No. _____

In the Supreme Court of the United States

STATE OF ALASKA, ET AL.,
Petitioners,

v.

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment prohibits a state from taking money from employees' paychecks to subsidize union speech when the state lacks sufficient evidence that the employees knowingly and voluntarily waived their First Amendment rights.

PARTIES TO THE PROCEEDING

Petitioners are the State of Alaska; Governor Michael J. Dunleavy, in an official capacity; Attorney General Treg R. Taylor, in an official capacity; the Department of Administration; and Commissioner Paula Vrana, in an official capacity. They were appellants below.

Respondent is Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO ("ASEA"). It was the appellee below.

RELATED PROCEEDINGS

Superior Court for the State of Alaska, Third Judicial District at Anchorage:

State of Alaska, et al. v. Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO, No. 3AN-19-09971-CI (Aug. 4, 2021) (final judgment)

Supreme Court of the State of Alaska:

State of Alaska, et al. v. Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO, No. S-18172 (May 26, 2023) (opinion)

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JURISDICTION

The Alaska Supreme Court's judgment was entered on May 26, 2023. App.1. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law … abridging the freedom of speech."

Alaska Statute §23.40.220 states: "Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees, and other employee benefits as certified by the secretary of the exclusive bargaining representative and shall deliver it to the chief fiscal officer of the exclusive bargaining representative."

INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), this Court gave clear directions to any state that takes money from employees' paychecks to subsidize union speech. Because unions "'tak[e] many positions during collective bargaining that have powerful political and civic consequences,'" states cannot force public employees to subsidize union speech. *Id.* at 2464, 2486. Nor can states assume that employees have consented to do so. *Id.* at 2486. Instead, states need "'clear and compelling' evidence" that employees have waived their First Amendment rights before deducting "an agency fee [or] any other payment." *Id.*

But states across the country have ignored these instructions. Instead of demanding "'clear and compelling' evidence" of an employee's consent, they blindly defer to unions, deducting dues whenever the union produces the smallest evidence of consent.

The results have been predictable. States deduct dues even when unions never notify employees of their First Amendment rights. States allow unions (rather than the employees) to deliver dues-deduction forms, thus depriving them of proof that the employees' signatures are genuine and that their choice was voluntary. And states continue deducting dues even when employees protest that their money was improperly used to subsidize union speech—because the employees were coerced, they never consented, or their signatures were forged.

But Alaska took *Janus* seriously. The State reviewed its dues-deduction process and concluded that

it was failing to protect the First Amendment rights of its employees. Under Alaska law, the State was required to deduct dues whenever a union delivered the employee's "written authorization." Alaska Stat. §23.40.220. That's it. The form didn't need to identify the employees' First Amendment rights, the employees didn't need to deliver the form to the State, and unions could impose harsh terms preventing employees from ending their subsidization of union speech.

To remedy these problems, the State announced that it would no longer deduct dues based solely on receipt of a dues-deduction form created by unions. Instead, the State would create its own form identifying employees' First Amendment rights, it would receive the form directly from employees, and it would allow employees to opt out whenever they chose to no longer subsidize union speech. These steps would guarantee employees' First Amendment rights to freedom of speech and freedom of association.

But the Alaska Supreme Court enjoined the State's efforts, limiting *Janus* to its facts and forcing the State to continue deducting dues under its prior process. Consequently, Alaska, like numerous states across the country, is continuing to disregard *Janus* by subsidizing union speech without sufficient evidence of employee consent.

Without this Court's intervention, states and unions will never change. The Court should vindicate the promise of *Janus*: that employees cannot be compelled to subsidize union speech. The Court should grant certiorari.

STATEMENT OF THE CASE

A. The First Amendment and Public-Sector Unions

The First Amendment protects more than the right to speak freely and to associate with others. It also protects "the right to *refrain* from speaking,'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added), and the "freedom *not* to associate," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added). "If 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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Compelling a person to subsidize the speech of others implicates these First Amendment concerns. It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). As Thomas Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Janus*, 138 S.Ct. at 2464 (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

Forcing state employees to subsidize public-sector unions through payroll deductions violates these First

Amendment principles. Public-sector unions frequently speak—through political advocacy and lobbying—on important issues of public policy, including state budgets, healthcare, education, climate change, sexual orientation, and child welfare. *Id.* at 2475-76. Unions also "tak[e] many positions during collective bargaining that have powerful political and civic consequences." *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310 (2012). Accordingly, forcing individuals to subsidize public-sector unions "constitute[s] a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Id*. at 310-11.

In June 2018, the Court issued its opinion in *Janus v. AFSCME, Council 31*. In *Janus*, an Illinois state employee (Mark Janus) challenged an Illinois law that required him to pay an "agency fee" to a union even though he was not a member of the union and strongly objected to the positions the union took in collective bargaining and related activities. 138 S.Ct. at 2460-62. Janus argued that being compelled to subsidize the union violated his First Amendment rights, and the Court agreed. *Id.* Recognizing that "compelled subsidization of private speech seriously impinges on First Amendment rights," the Court found that these mandatory fees violate the First Amendment by "compelling [individuals] to subsidize private speech on matters of substantial public concern." *Id.* at 2460, 2464.

Importantly, *Janus* was not a narrow decision limited to "nonmembers" and "agency fees." The Court recognized that *all* state employees have a First

Amendment right not to be forced to subsidize the speech of public unions. *Id.* at 2486. And these rights applied to "any … payment," whether labeled an "agency fee" or something else. *Id.*

The Court articulated the standard that states must apply when taking money from employees to subsidize union speech. Going forward, no state may deduct "an agency fee nor any other payment … unless the employee affirmatively consents to pay." *Id.* Employees must waive their First Amendment rights, and "such a waiver cannot be presumed." *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Knox*, 567 U.S. at 312-13). Rather, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality op.)). Thus, "[u]nless employees clearly and affirmatively consent before *any money* is taken from them, this [clear and compelling] standard cannot be met." *Id.* (emphasis added).

B. Alaska's Initiative to Protect the First Amendment Rights of Its Employees

The State of Alaska is one of the largest employers in Alaska, employing about 15,000 individuals. App.7. State law allows public employees to unionize. Alaska Stat. §23.40.080. There are eleven public-sector unions in Alaska, and the State has entered into collective bargaining agreements with each of them. App.105, ¶6.

The largest public-sector union in Alaska is Respondent ASEA, which is the exclusive bargaining

representative for about 8,000 state employees. App.7. In addition to collective bargaining, ASEA lobbies state officials to pass legislation and take administrative actions on issues like wages, pensions, and employee benefits. App.106-07, ¶14. ASEA also engages in speech and advocacy on issues of public concern, including healthcare, education, race, gender, sexual orientation, labor relations, and the State's budget. App.107, ¶16.

In 1972, Alaska adopted the Public Employment Relations Act ("PERA"). PERA requires the State to deduct "the monthly amount of dues, fees, and other employee benefits as certified by the [union] and deliver it to the [union]." Alaska Stat. §23.40.220. The State must take these steps when the union delivers the employee's "written authorization." *Id.*

Consistent with PERA, the State's practice before *Janus* was to deduct union dues and fees whenever the State received a dues-deduction form from the union. App.115, ¶¶46-47. The State was required to deduct these dues even if the form failed to identify the employee's constitutional rights, even if it lacked proof that the employee was acting voluntarily, and even if the form imposed onerous requirements for opting out of paying dues. Alaska Stat. §23.40.220; App.115, ¶¶46-47.

After taking office in December 2018, Governor Mike Dunleavy asked the Alaska Attorney General to determine whether the State's process for deducting union-related dues and fees was constitutional in light of *Janus*. App.118, ¶61; App.133-34. In August 2019,

the Attorney General issued a legal opinion, concluding that "the State's payroll deduction process is constitutionally untenable under *Janus*." App.136. Recognizing that the State could "only deduct monies from an employee's wages if the employee provides affirmative consent," the Attorney General identified at least two problems with the State's dues deduction process. App.140, 150-51.

First, the State was failing to ensure that employees' decisions to have money deducted from their paychecks to subsidize union speech was a "'knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.'" App.144 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Under state law, unions designed the form by which employees authorized the State to deduct their pay. App.150. The State thus could not "guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the unions' speech." App.150. Without these assurances, the employee's waiver could not be "considered knowing and intelligent." App.150.

Second, because unions controlled the environment in which employees were asked to authorize a payroll deduction, the State could not ensure that the employee's consent was "'freely given.'" App.150 (quoting *Janus*, 138 S.Ct. at 2486). For example, some collective bargaining agreements require employees to report to the union office immediately after being hired so that a union representative can urge them to

join the union. App.150. Because this process is an unknown "black box," the State could not ensure that the authorization form it received from the union was "'the product of a free and deliberate choice rather than coercion or improper inducement.'" App.150-51 (quoting *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007)).

The Attorney General found that these failures caused serious and irreparable harms to employees. App.151. Because dues-deduction forms usually require new employees to pay dues for a certain period, employees are "powerless to revoke the waiver of their right against compelled speech" if they later disagree with the union's speech or lobbying activities. App.151. These onerous terms were especially problematic for new employees, who likely have no idea "what the union is going to say with his or her money or what platform or candidates a union might promote during that time." App.151. Employees thus could be forced to see their "wages docked each pay period for the rest of the year to subsidize a message they do not support." App.151.

To remedy these problems, the Attorney General recommended that the Governor issue an administrative order that would "establish a procedure to ensure the State honors the First Amendment rights of its employees" before giving their money to a union. App.152. In particular, the Attorney General recommended that the State draft new written consent forms that identified the employees' First Amendment

rights, require employees to provide their consent directly to the State, and allow employees to regularly opt in or out of paying dues. App.152-54.

Within hours of the opinion's release, ASEA threatened to sue the State if it took any steps to implement the opinion. App.63-64. Consistent with PERA, the State's collective bargaining agreement with ASEA required the State to deduct money from an employee's paycheck and "transmi[t] [it] to the Union" whenever it received a request "in writing on the form provided by the Union." App.130-31; App.115, ¶47. But this agreement exemplified the constitutional problems that the Attorney General had identified. Because ASEA designed and drafted its dues deduction forms without any involvement from the State, the forms did not identify employees' First Amendment rights not to support the union. App.113, ¶41; App.132, 155-57. The forms themselves thus provided no assurances to the State that employees' waivers were "'knowing [and] intelligent.'" App.144.

In addition, the State could not confirm that an employee's consent to pay dues to ASEA was "'freely given.'" App.150. The State did not monitor or participate in the orientation sessions in which ASEA urged employees to become members of ASEA. App.112, ¶¶35-36. Nor did the State require employees to deliver their forms directly to the State, which would have provided evidence that the signature was genuine and their actions were voluntary. App.115, ¶46. Instead, the State would take dues from employees simply upon receiving a dues-deduction form from ASEA. App.115, ¶47. And when an employee asked

the State to stop deducting dues from their paychecks, the State would refuse and simply forward the request to ASEA. App.115-16, ¶51.

ASEA's dues-deduction forms also imposed onerous opt-out obligations on employees. ASEA's forms made payments "irrevocable" for one year and "for year to year thereafter" unless the employee gave both the State and ASEA "written notice of revocation" in a precise ten-day time period—"not less than ten (10) days and not more than twenty (20) days before the end of any yearly period." App.132, 155, 157; *see also* App.113, ¶38. Thus, unless employees provided written notice to ASEA precisely during this narrow ten-day window, they would be forced to continue paying dues to ASEA for another year. Even more problematic, the ten-day window was not the same for every employee (*e.g.*, it is not from December 21-31, as employees might expect), and ASEA provided no instructions on its website for how to resign membership or end dues deduction. App.117-18, ¶¶57-58.

After the Attorney General published his opinion, various government employees reached out to the State and asked it to stop deducting dues. App.123-24, ¶¶84-86. Nine of these employees had been paying dues to ASEA. App.124, ¶86. In line with the Attorney General's opinion, the State concluded that it lacked clear and compelling evidence that these employees had waived their First Amendment rights. App.124, ¶87. The State therefore honored these employees' requests and stopped deducting dues from their paychecks. App.124, ¶87.

A few weeks later, Governor Dunleavy issued Administrative Order 312 to "establish a procedure that ensures that the State of Alaska honors the First Amendment free speech rights of state employees to choose whether or not to pay union dues and fees." App.158; App.120, ¶69. The Order directed the State to, among other things, (1) adopt new forms that would clearly inform employees of their First Amendment rights; (2) develop an electronic system for employees to submit the authorization forms directly to the State; and (3) require the State to process requests to opt in or out of paying dues promptly after receiving a request. App.160-64.

C. Procedural History

In September 2019, the State sued ASEA, seeking, among other things, a declaratory judgment that the mechanisms for collecting dues from state employees in the State's collective bargaining agreement with ASEA violates the First Amendment. App.70-72. ASEA filed counterclaims in response, asking the Court to enjoin the State from implementing the Attorney General opinion and Administrative Order 312 or from making any changes to the dues-deduction processes that were in place before the opinion was issued. App.206. ASEA also sought damages, alleging that the State breached its contract with ASEA. App.206.

After the parties submitted stipulated facts, *see* App.103-28, the trial court ruled for ASEA, holding that the First Amendment "does not require the State to alter the union dues deduction practices in place prior to" the Attorney General opinion. App.35. The

trial court therefore enjoined the State from implementing the Attorney General opinion and Administrative Order 312 or otherwise changing the State's dues-deduction practices. App.35. The trial court further awarded ASEA damages for breach of contract. App.35.

The Alaska Supreme Court affirmed, holding that the First Amendment did not require the State to "alter the union dues deduction practices in place" before the Attorney General opinion was issued. App.32. According to the court, when the State possesses a dues-deduction form—no matter what is written on it—the First Amendment's requirements have been satisfied. App.19-20. When a public employee "voluntarily join[s] a union and agree[s] to pay dues," the court believed, "that action itself is clear and compelling evidence that the employee has waived those rights." App.19-20.

Going further, the court held that the State could *never* violate the First Amendment by processing a dues-deduction card because taking money from state employees' paychecks is not "state action." App.21-25. According to the court, the State was simply "facilitating interaction and agreements between two private parties." App.23. So no matter the employees' knowledge of their rights, the voluntariness of their actions, the authenticity of the signatures, or the terms of the form, the State could never "abridg[e] the freedom of speech" by taking the employees' money to subsidize union speech. U.S. Const., amend. I. The State's concerns, the Alaska Supreme Court believed, were simply "illusory." App.25.

REASONS FOR GRANTING THE PETITION

The Court should hear this case because the Alaska Supreme Court has "decided an important question of federal law" in a way that violates the First Amendment and "relevant decisions of this Court." S. Ct. R. 10(c). Despite *Janus*, states across the country are failing to protect the First Amendment rights of their employees. The Court has not hesitated to grant certiorari in similar circumstances. *See, e.g.*, *Harris*, 573 U.S. at 627 (granting certiorari because "other States were following Illinois' lead by enacting laws" governing union fees that raised "important First Amendment questions"). A ruling for Alaska on the question presented would ensure that public employees nationwide cannot be compelled to subsidize union speech.

I. The question presented is important and warrants this Court's review.

The Court in *Janus* imposed a high standard on states that seek to deduct union dues or fees from employee paychecks. Before taking their money to subsidize union speech, states must have "'clear and compelling' evidence" that "the employee [has] affirmatively consent[ed] to pay." *Janus*, 138 S.Ct. at 2486. But that is not what is happening in Alaska and across the country.

Alaska law requires the State to deduct dues whenever the union gives the State an employee's "written authorization." Alaska Stat. §23.40.220. That's it. No other proof of knowledge or voluntariness is required. If the employees don't know their rights,

the State still must deduct dues. If a union gives the state a form with a forged signature, the State still must deduct dues. If the employee was unduly pressured into signing the form, the State still must deduct dues. And if the form imposes onerous and difficult requirements for opting out of paying dues, the State still must deduct dues. This is hardly "clear and compelling" evidence that the employee has waived his First Amendment rights to not subsidize union speech.

Alaska is not an anomaly. Numerous states have adopted similar laws that fail to protect employees' First Amendment rights. Across the country, states will deduct dues simply because the union asserts that it has the employee's authorization. *See, e.g.*, Or. Rev. Stat. §243.806(4)(a), (7) (requiring dues deduction when the union provides "a list identifying the public employees" who have authorized deductions "by telephonic communication or in writing"); CT St. §31-40bb(i)-(j) (requiring dues-deduction when the union "certifies that it has and will maintain individual employee authorization"); IL St. Ch. 5 §315/6(f-10) (requiring dues deduction when the employer "receiv[es] written notice of authorization"). No other proof is needed.

This failure to demand "clear and compelling" evidence of employee consent imposes real harms on public employees. Like Alaska, most states deduct dues regardless of whether the union informs employees of their First Amendment rights not to subsidize union speech. *See, e.g.*, CT St. §31-40bb(i) (requiring employers to "honor employee authorizations created

or adopted" by a union); 19 Del. Code §1304(c) ("The public employer shall deduct from the payroll of the public employee the monthly amount of dues or service fee as certified by the [union]."). And like ASEA, public-sector unions do not disclose employees' First Amendment rights when it is not required by law. App.132, 155, 157; *see, e.g.*, *Wolf v. UPTE, CWA Loc. 9119*, No. 19-cv-2881, Dkt. 78-2, Ex. C (N.D. Cal.) (California dues-deduction form).

Many public employees thus have no idea that they have a First Amendment right not to financially support a public-sector union. For example, one survey found that most public-school teachers are unaware that "public employees, including public school teachers, cannot be required to pay dues to a union if they decide to not belong to the union." *One Year After Janus* at 4, Teacher Freedom (June 2019), bit.ly/3K3d9Fc. And new employees have no idea "what the union is going to say with his or her money or what platform or candidates a union might promote during that time." App.151.

This lack of knowledge has real consequences. When employees don't know their rights, they are forced to subsidize union speech they don't support. *See, e.g.*, *Marsh v. AFSCME Loc. 3299*, No. 19-cv-2382, Dkt. 53, at 12 (E.D. Cal.) (employee signed a dues-deduction form "during her orientation," which occurred after *Janus*, "because the Union led her to believe she had to as a condition of her employment"). Only through disclosure can state employees' decisions to support a union be "knowing, intelligent acts

done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

Despite unions' assurances that only union members will have their dues deducted, examples abound of *nonmembers* being forced to pay dues. The State of Washington for years took money from thousands of individuals who had not properly consented to dues deduction. *Routh v. SEIU Healthcare 775NW*, No. 14-cv-200, Dkt.227, at 2-3, 5; Dkt. 242 at 2-3, 5 (W.D. Wash.) (class-action settlement); *see also Araujo v. SEIU Loc. 775*, No. 20-cv-5012, Dkt. 1, at 2, 9-12 (E.D. Wash.) (Washington deducted dues pursuant to forged dues-deduction card). Similarly, in California, the state "'deducted money from [a public employee's] wages'" even though the employee "never signed a document indicating that she sought to become a union member or pay dues." *Quezambra v. UDWA AFSCME Loc. 3930*, 445 F. Supp. 3d 695, 699-700 (C.D. Cal. 2020). The employee initially "assumed that Union membership was mandatory because the dues deductions began in 2013 without her input." *Id.* at 700. But in February 2019 she discovered that membership was optional and requested a refund. *Id.* A union official admitted that the employee "'did not properly authorize the dues deductions.'" *Id.* But even then, the employee didn't recover all the dues that were taken from her because of the state's three-year statute of limitation. *Id.* These are not isolated incidents. *See, e.g.*, *Zielinski v. SEIU Loc. 503*, No. 20-cv-165, Dkt. 1, at 4-5 (D. Or.) (union instructed the State of Oregon to deduct dues "without [the employee's] consent and pursuant to a forged membership agreement"); *Jarret*

v. SEIU Loc. 503, No. 20-cv-1049, Dkt. 1, at 4-5 (D. Or.) (same); *Schiewe v. SEIU Loc. 503*, No. 20-cv-519, Dkt. 1, at 4-6 (D. Or.) (same).

When public employees learn of their rights or discover that dues have been improperly taken, they often must endure a byzantine process to stop the deductions or recover their money. Like Alaska, most states will not process requests to stop dues deduction without the unions' permission. *See, e.g.*, IL St. Ch. 5 §315/6(f-20) ("[E]mployee requests to … revoke, cancel, or change authorizations for payroll deductions for [unions] shall be directed to the [union] rather than to the public employer."); Wash. Rev. Code §41.80.100(e) ("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."). Employees thus must seek relief through the unions themselves, the same institutions who failed them in the first place.

But unions often make this process as difficult as possible, providing no clear mechanism for stopping dues deduction and dragging the process out for months. *See, e.g.*, *Marsh*, No. 19-cv-2382, Dkt. 53, at 5-7 (employee unsuccessfully "made numerous attempts to resign his membership" over a period of eight months); *Quezambra*, No. 19-cv-927, Dkt. 1, at 9-10 (union "did not respond" to multiple emails trying to stop dues deduction, and a union official came to the employee's house to discuss the matter despite being told multiple times to stay away); *Araujo*, No. 20-cv-5012, Dkt. 1, at 10-11 (union took "[a]bout a

year" to respond to request for a copy of a forged dues card). This is predictable, as unions have a financial incentive to keep employees subsidizing their efforts for as long as possible.

Many states also blindly follow the terms of the dues-deduction cards, even when the union imposes onerous restrictions on how and when employees can stop the deductions. *See, e.g.*, Or. Rev. Stat. §243.806(6) (requiring that dues deductions "shall remain in effect until the public employee revokes the authorization in the manner provided by the terms of the agreement"); Wash. Rev. Code §41.80.100(e) (dues deductions will be stopped only "in accordance with the terms and conditions of the authorization"). Unions thus frequently impose harsh terms preventing employees from stopping their dues deduction unless the request is made during a narrow annual window.

In California, for example, certain public employees cannot stop their dues unless the union receives a signed revocation letter "postmarked" precisely "between 75 days and 45 days before" the employee's "annual renewal date." *Wolf*, No. 19-cv-2881, Dkt. 78-2, Ex. C; *see also Mendez v. CTA*, No. 19-cv-1290, Dkt. 85-5 (N.D. Cal.) (employees cannot stop dues deduction unless they "sen[d] written notice via U.S. mail … not less than (30) days and not more than (60) days before the annual anniversary date of this agreement"). Complying with these obligations is difficult because few employees have access to their dues-deduction cards, and so they neither know the process for stopping dues deduction nor the time frame in which they must do it. *See, e.g.*, *Grossman v. HGEA,*

AFSCME Loc. 152, No. 18-cv-493, Dkt. 1, at 6-7 (D. Haw.) (employee had no recollection of joining the union; the union did not provide her with a copy of her dues card; and when she asked the union for her opt-out window, the union provided "the incorrect withdrawal [dates]"); *Marsh*, No. 19-cv-2382, Dkt. 53, at 5-7 (employee did not know how to resign and contacted his employer and four different union officials for information, all of whom either referred him to someone else or did not answer his calls).

Indeed, ASEA's revocation requirements are some of the worst in the country. Under the form's terms, the employee must continue paying dues unless he gives both the State and ASEA "written notice of revocation" in a brief ten-day window—"not less than ten (10) days and not more than twenty (20) days before the end of any yearly period." App.132, 155, 157; *see also* App.113, ¶38. It was only after the State sued that ASEA promised not to enforce the terms of its dues-deduction cards. App.117, ¶56.

The steps Alaska was planning to take would have ensured that its employees understood their constitutional rights and voluntarily consented to subsidize union speech. But most states have taken no similar steps to comply with *Janus*. Nor will they if the decision below is left to stand. This Court's intervention is needed to ensure that states do what *Janus* directs: Take money from employee paychecks to subsidize union speech only when there is "'clear and compelling' evidence" that the employee has consented. *Janus*, 138 S.Ct. at 2486.

II. The decision below conflicts with *Janus*.

The State should have prevailed below. The State stopped deducting dues because it lacked "clear and compelling" evidence that its employees had authorized the State to take money from their paychecks to subsidize ASEA's speech. But the Alaska Supreme Court disagreed, forcing the State to continue deducting dues in violation of the First Amendment and holding them liable for breach of contract. The lower court's decision conflicts with *Janus* and bedrock First Amendment principles.

The First Amendment prohibits the government from compelling employees to subsidize union speech. *See Janus*, 138 S.Ct. at 2486. This is because a "'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Id.* at 2464 (quoting *Knox*, 567 U.S. at 310). The Court in *Janus* made clear that "States and public-sector unions" cannot "extract agency fees" or "any other payment" from "nonconsenting employees." *Id.* at 2486.

States may, of course, deduct union dues when employees have waived their First Amendment rights. But courts "'do not presume acquiescence in the loss of fundamental rights.'" *Knox*, 567 U.S. at 312 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). And this presumption isn't limited to the criminal context. "[I]n the civil no less than the criminal area, 'courts indulge every reasonable presumption against

waiver.'" *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

This presumption against waiver is especially strong when First Amendment rights are at stake. The Court will not find a waiver of First Amendment rights "in circumstances which fall short of being clear and compelling." *Curtis Publ'g*, 388 U.S. at 145 (plurality op.). That is because the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

These principles apply with full force in the context of compelled subsidies to public-sector unions. In *Janus*, the Court endorsed a waiver standard based on a long list of prior decisions addressing the waiver of constitutional rights. 138 S.Ct. at 2486. Employees must waive their First Amendment rights, and "such a waiver cannot be presumed." *Id.* (citing *Zerbst*, 304 U.S. at 464; *Knox*, 567 U.S. at 312-13). To be effective, "the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 U.S. at 145 (plurality op.)). And so "[u]nless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.* States thus "'should not be permitted'" to take union dues from employees without first establishing a proper procedure that "'will avoid the risk that their funds will be used, even temporarily, to finance'" speech that the employees oppose. *Knox*, 567 U.S. at 312.

Given this precedent, the State correctly recognized that its dues-deduction process failed to comply with the First Amendment. Under Alaska law, the State must deduct dues from an employee's paycheck whenever it receives "written authorization" from the union—full stop. Alaska Stat. §23.40.220; *see also* App.115, ¶47; App.130-31. But this single sheet of paper, which the union itself supplies to the State, does not come close to providing "'clear and compelling' evidence" that an employee has freely consented to subsidize the union's speech. *Janus*, 138 S.Ct. at 2486. The form does not show that the employee's waiver was "knowing [and] intelligent," *Brady*, 397 U.S. at 748, because it does not identify the employee's First Amendment rights not to support the union, App.132, 155-57. And the form does not show that the employee's consent was "freely given," *Janus*, 138 S.Ct. at 2486, because ASEA (not the employee) delivers the form directly to the State and the State does not monitor the union's interactions with employees, App.112, ¶¶35-36; App.115, ¶¶46-47. The State thus cannot, without the necessary "clear and compelling" evidence of waiver, take an employee's money to subsidize ASEA.

Yet the Alaska Supreme Court upheld a permanent injunction that forced the State to continue these practices. According to the court, a dues-deduction form satisfies constitutional waiver requirements because when "a public employee … voluntarily join[s] a union and agree[s] to pay dues … that action itself is clear and compelling evidence that the employee has waived those rights." App.19-20. But the mere fact that the State has a sheet of paper with a signature

purporting to authorize the deduction of dues is woefully insufficient. Most obvious, the State cannot ensure that the signature is genuine—a problem that has occurred across the country, *see supra* 17-18—because ASEA, not the employee, delivers the form to the State.

But even if the employee's signature is authentic, multiple problems remain. The mere fact that individuals signed a document that purportedly waived their rights has never been dispositive. *See, e.g.*, *Fuentes*, 407 U.S. at 95 (constitutional rights were not validly waived through "fine print" in a contract where "[t]here was no bargaining over contractual terms between the parties," the parties were not "equal in bargaining power," and the purported waiver was on a "printed part of a form … and a necessary condition" of the agreement). The waiver still must be "'voluntarily, intelligently, and knowingly'" made. *Id*. (quoting *D.H. Overmyer Co. v. Frick*, 405 U.S. 174, 187 (1972)).

To be sure, ASEA's form states that the employee is "voluntarily" paying dues. App.155. But the fact that an employee knows he will pay dues to a union is not the same as having "'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Patterson v. Illinois*, 487 U.S. 285, 292 (1988). New employees likely have no "idea what the union is going to say with [their] money or what platform or candidates a union might promote during that time." App.151. Nor does the State know what pressures the employees faced *before* they signed the form. *See* App.150-51. A signature on a page just doesn't cut it.

After all, the "whole point" of the constitutional-waiver standard "is to be certain that the [employees] in fact consent[ed]" to dues deduction. *College Sav. Bank*, 527 U.S. at 680. In *Janus*, the Court did not hold that states could deduct fees if they had *some* indication that the employee agreed to it. The Court recognized the high standard: When employees "are waiving their First Amendment rights," such a waiver "cannot be presumed," and the waiver must be "shown by 'clear and compelling' evidence." *Janus*, 138 S.Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145 (plurality op.)). Because the State's process failed to satisfy this standard, the State appropriately took steps to remedy its violations.

The Alaska Supreme Court incorrectly believed that *Janus* was a narrow decision limited to whether "nonmembers" could be forced to pay "agency fees." App.18-19. While *Janus* involved a nonmember, the decision applies to all involuntary fees and has clear application to members and nonmembers alike. "Unless *employees* clearly and affirmatively consent before *any money* is taken from them," the "'clear and compelling'" waiver standard cannot be met. *Janus*, 138 S.Ct. at 2486 (emphasis added).

The Court's decision to speak broadly makes sense. The point of *Janus* was that public employees cannot be compelled to subsidize union speech. But if states can deduct dues simply because a union asserts that an employee is a "member"—despite the well-documented potential for fraud and compulsion—then *Janus*'s protections are meaningless. States cannot "simply establish through … other means the regime"

the Court found unlawful in *Janus*. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 143 S.Ct. 2141, 2176 (2023). That is why the Court insisted that states have "'clear and compelling' evidence … before *any* money is taken from them." *Janus*, 138 S.Ct. at 2486 (emphasis added).

As a fallback, the Alaska Supreme Court concluded that the State didn't need to alter its dues-deduction process because the State is simply "facilitating interaction and agreements between two private parties," and so "there is no state action giving rise to a First Amendment violation." App.23-25. That is wrong. There is no question that the *government's* decision to deduct dues constitutes "state action." When the State takes dues from employees' paychecks, it is not simply "approv[ing] of or acquiesc[ing] in the initiatives of a private party." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). It has "exercised coercive power" to take funds from their paychecks. *Id.*

Unsurprisingly, none of the cases the Alaska Supreme Court cited support its position. Its closest precedent held only that a union—a *private* actor—did not engage in the "state action" necessary to find liability under Section 1983. *See, e.g.*, *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020) (finding that the "§1983 claim against the union fails for lack of state action"). But that is far afield from holding that the *government* cannot violate the First Amendment from *its own actions*. The State's decision to take money from its employees is clearly "state action." And because the State lacked sufficient evidence that its employees waived their First Amendment rights, the

State could not take dues from them to subsidize union speech.

III. This case is an ideal vehicle to resolve the question presented.

This case squarely presents the question presented. To begin, the Court plainly has jurisdiction. This Court "possess[es] jurisdiction to review state-court determinations that rest upon federal law." *Oregon v. Guzek*, 546 U.S. 517, 521 (2006) (citing 28 U.S.C. §1257(a)); *see also* 28 U.S.C. §1257(a) (jurisdiction where "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution"). And both Alaska's claims and its defenses to ASEA's claims turn on the Alaska Supreme Court's decision that "neither the *Janus* decision nor the First Amendment required the State to … alter the union dues deduction practices in place under PERA and the [parties' collective bargaining agreement]." App.32; *see, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476 (1975) (Supreme Court jurisdiction where state court found that a state statute was not "'in conflict with the First Amendment'").

Nor does this case present any of the vehicle issues that were present in recent certiorari petitions involving *Janus* and union dues that the Court declined to grant. In those cases, the petitioners were union members alleging that their dues had been improperly deducted. *See, e.g.*, *Belgau v. Inslee*, No. 20-1120 (S.Ct.); *Savas v. CSLEA*, No. 22-212 (S.Ct.). But these cases had vehicle issues that are absent here.

Claims for prospective relief raised mootness issues when the individuals were no longer union members or had not moved to certify a class action. *See, e.g.,* AFSCME Br. in Opp. at 14-16, *Hendrickson v. AFSCME Council 18*, No. 20-1606 (S.Ct.) (arguing that the individual's "claim for prospective relief is moot because he is no longer bound by any dues-deduction agreement"); AFSCME Br. in Opp. at 23-25, *Belgau*, No. 20-1120 (arguing that mootness was a "jurisdictional obstacle to addressing the primary question presented" because the petitioners "never moved for class certification"). And lower courts had rejected petitioners' claims against the unions for the additional reason that unions cannot be liable for damages under Section 1983. *See, e.g.*, Order, *Savas v. CSLEA*, No. 20-56045, at 5 n.2 (9th Cir. 2022). None of these vehicle issues are present here.

This Court similarly declined to review cases out of the Ninth Circuit brought by three Alaska state employees who were forced to continue paying dues because of the trial court's decision in this case. *See Woods v. ASEA*, No. 21-615 (S.Ct.). But ASEA likewise argued that those cases had vehicle issues. The Ninth Circuit did not issue an opinion in those cases, but merely granted—through a one-sentence, unpublished order—the petitioners' motions for summary affirmance. *See* ASEA Br. in Opp. at 9, 17, *Woods*, No. 21-615 (arguing that the Court rarely reviews "non-precedential orders granting the petitioners' own motions for summary affirmance against themselves"). Those cases also raised questions of

mootness that are absent here. *See id.* at 10 n.5 (arguing that the petitioners' "claims for prospective relief are moot").

Finally, the implications of the State's case are far broader than those brought by individual union members. Numerous states have adopted laws like Alaska's and are similarly failing to protect their employees' First Amendment rights. The Court has granted certiorari to review state and union practices in similar circumstances. *See, e.g.*, *Harris*, 573 U.S. at 627. Doing so here would reinforce its command in *Janus*—that states must have clear and compelling evidence before taking money from public employees to subsidize union speech.

CONCLUSION

The Court should grant certiorari.

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