No. 24-2

IN THE
Supreme Court of the United States

CAMILLE BOURQUE,

Petitioner,

v.

ENGINEERS AND ARCHITECTS ASSOCIATION, ET AL.

Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the First Amendment prohibits a state from taking money from employees' paychecks to subsidize union speech when the state lacks sufficient evidence that the employees knowingly and voluntarily waived their First Amendment rights.

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INTEREST OF THE AMICI CURIAE[1]

Since 1968, the National Right to Work Legal Defense Foundation, Inc. has been the nation's leading advocate for employee freedom to choose whether to associate with unions. To this end, Foundation staff attorneys have represented individuals before the Supreme Court in several major cases involving individuals' First Amendment rights to refrain from subsidizing unions and their expressive activities. They include *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); and *Knox v. SEIU, Loc. 1000*, 567 U.S. 298 (2012).

The Foundation submits this amicus brief to inform the Court that: (1) unions and states are impeding employees' ability to exercise their First Amendment rights under *Janus*, and (2) six Circuit Courts have sanctioned these impediments by reading *Janus'* waiver requirement out of existence. Amicus curiae urges the Court to grant review to make clear that it meant what it said in *Janus*: that, to seize payments for union speech from nonmembers, a "waiver must be freely given and shown by 'clear and compelling' evidence.'" 585 U.S. at 930 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

SUMMARY OF ARGUMENT

The Court's review is urgently needed because states and unions are severely curtailing employees' right to stop paying for union speech. The laws of at

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[1] Rule 37 statement: All parties received timely notice of the Amici's intent to file this brief. No party's counsel authored any part of the brief and no one other than the Foundation and the Fairness Center funded its preparation or filing.

least seventeen states require government employers to enforce policies that prohibit employees from stopping government deductions of union dues except during short periods. Under *Janus*, these restrictions on when employees can exercise their First Amendment right to stop paying for union speech should be unconstitutional absent clear and compelling evidence the employees waived their speech rights. *See* 585 U.S. at 930.

Yet, six Circuit Courts have now held that states and unions can constitutionally seize payments for union speech from dissenting employees without proof they waived their constitutional rights. *See infra* at 7. In the Ninth Circuit, such payments can be seized without any actual proof of employee consent at all. According to the Ninth Circuit, it is constitutional for a state to deduct union payments from employees' wages based on unverified and false union assertions that the employees consented to the deductions. *See Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1125 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023). Also according to the Ninth Circuit, it is constitutional for unions to collect these payments from nonconsenting employees because unions are not state actors subject to the First Amendment. *Id.* at 1123-24. The Ninth Circuit has effectively abrogated *Janus*' core holding: 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." 585 U.S. at 930.

The Court should not allow the employee speech rights it recognized in *Janus* to be hamstrung in these

ways. The Court should grant the petition to reestablish that it violates the First Amendment for states and unions to seize payments for union speech from employees, and to restrict employees' right to stop making those payments, unless there is clear and compelling evidence the employees knowingly waived their speech rights.

ARGUMENT

I. Employees' First Amendment Right to Stop Subsidizing Union Speech Is Being Severely Restricted in at Least Seventeen States.

In 2018, the Court recognized in *Janus* that public employees have a First Amendment right not to subsidize union speech. 585 U.S. at 930. The Court held it unconstitutional for states and unions to deduct or collect union payments from a nonmember employee "unless the employee affirmatively consents to pay." *Id*. This consent, in turn, requires proof the employee waived his or her rights. *Id*. The Court explained that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id*. "Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id*. (quoting *Curtis Publ'g Co.*, 388 U.S. at 145).

Unfortunately, a number of states reacted to *Janus* by disavowing its waiver holding and by restricting the speech rights the Court recognized. Eleven states that filed briefs in *Janus* opposing its ultimate outcome issued strikingly similar guidance declaring *Janus* inapplicable to government deductions of union

dues from employees who sign dues deduction authorization forms.[2]

A dozen states amended their dues deduction laws after *Janus* to require government employers to enforce restrictions on when employees can stop payroll deductions of union dues. This includes California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington.[3] In the wake of *Janus*, government employers in at least four other states—New

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[2] *See* Affirming Lab. Rts. and Obligations in Pub. Workplaces, Cal. Att'y Gen. Op. (undated), rb.gy/wwetc5; Guidance Regarding the Rts. And Duties of Pub. Emps. After *Janus*, Conn. Att'y Gen. Op. (undated), rb.gy/qaw4ud; Guidance Regarding Rts. and Duties of Pub. Emps. after *Janus*, Ill. Att'y Gen. Op. (July 19, 2018), rb.gy/cphkyj; Guidance on the Rts. and Duties of Pub. Emps. After Janus, Md. Att'y Gen. Op. (undated), rb.gy/v71fyp; Affirming Labor Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated), rb.gy/guzdxw; Pub. Sector Emps. After Janus, N.M. Att'y Gen. Op. (undated); Guidance for Pub. Emps., N.Y. Dep't of Lab. (undated), https://www.nyspffa.org/main/wp-content/uploads/2018/07/nys_dol_janus_guidance.pdf; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Or. Att'y Gen. Op. (undated), rb.gy/ovweir; Guidance on the Rts. and Responsibilities of Pub. Emps. Following Janus, Pa. Att'y. Gen. Op. (undated), rb.gy/mb5ade; Pub. Lab. Rts. and Obligations Following Janus, Vt. Att'y Gen. Op. (undated), rb.gy/umfmzo; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Wash. Att'y Gen. Op. (July 17, 2018), rb.gy/saakuh.

[3] *See* Cal. Gov't Code § 1157.12; Cal. Educ. Code §§ 45060; Colo. Rev. Stat. § 24-50-1111(2); Conn. Publ. Act No. 21-25, §§ 1(a)(i–j); Del. Code Ann. tit. 19, § 1304; Haw. Rev. Stat. Ann. § 89-4(c); 5 Ill. Comp. Stat. § 315/6(f); Mass. General Laws ch.180 § 17A; Nev. Rev. Stat. § 288.505(1)(b); N.J. Stat. Ann. §52:14-15.9e; N.Y. Civ. Serv. Law § 208(1)(b); Or. Rev. Stat. § 243.806(6); Wash. Rev. Code § 41.80.100(d).

Mexico, Ohio, Minnesota, and Pennsylvania—have enforced restrictions on stopping payroll deductions under preexisting state laws.[4]

Some restrictions compel objecting employees to pay for union speech for several years. California and Pennsylvania authorize "maintenance of membership" requirements that compel employees who are or become union members to remain dues-paying union members for the duration of a collective bargaining agreement and permit them to withdraw from the union only during a thirty-day or fifteen-day period before the expiration of that agreement. *See* Cal. Gov't Code §§ 3513(i), 3540.1(i)(1), 3583(a); 43 P.S. § 1101.301(18). Given that most collective bargaining agreements last three years or more, maintenance of membership policies prohibit employees from exercising their First Amendment right to stop subsidizing union speech for several years. *See Savas v. Cal. State Law Enf't Agency*, No. 20-56045, 2022 WL 1262014, at *2 (9th Cir. Apr. 28, 2022), *cert. denied*, 143 S. Ct. 2430 (2023) (holding it constitutional for California and a union to prohibit employees from stopping state dues deductions for four years).

These restrictions infringe on the First Amendment rights of dissenting employees who resign their union membership and object to paying for union

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[4] *See Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 860-61 (8th Cir. 2023)); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021); *Allen v. Ohio Civ. Serv. Emps. Ass'n*, No. 2:19-cv-3709, 2020 WL 1322051, at *2 (S.D. Ohio Mar. 20, 2020); *Weyandt v. Pa. State Corr. Officers Ass'ns,* No. 1:19-cv-1018, 2019 WL 5191103, at *2 (M.D. Pa. Oct. 15, 2019).

speech. These nonmembers are compelled to continue to pay for union speech against their will, by means of government deductions of union dues from their wages, unless and until they submit another objection during a short revocation window. This compulsion is indistinguishable from a state and union requiring employees who resign their union membership to pay agency fees to that union for a time period. If anything, it is worse because the dissenting nonmembers are being forced to pay not reduced agency fees, but to pay full union dues that include union expenses for partisan political activities.

II. Lower Courts Are Allowing States to Restrict Employees' Rights under *Janus*, and to Seize Union Payments From Nonmembers, Without Proof the Employees Waived Their First Amendment Rights.

A. Six Circuit Courts allow states and unions to restrict when employees can stop paying for union speech without requiring evidence those employees waived their First Amendment rights.

After *Janus*, it *should* be unconstitutional for states and unions to seize payments from employees who become nonmembers of a union absent clear and compelling evidence the employees earlier waived their First Amendment right to stop paying for union speech. 585 U.S. at 929. It also *should* be unconstitutional for states and unions to restrict when employees can exercise that First Amendment right absent proof the employees knowingly waived it. Indeed, even without *Janus'* waiver holding, the latter proposition should be common sense.

Yet, six Circuit Courts have now held that states and unions do not need evidence of a waiver to seize union payments from employees who resign their membership and object to paying union dues. According to these lower courts, and contrary to *Janus*, these seizures are constitutional if there is a contract that authorizes the seizures. *See Barlow v. Serv. Emps. Int'l Union Loc. 668*, 90 F.4th 607, 615-16 (3d Cir. 2024); *Wheatley v. New York State United Tchrs.*, 80 F.4th 386, 391 (2d Cir. Sept. 5, 2023); *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 860-61 (8th Cir. 2023); *Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, 57 F.4th 582, 586 (7th Cir.), *cert. denied*, 143 S. Ct. 2614 (2023); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021); *Belgau v. Inslee*, 975 F.3d 940, 950-52 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021).

The lower courts' decisions to substitute a lesser *contract* standard for the *waiver* requirement this Court set forth in *Janus* matters because a waiver standard is more exacting. The Court explained in *Janus* that a "waiver must be freely given and shown by 'clear and compelling' evidence." 585 U.S. at 930 (quoting *Curtis Publ'g*, 388 U.S. at 145). The Court then cited three precedents holding an effective waiver requires proof of an "'intentional relinquishment or abandonment of a known right or privilege.'" *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 682 (1999) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *see Curtis Publ'g*, 388 U.S. at 143–45 (applying this standard to an alleged waiver of First Amendment rights). The Court has sometimes formulated these criteria as requiring that a waiver must be "voluntary, knowing,

and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *see Fuentes v. Shevin,* 407 U.S. 67, 94–95 (1972) (same). Along with these criteria, public policy must support enforcing a purported waiver of a constitutional right. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

A significant difference between a waiver standard and contract standard is that a waiver of a constitutional right requires proof the person *knew* of that right. A person can contractually agree to do something, like restrict when they can stop paying for union speech, without knowing they have a constitutional right not to do it. In contrast, to be enforceable, a "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986). Under a waiver standard, states, and unions could not restrict when employees can exercise their First Amendment rights under *Janus* without proving the employees were notified of their rights and intelligently chose to waive them.[5]

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[5] *Ramon Baro* illustrates the point. The case concerned a teacher who signed a dues deduction form at a mandatory union orientation without knowing she had constitutional right to not support the union. 57 F.4th at 584-85. When the teacher learned of that right a few days later and tried to exercise it, she was compelled to continue to pay union dues until a revocation period set forth in the form. *Id.* at 585. Applying contract principles, the Seventh Circuit held the teacher's lack of knowledge of her rights did not render the restriction on her rights unenforceable. *Id.* at 586-87. The outcome would have been different under a waiver standard.

Equally significant is that a purported waiver is unenforceable "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392. The most common way states and unions frustrate employees' right under *Janus*—prohibiting them from stopping government deductions of union dues except during an annual ten- or fifteen-day period—cannot satisfy this criterion.

The policy weighing against prohibiting employees from exercising their rights under *Janus* for 350 or 355 days of each year is of the highest order: employees' First Amendment right not to subsidize speech they do not wish to support. *See Janus*, 585 U.S. at 893–94. "[C]ompelled subsidization of private speech seriously impinges on First Amendment rights" and "cannot be casually allowed." *Id*. at 894. In *Curtis Publishing*, the Court rejected an alleged waiver of First Amendment freedoms, finding that "[w]here 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." 388 U.S. at 145.

No sufficient countervailing interest exists. The Court held in *Knox* that unions have no constitutional entitlement to monies from dissenting employees. 567 U.S. at 313. Union financial self-interests in collecting monies from dissenting employees do not outweigh those employees' First Amendment rights. *Id*. at 321.

The teacher not knowing of her constitutional right not to subsidize union speech would have proven that she did not knowingly waive that right by signing the form.

The constitutional-waiver standard the Court adopted in *Janus* would do much to curtail state and union suppression of employees' right to stop paying for union speech they oppose. It also would have the salutary effect of ensuring employees can make informed decisions about whether to subsidize a union and its expressive activities. *See* Deborah J. La Fetra, *Miranda for Janus: The Government's Obligation to Ensure Informed Waiver of Constitutional Rights*, 55 Loyola L.A. L. Rev. 405 (Spring 2022).

In contrast, the lesser contract standard that several Circuit Courts have now adopted in defiance of *Janus* leads to the opposite result. It allows states and unions to easily restrict when employees can exercise their First Amendment rights under *Janus* by simply writing restrictions into the fine print of dues deduction forms.

Unlike under a waiver standard, there is no requirement that employees presented with dues deduction forms be notified of their constitutional right not to financially support a union. Employees can unwittingly sign their First Amendment rights away for a year or more without having any idea they are doing so. There are few impediments to states and unions including oppressive restrictions in the forms. According to the Ninth Circuit, it is not problematic to prohibit employees from exercising their rights under *Janus* for *four years* based on an oblique reference to a maintenance of membership requirement in a dues deduction form. *See Savas*, 2022 WL 1262014, at *2. The decisions of the six Circuit Courts to not enforce *Janus'* waiver requirement have given unions and their governmental

allies wide latitude to throttle employees' ability to exercise their right to stop paying for objectionable union speech.

B. The Ninth Circuit has gutted *Janus*' affirmative consent requirement.

1. If the foregoing were not bad enough, the Ninth Circuit has made matters even worse for employees. The court has effectively abrogated this Court's holding in *Janus* that it is unconstitutional for states to deduct, and for unions to collect, union payments from employees without proof the employee affirmatively consented to pay. 585 U.S. at 929. According to the Ninth Circuit's decision in *Wright*, the First Amendment does not require that states or unions have objective proof of employee consent to pay. 48 F.4th at 1123–25. Under *Wright*, states can rely on unverified union assertions that employees want to pay union dues and unions are not subject to First Amendment strictures at all. *Id.*

In *Wright*, an Oregon state employee (Wright) sued a state agency and a union (the SEIU) for seizing union dues from her wages without her consent. *Id.* at 1116–17. Wright alleged SEIU caused the state agency to take union dues from her wages based on a forged authorization card, which the agency did not receive or review. *Id.* When affirming a lower court's dismissal of the employee's complaint, the Ninth Circuit issued two holdings that together eviscerate *Janus'* consent requirement.

First, the Ninth Circuit rejected the employee's position "that *Janus* created a constitutional 'duty' for the State to ensure that the employees listed in

SEIU's certification had duly authorized dues deducted from their salaries." *Id*. at 1124-25. The lower court held that "*Janus* does not require that Oregon ensure the accuracy of SEIU's certification of those employees who have authorized dues deductions" and, more generally, that "*Janus* imposes no affirmative duty on government entities to ensure that membership agreements and dues deductions are genuine." *Id*. at 1125.

Second, the Ninth Circuit held the union that demanded the state agency seize payments from Wright without her consent, and that received those payments, is not a state actor subject to the First Amendment. *Id*. at 1122–24. The union thus faced no liability under 42 U.S.C. § 1983 and could keep the payments it wrongfully seized. Under *Wright*, unions in the Ninth Circuit have no constitutional duty whatsoever to ensure that employees consent to pay union dues before seizing dues from those employees. As the Ninth Circuit later put it: a "union was not a state actor when it provided the dues authorization to the state employer, even if the authorization was fraudulent." *Schiewe v. Serv. Emps. Int'l Union Loc. 503*, No. 20-35882, 2023 WL 4417279, at *1 (9th Cir. July 10, 2023) (citing *Wright*, 48 F.4th at 1123-25). In the Ninth Circuit, unions are no longer subject to *Janus'* affirmative consent holding at all.

Taken together, *Wright*'s holdings make it constitutional in the Ninth Circuit for states to deduct payments for unions from nonmembers' wages, and for unions to collect those payments, without any actual proof the employees consented to pay. This result is the *exact opposite* of what the Court held in *Janus*: 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." 585 U.S. at 930.

2. The Ninth Circuit's gutting of *Janus'* affirmative consent requirement has real consequences. Three states in the Ninth Circuit—California, Oregon, and Washington—have laws that require public employers to deduct union dues from any employee whose name appears on a union-provided list. *See* Cal. Gov't Code § 1157.12(a); Or. Rev. Stat. § 243.806(7); Wash. Rev. Code § 41.80.100(2)(g). The laws require that "a public employer shall rely on the list to make the authorized deductions and to remit payment to the labor organization." Or. Rev. Stat. § 243.806(7); *see* Cal. Gov't Code § 1157.12(a) (similar); Wash. Rev. Code § 41.80.100(2)(g) (similar). California and Washington also require that public employers rely on union assertions when it comes to stopping deductions of union dues from employees' wages. *See* Cal. Gov't Code § 1157.12(b); Wash. Rev. Code §§ 41.80.100(2)(e)-(f).

California, Oregon, and Washington have effectively given unions control over their payroll deduction systems when it comes to taking union dues from employees' wages. According to the Ninth Circuit in *Wright*, the First Amendment does not apply to unions when they exercise that control and states can blindly follow union orders without verifying that employees actually consent to paying for union speech. *Wright* thus allows unions to control state payroll deduction systems with no constitutional accountability to employees. In the Ninth Circuit, the foxes are being allowed to run the henhouse.

3. Equally as shocking, the Ninth Circuit held this scheme in which a state grants a self-interested party (a union) the power to decide whether the state will seize monies for it from other parties (public employees) does not violate due process guarantees. *See Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1110–11 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 783 (2023). Turning a vice into a virtue, the Ninth Circuit reasoned that a state's "'mandatory indifference to the underlying merits of the [employees'] authorization'" to pay money to a union makes this process constitutional. *Id.* at 1111 (quoting *Belgau*, 975 F.3d at 948).

Contrary to the Ninth Circuit's conclusion, it violates Fourteenth Amendment procedural due process guarantees for California, Oregon, and Washington to grant a non-neutral arbiter, a union, the power to control whether employees will have union payments seized from their wages. A fundamental aspect of dues process is the right to a neutral or impartial decision maker—i.e., a decision maker that does not have an interest in property at issue. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). This requirement applies to state procedures for garnishing wages or attaching property. *See North Georgia Finishing, Inc. v. Di–Chem, Inc.*, 419 U.S. 601, 606-608 (1975); *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991). It violates dues process guarantees for a state to give a union the power to determine whether the government will transfer portions of employees' wages to it.

California, Oregon, and Washington's dues deduction systems share the same flaw as the *ex parte* garnishment systems the Court found to be unconstitutional in *Doehr, North Georgia Finishing,* and *Fuentes*

v. Shevin, 407 U.S. 67, 81 (1972). The states are depriving persons of their property based entirely on the assertion of one party (a union) that another party (an employee) owes it money. Employees are not provided with an opportunity to be heard by a neutral government body before union dues are seized from their wages. Employees also are not provided with such a process to stop seizures of union dues from their wages. A self-interested union is instead vested with the power to determine whether union dues are taken from employees' wages and when those deductions stop. This system comes nowhere close to satisfying basic requirements of due process.[6]

C. Ninth Circuit case law defies this Court's state action jurisprudence.

Wright, *Belgau*, and the decision at bar cannot be reconciled with *Janus*. The state action in those cases is the same as in *Janus*: the government and a union, acting jointly pursuant to a state law and collective bargaining agreement, deducting and collecting union payments from nonmembers' wages. The Court held that *unions* that engage in this action violate the First Amendment. 585 U.S. at 929 (holding "States and public-sector unions may no longer extract agency fees from nonconsenting employees"). Indeed, the Court

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[6] The California statute at issue is overbroad for similar reasons. By giving self-interested union officials broad discretion and control over whether the state will seize money from employees for union speech, the State creates a scenario in which employees will be unconstitutionally compelled to subsidize union speech.

has long held that unions can violate individuals' constitutional rights when working with a state to seize payments from those individuals. *See Harris*, 573 U.S. at 656; *Chi. Teachers Union No. 1 v. Hudson*, 475 U.S. 292, 310 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–37 (1977).

Ninth Circuit case law also cannot be reconciled with this Court's state action jurisprudence, which emerged in cases that concerned government mechanisms that allowed one party to seize money or property from another party. *See, e.g., Lugar v. Edmondson Oil Co.*, Inc., 457 U.S. 922 (1982). The Court has often found state action to be present in these circumstances. *See Lugar*, 457 U.S. at 941–42; *id.* at 932–34 (discussing *Sniadach v. Fam. Fin. Corp.*, 395 U.S. 337 (1969), *Fuentes,* 407 U.S. 67, and other cases). In *Lugar*, the Court further found 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.'" 457 U.S. at 937.

This case involves a state procedure that allows one party to seize money from other parties. Specifically, this case concerns the City of Los Angeles' payroll deduction system, which allows the Engineers and Architects Association (EAA) to take money from employees' wages upon that union's demand. Pet.App. 5a. Under *Lugar*, this system is the product of state action and EEA is a state actor when it uses that system. Indeed, EAA's collective bargaining agreement with the City both requires that the City deduct monies from employees' wages for the union and restricts when employees can stop those deductions. Pet.App. 5a. EEA plainly is jointly participating with City officials to seize monies from employees.

The fact EEA had the City take monies from Camille Bourque's wages without her consent does not erase the state action inherent in this government taking. The Court recently explained "the '[m]isuse of power, possessed by virtue of state law,' constitutes state action." *Lindke v. Freed*, 144 S.Ct. 756, 768 (2024) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). The Court also found state action in *Lugar* even though the party that used the attachment procedure *lacked* a valid claim to the property it had attached. 457 U.S. at 925.

In both *Belgau* and *Wright*, the Ninth Circuit tried to justify its state action holdings by labelling government deductions of union dues the "ministerial processing" of union dues deduction agreements. *Belgau*, 975 F.3d at 948; *Wright*, 48 F.4th at 1122. This is no mere ministerial act. It is the very state action that the Court in *Janus* held violates employees' First Amendment if the employees did not affirmatively consent to dues deductions.

Under the Ninth Circuit's holdings, there would have been no state action in *Janus* if Illinois' routine deductions of union agency fees from nonmembers' wages could be mislabeled "ministerial." There also would have been no state action in *Lugar* because attachment proceedings could be called the "ministerial" processing of private claims. The Ninth Circuit's state-action holding in *Belgau* and *Wright* are untenable in light of *Janus* and *Lugar*.

III. The Question Presented Is Exceptionally Important.

The restrictions on employees' speech rights that six Circuit Courts have now sanctioned impact millions of public employees. In 2022, approximately 6,090,600

state and local government employees were union members.[7] Of those employees, approximately 4,849,000 work in the seventeen states that require government employers to enforce prohibitions on when employees who resign their union membership can stop payroll deductions of union dues.[8] It is thus reasonable to estimate that well over four million public employees cannot exercise their First Amendment rights under *Janus* except during a few days each year.

These restrictions infringe on the employees' fundamental speech and associational rights. The Court in *Janus* recognized that, just as "[c]ompelling individuals to mouth support for views they find objectionable violates . . . [a] cardinal constitutional command," 585 U.S. at 892, "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* at 893. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* (quoting A Bill for Establishing Religious Freedom, 2 *Papers of Thomas Jefferson* 545 (J. Boyd ed.

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[7] Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 Indus. & Labor Rels. Rev. 349–54 (2003) (updated annually at unionstats.com); https://www.unionstats.com/members/members_index.html (estimating that 2,143,900 state employees and 3.946,700 local government employees were union members in 2022).

[8] *See* Barry T. Hirsh, *supra*, https://www.unionstats.com /state/htm/state_2022.htm.

1950)). A restriction on when employees can stop paying for union speech compels employees who no longer want to contribute money to propagate union speech to do so anyway.

Unless the Court grants review and breathes new life into *Janus'* waiver requirement, unions and their governmental allies will continue to severely restrict the right of millions of employees to stop subsidizing union speech. The Court should not tolerate this resistance to its holding in *Janus*.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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