No. 23-179

In the Supreme Court of the United States

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 Alaska

AMICI CURIAE BRIEF FOR THE STATES OF KANSAS, ALABAMA, IDAHO, INDIANA, IOWA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment prohibits a public entity from withdrawing money from an employee's paycheck to subsidize union speech when the state lacks clear and compelling evidence that employees have knowingly and voluntarily waived their First Amendment rights.

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Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018), held the automatic withdrawal of public-sector union dues and fees from nonmember public employees' paychecks without clear and compelling evidence that the employees knowingly and voluntarily waived their First Amendment rights violated the Constitution.[1] *Id.* at 2486. The Supreme Court of Alaska misinterpreted *Janus* to hold it was improper for Alaska to inform union state employees of their First Amendment rights, obtain clear waivers of those rights, and collect employee authorizations before withdrawing union dues and fees from employee paychecks. App. 18-26.

Until this issue is resolved, *amici* States Kansas, Alabama, Idaho, Indiana, Iowa, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia, as well as all public employers, will continue to find themselves stuck in a no-win situation. Collective bargaining agreements may compel *amici* States to withdraw dues and fees from public employees and hand them over to public-sector unions without any assurance that the employees knowingly and voluntarily waived their First Amendment rights. Failing to withdraw those funds may leave States vulnerable to lawsuits from unions, but providing those funds to the unions leaves States at risk of suit by public employees complaining about violations of their constitutional rights.

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[1] Pursuant to Supreme Court Rule 37, counsel notified counsel for both Petitioner and Respondent of its intent to file this *amicus* brief.

This is an issue that affects all public employers, including the *amici* States, school districts, municipalities, and any other public employer in this country that negotiates labor agreements with a public-sector union. Until this Court resolves this issue, public employers, like *amici* States, remain stuck between a rock and a hard place, at risk of a lawsuit but unable to take concrete actions to ensure their employees are knowingly and voluntarily waiving their First Amendment rights. This Court should grant Alaska's petition and reaffirm what it said in *Janus*: All public employees have First Amendment rights. Absent clear and compelling evidence that those employees wish to finance a union's speech, employees should not be compelled to pay.

SUMMARY OF THE ARGUMENT

All public employees have First Amendment rights, and those rights can only be waived by clear and compelling evidence that the waivers were knowingly and voluntarily made. Concerned about the continued constitutionality of its dues-deduction procedure after *Janus*, Alaska decided the best practice was to provide notice of First Amendment rights directly to all state employees and require those employees to inform the state directly of their waiver and agreement to have union dues and fees automatically withdrawn from their paychecks. But the Alaska Supreme Court held that *Janus* only applied to nonmembers and, consequently, Alaska violated its collective bargaining agreement with the Alaska State Employees Association (ASEA).

I. *Janus* recognized that all public employees possess First Amendment rights, not just those who are not members of the union. Forcing public employees to monetarily support public-sector unions represents a form of compelled speech. *Janus* also held that there must be clear and compelling evidence that a public employee has knowingly and voluntarily waived his or her First Amendment rights. Since a waiver of a federal constitutional right is governed by federal law, courts look to federal law, rather than state contract law to determine whether a waiver of that right occurred.

The Alaska Attorney General recognized two problems with Alaska's dues-deduction procedure. First, because unions created the paycheck authorization forms, Alaska could not be sure public employees were executing a knowing and voluntary waiver. Second, because unions controlled the entire process in which

public employees joined the union, Alaska did not know whether employees were being adequately informed of their First Amendment rights. As such, Alaska recognized it lacked the clear and compelling evidence necessary for a waiver of an employee's First Amendment rights. To remedy this, Alaska created its own waiver of rights/dues-withdrawal authorization form and notified public employees that they must provide authorization to the State directly. Alaska's decision allowed it to ensure it complied with *Janus* and was not vulnerable to lawsuit for violating its employee's constitutional rights.

II. Several federal circuit courts have addressed whether *Janus* applies to members of a public-employee union. These courts all incorrectly constrained *Janus* and disregarded that all public employees enjoy First Amendment rights. In making this mistake, the federal appellate courts ignored the important issue of whether employees voluntarily waived their First Amendment rights. While contract principles apply, they cannot be elevated above a foundational constitutional right.

ARGUMENT

The Alaska Supreme Court erroneously cabined *Janus* to its facts, stating *Janus* only held that nonunion members could not be forced to pay agency fees to unions. App 18-19. Thus, the Alaska Supreme Court explained, *Janus* did not mandate the Attorney General's opinion and related Administrative Order 312.

While *Janus* dealt with the forced subsidization of public-sector unions by nonmember public employees, even a cursory reading of the opinion shows that *Janus* was concerned with the First Amendment rights of *all* public employees—union members and nonmembers alike. The Alaska Supreme Court (and the federal courts that have addressed the issue) unfairly cabined *Janus*'s application.

I. *Janus*'s reasoning extends to all public employees—including union members—and requires clear and compelling evidence of a knowing and voluntary waiver of First Amendment rights.

The First Amendment, which applies to the states through the Fourteenth Amendment, forbids abridging the freedom of speech, "'includ[ing] 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 decline association for expressive purposes is similarly protected. *Id.* In *Janus*, this Court recognized that forcing public employees to monetarily support public-sector unions was a form of compelled speech and violated those employees' rights. *Id.* at 2464.

The Court did not limit this constitutional protection to non-union members (contrary to the Alaska Supreme Court's holding). Rather, the *Janus* Court clearly expressed that all public employees enjoy First Amendment protections from compulsory union dues and fees.[2] *See id.* at 2471 ("Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed."); *id.* at 2472 ("This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree."); *id.* at 2478 ("We simply draw the line at allowing the government to go further still and require all employees

[2] Though the clearest example, *Janus* was not the first instance that this Court has raised that all public employees have First Amendment rights as it pertains to public-sector unions. *See Harris v. Quinn*, 573 U.S. 616, 635-36 (2014) (recognizing the important First Amendment question that compulsory fees raises); *Knox v. Service Emps. Intern. Union, Local 1000*, 567 U.S. 298, 310-11 (2012) (explaining that compulsory union fees place a significant burden on the "dissenting employee" and represent an impingement of First Amendment rights); *cf. Pattern Makers' League of North America, AFL-CIO v. N.L.R.B.*, 473 U.S. 95, 103, 106-07 (1985) (union members have traditional right to resign from union without punishment and holding that union rule restricting right to resign violated principle of "voluntary unionism"); *Ellis v. Bhd. Of Ry. Airline and S.S. Clerks, Freight Handlers, Express and Station Emps., et al.*, 466 U.S. 435, 447, 455 (1984) (holding that, under the Constitution, union could not collect money from dissenting employees to support ideological causes not related to its collective-bargaining duties and holding that First Amendment limits use to which public-sector union can put funds paid by dissenting employees).

to support the union irrespective of whether they share its views."); *id.* at 2486 ("For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees.").

To be sure, analyzing a waiver of a union-member employee's First Amendment rights is not the same as a waiver of a nonmember's rights. The member chose to join the union, while the nonmember did not. But joining a union does not require the conclusion that union-member employees have no First Amendment rights. Nor that their joining is an automatic waiver of those rights. Rather, the question is whether union-member employees clearly and compellingly waived their First Amendment rights by joining the union and authorizing withdrawal of union dues and fees from their paychecks.

The Alaska Supreme Court also rejected Alaska's assertion that under *Janus* the State was attempting to obtain clear and compelling evidence that all public employees have waived their First Amendment rights when they joined a public-sector union. App. 18-21. The Alaska Supreme Court limited *Janus* to its facts, while ignoring the majority's broad language.

The *Janus* Court held that payments to a public-sector union by nonmembers violated the First Amendment, unless the employee affirmatively consented to pay, which would waive the employee's First Amendment rights. *Janus*, 138 S. Ct. at 2486. The *Janus* Court emphasized that "such a waiver cannot be presumed" and must be freely given and demonstrated by "clear and compelling evidence." *Id.* This principle applies to all public employees: "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be

met." *Id.* Thus, before union dues and fees can be deducted by the State from any public employee's paycheck, a waiver of those rights must be properly obtained.

This Court has recognized that, because public-sector unions take many positions that have important political and civic consequences, compulsory dues or fees "constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox v. Service Emps. Intern. Union, Local 1000*, 567 U.S. 298, 312 (2012) (quoting *Ellis v. Bhd. Of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 455 (1984)). Courts do not presume acquiescence to the loss of a public employee's First Amendment rights. *See Knox*, 567 U.S. at 312; *see also Janus*, 138 S. Ct. at 2464 ("Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). Because of that, "a 'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Janus*, 138 S. Ct. at 2464 (quoting *Knox*, 567 U.S. at 310-11). Thus, a waiver is necessary.

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Determining whether there was an intelligent waiver is case-specific, based on the particular facts and circumstances surrounding that case. *Id.* An intelligent waiver requires both comprehension and an intentional relinquishment of the right. *Brewer v. Williams*, 430 U.S. 387, 405 (1977).

In determining whether a person waived his or her First Amendment rights by agreeing to a contract, courts should not look at "[a state's] contract law as the standard for waiver since 'the question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law.'" *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981) (quoting *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)). Courts closely scrutinize waivers of constitutional rights, indulging in every reasonable presumption against a waiver. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *see also Sambo's*, 663 F.2d at 690. Waiver of First Amendment rights requires clear and compelling evidence of a waiver. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967). The waiver must be knowing and voluntary. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 205 (3rd Cir. 2012); *see also Janus*, 138 S. Ct. at 2486; *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972). Evidence of these elements are present "where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations." *Democratic Nat'l Comm.*, 673 F.3d at 205 (internal quotes omitted).

Absent this clear and compelling evidence, courts are generally unwilling to sustain a claim of waiver when its effect "might be an imposition on that valued freedom." *Curtis Publ'g*, 388 U.S. at 145.

Janus's recognition that clear and compelling evidence is required to support a public employee's waiver of First Amendment rights when joining a public sector union was an important milestone in First Amendment jurisprudence. Following *Janus*, the Alaska Attorney General identified two problems with Alaska's dues-deduction process. App. 150-51.

First, Alaska could not ensure that employees' decisions to have union dues and fees withdrawn from their paychecks to subsidize union speech was a knowing and voluntary waiver. App. 150. Alaska law permits public-sector unions to design the forms employees used to authorize paycheck deductions. App. 150. The Attorney General opined that Alaska thus could not "guarantee that the unions' forms clearly identified—let alone explained—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the union's speech." App. 150.

Second, unions controlled the environment in which employees were asked to agree to payroll deductions, making Alaska unable to ensure an employee's consent was freely given. App. 150-51. Because Alaska was shut out of the process, the Attorney General concluded it could not ensure the authorization forms it received from the union were "the product of a free and deliberate choice rather than coercion or improper inducement." App 150-51 (quoting *Comer v. Schiro*, 480 F.3d 960, 965 (9th Cir. 2007)).

Because of these two issues, the Attorney General determined Alaska could not be certain that state employees' dues-authorization forms constituted knowing and voluntary waivers of their First Amendment rights. App. 150-52. As such, there was no clear and compelling evidence that Alaska state employees had waived their First Amendment rights when joining the public-sector unions by authorizing dues deduction. App. 151-52.

Because the process to join ASEA operated within a "black box," Alaska could not be sure the State was complying with the First Amendment and *Janus* when it deducted union dues and fees from employees' paychecks. Seeking to address this deficiency, Alaska took steps to ensure it could be confident an employee's waiver of his or her First Amendment rights was constitutionally valid. Alaska decided the best practice was to contact state employees directly and inform them that, to continue to have their union dues and fees withdrawn from their paychecks, Alaska would provide a new authorization directly to the employees, and employees must convey their authorization directly to the State. App. 152-54. In taking this path, Alaska recognized the serious First Amendment consequences that union dues and fees can place on dissenting employees. *See Harris v. Quinn*, 573 U.S. 616, 655 (2014) ("Agency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees.").

Even after *Janus*, the world of public-sector union dues and fees remains murky at best. Until this Court takes the opportunity to clarify *Janus* and define what steps States must take to ensure they have clear and compelling evidence of knowing and voluntary waiver

of a public employee's First Amendment rights, States remain vulnerable to lawsuits and liability for their complicity in using employee money to support speech and advocacy by public-sector unions.

Alaska is not the only state that has recognized this issue. In 2020, the Texas Attorney General issued an opinion concluding *Janus* required public employers to ensure that employee consent to automatic payroll deductions remained voluntarily given. Tex. Att'y Gen. Op. KP-0310, at 3 (2020). The Texas Attorney General recommended the State adopt specific waiver language that informed public employees of the First Amendment rights that they were waiving when they joined a public-sector union. *Id.* at 2. Also in 2020, the Indiana Attorney General issued a legal opinion that adopted the same interpretation of *Janus* as Alaska and Texas. 2020 Ind. Op. Att'y Gen. No. 5 (June 17, 2020). The Indiana Attorney General concluded that *Janus* required notice to employees of their First Amendment rights against compelled speech; a showing of clear and compelling evidence of a voluntary waiver and an affirmative consent to automatic payroll deduction of union dues and wages; and an annual renewal of that waiver. *Id.* at 1.

II. The federal appellate courts that have addressed *Janus*'s applicability to union-member public employees have uniformly failed to recognize *Janus*'s applicability.

The federal courts of appeals that have addressed similar challenges brought by public employees who joined a public-sector union have similarly failed in interpreting *Janus*. Like the Alaska Supreme Court, the federal circuit courts have erroneously limited *Janus* to its facts. *See Wheatley v. New York State United*

Teachers, No. 22-2743-cv, 2023 WL 5688399, at *3-4 (2d Cir. Sept. 5, 2023); *Burns v. Sch. Serv. Emps. Union Local 284*, 75 F.4th 857, 860-61 (8th Cir. 2023); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 960-64 (10th Cir. 2021); *Bennett v. Council 31 of the Am. Fed'n of State, Cnty, & Mun. Emps.*, 991 F.3d 724, 731-33 (7th Cir. 2021); *Belgau v. Inslee*, 975 F.3d 940, 950-52 (9th Cir. 2020); *Fischer v. Governor of New Jersey*, 842 F. App'x 741, 752-53 (3rd Cir. 2021); *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, No. 20-3795, 2022 WL 898767, at *5-6 (6th Cir. Mar. 28, 2022).

In those cases, public employees filed suit after (a) not being allowed to resign, except during a specific, union-mandated timeframe, or (b) after attempting to resign and having union dues continue to be withdrawn from their paychecks. The employees alleged these actions violated their First Amendment rights. *Wheatley*, 2023 WL 5688399, at *1; *Burns*, 75 F.4th at 859; *Bennett*, 991 F.3d at 730; *Belgau*, 975 F.3d at 944; *Fischer*, 842 F. App'x at 744. Public employees frequently argued either that they did not fully understand their rights when signing the dues withdrawal authorizations or that they felt as though they had no choice but to join the union because (before *Janus*) nonmembers were charged compulsory agency fees anyway. *Wheatley*, 2023 WL 5688399, at *3; *Burns*, 75 F.4th at 859; *Bennett*, 991 F.3d at 730; *Belgau*, 975 F.3d at 944; *Fischer*, 842 F. App'x at 752. The employees also asserted that *Janus* gave them the right to end their union membership at any time. *Wheatley*, 2023 WL 5688399, at *3; *Burns*, 75 F.4th at 859; *Bennett*, 991 F.3d at 730; *Belgau*, 975 F.3d at 944; *Fischer*, 842 Fed. App'x at 752. Often relying on each other as supporting authority, the federal appellate courts repeatedly made the same mistake: holding the claims

were governed by contract law because the First Amendment is not applicable to the public employee's claims where a public employee's decision to join the union and pay dues and fees represents an affirmative consent to pay dues, placing it outside the scope of *Janus*. *Wheatley*, 2023 WL 5688399, at *3; *Burns*, 75 F.4th at 860-61; *Bennett*, 991 F.3d at 732; *Belgau*, 975 F.3d at 951; *Fischer*, 842 Fed. App'x at 752-53.

The federal courts noted that "[c]hanges in decisional law, even constitutional law, do not relieve parties from their pre-existing contractual obligations." *Hendrickson*, 992 F.3d at 959-60 (quoting *Fischer*, 842 F. App'x at 752). In other words, according to the circuit courts, the First Amendment does not provide a right to ignore promises that would otherwise be enforceable under the common law; thus *Janus* does not apply. *Hendrickson*, 992 F.3d at 959-60; *Bennett*, 991 F.3d at 731; *Belgau*, 975 F.3d at 950-51; *Fischer*, 842 Fed. App'x at 753.

The consequence of this rationale is to essentially hold that public employees who choose to join a union have essentially no First Amendment rights against that state actor. That cannot be correct. All public employees have First Amendment rights, and those rights must be considered when determining whether the requirement to have union dues and fees deducted from public employees' paychecks violates public employees' First Amendment rights. But, instead, the federal appellate courts have asserted that "*Janus* did not create 'a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement.'" *See Burns*, 75 F.4th at 861. As the Eighth Circuit put it, public em-

ployees chose to join the public-sector union and authorize dues deductions from their paychecks in exchange for the benefits of union membership, thereby assuming the risk of a subsequent change in the law. *Id.*; *see also Fischer*, 842 F. App'x at 753. And the Ninth Circuit asserted public employees did not have a right to renege on their agreements to join and pay dues to the unions, because "[t]his promise was made in the context of a contractual relationship between the union and its employees." *Belgau*, 975 F.3d at 950.

In adopting the above reasoning, the federal courts push the First Amendment to the side and focus entirely on contract principles. *Janus* recognized that all public employees have First Amendment rights. *See* 138 S. Ct. at 2478. The lower federal courts have ignored this by placing contract principles over the First Amendment. While contract principles may relate to the question of whether public employees may be able to end their union membership and terminate their duty to pay dues and fees to the union, that contract question only comes into play after a determination that public employees have properly waived their First Amendment rights.

Any constitutional challenge brought against a State would require the State to prove by clear and compelling evidence that the waiver was knowingly and voluntarily made. *See Janus*, 138 S. Ct. at 2486; *Curtis Pub. Co.*, 388 U.S. at 145. As Alaska's system stands right now, the State could not do so, nor is it clear that any State could. *Janus* continues to be misapplied by the lower courts. This Court should take this opportunity to clarify what *Janus* means.

CONCLUSION

The Court should grant certiorari and reverse the judgment of the Supreme Court of Alaska.

Respectfully submitted,

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