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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Respondents' briefs demonstrate why the Court granting Camille Bourque's Petition is so important. Approximately five million public employees in seventeen states across the country currently enjoy no constitutional protection against compelled speech injuries, and union-influenced states in other circuits throughout the country will likely adopt schemes similar to California's. Br. of Amicus Curiae Nat'l Right to Work Legal Defense Found., Inc. 17-18. Constitutional injuries are occurring now, and it would be better for the Court to address the issue now rather than wait for the problem to metastasize.

Like many employees currently having union dues withdrawn from their pay, Ms. Bourque never affirmatively consented to union membership or dues. She never signed a union card, and there is no allegation or evidence that Engineers and Architects Association (EAA) ever possessed a card on her behalf.[1] When she wrote to the union asking them to stop taking dues, nothing happened. Ms. Bourque then personally called the union, at which point she was told the deductions would continue for months until the time specified in the collective bargaining agreement (CBA) between EAA and her employer, the City of Los Angeles (the City). Again, nothing happened and the dues deductions continued.

The first issue addressed below is whether sufficient government involvement exists to hold one or more entities liable pursuant to 42 U.S.C. 1983 (Section 1983). The Ninth Circuit answers this question in the negative,

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[1] She specifically asked for a copy in her written request to opt out. Pet.App. 5a. None has ever been provided, and the City apparently has never requested a copy from EAA.

opining that neither the public employer itself nor the union is a state actor. The primary challenge is to the status of the union. Here, the state grants the union the power to compel the public employer to take dues from an employee and give the money to the union, under California Government Code § 1157.12 (Section 1157.12). The union has also entered into a collective bargaining agreement (CBA) with the public employer which also requires it to take dues deductions. Secondarily, the City, unprotected by the 11th Amendment, yet clearly a government entity which itself is the immediate cause of the constitutional injury by giving the dues to the union, has also adopted its own policy for the specific provision the union relied upon to deny Bourque's request to stop taking dues: the CBA agreement imposing a narrow window period restricting employees from ending the deductions.

Thus far, the analysis should follow this Court's decision in *Janus v. Am. Fed'n of State, Cnty, & Mun. Emps., Council* 31, 585 U.S. 878 (2018), and the line of preceding cases, which implicitly found constitutional protection against such a scheme. The only distinction is that here California purports to require the union to have obtained affirmative consent from a public employee before setting in motion its statutory authority to compel dues deductions. The Ninth Circuit, and Respondents, argue this negates any state action because neither the union nor the City can be implementing state policy while simultaneously violating state policy. But this is not the rule this Court has adopted. Every allegation of wrongdoing pursuant to Section 1983 contains an allegation that state-granted power was misused somehow.

The second issue addressed below is whether the City taking Ms. Bourque's money and giving it to EAA caused her a constitutional injury. The California

Attorney General does not concede any constitutional injury, presenting a stark opposition to what should be an easy question. Instead, he argues that because Bourque potentially had state remedies available, she should be denied access to the federal courts to seek protection against EAA and the City depriving her of her federally protected rights. But this Court has never required a citizen suffering a constitutional injury to seek first a remedy by proceeding in a venue of a state which, at minimum, has adopted procedures which cause the injury in the first place. Such a conclusion is at odds with the letter and spirit of Section 1983. To be sure, a public employee may waive a constitutional right. But here, as with Mark Janus, there can be no claim Bourque waived her right against the City compelling her financially to support objectionable union speech.

For these and the following reasons, the Petition should be granted.

I. THE NINTH CIRCUIT'S APPROACH CREATES A PREVIOUSLY NON-EXISTENT EXCEPTION TO STATE ACTION FOR UNIONS

EAA suggests a state action doctrine exception for public sector labor unions in reliance on Ninth Circuit rulings approving governments delegating their authority with unfettered discretion to close off access to federal courts. This contention is incorrect. Decades of this Court's precedent affirms a principle that is enshrined on the face of Section 1983, that when the state puts a private party into a specific position of power, only for it to abuse that position, the private party acts "under color of state law." *West v Atkins*, 487 U.S. 42, 49-50 (1988); *Lindke v. Freed*, 601 U.S. 187, 199-200 (2024).

First, the Ninth Circuit's suggestion that a union cannot face liability under Section 1983 if the actions they take are contrary to the law which granted them authority,[2] is incompatible with the plain language of Section 1983 and this Court's state action jurisprudence. Nowhere in the text of Section 1983 does the statute limit liability to those who act in "compliance" with state law. The statute instead imposes liability on persons acting "under color of any statute, regulation, custom, or usage." Section 1983. "Under color of" means the state has given the power to act. *See Lindke*, 601 U.S. at 200 (to misuse power, however, one must possess it in the first place). As such, this Court has declared that "[m]isuse of power, possessed by virtue of state law, constitutes state action." *Id.* at 199.

Afterall, every Section 1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right." *Id*. at 200. By way of example, the state gives a police officer the power to act when it provides a badge; should the officer abuse that power by exercising it beyond what the state permits, the officer continues to be acting "under color of" his authority, and liable for resulting constitutional injuries. The Ninth Circuit's restrictive approach to state action defies longstanding precedent of this Court, as the Ninth Circuit's approach would have refused to find state action by the contracting prison doctor in *West*, 487 U.S. at 42 (1988), or the private security guard in *Griffin v. State of Maryland*, 378 U.S. 130 (1964).

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[2] This is a position EAA is defending before this Court. *See* EAA. Opp. at 19.

Second, if the Ninth Circuit's position on state action is correct, governments could simply delegate government business to private parties and thereby ensure that Section 1983 would never apply to protect individuals against deprivations of their constitutional rights. Here, California has delegated its authority over employee payroll deductions to EAA. The Ninth Circuit gives the State unfettered discretion to close off all access to the federal courts by the simple expedient of statutorily requiring a union to certify it has an employee-signed certification. Sec. 1157.12(a). EAA certified it had such from Bourque, when it did not, and the statute required the State to rely solely on the EAA authorization to give Bourque's money to the union. *Id.* The law thus clothes unions with state authority, or at least it hands the power of the government to unions by its mere whisper. EAA caused harm to Ms. Bourque by forcing her to participate in political speech with which she disagrees, and EAA could not have caused her this harm had it not been in the privileged position of exclusive representative granted by the state under the Meyers-Milias Brown Act (the MMBA), Cal. Gov't Code §§ 3500, *et seq*., (granting exclusive representation), and Section 1157.12 (granting control over employee dues deductions).

EAA and the City also jointly entered into a CBA, pursuant to the MMBA, which further imbued the union with the authority to control dues deductions and creates a window period limiting when employees may exercise their right to cease dues deductions. The City's contention that its "only conduct here was to rely on EAA's membership list submitted to it and deduct dues in accordance with state law.", City of LA. Opp. P. 8, cannot be squared with the fact that the City agreed to a CBA which enshrines a window period

limiting when employees can request dues deductions to cease. The Ninth Circuit has enabled governments to close off workers' access to Section 1983 claims by simply delegating to unions the power to violate constitutional rights, where governments would have otherwise faced Section 1983 liability had they violated workers' constitutional rights themselves. This cannot be.

Third, the Ninth Circuit has repeatedly evaded finding state action in cases like this one by relying on so-called contracts between employees and their unions. But there is no such contract here. Instead, the union's collective bargaining agreement *with the government* is the source of the EAA's authority to continue to enforce its dues-taking authority. It is indistinguishable from the state authority that AFSCME Council 31 employed to take agency fees from Mark Janus. This Court should grant review to uphold the constitutional protections guaranteed in *Janus* against the state's simple statutory change purporting to require the union have consent. The state action doesn't change one iota, and the fact that the union never obtained any consent from Ms. Bourque squarely presents the fundamental question. There is constitutional injury, and the state cannot insulate its union from Section 1983 liability by changing *nothing* about the actual process by which it authorizes the union to seize dues.

The Ninth Circuit's approach to state action is at odds with this Court's long held skepticism of statutes which leave a person's ability to exercise their right to free speech at the unfettered discretion of a decision maker. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988). For good reason, this Court has consistently permitted First Amendment chal-

lenges against statutes which overly broad discretion to decision makers. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *Freedman v. Maryland*, 380 U.S. 51 (1965). It should continue to do so.

II. THE ATTORNEY GENERAL'S STATE EXHAUSTION ARGUMENTS UNDERMINE THE TEXT, PURPOSE, AND POLICY OF SECTION 1983

The Attorney General suggests that defendants in federal civil rights cases can undermine a citizen's right to access the federal courts by simply characterizing their alleged constitutional injury as something else, then arguing the case was brought in the wrong venue. This contention is incorrect and at odds with basic textual and historical evidence.

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era. During that period, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." Indeed, the 1871 Congress intended § 1, the precursor to Section 1983, to "throw open the doors of the United States courts" to individuals who were threatened with, or who had suffered, the deprivation of federal constitutional rights, Cong.

Globe, 42d Cong., 1st Sess., 376 (1871) (remarks of Rep. Lowe), and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary, *Patsy v. Bd. of Regents of State of Fla*., 457 U.S. 496, 504 (1982).

It does not take a textualist scholar to observe the lack of daylight between the applicable resulting text of Section 1983 and Ms. Bourque's claims of constitutional injury: Every person (EAA) who, under color of any statute, ordinance, regulation, custom, or usage (Section 1157.12, the MMBA, and the CBA) of any State or Territory or the District of Columbia (California), subjects, or causes to be subjected, any citizen of the United States (Ms. Bourque) or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws (the First Amendment right to free speech), shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

Hence, this Court has repeatedly rejected the idea that state remedies can or should supplant access to federal courts via Section 1983. *See Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 189, 187-90 (2019); *McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668, 672 (1963) (it would defeat the purpose of § 1983 if "the assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."); *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). Exhaustion of state remedies prior to bringing a Section 1983 action was also rejected by the Congress that enacted it. *Patsy*, 457 U.S. at 504-07 (1982) (detailing the debate and

legislative history surrounding enactment of Section 1983).[3]

If the Respondents' theory of Section 1983 was correct, few defendants acting with the authority of the state during the Civil Rights Era of the 1950s and 60s would have been held liable by the courts for behavior violating the rights of African Americans. In each case, the official in question could simply have reframed the plaintiff's injury to something other than a federal violation and suggested the proper route would have been to seek state remedies. Thankfully, this rule was not, and is not, present in the jurisprudence of this Court. Instead, the Court has consistently recognized, as it should here, the importance (and supremacy) of the cause of action extended by Congress to citizens to vindicate their federal rights against state abuses.

The Attorney General's suggestion that an affirmative defense to Section 1983 claims exists that neither the Constitution, Congress, nor this Court, recognize, presents an additional exceptionally important reason for the Petition to be granted to address and reject.

III. THE FIRST AMENDMENT RIGHTS OF MILLIONS OF PUBLIC EMPLOYEES ARE AT STAKE IN THE NINTH CIRCUIT AND BEYOND

We have now reached the bottom of the slippery slope of the multitude of Ninth Circuit opinions considering under what circumstances public employees, even those like Ms. Bourque who never consented to

[3] This lack of exhaustion requirement includes Section 1983 claims arising in the context of public employees and labor law. *See, e.g.*, *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869, 879 (1998).

anything, may assert their First Amendment right to cease subsidizing objectionable union speech: never. That all Respondents believe themselves insulated from *any* liability for taking dues from a public employee without affirmative consent and giving the money to a union, under the scheme California has adopted, perfectly illustrates the danger to public employees' free speech rights.

In the Ninth Circuit, and increasingly across the country, nothing remains to protect public employees. As noted by *amici*, Br. of Amicus Curiae Nat'l Right to Work Legal Defense Found, at 17-19, after *Janus*, states and unions seizing involuntary payments from nonmembers should be subject to at least *some* minimal constitutional scrutiny. 585 U.S. at 929. Yet, six Circuits have now adopted rules effectively gutting public employees' speech rights in the wake of the *Janus* case. *See, e.g.*, *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. 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. 2023), *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).

The statutory scheme at issue in this Petition from California has only one substantively immaterial change from the one struck down in Illinois in the *Janus* case. California has eviscerated *Janus* by the simple expedient of enacting a statute which purports to require the union to have obtained affirmative consent from the employee, and alleging a failure of this standard. If such an inoculation from constitutional scrutiny were valid, in the *Janus* case Illinois

need have done nothing other than enact a statute requiring AFSCME to deduct full union dues from Mark Janus, and he would have had no constitutional protection whatsoever.

CONCLUSION

For these reasons, the Petition should be granted.

Respectfully submitted,

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