No. 23-1111

IN THE

Supreme Court of the United States

GLENN LAIRD,

Petitioner,

v.

UNITED TEACHERS LOS ANGELES, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

In essence, the arguments in the Respondents briefing can best be summarized as: after the *Janus* decision, public employees enjoy less constitutional protection than they did before it. This argument blinks reality, especially given the facts underlying Glenn Laird's Petition.

Before he signed it, Laird specifically struck out language on his union card that could arguably have bound him to pay dues after he resigned his membership. Pet. App. 9a-10a. When UTLA insisted on taking his money past that point, using the force of state law and access to the District's payroll deduction system, Laird also affirmatively disputed the union's ability to continue taking his money to fund its political speech. *Id.* No party to this litigation disputes these facts. There is also no real argument Laird affirmatively consented or waived his First Amendment rights. This fact is also undisputed.

Nevertheless, the Respondents maintain that Laird's claims that his speech was compelled warrant no constitutional scrutiny. Forcing Laird to subsidize a campaign to "defund the police" for seven months without his affirmative consent, through the force of state law and a government operated payroll deduction system, and in direct violation of his most deeply held beliefs about student and teacher safety, was simply par for the course. This argument, and the three specific justifications the Respondents offer to deny Laird's Petition, do not hold water.

First, they insist the decision below is not appropriate for review because it was unpublished and thus non-precedential, and the splits of authority identified by Laird are illusory. Both contentions are

wrong. The underlying decision was based on precedential Ninth Circuit cases which serve as the primary authorities in that jurisdiction to deny objecting employees the ability to bring compelled speech claims. These cases, *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert denied*, 141 S. Ct. 2795 (2021) and *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, *cert. denied*, 143 S. Ct. 749 (2023), are in clear conflict with this Court and other circuits.

Second, the Respondents stray into the merits of Laird's case in arguing that the Petition calls for a "heightened scrutiny" standard applicable to union contracts with public employees. Maintaining that Laird is incorrect on this strawman, they proceed to argue he loses his claims under a basic contract standard, and thus the Petition should be denied. But not only does Laird ask only for a basic application of the *Janus* waiver standard, the Respondents conflate contract law with First Amendment waiver requirements. Requiring affirmative consent does not require "heightened scrutiny." It only requires application of well-established law.

Third, the Respondents suggest granting the Petition will adversely affect judicial administrability by constitutionalizing "run-of-the-mill" labor disputes. In reality, the courthouse doors have been open to public employees alleging union compelled speech injuries for over forty years without disruption. The only result has been increased compliance with the Constitution. If a state's "run of the mill" labor law violates the First Amendment, then these "disputes" belong in federal court.

The Petition should be granted.

I. THIS PETITION OFFERS AN IDEAL OPPORTUNITY TO ADDRESS NINTH CIRCUIT PRECEDENTS CONFLICTING WITH THIS COURT AND OTHER CIRCUITS

A. The opinion below directly relies upon precedential Ninth Circuit decisions.

Belgau v. Inslee, 975 F.3d 940, 946-49 (9th Cir. 2020), *cert denied*, 141 S. Ct. 2795 (2021), held that when the government is simply enforcing binding private agreements for dues deductions, there is no state action, rejecting an argument that the language in the membership and dues authorization card must meet constitutional waiver requirements. But the Ninth Circuit and district courts within its jurisdiction have since extended *Belgau* beyond its original mooring. Under this understanding, as exemplified in the underlying opinion, unions can take an employee's wages for political speech using state law, even without authorization and over the employee's objections, so long as they claim to have done so pursuant to an authorization. *See, e.g.*, Pet. App. 45a. The practice in the Ninth Circuit is that as long as some authorization exists, no matter the terms of the authorization, it equates with or supersedes the affirmative consent requirement of *Janus*.

Wright v. Serv. Emps. Int'l Union Loc. 503, 48 F.4th 1112, 1121-25, *cert. denied*, 143 S. Ct. 749 (2023), held that even when a union acts intentionally to compel speech using state law, such as forging an authorization, such action constitutes a "misuse" putting the union beyond the bounds of Section 1983. This conclusion is in conflict with language from this Court's recent unanimous decision in *Lindke v. Freed*, that the "[m]isuse of power, possessed by virtue of state

law," constitutes state action. 601 U.S. 187, 199 (2024) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Instead, as long established, the minimum required to establish state action is the presence of a private actor "possessed of state authority," who "purport[ed] to act under that authority," and a resulting constitutional violation. *Griffin v. Maryland*, 378 U.S. 130, 135 (1964); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("[T]he claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.").

The Ninth Circuit has effectively abrogated the holding in *Janus v. AFSCME*: 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. 878, 930 (2018). Since *Belgau* and *Wright*, the Ninth Circuit has not issued a single published opinion in *Janus*-related challenges, notwithstanding those challenges presenting factual allegations not present in *Belgau* or *Wright*, and based on legal arguments not presented by the objecting employees. The Ninth Circuit's evasion of its responsibility to protect public employees from constitutional injuries, specifically based on *Belgau* and *Wright*, justify an exercise of this Court's supervisory authority.

B. The petition identifies and is based on real splits of authority.

1. The Ninth Circuit's precedents conflict with this Court and other circuits regarding when employees' compelled speech claims receive constitutional scrutiny.

Whether called "agency fees," "dues deductions," or something else entirely, what matters is the lack of affirmative consent by employees, not labels the unions affix to their unconstitutional conduct. The Third Circuit in *Lutter v. JNESO* applied *Janus* in accordance with this understanding. In *Lutter*, the court recognized that in *Janus* this Court was concerned with the compelled speech of nonmembers generally, without drawing an explicit distinction between those who were never members and those who were previously consenting members and then became nonmembers. 86 F.4th 111, 127 (3d Cir. 2023) (formerly consenting employee could bring compelled speech claims based on *Janus*). The fact that Mark Janus was an agency fee payer, and the statute in question explicitly compelled his speech, did not affect the constitutional scrutiny this Court applied to AFSCME's deductions. What was key to the Court's analysis in *Janus* was compulsion. *Janus*, 585 U.S. at 930. The same was true in *Lutter*.

But according to the Respondents, based on *Belgau* and *Wright*, if a public employee signs a membership and payroll deduction card at some point in the past, they are trapped until unions say otherwise. No matter the terms of the employee's authorization, whether that employee has rightfully changed their mind, *see Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 315 (2012) (noting that the choice to

support a union's political activities may change "as a result of unexpected developments" in the union's political advocacy), and whether the employee actively opposes the speech being compelled. Once authorized, always authorized. Even in a case like this one, in which there is no "private agreement" or "contract" authorizing continuing dues deductions over Laird's objections. This conclusion, based directly on *Belgau* and *Wright*, conflicts with *Janus* and *Lutter*.

2. The Ninth Circuit's precedents conflict with *Lindke* and other circuits regarding when unions act under "color of law" for purposes of Section 1983.

Three federal circuits have followed this Court's clear understanding of state action in the context of involuntary union dues deductions. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) (*Janus II*); *Littler v. Ohio Assoc. of Pub. School Employees*, 88 F.4th 1176 (6th Cir. 2023) (citing *Janus II*, 942 F.3d at 361); *Lutter*, 86 F.4th at 127 (citing *Lugar,* 457 U.S. at 933). These cases recognize that "[t]he distinction between private conduct and state action turns on substance, not labels." *Lindke*, 601 U.S. at 197 (unanimous decision) (making the state action determination requires a "close look" at the conduct in question). In other words, it is not enough in this case that UTLA calls itself a private entity enforcing a non-existent contract, if it is in fact using state law to deprive Laird of his First Amendment rights.

The Ninth Circuit has not only refused to find state action in cases like this one, where state action is clearly operable, but has crafted a "misuse" of state law exception directly at odds with this Court's guidance.

See, e.g., *Wright*, 48 F.4th at 1121- 25.[1] As discussed above, this Court has subsequently unanimously clarified that simply alleging that you "misused" the authority the State grants you is not an excuse. *Lindke*, 601 U.S. at 200. All that matters is that the authority alleged to have caused the rights violation was possessed by virtue of state law. *Id.* The Ninth Circuit's refusal to recognize this principle, both in this case, and in rejecting attempts to raise the *Lindke* state action clarification *en banc*, *see, e.g.*, Or. Denying Reh'g En Banc, *Parde v. SEIU, Local 721*, No. 23-55021 (9th Cir., June 18, 2024) (cert petition pending), conflicts with this Court and three other circuits. The Petition should be granted.

II. THE RESPONDENTS AGREE WITH LAIRD, BUT RAISE OBJECTIONS TO STRAWMEN

A. The Petition asks for application of the *Janus* waiver standard.

In an attempt to avoid the splits of authority the Petition identifies the Respondents stray into the merits of Laird's claims and suggest that he is asking for application of a new "heightened waiver" standard applicable to union contracts with employees. This is false. The standard the Court laid down in *Janus* is simple, easy to understand, and clear.

A state-created procedure through which a union can certify union deductions from a given employee's lawfully earned wages without affirmative consent is unconstitutional. *Janus*, 585 U.S. at 930. No kind of union deduction can be made from a nonmember's pay

[1] And the Eighth Circuit has only worsened the circuit split in adopting the Ninth Circuit's rationale. *See Hoekman v. Education Minnesota*, 41 F.4th 969, 978 (8th Cir. 2022).

unless the employee first waives their First Amendment right to refuse, through affirmative consent. *Id.* This waiver cannot be presumed, but must instead be demonstrated through "clear and compelling evidence." *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Knox*, 567 U.S. at 312-13). In essence, this means the waiver must be knowing, intelligent, and voluntary. *Id.* (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999)). The facts here utterly fail this standard. Not only did Laird modify his UTLA card before he signed it, thereby actively evincing opposition to any restriction on his ability to end the deductions, but actively disputed the union's ability to continue taking his money. Pet. App. 9a-10a.

Laird asks only for this Court to clarify that it meant what it said in *Janus*, or even *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The Petition should be granted.

B. Under any waiver standard, Laird should prevail.

Janus is clear. Taking full unions dues from Laird's wages without affirmative consent to fund UTLA's speech was a First Amendment injury. The only way for the Respondents to avoid this conclusion is by showing that Laird did supply some form of affirmative consent. Given that they cannot do so, the Respondents attempt to substitute a lesser contract standard for the waiver requirement this Court set forth in *Janus*. The Court should reject this attempted bait-and-switch.

To be enforceable, a constitutional 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). By crossing out the restrictive language in his union card before he signed it, there is no argument that Laird meets any waiver standard, whether constitutional or contractual. Unions have no constitutional entitlement to collect monies from dissenting employees. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 184-85 (2007) ("I]t is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees."). Union financial self-interests in collecting monies from dissenting employees do not outweigh employees' First Amendment rights. *Knox*, 567 U.S. at 321. The Respondents know this, and the Court should grant the Petition to affirm it.

III. GRANTING THE PETITION WILL RESULT ONLY IN ENFORCEMENT OF THE FIRST AMENDMENT

The Ninth Circuit's gutting of *Janus*' affirmative consent requirement has real consequences, and the constitutional stakes are of the highest magnitude. This is true not only for Laird, but for employees across the Ninth Circuit with petitions for writs of certiorari currently pending before this Court.[2] These cases

[2] *Bourque v. Engineers & Architects Assoc.*, No 24-2 (S. Ct.) (employee never authorized deductions or joined union, yet union compelled speech); *Hubbard v. Serv. Employees Int'l Union, Local 2015*, No. 23-1214 (S. Ct.) (employee bound by forged union card); *Cram v. Serv. Employees Int'l, Union, Local 503*, No. 23-1112 (S. Ct.) (compelled speech through explicit electioneering fee deductions); *Deering v. Int'l Brotherhood of Electrical Workers, Local 18*, No. 23-1215 (S. Ct.) (union claims power to compel

concern anything but "run-of-the-mill" labor disputes, as the Respondents suggest. Granting the Petition will not flood the courts or disrupt labor relations. Instead, it will protect public employees' rights, as the Court has consistently done for close to half a century.

For nearly fifty years this Court has consistently protected the rights of dissenting public employees from compelled union speech. In *Janus*, this Court prohibited unions from compelling nonconsenting employees' speech. 585 U.S. at 878. In *Harris v. Quinn*, this Court prohibited a union from charging agency fees to partial-public employees. 573 U.S. 616, 645 (2014). In *Knox*, this Court prohibited a union from charging a special political assessment to objecting employees. 567 U.S. at 312. In *Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, the Court prohibited a union from enforcing a constitutionally inadequate procedure to handle nonmember objections to calculation of agency fees. 475 U.S. 292, 309 (1986). In *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, this Court prohibited a union from exacting an involuntary loan from nonmembers and charging for nonchargeable expenses. 466 U.S. 435 (1984). And finally, in *Abood*, despite the Court sanctioning the deduction of agency fees, it nonetheless prohibited a union from requiring

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speech through collective bargaining agreement); *Kant v. Serv. Employees Int'l Union, Local 721*, No. 23-1113 (S. Ct.) (union claims power to compel speech through extension of collective bargaining agreement); *Craine v. AFSCME, Local 119*, No. 24-122 (S. Ct.) (union claims power to compel both speech and continued membership through collective bargaining agreement); *Parde v. SEIU, Local 721*, No. 23-55021, 2024 WL 2106182 (9th Cir. May 10, 2024) (cert petition pending) (employee bound by forged union card).

nonmembers to pay a full dues equivalent charge funding political expression. 431 U.S. at 209.

In each of these cases the Court affirmed the rights of dissenting employees over the howls of potential catastrophe the unions and their allies rained down. In each case, the parade of horribles the unions forecasted never materialized. Instead, government employers and unions were simply required to conform their procedures to the Constitution. In large part, this result is based on the Court's recognition that the union's use of state procedures to take unwilling citizens' lawfully earned wages for union political speech is an affront to the principles of free speech. That is to say, the Court was not concerned with constitutionalizing labor disputes, because compelled union speech raises constitutional issues. The Petition should be granted.

CONCLUSION

For the aforementioned reasons, the Petition should be granted.

Respectfully submitted,

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