. Respondent District is an independent school district and public corporation existing pursuant to Minn. Stat. § 123A.55 and the Minnesota Education Code.

CORPORATE DISCLOSURE STATEMENT

No Petitioner is a corporation, and therefore no publicly held corporation owns 10% or more of stock in the Petitioners.

STATEMENT OF RELATED CASES

This case arises from and is related to the following proceedings in the United States District Court for the District of Minnesota and United States Court of Appeals for the Eighth Circuit:

- *Burns v. Sch. Serv. Emp. Union Loc. 284*, No. 21-638, 554 F. Supp. 3d 993 (D. Minn. 2021), opinion issued August 12, 2021;
- *Burns v. Sch. Serv. Emp. Union Loc. 284*, No. 21-638, judgment entered August 13, 2021 (D. Minn);
- *Burns v. Sch. Serv. Emps. Union Loc. 284*, No. 21-3052, 75 F.4th 857 (8th Cir. 2023), opinion issued July 28, 2023;

- *Burns v. Sch. Serv. Emps. Union Loc. 284*, No. 21-3052, judgment entered July 28, 2023 (8th Cir.); and
- *Burns v. Sch. Serv. Emps. Union Loc. 284*, No. 21-3052, 2023 U.S. App. LEXIS 24267 (8th Cir. Sept. 12, 2023), denial of petition for re-hearing, decided September 12, 2023.

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JURISDICTION

The District of Minnesota issued its decision on August 12, 2021, and judgment was entered on August 13, 2021. The Eighth Circuit affirmed on July 28, 2023, entered judgment on July 28, 2023, and denied the petition for rehearing on September 12, 2023, rendering the judgment final and subject to no further review. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioners Pollyanna Burns, Rhonda Tomoson, and Diane Gooding are food service managers ("lunch ladies") who work for Respondent Independent School District 191 ("the District").

In 2015, Burns and Tomoson were presented with a Hobson's choice: join the Service Employees International Union Local 284 ("the union") and pay 100% of union dues, pay an 85% agency fee, or lose their job. App. 9a; Compl. ¶¶ 12–13, 17–18. Burns and Tomoson were never informed of their First Amendment right not to be a member of the union and not to pay any dues to the union. Compl. ¶¶ 13, 18. Facing this unconstitutional choice, *see Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018), both lunch ladies signed dues-checkoff forms and joined the union. App. 14a; Compl. ¶¶ 13, 18.

Diane Gooding signed her dues-checkoff form in January 2019. App. 14a; Compl. ¶ 24. Gooding was never informed of her First Amendment right not to join the union and not to give the union a dime. Compl. ¶ 25. For all three lunch ladies, the union immediately began deducting dues. Compl. ¶¶ 14, 19, 24.

Leaving the union turned out to be much more difficult. The lunch ladies terminated their membership

and demanded that fees stop being deducted from their paychecks on March 5, 2020. App. 16a; Compl. ¶¶ 15, 20, 26. At that point, it was clear that Petitioners had not "affirmatively consent[ed] to pay" any further dues. *Janus*, 138 S. Ct. at 2486. The District and the union ignored their demand and kept deducting dues anyway. App. 16a–17a; Compl. ¶¶ 16, 21, 27. These dues subsidized speech the lunch ladies disagreed with. Compl. ¶ 51.

Respondents argue that they were entitled to keep deducting dues, no matter what Petitioners had to say about it, based on an arbitrary "termination period" buried in the dues-checkoff form. App. 23a–24a; Compl. ¶ 29. The lunch ladies could only request that Respondents stop deducting union dues "not less than thirty (30) and not more than forty-five (45) days" from the annual date of the agreement. App. 15a–16a. In other words, the "termination period" provided only 15 days a year when Petitioners could exercise their First Amendment right to leave the union. Joining the union, and starting the deduction of dues, on the other hand, could take place at any time.

Burns and Tomoson again requested the stoppage of dues deductions within the 15-day window in July 2020, and Respondents finally stopped their deductions. App. 17a; Compl. ¶¶ 16, 21. Gooding again requested the stoppage of dues deductions within her 15-day window in December 2020, and Respondents finally stopped their deductions. App. 17a; Compl. ¶ 27. That means from March 2020 through July 2020 for Burns and Tomoson, and from March 2020 through December 2020 for Gooding, Respondents continued to deduct dues despite the lunch ladies' explicit revocation of any alleged consent to them. App. 16a–17a.

There is no doubt that both the union and the District had a role in the violation of Petitioners' First Amendment rights. The union collected the dues-checkoff forms. *See* Master Agreement at 2, Art V, § 3, https://resources.finalsite.net/images/v1630596361/isd191org/d44elqa2neb8pfafoaim/FoodServiceMASTERAGREEMENT2123TADraft.pdf (accessed Dec. 5, 2023). The District then specifically negotiated for authority to review checkoffs before processing dues deductions: "The Union shall provide the District with the appropriate form of authorization (examples of appropriate form are: paper, electronic file, audio file) for dues/premier member dues deduction." *Id.* Under Minnesota law in effect at the time, the union and District were authorized to require a fair share fee for nonmembers and deduct dues from employee paychecks. Minn. Stat. § 179A.06, subd. 3, 6 (2015).

On March 5, 2021, Petitioners brought this lawsuit alleging that Respondents' deductions violated their First Amendment rights because they were deducted without any clear and compelling evidence that Petitioners freely waived their First Amendment rights. App. 17a; Compl. ¶¶ 46–53; *see* 42 U.S.C. § 1983. The district court had federal subject-matter jurisdiction over Petitioners' First Amendment claims, *see* 28 U.S.C. §§ 1331, 1343, and supplemental jurisdiction over Petitioners' state-law claims, *see* 28 U.S.C. § 1367. Respondents moved to dismiss the lunch ladies' First Amendment claims and asked the district court to decline to exercise supplemental jurisdiction over the additional state-law claims. App. 17a. The district court granted the motion and Petitioners appealed. App. 6a, 25a–26a.

On appeal, the Eighth Circuit cut *Janus* off at the knees. First, the court held that the union was free from First Amendment scrutiny because its involvement did not qualify as state action. App. 7a. Next, regarding actions taken by the District, the court held that *Janus* only "concerned compelling extraction of fees from non-union members." *Id.* at 8a. In other words, the First Amendment offered no protection to public employees at the time they are presented a dues-checkoff form to become union members. Further, the court concluded that *any* decision to "sign[] a union membership contract" counts as a "clear[] and affirmative[]" waiver of the "right to refrain from joining the union, and consent[] to fund the union according to the terms of the contract." *Id.* at 9a. The lunch ladies' Hobson's choice made no difference.

Petitioners sought rehearing en banc or rehearing by the panel. The petition was denied on September 12, 2023. App. 27a.

REASONS FOR GRANTING THE PETITION

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), the Court was clear. Public-sector unions "take[] many positions during collective bargaining that have powerful political and civic consequences." *Id.* at 2464 (quoting *Knox v. Serv. Emp. Int'l Union, Loc. 1000*, 567 U.S. 298, 310–11 (2012)). Any "compelled subsidization" of these positions "seriously impinges on First Amendment rights, [so] it cannot be casually allowed." *Id.* As a result, "[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." *Id.* at 2486

(emphasis added). Whenever an employee pays a public-sector union, core First Amendment rights are waived. "[S]uch a waiver cannot be presumed." *Id.*

Federal courts have read *Janus* and done the exact opposite. Since 2018, a "swelling chorus" of courts have insisted that *Janus* only protects non-union members just because there's no signature on a dues checkoff form. App. 8a. (quoting *Belgau v. Inslee*, 975 F.3d 940, 951 (9th Cir. 2020)). If a public employee signs a dues checkoff form, even when facing the same coercive, unconstitutional Hobson's choice at issue in *Janus*—to pay the union or pay the union more—the waiver of key First Amendment rights has been presumed. *Janus*' demand for "clear and compelling" evidence that any waiver "be freely given" has been ignored. *Janus*, 138 S. Ct. at 2486.

Even worse, when employees demand to exercise their First Amendment rights, public-sector unions have been permitted by the federal courts to keep deducting fees anyway. App. 9a–10a; *Hendrickson v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 18*, 992 F.3d 950, 964 (10th Cir. 2021) (enforcing a narrow opt-out window); *Fisk v. Inslee*, 759 F. App'x 632, 633–34 (9th Cir. 2019) (unpublished) (same).

Public-sector unions have been empowered by the federal courts in another way. According to some circuits, a public-sector unions' use of "state procedures with the help of state officials" to automatically deduct dues from public employee paychecks does not constitute state action, despite clear Supreme Court precedent to the contrary. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 933 (1982). This has caused a clear circuit split on the issue of state action. *Compare* App. 7a (holding that the union did not act "'under color of'

state law"), *with Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31 ("Janus II")*, 942 F.3d 352, 361 (7th Cir. 2019) (holding that the union did). In sum, public-sector unions have been given a free pass to get out of Section 1983 liability. The end result is that public employees nationwide are being compelled to subsidize union speech.

Five years after *Janus* was decided, no one seems to know how to exercise *Janus* rights. Joining a public-sector union under coercive conditions apparently counts as a "freely given" waiver of First Amendment rights. *Janus*, 138 S. Ct. at 2486. Unions and public employers have free reign to continue to "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves," even after public employees have resigned from the union and asked for dues deductions to stop. *Id.* at 2464 (quoting A Bill for Establishing Religious Freedom, *in* 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). And public-sector unions, empowered by state law to get dues deductions, are off the hook. Such a "sinful and tyrannical" system cannot be allowed to continue. *Id.* (quoting A Bill for Establishing Religious Freedom, *supra*).

Given the confusion that persists after *Janus*, the Court should take up the Petition to further articulate the applicability of *Janus*' waiver rule. In the alternative, there are two similar petitions before the Court, so Petitioners ask the Court to consolidate these three cases and issue the writ of certiorari to fully address the confusion that persists in applying *Janus*. *See* Petition for Writ of Certiorari, *State of Alaska v. Alaska State Emps. Assoc.*, No. 23-179 (Aug. 23, 2023); Petition for Writ of Certiorari, *Jarrett v. Serv. Emps. Int'l Union, Loc. 503*, No. 23-372 (Oct. 4, 2023). Absent further clarification from the Court, First Amendment

protections, promised to public employees in *Janus*, will continue to shrink away.

Petitioners ask the Court to grant the Petition, issue the writ of certiorari, and decide that public-sector unions and government employers, both of which are liable under Section 1983, cannot collect any union dues absent clear and compelling evidence of the waiver of First Amendment rights and that dues deductions must stop when an employee exercises their First Amendment right to resign public-sector union membership.

I. The Eighth Circuit's Erroneously Narrow Interpretation of *Janus* is Inconsistent with the Court's Demand for Affirmative Consent Before Waiving Bedrock First Amendment Rights.

"[T]he compelled subsidization of private speech seriously impinges on First Amendment rights." *Janus*, 138 S. Ct. at 2464. As a result, the Supreme Court has long recognized "that a 'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Id.* (quoting *Knox*, 567 U.S. at 310–11). As the Court in *Janus* made clear, that means no payment to a public-sector union may be extracted without employee consent: "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." *Id.* at 2486.

According to the Eighth Circuit, and other federal courts, however, *Janus* only protects against the

"compelled extraction of fees from non-union members." App. 8a; *see also Bennett v. Council 31 of the Am. Fed'n of State, Cnty., & Mun. Emps.*, 991 F.3d 724, 733 (7th Cir. 2021) ("Having consented to pay dues to the union, regardless of the status of her membership, Bennett does not fall within the sweep of *Janus*'s waiver requirement."); *Belgau*, 975 F.3d at 952 (holding that *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement").

This interpretation renders *Janus* a nearly dead letter. Consider the choice facing lunch ladies Burns and Tomoson back in 2015. They were given a dues-checkoff form which provided three options: join the union and pay 100% of dues, opt out of the union and pay 85%, or lose their job. Under the Eighth Circuit's strange reasoning, the lunch ladies had a First Amendment right *not* to pay 85%, but the Constitution has nothing to say about the decision to pay even more.

Janus did not create such an anomaly. The lunch ladies *were*, indisputably, "nonmembers" when presented with their first dues checkoff form. As a result, *Janus* requires that the public-sector union and the state obtain and ascertain, respectively, that these employees had waived their First Amendment rights by clear and compelling evidence before collecting "any other payment to the union." *Janus*, 138 S. Ct. at 2486. The language "nor any other payment to the union" must refer to any other payment *different from* an agency-fee payment, which includes membership dues. Further, any decision to join a public-sector union, just like subsidizing it through agency fees, raises the same First-Amendment concern of being required

to pay for speech with which you disagree. *Janus*' proscription on compelled speech thus includes full dues payments made to a public-sector union as well as agency fees. *See* Petition for Writ of Certiorari, at 14, *State of Alaska v. Alaska State Emps. Assoc.*, No. 23-179 (Aug. 23, 2023) (explaining that "[t]he Court in *Janus* imposed a high standard of states that seek to deduct union dues or fees from employee paychecks").

That means the presence of the lunch ladies' *signature alone* on a dues-checkoff form should not be the end of their First Amendment case. The Court in *Janus* was clear that any agreement to pay, including by joining the public-sector union, amounts to the "waiv[er] [of] their First Amendment rights, and such waiver cannot be presumed." *Janus*, 138 S. Ct. at 2486. In the lower courts, however, signing on the dotted line somehow amounts to "'clear and compelling' evidence" that the waiver of First Amendment rights was "freely given." *Id.* In *Burns*, the court simply accepted that "[b]y signing a union membership contract, an employee 'clearly and affirmatively' waives her right to refrain from joining the union, and consents to fund the union according to the terms of the contract." App. 9a; *see also Baro v. Lake Cnty. Fed'n of Tchr. Loc. 504*, 57 F.4th 582, 586 (7th Cir. 2023) ("The voluntary signing of a union membership contract *is* clear and compelling evidence that an employee has waived her right not to join a union."); *Hendrickson*, 992 F.3d at 962 (same); *Oliver v. Serv. Emps. Int'l Union Loc. 668*, 830 F. App'x 76, 79–80 (3d Cir. 2020) (unpublished) (same).

The Constitution requires more than a signature. It requires affirmative consent. In commanding "clear and compelling" evidence, the *Janus* Court cited numerous cases demanding more than checking for a

signature on a page. Notably, the Court cited the seminal case *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There, the Court explained that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" and "do not presume acquiescence in the loss of fundamental rights." *Id.* (first quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and then quoting *Ohio Bell Tele. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937)); *see also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680–82 (1999) ("The classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'" (quoting *Johnson*, 304 U.S. at 464)); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion) ("Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.").

In sum, the Court in *Janus* very clearly instructed lower courts to scrutinize whether any alleged waiver was truly "freely given," as supported by clear and compelling evidence, consistent with the line of cases related to waiver of the constitutional rights of criminal defendants. *Janus*, 138 S. Ct. at 2486. To presume, without examination, as the Eighth Circuit did, that a signature on a page is consent turns *Johnson* and its progeny on its head. Accepting a signature as proof of "voluntary" waiver without further inquiry is akin to the Roman Catholic Church claiming that Galileo Galilei "voluntarily" recanted his scientific discovery that the Earth revolves around the Sun, just because he said so publicly. And yet the Earth moves.

Furthermore, the current "swelling chorus" from the lower courts, App. 8a (quoting *Belgau*, 975 F.3d at 951), has created an anomaly in the case law. Had Burns and Tomoson decided to pay the 85% agency fee, the Eighth Circuit presumably would have checked for the "intentional relinquishment or abandonment" of their First Amendment right. *Johnson*, 304 U.S. at 464. The court also would have "indulge[d] [in] every reasonable presumption against waiver." *Id.* (quoting *Aetna Ins. Co.*, 301 U.S. at 393). Instead, because the lunch ladies made a different decision—while facing an unconstitutional Hobson's choice—they get no protection. *Janus* does not allow for such a backwards standard: "employees" must "clearly and affirmatively consent before *any* money is taken from them." *Janus*, 138 S. Ct. at 2486 (emphasis added).

II. Under the Eighth Circuit's Improper Application of *Janus*, Public Employees Across the Country are Being Compelled to Subsidize Private Speech.

Without further clarification from this Court, public employees will continue to be forced to subsidize union speech without any opportunity to freely waive their First Amendment rights. All three lunch ladies allege that they were not given notice of their First Amendment right not to pay the union. Compl. ¶¶ 29–30. Instead, they all thought their options were pay, pay even more, or look for work elsewhere. App. 22a.

The problem is more widespread than three lunch ladies in suburban Minnesota. Across the country, states will deduct dues simply because the public-sector union asserts that it has the employee's authorization. *See, e.g.*, Del. Code tit. 19 § 1304(c) ("The public employer shall deduct from the payroll of the public

employee the monthly amount of dues or service fee as certified by the secretary of the exclusive bargaining representative."); Wash. Rev. Code § 41.80.110(2)(g) ("The employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions."); *see also* Petition for Writ of Certiorari, at 15, *State of Alaska v. Alaska State Emps. Assoc.*, No. 23-179 (Aug. 23, 2023) (citing additional examples in Or. Rev. Stat. § 243.806(4)(a), (7), CT St. § 31-40bb(i)-(j), and IL St. Ch. 5 § 315/6(f-10)). In these states, the only assurance that "employees [have] clearly and affirmatively consent[ed] before any money is taken from them" is the public-sector union's representation. *Janus*, 138 S Ct. at 2486.

Many states go even further to thwart *Janus*. California law prohibits public employers from "deter[ing] or discourag[ing]" employees "from becoming or remaining members of an employee organization" and the employer cannot disseminate mass communications to employees absent union approval or an accompany union message. Cal. Gov. Code § 3550, 3553. This law has already been held to prohibit messaging to employees about the *Janus* decision. *See Am. Fed'n of State, Cnty. & Mun. Emps. Loc. 3299 v. Regents of the Univ. of Cal.,* Pub. Emp. Rels. Bd. Decision No. 2755-H, at 2 (Mar. 1, 2021), https://perb.ca.gov/wp-content/uploads/decisionbank/decision-2755H.pdf; *see also* Deborah J. La Fetra, Miranda *for* Janus: *The Government's Obligation to Ensure* Informed *Waiver of Constitutional Rights*, 55 Loy. L.A. L. Rev. 405, 415 (2022) (discussing the decision). Other state laws are similar. *See, e.g.*, N.J. Stat. § 34:13A-5.14(b) (prohibiting public employers from "encourag[ing] or discourag[ing] an employee from joining, forming or

assisting an employee organization"). Indeed, Minnesota recently amended its law so that "public employer[s] must rely on a certification from any exclusive representative requesting remittance of a deduction that the organization has and will maintain an authorization." Minn. Stat. § 179A.06, subd 6(a) (2023). The public-sector union cannot even be asked to show its work: "An exclusive representative making such certification must not be required to provide the public employer a copy of the authorization unless a dispute arises . . . ." *Id.*

There are even examples of public-sector unions forging employee signatures in order to automatically deduct dues. *See Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1117–20 (9th Cir. 2022) (assuming that a membership agreement was forged but declining to find standing for a *Janus* claim anyway); *Todd v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 5*, 571 F. Supp. 3d 1019, 1029 (D. Minn. 2021) (alleging that the union forged his signature), appeal filed Nov. 29, 2021; *see also* Brief of *Amicus Curiae* Upper Midwest Law Center in Support of Granting the Petition at 4–7, *Wright v. Serv. Emps. Int'l Union, Loc. 503*, No. 22-577 (Jan. 16, 2023) (discussing the widespread problem of union forgery). Point being, there is no reason to think that employees are being adequately informed of their *Janus* rights.

Despite this evidence, no federal court has given a second look at any employee's signature on a dues-checkoff form. *See, e.g.*, App. 9a–10a; *Hendrickson*, 992 F.3d at 962; *Bennett*, 991 F.3d at 731–32; *Belgau*, 975 F.3d at 951–52. This state of affairs goes against the clear mandate of *Janus* that the waiver of First Amendment rights "cannot be presumed." *Janus*, 138 S. Ct. at 2486.

III. The Eighth Circuit's Endorsement of the Union's Unconstitutional and Unjustifiable Opt-Out Procedure Presents Another Grave Constitutional Wrong Only This Court Can Correct.

The opinion below suffers from another fundamental flaw. The Eighth Circuit essentially held that a First Amendment waiver cannot be revoked. App. 9a–10a. Such a holding is flatly inconsistent with the *Janus* Court's instruction for courts to look to the line of cases related to waiver of the constitutional rights of criminal defendants in determining whether any alleged waiver was truly "freely given," as supported by clear and compelling evidence. *Janus*, 138 S. Ct. at 2486; *see Stevens v. Marks*, 383 U.S. 234, 243–44 (1966) ("Even were we to assume, without deciding, that a State may constitutionally exact, on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any justification for denying the right to withdraw it."). The First Amendment is not a one-way ratchet where employees only get one chance to exercise their rights. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate").

Further, when a public employee expressly resigns from a union, that employee is a "nonmember." Even under the Eighth Circuit's cabined reading of *Janus*, the lunch ladies should have received First Amendment protection at that point. But instead, the court enforced the union's unjustifiable waiting-period requirement where, even after an employee expressly leaves the union, dues deductions can only be stopped once a year, during a 15-day window. Such procedures are not uncommon. *See, e.g.*, *Hendrickson*, 992 F.3d at

955 (two-week opt-out window); *Bennett*, 991 F.3d at 728 (15-day opt-out window); Petition for Writ of Certiorari, at 19–20, *State of Alaska v. Alaska State Emps. Assoc.*, No. 23-179 (Aug. 23, 2023) (detailing how pervasive this problem is). And they are unconstitutional.

Even pre-*Janus* cases recognized that public-sector unions cannot utilize procedures that fail to adequately protect First Amendment rights. First, in *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986), the Court explained that procedures for nonmembers must "be carefully tailored to minimize the infringement" with First Amendment rights. As a result, a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring)).

In *Knox*, the Court went even further. It rejected the union's policy of assessing a special assessment for electoral campaign funding "without providing a new opportunity for nonmembers to decide whether they wished to contribute." 567 U.S. at 314. *But see* App. 10a (holding that the lunch ladies were not protected from "subsequent changes in the law [that] could alter the cost-benefit balance of their bargain" (quoting *Fischer v. Governor of NJ*, 842 F. App'x 741, 753 (3d Cir. 2021) (unpublished)). A fee was assessed on nonmembers who had previously opted out as well. *Knox*, 567 U.S. at 314. The Court concluded that "[t]his aggressive use of power by the [union] to collect fees from nonmembers [was] indefensible." *Id.* As the Court explained, "there is no way to justify the

additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires." *Id.* at 317. The problem is the exact same for the lunch ladies. After all three exercised their right to resign, the union added "the additional burden of . . . yet another opt-out requirement" to stop the automatic deduction of dues. *Id.*

Thus, the Eighth Circuit's treatment of the rights of nonmembers post-*Janus* creates the strange situation where nonmembers had greater procedural safeguards under *Abood v. Detroit Board of Education*, 413 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. at 2460. The Eighth Circuit's conclusion that any "fund[ing] [of] the union according to the terms of the contract" is permissible, App. 9a, flies in the face of decades of precedent untouched by *Janus*. In demanding that nonmembers must be given the opportunity to "affirmatively consent before any money is taken from them," the Court hardly could have meant to green light procedures making it impossible to exercise that right. *Janus*, 138 S. Ct. at 2486; *see Roberts*, 468 U.S. at 623 (explaining that infringements on the freedom of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Kusper v. Pontikes*, 414 U.S. 51, 58–59 (1973) ("[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty."); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone" in the First Amendment context); *Knox*, 567 U.S. at 313–14 (explaining that "measures burdening the freedom of speech or association must serve a 'compelling

interest' and must not be significantly broader than necessary to serve that interest").

Lower courts have previously cited the inapposite *Cohen* decision to disregard post-resignation claims. *See* App. 9a ("The First Amendment does not provide the employees with an opportunity to 'disregard promises that would otherwise be enforced under state law.'" (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991))); *Belgau*, 975 F.3d at 950 (relying on *Cohen*). This reasoning misconstrues Supreme Court precedent. The issue in that case was not whether *Mr. Cohen* waived his First Amendment rights; rather, it has to do with whether a newspaper could *intentionally violate* a confidentiality contract with Cohen because of the *newspaper's* First Amendment rights. *Cohen*, 501 U.S. at 665. The answer is clearly no; tortfeasors do not have automatic First Amendment protection from laws which are "generally applicable to the daily transactions of all the citizens of Minnesota," such as breach-of-contract and promissory-estoppel laws. *Id.* at 670. *Cohen*, in other words, rejects the use of the First Amendment as a "sword" to commit intentionally wrongful acts. It only relates to the First Amendment rights of the alleged tortfeasor—the District and union here. It has nothing to do with Petitioners' First Amendment rights; *Cohen* does not strip non-tortfeasor, innocent parties of their First Amendment right to object to ongoing compelled speech.

At bottom, the Eighth Circuit's "anything goes" treatment of public-sector union opt-out procedures makes a mess of Supreme Court precedent. It ignores the Court's clear instruction that any procedure restricting First Amendment rights "serve a 'compelling interest' and must not be significantly broader than

necessary to serve that interest." *Knox*, 567 U.S. at 313–14. And it justifies this departure based on a backwards interpretation of *Cohen*. Such an erroneous and pervasive misapplication of this Court's First Amendment jurisprudence cannot be allowed to stand. *See Hendrickson*, 992 F.3d at 964 (making the same error); *Bennett*, 991 F.3d at 731 (same); *Belgau*, 975 F.3d at 950 (same).

IV. Government Employers Are Responsible for Ensuring Union Dues Deductions from Employee Paychecks Are Based on Valid First-Amendment Waivers.

Affording First Amendment safeguards to government employees vis-à-vis their union-dues deductions is not hard, but it is important. Government employers, who actually make the deductions at issue, owe government employees minimal safeguards. In the context of union-dues deductions, the government employer must obtain at least a simple confirmation from the employer that the employee has consented to dues deductions and waived any First Amendment rights related to the deductions is required of government employers.

First Amendment due process is sensitive to the specific context, and "varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). The familiar *Eldridge* factors are helpful. The Court weighs the private interest, the risks of erroneous deprivation of such interest, the probable value of additional procedural safeguards, and the government's interest, including administrative burdens. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

These factors support requiring a government employer to confirm deductions with an employee to

ensure First Amendment rights are not inadvertently stripped. First, a government employee's private interest is incredibly strong, as it is the First Amendment at the height of its protections—against compelled political speech. Second, the risk of erroneous deprivation of those rights is strong, as they are "fragile." *E.g., Hudson*, 475 U.S at 303 n.12 (quoting Henry P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 551 (1970)). Applicants for public employment—who often have never been union members prior to application—are faced with a bunch of papers on their first day at work, which include a union checkoff. And public-sector unions have been sued repeatedly in recent years over allegations of forged applications and processing errors which signed up employees with no possible consent to dues deductions at all. *See, e.g.*, *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1106 (9th Cir. 2022) (claim of unauthorized deductions based on alleged error); *Wright*, 48 F.4th at 1117–20 (claim of unauthorized deductions based on forgery); *Todd*, 571 F. Supp. 3d at 1029 (claim of unauthorized deductions based on forgery).

Third, the addition of simple procedural safeguards has the potential to totally stop unauthorized "charges," the same way banking anti-fraud messages stop someone from illegally using one's credit card. Fourth, there is no great burden on government employers to send an automatic confirming email upon being presented with an employee's alleged request for checkoff.

In this case, no such confirmation occurred, and the District relied on the union's word to make deductions from Petitioners' paychecks. When this case began, nothing in Minnesota law or the union-District bargaining agreement forbade this easy step. *But see*

Minn. Stat. § 179A.06, subd 6(a) (2023) (2023 law now requires employers not to question union statement of whose deductions to take). Nor could any law constitutionally forbid this simple procedure. *Cf. id.*

The Court should grant the writ of certiorari to hold that the District here failed Petitioners by not confirming a valid waiver of First Amendment rights. This issue can be efficiently addressed if the Court reviews *Jarrett*. Petition for Writ of Certiorari, *Jarrett v. Serv. Emps. Int'l Union, Loc. 503*, No. 23-372 (Oct. 4, 2023).

V. Public-Sector Unions Are State Actors When They Act Pursuant to State Law with the Assistance of the State.

Lower courts have found one additional way of eliminating the promise of *Janus*. These courts have misapplied Supreme Court precedent to hold that "when a public sector union—a private entity—deducts dues from its union members, the deduction is not based on state authority, but rather on a private agreement between the union and the union member." App. 7a; *see also Hoeckman v. Educ. Minn.*, 41 F.4th 969, 977–78 (8th Cir. 2022); *Wright*, 48 F.4th at 1121–25; *Jarrett v. Serv. Emps. Int'l Union Loc. 503*, No. 21-35133, 2023 U.S. App. LEXIS 17139, at *2 (9th Cir. 2023) (unpublished).

This conclusion flies in the face of *Lugar*. There, the Court laid out a two-prong test for when the "deprivation of a federal right [may] be fairly attributable to the State." 457 U.S. at 937. The first prong is the requirement that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.*

And second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be . . . because he has acted together with or has obtained significant aid from state officials." *Id.*

As to *Lugar's* first prong, the Eighth Circuit merely accepted as fact that the deduction of public-sector union dues is "a private agreement between the union and the union member." App. 7a. This conclusion distorts reality. The union was enabled by the Minnesota Public Employment Labor Relations Act to deduct dues and agency fees from government employee paychecks. Minn. Stat. § 179A.06, subd. 3, 6 (2015). The union 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. Without state law, the union would have had neither the ability nor the authority to seize funds from state employees' paychecks like the lunch ladies'. It is Minnesota law that empowered the union, not the mere existence of a private agreement.

With regard to *Lugar's* second prong, the union, through its contract with the lunch ladies' employer, willfully participated with the State to deduct from the lunch ladies' 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"). The District automatically deducted from the lunch ladies' wages at the behest of the union using a state law procedure. The whole scheme would not work without cooperation between the union and the District, as is mandated by state law. *See 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"); *United States v. Price*, 383 U.S. 787, 794 (1966) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To 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.").

The Eighth Circuit's neglect of the circumstances of this case is contrary to *Lugar*: "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. The existence of a private agreement does not change the analysis. 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."

Decisions in the Eighth and Ninth Circuits have also created a circuit split. *See* Brief of The Liberty Justice Center, The Illinois Policy Institution, and the Upper Midwest Law Center as *Amici Curiae* Supporting Petitioners at 2–3, 7–8, *Jarrett v. Serv. Emps. Int'l Union, Loc. 503*, No. 23-372 (Nov. 2, 2023) (recognizing the circuit split). After *Janus*, the Seventh Circuit held that the public-sector union's "use of state procedures with the overt, significant assistance of state officials" amounted to state action under Section 1983. *Janus II*, 942 F.3d at 361 (quoting *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)). The facts on the ground were similar to this case: the

union "was a joint participant with the state in the agency-fee arrangement." *Id.* The public employer then took fees for the union "from the employees' paychecks and transferred that money to the union. . . . . This is sufficient for the union's conduct to amount to state action." *Id.* In sum, action from this Court is necessary to correct confusion in the lower courts about how, when, and against whom to enforce *Janus* rights.

VI. This Case Presents an Ideal Vehicle for the Court to Resolve the Questions Presented.

Post-*Janus*, public employees are trapped by coercive procedures when they join the union, when they try to leave, and foreclosed from holding the public-sector union accountable. This case encompasses all aspects of the problem, giving this Court the opportunity to fully correct the problems created by lower courts' erroneously narrow interpretation of *Janus*.

First, public employees who joined a public-sector union before *Janus*, like Burns and Tomoson, were "forced to subsidize a union, even if they chose not to join and strongly object to the positions the union takes in collective bargaining and related activities." *Janus*, 138 S. Ct. at 2459–60. In other words, because they had no choice but to "subsidize the union" by paying full union dues or an 85% agency fee, the lunch ladies were faced with an unconstitutional Hobson's choice. When they were "nonmembers"—which is the case at the very moment an employee is signing a dues checkoff—the lunch ladies were compelled "to subsidize private speech on matters of substantial public concern." *Id.* at 2460.

The Eighth Circuit's conclusion that the lunch ladies were "'faced with a constitutional choice—

whether or not to join' the union" neglects half of *Janus*. App. 9a–10a (quoting *Oliver*, 830 F. App'x at 79). If the choice to pay the union a little bit requires a knowing and voluntary waiver of First Amendment rights, surely the choice to pay the public-sector union even more requires the same. This case therefore squarely presents the opportunity for this Court to clarify that the coercive choice present in *Janus* cannot be made absent voluntary waiver, no matter what the government employee ultimately decides. Thus, this case is a much better vehicle than similar cases this Court has declined to grant certiorari in. *See Belgau*, 975 F.3d at 950–51 (explaining that the union "did not force Employees to sign the membership cards or retain membership status to get or keep their public-sector jobs" and "Employees' choice was not between paying the higher union dues or the lesser agency fees"), *cert denied*, 141 S. Ct. 2795 (2021).

Second, this case also squarely presents the second post-*Janus* problem. All three lunch ladies *left the union*—again, becoming *nonmembers*—but continued to be subjected to automatic due deductions for months based on a 15-day opt-out window imposed by the union. For months, the District continued to deduct dues from the lunch ladies despite the fact that they were officially nonmembers and had demanded to exercise their First Amendment right not to fund the union's speech.

Third, the Eighth Circuit refused to entertain the possibility of holding the union responsible for a Section 1983 violation despite the fact that it "invok[ed] the aid of state officials to take advantage of state-created [dues deduction] procedures." *Lugar*, 457 U.S. at 942.

Finally, this case raises similar issues as two other important petitions before the Court. *See* Petition for Writ of Certiorari, *State of Alaska v. Alaska State Emps. Assoc.*, No. 23-179 (Aug. 23, 2023); Petition for Writ of Certiorari, *Jarrett v. Serv. Emps. Int'l Union, Loc. 503*, No. 23-372 (Oct. 4, 2023). The fact that three certiorari petitions concerning the scope of *Janus* are again before the Court demonstrates the confusion still plaguing lower courts. By consolidating these cases and granting the petition for a writ of certiorari, the Court can provide much needed instruction on the scope and application of *Janus*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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