No. 24-1305

IN THE
Supreme Court of the United States

MARCUS TODD,

Petitioner,

V.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 5,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER, AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

1. When a public-sector union gets the government to divert an employee's pay by stating that he consented to join the union, is it a state actor such that the "clear and compelling evidence" First Amendment standard of *Janus* applies?

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation organization that pursues strategic, precedent-setting cases to revitalize constitutional restraints on government power and protections for individual rights. LJC represented Mark Janus in his lawsuit to protect public-sector workers' right to freedom from forced union association, support, or speech. *See Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018).

LJC has represented public employees seeking to enforce the *Janus* requirement that public employees provide "affirmative consent" to waive their right before subsidizing a public sector union—the same protection Petitioner seeks in this petition. *See e.g., Ramon Baro v. Lake County Federation of Teachers, Local 504*, 57 F.4th 582 (7th Cir. 2023), *cert. denied* No. 22-1096 (Jun. 12, 2023); *O'Callaghan v. Napolitano*, No. 19-56271, 2022 U.S. App. LEXIS 11559 (9th Cir. Apr. 28, 2022), *cert. denied* No.22-219 (May 1, 2023); *Adams v. Teamsters Local 429*, No. 20-1824, 2022 U.S. App. LEXIS 1615 (3d Cir. Jan. 20, 2022), *cert. denied* No. 21-1372 (Oct. 3, 2022); *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), *cert. denied* No. 20-1603 (Nov. 1, 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), *cert. denied* No. 20-1606 (Nov. 1, 2021).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondent received notice of Amicus' intent to file this brief.

SUMMARY OF ARGUMENT

Janus v. AFSCME, 585 U.S. 878 (2018), held that laws allowing government employers to withhold agency fees from nonconsenting employees on behalf of public-sector unions violated those employees' First Amendment rights. This Court explained 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by clear and compelling evidence." *Id.* at 930 (citations omitted).

Yet, when government employees bring claims alleging that their employers withheld money from their paychecks on behalf of public-sector unions without the employees' affirmative consent, federal courts are ignoring *Janus*'s waiver requirement and holding either that *Janus* applies solely to its facts or that no state action exists because the union is at fault.

Here, Petitioner's union dues were withheld from his paychecks—without consent—by his government employer on behalf of a public-sector union pursuant to statutes that grant unions the power to certify whose wages must be deducted as dues. The unions are not required to provide evidence that employees provided consent—let alone affirmative consent—to these deductions. Nonetheless, the Eighth Circuit declined to apply First Amendment scrutiny because it held that a union is not a state actor.

The Eighth Circuit's holding is wrong. It is inconsistent with *Janus*, which ruled a union violated Mr. Janus's First Amendment rights when it acted with the government employer to withhold dues from his paycheck for the benefit of the union. It contradicts the rule that a "procedural scheme created by [a] statute" for the benefit of a private entity amounts to state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); *see also, Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found"). And it conflicts with the Seventh Circuit's holding that a union's conduct is state action when a state employer deducts fees from an employee's paycheck on behalf of the union, which then spends it on authorized labor-management activities pursuant to the collective bargaining agreement. *Janus v. AFSCME (Janus II)*, 942 F.3d 352, 361 (7th Cir. 2019).

State and local government employers, at the behest of unions, will continue to deduct union dues from employees regardless of whether employers have evidence that employees have provided affirmative consent to waive their right to not pay a union. By ignoring *Janus*, federal courts are allowing this to happen.

Unless this Court intervenes, thousands of state and local government employers across the country will continue to defy *Janus*. This petition should be granted to ensure that public employees' First Amendment right to choose whether to subsidize unions' political speech is protected.

ARGUMENT

I. Certiorari should be granted because the Eighth Circuit's holding contradicts *Janus* and creates a circuit split.

Under *Janus*, state action exists and the First Amendment is violated when laws allow government employers to withhold agency fees from nonconsenting employees on behalf of public-sector unions. 585 U.S. at 929-30.

A. State action exists because the structure of the Minnesota's laws are like the laws at issue in *Janus*.

Before the *Janus* decision, Illinois law allowed collective bargaining agreements to include "a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment" but not to exceed the amount of union member dues. *See Janus*, 585 U.S. at 887 (citing 5 ILCS 315/6(e)). Accordingly, AFSCME Council 31 entered into a collective bargaining agreement with the government, Mark Janus's employer, requiring nonmembers like Mr. Janus to pay agency fees. *Id*. at 888-89. This Court held that this arrangement constituted state action, and that the First Amendment applied.

However, the Eighth Circuit found that no state action existed in a substantially similar legal arrangement in Minnesota.

Indeed, Minnesota has statutes that grant unions exclusive control to decide from which employees the government employer must withhold dues. Minnesota

Statute § 179A.06, subd. 6 governs how public employers withhold dues on behalf of a public-sector union solely based on a list of employees provided to it by the union (no actual evidence of employee consent is required).

It was obvious that the Illinois law in *Janus* was state action—so obvious that this Court assumed it. It is the same in Minnesota.

B. The Eighth Circuit decision creates a circuit split with the Seventh Circuit.

The Eighth Circuit's decision at issue conflicts with the Seventh Circuit's decision in *Janus v. AFSCME (Janus II)*, 942 F.3d 352, 361 (7th Cir. 2019).

In *Janus II*, the Seventh Circuit held that a union is "a joint participant" with a public employer when the employer "deduct[s] fair-share fees from the employees' paychecks and transfer[s] that money to the union, which then spen[ds] it on authorized labor-management activities pursuant to the collective bargaining agreement." *Id.* "This is sufficient for the union's conduct to amount to state action." *Id.* Thus, the union was a proper § 1983 defendant. *Id.*

The *Janus II* union was a joint participant in the Illinois structure for withholding fair-share fees from employees' paychecks because it received the dues that the public employer withheld from employees on its behalf. That standard is met by the petitioning case. Indeed, Minnesota law similarly makes unions a "joint participant" when they receive funds withheld by the employer, which they spend on authorized labor management activities.

The Eighth Circuit's decision that no state action existed in this arrangement conflicts with the Seventh

Circuit's decision that found state action when a union receives money withheld by a public employer from employees on the union's behalf. This Court should grant the petition to resolve this circuit split and hold that the Seventh Circuit's decision is correct, reversing the Eighth Circuit's erroneous decision.

C. *Janus* sets the constitutional requirements for public employer wage withholding from employees on behalf of a union.

Janus held the First Amendment protects government employees from being coerced to financially support a public-sector union's political speech. *Janus*, 585 U.S. at 886.

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. at 930 (citations omitted).

Accordingly, *Janus* requires an employer to have more than mere consent—and certainly more than the union's unsupported claim that consent exists—from

an employee before withholding dues for the benefit of the union. Rather, before deducting dues, a public employer must have clear and compelling evidence that an employee has freely given affirmative consent for the employer to withhold money from the employee's paycheck. *Id*. Where a public employer's only evidence of an employee's consent is a mere assertion from the public-sector union, the employer does not have clear and compelling evidence of affirmative consent.

Further, a valid waiver of First Amendment rights requires clear and compelling evidence that the individual *knew* of his or her First Amendment rights and chose to waive them. *See id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) and *Curtis Publishing Co.*, 388 U.S. 130, 130 (1967), requiring knowledge of a constitutional right to waive it); *see also Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (for a waiver of constitutional rights to be effective "it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege"). Government employers cannot presume their employees know about their right to not contribute to a union. *Zerbst*, 304 U.S. at 465.

The systems established for withholding dues set forth in Minnesota law—which requires public employers to withhold dues from employees on nothing more than the union's say-so—cannot meet the *Janus* standard.

Therefore, the petition should be granted not only because the Eighth Circuit's ruling contradicts *Janus*, but because the Minnesota statutory scheme fails to meet the *Janus* constitutional requirements for withholding money from employees on behalf of a union.

II. This Court should grant certiorari to protect government employees from state-created procedural systems that benefit public-sector unions, while violating their constitutional rights.

"To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966); *see also Dennis v. Sparks,* 449 U.S. 24, 27 (1980) (a private party is a state actor if he is a "willful participant in joint action with the State or its agents."). Further, a "procedural scheme created by [a] statute" for the benefit of a private entity is the product of state action, and thus subject to constitutional restrains that may be properly addressed in a § 1983 action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

While the use of state sanctioned private remedies or procedures does not rise to the level of state action, "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486 (1988). And, where a government delegates state responsibilities to a private actor, that private actor is engaged in state action. *West v. Atkins*, 487 U.S. 42, 56 (1988).

In *West*, a state delegated its constitutional obligation to provide medical care to jailed prisoners to a private actor. This Court held, "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action

had he acted in a purely private capacity." *Id.* at 56 n.15 (quoting *Griffin v. Maryland*, 378 U.S. 130, 135 (1964)).

Here, Minnesota law requires public employers to withhold dues on behalf of public-sector unions from employees based purely on the unions' uncorroborated say-so. *See* Minn. Stat. § 179A.06, subd. 6. This system meets the standard for state action. Here, the unions are "willful participant[s] in joint activity with the State or its agents." *See Price*, 383 U.S. at 794. The public-sector unions on whose behalf the public employer withholds dues are also clearly "private parties mak[ing] use of state procedures with the overt, significant assistance of state officials." *Tulsa Professional Collection Services, Inc.*, 485 U.S. at 486. These laws are fairly characterized as "procedural scheme[s] created by . . . statute" for the benefit of a private entity. *See Lugar*, 457 U.S. at 941.

Indeed, the unions are so ingrained in the state-created dues withholding system that public employers are required to withhold dues from an employee at the *sole discretion and uncorroborated say-so* of the union. These laws make unions, rather than the employees themselves, the sole arbiter of which employees the public employer must withhold dues from. This delegation of government power constitutes state action—it is "irrelevant that [the unions] might have taken the same action . . . in a purely private capacity." *West*, 487 U.S. at 56 n.15 (quoting *Griffin*, 378 U.S. at 135).

Indeed, Minnesota law meets every metric set by this Court to determine whether state action exists.

CONCLUSION

Minnesota law allows public-sector unions to dictate to the government whose money must be withheld on the unions' behalf. The Eighth Circuit's decision that there is no state action in this arrangement contradicts *Janus*, and other long-established precedents. Moreover, it is contrary to the Seventh's Circuit's decision in *Janus II*, creating a circuit split. This Court should grant the petition and make clear that government systems providing the use of government power for the benefit of public-sector unions constitute state action and should be subject to constitutional restraints.

July 21, 2025

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