No. 19-35137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELISSA BELGAU, ET AL.,

Appellants / Petitioners,

v.

JAY ROBERT INSLEE,
GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Appellees / Respondents.

On Appeal from the United States District Court
for the Western District of Washington
No.: 3:18-cv-05620
Hon. Robert J. Bryan

BRIEF OF MARK JANUS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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QUESTIONS PRESENTED

The Supreme Court in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018) held that states and unions violate the First Amendment if they deduct and collect payments for union speech from employees without clear and compelling evidence the employees waived their First Amendment right not to pay for union speech. The questions presented are:

1. Does the panel's holding that states and unions do not need evidence of a constitutional waiver to take payments for union speech from union members conflict with *Janus*?

2. Does the panel's holding that states and unions can seize payments from objecting, nonmember employees until a 10-day escape period is satisfied conflict with *Janus*?

3. Does the panel's holding that unions are not state actors when they jointly act with states to deduct and collect union dues from employees' wages conflict with *Janus*?

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Counsel for Janus secured permission from counsel for Plaintiffs and Defendants to file this brief. *See* Fed. R. App. P. 29(a)(2). Therefore, no motion for leave to file accompanies this brief. *See* Cir. Rule 29-2(a).

No counsel for any party authored any part of this brief, and no person or entity other than counsel for Amicus funded its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

This brief was prepared in Microsoft Word using Century Schoolbook font, set to size 14. The body of this brief, including footnotes, contains 3,015 words. *See* Fed. R. App. P. 32(g)(1). The limit for an amicus brief regarding a petition for rehearing en banc is 4,200. Cir. R. 29-2(c)(2).

/s/ William L. Messenger
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INTERESTS OF THE *AMICUS CURIAE*

Mark Janus is the former Illinois public employee whose First Amendment right to not pay for union speech was vindicated by the Supreme Court in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). Janus also was the appellant in *Janus v. AFSCME, Council 31 (Janus II)*, 942 F.3d 352, 361 (7th Cir. 2019), *cert. petition pending*, No. 19-1104, wherein the Seventh Circuit held — contrary to the panel opinion here — that a union is a state actor when it acts jointly with a state to take monies from employees for its expressive activities. Mark Janus has an interest in this case because the panel opinion undermines the important First Amendment freedoms the Supreme Court recognized in his case.

Janus files this brief, with the consent of all parties, pursuant to Federal Rule of Appellate Procedure and Circuit Rule 29-2.

INTRODUCTION & SUMMARY OF ARGUMENT

The Supreme Court in *Janus* held that the First Amendment guarantees public employees a right not to subsidize a union and its speech. 138 S. Ct. at 2486. To protect these rights, the Court held that public employers cannot deduct, and unions cannot collect, payments for union speech from employees without clear and compelling evidence the employees waived their First Amendment right not to pay for union speech. *Id.*

The panel opinion guts the Supreme Court's holding and sanctions onerous restrictions on when employees can exercise their constitutional rights. The panel held that states do not need evidence of a constitutional waiver to seize union dues from employees, but that a mere union membership contract will suffice. *Belgau v. Inslee*, No. 19-35137 (9th Cir. Sept. 16, 2020), slip opinion at 20. The panel further held that unions that act in concert with states to take union dues from employees are not even state actors subject to First Amendment strictures. *Id.* at 14. The panel ultimately found it is constitutional for a state and a union to continue

seize payments for union speech from objecting, nonmember employees until they satisfy a 10-day annual escape period. *Id*. at 20.

The Court should rehear this case *en banc* because the panel opinion cannot be reconciled with *Janus*. Membership in a union is not a substitute for the constitutional waiver the Supreme Court held is required for the government to take monies for union speech from employees. Unions plainly are constitutionally responsible for their role in extracting payments from employees, as the Supreme Court held that "States and *public-sector unions* may no longer extract agency fees from nonconsenting employees." 138 S. Ct. at 2486 (emphasis added).[1] The Supreme Court in *Janus* never would have countenanced that states and public-sector unions could prohibit employees from exercising their First Amendment right to not subsidize union speech for 355–56 days of every year, and

[1] The panel's holding on state action also conflicts with the Seventh Circuit's holding in *Janus II* and with a recent decision from the Third Circuit, which assumed without deciding that unions are state actors in these circumstances. *Diamond v. Pa. State Educ. Ass'n*, Nos. 19-2812, 19-3906, 2020 U.S. App. LEXIS 27475, at *13 n.2 (3d Cir. Aug. 28, 2020) (Rendell, J., lead opinion); *id*. at *36–37 (Fisher, J., concurring); *id*. at *53 (Phipps, J., dissenting)

continue to extract payments from nonconsenting employees until a 10-day escape period is satisfied. The Court should rehear this case to bring its case law back in line with controlling Supreme Court precedent.

ARGUMENT

I. The panel's conclusion that states and unions can seize union dues from objecting, nonmember employees without proof they waived their First Amendment rights conflicts with the Supreme Court's holding in *Janus*.

The Supreme Court in *Janus* explained that payments to a union could be deducted from a public employee's wages only if that employee "affirmatively consents" to waive his or her right to not pay a union:

> 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.

Janus, 138 S. Ct. at 2486 (citations omitted). This waiver requirement makes sense. Given that individuals have a First Amendment right not

to pay for union speech, it follows that individuals must waive that right for states to take payments from them for union speech.[2]

This Court has held "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." *Leonard v. J.E. Clark,* 12 F.3d 885, 889 (9th Cir. 1994). Even where these prerequisites are satisfied, a waiver is unenforceable "'if the interest in its enforcement is out-weighed in the circumstances by a public policy harmed by enforcement of the agreement.'" *Id.* at 890 (quoting *Davies v. Grossmont Union Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991)).

The panel held that the waiver analysis *Janus* requires need not be conducted when a state and union take union dues from individuals who signed union membership contracts. Slip opinion at 17. A union membership contract is not equivalent to, or a substitute for, clear and compelling

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[2] At least three state attorney generals have recognized that *Janus* requires evidence of a waiver for a state to take union payments from employees' wages. Alaska Atty. Gen. Op., at *5 (Aug. 27, 2019) (2019 ALAS. AG LEXIS 5); Indiana Atty. Gen. Op. 2020-5, at *3-4 (June 17, 2020) (2020 IND. AG LEXIS 14); Texas Atty. Gen. Op. KP-0310, at *2-3 (May 31, 2020) (2020 TEX. AG LEXIS 89).

evidence of a knowing, voluntary and intelligent waiver of First Amendment rights. An individual's decision to sign a union membership agreement does not in itself prove (1) she knew of her First Amendment right to not pay for union speech; (2) intelligently decided to waive her right; or (3) voluntarily waived that right.

Ms. Belgau's situation proves the point. When she signed a dues deduction form, she did not know she had a First Amendment right to not subsidize the WFSE and its speech. Indeed, *Janus* had yet to be decided. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144–45 (1967) (holding that a party could not waive a First Amendment right before it was recognized by the Court). Consequently, it cannot be said that Ms. Belgau intelligently chose to waive her constitutional rights. Nor can it be said that she voluntarily consented to subsidize the WFSE because, at the time, she was required to subsidize the WFSE under Washington's agency fee statute. *See* RCW Rev. Code Wash. (ARCW) § 41.59.060 (v.2017).

The panel reasoned that union membership obviates the need for a waiver analysis because union membership shows the employee consented to dues deductions and is thus not being compelled to subsidize the union. Slip opinion at 17. But *Janus* requires clear and compelling evidence of a waiver *to prove* employees affirmatively consent to dues deduction. 138 S. Ct. at 2486. Without such evidence of a waiver, affirmative consent has not been proven under *Janus*. The notion that proof of a waiver is not needed if employees consented to dues deduction is logically impossible — the former is an element of the latter.

Most glaringly, the panel ignored the fact that the Appellant employees in this case had union dues seized from them *after* they resigned their membership and objected to dues deductions. Even under a cramped interpretation of *Janus* in which only nonmembers must waive their First Amendment rights for union payments to be taken from them, a waiver analysis should have been conducted here. Absent proof the Appellant

employees waived their rights under *Janus*, the State and WFSE's seizure of union dues from them over their objections and at times in which they were nonmembers certainly violated their First Amendment rights.

The panel's holding that states and unions do not need proof of waiver even to take union dues from objecting, nonmember employees effectively erases *Janus'* waiver requirement. This, in turn, opens the door to states and unions to imposing onerous restrictions on when and how employees can exercise their rights under *Janus*. The panel here upheld a policy under which employees are prohibited from exercising their First Amendment right to stop paying for union speech for 355–56 days of every year.

These types of escape-period restrictions significantly abridge fundamental speech and associational rights guaranteed by the First Amendment. In *Janus*, the Supreme Court reiterated that "'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" 138 S. Ct. at 2463 (quoting *West Virginia Bd. of Educ. v.*

Barnette, 319 U.S. 624, 642 (1943)) (emphasis omitted). The Court recognized that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command," and that "compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns." *Id*. at 2463–64. "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*. at 2464 (quoting A Bill for Establishing Religious Freedom, 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)). The sole effect of state-enforced escape period restrictions is to compel employees who no longer want to contribute money to support union speech — or who never freely chose to do so in the first place — to subsidize that speech until they give notice during a short escape period.

The Court would never tolerate such a draconian restriction on First Amendment rights in other contexts. For example, *Janus* found an individual subsidizing a public sector union to be comparable to subsidizing a political party, because both entities engage in speech on matters of

political and public concern. 138 S. Ct. at 2484. This Court would not permit the State of Washington to continue to seize contributions for a favored political party from dissenting employees who object to those deductions outside of an arbitrary 10-day period once per year.

Janus also found "measures compelling speech at least as threatening" to constitutional freedoms as measures that restrict speech, if not more so because "individuals are coerced into betraying their convictions." *Id.* at 2464. The courts would not countenance a state restricting individuals from speaking about union or public affairs for all but ten days of each year. For states to compel individuals to subsidize union speech concerning public affairs for as much as a full calendar year, with just a 10-day opt-out window for the next year, is an equally, if not more so, egregious violation of their First Amendment rights.

The panel's decision that states and unions do not need clear and compelling evidence that employees waived their First Amendment rights to take payments for union speech from them — even over the employees' objections and after they resign their union membership — conflicts with

Janus and undermines the employee rights recognized in that case. The Court should vacate the panel's decision and rehear the case *en banc*.

II. The panel's holding that unions are not state actors conflicts with *Janus* and *Janus II*.

The Supreme Court has "consistently held 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' for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941, (1982); *accord Copelan v. Croasmun*, 84 F. App'x 762, 763-64 (9th Cir. 2003). The panel's conclusion that unions acting jointly with states to seize monies from dissenting employees' wages are not state actors is inconsistent with the well-established principle.

The conclusion is inconsistent with *Janus* itself. *Janus* involved a First Amendment claim against a union (AFSCME) that was acting in concert with a state (Illinois) to seize union fees from employees' wages. 138 S. Ct. at 2486. The Supreme Court held that both the state and the union violated employees' First Amendment rights by seizing union fees from employees pursuant to this law. *Id.*

On remand in *Janus II*, the Seventh Circuit made explicit what was a necessary predicate for the Supreme Court's decision: that there is state action when a state "deduct[s] fair-share fees from the employees' paychecks and transfer[s] that money to the union . . . ." 942 F.3d 352, 361 (7th Cir. 2019). The Seventh Circuit recognized that union defendant is a state actor under the joint participant doctrine. 942 F.3d at 361. The Court found it "sufficient for the union's conduct to amount to state action" because 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." *Id.*

The Seventh Court reached a similar conclusion years earlier in *Hudson v. Chicago Teachers Union Local No. 1*, where it held:

> 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.

743 F.2d 1187, 1191 (7th Cir. 1984).[3]

The panel's state-action holding cannot be reconciled with *Janus*, *Janus II*, or *Hudson*. Nor can it be reconciled with the body of case law finding state action to be present in cases concerning state procedures for garnishing monies or property from individuals. *See Lugar*, 457 U.S. at 941 (addressing state procedure for attaching property); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (addressing state garnishment of bank account); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (addressing state garnishment of employees' wages); *Jackson v. Galan*, 868 F.2d 165, 167–68 (5th Cir. 1989) (same); *Copelan*, 84 F. App'x at 763 (addressing state assistance to execute writ for property).

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[3] A number of other district courts have found state action in similar circumstances. *See Grossman v. Haw. Gov't Employees Ass'n/AFSCME Local 152*, 2020 WL 515816 (D. Haw., Jan. 31, 2020); *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912 (E.D. Cal, Dec. 20, 2019); *LaSpina v. SEIU Pennsylvania State Council*, 2019 WL 4750423 (M.D. Pa., Sept. 30, 2019); *Kabler v. United Food & Commercial Workers Union*, No. 1:19-CV-395, 2019 U.S. Dist. LEXIS 214423, at *41 (M.D. Pa. Dec. 11, 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D.Alaska 2019); and *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 6330686 (C.D. Cal., Sept. 30, 2019).

The panel tries to distinguish *Janus II* by saying that case concerned agency fees, while this case concerns union dues. Slip opinion at 14, n.3. It is a distinction without a difference. The state action is the same in either context: a state and union acting jointly together to deduct and collect payments for a union from employees. Whether these payments are called agency fees or union dues makes no difference. As the Supreme Court stated in *Janus*: "[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." 138 S. Ct. at 2486 (emphasis added).

The panel's mischaracterization of the state's role in deducting union dues from dissenting employees' wages as a mere "ministerial act" also misses the mark. Slip opinion at 12. There is nothing "ministerial" about a state systematically deducting millions in union dues from tens of thousands of state employees throughout the year.

In *Jackson*, the Fifth Circuit rejected an argument that a public official was "not a state actor" because his "garnishment of appellee's wages

was a ministerial duty which he was required to perform under state law." 868 F.2d at 167–68. The court recognized that, "[s]tate officials acting pursuant to a state statute are acting under color of state law for purposes of § 1983, regardless of whether state law gave them any discretion in carrying out their duties." *Id.* at 168.

The facts of this case are nothing like those in which the Court determined that government's role was ministerial. In *Gaskell v. Weir*, 10 F.3d 626, 628 (9th Cir. 1993), the Court found the "ministerial act of accepting and filing" settlement papers did not create a significant governmental nexus between a court clerk and two disputatious private parties. In *Seattle Fishing Servs. Ltd. Liab. Co. v. Bergen Indus. & Fishing Co.*, 242 F. App'x 436, 438 (9th Cir. 2007), the Court found no state action when a court clerk issued a writ of garnishment. The situations in *Gaskell* and *Seattle Fishing Services* are a very far cry from the situation here, where a union enters in an agreement with a state to have that state systemat-

ically take union dues from the wages of thousands of employees, including dissenting employees who object to those deductions outside of a 10-day escape period.

The panel mischaracterizes the dues deduction authorizations that prescribe that escape period as being an agreement between "private" parties — i.e., between the union and employees. Slip opinion at 12. To the contrary, *the State* is a party to the authorizations. "[A] dues-checkoff authorization is a contract between an employee and the employer," *see NLRB v. U.S. Postal Service*, 827 F.2d 548, 554 (9th Cir. 1987), which here is the State of Washington. *Accord Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018). The dues deduction forms in this case state that they "authorize and direct my Employer to deduct from my pay . . ." Exs. 4-17 (ER 34-71). The State is a party — indeed is a necessary party — to the forms that impose a 10-day escape period on when employees can stop State deductions of union dues.

Even if an agreement with the State of Washington that purports to authorize that State to deduct union dues from State employees' wages

could be called a "private" agreement — which it cannot — the proposition still would not defeat a finding of state action because the State enforces that agreement. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (holding a promissory estoppel action to enforce a private confidentiality contract involved a "state action."); *cf. Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (analyzing whether private agreement in which party purported to waive due process rights constituted a constitutional waiver).

There is an overwhelming degree of state action present here: a state and union are jointly taking monies for union speech from state employees pursuant to a state statute. This is the state action the Supreme Court held violates the First Amendment absent clear and compelling evidence that employees waived their rights and consented to this taking. *Janus*, 138 S. Ct. at 2486. The panel's state action holding conflicts with *Janus* and *Janus II*. The Court should reconsider that holding *en banc*.

CONCLUSION

The panel's ruling conflicts with both the Supreme Court's decision in *Janus* and the Seventh Circuit's decision in *Janus II*. The petition to re-hear the case *en banc* should be granted.

Respectfully submitted, October 12, 2020

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