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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether public employees who voluntarily joined a union, signed written agreements to pay membership dues via payroll deduction for a one-year period, and received membership rights and benefits in return, suffered a violation of their First Amendment rights when their employer made the deductions that they affirmatively and unambiguously had authorized.

2. Whether a labor union engaged in "state action" for purposes of 42 U.S.C. § 1983 when the union entered into voluntary private membership and dues authorization agreements with its individual members.

CORPORATE DISCLOSURE STATEMENT

Respondent Alaska State Employees Association / AFSCME Local 52 has no parent corporation, and no company owns any stock in Respondent.

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INTRODUCTION

The lower courts unanimously and correctly have held that the deduction of union dues pursuant to a public employee's voluntary union membership and dues deduction authorization agreement does not violate the employee's First Amendment rights. The two non-precedential, unpublished orders below apply the unanimous consensus on this issue, which follows from this Court's precedent establishing that "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

Since June 2021, this Court has denied eight petitions for certiorari that raised the same question presented here about the enforceability of union membership agreements.[1] There have been no developments in the short time since those denials that would make the orders below worthy of this Court's review. This petition should also be denied.

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[1] *Grossman v. Hawaii Gov't Emps. Ass'n*, No. 21-597, 2021 WL 5763142 (U.S. Dec. 6, 2021); *Smith v. Bieker*, No. 21-639, 2021 WL 5763152 (U.S. Dec. 6, 2021); *Wolf v. UPTE-CWA 9119*, No. 21-612, 2021 WL 5763147 (U.S. Dec. 6, 2021); *Hendrickson v. AFSCME Council 18*, No. 20-1606, 2021 WL 5043581 (U.S. Nov. 1, 2021); *Bennett v. AFSCME, Council 31, AFL-CIO*, No. 20-1603, 2021 WL 5043580 (U.S. Nov. 1, 2021); *Troesch v. Chicago Teachers Union*, No. 20-1786, 2021 WL 5043587 (U.S. Nov. 1, 2021); *Fischer v. Murphy, Gov. of N.J.*, No. 20-1751, 2021 WL 5043585 (U.S. Nov. 1, 2021); *Belgau v. Inslee*, No. 20-1120, 141 S. Ct. 2795 (June 21, 2021).

STATEMENT OF THE CASE

A. Background

1. The petition arises from two separate cases (*Creed* and *Woods*) against the same defendants, respondents Alaska State Employees Association / AFSCME Local 52 ("ASEA" or "Union") and the Commissioner of the State of Alaska Department of Administration ("Commissioner" or "State").

ASEA is the democratically chosen representative for a bargaining unit of Alaska state employees. App. 4–5. "Employees of the State of Alaska are not required to become union members as a condition of employment. 'Alaska law makes union membership for state employees voluntary.'" App. 4, 25; *see* AS 23.40.080. "'[E]mployees must sign [a] form if they wish to join the union.'" App. 25 (citation omitted). Employees who choose to become members may resign from union membership at any time.

Petitioners Creed, Riberio, and Woods are three state employees. They concede that they each joined ASEA and signed voluntary union membership and dues deduction agreements that affirmatively "authoriz[ed]" their employer "to deduct dues for ASEA from their wages." Pet. 8.

The single-page agreements were titled "Union Membership Card / Payroll Deduction Authorization," and stated:

> I hereby apply for or commit to maintain my membership in ASEA/AFSCME Local 52 and I agree to abide by its Constitution and Bylaws.

> By this application, I authorize ASEA/AFSCME Local 52 and its successor or assign, … to act as my exclusive bargaining representative for purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment with my Employer.
>
> Effective immediately, **I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, regardless of whether I am or remain a member of ASEA, the amount of dues certified by ASEA**, and as they may be adjusted periodically by ASEA. I further authorize my Employer to remit such amount monthly to the ASEA. **My decision to pay my dues by way of payroll deduction,** as opposed to other means of payment, **is voluntary and not a condition of my employment**.
>
> **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) days before the end of any yearly period**.

App. 5–7, 27 (emphases added).

Petitioners each "checked the box on the form that read: 'Yes, I choose to be a union member.'" App. 7, 27. The State played no role in determining the terms of these private membership agreements.

As union members, petitioners received rights and benefits not available to nonmembers, including "the right to vote in union officer elections, run for union office, participate in the union's internal affairs, be elected or appointed to serve as a union steward, and vote on whether to ratify a collective bargaining agreement…." App. 5. They also received "access to members-only benefits, including, for example, discounts on various goods and services including credit cards and rental cars; access to [a certain] dental benefit, AFSCME's free college benefit, and no-cost life insurance; and invitations to members-only events." App. 5.

Petitioner Woods had previously joined the Union and was serving in a leadership role as a Union steward when he signed a new membership and dues deduction authorization agreement. App. 6. Petitioner Riberio admitted that he chose to join the Union and signed his agreement because "he believed that membership would provide value to him and his colleagues." App. 26. Petitioner Creed similarly admitted that she "chose to join" the Union and sign her agreement. App. 26.

The provision in petitioners' membership agreements stating that dues deductions would be irrevocable for one-year periods incorporated the same terms Congress has authorized for federal employees, postal employees, and employees covered by the

National Labor Relations Act and the Railway Labor Act. *See* 5 U.S.C. § 7115(a)–(b); 39 U.S.C. § 1205; 29 U.S.C. § 186(c)(4); 45 U.S.C. § 152, Eleventh (b).[2] A one-year irrevocability period for a union member's dues authorization "provides [the union] with financial stability by ensuring a predictable revenue stream" and allowing it to "make long-term financial commitments without the possibility of a sudden loss of revenue," and prevents individuals "from gaming the [u]nion's system of governance" by "pay[ing] dues for only a month to become eligible to vote in a [u]nion officer election" or access a members-only benefit "and then reneg[ing] on all future financial contributions." *Fisk v. Inslee*, 2017 WL 4619223, at *3 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F. App'x 632 (9th Cir. 2019).

2. Before June 27, 2018, Alaska law and this Court's precedent permitted public employers to require employees who were not union members to pay agency fees to their bargaining unit's union representative. App. 7; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Under *Abood*, agency fees could be collected to cover the nonmembers' share of union costs germane to collective bargaining representation, but not to cover a union's political, ideological, or membership activities. 431 U.S. at 235–36. The collective bargaining agreement between the State and ASEA at the time provided for the collection of agency

[2] The United States Department of Justice determined more than 70 years ago that union dues deduction authorizations with an annual window for revocation comport with 29 U.S.C. § 186, which regulates dues authorizations for employees covered by the National Labor Relations Act. Justice Department's Opinion on Checkoff, 22 LRRM 46–47 (1948).

fees, which were less than union dues paid by members. App. 7.

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that *Abood* "is now overruled" and that a public employer's requirement that nonmembers must pay agency fees as a condition of employment "violates the First Amendment and cannot continue." *Id.* at 2486. *Janus* did not involve voluntary union membership agreements, and the Court explained that, beyond eliminating compulsory nonmember agency fees, "States can keep their labor-relations systems exactly as they are." *Id.* at 2485 n.27. The State and ASEA immediately complied with *Janus* by ceasing collection of agency fees. App. 7.

Alaska law provides for public employers to make union dues deductions only "[u]pon written authorization of a public employee." AS 23.40.220; App. 12, 25–26. The current collective bargaining agreement between ASEA and the State similarly provides that the employer will deduct union membership dues only "[u]pon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member." App. 26. The collective bargaining agreement does not permit the collection of any agency fees.[3]

3. Petitioners each resigned their union memberships after *Janus*. App. 8, 28–29. Riberio resigned in late July 2019; Creed resigned in late August 2019; and Woods resigned in November 2019. Pet. 9; App. 8, 28–29. Pursuant to the terms of their signed

[3] Petitioners' discussion of other states' laws is irrelevant. Pet. 3–4.

authorization agreements, petitioners' dues deductions continued for a short time until the end of the one-year dues commitment period each petitioner had authorized. App. 8–9, 29–31. Riberio's deductions ended in January 2020; Creed's deductions ended in June 2020; Woods' deductions ended in July 2020. App. 8–9, 31.

B. Proceedings below

1. Petitioners Creed and Riberio filed suit against ASEA and the State under 42 U.S.C. § 1983 on March 16, 2020, alleging that petitioners' payment of union dues pursuant to their own dues authorization agreements violated their First Amendment rights (*Creed*). App. 31. Creed and Riberio filed suit only on behalf of themselves as individuals.

Petitioner Woods filed a separate suit bringing a substantively identical claim against the same defendants on April 1, 2020 (*Woods*). App. 9. Woods styled his complaint as a class action, but he never moved for class certification.[4]

In both cases, petitioners did not dispute that the First Amendment permits public employees to authorize the payment of union membership dues via payroll deduction. Rather, petitioners contended that their express, affirmative consent to join ASEA and pay dues was invalid because it was provided before this Court decided *Janus* and did not include a special

[4] Woods also sought to challenge an indemnification clause in ASEA's collective bargaining agreement with the State. The district court rejected that claim for lack of standing. App. 18–21. Petitioners do not challenge that holding.

"waiver" that petitioners claim *Janus* now requires. Pet. 10; App. 9, 35. Petitioners sought to recover from ASEA the dues they had paid and sought prospective relief to prevent further dues deductions. App. 32.

2. The two cases were assigned to District Judge H. Russel Holland. Although nominally a defendant in both cases, the State filed briefs supporting petitioners' claims.

The district court dismissed Creed's and Riberio's complaint. App. 24–48. The district court subsequently granted summary judgment against Woods' claims. App. 3–21.

The district court held in both cases that petitioners' claims failed on the merits, because "it is undisputed that [petitioners] affirmatively consented to pay union dues and agreed that [their] consent could only be revoked during a specific period." App. 15, 39. Following this Court's precedent, the district court held that "'[t]he First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforceable under state law[.]'" App. 37 (quoting *Cohen*, 501 U.S. at 672); App. 17. Thus, the district court held, "'[t]he First Amendment does not support [an employee's] right to renege on [his] promise to join and support the union. This promise was made in the context of a contractual relationship between the union and [the] employees.'" App. 15 (citation omitted). Joining the unanimous judicial authority on the issue, the district court held that "[n]othing in *Janus* changes this," and petitioners' "union membership agreements were binding contracts that remain enforceable … after *Janus*." App. 39–40, 47.

In *Creed*, which the district court decided before the Ninth Circuit's decision rejecting indistinguishable claims in *Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021), the district court went on to hold that, even if a "heightened" waiver standard applied, that standard was satisfied because petitioners undisputedly chose to sign voluntary contracts clearly agreeing to join the Union and have dues deducted from their paychecks, knowing that they were free not to do so. App. 41–48 & n.42. The district court also held that Creed's and Riberio's claims for prospective relief were moot, because their dues deductions had ended pursuant to the terms of their own signed dues deduction agreements. App. 33.

In *Woods*, decided after the Ninth Circuit issued *Belgau*, the district court also held that petitioner Woods' Section 1983 claims against ASEA failed on the additional grounds that the terms of Woods' private membership agreement with the Union were not "state action" subject to challenge under Section 1983 and the Union (a private party) was not a "state actor." App. 11–14.

3. Petitioners appealed to the Ninth Circuit but, rather than file opening briefs, petitioners filed motions for summary affirmance of the judgments against themselves. The Ninth Circuit granted those motions in single-sentence unpublished orders. App. 1, 2. Petitioners Creed and Riberio advised the Ninth Circuit that their claims for prospective relief (including all claims against the State) were moot, because their dues deductions had ended pursuant to the terms of their dues deductions agreements. Pet. 12

n.7.[5] All three petitioners further advised the Ninth Circuit that their claims were foreclosed by the Ninth Circuit's decision in *Belgau*. Pet. 12.

In *Belgau*, the Ninth Circuit rejected Section 1983 claims brought by former union members to challenge dues deductions that the plaintiffs had authorized. The Ninth Circuit held that the deduction of dues pursuant to the plaintiffs' own voluntary, affirmative, written authorizations did not violate the First Amendment. *Belgau*, 975 F.3d at 950–52. The Ninth Circuit explained that "[w]hen 'legal obligations … are self-imposed,' state law, not the First Amendment, normally governs," and the First Amendment does not "provide a right to 'disregard promises that would otherwise be enforced under state law.'" *Id.* at 950 (quoting *Cohen*, 501 U.S. at 671). The plaintiffs' public employer had simply "honored the terms and

[5] Petitioner Woods' claims for prospective relief are moot for the same reason. Woods brought his complaint as a putative class action but never moved for class certification. There are narrow circumstances in which the mootness of a named plaintiff's individual claims *before* class certification will not moot a case if those claims "are so inherently transitory that the trial court will not have even enough time *to rule on a motion for class certification* before the proposed representative's individual interest expires." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (emphasis added, quotation marks omitted) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)); *see also Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975). In this case, however, the district court had ample time to "rule on a motion for class certification before" Woods' dues commitment expired. Woods' complaint was filed April 1, 2020, and his claims did not become moot until almost four months later, when his deductions ended as of July 25, 2020. App. 8–9; *cf. County of Riverside*, 500 U.S. at 47 (plaintiffs' claims would become moot after, at most, seven days).

conditions of a bargained-for contract" between private parties "by deducting union dues only from the payrolls of Employees who gave voluntary authorization to do so." *Id.* The Ninth Circuit concluded that "[n]o fact supports even a whiff of compulsion." *Id.*

The Ninth Circuit in *Belgau* rejected the same argument that petitioners press here—that *Janus* imposed a new heightened "waiver" standard for voluntary union membership agreements. *Id.* at 951–52. The Ninth Circuit explained:

> The Court [in *Janus*] considered whether a waiver could be presumed for the deduction of agency fees only after concluding that the practice of automatically deducting agency fees from nonmembers violates the First Amendment…. The Court discussed constitutional waiver *because* it concluded that nonmembers' First Amendment right had been infringed, and in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement.

Id. at 952 (emphasis in original).

The Ninth Circuit also held in *Belgau* that the plaintiffs' Section 1983 claims against the defendant union failed because the union was a private party and its receipt of membership dues pursuant to its private agreements with its members did not constitute "state action" sufficient to support a claim against the union under Section 1983. *Id.* at 946–49.

This Court denied the plaintiffs' petition for certiorari in *Belgau*, and the Court has since denied petitions in seven other cases raising the same First Amendment claim. *See supra* at 1 n.1.

C. State court litigation

The decisions below are consistent with the ruling of the Alaska superior court about dues deductions voluntarily authorized by ASEA members. In August 2019, more than a year after this Court's decision in *Janus*, the former Alaska Attorney General opined that *Janus* invalidated all existing union membership agreements and required "a significant change" in the State's dues deduction practices for union members who had affirmatively authorized those dues. App. 28–29; Pet. 6–7. The State's executive branch then sought to end dues deductions for state employee union members who had individually authorized those deductions. Pet. 7; App. 7–8, 30.

The State sued ASEA in state court seeking a judicial declaration supporting the executive branch's actions. The Alaska superior court rejected the State's contentions, held that the executive branch's actions violated Alaska state law and the State's contract with ASEA, and enjoined implementation of the Attorney General's opinion letter. The Alaska superior court agreed with the unanimous judicial consensus that *Janus* did not invalidate voluntary union membership agreements and concluded that the Attorney General's opinion letter to the contrary was incorrect. *See State of Alaska v. Alaska State Emps. Ass'n/AFSCME Local 52, AFL-CIO*, No. 3AN-19-09971CI, 2019 WL 7597328, at *1–7, Temporary Restraining Order (Oct. 3, 2019), Preliminary Injunction (Nov. 5, 2019), Order

Granting Summary Judgment (Alaska Super. Ct. Feb. 8, 2021); Pet. 7; App. 8, 30.[6]

REASONS FOR DENYING THE PETITION

In *Cohen v. Cowles Media*, this Court held that "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." 501 U.S. at 672. The decisions below simply applied that established principle to hold that the enforcement of public employees' own voluntary, affirmative written agreements to pay union membership dues, for which the employees received membership rights and benefits in return, did not violate the employees' First Amendment rights.

Petitioners provide no good reason for this Court to review the Ninth Circuit's unpublished, non-precedential, one-sentence orders below. Petitioners concede that three other circuits and dozens of district courts have joined the Ninth Circuit in unanimously rejecting indistinguishable claims. Like the Ninth Circuit, every other court to address the issue has recognized that *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)—which invalidated a statutory

[6] In her brief supporting the petition, the Commissioner inaccurately suggests that she is "[s]tuck between conflicting demands" as the defendant in suits brought by petitioners and ASEA. Commissioner Br. 1. In fact, the State affirmatively filed suit against ASEA in Alaska superior court seeking a declaratory judgment that *Janus* requires the Commissioner to cease dues deductions for voluntary union members, and the superior court rejected the State's argument. ASEA was forced to file a counterclaim to prevent the Commissioner from violating Alaska state law and the State's contract with ASEA.

requirement that public employees pay mandatory agency fees to a union as a condition of public employment if the collective bargaining agreement provided for such mandatory fees—did not address or invalidate voluntary dues authorization agreements by employees who choose to become union members. This Court has recently denied petitions for certiorari in eight of those cases. There have been no developments since that time that would justify a grant of review here.

I. The lower courts unanimously have rejected petitioners' argument that *Janus* invalidated voluntary union membership agreements.

Petitioners contend that review is justified to "resolve confusion" about *Janus*. Pet. 13. There is no "confusion" to resolve. As both petitioners and the State acknowledge, the lower courts unanimously have rejected petitioners' arguments; there is no split of authority about the application of the First Amendment. Pet. 11; Commissioner Br. 9, 15–16.

Petitioners voluntarily chose to become union members and signed membership agreements. In those agreements, petitioners affirmatively and unambiguously agreed to pay union dues. App. 5–7, 27. The circuit courts that have addressed the issue unanimously have "recogniz[ed] that *Janus* does not extend a First Amendment right to avoid paying union dues" that a public employee affirmatively agreed to pay as part of a private contract through which the employee

received the benefits of union membership. *Belgau*, 975 F.3d at 951, *cert. denied*, 141 S. Ct. 2795 (2021).[7]

This Court has recently denied petitions for certiorari in eight of those cases. *See supra* at 1 n.1. Dozens of district courts have reached the same conclusion.[8]

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[7] *See Bennett v. Council 31 of the AFSCME, AFL-CIO*, 991 F.3d 724, 729–33 (7th Cir. 2021), *cert. denied*, 2021 WL 5043580 (U.S. Nov. 1, 2021) ("*Janus* said nothing about union members who, like Bennett, freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union."); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961 (10th Cir. 2021), *cert. denied*, 2021 WL 5043581 (U.S. Nov. 1, 2021); *Fischer v. Governor of N.J.*, 842 F. App'x 741, 753 & n.18 (3d Cir. 2021) (unpublished), *cert. denied*, 2021 WL 5043585 (U.S. Nov. 1, 2021); *see also Grossman v. Hawaii Gov't Emps. Ass'n*, 854 F. App'x 911, 912 (9th Cir. 2021) (unpublished), *cert. denied*, 2021 WL 5763142 (U.S. Dec. 6, 2021); *Smith v. Bieker*, 854 F. App'x 937 (9th Cir. 2021) (unpublished), *cert. denied*, 2021 WL 5763152 (U.S. Dec. 6, 2021); *Wolf v. Shaw*, 2021 WL 4994888 (9th Cir. Sept. 16, 2021) (unpublished), *cert. denied sub nom.*, *Wolf v. UPTE-CWA 9199*, 2021 WL 5763147 (U.S. Dec. 6, 2021); *Troesch v. Chicago Teachers Union, Local Union No. 1*, 2021 WL 2587783 (7th Cir. Apr. 15, 2021) (unpublished), *cert. denied*, 2021 WL 5043587 (U.S. Nov. 1, 2021); *Oliver v. SEIU Local 668*, 830 F. App'x 76, 80 (3d Cir. 2020) (unpublished); *LaSpina v. SEIU Pa. State Council*, 985 F.3d 278, 287 (3d Cir. 2021).

[8] *See, e.g.*, *Mendez v. Cal. Teachers Ass'n*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020) ("As every court to consider the issue has concluded, *Janus* does not preclude enforcement of union membership and dues deduction authorization agreements ...."), *aff'd*, 854 F. App'x 920 (9th Cir. 2021); *Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME, Local 11*, 2020 WL 1322051, at *12 (S.D. Ohio Mar. 20, 2020) (noting "the unanimous post-*Janus* district court decisions holding that employees who voluntarily chose to join a union ... cannot renege on their promises to pay union dues"); *Todd v. AFSCME, Council 5*, __ F. Supp. 3d __, 2021 WL

Petitioners fail to identify *any* contrary judicial authority. They cite a letter from the former Alaska Attorney General opining that *Janus* invalidates all existing union membership agreements. Pet. 6–7, 15.[9]

5235138, at *3–4, 7–8 (D. Minn. Nov. 10, 2021); *Barlow v. Serv. Emps. Int'l Union, Local 668*, __ F. Supp. 3d __, 2021 WL 4743621, at *8–11 (M.D. Pa. Oct. 12, 2021); *Biddiscombe v. Serv. Emps. Int'l Union, Local 668*, __ F. Supp. 3d __, 2021 WL 4743735, at *8–11 (M.D. Pa. Oct. 12, 2021); *Smith v. Serv. Emps. Int'l Union, Local 668*, __ F. Supp. 3d __, 2021 WL 4743579, at *8–11 (M.D. Pa. Oct. 12, 2021); *Burns v. Serv. Emps. Int'l Union Local 284*, __ F. Supp. 3d __, 2021 WL 3568275, at *3–5 (D. Minn. Aug. 12, 2021); *Hoekman v. Educ. Minn.*, 519 F. Supp. 3d 497, 508–09 (D. Minn. 2021); *Yates v. Am. Fed'n of Teachers, AFL-CIO*, 2020 WL 6146564, at *1 (D. Or. Oct. 19, 2020) *aff'd sub nom., Yates v. Hillsboro Unified Sch. Dist.*, 2021 WL 4777010 (9th Cir. Oct. 12, 2021); *Wagner v. Univ. of Wash.*, 2020 WL 5520947, at *5 (W.D. Wash. Sept. 11, 2020); *Labarrere v. Univ. Prof'l & Tech. Employees, CWA 9119*, 493 F. Supp. 3d 964, 971–72 (S.D. Cal. 2020); *Polk v. Yee*, 481 F. Supp. 3d 1060, 1071 (E.D. Cal. 2020); *Molina v. Pa. Soc. Serv. Union*, 2020 WL 2306650, at *7–8 (M.D. Pa. May 8, 2020); *Durst v. Or. Educ. Ass'n*, 450 F. Supp. 3d 1085, 1090–91 (D. Or. 2020), *aff'd*, 854 F. App'x 916 (9th Cir. 2021); *Loescher v. Minn. Teamsters Pub. & Law Enf't Emps.' Union, Local No. 320*, 441 F. Supp. 3d 762, 772–74 (D. Minn. 2020); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F. Supp. 3d 1108, 1118–19 (S.D. Cal. 2020); *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 923–25 (E.D. Cal. 2019), *aff'd*, 854 F. App'x 923 (9th Cir. 2021); *Anderson v. SEIU Local 503*, 400 F. Supp. 3d 1113, 1115–16 (D. Or. 2019), *aff'd*, 854 F. App'x 915 (9th Cir. 2021); *Seager v. United Teachers L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019), *aff'd*, 854 F. App'x 927 (9th Cir. 2021); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 876–77 (C.D. Cal. 2019); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019).

[9] Petitioners also cite letters from the Attorneys General of Texas and Indiana. Pet. 5. None of these three letters even

But as petitioners acknowledge, the Alaska superior court permanently enjoined implementation of that opinion letter, joining the unanimous judicial consensus and concluding that the opinion letter was incorrect. *See State of Alaska*, 2019 WL 7597328, at *1–7; App. 80; *supra* at 12–13.

Given the unanimous consensus of the lower courts, there is no reason for this Court to intervene.

II. The Ninth Circuit's unpublished orders faithfully apply this Court's precedents.

Petitioners also seek review on the ground that the Ninth Circuit's rejection of their First Amendment claims "conflict[s] with *Janus*." Pet. 19. This Court generally does not grant review solely to correct purported errors in decisions below, especially nonprecedential orders granting the petitioners' own motions for summary affirmance against themselves. Moreover, petitioners' merits arguments already have been found insufficient to justify review in the eight prior petitions raising the same arguments, including four petitions denied on November 1, 2021, and three petitions denied on December 6, 2021. There have been no relevant legal developments since that time that would support a different outcome here.

In any event, petitioners' merits arguments are incorrect. *Janus* held that mandatory agency fee requirements for public employees are not consistent

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mentions, let alone attempts to contend with, the unanimous judicial authority on the issue.

with the First Amendment. 138 S. Ct. at 2486. These cases, in contrast, involve public employees who voluntarily became union members, expressly and affirmatively agreed to pay membership dues, and received membership rights and benefits in return. Petitioners did not experience any violation of their First Amendment rights when their employer made the dues deductions they had affirmatively authorized, because "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen*, 501 U.S. at 672.

Petitioners erroneously contend that *Janus* imposed a new, heightened "waiver" analysis whenever a public employee elects to join a union and pay membership dues. As the lower courts unanimously have recognized, *see supra* at 14–17 & nn.7–8, *Janus* did not change the law governing the formation and enforcement of voluntary contracts between unions and their members. The relationship between unions and their members was not at issue in *Janus*.

Petitioners' arguments conflict with *Cohen*, which did not apply a special, heightened "waiver" analysis to a newspaper's promise not to reveal the identity of a confidential source, because the government's enforcement of the promise did not give rise to a First Amendment objection that needed to be waived. The same is true here. Private parties often enter into agreements that implicate First Amendment rights—arbitration agreements, nondisclosure agreements, annual magazine subscriptions—and the government routinely honors those agreements. Outside the context of criminal suspects in custody or criminal defendants pleading guilty, a voluntary, affirmative,

and unambiguous agreement is sufficient. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 234–49 (1973) (consent to search is waiver of Fourth Amendment right against involuntary searches).[10]

The passage from *Janus* on which petitioners rely concerns workers who never joined the union ("nonmembers") and never affirmatively authorized membership dues deductions:

> Neither an agency fee nor any other payment to the union may be deducted from a *nonmember's* wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, *nonmembers* are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

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[10] Petitioners' cases are not to the contrary. Pet. 18. The Court in *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), addressed the right to counsel during custodial interrogation. In *D.H. Overmyer Co., v. Frick Co.*, 405 U.S. 174, 185–86 (1972), the Court merely held that "assum[ing]" without deciding whether a heighten "waiver" analysis applied to a procedure that would otherwise violate due process, the parties' contract constituted such a waiver. In *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972), the Court simply held that "fine print" in a consumer contract did not provide sufficiently "clear" consent to a constitutionally invalid replevin procedure that did not comply with procedural due process.

138 S. Ct. at 2486 (emphases added, citations omitted). The Court cited "waiver" cases in this passage not to tacitly overrule *Cohen*, but to make clear that the States cannot presume from nonmembers' *inaction* that they wish to support a union.[11]

As the lower courts unanimously have recognized, *Janus* did not prohibit voluntary dues payments but "made clear that a union may collect dues when an 'employee affirmatively consents to pay.'" *Bennett*, 991 F.3d at 732 (quoting *Janus*, 138 S. Ct. at 2486). Petitioners concede here that they chose to join ASEA and signed membership and dues authorization agreements. In those agreements, petitioners "clearly and affirmatively consent[ed]," *Janus*, 138 S. Ct. at 2486, to dues payments.[12]

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[11] The four "waiver" cases *Janus* cited concerned whether waiver could be found solely from the plaintiff's inaction. *See Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938) (addressing whether pro se defendant had properly waived his Sixth Amendment right to counsel by failing to ask that counsel be appointed); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–80 (1999) (rejecting argument that State had "constructively" waived its sovereign immunity by engaging in activity that Congress decided to regulate); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315, 322 (2012) (nonmembers of union could not be deemed to consent to union political assessment through their silence); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–44 (1967) (libel defendant could not be deemed to have waived, through its silence, libel defense later recognized in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

[12] The State incorrectly asserts that the Ninth Circuit held that "[e]vidence of prior membership in a union was enough" to authorize dues deductions. Commissioner Br. 13. To the contrary, petitioners not only joined the Union, but they

Petitioners also contend that their otherwise-valid membership and dues deduction agreements were invalidated because this Court's later decision in *Janus* changed the options available to nonmembers going forward. Pet. 23–24. But it is well-established that contractual commitments are not voided by later changes in the law affecting potential alternatives to entering the contract, "even when the change is based on constitutional principles." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 277 (3d Cir. 2002). Even in cases involving plea agreements—contracts that waive constitutional rights, *Puckett v. United States*, 556 U.S. 129, 137 (2009)—this Court has held that the fact that a defendant may have accepted a plea agreement in part to avoid an alternative later deemed unconstitutional does not provide a basis for voiding that agreement. *See Brady v. United States*, 397 U.S. 742, 757 (1970); *see also Hendrickson*, 992 F.3d at 964 ("*Brady* shows that even when a 'later judicial decision[]' changes the 'calculus' motivating an agreement, the agreement does not become void or voidable."); *Bennett*, 991 F.3d at 731 ("a subsequent change in the law cannot retrospectively alter the parties' agreement") (quotation marks and citation omitted).

This Court's holding in *Janus* was that "States and public-sector unions may no longer extract agency fees from *nonconsenting* employees." 138 S. Ct. at 2486 (emphasis added). It is undisputed that, after *Janus*, Alaska complied with that holding by immediately stopping the collection of agency fees from all

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affirmatively, voluntarily, and unambiguously authorized the exact dues deductions they now challenge.

nonmembers. App. 7. The Ninth Circuit's unpublished orders here only address union members who *consented* to have union dues deducted from their paychecks.[13]

There also is an additional reason why the Court's intervention is not warranted. It has now been more than three years since the *Janus* decision, and state employees like petitioners who joined ASEA before *Janus* have had multiple opportunities to revoke their dues authorization agreements if they wished to do so. Indeed, in August 2019, the State sent a copy of the *Janus* decision to all state employees. Thus, the issue presented here about employees who became union members before *Janus* has become even less significant because of the passage of time.

III. The second question presented also is not worthy of review.

Petitioners present a second, subsidiary question regarding the district court's holding in *Woods* that petitioner Woods' Section 1983 claims against the Union also failed for lack of sufficient "state action." Pet. i; App. 11–14. That question does not independently merit review. The resolution of the question would not

[13] The State's arguments about "evergreen" clauses are misplaced. Commissioner Br. 16–19. This case does not involve "presumed consent." Commissioner Br. 18. Petitioners undisputedly voluntarily and affirmatively agreed to join the Union and pay the dues at issue, for which they received valuable consideration in return. Petitioners' deductions ended at the first window periods following their resignations. As the State's own citations to state statutes reflect, state law is fully capable of limiting abusive or improper contract provisions, which did not exist here. Commissioner Br. 18–19.

change the outcome of these cases, and in any event, there is no conflict to resolve.

The Ninth Circuit said nothing about "state action" (or anything else) in these cases, but merely granted petitioners' own motions for summary affirmance against themselves. App. 1, 2. The district court in both cases held that all petitioners' claims failed on the merits against all respondents, including ASEA, because petitioners suffered no First Amendment violation when they paid the dues they had voluntarily and affirmatively authorized. App. 14–21, 35–48. Although the district court held that petitioner Woods' claims against ASEA also failed for lack of sufficient "state action," that additional holding was not necessary to the court's judgment. Rather, the district court explained that Woods' claims failed on the merits "even if [ASEA] were acting under color of state law." App. 14. The district court expressly did not address the "state action" issue with respect to Creed's and Riberio's claims, because their claims too failed on the merits. App. 48 n.49. Resolving petitioners' second question presented thus would not change the outcome of these cases. *See, e.g.*, *Hendrickson*, 992 F.3d at 961 n.17 ("Because we find that Mr. Hendrickson's underlying claim for back dues against the Union fails, we do not additionally consider whether the Union meets the 'state actor' element for this § 1983 claim."); *Bennett*, 991 F.3d at 729–33 (rejecting indistinguishable First Amendment claim against union on the merits without addressing "state action" issue); *Fischer*, 842 F. App'x at 752–53 (same).

In any event, petitioners are wrong in asserting that the Ninth Circuit's state action analysis in *Belgau* is inconsistent with the Seventh Circuit's state

action analysis in *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*), and *Hudson v. Chicago Teachers Union No. 1*, 743 F.2d 1187 (7th Cir. 1984). Pet. 12, 25–27. The Union's conduct here was not, as petitioners assert, "the same as in *Janus*" and *Hudson*. Pet. 26. *Janus* and *Hudson* did not involve voluntary dues payments. The "state action" in those cases was the *requirement*, contained in a collective bargaining agreement with the State, that nonmembers must pay agency fees as a condition of public employment. *See Janus*, 138 S. Ct. at 2479 & n.24 (explaining that "a very different First Amendment question arises when a State *requires* its employees to pay agency fees") (emphasis in original). The unions in *Janus* and *Hudson* had jointly agreed with the government to impose that mandatory agency fee requirement on nonmembers. In these cases, by contrast, the petitioners' obligation to pay dues stemmed not from any state policy or law, but from their own voluntary private agreements. The Ninth Circuit in *Belgau* expressly distinguished *Janus II, see Belgau,* 975 F.3d at 948 n.3, and there is no conflict.

Petitioners incorrectly contend that, in this case, the State was a party to petitioners' individual membership and dues deduction agreements with ASEA. Pet. 21, 28–29. To the contrary, the State played no role in drafting the agreements, and the State did not sign or agree to the terms of those agreements. As the district court correctly held, petitioners' signed Payroll Deduction Authorization agreements "created a contract between [petitioners] and ASEA," not the State, and "the fact the due[s] authorization form also involves an assignment to a third party does not mean it is not a contract between [petitioners] and ASEA." App. 36–37; *see Oliver v. SEIU Local 668*, 415 F. Supp.

3d 602, 611-12 (E.D. Pa. 2019), *aff'd*, 830 F. App'x 76 (3d Cir. 2020).

Contrary to petitioners' contention (Pet. 27–29), the Ninth Circuit's state action analysis in *Belgau* also is consistent with *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). *Lugar* involved a challenge to a state prejudgment attachment statute that directed state officials to "attach property on the *ex parte* application of one party to a private dispute," based solely on that party's allegation that the other party might dispose of the property to defeat his creditors, without providing the other party prior notice or the opportunity to be heard. 457 U.S. at 924–25, 942. The source of the constitutional harm was the due-process-violating state statute. The private party invoking that invalid statutory procedure to obtain property was considered a joint actor with the State. *Id.* at 941–42.

By contrast, under Alaska law, public employee dues deductions may only be made if the employee voluntarily and affirmatively authorizes the public employer to make those deductions. AS 23.40.220; App. 12, 25–26. The deductions here were made pursuant to petitioners' own voluntary private agreements with the Union. The Union's conduct was simply to enter into such private agreements. "That the State responds to [private parties'] actions … does not render it *responsible* for those actions." *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982) (emphasis in original) (rejecting argument that private conduct was

state action). As such, the *Lugar* state action analysis does not apply here.[14]

Public employees authorize voluntary payroll deductions for many purposes, including for charitable campaigns and health and pension plans. On petitioners' state action analysis, every private party that receives money through such voluntary payroll deductions would be a "state actor" subject to suit under 42 U.S.C. § 1983. Moreover, every dispute about whether a union representing public employees engaged in misconduct to obtain an employee's signature on a dues deduction authorization agreement would be cognizable in federal court, thereby turning the federal courts into substitutes for state public employee relations boards, which exist to resolve labor-relations disputes involving public employees and unions. There is no authority for either proposition.

For all these reasons, the second question presented is not worthy of this Court's review.

CONCLUSION

The petition for certiorari should be denied.

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[14] Petitioners' other cited cases do not support their argument that ASEA could be subject to liability here as a Section 1983 "state actor." Pet. 27. In *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), the defendant in a state court proceeding alleged that the proceeding violated due process. The case involved no question of whether a private party was a "state actor" under Section 1983. In *Fuentes*, 407 U.S. 67, the plaintiffs sued state officials. The Court did not address whether any private co-defendants were Section 1983 "state actors."

Respectfully submitted,

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