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

REPLY BRIEF FOR PETITIONERS

TREG TAYLOR
Attorney General
JESSICA M. ALLOWAY
Solicitor General
1031 W. 4th Ave.,
Ste. 200
Anchorage, AK 99501
(907) 269-5108

J. MICHAEL CONNOLLY
Counsel of Record
GILBERT C. DICKEY
STEVEN C. BEGAKIS
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

Counsel for Petitioners

November 10, 2023

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Rules

Other Authorities

REPLY BRIEF

ASEA's opposition rests on a false premise: that a state-run dues-deduction system is no different from a voluntary agreement between private parties. BIO.23. Deducting union dues is a unique state enterprise. The government takes money directly from an employee's paychecks. The government sends that money to unions to lobby, advocate, and bargain on the most important issues of the day. The government commits the employee to continue making payments into the future. And the government refuses to stop the payments until it receives the union's permission. This government-run, speech-subsidizing program bears no resemblance to a private contract enforced by a neutral judge.

When employees are improperly subjected to this process—whether from compulsion, mistake, fraud, lack of knowledge, or otherwise—their First Amendment rights are violated. In numerous similar contexts—including *Janus* itself—this Court has stressed that individuals must waive their constitutional rights. Petitioners' insistence that the State of Alaska obtain "clear and compelling" evidence of employee waiver follows directly from this precedent.

Recognizing the importance of the petition, ASEA tries to distract. But none of its vehicle arguments are persuasive. Petitioners have standing because they were defendants below and the lower courts awarded ASEA declaratory, injunctive, and monetary relief based on a misinterpretation of federal law. Issue preclusion doesn't apply because, among other reasons, the prior federal cases presented different issues, no

First Amendment issue was necessarily decided, and Petitioners lacked a full and fair opportunity to litigate their claims. And ASEA's reams of lower-court case citations are inapposite, as they all involve *individuals* bringing §1983 claims to challenge the dues that were collected against them.

This petition is important, it is an ideal vehicle to resolve the question presented, and the decision below conflicts with *Janus* and the First Amendment. The Court should grant certiorari.

I. There is no obstacle to this Court's review.

1. For the first time, ASEA argues that Petitioners "lack standing to assert their First Amendment argument." BIO.25-27. But Petitioners (the State and state officials) were counterclaim and third-party defendants below. App.14-15. "'Article III does not restrict the opposing part[ies'] ability to object to relief being sought at [their] expense.'" *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2195 (2020). Petitioners also have appellate standing to challenge the monetary, declaratory, and injunctive remedies that were imposed against them. App.39-41; *see, e.g., Moore v. Harper*, 600 U.S. 1, 15 (2023); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989). The State, too, has standing for its declaratory-judgment action to resolve the "substantial controvers[y] between parties having adverse legal interests." *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 n.3 (2013).

ASEA's cases (at 25-27) are inapposite. They hold that state officials lack standing when litigating

against *the state* to "tes[t] the constitutionality of the law purely in the interest of third persons." *Smith v. Indiana*, 191 U.S. 138, 149 (1903). In these unique situations, "there is no 'case or controversy'" because the "state is essentially suing itself." *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008). Not so here. Petitioners were in litigation with private parties, the State was found liable for damages, and all Petitioners were enjoined from taking actions. Petitioners' standing is "beyond dispute." *Seila Law*, 140 S.Ct. at 2196.

2. ASEA barely pressed issue preclusion below (giving it a single page of briefing) and makes little effort to show it here. For good reason. In *Creed v. ASEA*, 472 F. Supp. 3d 518 (D. Alaska 2020), and *Woods v. ASEA*, 496 F. Supp. 3d 1365 (D. Alaska 2020), state employees sued ASEA in federal district court, seeking to enjoin the union from collecting dues and to obtain a refund of the dues collected. The plaintiffs also sued the Alaska Commissioner of Administration because the State was deducting dues from their paychecks per a state-court injunction. *See* App.43-44. Because the real dispute was between the plaintiffs and ASEA, the Commissioner was only a nominal defendant and had "relatively limited participation in the federal cases." App.17. After the district court ruled for both ASEA and the Commissioner, the Ninth Circuit, in one-sentence orders, granted the plaintiffs' motions for summary affirmance. *Creed v. ASEA*, No. 20-35743, 2021 WL 3674742 (9th Cir. Aug. 16, 2021); *Woods v. ASEA*, No. 20-35954, 2021 WL 3746816 (9th Cir. Aug. 11, 2021).

The state courts below correctly refused to apply issue preclusion. *See* App.17. To begin, the question presented here isn't "identical" to any issue decided in *Woods* and *Creed*. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984). This case addresses the *State*'s obligations—whether the State's dues-deduction process provides sufficient evidence of waiver. In *Woods* and *Creed*, the question was whether the employees had a "'right to renege on their promise to join and support the union.'" *Woods*, 496 F. Supp. 3d at 1373; *Creed*, 472 F. Supp. 3d at 526-27. The lack of symmetry is no doubt why ASEA seeks broad preclusion over all of Petitioners' "First Amendment arguments." BIO.27-28.

Whatever "First Amendment argument" ASEA believes is precluded, there's no question that it wasn't "necessarily decided" against the Commissioner. *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979). In *Creed*, the district court—at the plaintiffs' request—dismissed the claims against the Commissioner in a two-sentence, unreasoned order. *See Creed*, No. 20-cv-65, Dkt. 40; *see also Creed*, 472 F. Supp. 3d at 524 (holding that the plaintiffs' claims for prospective relief were moot). And in *Woods*, the district court held that the plaintiff's claims failed because "ASEA is not a state actor" *and* because *Janus* did not give Woods a "right to renege on [his] promise to join and support the union." *Woods*, 496 F. Supp. 3d at 1372. Because either of these rulings "standing independently would be sufficient to support the result," the First-Amendment issue resolved in *Woods* "is not

conclusive … standing alone." Restatement (Second) of Judgments §27, cmt. i.

Even if the question presented here were previously litigated, the Commissioner had no "'full and fair opportunity to litigate'" it. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). The Commissioner was only a nominal party in the federal cases. As a codefendant, the Commissioner was not adverse to ASEA; the real disputes were between the plaintiffs and ASEA. Indeed, in both cases, the Commissioner never filed a single motion, prevailing only because *ASEA* asked the court to issue judgment in *the Commissioner*'s favor. *Creed*, No. 20-cv-65, Dkt. 24 at 33; *Woods*, No. 20-cv-74, Dkt. 38 at 28. Because the Commissioner was not in an adversarial posture against ASEA, the Commissioner had no control over the litigation. The Commissioner thus just filed "responses" (akin to amicus briefs) to the plaintiffs' and ASEA's motions. As the Alaska Supreme Court recognized, the Commissioner's "relatively limited participation in the federal cases" weighs heavily against preclusion. App.17.

Last, issue preclusion doesn't apply because nonmutual offensive collateral estoppel is unavailable against the government. *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *State of Idaho Potato Comm'n v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005). The federal lawsuits were not between ASEA and the Commissioner, who were codefendants. ASEA thus cannot preclude Petitioners from arguing any issue that was at stake in the federal cases. *See id.*

3. Denying certiorari because "employees are capable of asserting their own First Amendment rights" is not a serious argument. BIO.23-25. Governments cannot violate the Constitutional rights of their citizens, regardless of whether they can be sued. Far from acting as a "self-appointed champion" of "third parties," BIO.24, Petitioners simply acted to ensure that the State's dues-deduction process operates within Constitutional bounds.[1]

ASEA doesn't believe its own argument in any event. Public-sector unions, including ASEA, have repeatedly argued that employees *can't* bring First Amendment challenges because unions are not state actors, and many courts have agreed. *See, e.g.*, *Belgau v. Inslee*, 975 F.3d 940, 947 (9th Cir. 2020); *Woods*, 496 F. Supp. 3d at 1372. Indeed, if the opinion below is left to stand, employees can't even sue the *government* to protect their rights, since deducting dues is not "state action" in Alaska. App.21-25.

Nor are Petitioners "complaining about their own conduct." BIO.24-25. Petitioners include the Alaska agency and executive officials charged with implementing the dues-deduction process. State officials routinely make administrative changes in response to this Court's decisions. *See, e.g.*, Mather, *After Su-*

[1] The State did not "voluntarily" adopt a new CBA with the same provisions. BIO.24. As ASEA knows, the trial court below enjoined Petitioners from "making any changes to the State employee dues deduction practices that were in place before" August 27, 2019. App.100; *see* App.43.

preme Court Ruling, UVA Adjusts Admissions Practices, UVAToday (Aug. 1, 2023) (revising admissions policies in response to *SFFA v. Harvard*, 143 S.Ct. 2141 (2023)). That those actions teed up the question presented doesn't create a "strange posture." BIO.24. It makes the petition an ideal vehicle to resolve the question presented. Pet.27-29.

II. The question presented is important and warrants the Court's review.

This petition is exceptionally important to millions of state employees across the country, as Petitioners' numerous amici explain. ASEA and other unions insist that no waiver standard is necessary because, after *Janus*, only employees who "affirmatively consent" to join a union must pay dues. BIO.22. That's what *Janus* requires, but it is not what is happening:

- Unions have deducted dues from employees who never signed dues-deduction forms. Pet.17-18; FF-Br.5-10.

- Unions have forged employees' signatures on membership cards. Pet.17-18; GI.Br.6; Janus.Br.9.

- Unions have misled employees about whether joining a union is mandatory. Pet.16-17; FF-Br.11-12; GI.Br.5.

- Unions have ignored or impeded employees' requests to opt out of paying dues. Pet.18-19; FF-Br.12-14, 20-23.

- Unions have imposed onerous opt-out conditions on employees seeking to stop paying dues. Pet.18-19; FF-Br. 15-19; Buckeye.Br.9-11; G.I.Br.5-6, 11-12; NRW-Br.5-7.

Some States allow and encourage this behavior:

- States deduct dues based on the slimmest evidence of consent. Pet.14-16; NRW-Br.8-9, 12-16.

- States don't require unions or employers to inform employees of their First Amendment rights, and some even *prohibit* it. Pet.15-16; FF-Br.4; Buckeye-Br.5-7; Janus-Br.15.

- States won't stop deducting dues without the *union's* permission. Pet.18-20.

Petitioners' modifications to the State's dues-deduction process would have addressed these problems with minimal intrusion into union operations. It isn't hard for a union to disclose First Amendment rights on a dues-deduction form. Nor is it burdensome for an employee to provide the form directly to the State. Why were these easy, nonintrusive reforms so vigorously resisted? Likely because when employees know their rights and are free to decide, many choose not to join and subsidize the union. Mackinac-Br.8-17.

Not contesting importance, ASEA insists that the lower courts have "unanimously rejected Petitioners' First Amendment argument." BIO.15. Not so. *Every*

case ASEA provides—in three pages of footnote citations, BIO.15-17—was brought by *individual employees*. Whether employees can "renege on their promise to join and support the union," *Belgau*, 975 F.3d at 950, is not at issue here. This petition concerns only the *State*'s obligations: whether the State has sufficient evidence of waiver to deduct dues from an employee's paycheck.

True, this petition doesn't present a circuit split. But the case need only be "important" to warrant certiorari. S.Ct.R.10(c). Indeed, this Court routinely grants certiorari in First Amendment cases even when no circuit split exists. *See* Shapiro, *Supreme Court Practice*, §4.14 (11th ed. 2019). For example, in *Harris v. Quinn*, the Court granted certiorari to review state laws mandating fair share fees to unions "[i]n light of the important First Amendment questions these laws raise." 573 U.S. 616, 627 (2014). The Court granted certiorari over the respondent's objection that the case "implicates no split in authority." *Harris*-BIO at 20-21. In *Snyder v. Phelps*, the Court granted certiorari to review whether funeral picketers receive First Amendment protection from state tort liability. 562 U.S. 443, 451 (2011). The Court granted certiorari over the respondent's objection that "there is no split in the circuits relevant to this case." *Snyder*-BIO at 25-27. And in *Hill v. Colorado*, the Court granted certiorari to review a state statute prohibiting speech near certain facilities "because of the importance of the case." 530 U.S. 703, 714 (2000). The Court granted certiorari over the respondent's objection that "the decision below is not in conflict with the

decision of any other lower court." *Hill*-BIO at 4, 22-26.

This case is no different. The important First Amendment issue presented here warrants this Court's resolution.

III. The Alaska Supreme Court got it wrong.

ASEA recognizes that state employees have a First Amendment right to not subsidize union speech. Under the First Amendment, "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 573 U.S. at 656. Because unions often "speak out" on "controversial" matters of public concern, "States and public-sector unions" cannot "extract … any … payment" from "nonconsenting employees." *Janus*, 138 S.Ct. at 2476, 2486.

The question presented, then, is straightforward: How much evidence does the State need before it can take money from state employees' paychecks to subsidize union speech? The default rule is that courts "'do not presume acquiescence in the loss of fundamental rights.'" *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 312 (2012). Waivers of constitutional rights must be "'voluntarily, intelligently, and knowingly'" made. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972). And these rules apply with full force to the waiver of First Amendment rights. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality op.).

In *Janus*, the Court applied these same principles to employee subsidization of union speech through payroll deductions. When taking money from employee paychecks, a waiver of First Amendment rights "cannot be presumed." *Janus*, 138 S.Ct. at 2486 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Knox*, 567 U.S. at 312-13). "Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g*, 388 U.S. at 145 (plurality op.)).

Against this backdrop, ASEA makes two arguments for why the State can deduct dues without evidence that employees have waived their First Amendment rights. *First*, ASEA argues that, under *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), no waiver analysis is needed when private parties relinquish First Amendment rights by contract. BIO.19-20. But *Cohen* said no such thing. There, a confidential source sued a newspaper after it broke its promise not to disclose his name in its reporting. 501 U.S. at 666. The Minnesota Supreme Court held that the individual failed to state a claim for promissory estoppel because enforcing the newspaper's promise would violate the "constitutional rights of a free press." *Id.* at 667. This Court reversed, based on its "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. *Cohen* thus had nothing to do with waiving constitutional rights. Its sole holding was that enforcement of "general laws against the press is not subject

to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670.[2]

Cohen aside, private agreements are not uniquely exempt from waiver requirements. *See, e.g., Fuentes*, 407 U.S. at 94-96 (holding that individuals who signed "conditional sales contracts" had not "waived their basic procedural due process rights"). Consider a defendant who tried to stop someone from speaking when the purported promise occurred under compulsion, in "fine print," or with no "equal[ity] in bargaining power." *Id.* at 95. Of course the Court would examine whether the person properly waived his rights. And because the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom,'" the Court wouldn't find a waiver "in circumstances which fall short of being clear and compelling." *Curtis Publ'g*, 388 U.S. at 145 (plurality op.).

Second, ASEA contends that *Janus* adopted a new consent standard for dues deductions, holding only that "States cannot presume from nonmembers' *inaction* that they wish to support a union." BIO.21. But the Court has never limited its waiver analysis to "inaction." *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999)

---

[2] *Cohen* is inapplicable here even if it had broader application outside of the press. A state's dues-deduction system is not a "generally applicable law" that would "otherwise be enforced under state law." 501 U.S. at 672. Nor is a dues-deduction form a contract between the union and the employee. *See Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018).

(assessing whether the defendant waived its rights by "selling and advertising a for-profit educational investment vehicle in interstate commerce"). Nothing in *Janus* hints at ASEA's proposed abandonment of that approach.

More important, ASEA's argument simply assumes the question presented. How does the State know that an employee "voluntarily became [a] union membe[r]"? BIO.18. Because the union collects the dues form and delivers it to the State, the State cannot ensure that the signature is genuine and that the employee was not coerced into signing it. Pet.8-9, 23-24. The "whole point" of the constitutional waiver standard "is to be certain" that individuals have, in fact, waived their rights. *Coll. Sav. Bank*, 527 U.S. at 680. As *Janus* makes clear, the First Amendment demands more than blind deference to unions.

CONCLUSION

The Court should grant certiorari.

TREG TAYLOR
Attorney General
JESSICA M. ALLOWAY
Solicitor General
1031 W. 4th Ave.,
Ste. 200
Anchorage, AK 99501
(907) 269-5108

J. MICHAEL CONNOLLY
Counsel of Record
GILBERT C. DICKEY
STEVEN C. BEGAKIS
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

November 10, 2023

Counsel for Petitioners