No. 23-372

In The Supreme Court of the United States

TOREY JARRETT, *Petitioner,*
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, et al., *Respondents.*

MARGO CASH SCHIEWE, *Petitioner,*
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, et al., *Respondents.*

SHARRIE YATES, *Petitioner,*
v.
WASHINGTON FEDERATION OF STATE EMPLOYEES, AFSCME COUNCIL 28, et al., *Respondents.*

MARIA QUEZAMBRA, *Petitioner,*
v.
UNITED DOMESTIC WORKERS OF AMERICA, AFSCME LOCAL 3930, et al., *Respondents.*

THEODORE MENDOZA, *Petitioner,*
v.
AFSCME LOCAL 3299, et al., *Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

TIMOTHY SANDEFUR*
PARKER JACKSON
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Counsel for Amicus Curiae Goldwater Institute
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In the cases below, public sector unions directed government employers to deduct union dues from Petitioners' wages, even though they were non-union public employees who had not affirmatively consented to the deductions. Petitioners' employers continued the unauthorized deductions even after Petitioners objected.

For nearly a half century, this Court has implicitly found unions to be state actors under these circumstances, potentially liable for constitutional violations when directing the government to divert non-consenting employees' wages for union dues. Despite these decisions, and in conflict with the Seventh Circuit, the Ninth Circuit has since *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), consistently held that a union cannot be liable for constitutional violations under 42 U.S.C. § 1983 because a union is not a "state actor" so long as it claims to have a public employee's affirmative consent.

The questions presented are:

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases, and it files amicus briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. The Institute has appeared frequently as counsel for parties or as amicus curiae in cases implicating speech and associational rights. *See*, *e.g.*, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Alaska v. Alaska State Emps. Ass'n*, No. 23-179 (pending); *Anderson Fed'n of Teachers v. Rokita*, No. 23-1823 (7th Cir. pending); *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) (reversing dismissal of First Amendment challenge to mandatory bar association membership). The Institute devotes particular

[1] The parties received timely notice of the Goldwater Institute's intent to file this amicus brief per Supreme Court Rule 37.2. Pursuant to Rule 37.6, counsel for Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than Amicus, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

attention to government subsidies for special interests such as unions. *See*, *e.g.*, *Alaska, supra*; *Rokita, supra*; *Borgelt v. City of Austin*, No. 22-1149 (Tex. pending); *Gilmore v. Gallego*, No. CV-23-01-130-PR (Ariz. pending).

The Institute believes its litigation experience and public policy expertise will aid this Court in considering the appeal.

SUMMARY OF ARGUMENT

Does *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), mean what it says? That is, must government employers have clear and compelling evidence of an employee's affirmative consent *before* taking money out of their paycheck and handing it over to a union?—or may states force government employers to defer to a *union*'s own assertions regarding employee consent? And when public-sector unions *illegally forge* dues deduction authorization forms—thus thwarting *Janus*'s protections—are they shielded from liability under 42 U.S.C. § 1983 on the grounds that the forgery and the subsequent illegal deduction of dues are not "state action"?

The answer is simple: *Janus* requires clear and compelling evidence of *actual* voluntary, affirmative consent before the state may take money from a person's paycheck for the benefit of the union. Without that protection for genuine consent, the right to freely associate—and freely *dis*associate—means little. Yet

thanks to a series of recent decisions by lower courts,[2] *Janus*'s protection for these rights have been effectively gutted. This Court should act to give full protection to the First Amendment rights of public sector employees who have been victimized by fraudulent union dues deduction schemes, restrictive opt-out windows designed to trap them into ongoing dues payments, and other schemes whereby public sector unions are effectively nullifying the rights to which *Janus* and other cases promise protection.

ARGUMENT

I. Government employers and public-sector unions are state actors when they collect union dues through government payroll systems.

It goes without saying that a forged authorization form is not clear and compelling evidence of an employee's affirmative consent to pay union dues. But if a

[2] *See*, *e.g.*, *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021); *Zielinski v. SEIU Loc. 503*, No. 20-36076, 2022 WL 4298160 (9th Cir. Sept. 19, 2022); *Jarrett v. Marion Cnty.*, No. 6:20-cv-01049-MK, 2021 WL 65493 (D. Or. Jan. 6, 2021), *aff'd*, 2023 WL 4399242 (9th Cir. July 7, 2023); *Schiewe v. SEIU Loc. 503*, No. 3:20-cv-00519-JR, 2020 WL 5790389 (D. Or. Sept. 28, 2020); *Wright v. SEIU Loc. 503*, 48 F.4th 1112 (9th Cir. 2022); *Semerjyan v. SEIU Loc. 2015*, 489 F. Supp.3d 1048 (C.D. Cal. 2020), *appeal dismissed*, No. 21-55104, 2021 WL 6881066 (9th Cir. Nov. 12, 2021); *Yates v. Wash. Fed'n of State Emps.*, 466 F. Supp.3d 1197 (W.D. Wash. 2020); *Quezambra v. United Domestic Workers of Am. AFSCME Loc. 3930*, 445 F. Supp.3d 695 (C.D. Cal. 2020).

"private" union does the forging, is there any state action to be found? The answer is doubly "yes": The state is not a passive observer when it takes money from someone's paycheck and hands it to someone else. When it chooses to subsidize a union by granting access to government payroll systems, it is acting as a sovereign. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 364 (2009). It is the government that does the subtracting—from government employees' paychecks through the government's payroll system, none of which is required for the union to exist or operate. *See*, *e.g.*, *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) ("[T]he First Amendment does not impose an affirmative obligation on the state to assist the program of the association by providing payroll deduction services."); *Brown v. Alexander*, 718 F.2d 1417, 1422 (6th Cir. 1983) ("'[T]he First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union.'" (citation omitted)); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 320 (6th Cir. 1998) ("[P]ublic employees . . . have no more right than private employees to compel their employer to assist them in exercising their First Amendment rights.").

Indeed, "the State is not constitutionally obligated to provide payroll deductions at all." *Ysursa*, 555 U.S. at 359. When it chooses to do so, that action must withstand First Amendment scrutiny.[3] In other words, it is

[3] As the Petition correctly points out, the question of whether a *government employer* engages in state action when deducting union dues from public employee paychecks is before the Court in

impossible for a government entity to subsidize speech for First Amendment purposes without also engaging in state action that triggers First Amendment scrutiny. Therefore, the government itself—not just union middlemen—must have clear and compelling evidence of an employee's affirmative consent before it deducts union dues through a state payroll system.

But more importantly here, the answer is also "yes" with regard to public-sector unions because even "private" parties count as state actors when they invoke the aid of state officials to take advantage of state-created procedures to deprive another private party of property.[4]

Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982), is particularly instructive. *Lugar* concerned the deprivation of property through a private creditor's use of Virginia's prejudgment attachment procedures—a deprivation which the plaintiff said violated the Due Process of Law Clause. *Id.* at 924. *See also Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (applying

---

Alaska v. Alaska State Emps. Ass'n, Case No. 23-179, in which a petition for certiorari is pending. The Court should grant review of both as companion cases, as both cases involve union resistance to *Janus* and other related precedent.

[4] It would be absurd to suggest that the enforcement of a private agreement *is* state action in a case like *Shelley v. Kraemer*, 334 U.S. 1 (1948), and that the "pervasive entwinement of public institutions and public officials" in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001), are enough to make the actions of private entities into state action—but that the union's use of and measure of control over government payroll systems to deprive public-sector employees of property is not.

Due Process of Law protections to prejudgment wage garnishments). The Court found that the deprivation was state action, which meant the plaintiff's case could proceed.

The Court reached this conclusion based on two considerations: first "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," and, second, "whether, under the facts of [the] case . . . private parties, may be appropriately characterized as 'state actors.'" *Lugar*, 457 U.S. at 939. As to the first question, the statute authorized the prejudgment attachment of property without hearing from the property owner, a "procedural scheme" that was "obviously" the "product of state action," and therefore "subject to constitutional restraints." *Id.* at 941.

On the second question, the Court 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.* (emphasis added). *See also id.* at 927 n. 6 ("Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a § 1983 claim against a private party."). Merely "invoking the aid of state officials to take advantage of state-created attachment procedures" was sufficient to satisfy the state action requirement. *Id.* at 942.

Here, as in *Lugar*, a private party—the union—invokes the aid of state officials to take advantage of

state-created procedures to take property from another private party without clear and compelling evidence of the property owner's consent. That private party could not accomplish the taking without those state-created procedures, after all. And this fact means that the statutory schemes must comport with all constitutional requirements, including those articulated in *Janus*.

But the statutes in this case obviously fall short, because they substitute blind deference to union assertions regarding employee consent for the constitutionally mandated clear and compelling evidence of affirmative consent. *See*, *e.g.*, O.R.S. § 243.806(7) ("A public employer shall rely on the [union's] list to make the authorized deductions and to remit payment to the [union]." App.116a.); R.C.W. § 41.80.100(2)(g) ("The employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions." App.119a.); C.G.C. § 1157.12 (covered public employers "shall . . . [r]ely on a certification from any employee organization requesting a deduction or reduction that they have and will maintain an authorization, signed by the individual from whose salary or wages the deduction or reduction is to be made." App.124a.).

That deference results in the delegation of a public function to the union, joint participation and involvement of the government in the union's deprivation schemes, and a sufficient nexus between the union and the government to render the unions state actors in the context of payroll deductions for union dues.

The fact that states have tried to pass the buck onto the unions only buttresses the conclusion that the statutorily mandated deference makes the unions state actors. Both Oregon's and California's statutes attempt to shield those states from any liability. O.R.S. § 243.806(8) ("[A] public employer that makes deductions and payments in reliance on the [union's] list . . . is not liable to a public employee for actual damages resulting from an unauthorized deduction . . . A labor organization that receives payment from a public employer shall defend and indemnify the public employer for the amount of any unauthorized deduction resulting from the public employer's reliance on the list." App.116a–117a); C.G.C. § 1153(c) ("reliev[ing] the state, its officers and employees, of any liability that may result from making, canceling, or changing requested deductions or reductions." App.120a.); C.G.C. § 1153(g) ("The employee organization shall indemnify the Controller for any claims made by the employee for deductions made in reliance on that notification." App.121a.).

But state *statutes* cannot transfer the government's *constitutional* obligation to obtain clear and compelling evidence of a public employee's affirmative consent to a union—at least, not without turning the union into a state actor. To ignore the constitutional requirements expressed in *Janus* while citing compliance with state statutes is to miss the (un)constitutional forest for the statutory trees. *See* App.42a (citing "the state's statutory obligation to deduct dues based on union authorization (even if fraudulently obtained)"); App.52a ("[T]he law requires the State to

enforce the dues deduction arrangement without an inquiry into the merits of the agreement.").

California's statute goes even further and attempts to eviscerate *Janus*'s requirement entirely; it states that "[a]n employee organization that certifies that it has and will maintain individual employee authorizations shall not be required to provide a copy of an individual authorization to the Controller unless a dispute arises about the existence or terms of the authorization." C.G.C. § 1153(b) (App.120a). This inverts the constitutional rule that affirmative consent be obtained "*before* any money is taken from [employees]," *Janus*, 138 S. Ct. at 2486, and says instead that evidence *cannot* be required until *after* a dispute has arisen.

The courts below characterize the problem of forged dues deduction authorizations as "an exclusively private act," App.42a, and mere "private misuse of a state statute." App.22a (citation omitted). But the deliberate transfer of control, liability, and constitutional obligations onto the unions show that these statutes are functioning precisely as designed.

Lower courts' reliance on *Belgau, supra*, is also misplaced. For all *Belgau*'s flaws,[5] it at least arguably involved a valid private agreement in effect between

[5] Among other legal errors, *Belgau* wrongly framed the processing of payroll deductions for union dues as a mere "ministerial" act, 975 F.3d at 948; *see also* App.53a, as opposed to a state subsidy of speech, which is an affirmative act of assistance. *See*, *e.g.*, *Ysursa*, 555 U.S. at 364.

the employees and the union. *See* 975 F.3d at 945. But that is clearly not true in the case of a *forged* agreement. The government employer may have had clear and compelling evidence of affirmative consent in *Belgau* (at least initially), but no such showing can be made in these cases. Thus, where "the 'source of the alleged constitutional harm'" in *Belgau* may not have been a state statute, "but [instead] the particular private agreement between the union and Employees," *id.* at 947, the government policies here of enforcing fraudulent deduction authorizations are sources of the harm. And because the government here "facilitates unconstitutional conduct through its involvement with a private party" and is a "joint participant in the challenged activity," *id.* (citation & marks omitted), these states are not off the hook for the unions' fraud because the statutes fail to meet the standards articulated by this Court in *Janus*.

The Court should accept review and reinforce *Janus* by holding both government employers and public-sector unions liable when they act in concert to deprive employees of pay to fund union activities, including political activities.

II. The lower courts' erroneously narrow interpretation of *Janus* eviscerates employees' First Amendment rights to refrain from speaking and to freely disassociate.

The courts below minimized the significance of *Janus*, effectively limiting it to its precise facts and

misconstruing its broader principles. For example, the District Court in *Yates* wrote that *Janus* "spoke only to the deduction of state compelled fees from nonconsenting, *non-union members*, not *union members* like Plaintiff," App.77a (emphasis in original), and claimed that "*Janus* established only protected liberty or property interests for *non-union members*, not *union members* like Plaintiff." App.78a (emphasis in original). More egregiously, the Ninth Circuit repeatedly claimed that "*Janus* did not impose an affirmative duty on the government to confirm that the agreement between the union and employee is genuine." App.3a.

But such cabined interpretations of *Janus* ignore the fact that the First Amendment protects *all* citizens against compelled speech and compelled association, not just non-union-member public employees.[6] As the Petition observes, *Janus* applied not just to agency fees but to "*any* other payment to the union." *Janus*, 138 S. Ct. at 2486 (emphasis added). *Janus*'s First Amendment analysis therefore applies to all forms of state action that result in nonconsensual association or subsidization.

Of course, historical experience shows that it has *often* been the case that people have joined or made payments to unions without actually voluntarily,

---

[6] Restricting *Janus*'s requirement of clear and compelling evidence to cases of non-members makes the *Janus* decision easy to evade, by the simple expedient of making it prohibitively difficult to quit the union—as, for example, in *Savas v. Cal. State L. Enf't Agency*, No. 20-56045, 2022 WL 1262014 (9th Cir. Apr. 28, 2022), *cert. denied*, 143 S. Ct. 2430 (2023).

freely, and affirmatively intending to waive their constitutional rights. Unions frequently engage in intimidation, manipulation, and other unfair tactics to obtain "agreement" from employees. Unions have spent years concealing from prospective members that they have a right to refuse. *See generally Monson Trucking Inc.*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee Beck rights notice); *Loc. 74, Serv. Emps. Int'l Union*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Loc. No. 377*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights."); Jeff Canfield, *Comment, What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049, 1050 (2001) (noting that union behavior "makes it nearly impossible for average employees to successfully assert these rights granted by the Court"); R. Bradley Adams, *Union Dues and Politics: Workers Speak Out Against Unions Speaking For Them*, 10 U. Fla. J.L. & Pub. Pol'y 207, 222 (1998) ("[M]ost union members are unaware of their right to prevent the union from spending their fees and dues on political causes.").

Some unions have adopted procedural requirements for workers to object to the unlawful expenditure of their dues that are so complicated as to effectively deprive members of those rights. *See*, *e.g.*, *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 848 (7th

Cir. 2000) (union collected full amount of dues from nonmembers rather than 85 percent associated with collective bargaining, and required year-long process for rebate); *Cummings v. Connell*, 316 F.3d 886, 890–91 (9th Cir. 2003) (confusing and incomplete notice of *Hudson* rights was unconstitutional); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998) (requiring workers to object to paycheck deductions annually in writing, rather than to assert continuing objection). And here, unions have forged workers' signatures on their membership cards. *See also*, *e.g.*, *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102 (9th Cir. 2022); *Wright v. SEIU Loc. 503*, 48 F.4th 1112 (9th Cir. 2022).

The lower courts' cabined view of *Janus* threatens the constitutional rights of all public-sector employees—including both "the right to refrain from speaking," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), and "[t]he right to eschew association for expressive purposes," *Janus*, 138 S. Ct. at 2463—because it reads out *Janus*'s requirement that a government employer must have clear and compelling evidence of an employee's affirmative consent before deducting union dues from the employee's wages.

If the decisions below stand, courts will defer to unions whenever determining who union members (and, therefore, their financiers) are—which means state statutes will continue to be used to override the constitutional rights of public employees (union member or not), and public employees will find themselves trapped in union membership, and compelled to pay

dues even if they wish to exercise their First Amendment right to no longer associate with or subsidize the union. In other words, the waiver of purported union members' First Amendment rights will be presumed in violation of *Janus*. 138 S. Ct. at 2486.

It isn't just the forged authorization cards that present a First Amendment problem. Restrictions on the right to leave the union and stop[7] paying union dues[8] are constitutionally infirm as well. This Court's precedents make clear that without the right to *disassociate*, the right to associate means little. *Roberts v.*

---

[7] *Delaying* the termination of dues deductions after a request has been received is a form of compelled subsidization as well, as consent no longer exists for *any* additional payments. *See* R.C.W. § 41.80.100(2)(f) (App.119a) (allowing delay of termination until "the second payroll after receipt of the confirmation" of revocation from the union); C.G.C. § 1153(h) (App.121a) (allowing delay of any change to deductions through "the month subsequent to the month in which the request is received").

[8] Each of the three states' statutes here purport to allow unions to place restrictions on the right to revoke dues deduction authorizations in their collective bargaining agreements or dues deduction authorization forms. O.R.S. § 243.806(6) (App.116a) ("A public employee's authorization for a public employer to make a deduction . . . shall remain in effect until the public employee revokes the authorization in the manner provided by the terms of the agreement."); C.G.C. § 1153(h) (App.121a–122a) ("[A] deduction for an employee organization may be revoked only pursuant to the terms of the employee's written authorization."); R.C.W. § 41.80.100(d)–(e) (App.118a–119a) ("The employee's authorization remains in effect until expressly revoked by the employee in accordance with the terms and conditions of the authorization. . . . An employee's request to revoke authorization for payroll deductions must be in writing and submitted by the employee to the exclusive bargaining representative in accordance with the terms and conditions of the authorization.").

U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate."). In fact, the Court long ago recognized the centrality of the right to resign from a union. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (union members' freedom to leave the union and escape union rule meant rule was not coercive).

Association with *any* organization should not, and constitutionally cannot, be a one-way ticket. In fact, the right to resign is *more* important than the right not to join in the first place.[9] Being forced to associate with an organization is offensive enough, but it is effectively a one-time injury. Being denied the right to *dis*associate if that organization commits an act one regards as wrong is worse—because it stretches the associational and expressive injury into the indefinite future.

To avoid such constitutional injuries, *Janus* requires government employers—not just union middlemen—to have clear and compelling evidence of an employee's affirmative consent before facilitating *any* payment to a union. The Court should take the opportunity here to bolster that requirement and correct the lower courts' efforts to dispense with it.

---

[9] Even members of this Court have exercised their right to resign in protest: Justice Benjamin Curtis resigned in the wake of the *Dred Scott* ruling.

III. The pervasive use of restrictive opt-out windows undermines *Janus* and must be curtailed.

One particularly troubling aspect of the decisions below is the lower courts' indifference to clever efforts to trap public-sector employees into union membership and the ongoing obligation to pay dues. Public employees should have the freedom to opt out of union membership and state-facilitated payroll deductions for union dues at will, at least where they have not entered a contractual obligation to pay a specified amount of dues.

In at least four of the consolidated cases here, the respective unions utilized restrictive opt-out windows, severely limiting when the Petitioners could opt out of union membership and dues deductions. Pet. at 5, 6, 8. Each of these resulted in the government employer deducting dues from the employees' paychecks for *months* after the employees had revoked their consent. *Id.* at 5–6, 8–9. This means that for all of those post-revocation payments, the government could not show clear and compelling evidence of affirmative consent, and Petitioners' rights were violated.

Importantly, these opt-out windows—at least in the cases of Petitioners Yates and Mendoza—were not included in the original authorization forms when they initially joined, but were included in the subsequently produced forged authorizations. *Id.* at 6, 8; *see also* App.60a (Yates' alleged authorization "could only be nullified during a 10-day window at the end of the

yearly period'). That the unions would attempt to insert this provision into forged authorizations suggests that they are aware that "clear and compelling evidence" of affirmative consent cannot be shown where a member has expressed a desire to revoke consent.

Such a scheme mirrors the kind of manipulation in which unions have frequently engaged, in violation of workers' constitutional rights. For example, in *Office & Professional Employees International Union, Local 29, AFL-CIO*, 331 N.L.R.B. 48 (2000), the union created a mechanism whereby workers could object to the spending of dues for political purposes—rules so complicated that they nullified the right to object. A worker had to specify exactly the amount of fees she believed were wrongly withheld, and what the money had been spent on—information most workers would find too difficult to obtain—and the union "treat[ed] the failure to [provide such information] . . . as a waiver of the right to challenge the expenditures." *Id*. at 49. The National Labor Relations Board found that this "simply place[d] too high a burden on the objector's exercise of her right to challenge the Union's figures." *Id*.

Likewise, in *Shea*, *supra*, the Fifth Circuit noted that the procedure created for objecting dissenters was intended to prevent them from vindicating their rights:

> It seems to us that the unduly cumbersome annual objection requirement is designed to prevent employees from exercising their constitutionally-based right of objection, and serves only to further the illegitimate interest

> of the [union] in collecting full dues from non-members who would not willingly pay more than the portion allocable to activities germane to collective bargaining.

154 F.3d at 515. The point is simple: even if it could be shown by clear and compelling evidence that employees freely consented in advance to a restrictive opt-out window, rules that make it "unduly cumbersome" to withdraw that consent—to resign and refuse to subsidize the union further—would render such consent essentially meaningless. It would be equivalent to what political scientists, describing when legitimately instituted governments take subsequent action to remain in power illegitimately, have jocularly called the principle of "one man, one vote, *one time.*" Tom G. Palmer, *Democracy and the Contest for Liberty*, 102 Nw. U. L. Rev. 443, 444 (2008).

Of course, insulating the union from the consequences of abrupt membership decline also further reduces a union's accountability to its membership.

Unfortunately, restrictive opt-out windows of myriad forms have become pervasive.[10] For example, in Tucson, Arizona, the Tucson Unified School District's various collective bargaining agreements contain annual opt-out deadlines or windows as narrow as two weeks in length. *See* Parker Jackson, *Goldwater Demands*

---

[10] To say nothing of opt-out windows' pernicious cousins, so-called "maintenance of membership" requirements. *See Savas*, 2022 WL 1262014 at *1–2 (upholding "maintenance of membership requirement").

Tucson Unified School District Stop Trapping Its Employees in Unions, Goldwater Institute (January 18, 2023).[11] The National Treasury Employees Union recently sought to convince the Federal Labor Relations Authority to adopt restrictive annual opt-out periods for all federal employees. *See* Parker Jackson, *Goldwater Tells Federal Agency to Protect Workers' Rights from Union Power Grab*, Goldwater Institute (January 25, 2023).[12] *See also* Petition at 19–20 (citing additional examples).

There's nothing new about such obstructionist tactics. In *Local 647, United Automobile Workers*, 197 N.L.R.B. 608 (1972), the union gave members a ten-day window in which they could resign—and that ten-day period was carefully timed to coincide with the Christmas holiday: only resignations presented between December 22 and 31 would be accepted. *Id*. at 609. And these were then subjected to a sixty-day "waiting period," so that resignations only became valid in March. *Id*.

The NLRB said this "amount[ed], in effect, to a denial to members of a voluntary method of severing their relationship with the Union." *Id*. *Accord Marlin Rockwell Corp. (Auto. Workers, Loc. 197) (AFL-CIO)*, 114 N.L.R.B. 553, 589 (1955) (same arrangement). *See also Loc. 58, Int'l Bhd. of Elec. Workers (IBEW),*

---

[11] https://www.goldwaterinstitute.org/goldwater-demands-tucson-unified-school-district-stop-trapping-its-employees-in-unions/.

[12] https://www.goldwaterinstitute.org/goldwater-tells-federal-agency-to-protect-workers-rights-from-union-power-grab/.

AFL-CIO v. NLRB, 888 F.3d 1313, 1317 (D.C. Cir. 2018) (union required members to resign in person and show picture identification to do so); *Debont v. City of Poway*, No. 98CV0502-K(LAB), 1998 WL 415844, at *2 (S.D. Cal. Apr. 14, 1998) (collective bargaining agreement that "required [plaintiff] to remain a member of the union for an extended period of time merely because at some point in the past, he chose to join the union" was unconstitutional); *McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp.2d 522, 527 (M.D. Pa. 2007) (where the contract "lock[ed] plaintiffs into union membership for the duration," so that "the only way plaintiffs can resign from the union is to leave their employment," the result was "a direct and deleterious impact on plaintiffs' rights under the First Amendment").

In short, restrictive opt-out windows designed to trap employees in unions are simply compelled association and compelled subsidization in disguise.

Unions could avoid at least some of the associational rights problems caused by restrictive opt-out windows simply by charging annual dues as a lump sum rather than asking to use the state's payroll system to spread dues out over the course of a year. Of course, that would put more scrutiny on the annual cost of membership, which is easily masked when broken down into monthly or biweekly increments. It would be much easier for a union—or, critically, the State—to show clear and compelling evidence of valid consent if only one payment were at issue and that payment was made prior to the revocation of consent. But when dues deductions are spread out over a long

period of time, it becomes difficult if not impossible to prove clear and compelling evidence of affirmative consent for each individual payment, particularly after such consent has been revoked by the employee. States should not be allowed to shirk away from their duty to ensure that worker consent is indeed knowing, intelligent, and voluntary before compelling payment.[13]

CONCLUSION

The taking of money from public employee paychecks based on forged dues deduction authorization forms is government-facilitated theft, and it results in compelled speech and compelled association. The deference given by California, Oregon, and Washington to union assertions regarding such forms cannot be reconciled with *Janus*'s clear and compelling evidence standard. And neither government employers nor the public-sector unions who collude with them in this mutually beneficial funding scheme are shielded from liability or constitutional scrutiny by a lack of state action.

[13] An employee's obligation to pay dues to the union—a private entity—is separate and apart from the authorization of state payroll deductions. If a state ceases to deduct union dues from an employee's paycheck, the employee remains free to contribute financially to the union by other means. And even if a union can prove a contractual entitlement to a specific employee's union dues, the state is not obligated by the First Amendment to enforce the contract through payroll deductions because the state is not constitutionally required to subsidize a union or any other private organization.

To address these proliferating injustices and to reaffirm the First Amendment's broad speech and associational rights protections, the Court should *grant* the petition.

Respectfully submitted,

TIMOTHY SANDEFUR*
PARKER JACKSON
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
**Counsel of Record*