No. 24-1305, 24-1306

IN THE

Supreme Court of the United States

MARCUS TODD,
Petitioner,
v.
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 5,
Respondent.

TERRY KLEE,
Petitioner,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 51, ET AL.
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS

BRIEF OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a public-sector union that invokes the aid of state officials to deduct union dues from a nonconsenting public-sector employee acts "under color of law" for purposes of 42 U.S.C. §1983.

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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 Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

The Foundation and Mackinac Center submit 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) Circuit Courts have sanctioned these impediments by reading *Janus'* waiver requirement out of existence and by holding unions are not state actors when they have states seize union dues from employees. Amici urge the Court to grant the petitions in both *Todd* and *Klee* and to hear the cases together.

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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.

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 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 states and lower courts to hamstring the speech rights the Court recognized in *Janus*. The Court should grant the petitions in *Todd* and *Klee* to reestablish that it violates the First Amendment for a union to have states seize payments for union speech from employees, and to restrict employees' right to stop those payments, unless the union can prove the employees waived their 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. These states include 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;

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).

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).

[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).

These restrictions infringe on the First Amendment rights of dissenting employees who resign their union membership and oppose paying for union speech. These nonmembers are compelled to continue paying for union speech against their will, by means of government deductions of union dues from their wages, 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. In fact, this compulsion is worse because the dissenting nonmembers are forced to pay full union dues that fund partisan political activities, not just reduced agency fees.

To make matters worse, several states allow unions to control when the government takes union dues from employees' wages. In Minnesota, public employers "must rely" on information from unions about when to start and stop union dues deductions. Minn. Stat. § 179A.06. The same is true in California, Oregon, and Washington—public employers must 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 mandate 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 these deductions. *See* Cal. Gov't Code § 1157.12(b); Wash. Rev. Code §§ 41.80.100(2)(e)-(f). In these states, government

payroll officers are the marionettes of union officials when it comes to taking union dues from employees.

II. Lower Courts Are Allowing States to Undermine Employees' Rights under *Janus*.

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 is 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 that 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 the 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.

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. 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 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 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 unless they have 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 assertions that employees want to pay union dues from unions that, according to that court, are not subject to First Amendment strictures at all. *Id*.

In *Wright*, an Oregon state employee ("Wright") sued a state agency and a union ("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, which demanded the state agency seize payments from Wright without her consent and accepted 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, the Ninth Circuit's holdings in *Wright* make it permissible for states to deduct payments for nonconsenting employees' wages, and for unions to collect those payments, without any actual proof the employees consented to pay. These holdings are 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. Eighth Circuit precedents are little better. The court held that unions are not state actors when they have government employers seize money from employees under a dues deduction agreement, *Burns*, 75 F.4th at 860-61, or in the absence absent of a valid dues deduction agreement, *Todd v. AFSCME Council 5*, 125 F.4th 1214, 1217 (8th Cir. 2025). *See also Littler v. Ohio Ass'n of Pub. Sch. Emps*., 88 F.4th 1176, 1181 (6th Cir. 2023) (same). In the Eighth Circuit, no matter how a union seizes money for speech from public employees, it cannot be held liable under Section 1983 for violating employees' First Amendment rights.

3. This gutting of *Janus*' affirmative consent requirement has real consequences. As discussed, in one state in the Eighth Circuit (Minnesota) and in three states in the Ninth Circuit (California, Oregon, and Washington), government employers must blindly follow union orders when it comes to deducting union dues from employees' wages. *See supra* at 6. According to the Eighth and Ninth Circuits, the First Amendment does not apply to unions when they exercise that control. Unions thus control the states' payroll deduction systems with no constitutional accountability to employees. In the Eighth and Ninth Circuits, the foxes are guarding the henhouse.

Shockingly, the Ninth Circuit held that it does not violate due-process guarantees for a state to grant a self-interested party (a union) the power to decide if the state will seize monies from other parties (public employees) for the union's benefit. *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 states 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 due process is the right to an impartial maker—i.e., a decision maker that does not have an interest in the property at issue. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986). 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 the due process guarantees for a state to give a union the power to determine if the government will transfer portions of employees' wages to that union's coffers.

C. Eighth and Ninth Circuit case law defies this Court's and the Seventh Circuit's state action jurisprudence.

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

individuals' constitutional rights when working with a state to seize union payments from those individuals. *See Harris*, 573 U.S. at 656; *Hudson*, 475 U.S. 292, 310 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–37 (1977).

Post-*Janus* Eighth and Ninth Circuit opinions also conflict with this Court's state-action precedents 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; *Sniadach v. Fam. Fin. Corp.*, 395 U.S. 337 (1969); *Fuentes,* 407 U.S. 67. In *Lugar*, the Court held a statutory procedure permitting a private party to attach disputed property "obviously is the product of state action." 457 U.S. at 941. 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.'" *Id.* at 937.

Both *Klee* and *Todd* involve state procedures that allows one party (a union) to seize money from other parties (public employees). Under *Lugar*, this system "obviously is the product of state action." 457 U.S. at 941; *cf. Abood,* 209 U.S. at 226 (finding "the actions of public employers surely constitute 'state action'" when they requirement payment of union agency fees). The respondent unions are state actors when they use this system because they worked hand-in-glove with the states to seize disputed monies from the petitioners.

The fact the state and union in *Todd* took union dues from the employee's wages without his consent

does not erase the state action inherent in this government taking. As this 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 that had attached. 457 U.S. at 925.

In *Wright*, the Ninth Circuit tried to justify its state action holdings by labelling government deductions of union dues a "ministerial" action. 48 F.4th at 1122. This is no mere ministerial act. It is the very state action the Court in *Janus* held violates employees' First Amendment rights 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 agency fees from nonmembers' wages was mislabeled "ministerial." There also would have been no state action in *Lugar* because the attachment proceedings at issue could be called the "ministerial" processing of private claims. The Ninth Circuit's state-action holding in *Wright* is untenable in light of *Janus* and *Lugar*.

2. Eighth and Ninth Circuit precedents also cannot be squared with the Seventh Circuit's decisions in *Janus v. AFSCME Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) and *Hudson v. Chi. Teachers Union Local No.* 1, 743 F.2d 1187, 1191 (7th Cir. 1984). On remand from this Court in *Janus*, the Seventh Circuit explained that it is "sufficient for the union's conduct to amount to state action" if a state agency "deducted fair

share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement." 942 F.3d at 361. The Seventh Circuit reached a similar conclusion decades earlier, holding:

> when a public employer assists a union in coercing public employees to finance political activities, that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 along with the agency.

Hudson, 743 F.2d at 1191.The Seventh Circuit is correct on this matter and the Eighth and Ninth Circuits are wrong. The Court should resolve this conflict.

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.[5] 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

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[5] 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).

can stop payroll deductions of union dues.[6] 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. 1950)). A restriction on when employees can stop paying for union speech compels nonconsenting employees to fund union speech they oppose.

Unless the Court grants review and breathes new life into *Janus*' requirements, unions and their governmental allies will continue severely restricting and violating the First Amendment rights of millions of employees who want to stop subsidizing union speech. The Court should not tolerate such resistance to its holding in *Janus*.

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

CONCLUSION

The Court should grant the petitions for certiorari.

Respectfully submitted,

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July 24, 2025