No. 21-615

In the Supreme Court of the United States

CHRISTOPHER A. WOODS, ET AL.,
Petitioners,

v.

ALASKA STATE EMPLOYEES ASSOCIATION,
AFSCME LOCAL 52, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENT PAULA VRANA, COMMISSIONER OF ADMINISTRATION FOR THE STATE OF ALASKA

TREG TAYLOR
Attorney General
State of Alaska
JESSICA M. ALLOWAY
Solicitor General
Counsel of Record
DAVID A. WILKINSON
Assistant Attorney General
1031 W. 4th Ave., Ste 200
Anchorage, AK 99501
(907) 269-5108
jessie.alloway@alaska.gov

Counsel for Respondent

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

In *Janus v. AFSCME, Council 31*, the Court held that the First Amendment bars States and public sector unions from compelling public employees to subsidize union speech through agency fees. 138 S. Ct. 2448 (2018). Ridding public employees of a "significant impingement on [their] First Amendment rights," the Court directed 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." *Id.* at 2464, 2486 (internal quotations omitted). That consent waives First Amendment rights and thus, to be valid, "must be freely given and shown by 'clear and compelling' evidence." *Id.* at 2486. Misreading *Janus*, the Ninth Circuit held that this First Amendment right does not extend to public employees who previously agreed to join the union. As a consequence, a dues-authorization card can be used to compel an employee to subsidize union speech without any evidence that the employee validly waived his or her First Amendment rights.

The question presented is:

Do public employees waive their First Amendment rights merely by signing union dues-authorization cards—with no disclosure of their rights or the union's intended speech—such that a State and union may seize dues over the employees' express objections?

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INTRODUCTION

Respondent, the Commissioner of Administration for the State of Alaska, faced lawsuits from both public employees and the union after she attempted to comply with this Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The petitioners here, public employees who no longer support the union, wanted the State to stop deducting union dues from their paychecks. The union obtained an injunction in state court forcing the State to continue deducting dues from the public employees' paychecks over the employees' objections. Stuck between conflicting demands, the Commissioner, although appearing as a respondent here, urges the Court to grant the petition to protect the First Amendment rights of government employees in Alaska and throughout the country.

After the Court issued its decision in *Janus*, the Alaska Attorney General published a legal opinion concluding that the State of Alaska's dues-deduction process was unconstitutional. Pet. App. 53–72. The Attorney General recognized, among other things, that "[m]embers of a union have the same First Amendment rights against compelled speech that non-members have." Pet. App. 59. As a consequence, state employees who were members of a public sector union could "object to having a portion of their wages deducted from their paychecks . . . even if they had previously consented." Pet. App. 59.

In response, a number of state employees (including the petitioners here) asked for their dues deduction to be stopped. In keeping with *Janus* and the Attorney General's opinion, the State honored their requests and stopped deducting union dues from their paychecks. The State, however, was later forced to reinstate the petitioners' dues deductions after respondent Alaska State Employees Association (ASEA) obtained injunctive relief in Alaska state court.

The petitioners then sued the State and ASEA in federal court, seeking to stop union dues from being taken from their paychecks. The State agreed with the petitioners that their First Amendment rights had been violated. But the district court did not, holding that the dues-authorization cards previously signed by the petitioners were sufficient to force the state employees to continue subsidizing union speech—even though there was no evidence that the petitioners had validly waived their right to be free from compelled speech. The Ninth Circuit summarily affirmed.

Janus was a landmark decision protecting the First Amendment rights of public employees. Because of *Janus*, the State of Alaska and ASEA should not have continued taking dues from the petitioners' wages over their objection and without evidence that the petitioners validly waived their First Amendment rights. The opinions below misread *Janus* and the First Amendment.

The Court's guidance on this issue is needed—for the State of Alaska, for other States struggling

with the meaning of *Janus*, and for all other state employees facing the same predicaments as the petitioners. The Court should grant the petition.

STATEMENT OF THE CASE

1. In August 2019, the Alaska Attorney General issued an opinion concluding that the State's "payroll deduction process is constitutionally untenable under *Janus*." Pet. App. 55. The Attorney General understood that *Janus*'s application of the First Amendment reaches beyond agency fees and "prohibits public employers from forcing their employees to subsidize a union." Pet. App. 54.

To be constitutionally valid, the Attorney General concluded, consent to deduct union dues must be "free from coercion or improper inducement"; "knowing, intelligent . . . [and] done with sufficient awareness of the relevant circumstances and likely consequences"; and "reasonably contemporaneous." Pet. App. 63–64 (citation omitted). The Attorney General recommended an overhaul of the State's payroll process. Specifically, he recommended that employees give consent to the State, rather than just to the union, and that they be allowed to have regular opportunities to opt-in or opt-out of paying union dues. Pet. App. 70–72.

The next month, Alaska Governor Michael Dunleavy implemented the Attorney General's recommendations by an administrative order. Pet. App. 73–78. The order required the Alaska Department of Administration to develop new payroll procedures, including an opt-in form that tells employees "that they

are waiving their First Amendment right not to pay union dues or fees and thereby not to associate with the union's speech" and an opt-out form that allows employees to stop payroll deduction within thirty days. Pet. App. 75–77.

2. Petitioners Linda Creed, Tyler Riberio, and Christopher Woods are State of Alaska employees whose bargaining unit is exclusively represented by respondent ASEA. Pet. App. 4, 25. Each joined ASEA before the Court's 2018 decision in *Janus*. Pet. App. 5, 26. When they began their public employment, they were presented with the dilemma of either joining the union and paying dues or declining membership but still paying agency fees. As Creed explains, she was "forced to either join and pay dues or not join and pay fees, so she chose to join." Pet. App. 26.

After the Court's decision in *Janus*, the petitioners exercised their First Amendment right to decline membership and stop subsidizing union speech. Pet. App. 8, 28–29. In July 2019, Riberio wrote to ASEA to cancel his membership and dues authorization. Pet. App. 28. He explained that he had "learned through experience within the union that its priorities and values did not comport with his views on important topics." Pet. App. 28. The next month, Creed wrote to cancel her membership and stop paying dues. Pet. App. 29. Woods did the same in November 2019. Pet. App. 8.

Although the petitioners had withdrawn their memberships, ASEA refused to stop collecting dues until each reached an annual ten-day escape period.

Pet. App. 8, 29–31. ASEA rested on the fine print of pre-*Janus* dues-authorization cards, which directed the State to deduct union dues from each employees' pay and ostensibly foreclosed the employees from stopping payment—even if they ceased to be members—unless they asked during the annual ten-day periods. The cards stated:

> This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement . . . between the Employer and the Union, whichever occurs sooner, and for year to year thereafter, unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) before the end of any yearly period.

Pet. App. 6, 27.

Alaska's Public Employee Relations Act requires public employers to deduct union dues, fees, or other benefits from the employee and transmit them to the union if the employee provides written authorization to do so. Alaska Stat. § 23.40.220. The Act does not provide any details on how an employee's authorization must be procured or provide any safeguards to ensure that the employee's authorization for the employer to withhold those funds is freely executed with full awareness of the employee's rights. *Id.*

3. In accordance with *Janus* and the Alaska Attorney General Opinion, however, the Commissioner complied with state employees' requests (including the petitioners' requests) to immediately halt their dues deduction. Pet. App. 7–8, 30. As a result, these employees were no longer compelled to subsidize the speech of a union that they opposed.

But this was short lived. An Alaska state court subsequently enjoined the State from implementing the attorney general opinion or administrative order and forced the State to continue deducting dues from objecting state employees. Pet. App. 81. (That case is now pending on appeal. *See Alaska v. Alaska State Emps. Ass'n/AFSCME Local 52, AFL-CIO*, Case No. S-18172 (Alaska).)

The State thus continued to deduct dues from Creed's paycheck for another ten months after she rescinded her membership. Pet. App. 29. Riberio would be compelled to subsidize the union for five additional months, and Woods for another seven months. Pet. App. 8, 28, 31.

4. In March 2020, Creed and Riberio sued ASEA and the Commissioner, alleging that ASEA and the Commissioner violated their "First Amendment rights to free speech and free association to not financially support a union without their affirmative consent." Pet. App. 31. Woods sued the next month, on behalf of himself and a proposed class, alleging that ASEA and the Commissioner violated his First Amendment rights by prohibiting him from stopping dues deductions outside of a ten-day period and taking union dues

without a constitutionally adequate waiver. Pet. App. 9.

The district court dismissed Creed and Riberio's complaint. Pet. App. 48. The court held that Creed and Riberio had no cause of action because, by signing the dues-authorization forms, they "affirmatively consented to pay union dues and agreed that their consent could only be revoked during a specific period." Pet. App. 39. The forms, the district court believed, were "binding contracts that remain enforceable even after *Janus*." Pet. App. 39, 47. A few months later, the district court granted summary judgment against Woods for similar reasons. Pet. App. 3–21.

5. On appeal, the petitioners moved for summary affirmance based on the Ninth Circuit's recent decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). In *Belgau*, public employees also challenged the deduction of union dues without a valid waiver of their First Amendment rights. *Id.* at 945–46. The Ninth Circuit held that dues-authorization forms amounted to binding contracts—continuing even after the employees withdrew from membership. *Id.* at 950. Despite the Court's holding in *Janus*, the Ninth Circuit concluded that the employees had no First Amendment right to stop subsidizing union speech. *Id.* And the Ninth Circuit rejected the existence of a First Amendment right to be free "not to pay union dues without 'consent that amount to the waiver of a First Amendment right.'" *Id.* at 951.

Relying on *Belgau*, the Ninth Circuit summarily affirmed in both cases. This petition followed.

REASONS FOR GRANTING THE PETITION*

As this Court has repeatedly made clear, there is a "significant impingement on First Amendment rights" when "public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civil consequences.'" *Janus*, 138 S. Ct. at 2464 (quoting *Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 310–11 (2012)); *see also Ellis v. Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 455 (1984). Employees forced to pay union dues to support issues with which they disagree face the same harm to First Amendment rights as employees forced to pay agency fees. To guard against the harm caused by that compelled speech, the Court in *Janus* made clear that neither States nor unions may compel employees to fund a union unless the employees waive their First Amendment rights. 138 S Ct. at 2486. But the lower courts have ignored this directive, requiring the State of Alaska and others to take money from employees who, although they once joined the union, have withdrawn their memberships and object to the union's speech.

This petition presents an ideal vehicle for correcting the lower courts' misreading of *Janus*. The facts are undisputed and emblematic of how unions

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* The Commissioner takes no position on the second question presented by the petitioners, which concerns a union's liability under 42 U.S.C. § 1983, because it bears only on claims against ASEA and not the Commissioner. *See* Pet. § II(D) at 25–29.

use dues-authorization cards to unduly constrain public employees' First Amendment rights to refrain from subsidizing union speech. The Court should grant the petition for three reasons.

First, at least four circuits—the Third, Seventh, Ninth, and Tenth—have ignored the Court's instructions in *Janus* and are compelling employees to fund union speech with which they do not agree. According to those circuits, *Janus*'s protections apply only to *some* state employees and only to *certain types* of deductions—specifically, "nonmembers" who were forced to pay "agency fees." *Fischer v. Governor of New Jersey*, 842 Fed. App'x 741, 753 (3d Cir. 2021), *cert. denied sub nom. Fischer v. Murphy*, — S. Ct. —, 2021 WL 5043585; *Bennett v. AFSCME Council 31, AFL-CIO*, 991 F.3d 724, 730–31 (7th Cir. 2021), *cert. denied*, — S. Ct. —, 2021 WL 5043580; *Belgau*, 975 F.3d at 950–52; *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961–62 (10th Cir. 2021), *cert. denied*, — S.Ct. —, 2021 WL 5043581. The Ninth Circuit's decision in *Belgau* illustrates those circuits' reasoning: all that a State or union needs in order to deduct union dues is *some* evidence that at some point in the past the employee "voluntarily authorized" the deduction. 975 F.3d at 950.

Second, public unions are meeting the lower standard set by decisions like *Belgau* by entangling employees in evergreen clauses on dues-authorization cards. Although employees may sign the authorization cards, the union does not tell them about their First Amendment rights, the positions the union will take

during collective bargaining, or the political or ideological projects it will support during the upcoming year. Worse yet, the evergreen clauses place the burden on objecting members to opt out of paying for speech they do not support during a limited period, resulting in "a remarkable boon for unions." *Knox*, 567 U.S. at 312. The unions' reliance on evergreen clauses to automatically renew the authorization and lock in employees for long durations is far reaching and recurring, as evidenced by the number of petitions pending with the Court raising similar issues. *E.g.*, *Grossman v. Hawaii Gov't Emps. Ass'n, AFSCME Local 152*, No. 21-597 (S. Ct.); *Anderson v. Serv. Emps. Int'l Union Local 503*, No. 21-609 (S. Ct.); *Wolf v. Univ. Prof'l & Tech. Emps., Commc'n Workers of Am. Local 9119*, No. 21-612 (S. Ct.); *Smith v. Bieker*, No. 21-639 (S. Ct.).

Third, the lower courts' interpretation of *Janus* is not unanimously shared. The States of Alaska, Texas, and Indiana have all recognized that *Janus*'s protections apply to all employees and to all types of compelled financial support to public unions. These legal opinions are sound and directly refute the lower courts' constrained interpretation of *Janus*. They also reflect differing views on a profound constitutional question of exceptional importance to both States and public employees.

The Court should grant certiorari.

I. The Ninth Circuit improperly limited the First Amendment's protections to "non-members" paying "agency fees."

The First Amendment protects "'both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The right to "eschew association for expressive purposes is likewise protected." *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.")). Forcing individuals to "mouth support for views they find objectionable violates [these] cardinal constitutional command[s]." *Janus*, 138 S. Ct. at 2463. This principle reaches not only to speech itself, but also subsidizing speech. *Id.* at 2464. As Thomas Jefferson stated, "'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.* (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed, 1950) (emphasis deleted and footnote omitted)).

That does not, of course, mean that state employees cannot elect to financially support a union. But there is a "presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (citation omitted) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). That is because "[c]ourts '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)). This is especially true when it comes to a waiver of First Amendment freedoms. Courts will not find a waiver of First Amendment rights "in circumstances which fall short of being clear and compelling" because the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (quoting *Palko v. State of Conn.*, 302 U.S. 319, 327 (1937)).

In *Janus*, the Court made clear that these longstanding waiver rules apply no differently in the context of compelled subsidies to public sector unions. *Janus*, 138 S. Ct. at 2486. In laying down a roadmap for future cases, the Court relied on a long list of its prior decisions addressing the waiver of constitutional rights. Going forward, the Court warned, public employers may not deduct "an agency fee nor any other payment to a union . . . 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.* The Court stressed that 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). Rather, "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). Accordingly, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met." *Id.*

The Ninth Circuit's analysis thus should have been straightforward. The petitioners withdrew their memberships and objected to dues deduction. Pet. App. 8, 28–29. ASEA may have believed that the employees had already agreed to pay the dues. Pet. App. 6, 8, 27, 29–31. But the Ninth Circuit should have held that the State could not deduct dues from the petitioners unless there was "clear and compelling evidence" that the employees had not just signed a dues-authorization card with an evergreen clause, but actually waived their First Amendment rights. *Janus*, 138 S. Ct. at 2486.

But following its decision in *Belgau*, the Ninth Circuit did not do that. Instead, it summarily affirmed the district court. Pet. App. 1–2. According to the Ninth Circuit, a public employer could deduct union dues from employees even if it had no "clear and compelling" evidence that the employee waived his or her First Amendment rights. *Belgau*, 975 F.3d 950–52. Evidence of prior membership in a union was enough. *Id.* That was because, the Ninth Circuit believed, this Court in *Janus* had narrowly limited its holding and corresponding constitutional protections to only "nonmembers" forced to pay "agency fees." *Id.* at 952. This is wrong.

While *Janus* involved a nonmember, the Court's decision placed prohibitions on public employers generally and has clear application to members and nonmembers alike. As it often does, the Court "laid down broad principles" dictating States' obligations when deducting dues and fees from all employees. *Agcaoili v. Gustafson*, 870 F.2d 462, 463 (9th Cir.

1989). The Court made clear that state employees cannot be compelled to subsidize the speech of a union with which they disagree. *Janus*, 138 S. Ct. at 2486. Although employees can waive this First Amendment right, "such a waiver cannot be presumed," and it must be shown by "'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 U.S. at 145). The outcome in *Janus* was simply an application of these broader principles.

The Ninth Circuit, however, "strip[ped] content from principle by confining the Supreme Court's holding[] to the precise facts before [it]." *Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994) (internal quotation marks and citations omitted). Under the Ninth Circuit's decision, the government can take money from employees' paychecks to give to a union—and thus force the employees to subsidize the speech of a private actor with whom they disagree—without the employees ever knowingly and voluntarily waiving their First Amendment rights. That directly contradicts the reasoning of *Janus*.

Even assuming the "clear and compelling" waiver standard is limited to nonmembers (which it is not), the Ninth Circuit still should have applied it here. The petitioners resigned their memberships at the same time they asked the union to stop their dues deductions. Pet. App. 8, 28–29. Despite the employees' resignations, ASEA insisted that the State continue deducting union dues until the annual ten-day escape period set out in the dues-authorization cards. Pet. App. 6, 8, 27, 29–31.

By resting on *Belgau* in its summary affirmances, the Ninth Circuit held that *Janus*'s protections did not apply to the petitioners because they had already "voluntarily authorized" the payments when they signed the union's dues-authorization cards. *Belgau*, 975 F.3d at 950–51. But this reasoning is fundamentally flawed. It assumes that constitutional rights are automatically waived as long as they are relinquished through a contract. That is wrong. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (finding no waiver of constitutional rights 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 sales contract and a necessary condition of the sale"). Indeed, in *Janus*, the Court did not hold that agency fees could be deducted from nonmembers' paychecks as long as there is some indication that the employees agreed to it. To the contrary, the Court held that when nonmembers "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).

The Seventh and Tenth Circuits have also followed the Ninth Circuit's erroneously restrictive reading of *Janus*. Like *Belgau*, those courts have held that public employees have no First Amendment right to stop subsidizing a union—even after the employee becomes a nonmember—so long as the employees earlier signed dues-authorization forms. *Bennett*, 991 F.3d at 730–31; *Hendrickson*, 992 F.3d at 961–62. The Third

Circuit did the same in a non-precedential decision. *Fischer*, 842 Fed. App'x at 753.

At bottom, freedoms of speech and association are critical to our democratic form of government, the search for truth, and the "individual freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34, 637 (1943); *Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982). Given the importance of these rights, the Court has long refused "to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publ'g*, 388 U.S. at 145. The Ninth Circuit's opinion disregarded these fundamental principles.

II. This Court should grant the petition because unions are using evergreen clauses to compel employees to subsidize union speech.

The Court's review is critical to correct "the swelling chorus of courts" that have strayed from *Janus*, as well as the teachings in *Knox* and *Hudson*. *See Belgau*, 975 F.3d at 951 & n.5. Even before *Janus, Knox* and *Hudson* recognized that employees "should not be required to fund a union's political and ideological projects unless they choose to do so after having 'a fair opportunity' to assess the impact" of paying for union activities. *Knox*, 567 U.S. at 314–15 (quoting *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 (1986)). Although these cases dealt specifically with nonmembers paying agency fees, their reasoning logically extends to withdrawing members. Both members and nonmembers

are entitled to make an "informed choice" whether to support a union's speech. *Id.*

To allow for an "informed choice," employees should at least have notice of the politically significant issues the union intends to pursue during the relevant period. As this Court said in *Knox*, "[g]iving employees only one opportunity per year to make this choice is tolerable if employees are able at the time in question to make an informed choice." 567 U.S. at 315. If the union is unable or unwilling to educate potential members on the positions it will take during the relevant period, the employees must be informed that the union could use their money on speech with which the employees disagree—and that the employees are giving up a constitutional right to decline to fund another's speech.

The importance of assuring that employees give knowing consent is all the more apparent when unions add terms to employees' payroll deduction authorizations that restrict rights of free speech and association—like making the deductions irrevocable for a year or making the authorization renew by an evergreen clause. New employees might have no idea what the union is going to say with their money or what platform or candidates the union might promote during that time. If employees become unhappy with the union's message, they will be powerless to stop funding that speech—forced to see wages docked each pay period to subsidize a message they do not support.

The risk of harm to employees only increases with the unions' frequent use of automatic renewal

provisions. Typically found in residential leases, gym memberships, and many other service-based agreements, these clauses are often used in consumer and commercial contracts because, unless a party expressly opts out during a narrow escape period, the clauses automatically bind a contracting party to an agreement beyond the original contract term. So what may have been a "tolerable" period at the start of this contract can become intolerable without any additional notice.

In practice, once employees agree to join the union, they are often bound to an opt-out system, requiring employees to end their membership only during limited periods as determined by the union. As this Court has recognized, an opt-out system, while "a remarkable boon for unions," is constitutionally problematic because courts "'do not presume acquiescence in the loss of fundamental rights.'" *Knox*, 567 U.S. at 312 (quoting *Coll. Sav. Bank,* 527 U.S. at 682). Even in the context of consumer contracts, many States, including California and New York, have found that parties are "often uninformed as to, or fail to comprehend, the nature of the agreement." *See* Cal. Assem. Floor Analysis of Assem. Bill 390 (2021-2022 Reg. Sess.), available at https://bit.ly/3cXbvEx; Comm. Rep., *see also* 2019 N.Y. S.B. 1475 (NS) ("An increasing number of consumers are struggling with misleading offers known as automatic renewals of merchandise and services.") This has led these States, even with consumer contracts, to require more than the presumed consent arising from an evergreen clause. *See* Cal. Bus. & Prof. Code §§ 17600–17606; 815 Ill. Comp. Stat. 601/10; La. Stat. Ann. § 9:2716; N.Y. Gen. Bus. Law §§ 526–27;

N.C. Gen. Stat. Ann. § 75-41; Or. Rev. Stat. § 646A.295.

Like parties to consumer contracts, without proper notice, public employees are uninformed and not likely to fully comprehend the nature of the agreement or its impacts on their First Amendment rights. Relying on this weak evidence to require employees to continue to fund political speech with which they do not agree is untenable in light of *Janus*, and it should be addressed by the Court.

III. The Ninth Circuit's opinions conflict with multiple States' interpretations of *Janus*.

The Ninth Circuit's decisions not only disregard *Janus* but they also conflict with several States' reasoned interpretations of the Court's holding. After the Alaska Attorney General issued his opinion, the Texas Attorney General issued a legal opinion reaching similar conclusions. *See* Tex. Op. Att'y Gen. No. KP-0310, 2020 WL 7237859 (May 31, 2020). According to the Texas Attorney General, after *Janus*, "a governmental entity may not deduct funds from an employee's wages to provide payment to a union unless the employee consents, by clear and compelling evidence, to the governmental body deducting those fees." *Id.* at *2. The Texas Attorney General recommended that the State create a system by which "employee[s], and not an employee organization, directly transmit to an employer authorization of the withholding" to ensure the employee's consent was "voluntary." *Id.* The Texas Attor-

ney General also recommended that the employer explicitly notify employees that they are waiving their First Amendment rights. *Id.*

The following month, the Indiana Attorney General released a similar opinion. *See* Ind. Op. Att'y Gen. No. 2020-5, 2020 WL 4209604 (June 17, 2020). According to the Indiana Attorney General, "[t]o the extent the State of Indiana or its political subdivisions collect union dues from its employees, they must provide adequate notice of their employees' First Amendment rights against compelled speech in line with the requirements of *Janus*." *Id.* at *1. That notice "must advise employees of their First Amendment rights against compelled speech and must show, by clear and compelling evidence, that an employee has voluntarily, knowingly, and intelligently waived his or her First Amendment rights and consented to a deduction from his or her wages." *Id.* Finally, "to be constitutionally valid, a waiver, or opt-in procedure, must be obtained from an employee annually." *Id.*

These authorities demonstrate that the Ninth Circuit's opinions conflict with *Janus* and the First Amendment principles that underlie the Court's decision. The petitioners here, like Mr. Janus before, are entitled to the First Amendment's protections against compelled speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TREG TAYLOR
Attorney General
State of Alaska
JESSICA M. ALLOWAY
Solicitor General
Counsel of Record
DAVID A. WILKINSON
Assistant Attorney General
1031 W. 4th Ave., Ste 200
Anchorage, AK 99501
(907) 269-5108
jessie.alloway@alaska.gov

Counsel for Respondent

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