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 AMICI CURIAE MACKINAC CENTER FOR PUBLIC POLICY AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case because of our history of studying the political activity of public-sector unions. Landmark has compiled instances of apparently unreported political activity by national teachers' unions and their state affiliates in referrals to the Internal Revenue Service and other federal and state administrative agencies.

Michigan passed both private-sector and public-sector right-to-work legislation in December 2012. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws, and its research regarding the impact of right-to-work laws on union membership

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[1] All parties received less than 10 days notice and have not objected to the filing of this brief. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than amici curiae, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

was cited in this Court's *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018) decision. *Id*. at 2466, n.3.

SUMMARY OF ARGUMENT

This Court's *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018) decision eliminated forced subsidization of unions by public-sector employees. This was a reversal of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had allowed nonmembers to be charged agency fees. In *Janus*, this Court indicated that there would be "unpleasant transition costs" as the unions "make adjustments in order to attract and retain members," but this would have to be borne by the unions as they have had a "considerable windfall . . . under *Abood*." *Janus*, 138 S.Ct. at 2485-86.

This Court held that compelled support of a union through an agency-fee procedure "violates the First Amendment and cannot continue." *Id*. at 2486. An "agency fee or any other payment to the union" could not be deducted or collected "unless the employee affirmatively consents to pay." *Id*. A payment constitutes a "waiver of First Amendment rights" and "such a waiver cannot be presumed," but instead must be "freely given and shown by clear and compelling evidence." *Id*.

Most states were passive regarding *Janus*' waiver language (or enacted legislation to blunt the case's impact). Alaska was not passive. It took affirmative steps so that it could determine that all financial support for

public-sector unions was "freely given" and supported by "clear and compelling" evidence. The Alaska Supreme Court held that this was neither required by *Janus* nor the First Amendment, and therefore, these steps violated the state's public-employee-bargaining statute. The Alaska Supreme Court was wrong.

There is evidence of the practical effect of this error. In Michigan, the Michigan Civil Service Commission enacted a system like the one proposed by Alaska Attorney General. It significantly increased the number of employees who left the union and stopped providing financial support. It may be that up to an additional 1.75 million public employees would exercise their *Janus* rights if given an annual, clear recitation of those rights.

ARGUMENT

I. *Janus* ended compelled financial support to public-sector unions and put the fiscal impact of that change on those unions.

In *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448 (2018), this Court held that forcing "public employees . . . to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities" violates the First Amendment. *Id*. at 2459-60. *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), wherein "a similar law" had been upheld. *Janus*, 138 S.Ct. at 2460.

This Court indicated 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. at 2486 (cleaned up).

This Court recognized that the anticipated financial impact of the change caused by *Janus* must fall on the public-sector unions, and indicated that they would be forced to adjust in order to "attract and retain members":

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those

> unconstitutional exactions cannot be allowed to continue indefinitely.

Id. at 2485-86.

Yet, those exactions have continued for over five years and will continue unless and until this Court enforces its waiver language. Alaska attempted to faithfully follow that language by making certain that employees who are having money withdrawn to support a public-sector union actually waived their *Janus* right not to do so.

In essence, the Alaska Supreme Court held that an employee signature on the following constituted clear-and-compelling evidence of a waiver:

> This voluntary authorization and assignment shall be irrevocable, regardless of whether I am or remain a member of ASEA, for a period of one year from the date of execution or until the termination date of the collective bargaining agreement . . . whichever occurs sooner, and for year to year thereafter unless I give [the State] and [ASEA] written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period.

State v. Alaska State Emp. Ass'n, 529 P.3d 547, 552 n.19 (Alaska 2023); see also App. 156. At another point, the Alaska Supreme Court discussed this same post-*Janus* dues-authorization form:

> ASEA's union dues authorization forms emphasized that employees do not have to pay

> union dues, and forms used since 2018 emphasized that joining the union is optional. For example, the version revised in September 2019, reads: "Yes, I choose to be a Union member. . . . I understand my membership supports the organization advocating for my interests . . . and paying union dues is not a condition of employment."

Id. at 552; see also App. 156 (September 18, 2019 form).

The Alaska Supreme Court justified its narrow construction of *Janus*. First, it held *Janus* "expressly dealt only with charging union agency fees to nonmember employees." *State v. Alaska State Emp. Ass'n*, 529 P.3d at 555. In that same paragraph, it emphasized that the "labor practice challenged and ultimately prohibited by *Janus* was that of charging compulsory agency fees to nonmember public employees, *as a condition of employment*, to support union bargaining activities." *Id*. at 555 (emphasis in original).

The Alaska Supreme Court cited 138 S.Ct. 2460 for the condition-of-employment proposition. See *State v. Alaska State Emp. Ass'n*, 529 P.3d at 555 n.32. *Janus* does not mention "condition of employment" on that page.[2] The court seemed to use the term as a basis for its second point related to *Janus*: "the State's reading of *Janus* imagines compulsion when none exists." *State v. Alaska State Emp. Ass'n*, 529 P.3d at 555. Specifically, it noted that the 2019-2022 collective bargaining

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[2] The term is important in labor law as a statutory matter. See 29 U.S.C. §§ 151, 152(9), § 158(d), and § 159(a).

agreement "did not contain a requirement for agency fees deductions from nonmembers' paychecks." *Id*. at 552.[3] With the elimination of agency fees from the collective-bargaining agreement, it opined: "no public employee had to choose between a job or unwillingly subsidizing union speech." *Id*. at 556.

Third, the Alaska Supreme Court held that it "may be that a public employee waives First Amendment free speech rights by voluntarily joining a union and agreeing to pay dues; but, if so, that action itself is clear and compelling evidence that the employee has waived those rights." *Id*. at 556.[4]

The State's efforts to satisfy the clear-and-convincing-evidence standard were proper. The Alaska Supreme Court erred. See generally Petition at pp. 21-27; and 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 (2020).

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[3] Such requirements are one of the subcategories of union security and that portion of a collective bargaining agreement dealing with dues and fees is generally known as a union-security clause.

[4] The Alaska Supreme Court did not discuss which (if any) words would be necessary for a public employee to join a union and thereby waive their First Amendment rights. Would "I join the union" and a signature suffice as clear and compelling evidence of waiver? It certainly implies that the September 2019 revision language would be adequate.

II. Data from Michigan's Civil Service Commission shows that many more public employees would exercise their *Janus* rights if they were properly informed of them and given an annual option to exercise them.

Michigan's Civil Service Commission is a state constitutional entity that manages the state's civil service employees (generally executive-branch employees). Mich. Const. of 1963, art. XI, § 5. By rule, it allows collective bargaining. Mich. Civ. Serv. Comm'n Rule 6-1.2. Local employee collective bargaining is addressed in Michigan's Public Employment Relations Act. Mich. Comp. Laws §§ 423.201-217. When Michigan enacted public-sector right to work in 2012,[5] there was some question whether it would apply to state employees.

In *UAW v. Green*, 870 N.W.2d 867 (Mich. 2015), the Michigan Supreme Court held that agency fees for state employees were unconstitutional under Michigan's constitution.

Effective July 13, 2020, the Michigan Civil Service Commission issued Michigan Civil Service Commission Rule 6-7.2, which states:

> The director shall establish the exclusive process for employees to authorize or deauthorize deduction of dues or fees. An authorization will expire at the start of the first full pay period each fiscal year unless it was

[5] 2012 Mich. Pub. Act 349.

> authorized or reauthorized during the previous fiscal year. The director shall provide annual notice to all exclusively represented employees of the right to join or not join an exclusive representative without affecting employment status, the right not to maintain membership in an exclusive representative to retain employment, an exclusive representative's duty of fair representation to all bargaining-unit members, and the prohibition on union activities during actual duty time.

Id.

For its state employees, Michigan tracks the number of employees covered by a contract and the number of those employees that join the union. Until very recently, this information was tracked quarterly (it is now annual). The report is titled "Annual Workforce Report."

The questions surrounding public-sector agency fees and the soundness of *Abood* have been discussed in a number of this Court's recent decisions. See *Knox v. SEIU Local 1000*, 567 U.S. 2277 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *Friedrichs v. California Teachers Ass'n*, 136 S.Ct. 1083 (2016); and *Janus*. One key question that arose over the course of these cases was whether a public-sector union's status as an exclusive bargaining agent and the need for agency fees were "inextricably linked."

In both *Friedrichs* and *Janus*, the Mackinac Center filed briefs at the amicus and merits stage. These four briefs looked at various methods of quantifying

the union-membership percentage as a means of determining whether unions in a right-to-work environment could survive and function as an exclusive-collective-bargaining agent. This work was cited by this Court in *Janus*. *Janus*, 138 S.Ct. at 2466, n.3.

The briefs attempted to focus on the union-membership percentage, which is simply the number of union members covered by a collective bargaining agreement divided by the total number of employees – both union members and nonmembers – covered by a collective-bargaining agreement. This figure provides a ratio of support per worker covered.

The Michigan Civil Service Commission's "Annual Workforce Report" allows union-membership rates to be determined with precision. It provides the numerator (employees in bargaining unit who are union members) and the denominator (size of the bargaining unit) and particularly when quarterly did so in a timely manner so that the reported data would not lag events on the ground. The reports are formulaic. Each cited report contains the relevant data on collective bargaining coverage and union membership at table 5-1.

There are five relevant unions: (1) Michigan State Employees Association (MSEA); (2) UAW Local 6000; (3) Michigan Corrections Organization, SEIU Local

526M (MCO); (4) SEIU Local 517M[6]; and (5) AFSCME Council 25.[7]

There are four relevant reports: (1) the report immediately before the law in which Michigan banned agency fees took effect (Fiscal 2012-13 Second Quarter – ending March 30, 2013);[8] (2) the report immediately before *UAW v. Green*[9] was decided (Fiscal 2014-15 Third Quarter – ending June 20, 2015);[10] (3) the report immediately before the MCSC amended its rules to require that state employees annually opt-in to paying dues (Fiscal 19-20 Third Quarter – ending June 27, 2020);[11] and the final report is the most recent annual one. (Fiscal 21-22 – ending September 30, 2022).[12]

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[6] The report contains three branches of this union, which numbers will be combined here.

[7] The Michigan State Police Troopers Association – a state employees' union – is excluded here because Michigan's agency-fee ban did not apply to police and fire employees. Mich. Comp. Laws § 423.210(4)(a).

[8] This document is available at the following link: https://www.michigan.gov/documents/mdcs/WF_2013_2nd_Quarter_Complete_417855_7.pdf.

[9] Again, that decision made it clear that agency fees were banned for most state employees too.

[10] This document is available at the following link: https://www.michigan.gov/documents/mdcs/WF_2015_3rd_Quarter_Complete_496483_7.pdf.

[11] This document is available at the following link: https://www.michigan.gov/documents/mdcs/WF_2020_3rd_Quarter_Complete_697389_7.pdf.

[12] This document is available at the following link: https://www.michigan.gov/mdcs/-/media/Project/Websites/mdcs/workforce/21-22/43rd_AWFR_Complete.pdf?rev=48b5108724434

The first report sets a baseline before Michigan passed right to work. The second report occurs after it became clear that right to work applied to state employees. The third shows what impact five years of right to work had. The final report shows that when annually and clearly informed of their rights under *Janus*, more employees exercise those rights.

MSEA

Date	Members	Unit Size	Membership Rate
March 30, 2013	3,079	3,329	92.5%
June 20, 2015	3,363	4,654	72.3%
June 27, 2020	2,220	4,161	53.4%
September 30, 2022	1,664	4,117	40.4%

UAW 6000

Date	Members	Unit Size	Membership Rate
March 30, 2013	15,673	17,147	91.4%
June 20, 2015	14,662	16,904	86.7%
June 27, 2020	12,674	16,446	77.1%
September 30, 2022	10,798	15,586	69.3%

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MCO

Date	Members	Unit Size	Membership Rate
March 30, 2013	6,598	6,890	95.8%
June 20, 2015	6,232	6,633	94.0%
June 27, 2020	5,368	5,863	91.6%
September 30, 2022	4,457	5,110	87.2%

SEIU Local 517

Date	Members	Unit Size	Membership Rate
March 30, 2013	3,532	3,679	96.0%
June 20, 2015	3,259	3,764	86.6%
June 27, 2020	2,666	3,963	67.3%
September 30, 2022	2,534	4,099	61.8%

AFSCME Council 25

Date	Members	Unit Size	Membership Rate
March 30, 2013	1,736	1,769	98.1%
June 20, 2015	1,282	1,357	94.5%
June 27, 2020	1,318	1,650	79.9%
September 30, 2022	907	1,472	61.6%

Aggregating these state-employee-union numbers at the four signposts, shows 32,814 represented state

employees constituted of 30,618 members and 2,196 nonmembers immediately prior to Michigan's agency-fee ban. This was a membership rate of 93.3%. By June 2015, those numbers had changed to 33,312 represented state employees constituted of 28,798 members and 4,514 nonmembers for a membership rate of 86.4%. In June 2020, the state employee unions represented 32,083 state employees constituted of 24,246 members and 7,837 members for a membership rate of 75.6%. Finally, in September 2022, these unions represented 30,384 state employees and had 20,360 members. This is a union-membership rate of 67.0%[13]

Thus, despite right to work having been the law of the land for five years (2015-2020), when Michigan gave annual clear recitations to state employees about their *Janus* rights, a significant number of employees chose to leave the union and no longer financially support it.

The most commonly cited data on union membership and worker representation comes from the U.S. Bureau of Labor Statistics (BLS). As part of the Current Population Survey (CPS), the BLS releases an annual union membership survey every January for the prior year, which is based on three months of surveying. This year's release was January 19, 2023, and indicates "the data on union membership are collected as

[13] Another benefit to this data set is that it sets out both the total state employees and the total state employees covered by union contracts. The consistency of these numbers alleviates any concern that changes in membership rates are due to fluctuations in the employee pool.

part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 eligible households that obtains information on employment and unemployment among the nation's civilian noninstitutional population age 16 and over."[14] The questionnaire asks whether at their job, the individual is "a member of a labor union or of an employee association similar to a union" and whether that job is "covered by a union or employee association contract."[15]

There is some question whether those surveyed understand the nuances of coverage under a collective-bargaining agreement and membership. Still, according to the January 19, 2023 BLS release, there are around 7,835,000 public employees represented by unions and around 7,062,000 were union members for a union membership rate of 90.13%. But if Michigan's (and Alaska's) approach of requiring employees to be informed of their right under *Janus* is adopted, the number of union members might be expected to drop

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[14] https://www.bls.gov/news.release/pdf/union2.pdf.

[15] https://www2.census.gov/programs-surveys/cps/techdocs/questionnaires/Labor%20Force.pdf. These questions have consistently been used since 1977. Patrick J. Wright, *Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey's Public Sector Unionism Data Sufficiently Reliable?* 2017 U. Chi. Legal F. 563.

In that article, the undersigned questioned the reliability of some of the results from these CPS questions when compared to other data sources. *Id*. at 573-91. These same concerns were discussed in the amicus brief this Court cited in *Janus* at n.3. While that brief was cited, this Court also referred to CPS data in notes 1 and 2, thereby indicating that CPS data is of interest. *Janus*, 138 S.Ct. at 2466 nn.1, 2.

to around 5,250,000. This would mean that a little over 1.75 million more employees would be exercising their *Janus* rights.

Amicus put out a recent report wherein it used other methods like payroll information to see how many employees have had union dues removed. Jarrett Skorup, *The Janus Effect: The Impact of the 2018 Supreme Court Decision on Public Sector Unions* (2023). In that document, it was estimated that the national public-sector unionization rate was 77.8%.[16] Assuming this rate is more accurate than the BLS, there would be 6,095,630 unionized employees (.778 x 7,835,000 employees). Thus, to get to that 5,250,000 figure that would align with a 67% unionization rate, there would still have to be around 800,000 additional employees who chose not union members and not to financially supporting the union.

The point of this is relatively simple. If this Court's requirement of clear and convincing evidence of waiver were being enforced, perhaps up to 1.75 million more public employees might choose to exercise their rights under *Janus*. If this Court is not going to enforce its waiver requirement, the public-sector union windfall will continue based solely on employee's ignorance of their First Amendment rights. Public-sector employees should not have to be constitutional scholars to exercise their rights – they should have an informed,

[16] That document focused on the employees who opted out. Essentially it is 100% minus the unionization rate percentage. For sake of clarity, that opt out percentage (22.2%) was converted to a unionization rate (100%-22.2%=77.8%).

voluntary choice about whether to support a union. This Court should clarify what is required by the waiver language of *Janus*.

The above data suggests that the Alaska Supreme Court's rejection of informed-consent requirements has prevented the likely impact of this Court's *Janus* decision from being fully realized. As such, over a million public-sector employees could be continuing to financially subsidize political speech with which they may disagree, sheerly out of ignorance of their own constitutional rights. This must end.

CONCLUSION

For the reasons stated above, this Court should grant certiorari in this matter.

Respectfully submitted,

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