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

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
ANNIKA BOONE BARKDULL*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

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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INTRODUCTION AND INTEREST OF *AMICUS*[1]

The Governor and Attorney General of Alaska did what few lower courts have done: they heeded this Court's command in *Janus*. In that case, this Court made clear that "[u]nless employees clearly and affirmatively consent before any money is taken from them," the First Amendment's standard "cannot be met." *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

Those charged with enforcing Alaska's laws determined that the State's pre-*Janus* dues-deduction processes used the power of the government to take money directly from employees' paychecks without first ensuring that the constitutional waiver standard was met. The governor issued an administrative order to rectify that error, requiring (1) that the State create its own dues deduction form which clearly identified employees' First Amendment rights and (2) that the State deduct dues from employees' paychecks only after the employee, not the union, returned the form to the State.

The Alaska Supreme Court's injunction against that order erroneously narrowed *Janus* and prevented the State from protecting employees' constitutional rights. This is far from an isolated error: Other lower

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties were notified by *amicus curiae* of its intent to file this brief at least 10 days prior to its due date.

courts have improperly limited *Janus* to its facts at every turn. This Court's review is necessary to prevent further evisceration of *Janus*'s constitutional bulwark.

This Court's review is of particular importance to Amicus Protect the First Foundation ("PT1") a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of all people across the ideological spectrum, including people who may not even agree with the organization's views. This case and its implications for the waiver of First Amendment rights is of particular interest to PT1 and its mission to protect First Amendment rights and values.

STATEMENT

Before this Court's decision in *Janus*, Alaska deducted union dues from a public employee's paycheck whenever it received a dues-deduction form for that employee from the union. Alaska Stat. § 23.40.220. When the state's current governor took office six months after *Janus* was decided, he asked the Attorney General to determine whether, in light of that decision, the State's pre-*Janus* dues-deduction process was constitutional. Pet. App. 118.

The Attorney General issued a legal opinion, concluding that the dues-deduction process violated the First Amendment. Pet. App. 136. Unions designed the forms, so the State could not guarantee those forms identified and explained employees' rights concerning union membership. Pet. App. 144, 150. Nor could the State ensure employees had *freely* waived their rights: Unions controlled the environment in

which employees were asked to authorize payroll deductions. Pet. App. 150.

The governor then issued an executive order directing the State to create new dues-deduction forms that clearly explained employees' First Amendment rights. Pet. App. 158–165. The order further provided that the State must receive those forms directly from employees themselves, not unions. Pet. App. 162.

The State sought a declaratory judgment that the pre-*Janus* dues-deduction mechanisms violated employees' First Amendment rights, and Respondent countered with an injunction motion. Pet. App. 70–72. The trial court ruled against the State, and the Supreme Court of Alaska affirmed, holding that *any* dues-deduction form the State received satisfied the requirements of the First Amendment, regardless of that form's contents or the circumstances in which it was filled out. Pet. App. 19–20.

REASONS FOR GRANTING THE PETITION

Amicus writes to highlight two points. First, before a union can use an arm of the State to deduct dues directly from employees' paychecks, the State must ensure that those employees knowingly and freely waived their First Amendment right not to join or contribute funds to the union. The Alaska Supreme Court's holding to the contrary was error. Second, this case is simply one instance in a barrage of lower court decisions skirting *Janus*'s holding. Nothing but this Court's review will end that torrent.

I. *Janus* Makes Plain that Deducting Union Dues Absent Clear and Knowing Waiver Compels Political Speech and Association in Violation of the First Amendment.

As this Court has long recognized, compelling union contributions strikes "at the heart of the First Amendment." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-236 (1977), overruled by *Janus*, 138 S. Ct. 2448. And this Court reiterated in *Janus* that, "because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed," and that an employee's waiver of that fundamental right "cannot be presumed." *Janus*, 138 S. Ct. at 2464, 2486. Thus, "*before*" the government takes any money from an employee's paycheck and transfers it to union coffers, the State must ensure that "the employee affirmatively consents to pay." *Id.* at 2486 (emphasis added).

The Alaska Supreme Court's decision has prevented the State from heeding that command. If

the government is to actively garnish an employee's wages, it is not enough, as the lower court suggested, Pet. App. 19–20, that any old dues deduction form be filled out.[2] As this Court recognized in *Fuentes* v. *Shevin*, individuals do not necessarily waive their constitutional rights simply because they have assented to a private agreement purporting to do so. 407 U.S. 67, 95 (1972). If there is no showing that individuals "were actually aware or made aware of the significance" of the purported waiver, that waiver is not presumed to be knowing and intelligent. *Id.* That is doubly true here because the union—a party "far from equal in bargaining power" with employees—controls the documentation and its distribution. *See id.* And, because later opt-out is a tortuous process limited to a ten-day window that is not even the same for all employees, Pet. App 152–155, 157, courts must be especially wary of holding that employees knowingly waived their First Amendment rights.

Alaska sought to correct the constitutional defects in its system and move the State into compliance with the First Amendment and this Court's clear directive in *Janus*. The Alaska Supreme Court's injunction distorts the First Amendment and this Court's decisions.

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[2] The situation might be different if a state sought to interfere with the ability of an association to enroll and collect dues directly from its members. But where, as here, the union seeks to force the State to use its coercive power to essentially garnish wages from employees, the First Amendment demands that the State ensure those employees have consented to that waiver of their constitutional rights.

II. The Lower Courts Are Routinely Eviscerating *Janus's* Protections.

Nor is the Alaska Supreme Court alone in that distortion. As this Court well knows, for the past five years there has been an unceasing flood of petitions seeking reversal of misguided decisions by the lower courts, which have repeatedly ignored *Janus*'s requirements and narrowed its application. This blatant disregard for the holding in *Janus* not only presents a serious issue of sound judicial administration, but also impairs the First Amendment rights of employees across the country.

For example, the Ninth Circuit has avoided *Janus*'s implications multiple times. In *Belgau* v. *Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021) (mem.), that court confronted a case in which state employees resigned their union memberships, but the state continued to deduct union dues throughout an "irrevocability" period. The court sidestepped the First Amendment violation by reasoning that the objecting employees had not been "compelled" to support union speech because they had chosen to join the union in the first place. *Id.* at 952. Their current objections and wishes to resign were, in the court's view, irrelevant.

And *Belgau* was far from the only time the Ninth Circuit has ignored the First Amendment's dictates in order to prop up unions. It committed a similar error in *Mentele* v. *Inslee*, holding that Washington's requirement that a union act as the exclusive bargaining representative for publicly subsidized childcare providers who were state employees "only for purposes of collective bargaining" did not

unconstitutionally compel association with the union. 916 F.3d 783, 785, 790-91 (9th Cir. 2019), *cert. denied Miller* v. *Inslee*, 140 S. Ct. 114 (2019). To reach that holding, the Ninth Circuit chose to rely on *Knight*, rather than Janus's superseding requirements. *Id.* at 788.

And the court's errors were not limited to its narrow reading of *Janus*. It also erroneously suggested that the burden to prove that there were no less restrictive means available fell to the plaintiff-childcare provider, rather than the government. *Id.* at 791 (Plaintiff "has not suggested an alternative way for the State to solicit meaningful input from childcare providers while simultaneously avoiding the chaos and inefficiency of having multiple bargaining representatives or negotiating with individual providers").

Other circuits too have done their best to limit *Janus*. For example, in *Fischer* v. *Governor of New Jersey*, the Third Circuit imposed an implausibly narrow interpretation of *Janus* on a class of public-school teachers seeking relief from an unconstitutional union-membership agreement. 842 F. App'x 741, 753 (3rd Cir.) (unpublished), *cert denied sub nom. Fischer* v. *Murphy*, 142 S. Ct. 426 (2021). In that case, the teachers sought to revoke their union membership shortly after *Janus* was decided. Yet the Third Circuit required them to remain in the union on the reasoning that *Janus* only protected employees who had the foresight to opt out of the union, even when doing so would require them to pay significant agency fees. *Id.* at 745, 753 n.18. The Third Circuit held that there was

no compelled speech and refused to even conduct a waiver analysis. *Id.* at 753 n.18.

Similarly, the Seventh Circuit has held that there was no First Amendment violation where a school district employee was not permitted to stop paying union dues upon her resignation. *Bennett* v. *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 991 F.3d 724, 730 (7th Cir.) *cert. denied sub nom. Bennett* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31, AFL-CIO*, 142 S. Ct. 424 (2021). The plaintiff in that case was thus similarly compelled to support speech with which she did not agree.

In short, the lower courts have consistently ignored and evaded *Janus*'s constitutional directives. By granting the petition, this Court can halt further destruction of the rights protected by *Janus* and make clear to the lower courts that the government cannot compel employees to support unions without sufficient evidence that the employees knowingly and voluntarily waived their First Amendment rights.

CONCLUSION

Alaska is properly trying to support employees' First Amendment rights by ensuring that, before it uses government power to collect a union's bills, employees knowingly and freely consent to support the union. The state supreme court's erroneous narrowing of *Janus* is preventing Alaska from doing so. This Court should grant the petition and clarify *Janus*'s scope to prevent the continued perpetuation of that error throughout the lower courts.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
ANNIKA BOONE BARKDULL*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com
Counsel for Amicus Curiae

*Not yet admitted in D.C.

SEPTEMBER 29, 2023