No. 23-179

In The
Supreme Court of the United States

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

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

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

Jay R. Carson
Counsel of Record
David C. Tryon
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
j.carson@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org
a.certo@buckeyeinstitute.org

Counsel for Amicus Curiae

QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference.

The Buckeye Institute has a particular interest in this case. Following this Court's decision in *Janus v. AFSCME,* 138 S. Ct. 2448 (2018), The Buckeye Institute has represented and continues to represent public sector employees seeking to exercise their First

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[1] Pursuant to Rules 37.2(a), The Buckeye Institute states that it has provided timely notice of its intent to file this amicus brief to all the parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

Amendment right to refrain from financially supporting union speech with which they disagree.

SUMMARY OF THE ARGUMENT

In *Janus,* this Court held that the First Amendment guarantees public employees the right not to subsidize a union and its speech. *Janus,* 138 S. Ct. at 2486. To protect this right, the Court held that public employers cannot deduct, and unions cannot collect, payments for union speech from employees without clear and compelling evidence that the employees waived their First Amendment rights to refrain from supporting for union speech. *Id*.

But the promise that *Janus* held for dissenting bargaining union members has proved illusory. Public sector unions—often with the assistance of state legislatures—have sought to impede public sector employees from exercising their *Janus* rights. Indeed, as this case shows, public sector unions have resisted efforts to make public sector employees aware of their *Janus* rights or to protect employees' ability to exercise them. In many cases, circuit courts have upheld these efforts under the theory that public employees waive their *Janus* rights when they join a union.

For example, the Ninth Circuit held that states do not need evidence of a constitutional waiver to seize union dues from employees, but that a mere union membership contract will suffice. *Belgau v. Inslee*, 975 F.3d 940, 952 (9th Cir. 2020). Numerous other circuits followed suit. See, *e.g., Wheatley v. New York State*

United Teachers, No. 22-2743-cv, 2023 WL 5688399, at *3–4 (2d Cir. Sept. 5, 2023); *Bennett v. Council 31 of the American Federation of State, County and Municipal Employees, AFL-CIO*, 991 F. 3d 724 (7th Cir. 2021). Relying on *Belgau* and the cases that followed it, unions have allowed members to resign from membership but still continued to charge them dues through the contractual period and, in some cases, automatically continued to deduct dues even after resignation. As a result, public employees who might never have been aware of their *Janus* rights when they first joined the union have found themselves locked into a continued commitment to pay dues to a union of which they are no longer members. Thus, while public employees theoretically had a right to resign union membership even under *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235 (1977), *overruled by Janus*, 138 S. Ct. 2448, and a right to refrain from financially supporting union speech under *Janus*, these rights have little practical value if employees are unaware of them and can waive them—for years at a time—by signing a union card and can only assert them in a time and manner determined by the union.

Alaska's policy resolved the *Belgau* problem by making public employees aware of their rights and standardizing the opt-out process. Consistent with *Belgau*'s approach of treating union membership as a contract, the Alaska policy applied the commonsense principle that when entering into a contract—particularly one that will run for several years—contracting parties ought to know what they are agreeing to. In the case of public sector union

membership, however, terms are often opaque. The dues deductions cards that purport to serve as a "clear and compelling" First Amendment waiver not only fail to tell employees that they are waiving their *Janus* rights by signing, but often lack key terms such as the amount of dues to be paid, when the contract renews, and when members can effectively resign without having to continue to pay dues. See Pet. App. 102.

The Alaska Supreme Court's rejection of Alaska's commonsense notice requirement and standardized waiver form only increases confusion among public employees regarding the scope of their rights under *Janus* and continuing litigation seeking to vindicate the right to refrain from financially supporting union speech. Accepting this case for review will allow the Court to clarify both the scope of *Janus* and what steps governments can take to ensure that public employees are able to make informed decisions regarding whether to waive their *Janus* rights.

Further, the Alaska policy is consistent with the idea that the right to join a group for expressive purposes presumes the right to leave that group when it expresses ideas that the member does not support. *Janus* held—consistent with this Court's longstanding jurisprudence—that money is tantamount to speech. Because public sector unions are necessarily devoted to political expression, requiring members to continue to "speak" in favor of a union position after they have left the union is plainly inconsistent with *Janus*. The Alaska policy struck a reasonable balance between respecting contracts entered into by employees and their unions while still allowing employees to exercise

their *Janus* rights. Accepting this case will allow the Court to address the tension inherent in long-term contracts with expressive organizations and the government's role in mediating it.

Further, the Alaska policy is not inconsistent with its statute. When two government directives can be harmonized and construed to support the exercise of a constitutional right, that reading should be preferred.

ARGUMENT

A. The Unfulfilled Promise of *Janus*

1. Legislative Actions to Prevent Employees from Exercising Their *Janus* Rights

Before the ink was dry on this Court's decision in *Janus*, public sector unions and state governments tried to discourage public employees from exercising their rights under it. For example, "on the day *Janus* was decided," former California governor Jerry Brown signed into law a measure forbidding "public agencies from communicating with their employees about union membership and dues and gives to the public employee unions the sole responsibility for obtaining consent for dues deductions." Debra J. La Fetra, *Miranda for Janus: The Government's Obligation to Ensure Informed Waiver of Constitutional Rights*, 55 Loy. L.A.L. Rev. 405, 408–09 (2022). The sweep of the California statute was broad, essentially operating as a gag order on public entities:

> The law allows only union representatives to address new employees at their orientation meetings and forbids public agencies from disclosing to anyone other than the union and the new employees the time and place of such meetings. California agencies may not send email or any other "mass communication" to workers regarding union membership or dues without the union's approval of the content or simultaneously with the union's own mass communication (paid for by the employer).

Id.

Similarly, in November 2019, Illinois amended the Illinois Public Labor Relations Act and the Illinois Educational Labor Relations Act to prevent employers or third parties from alerting public employees to their *Janus* rights and assuring that any information that employees received came from the union. For example, the legislative changes required public employers to "refer all inquiries regarding union membership to the exclusive bargaining representative, except that the employer may communicate with employees regarding payroll processes and procedures." 2019 Ill. Legis. Serv. P.A. 101-620 (West). The Illinois amendments also required the employer to "at least once a month" provide the relevant union with a spreadsheet with home and work contact information for every bargaining unit member, and further requires employers to provide this information for new employees to the bargaining unit representative within 10 days of their hire. *Id.* In addition, employers must allow unions to meet with all newly hired employees for up to one hour (on paid time) within 10

days of the employee's hire date. *Id.* At the same time, the legislation prohibited employers from disclosing any of the same information to third parties, making such disclosure an unfair labor practice. *Id.*

Other provisions specifically target employee attempts to exercise their *Janus* rights. Employers are obligated to honor signed dues cards "as written" and allows the union to limit employees' ability to terminate dues so long as the limitation is "reasonable." *Id.* The statute further provides that a one-year irrevocability period with a 10-day revocation window is presumptively reasonable. *Id.* The legislation also requires that employees bring any challenge to dues collection in the State Employee Relations Board and requires the employer to continue to collect dues while the challenge proceeds. *Id.* If an employer honors a revocation request without first obtaining the union's consent commits an unfair labor practice. *Id.*

Ms. La Fetra states the obvious when she notes that "[t]hese laws are intended to keep public workers ignorant of their constitutional rights so that when the union representative hands them a membership card and says 'sign here,' they do so without understanding that they have a choice, much less the consequences of that choice." La Fetra, *supra*, at 409. This "hide the ball" mentality conflicts with the very idea that public unions represent the employees. Concealing the terms of the relationship is an anathema to the concept of fair representation. See *Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 916 v. Fed. Lab. Rels. Auth.*, 812 F.2d 1326, 1327 (10th Cir. 1987) ("[T]he roots of the duty of

fair representation should coincide for both public and private labor unions.").

Even pre-*Janus*, this Court held that the First Amendment requires that public unions give employees adequate information to make an informed decision regarding dues payments. *Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 306 (1986) ("[T]he original information given to the nonunion employees was inadequate".). The Alaska Policy requires no more than *Hudson* demands.

In other contexts, this Court has required more than just notice, it has mandated the same protections that the Alaska policy provides. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966) (requiring a person "first be informed in clear and unequivocal terms" of his rights before he can waive them). When the government conspires with the union to deduct money from state employees' paychecks and cedes "the process of eliciting public employees' consent to payroll deductions of union dues and fees to the union itself," "the government has a special duty to ensure informed consent." La Fetra, *supra*, at 431. Where there is concealment of a constitutional right, the validity of consent is clouded. See *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

2. *Belgau* and the Union Membership Contract

On the litigation front, the most prominent and successful attack on public employees' ability to

exercise their *Janus* rights arose from the Ninth Circuit's decision in *Belgau v. Inslee*, 975 F. 3d 940 (9th Cir. 2020). In *Belgau*, the court applied *Janus* narrowly, noting that the plaintiff in *Janus* was not a union member seeking to revoke the authorization of dues, but a non-member contesting fair share fees. The court held that an employee who agrees to join a union is bound by his or her membership contract with the union and thus his or her ability to cancel membership and revoke dues authorization is a matter of private contract with no First Amendment implications. *Id.* at 951. The result is that once an employee signs a union card—often unaware of its implications—he or she can be bound to support union speech for years. Employees discover that—as the song goes—while they can check out of union membership anytime, when it comes to paying dues, they can never leave.

Numerous district and circuit courts have followed *Belgau*'s reasoning and required public employees to continue to pay dues to support union speech even after they have "resigned" from the union and receive no benefits beyond what the union is statutorily required to provide to all bargaining unit members.

Since the *Janus* decision, The Buckeye Institute's Legal Center has represented over 20 public employees who have been forced to continue to pay union dues even after they opted out of union membership.

For example, The Buckeye Institute represented Chelsea Kolacki, a school employee in the Toledo area,

who submitted a letter to the Ohio Association of Public School Employees ("OAPSE") on September 2, 2020, resigning her membership in the union and revoking her dues deduction authorization. Her union membership agreement, however, which was signed nearly two years before the Court's decision in *Janus* provided that her dues deduction authorization would "remain in effect . . . unless withdrawn by me in the manner provided in the Collective Bargaining Agreement . . ., or where there is no provision for withdrawal in the Agreement, only during a 10 day period from August 22 through August 31" of each year. The union accepted Ms. Kolacki's resignation from the union but stated that her attempt to withdraw her dues deduction authorization was "untimely" and that it would, with the school district's assistance, continue to deduct dues until the next 10-day period, which will open nearly a year after her union resignation.

Similarly, Michelle Cymbor, who works in the Springfield Local School District near Akron, Ohio, submitted a letter to OAPSE on October 19, 2020, resigning from the union and withdrawing her authorization for dues deduction. Like Ms. Kolacki, the union accepted the resignation but stated that her withdrawal of authorization was untimely because "dues deduction authorization shall be continuous for the life of the contract unless such authorization is revoked during the final thirty (30) days of the contract." In this case, the contract was set to expire on June 30, 2020, but was renewed for another year. The union told Ms. Cymbor that it will continue—again, with the help of her public employer—to

take dues out of her paycheck until June 2021, at which point she could again attempt to withdraw her consent. In both cases, the union acknowledged that the employees were no longer union members, and that the union was no longer obligated to provide them with services beyond what is statutorily required for any member of the bargaining unit.

The Buckeye Institute currently represents five public employees who have resigned from their respective unions, had their resignation recognized by the union, but have been required to continue paying dues to an organization to which they no longer belong. See Am. Compl., *Darling v. AFSCME*, No. 22 CV 008864 (Ohio C.P. May 26, 2023). The common thread in these cases is that the employees were unaware that when they signed the initial deduction card that they were making a long-term commitment to support union political speech. Indeed, in some cases, the unions relied on membership forms that pre-dated *Janus* but had renewed automatically without the employees' knowledge.

Alaska's policy of advising public employees of their rights and standardizing the process for joining and withdrawing from public union membership would have averted most, if not all, of this litigation by allowing employees to make an informed decision when they began employment. See *Hudson*, 475 U.S. at 306 (requiring unions to give adequate information in the context of dues payments to allow employees "to gauge the propriety of the union's fee"). Indeed, the volume of requests that The Buckeye Institute receives from public employees seeking assistance in

exercising their *Janus* rights, and the continued union opposition to employee requests, testifies to the current state of confusion in the law. By accepting this case, the Court can bring clarity to the interplay between private union membership contracts, First Amendment rights under *Janus*, and the mediating role of state and local governments.

B. Alaska's Policy is Consistent with Contract Law and State Consumer Safeguards

The Buckeye Institute has argued that *Belgau* was wrongly decided and filed an amicus brief asking this Court to grant certiorari, which was denied. Regardless, if one accepts *Belgau*'s reasoning that a public employee can contractually waive his or her *Janus* rights by agreeing to union membership it follows that standard principles of contract should apply to the entirety of the public employee union membership agreement. Viewed in that light, the Alaska policy is eminently reasonable and consistent with both *Janus* and *Belgau*.

States routinely prescribe forms and mandate certain disclosures in consumer transactions. See, *e.g.,* Ohio Rev. Code § 1345.01, et seq ("Ohio Consumer Sales Practices Act"). The goal of these statutes is to protect unsophisticated consumers from sharp practices buried in contractual fine print and ensuring that consumers are aware of various statutory protections. See, *e.g.,* Ohio Rev. Code § 1345.03(B)(1) (considering "[w]hether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests in

determining whether an act or practice is unconscionable). The Alaska policy serves the same—and arguably more important —ends.

A newly-hired public employee, for example a first-year teacher, is unlikely to have any experience with the legalities of public collective bargaining. He or she is probably unaware of this Court's decisions in *Abood* or *Janus*. The new teacher is simply handed a union deduction card along with all of the rest of the first-day paperwork and urged to sign it. The new teacher may believe that he or she is required to sign the card and has no immediate access to information to the contrary. The same public interest that requires notifying consumers of their rights when buying a car or contracting for home improvements animates Alaska's policy of notifying public employees regarding their constitutional rights before they inadvertently waive them.

Further, the Alaska policy is consistent with the common law of contracts. At the core of every contract is a meeting of the minds. And without a mutual understanding of the contract's terms, no meeting of the minds can occur. Union dues deduction cards are typically just that—index cards that do not provide any recitation of the terms of the contract, its duration, the amount of dues, or mutual consideration owed between the parties, or the how an employee can terminate the contract. Indeed, these deficiencies render suspect the contract's validity. The Alaska policy is consistent with the commonsense notion that parties to a contract, particularly one in which

bargaining power is unequal, ought to know, or be able to discover, the contract's terms before signing.

And while the wisdom of the Alaska policy is not at issue in this case, accepting this case for review will allow the Court to provide guidance to policy makers in mediating the tension between *Janus*, *Belgau*, and existing state statutes.

C. The Alaska Policy is Consistent with Alaska's Public Employee Statute.

Where the Court can read a statute in a manner that harmonizes it with regulatory provisions, that interpretation should be preferred. See *Emery Mining Co. v. Secretary of Labor, Mine Safety and Health Administration*, 744 F. 2d 1411, 1414 (10th Cir. 1984) ("a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.")

The Alaska Supreme Court invalidated the Alaska policy on the basis that it conflicted with the state's Public Employment Relations Act ("PERA"). Alaska Stat § 23.40.220. But the Alaska policy is consistent with the First Amendment and *Janus* and, therefore, if there is a choice between the Alaska Policy and PERA, PERA must fall. The Court need not go there. There is no facial disagreement between the Alaska policy and PERA and so both may stand.

The statute provides: "Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the

public employee the monthly number of dues, fees, and other employee benefits as certified by the secretary of the exclusive bargaining representative and shall deliver it to the chief fiscal officer of the exclusive bargaining representative." *Id.*

The Alaska policy that created a standardized form informing employees of their *Janus* rights does not run afoul of the requirement that the form and dues amount be certified by the union's secretary and delivered to its chief fiscal officer. It merely standardizes those forms and provides appropriate warnings regarding the legal effect of signing. It does not prevent the union from communicating with employees regarding membership and touting the benefits of membership. It merely advises employees that they are signing away a right.

To the extent that the Alaska policy allows employees to leave the union and cease paying dues at any time, it is plainly consistent with *Janus*, the First Amendment and black letter law allowing members to leave voluntary organizations. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 674 (1990) (Kennedy, J., dissenting) ("To the extent that members disagree with a nonprofit corporations policies, they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own.").

By accepting this case, the Court can clarify the scope of state government power to balance contractual interests between unions and their

members, the goals of collective bargaining and the First Amendment.

CONCLUSION

For all the forgoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Jay R. Carson
Counsel of Record
David C. Tryon
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
j.carson@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org
a.certo@buckeyeinstitute.org

Counsel for Amicus Curiae

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