No. 20-1120

In The
Supreme Court of the United States

MELISSA BELGAU, ET AL.,

Petitioners,

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case due to its history of studying the political activity of public sector unions. Landmark has compiled instances of apparently unreported political activity by a national teachers' union and its state affiliates in referrals to the Internal Revenue Service and other federal and state administrative agencies.

Landmark urges this Court to grant the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court's attempt to protect the First Amendment rights of agency fee payers in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), ultimately proved

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[1] The parties consented to the filing of this brief. Counsel for *Amicus Curiae* provided notices to counsel for parties of its intent to file this brief on March 8, 2021. All parties consented on March 8, 2021. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae, its members, or its counsel* made a monetary contribution to its preparation or submission.

unworkable. Its vague standard still left agency fee payers vulnerable to abuse. After being forced to revisit the impingement of these workers' rights in a string of cases, the Court overturned *Abood* in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) to create a new, unambiguous standard. Fees could only be collected from workers if they affirmatively consented to pay. On notice that the clock was running out on *Abood*, many union-friendly states took steps to protect their allies before *Janus* was issued. Washington revised its collective bargaining agreement with Washington Federation of State Employees, AFSCME, Council 28 ("WFSE") to honor new deduction cards between the union and union members. The cards irrevocably locked in fees from union members, even if they later resigned their membership, until a short window at the end of the contract. The Ninth Circuit's decision upholding WFSE's attempt to deduct fees through the state of Washington from former union members contravenes the holding in *Janus* and impinges workers' rights.

ARGUMENT

I. The Ninth Circuit's decision improperly allowed Washington and the WFSE to extract funds from nonunion members in contravention of *Janus v. AFSCME, Council 31*.

In *Janus*, the Court took the rare step of overruling precedent to affirm the First Amendment rights of an oft-disfavored group: workers who don't want to

associate with or support a union. The prior standard created in *Abood* to protect agency fee payers from being compelled to support union activity that was not germane to collective bargaining had led to "practical problems and abuse." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018). In *Janus*, the Court noted that *Abood* had "a vagueness problem," that its ruling was "unworkable," and the line that had taken the Court "over 40 years to draw" had no supporters and had proved "impossible to draw with precision." Id. at 2481-2482. A long line of cases after *Abood*—where public-sector unions and their state supporters impinged the rights of dissenting workers—gave warning of the Court's growing dissatisfaction with *Abood*'s underlying analysis and holding. *See Knox v. Service Employees International Union*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016).

So, the Court spoke plainly with an unambiguous standard for both states *and* public-section unions: "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). "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." Id. Consent was further clarified. "By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." Id. Instead, "to be effective, the waiver must be freely given

and shown by 'clear and compelling' evidence." Id. (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)). The Court concluded, "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." Id.

Before the opinion in *Janus* was issued, the state of Washington and the Washington Federation of State Employees, AFSCME, Council 28 ("WFSE") took a dramatic new step to lock in agency fees by contract. They amended the 2017-2019 Collective Bargaining Agreement ("CBA") that covered state employees through a Memorandum of Understanding ("MOU"). Pet. App. 7a-8a, 74a-75a. Under the MOU, Washington was required to "honor the terms and conditions" of new payroll deduction authorization cards. Id. at 74a, 83a-84a, 86a. In tiny print, these new cards placed restrictions on when employees would be allowed to stop having fees to WFSE deducted by the state from their paychecks. Id. The new cards permitted employees to resign their union membership at any time but required them to keep paying agency fees until a narrow, ten-day escape period occurring only once a year. Id. at 83a. Unless an objection was made during that period, the cards would renew automatically. Id. Even after *Janus*, the state and the WFSE amended the CBA once again but continued to restrict the exercise of *Janus* rights. Id. at 66a-73a, 86a. Through their maneuvering, the WFSE and Washington ensured their workers were in a worse position than agency fee payers had been before *Janus*. Now, if workers who were union members

decided to leave the union, instead of merely being liable for agency fees, they would be locked in and liable for full union dues until the short window at the end of the contract.

Despite a clear standard set forth after a lengthy discussion criticizing amorphous judicial standards, the Ninth Circuit Court of Appeals ruled against Petitioners. *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). *Janus*, in the circuit court's view, applied to the extraction of fees from nonmembers and not dues from union members. The circuit court denied the Section 1983 claim against the WFSE for lacking the necessary threshold of state action, and denied the First Amendment claim against Washington because the workers, by virtue of their union membership, consented to the deduction of union dues. "At bottom, Washington's role was to enforce a private agreement." *Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020). As explained below, the circuit court's conclusions about the Section 1983 and First Amendment claims were wrong.

A. Washington and the WFSE were sufficiently linked to establish state action.

The circuit court applied the two-prong test set forth in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) to determine whether the union's conduct qualified as state action. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is

responsible." Id. at 937. Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. The circuit court ended the citation to the case here, *Belgau*, 975 F.3d at 947, but the opinion in *Lugar* continued to explain the second prong. "This may be because he is a state official, *because he has acted together with or has obtained significant aid from state officials*, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937 (emphasis added). In a footnote, the circuit court claimed that no other tests articulated by the Supreme Court applied, including the nexus test. *Belgau*, 975 F.3d at 947, n. 2.

Professors William Baude and Eugene Volokh anticipated some of the issues for unions after *Janus* in *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 201-203 (2018) and concluded it was likely unions could be sued under 42 U.S.C. § 1983. *But see* Erwin Chemerinsky & Catherine L. Fisk, *Response: Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 Harv. L. Rev. F. 42 (Nov. 2018). Professors Baude and Volokh laid out three steps for union liability. First, the Court's decisions have retroactive application under *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). Second, they argued that the private debt collectors in *Lugar* appear analogous to unions collecting fees. "The state statutes authorizing the collection of agency fees are unconstitutional state action, just as in *Lugar*. And the unions 'invoked the aid of state officials' to collect those fees, just as in *Lugar*." Baude & Volokh, at 201 (footnotes

omitted). Third, unions are not granted the qualified immunity defense available in Section 1983 cases for government defendants. Id. at 202.

This theory of liability is more compelling than the circuit court's analysis. The circuit court's portrayal of the state as a mere enforcer of a private contract does not correspond with the facts. Rather than being in a one-time, arms-length relationship, there was an ongoing nexus between them. Washington granted collective bargaining rights and exclusive representation to the WFSE, thereby forcing Petitioners to accept the WFSE to speak on their behalf as their representative during contract negotiations. Washington and the WFSE were parties to a contract which required the state to honor the terms and conditions of the union's payroll deduction agreements with the Petitioners. Under the statute in effect in the immediate aftermath of *Janus*, Washington law *directed* the state of Washington to collect the dues on behalf of WFSE from union members who authorized the deduction. RCW 41.80.100(3)(a). The ties between the union and the state were stronger than the ties between the creditor and sheriff in *Lugar*. The circuit court erred by ruling that the threshold of state action had not been met in the Section 1983 claim against the union.

B. The union contract did not meet *Janus*'s requirements for a clear and knowing consent to the payment of fees.

The circuit court regarded the Petitioners' claim against the state as one based on contract and not the

First Amendment. *Belgau v. Inslee*, 975 F.3d at 950. The Petitioners, they noted, were not coerced to sign the membership cards and they voluntarily agreed to have union dues deducted from their payrolls. Id. The circuit court dismissed the argument that the *Janus* Court's emphatic discussion of waiver requirements applied to the Petitioners. "The [*Janus*] Court discussed constitutional waiver because it concluded that nonmembers' First Amendment right had been infringed, and in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." Id. at 952.

Yet the retroactive application of Supreme Court precedent under *Harper* undercuts the circuit court's view. The workers who became union members and signed authorizations for payroll deductions before the Court's ruling in *Janus* could not have given true consent if they were unaware of their rights. Certainly, the Petitioners withdrew their consent when they resigned from the union in the wake of *Janus*. To hold former members to a contract that impinges their First Amendment rights after the *Janus* Court so vehemently denounced the compulsion of speech does not make sense.

Holding the workers to the contract after they resign from the union until a short escape window is met is hard to justify. Changing payroll deductions does not impose so heavy an administrative burden that it can only be done a few weeks a year. News reports also indicate that union leadership across the country and

labor-friendly states were aware that *Janus* was coming beforehand. *See*, *e.g.*, Alana Semuels, *Is This the End of Public-Sector Unions in America*?, The Atlantic, June 27, 2018. The short escape window imposed on the Petitioners in tiny print appears to be nothing more than a way to maximize dues out of unwitting workers. It is the type of abuse that *Janus* was intended to prevent.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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