No. 21-615

IN THE
Supreme Court of the United States

CHRISTOPHER A. WOODS, LINDA CREED,
TYLER RIBERIO,
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

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INTRODUCTION

The briefs submitted by the State Respondent and by fifteen states as amici curiae demonstrate why this Court's review is needed: states require guidance on when they can lawfully take payments for union speech from employees under *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). Alaska and the fifteen states believe that, under *Janus*, this requires "'clear and compelling' evidence" the employees waived their constitutional rights. *Id.* at 2486 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)). Other states, now backed by three circuit courts, take the contrary position that government employers only need evidence of a contract to seize union dues from objecting employees who resign their union membership. *See* Pet. 2–3.

It is important that the Court resolve this disagreement because many states and unions are restricting employees' right to stop paying for union speech. Pet. 3–4. Here, the dues deduction authorization the State enforces prohibits employees who become nonmembers of ASEA from stopping dues deductions except during an annual ten-day period. Pet.App. 6, 27. Unless the Court establishes that employees' First Amendment rights under *Janus* cannot be restricted unless employees validly waive those rights, states and unions will continue to hamstring employees' ability to stop paying for union speech.

This harm is exacerbated by the Ninth Circuit's conclusion that unions that work with government employers to seize union dues from dissenting employees' wages are not state actors subject to constitutional constraints. *Belgau v. Inslee*, 975 F.3d 940, 945-49

(9th Cir. 2020). This untenable conclusion conflicts not only with this Court's holdings in *Janus*, but also with two Seventh Circuit precedents. *See Janus v. AFCSME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus* II"); *Hudson v. Chi. Teachers Union Local No.* 1, 743 F.2d 1187, 1191 (7th Cir. 1984), *aff'd* 475 U.S. 292 (1986).

This case presents the Court with a unique vehicle to resolve this conflict, to clarify its holding in *Janus*, and to protect employees' right to refuse to subsidize union speech. The petition should be granted.

I. The Ninth Circuit's Decision Conflicts with *Janus.*

The Ninth Circuit defied this Court's holding in *Janus*, 138 S. Ct. at 2486, by declaring that governments and unions do not need clear and compelling evidence of a waiver to seize union dues from employees who become nonmembers and object to those seizures. *Belgau*, 975 F.3d at 952. Indeed, even without *Janus'* waiver holding, the court should have recognized that the government cannot restrict employees' exercise of their First Amendment right under *Janus* unless employees expressly waive that right.

Contrary to the false impression ASEA tries to create, this case does not concern union members voluntarily paying union dues for membership benefits. It concerns union dues involuntarily seized from petitioners and other employees *after* they resigned their union membership and objected to supporting the union financially. Pet. 9–10. This case involves "nonmembers" being compelled to subsidize union speech, just as *Janus* did. 138 S. Ct. at 2486.

Janus applies to employees who become nonmembers by resigning their union membership, and not just to employees who never joined a union, as ASEA contends (at 19). Employees who joined a union in the past do not forfeit their First Amendment right to stop subsidizing that union's speech in the future. Employees who choose to exercise their right by resigning their membership are as much "nonmembers" under *Janus* as employees who never joined in the first place. 138 S. Ct. at 2486. Unless these nonmembers earlier waived their First Amendment right to stop paying for union speech, states and unions necessarily violate that right by compelling them to continue to subsidize union speech over their objections.

Janus' waiver holding does much more than merely "make clear that the States cannot presume from nonmembers' *inaction* that they wish to support a union." ASEA Br. 20 (emphasis in original). The Court established the evidentiary burden that government employers and unions must satisfy to prove employees consent to subsidizing a union by holding that "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). Under the three precedents cited in *Janus*, showing a waiver requires proof of an "'intentional relinquishment or abandonment of a known right or privilege." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see Curtis Publ'g*, 388 U.S. at 143-45 (applying this standard to an alleged waiver of First Amendment rights).

ASEA argues (at 18) that *Janus'* consent requirement can be satisfied by a contract in which an employee agrees to pay union dues as a nonmember. But that contention conflicts with this Court's repeated use of the term "waiver" in *Janus*, 138 S. Ct. at 2486. The Court stated: "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights," that "such a waiver cannot be presumed," and that "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 at 145). The Court in *Janus* clearly required proof of a "waiver," and not proof of a contract.

The two are not equivalent. The criteria for proving a waiver of a constitutional right is more exacting than the criteria for proving formation of a contract. For example, a key element to proving a waiver is that an individual must have known of the constitutional right that he or she allegedly waived—*i.e.*, the individual must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986); *see Curtis Publ'g*, 388 U.S. at 144-45 (holding that an individual did not waive his First Amendment right because he did not know of that right). That is not an element to proving a contract. Here, even if the dues deduction form at issue amounts to a contract, it does not amount to clear and compelling evidence of a waiver because nothing on the form proves a signatory knew of his or her First Amendment right not to support ASEA or intelligently chose to waive that right.

ASEA's reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) is misplaced for the reasons discussed in the petition at 21–22. Most pertinently, this case

does not involve a "private" agreement like *Cohen* or a "contract between unions and their members," as ASEA claims (at 18). This case involves an agreement that directs the *State of Alaska* to deduct union dues from employees when they are *not* union members. Pet. 21-22. The dues deduction authorization states that the signatory "direct[s] my Employer"—which here is the State of Alaska—"to deduct from my pay each period, regardless of whether I am or remain a member of ASEA, the amount of dues certified by ASEA . . . " Pet.App. 6, 27.[1] *Cohen* did not address an agreement with a state in which a citizen allegedly agreed to allow that state to violate his or her constitutional rights. In contrast, *Janus* speaks directly to the evidence states need to take union payments from nonmembers' wages without violating their First Amendment rights. The Court held it requires a "waiver" that is "freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145).

Janus' waiver requirement is important. Without it, states and unions can easily restrict when employees can stop paying for union speech simply by writing restrictions into the fine print of dues deductions forms. No evidence that employees knew of their First

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[1] Nothing in the record supports ASEA's unsubstantiated claims that "the State played no role in drafting the agreements" and "did not sign or agree to the terms of those agreements." ASEA Br. 24. Indeed, it is implausible that the State would deduct monies from its employees' wages without approving the terms of the form authorizing those deductions. In any event, regardless of who drafted the dues deduction form, the fact remains that it purports to authorize the State to take union dues from employees' wages when they are nonmembers.

Amendment rights or intelligently decided to surrender those rights is required. This harm is not speculative: several states and unions are systematically using this tactic to prohibit employees from exercising their First Amendment rights under *Janus* for all but a few days of each year. *See* Pet. 3–4.

The Court should not tolerate this resistance to the free speech rights it recently recognized in *Janus*. The Court should grant the petition to reaffirm *Janus'* waiver requirement and firmly establish that states cannot restrict employees' right not to pay for union speech rights absent clear and compelling evidence the employees knowingly, intelligently, and voluntarily waived their rights.

II. The Ninth Circuit's state action and state actor holdings conflict with this Court's precedents and Seventh Circuit case law.

The Court also should grant review to resolve the conflict between *Belgau*'s state action holding and the precedents of this Court and the Seventh Circuit. *See* Pet. 25–29. The state action here is the same as in *Janus*: a state and union, acting jointly pursuant to a state law and collective bargaining agreement, deducted and collected monies from nonmembers' wages. In contrast to the Ninth Circuit's holding in *Belgau*, the Seventh Circuit recognized that unions engaging in this state action are state actors. *See Janus II*, 942 F.3d at 361; *Hudson*, 743 F.2d at 1191.

ASEA claims the state action in *Janus* and *Hudson* was the requirement that nonmembers pay agency fees. ASEA Br. 24. The claim is superficial. The state action that actually violated the employees' First Amendment rights in those cases was the government

and union *taking money* from them for union speech. That is the state action that compelled those employees to subsidize union speech against their will. It is likely for this reason the Court in *Janus* did not only hold agency fee requirements unconstitutional. The Court addressed the underlying taking by holding that "employees [must] clearly and affirmatively consent before any money is taken from them" and by holding that "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." 138 S. Ct. at 2486. Petitioners were subject to the very action *Janus* held to be unconstitutional: they had payments for union speech seized from their wages when they were nonmembers and without their consent.

ASEA's attempt to reconcile *Belgau* with *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) is equally unavailing. *Lugar* held that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor.'" *Id.* at 941. ASEA is a state actor under *Lugar* because it worked hand-in-glove with the State to seize disputed union dues from petitioners' wages. Pet. 27–28. ASEA tries to distinguish *Lugar* by claiming (at 25) that the "deductions were made pursuant to petitioners' own voluntary private agreements with the Union." Even if that claim were true, and it is not, it would not distinguish *Lugar* because the creditor in that case had a rightful claim to some of the disputed property that the government sequestered for it. 457

U.S. at 925 n.3.[2] ASEA's mistaken belief that it had a right to receive dues from petitioners after they became nonmembers does not change the reality that ASEA is a state actor under *Lugar* because it worked jointly with the State to seize those disputed monies.

Belgau's state actor holding not only conflicts with *Janus* and *Lugar*, it also imperils employees' First Amendment rights under *Janus*. The holding frees unions from constitutional constraints when working with state and local governments to take union dues from employees. The Ninth Circuit has effectively given unions a free pass to infringe on employees' speech rights without fear of liability under 42 U.S.C. § 1983. The Court's review is warranted.

III. This Petition Presents a Unique Vehicle to Reaffirm *Janus'* Waiver Requirement.

This petition differs from other petitions that raised similar questions because, unlike in those cases, the State respondent here wants to faithfully enforce *Janus*' waiver requirement. Based on a legal opinion by Alaska's Attorney General correctly interpreting *Janus*, Alaska's Governor directed the Department of Administration to reform the State's payroll deduction procedures to comply with the decision's waiver

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[2] Petitioners' dues deduction authorizations were neither "voluntary" nor "private" agreements. The authorizations were not voluntary because, when petitioners signed the forms, they were subject to an agency fee requirement and had no choice but to subsidize ASEA. *See* Pet. 24. The authorizations also were not private agreements because they directed the State of Alaska to deduct union dues from petitioners' wages regardless of their membership in ASEA. *See id.* at 21–22; *supra* at 5.

requirement. Pet.App. 53, 73. The State's reform efforts are being blocked by ASEA's claim that *Janus* requires no evidence of a waiver—a claim now backed by Ninth Circuit case law. *See* Pet. 7–8. This petition thus presents the Court with a unique situation for clarifying what actions states must take to comply with *Janus*.

States need this clarity because they disagree on what actions are required. While at least eleven states take the position that *Janus* has no impact on government deductions of union dues made pursuant to assignments, *see* Pet. 2–3, Alaska and fifteen other states believe such deductions require clear and compelling evidence the employees waived their First Amendment rights, *see* Br. of Amici Curiae W. Va. et al. The Court should resolve this disagreement.

The petition arising from summary affirmance orders does not make it an unattractive vehicle for resolving this disagreement. In *Friedrichs v. Cal. Teachers Ass'n*, 576 U.S. 1082 (2015), the Court chose to review one of its precedents by granting a petition that arose from a Ninth Circuit summary affirmance order that was based on that precedent, *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014). Similarly, the Court can effectively review *Belgau*'s untenable holdings here because the summary affirmance motions the Ninth Circuit granted were based on *Belgau* being a circuit precedent that controlled petitioners' claims.[3]

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[3] *See* Woods C.A. Mot. for Summ. Affirmance, 3-4 (Dkt. No. 15, June 29, 2021); Creed C.A. Mot. for Summ. Affirmance, 4-5 (Dkt. No. 18, July 2, 2021).

The validity of *Belgau*'s holdings are before the Court both for this reason and because the district court's decision in *Woods* is predicated on *Belgau*. Pet.App. 10-18. Contrary to ASEA's claim (at 23), this includes *Belgau'*s state-action and state-actor holdings because Woods's claims against ASEA were dismissed based on those holdings. Pet.App. 13.

Woods and *Creed* do not present any thorny jurisdictional issues that could complicate the Court's review of those holdings. It is undisputed that petitioners have live claims for retroactive relief. Woods also has live claims for both retroactive and prospective relief for members of the putative class sought in his complaint. ASEA falsely accuses Woods of not timely moving for class certification. ASEA Br. 10 n.5. ASEA fails to mention that the district court, upon the joint request of ASEA and the other parties, ordered that "class certification proceedings are stayed pending the court's ruling on ASEA's motion for summary judgment." Woods D. Ct. Order from Chambers (Dkt. 37, July 9, 2020). If this Court holds ASEA was not entitled to summary judgment, Woods' class claims will remain justiciable because they relate back to the filing of the complaint. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991).

Overall, this petition presents the Court with an excellent vehicle to resolve the disagreement among states over what the Court meant in *Janus* when it held that, to deduct union payments from nonmembers' wages, a "waiver must be freely given and shown by 'clear and compelling' evidence.'" 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145).

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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