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 a Writ of Certiorari to the Supreme Court for the State of Alaska

BRIEF IN OPPOSITION

SCOTT A. KRONLAND
MATTHEW J. MURRAY
Counsel of Record
ALTSHULER BERZON LLP
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151
mmurray@altber.com

Counsel for Respondent Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court held that public employers may no longer compel non-union-members to pay agency fees as a condition of employment, but otherwise "States can keep their labor-relations systems exactly as they are." *Id.* at 2485 n.27. After *Janus*, the State of Alaska and the Alaska State Employees Association (ASEA), revised their collective bargaining agreement to end agency fees while retaining the State's commitment to deduct union membership dues for employees who voluntarily join the union and authorize dues deductions.

After a change in administration, Alaska executive branch officials refused to process voluntary dues deductions in accordance with state law and the State's contract with ASEA. The Alaska Supreme Court, citing "abundant evidence of anti-union animus," concluded that the officials had violated multiple state laws and breached the State's contract with ASEA by unilaterally refusing to honor employees' voluntary union membership and dues deduction authorization agreements. The question presented here is:

Did *Janus* require the State of Alaska's executive branch officials to breach the State's contract and violate state law by refusing to honor public employees' voluntary union membership and dues deduction authorization agreements?

CORPORATE DISCLOSURE STATEMENT

Respondent Alaska State Employees Association / American Federation of State, County and Municipal Employees Local 52, AFL-CIO has no parent corporation, and no company owns any stock in Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other

PRELIMINARY STATEMENT

Union membership in Alaska is voluntary. The State of Alaska deducts union membership dues for state employees only after an individual employee voluntarily signs a union membership agreement that clearly and affirmatively authorizes those deductions.

The Alaska Supreme Court ruled below that the State's processing of voluntary union payroll deductions is consistent with the First Amendment and this Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). Other courts have unanimously agreed. Since June 2021, this Court has denied petitions for certiorari in more than a dozen cases that raised the same question petitioners seek to present here about voluntary union dues authorization agreements—including in two federal cases involving employees in the same Alaska state employee bargaining unit at issue here. *See Woods v. Alaska State Emps. Ass'n*, No. 21-615, 142 S. Ct. 1110 (2022) (denying joint petition in both cases).[1] There have been no

[1] *See also Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, No. 22-1096, 143 S. Ct. 2614 (2023); *O'Callaghan v. Drake*, No. 22-219, 143 S. Ct. 2431 (2023); *Savas v. Cal. Statewide Law Enf't Ass'n*, No. 22-212, 143 S. Ct. 2430 (2023); *Polk v. Yee*, No. 22-213, 143 S. Ct. 405 (2022) (denying petition covering two cases); *Cooley v. Cal. Statewide Law Enf't Ass'n*, No. 22-216, 143 S. Ct. 405 (2022); *Yates v. Hillsboro Unified Sch. Dist.*, No. 21-992, 142 S. Ct. 1230 (2022); *Anderson v. Serv. Emps. Int'l Union Loc. 503*, No. 21-609, 142 S. Ct. 764 (2022) (denying joint petition covering four cases); *Grossman v. Hawaii Gov't Emps. Ass'n*, No. 21-597, 142 S. Ct. 591 (2021); *Smith v. Bieker*, No. 21-639, 142 S. Ct. 593 (2021); *Wolf v. UPTE-CWA 9119*, No. 21-612, 142 S. Ct. 591 (2021); *Hendrickson v. AFSCME Council 18*, No. 20-1606, 142 S. Ct. 423 (2021); *Bennett v. AFSCME, Council 31, AFL-CIO*, No.

developments since those denials that would make the issue worthy of this Court's review.

Moreover, there are multiple reasons why this case would not be an appropriate vehicle for review of the First Amendment question that petitioners seek to present. The individuals whose First Amendment rights purportedly are being violated are not parties here. Petitioners lack standing to seek relief in this Court from having to comply with their own state laws. The collateral estoppel effects of previous federal court judgments also preclude petitioners from relitigating the First Amendment issue they seek to present.

This petition should be denied.

STATEMENT OF THE CASE

A. Background

1. ASEA is the democratically chosen collective bargaining representative for a unit of Alaska state employees. App. 105 ¶7; App. 106 ¶10. Under Alaska's Public Employment Relations Act (PERA), union membership is voluntary. App. 106 ¶11. Employees join ASEA by signing membership agreements that authorize the State as their employer to deduct union dues from their pay in exchange for ASEA providing them the rights and benefits of union membership, including rights to run for union office, vote in union

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20-1603, 142 S. Ct. 424 (2021); *Troesch v. Chicago Tchrs. Union*, No. 20-1786, 142 S. Ct. 425 (2021); *Fischer v. Murphy*, No. 20-1751, 142 S. Ct. 426 (2021); *Belgau v. Inslee*, No. 20-1120, 141 S. Ct. 2795 (2021).

officer elections, serve on bargaining committees, and otherwise participate in internal union affairs; and access to group benefits programs, including no-cost life insurance, free college courses, scholarships, and discounts on products and services. App. 106 ¶12; App. 114 ¶42.

The State and ASEA have entered into a series of collective bargaining agreements (CBAs) since 1989, when unit employees elected ASEA as their representative. App. 108 ¶¶18-19. Each CBA, including the CBA at issue here, which was effective through June 30, 2022, contained a section on payroll deductions in which the State agreed to deduct union dues from employees' wages "[u]pon receipt … of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member." App. 130; Alaska Sup. Ct. Exc. 254-55, 262-63, 269-70, 277, 285, 293, 313.[2] Since 2004, the CBAs further provided that "[b]argaining unit members may authorize payroll deductions in writing on the form provided by the Union. Such payroll deductions will be transmitted to the Union by the state." App. 131; Alaska Sup. Ct. Exc. 262, 270, 277, 285, 293, 313.

"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." App. 9. Those union membership and dues deduction authorization forms state in pertinent part:

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[2] Citations to "Alaska Sup. Ct. Exc." are to the Excerpts of Record in the Alaska Supreme Court.

> Yes, I choose to be a Union member of ASEA/AFSCME Local 52. I understand my membership supports the organization advocating for my interests as a bargaining unit member and as an individual. ASEA membership and paying union dues is not a condition of employment. By submitting this form, I choose to be a union member and to pay my dues by way of payroll deduction.
>
> …
>
> 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 (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period.

App. 112-13 ¶¶37-38; App. 155.

The provision in ASEA's membership agreements stating that dues deductions will be irrevocable for one-year periods incorporates the same terms Congress has authorized for federal employees, postal employees, and employees covered by the National Labor Relations Act and the Railway Labor Act. *See* 5

U.S.C. § 7115(a)–(b); 39 U.S.C. § 1205; 29 U.S.C. § 186(c)(4); 45 U.S.C. § 152, Eleventh (b).[3]

The State receives a copy of every individual employee's signed agreement from ASEA and only deducts dues for employees who have signed an agreement. App. 115 ¶¶46-48. When asked, ASEA staff inform employees about the process for resigning their union membership and revoking dues deduction authorizations. App. 117 ¶57. If an employee wishes to resign membership, ASEA processes that request immediately. App. 116 ¶52. If the employee also requests to stop dues payments, ASEA processes the request in accordance with the terms of the employee's signed agreement. App. 116-17 ¶¶53-55. If an employee who signed a deduction agreement with a one-year dues commitment asks to stop deductions before the annual revocation widow, ASEA holds that request and processes it on the first day of the window. App. 117 ¶56.

2. Before June 27, 2018, Alaska law and this Court's precedent permitted public employers to require non-union-members to pay proportional fees to their representative union to cover the nonmembers' share of union costs germane to collective bargaining representation, but not to cover a union's political or

[3] A one-year irrevocability period "provides [the union] with financial stability by ensuring a predictable revenue stream," thereby enabling the union to "make long-term financial commitments without the possibility of a sudden loss of revenue," and also prevents individuals "from gaming the [u]nion's system of governance" by "pay[ing] dues for only a month to become eligible to vote in a [u]nion officer election" or accessing a members-only benefit "and then reneg[ing] on all future financial contributions." *Fisk v. Inslee*, 2017 WL 4619223, at *3 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F. App'x 632 (9th Cir. 2019); App. 114 ¶45.

ideological activities. *See Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977).

Consistent with this authority, the State deducted an "agency fee" from unit employees who were not members of ASEA and remitted that fee to ASEA. App. 108 ¶20. At all times, the chargeable portion of agency fees was less than full union member dues. *Id.*

This Court issued its decision in *Janus* on June 27, 2018. *Janus* overruled *Abood* and held that public employees who had not opted to join a union and pay union dues could no longer be required to pay agency fees as a condition of public employment. *Janus*, 138 S. Ct. at 2486. This Court also stated that, apart from ceasing agency fees, "States can keep their labor-relations systems exactly as they are." *Id.* at 2485 n.27.

The State and ASEA promptly modified the then-applicable CBA to comply with *Janus* by removing the provisions regarding agency fees. App. 109 ¶23; Alaska Sup. Ct. Exc. 297. On September 7, 2018, then-Attorney General Jahna Lindemuth issued a legal memorandum regarding *Janus*. App. 109 ¶26. That Lindemuth Memorandum concluded that "[t]he *Janus* decision addressed the issue of payment of agency fees by non-union members. It does not require existing union members to take any action; existing membership cards and payroll deduction authorizations by union members should continue to be honored." Alaska Sup. Ct. Exc. 302.

In fall 2018, the State and ASEA negotiated a new CBA. App. 110 ¶28. The new CBA (which was the CBA at issue in the proceedings below, but which expired as of June 2022) did not include an agency fee

requirement. App. 130-31. The State did not propose any changes to the CBA provision that governed payroll deductions for union membership dues. App. 110 ¶28.

Representatives of the State and ASEA tentatively agreed to the CBA in November 2018. App. 110 ¶29. ASEA members then voted to ratify the agreement; ASEA representatives signed it; and the Legislature approved a state operating budget that included full funding for the CBA. *Id.* Then-Commissioner of Administration Kelly Tshibaka formally signed the CBA on behalf of the State on August 8, 2019. *Id.*

3. On August 27, 2019, more than a year after the *Janus* decision, then-Attorney General Kevin Clarkson issued an opinion regarding *Janus*. App. 118 ¶61. The opinion proclaimed that, under *Janus*: all existing union dues deduction agreements are invalid; the State must take control over the process for authorizing union dues by creating new forms with a warning that individuals are "waiving" their First Amendment rights by joining the Union; and each employee must repeatedly reaffirm this "waiver" at intervals chosen by the State. App. 133-54.

Attorney General Clarkson did not give ASEA the opportunity to provide any input before issuing his opinion, but State officials in his office did consult with anti-union advocacy groups. App. 119 ¶¶63-64. Attorney General Clarkson's opinion was contrary to the Lindemuth Memorandum and the reasoning of at least ten federal and state court decisions published prior to August 27, 2019. App. 118 ¶62; App. 85-88 & nn.22-23 (citing authorities); App. 178-84 (same). Former Attorney General Clarkson was aware of these

authorities, but his opinion did not discuss them. App. 118 ¶62.

Although Attorney General Clarkson did not provide any advance notice to ASEA, his opinion was not a surprise to other State officials. The day the opinion was released, Commissioner Tshibaka sent a mass email to all 8,000 bargaining unit employees, informing them that "the State is currently not in compliance with" *Janus*. App. 12, 119 ¶65; Alaska Sup. Ct. Exc. 449. An attached "Frequently Asked Questions" document told all employees that their existing union membership and dues authorization agreements would be cancelled. App. 12; Alaska Sup. Ct. Exc. 463. Commissioner Tshibaka did not consult with ASEA about the content of the email or give ASEA any advance notice of the mass communication. App. 119-20 ¶65.

The State also began interfering with ASEA's relations with its members, communicating directly with individual bargaining unit employees and sending some ASEA members a "Cease Union Dues Deduction" form to sign that was created by the Department of Administration. App. 123 ¶¶81-83.

4. After ASEA objected to the Attorney General's opinion and the State's emails to all unit employees, the State filed this lawsuit against ASEA seeking a declaration endorsing former Attorney General Clarkson's interpretation of *Janus*. App. 120 ¶68. ASEA filed an answer, counterclaims, and motion for a temporary restraining order and preliminary injunction on September 25, 2019. App. 120 ¶68.

The next day, Governor Mike Dunleavy issued Administrative Order 312 ("AO 312"). App. 120 ¶69; App. 158-65. The AO directed Alaska's Department of Administration and Department of Law "to implement new procedures and forms for affected state employees to 'opt-in' and 'opt-out' of paying union dues and fees." App. 160. The AO stated that "all dues and fees deductions made under prior procedures will be immediately discontinued" once the State created new forms, and provided that affected unions would be notified only after "the forms and processes described above are completed." App. 160-63. The State did not consult with ASEA or offer ASEA the opportunity to provide any input before the Governor issued AO 312, but officials in the Governor's office did consult with anti-union organizations. App. 121 ¶¶73-74.

Then-Commissioner Tshibaka again emailed all unit employees on the same day that AO 312 issued. App. 121 ¶75. This email told all employees that "the prior administration's response to *Janus* failed to adequately protect your First Amendment rights." Alaska Sup. Ct. Exc. 492. The State did not consult with ASEA about the content of the mass email nor give ASEA any advance notice of the email. App. 121 ¶75.

The Governor, Attorney General, and Commissioner also held a press conference on September 26, 2019, about AO 312. App. 121-22 ¶¶76-77. At the press conference, Attorney General Clarkson said the State was not obligated to follow its CBA with ASEA because "a contract that is unconstitutional is really no contract at all." Alaska Sup. Ct. Exc. 527.

B. Proceedings below and in federal court

1. On October 3, 2019, the Alaska superior court granted ASEA's request for a temporary restraining order to halt implementation of the Attorney General Opinion and AO 312. App. 73-102. The court found "no support for the State's argument in *Janus* or in any other U.S. Supreme Court case, in no case from any other jurisdiction, not in PERA, and not in the collective bargaining agreement." App. 95. The court converted the temporary restraining order into a preliminary injunction on November 5, 2019. App. 42-44.

The parties submitted a joint statement of stipulated facts, and the superior court granted ASEA's motion for summary judgment. App. 33-37. The court concluded that "the stipulated undisputed facts establish that the State [and] third-party defendants …, by unilaterally changing the union member dues deduction procedures … and directly dealing with General Government Unit bargaining members: (1) breached the collective bargaining agreement between ASEA and the State; (2) breached the implied covenant of good faith and fair dealing; (3) violated the separation of powers enshrined in the Alaska state constitution and violated the Public Employment Relations Act; and (4) violated the [Alaska] Administrative Procedures Act." App. 34-35.

The superior court then entered a judgment permanently enjoining petitioners from implementing Attorney General Clarkson's opinion letter and AO 312 and awarding ASEA damages in the amount the parties stipulated ASEA had suffered through diverted staff time, lost dues, and lost memberships

resulting from the State's actions. App. 14, 16; App. 38-41; App.125-26 ¶¶91-93.

2. Meanwhile, on March 16, 2020, two state employees sued ASEA and the Commissioner of Administration in federal court, alleging that their payment of union dues pursuant to their own union membership and dues deduction authorization agreements with ASEA violated their First Amendment rights. *Creed v. Alaska State Emps. Ass'n*, 472 F. Supp. 3d 518 (D. Alaska 2020), *aff'd*, 2021 WL 3674742 (9th Cir. Aug. 16, 2021), *cert. denied*, 142 S. Ct. 1110 (2022).

On April 1, 2020, another Alaska state employee filed a separate suit in the same federal court alleging a substantively identical claim against the same defendants. *Woods v. Alaska State Emps. Ass'n*, 496 F. Supp. 3d 1365 (D. Alaska 2020), *aff'd*, 2021 WL 3746816 (9th Cir. Aug. 11, 2021), *cert. denied*, 142 S. Ct. 1110 (2022).

In both federal cases, the Commissioner was nominally a defendant but argued for a judgment against ASEA on the same grounds that she and her co-petitioners urge here. In both cases, the district court rejected those *Janus*-based arguments and entered final judgment for ASEA. *Creed*, 472 F. Supp. 3d 518; *Woods*, 496 F. Supp. 3d 1365. The Ninth Circuit affirmed both decisions. *Creed,* 2021 WL 3674742; *Woods*, 2021 WL 3746816. The plaintiffs in those cases then filed a joint petition for certiorari. The Commissioner, who is a petitioner here, filed a respondents' brief in support of certiorari, arguing—as she does here—that the lower courts' reading of *Janus* and the First Amendment was "improperly limited."

Brief of Resp. Paula Vrana, Comm'r of Admin. for the State of Alaska, No. 21-615, *Woods v. ASEA*, 2021 WL 5568051, at *11 (U.S. filed Nov. 23, 2021). This Court denied the joint petition. *Woods*, 142 S. Ct. 1110 (2022).

3. The Alaska Supreme Court in this case then unanimously affirmed the superior court's decision below that the State violated Alaska state statutes and the State's collective bargaining agreement with ASEA and that "the State's actions were not compelled by *Janus*." App. 4.

The Alaska Supreme Court reasoned that "the State's interpretation of *Janus* has three major flaws." App. 18. "First, … [t]he 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 collective bargaining activities." *Id.* (emphasis in original). "*Janus* did not address how union dues are collected from public employees who *voluntarily* join public sector unions and agree to pay union dues. In fact, in *Janus* the Supreme Court said: 'States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.'" App. 18-19 (quoting *Janus*, 138 S. Ct. at 2485 n.27; emphasis in original; footnotes omitted).

"Second, the State's reading of *Janus* imagines compulsion when none exists." App. 19. "[W]hen 'the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced.'" *Id.* (quoting *Kidwell v. Transp.*

Commc'ns Int'l Union, 946 F.2d 283, 292–93 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992)).

"Third, the State conflates waiving First Amendment rights with exercising them." App 19. When a public employee voluntarily joins a union and agrees to pay dues, "that action itself is clear and compelling evidence that the employee has waived [any] rights" not to do so. App. 19-20. Moreover, "a public employee also exercises a First Amendment right of free association by voluntarily choosing to become a dues-paying union member." App. 20. Thus, "[t]he State's assertion that it needs additional clear and compelling evidence of waiver before it can lawfully deduct union dues from union employees' paychecks pretends to value one First Amendment right while actually impinging upon another." *Id.*

Petitioners "conceded at oral argument" that "the State ha[d] no justification for its unilateral actions contrary to the CBA other than its reading of *Janus*." App. 26. The Alaska Supreme Court held as a matter of state law that the State breached its contract with ASEA and the implied covenant of good faith and fair dealing. App. 26-27. The court also held that the State violated at least three provisions of Alaska's PERA, including state statutes (1) requiring a public employer to deduct union membership dues "[u]pon written authorization of [the] public employee," App. 28 (quoting AS 23.40.220); (2) prohibiting a public employer from "dominat[ing] or interfere[ing] with the formation, existence, or administration of" a labor organization, App. 28 (quoting AS 23.40.110(a)(2)); and (3) prohibiting a public employer from "discriminat[ing] in regard to … a term or condition of employment to encourage or discourage membership

in a[] [labor] organization," App. 29 (quoting AS 23.40.110(a)(3)).[4]

As part of those rulings, the Alaska Supreme Court found that there was "abundant evidence of anti-union animus" in the record:

> The State espoused its sweeping interpretation of *Janus* and began unilaterally changing dues deduction procedures only after a change in administration; the new administration consulted with Outside special interest groups but did not consult or negotiate with ASEA, with which it had a collective bargaining agreement; the State emailed all employees represented by ASEA to inform them (incorrectly) about their First Amendment rights and about union members' (fictitious) rights to immediately stop payroll dues deductions, again without first consulting ASEA; the State made changes only to union dues deduction procedures, not to other union-related employee payroll deductions; and the State actually stopped collecting dues from ASEA members outside their contractual revocation windows and did not inform ASEA.

App. 30-31. The Alaska Supreme Court unanimously concluded that the State "acted with an anti-union

[4] The state supreme court did not find it necessary to address the superior court's holdings that the State's executive branch officials also violated the state constitutional separation of powers doctrine and the Alaska Administrative Procedures Act. App. 31-32.

motive" and "that the State's actions were 'not neutral' but rather were 'hostile' to ASEA." App. 30-31.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for multiple reasons: The lower courts have unanimously rejected petitioners' First Amendment argument so there is no need for this Court to resolve any split of authority; the decision below is correct; and, in any event, this case would not be a suitable vehicle for adjudicating the purported First Amendment rights of third parties.

I. The lower courts unanimously have rejected petitioners' argument.

The stipulated facts establish that public employees in Alaska voluntarily choose whether to become union members. Employees who choose to become union members sign written membership agreements in which they affirmatively and unambiguously agree to pay union dues through payroll deductions. Like the Alaska Supreme Court, "every circuit to consider the matter has concluded that the deduction of union dues under a valid contract between the union and a member does not violate the First Amendment." *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 860 (8th Cir. 2023).[5] Dozens of district courts have reached

[5] *See Wheatley v. N.Y. State United Tchrs.*, 80 F.4th 386, 390–91 (2d Cir. 2023); *Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, 57 F.4th 582, 586 (7th Cir. 2023), *cert denied*, 143 S. Ct. 2614 (2023); *Hoekman v. Educ. Minn.*, 41 F.4th 969, 978 (8th Cir. 2022); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021); *Bennett v.*

the same conclusion.[6] Petitioners fail to identify *any* contrary judicial authority.

Council 31 of the AFSCME, AFL-CIO, 991 F.3d 724, 729–33 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (2021); *Fischer v. Governor of N.J.*, 842 F. App'x 741, 753 & n.18 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 426 (2021); *Oliver v. SEIU Loc. 668*, 830 F. App'x 76, 80 (3d Cir. 2020); *Belgau v. Inslee*, 975 F.3d 940, 951 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021).

[6] *Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME, Loc. 11*, 2020 WL 1322051, at *12 (S.D. Ohio Mar. 20, 2020) (noting "the unanimous post-*Janus* district court decisions holding that employees who voluntarily chose to join a union … cannot renege on their promises to pay union dues"); *see, e.g.*, *Todd v. AFSCME, Council 5*, 571 F. Supp. 3d 1019, 1025–26, 1030–31 (D. Minn. 2021); *Barlow v. Serv. Emps. Int'l Union, Loc. 668*, 566 F. Supp. 3d 287, 297–301 (M.D. Pa. 2021); *Crouthamel v. Walla Walla Pub. Schs.*, 535 F. Supp. 3d 1025, 1034 (E.D. Wash. 2021); *Troesch v. Chicago Tchrs. Union*, 522 F. Supp. 3d 425, 429 (N.D. Ill. 2021), *aff'd*, 2021 WL 2587783 (7th Cir. Apr. 15, 2021), *cert. denied*, 142 S. Ct. 425 (2021); *Wolf v. Univ. Pro. & Tech. Emps., Commc'ns Workers of Am. Loc. 9119*, 2020 WL 6342934, at *3 (N.D. Cal. Oct. 29, 2020), *aff'd*, 2021 WL 4994888 (9th Cir. Sept. 16, 2021), *cert. denied*, 142 S. Ct. 591 (2021); *Woods v. Alaska State Emps. Ass'n*, 496 F. Supp. 3d 1365, 1372–74 (D. Alaska 2020), *aff'd*, 2021 WL 3746816 (9th Cir. Aug. 11, 2021), *cert. denied*, 142 S. Ct. 1110 (2022); *Yates v. Am. Fed'n of Tchrs., AFL-CIO*, 2020 WL 6146564, at *1–2 (D. Or. Oct. 19, 2020), *adopting report*, 2020 WL 7049550 (D. Or. Nov. 29, 2020), *aff'd sub nom.*, *Yates v. Hillsboro Unified Sch. Dist.*, 2021 WL 4777010 (9th Cir. Oct. 12, 2021), *cert. denied*, 142 S. Ct. 1230 (2022); *Labarrere v. Univ. Pro. & Tech. Emps., CWA 9119*, 493 F. Supp. 3d 964, 971–72 (S.D. Cal. 2020), *aff'd*, 2022 WL 260868 (9th Cir. Jan. 27, 2022); *Wagner v. Univ. of Wash.*, 2020 WL 5520947, at *5 (W.D. Wash. Sept. 11, 2020), *aff'd*, 2022 WL 1658245 (9th Cir. May 25, 2022); *Savas v. Cal. State Law Enf't Agency*, 485 F. Supp. 3d 1233, 1237–40 (S.D. Cal. 2020), *aff'd*, 2022 WL 1262014 (9th Cir. Apr. 28, 2022), *cert. denied*, 143 S. Ct. 2430 (2023); *Polk v. Yee*, 481 F. Supp. 3d 1060, 1071 (E.D. Cal. 2020), *aff'd*, 36 F.4th 939

(9th Cir. 2022), *cert. denied*, 143 S. Ct. 405 (2022); *Creed v. Alaska State Emps. Ass'n*, 472 F. Supp. 3d 518, 524–30 (D. Alaska 2020) *aff'd*, 2021 WL 3674742 (9th Cir. Aug. 16, 2021), *cert. denied*, 142 S. Ct. 1110 (2022); *Molina v. Pa. Soc. Serv. Union*, 613 F. Supp. 3d 864, 875–77 (M.D. Pa. 2020); *Durst v. Or. Educ. Ass'n*, 450 F. Supp. 3d 1085, 1090–91 (D. Or. 2020), *aff'd*, 854 F. App'x 916 (9th Cir. 2021), *cert. denied sub nom.*, *Anderson v. Serv. Emps. Int'l Union Loc. 503*, 142 S. Ct. 764 (2022); *Loescher v. Minn. Teamsters Pub. & Law Enf't Emps.' Union, Loc. No. 320*, 441 F. Supp. 3d 762, 772–73 (D. Minn. 2020); *Quirarte v. United Domestic Workers AFSCME Loc. 3930*, 438 F. Supp. 3d 1108, 1118–19 (S.D. Cal. 2020), *aff'd sub nom.*, *Polk v. Yee*, 36 F.4th 939 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 405 (2022); *Grossman v. Hawaii Gov't Emps.' Ass'n/AFSCME Loc. 152*, 611 F. Supp. 3d 1033, 1044 n.9 (D. Haw. 2020), *aff'd*, 854 F. App'x 911, 912 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 591 (2021); *Mendez v. Cal. Tchrs. Ass'n*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020), *aff'd*, 854 F. App'x 920 (9th Cir. 2021), *cert. denied sub nom.*, *Anderson v. Serv. Emps. Int'l Union Loc. 503*, 142 S. Ct. 764 (2022); *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 923–24 (E.D. Cal. 2019), *aff'd*, 854 F. App'x 923 (9th Cir. 2021); *Anderson v. Serv. Emps. Int'l Union Loc. 503*, 400 F. Supp. 3d 1113, 1116–18 (D. Or. 2019), *aff'd*, 854 F. App'x 915 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 764 (2022); *Seager v. United Tchrs. L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019), *aff'd*, 854 F. App'x 927 (9th Cir. 2021), *cert. denied sub nom.*, *Anderson v. Serv. Emps. Int'l Union Loc. 503*, 142 S. Ct. 764 (2022); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019), *aff'd sub nom.*, *O'Callaghan v. Napolitano*, 2022 WL 1262135 (9th Cir. Apr. 28, 2022), *cert. denied sub nom., O'Callaghan v. Drake*, 143 S. Ct. 2431 (2023); *Babb v. Cal. Tchrs. Ass'n*, 378 F. Supp. 3d 857, 876–77 (C.D. Cal. 2019), *aff'd sub nom.*, *Martin v. Cal. Tchrs. Ass'n*, 2022 WL 256360 (9th Cir. Jan. 26, 2022); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019), *aff'd*, 2022 WL 1262015 (9th Cir. Apr. 28, 2022), *cert. denied*, 143 S. Ct. 405 (2022); *Smith v. Super. Ct., Cnty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018), *aff'd sub nom.*, *Smith v. Bieker*, 854 F. App'x 937 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 593 (2021).

This Court has denied petitions for certiorari in more than a dozen cases raising the same basic argument that petitioners press here. *See supra* at 1 n.1. Given the unanimous consensus of the lower courts, there is no reason for this Court to intervene.

II. The Alaska Supreme Court's decision faithfully applies this Court's precedents.

Petitioners seek review on the ground that the Alaska Supreme Court's decision purportedly "conflicts with *Janus*." Pet. 21. Petitioners' merits arguments about a purported conflict with *Janus* already have been found insufficient to justify review in the numerous prior petitions raising the same arguments. *Supra* at 1 n.1. There have been no relevant legal developments since those petitions were denied that would support a different outcome here.

In any event, petitioners' merits arguments are incorrect. *Janus* held that mandatory agency fee requirements for public employees are not consistent with the First Amendment. 138 S. Ct. at 2486. This case, in contrast, involves union membership dues for public employees who voluntarily became union members, expressly and affirmatively agreed to pay membership dues in clear written agreements, and received membership rights and benefits in return. The stipulated undisputed facts establish that "[o]nly those employees who join ASEA and sign forms authorizing the State to deduct their union dues from their paychecks will pay anything to ASEA." App. 23-24. Employees do not experience any violation of their First Amendment rights when their employer makes the dues deductions the employees themselves have

affirmatively authorized, because "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

Petitioners do not dispute that under Alaska law, public employers may deduct union membership dues only after an individual employee voluntarily and affirmatively authorizes those deductions. App. 106 ¶11; App. 115 ¶48; AS 23.40.020, 23.40.080. Petitioners erroneously contend that *Janus* requires more than affirmative voluntary consent and instead imposes a new, heightened "waiver" analysis whenever a public employee elects to join a union and pay membership dues. As the lower courts unanimously have recognized, *see supra* at 15-17 nn.5-6, *Janus* did not change the law governing the formation and enforcement of voluntary contracts between unions and their members. "*Janus* concerned compelled extraction of fees from non-union members; the opinion said nothing about union members who 'freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union.'" *Burns*, 75 F.4th at 860–61 (quoting *Bennett*, 991 F.3d at 732).

Petitioners' arguments conflict with *Cohen*, 501 U.S. at 672, which did not apply a special, heightened "waiver" analysis to a newspaper's promise not to reveal the identity of a confidential source, because the government's enforcement of the promise did not give rise to a First Amendment objection that needed to be waived. The same is true here. Private parties often enter into agreements that implicate First Amendment rights—arbitration agreements, nondisclosure

agreements, annual magazine subscriptions—and the government routinely honors those agreements. Outside the context of criminal suspects in custody or criminal defendants pleading guilty, a voluntary, affirmative, and unambiguous agreement is sufficient. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 234–49 (1973) (consent to search is waiver of Fourth Amendment right against involuntary searches).[7]

The passage from *Janus* on which petitioners rely concerns workers who never joined the union ("nonmembers") and never affirmatively authorized membership dues deductions:

> 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

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[7] Petitioners' cases are not to the contrary. Pet. 24. In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972), the Court merely held that, "assum[ing]" a "waiver" analysis applied to a procedure that would otherwise violate due process, the parties' contract constituted such a waiver. In *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972), the Court simply held that "fine print" in a consumer contract did not provide sufficiently "clear" consent to a constitutionally invalid replevin procedure that did not comply with procedural due process. In *Patterson v. Illinois*, 487 U.S. 285, 292 (1988), the Court addressed the waiver of the Sixth Amendment right to counsel by a criminal defendant subjected to custodial interrogation.

> and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S. Ct. at 2486 (emphases added, citations omitted). The Court cited "waiver" cases in this passage not to tacitly overrule *Cohen*, but to make clear that the States cannot presume from nonmembers' *inaction* that they wish to support a union.[8]

As the lower courts unanimously have recognized, *Janus* did not prohibit voluntary dues payments but "made clear that a union may collect dues when an 'employee affirmatively consents to pay.'" *Bennett*, 991 F.3d at 732 (quoting *Janus*, 138 S. Ct. at 2486); *see, e.g.*, *Burns*, 75 F.4th at 861 ("By signing a union membership contract, an employee 'clearly and affirmatively' waives her right to refrain from joining the union, and consents to fund the union according to the terms of the contract.") (citing *Ramon Baro*, 57 F.4th at 586).

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[8] The four "waiver" cases *Janus* cited concerned whether waiver could be found solely from the plaintiff's inaction. *See Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938) (addressing whether pro se defendant had properly waived his Sixth Amendment right to counsel by failing to ask that counsel be appointed); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–80 (1999) (rejecting argument that State had "constructively" waived its sovereign immunity by engaging in activity that Congress decided to regulate); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315, 322 (2012) (nonmembers of union could not be deemed to consent to union political assessment through their silence); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–44 (1967) (libel defendant could not be deemed to have waived, through its silence, libel defense later recognized in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

The undisputed facts here establish that the State as employer makes dues deductions only after an individual employee voluntarily chooses to join ASEA and signs a written membership and dues authorization agreement. In those agreements, the employees "clearly and affirmatively consent," *Janus*, 138 S. Ct. at 2486, to dues payments, so the decision below is entirely consistent with *Janus*.[9]

Petitioners cite *allegations* in complaints in other cases from other states to attempt to bolster their argument that unions are bad actors. Pet. 16-20. The record here includes no evidence whatsoever of any misconduct by ASEA. App. 106 ¶11; App. 115 ¶¶48-50. Moreover, the Alaska Labor Relations Agency has jurisdiction to hear and resolve unfair practice charges against public employee unions that allegedly interfere with the rights of public employees. AS 23.40.120–23.40.180. Petitioners fail to explain why their own state agency and state courts would be unable to redress hypothetical union misconduct.

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[9] Petitioners incorrectly assert that they "blindly defer to unions, deducting dues whenever the union produces the smallest evidence of consent." Pet. 2. To the contrary, the stipulated facts established that the State only deducts union dues after an individual employee signs a voluntary union membership agreement in which the employee affirmatively, voluntarily, and unambiguously authorizes the exact dues deductions at issue. App. 106 ¶11; App. 115 ¶¶48-50. The Alaska Supreme Court also did *not* hold that the State must deduct union dues if an employee's signature was "forged" or "the employee was unduly pressured into signing the form" or that union membership agreements may "impose[] onerous and difficult requirements for opting out of paying dues." Pet. 15. Such union misconduct would violate PERA. AS 23.40.080, 23.40.110(c). The record contains no evidence that such situations have occurred. App. 115 ¶¶48-50.

Ultimately, petitioners concede that this case involves voluntary, signed agreements between private parties (an employee and a union) to pay money in exchange for valuable consideration (membership benefits and privileges), with no evidence of coercion or misunderstanding. Pet. 24. The *Janus* decision does not preclude the government from honoring individuals' voluntary, affirmative choices, so there is no "conflict[] with *Janus*," Pet. 21, that could justify review.

III. This case would not be a suitable vehicle for review.

The petition should also be denied because this case would not be an appropriate vehicle for considering the First Amendment issue that petitioners seek to raise. The individuals whose First Amendment rights purportedly are being violated are not parties. Petitioners lack standing to assert their First Amendment argument in this Court. Petitioners' argument is also foreclosed by the collateral estoppel effect of judgments in other cases.

1. As an initial matter, the normal rule in federal litigation is that a litigant "must assert his own legal rights and interests." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Public employees are capable of asserting their own First Amendment rights, and they have done so in numerous cases that raised the same First Amendment argument that petitioners raise here. *See*

supra at 15-17 nn.5-6.[10] They do not need a self-appointed champion.

Moreover, not only do petitioners seek to raise the purported First Amendment rights of third parties, but petitioners themselves are committing the purported violations of those rights. Petitioner State of Alaska complains that "laws like Alaska's are … failing to protect … employees' First Amendment rights." Pet. 29. But the State has not changed its laws. It could do so. Public employers do not have an obligation under the federal constitution to process payroll deductions for union dues, much less to follow a particular process for such deductions. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009).

Likewise, petitioners urge that "the State's collective bargaining agreement with ASEA violates the First Amendment." Pet. 12. But the CBA at issue in this case expired in June 2022. App. 8; App. 110 ¶27. After petitioners' purported epiphany about the *Janus* decision, the State voluntarily entered into a new CBA that contains the same provisions that the State seeks to complain about.[11]

The strange posture of this case—in which the alleged victims are not parties and the petitioners are

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[10] Petitioners observe that some prior employee certiorari petitions had vehicle issues, Pet. 28-29, but many did not.

[11] The current CBA governing ASEA's bargaining unit took effect July 1, 2022, and is available on the Alaska Department of Administration's website at https://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/GGU2022-2025.pdf.

complaining about their own conduct—makes this case a poor vehicle for review.

2. Petitioners also lack standing to assert their First Amendment argument in this Court. At the least, there is a significant threshold question about petitioners' standing that makes this case unsuitable for review.

Petitioners who are state officials (the Alaska Governor, Attorney General, and Commissioner of the Department of Administration) lack standing to challenge the constitutionality of state law because they are not personally adversely affected—their interest is official, rather than personal. The judgment below does not require them to do anything except comply with state law when acting in their official capacities.

The petitioner officials are in the same position as the county auditor in *Smith v. Indiana*, 191 U.S. 138 (1903), who was ordered by a state court to carry out state law, notwithstanding the auditor's contention that the state law violated the federal constitution. This Court dismissed the auditor's appeal, reasoning that "he was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers" and "the interest of an appellant in this court should be a personal, and not an official, interest." *Id.* at 148–49; *accord Braxton Cnty. Ct. v. State of W. Virginia*, 208 U.S. 192 (1908).[12]

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[12] *See also Coleman v. Miller*, 307 U.S. 433, 466 (1939) (Opinion of Frankfurter, J.) ("[T]his Court has consistently held that the interest of a state official in vindicating the Constitution of the United States gives him no legal standing here to attack the

The other petitioners (the State and its Department of Administration) are in an even worse position with respect to standing. They have no "personal" interest in setting aside a state court judgment that enjoins them from violating *their own* laws. They adopted those laws and are free to change them. "A State clearly has a legitimate interest in the continued enforceability of its own statutes," *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022) (citation, internal quotation marks omitted), but not in asking this Court to hold that the State's own statutes are unconstitutional. As in *Smith v. Indiana*, the desire to vindicate the purported rights of third parties is not sufficient to confer standing to litigate in this Court.

The judgment below does require the State to pay damages to ASEA. But that injury in fact is not sufficient to create standing for the State to assert the constitutional rights of third parties in this Court because that injury was self-inflicted. In *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983), for example, administrative law judges who lacked standing to argue that following their own agency's instruction

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constitutionality of a state statute in order to avoid compliance with it."); *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 347–48 (1936) (Brandeis, J., concurring) (the Supreme Court will not pass upon constitutionality of a statute "upon complaint of one who fails to show that he is injured by its operation. … Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained."); *Donelon v. Louisiana Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008); *Cronson v. Clark*, 810 F.2d 662, 664 (7th Cir. 1987); *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 235–39 (9th Cir. 1980); *Finch v. Miss. St. Med. Ass'n,* 585 F.2d 765, 774 (5th Cir. 1978).

would violate the rights of third parties could not "confer it on themselves, bootstrap fashion, by disobeying the instruction and then complaining that their disobedience laid them open to discipline." *Id.* at 906.

This case involves the same type of attempted bootstrapping. The State's only asserted reason for violating state law and its CBA was its desire to vindicate the purported rights of third parties. The State intentionally caused damages to ASEA (resulting in a damages award against the State) only because the State violated state law by failing to discuss its plans with ASEA in advance, so that the State could harm ASEA before ASEA obtained a temporary restraining order. As *D'Amico* reasons, the State's self-inflicted injury should not create an exception to the rule applied in *Smith v. Indiana.*

3. Finally, petitioners' First Amendment arguments are foreclosed by the collateral estoppel effect of the federal judgments in *Creed* and *Woods*. At the least, there is a significant threshold question about collateral estoppel that makes this case unsuitable for review.

The State's executive branch representative (the Commissioner of the Department of Administration) was a party to *Creed* and *Woods*. Although the Commissioner was named a defendant, the Commissioner was aligned with the plaintiffs and urged the district court to rule that the State's deduction of membership dues for employees who authorize deductions by signing ASEA membership agreements violates the employees' First Amendment rights. The district court in both cases rejected the First Amendment claim. *See supra* at 11.

ASEA argued below that the *Creed* and *Woods* judgments preclude petitioners from relitigating the same issue. The Alaska Supreme Court recognized that "ASEA's preclusion argument is not necessarily without merit," but "decline[d] to apply preclusion" and instead rejected the State's arguments on the merits. App. 17. The Alaska Supreme Court had discretion to reject the State's claim on the merits, rather than based on collateral estoppel, but the preclusive effect of a federal judgment in a federal question case (like *Creed* and *Woods*) is a matter of federal common law, not state law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). This Court would have to consider the collateral estoppel issue before it could render a decision *in favor* of petitioners.

Petitioners are all in privity with the Commissioner, who was a party to *Creed* and *Woods* in her official capacity; the same First Amendment issue was litigated in *Creed* and *Woods*; and the resolution of that issue was essential to the district court's judgment in both cases. As such, collateral estoppel does apply. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015); *Taylor*, 553 U.S. at 894–95.

For all these reasons, this case would not be an appropriate vehicle for review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

SCOTT A. KRONLAND
MATTHEW J. MURRAY
Counsel of Record
ALTSHULER BERZON LLP
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151
mmurray@altber.com

Counsel for Respondent Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO

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