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 of the State of Alaska

BRIEF OF MARK JANUS, THE LIBERTY JUSTICE CENTER, AND THE ILLINOIS POLICY INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment prohibits a state from taking money from employees' paychecks to subsidize union speech when the state lacks sufficient evidence that the employees knowingly and voluntarily waived their First Amendment rights.

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INTEREST OF THE AMICI CURIAE[1]

Mark Janus is the former Illinois public employee whose First Amendment right to not pay for union speech against his will was vindicated by this Court in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). Mr. Janus is committed to ensuring that all public employees have a free choice to decide whether they wish to pay money to public sector unions and are not required to do so involuntarily or without knowledge.

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. The Liberty Justice Center represented Mark Janus before this Court in his lawsuit seeking to protect public-sector workers' right to freedom from forced union association, support, or speech. *See Janus*, 138 S. Ct. at 2448. The Liberty Justice Center has represented public employees who sought to enforce this Court's requirement in *Janus* that public employees provide "affirmative consent" to waive their right before subsidizing a public sector union—the same protection Petitioner State of Alaska sought to provide its workers. *See e.g., Ramon Baro v. Lake County Federation of Teachers, Local 504*, 57 F.4th 582 (7th Cir. 2023), *cert. denied* No. 22-1096 (Jun. 12, 2023); *O'Callaghan v. Napolitano*, No. 19-

[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amici funded its preparation or submission. Counsel for both Petitioners and Respondent received notice more than 10 days before its filing that Amici intended to file this brief.

56271, 2022 U.S. App. LEXIS 11559 (9th Cir. Apr. 28, 2022), *cert. denied* No.22-219 (May 1, 2023); *Adams v. Teamsters Local 429*, No. 20-1824, 2022 U.S. App. LEXIS 1615 (3d Cir. Jan. 20, 2022), *cert. denied* No. 21-1372 (Oct. 3, 2022); *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), *cert. denied* No. 20-1603 (Nov. 1, 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), *cert. denied* No. 20-1606 (Nov. 1, 2021).

The Illinois Policy Institute is a nonpartisan, nonprofit public policy research and education organization that promotes personal and economic freedom through free markets and limited government. Headquartered in Illinois, the Institute's focus includes budget and tax, good government, jobs and economic growth and labor policy. For years, the Institute heard from government workers frustrated by being forced to give a piece of their paycheck to a highly political union. Those workers included Mark Janus. The Institute coordinated with the National Right to Work Legal Defense Foundation and Liberty Justice Center, who then represented Mr. Janus before this Court.

SUMMARY OF ARGUMENT

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018), this Court held that an Illinois law allowing government employers to withhold agency fees from nonconsenting employees on behalf of public-sector unions violated those employees' First Amendment rights. This Court explained that "[n]either 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.'" 138 S. Ct. 2448, 2486 (2018) (citations omitted).

Yet, when government employees have brought claims alleging that their employers withheld money from their paychecks on behalf of public-sector unions without the employees' affirmative consent, every federal court to have addressed such claims has ignored the waiver requirement set forth by this Court in *Janus* and held that *Janus* applies solely to its facts.

In response to this Court's holding in *Janus*, the State of Alaska—in contrast with many states that simply stopped withholding agency fees from nonmember employees on behalf of public sector unions—took this Court's waiver requirement seriously. Recognizing that Alaska's existing law requiring the State to deduct dues whenever a union provided an employee's "written authorization" was not consistent with *Janus'* "affirmative consent" waiver requirement, the State created its own dues deduction form,

which informed employees of their First Amendment right to not pay a union under *Janus*, and collected such forms directly from the employees, allowing them to opt out of union dues deduction whenever they chose. But Respondent sought, and the Alaska Supreme Court granted, an injunction against the State's efforts—ignoring the *Janus* waiver requirement and holding *Janus* to its facts, much like the lower federal courts.

At the behest of unions, government employers in most states continue to deduct union dues from employees regardless of whether the employer has evidence than an employee has provided affirmative consent to waive their right to not pay a union—and the lower federal courts, by ignoring this Court's holding in *Janus*, have allowed this to happen. Here, the Supreme Court of Alaska, in a lawsuit filed by unions, has prevented the State of Alaska from attempting to comply with *Janus's* waiver requirement.

As a result, unless this Court intervenes, thousands of state and local government employers across the country will continue to defy *Janus* by deducting union dues from employees without clear and compelling evidence that the employees knew of and waived their right not to pay.

A right to not pay money to a union that an employee can unknowingly or involuntarily waive is akin to no right at all. This Court should grant the petition to ensure that the public employees' First Amendment right to choose whether to subsidize unions' political speech is protected.

ARGUMENT

I. Despite this Court's holding in *Janus*, public employees continue to subsidize union speech without first providing affirmative consent.

This Court has recognized that the First Amendment protects government employees from being coerced to financially support a public-sector union's political speech. *Janus*, 138 S. Ct. at 2460. That decision was necessary because state laws had long given unions enormous benefits and privileges that infringed on government workers' First Amendment right against compelled speech.

Yet, since *Janus*, government employers, at the behest of public-sector unions and under state law, have continued to withhold money from public employees' paychecks even when the employer lacks clear and compelling evidence that employees knew of and chose to waive their right to not pay a union, such as when a government employer relies simply on the word of the union that an employee has "consented."

Unfortunately, the lower federal courts have allowed this to happen by ignoring *Janus*'s "affirmative consent" waiver requirement, and by narrowly interpreting that holding to apply only to its facts. In this case, that same narrow interpretation of *Janus*—this time by the Supreme Court of Alaska—has prevented the State of Alaska from implementing a policy seeking to comply with the *Janus* waiver requirement.

This Court should grant the petition because the right to not be coerced to financially support a public sector union is practically void if one can waive that right without knowledge that it exists.

A. The First Amendment protects government employees from being coerced to subsidize the political speech of public-sector unions.

In *Janus*, this Court held that an Illinois law allowing government employers to withhold agency fees from nonconsenting employees on behalf of public-sector unions violated those employees' First Amendment rights. 138 S. Ct. 2448, 2486 (2018). In doing so, this Court stated 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. *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (some citations omitted).

This paragraph makes clear that (1) agency fees or other union payments withheld by a government employer without an employee's consent are unconstitutional, and (2) when an employee does consent to pay

money to a union, that employee's consent must meet this Court's standards for waiver of constitutional rights—requiring clear and affirmative consent, freely given, and shown by clear and compelling evidence—before a government employer may withhold money from an employee's paycheck on behalf of a union.

Further, a valid waiver of First Amendment rights requires clear and compelling evidence that the individual *knew* of his or her First Amendment rights and chose to waive them. *See Janus*, 138 S. Ct. at 2486 (citing *Zerbst*, 304 U.S. at 464 and *Curtis Publishing Co.*, 388 U.S. at 130, requiring knowledge of a constitutional right to waive it); *see also Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (for a waiver of constitutional rights to be effective "it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege").

Government employers cannot presume that their employees have knowledge of their right to not pay money to a union under *Janus*. *Zerbst*, 304 U.S. at 465. Thus, government employers may not withhold union dues or fees from government workers without clear and compelling evidence that those workers have knowledge of their right not to pay money to a union and freely chose to waive that right.

B. The lower federal courts and the Alaska Supreme Court refuse to fully apply *Janus*.

Since this Court's decision in *Janus*, government employees have brought dozens of cases across the country seeking relief from having union dues deducted from their paychecks without their affirmative

consent. Many of these cases were filed by employees who joined a union before *Janus*, when they were faced with an unconstitutional choice between paying union dues as members or paying agency fees as nonmembers. After *Janus*, these employees were unable to stop their dues deductions because they were thwarted by an "opt-out window" that permitted them to stop union dues deductions only during a short window, often occurring annually, but sometimes not for multiple years. These employees argued that the opt-out windows could not compel the continued withholding of union dues because the employees had not provided affirmative consent to waive their right under *Janus*. At the time they agree to pay money to the union as dues-paying members they could not have done so freely—because they were required to either pay full union dues or agency frees as nonmembers—and they did not know that they had a First Amendment right not to pay money to a union.

The lower courts, however, have consistently held that *Janus* did not apply to these government workers; rather, they limited the holding in *Janus* only to agency fee payers. *See, e.g.*, *Fischer v. Governor of New Jersey*, No. 19-3914, 2021 U.S. App. LEXIS 1158, at *1-2 (3d Cir. Jan. 15, 2021); *Oliver v. SEIU Local 668*, 830 F. App'x 76 (3d Cir. 2020); *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021); *Belgau v. Inslee*, 975 F.3d 940, 945 (9th Cir. 2020); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021).

At least one case involved an employee who, after *Janus*, joined a union without knowing of her *Janus* rights. In that case, a public-school teacher on a J-1 Visa—a citizen of Spain—joined a union believing it to be required, but when she learned of her mistake a

few days later and attempted to opt out, she was told by the union that she must pay union dues until the following year at the next opt-out window. She argued that she could not be forced to pay union dues because she had no knowledge that she was waiving her right to not pay money to a union and therefore had not provided affirmative consent. The Seventh Circuit, however, held that "[a]ll circuits to consider the issue have agreed that *Janus* creates no new waiver requirement before a valid union contract can be enforced." *Ramon Baro v. Lake County Federation of Teachers, Local 504*, 57 F.4th 582 (7th Cir. 2023).

A final category of cases seeking to invoke *Janus's* affirmative consent waiver requirement involves allegations that the employee never signed a union card or dues deduction agreement and that union officials forged the employee's signature. Here, the employees have argued that the signatures do not meet *Janus's* affirmative consent requirement because the forged signatures are not clear and compelling evidence of the employees' waiver of their right to not pay the union. Nonetheless, the lower courts that have heard these cases have held that *Janus* does not require such affirmative consent and these cases do not implicate the First Amendment. *See e.g., Ochoa v. Public Consulting Group, Inc.*, 48 F.4th 1102 (9th Cir. 2022); *Wright v. SEIU Local 503*, 48 F.4th 1112 (9th Cir. 2022).

The petition before this Court involves a court's similar refusal to recognize and implement the waiver requirements set forth in *Janus*, though it involves a state's attempt to comply with those requirements. After *Janus*, Alaska's Attorney General issued a report

recognizing that under existing Alaska law—requiring it to withhold dues as certified by the union when the union provided an employee's "written authorization," Alaska Stat. § 23.40.220—the State could not ensure that employees who provided such written authorization had knowledge of their First Amendment right not to authorize any payroll deductions to subsidize unions' speech and could not ensure that the employee's consent was freely given, as required by *Janus*. App.150-51.

But when the Governor issued an administrative order that sought to protect state employees' *Janus* rights, App. 160-64, Respondent Alaska State Employees Association sought to enjoin the administrative order. On appeal, the Alaska Supreme Court held that the First Amendment did not require the State to "alter the union dues deduction practices in place" before the Attorney General opinion was issued, App. 32, and that the "State's interpretation of *Janus* is incorrect." App. 20. The Alaska Supreme Court held that *Janus* only applies to charging union agency fees to nonmember public employees. App. 18. When a public employee "voluntarily join[s] a union and agree[s] to pay dues," the Alaska Supreme Court found, "that action itself is clear and compelling evidence that the employee has waived those rights." App. 19-20.

C. The holdings of the lower federal courts and the Alaska Supreme Court conflict with *Janus*.

The holdings of the lower federal courts and the Alaska Supreme Court narrow this Court's holding in *Janus* to its facts while ignoring its ultimate holding. They assert that *Janus* applies only to nonmember agency fee payers and not employees who sign a union

membership agreement and have union dues deducted from their paychecks by the government employer. According to these courts, *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Belgau*, 975 F.3d at 952.

But this interpretation of *Janus*—applying it only where nonmembers who never agreed to pay money to a union but had agency fees withheld anyway—conflicts with the language of *Janus's* holding.

"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." *Janus*, 138 S. Ct. at 2486.

If *Janus*'s holding were limited only to those nonmembers who had agency fees withheld from their paychecks without their consent—as the lower courts and Alaska Supreme Court hold—then why did this Court explicitly refer to nonmembers who "agree[] to pay" money to the union? *Janus*, 138 S. Ct. at 2486. Neither Mr. Janus nor any other agency-fee payer ever agreed to pay anything to the union; agency fees were by nature compulsory. There is only one circumstance that applies to nonmember employees who agree to pay money to a union: those who sign union membership cards and dues deduction agreements to become members. *Janus's* waiver requirement therefore must apply to all employees at the time they sign a union card and dues deduction agreement. But the

lower federal courts and Alaska Supreme Court have simply ignored this language.

This Court's holding in *Janus* is easy to understand: The First Amendment prohibits government from coercing people to financially support private political speech. Therefore, government employees may not be coerced by state law to financially support a union's political speech. When a government employee agrees to allow money to be withheld from them to a union, they are waiving their constitutional right. Waiving a constitutional right cannot be presumed. Therefore, government employers may not withhold money from government employees unless it has clear and compelling evidence that the employee has knowledge of their constitutional right to not pay money to a union and seeks to freely waive that right.

The problem with the lower courts and Alaska Supreme Court's interpretation of *Janus* is that, while they acknowledge that a government employer may not withhold money from an employee on behalf of a union without the employee's consent, they ignore the Court's clear instructions on what constitutes consent. These courts have thus allowed public-sector unions to use state law to get government employers to withhold money on their behalf without any kind of check on whether the employee actually consents. As a result, courts will apply no constitutional scrutiny when a government employer withholds money from an employee's paycheck so long as a union can produce a union card with that employee's signature—even if the employee has no idea about their *Janus* rights, and

even if the employee did not actually sign the union card.

The lower courts' interpretation of *Janus* thus incentivizes unions to keep public employees ignorant of their *Janus* rights and to ensure that they obtain a union card from every employee by any means necessary.

II. Without this Court's intervention, state laws will continue to force government employees to subsidize union political speech without proper consent.

The facts of the case before this Court show how existing state laws, used by public-sector unions, will continue to coerce government employees to subsidize union political speech by allowing government employers to withhold union dues from employees' paychecks both involuntarily and without their knowledge of their First Amendment right protected by *Janus*.

Like similar laws in many other states, Alaska's law requires the State to deduct union dues from employees' paychecks based simply on the union's delivery of the employee's written authorization, and thus does not adequately protect employees' rights under *Janus*. App. 150-51. The statute does not ensure that employees have knowledge of their First Amendment right not to authorize the state to deduct union dues from their paycheck. App. 150. Nor does the law ensure that the employees' consent to dues deductions is freely given. App. 150. As a result, this Court's requirement that employees provide affirmative consent to waive their right to not pay money to a union before their government employer withholds money from their paycheck is not being followed.

And Respondent's actions in this case show that a State or government employer that does take *Janus*'s affirmative consent requirement seriously will be opposed by public-sector unions for breach of contract or unfair labor practice claims. Indeed, Alaska is not the only state to attempt to comply with this Court's waiver requirement in *Janus* only to have those efforts challenged by unions. Both Indiana and Florida, for example, have passed legislation to provide a process to ensure public-sector employees had adequately knowledge of their *Janus* rights and provided affirmative consent to waive those rights—and unions have challenged both efforts. *See* Ind. Code § 20-29-5-6 (2003) (challenged in *Anderson Federation of Teachers v. Rokita*, No. 1:21-cv-01767, 2023 U.S. Dist. LEXIS 54757 (S.D. Ind. Mar. 30, 2023), *appeal docketed*, No. 23-1823 (7th Cir. May 1, 2023)); Fla. Sen. B. 256, Reg. Sess. (2023) (challenged in *Alachua County Education Ass'n v. Rubottom*, No. 1:23-cv-00111 (N.D. Fla. Filed May 9, 2023)).

What's more, in the wake of this Court's decision in *Janus*, public-sector unions have lobbied state legislatures to adopt legislation intended to make it hard for government employees to know their constitutional rights under *Janus*. For example, in Illinois, after *Janus* struck down the Illinois agency fee statute, Illinois amended Section 11.1 of Illinois's Education Labor Relations Act ("IELRA"), 115 Ill. Comp. Stat. §5/11.1 (as amended by P.L. 101-0620, eff. Dec. 20, 2019). IELRA prevents employers from "discouraging" union membership and requires employers to "refer all inquiries about union membership" to the union, except for those regarding payroll processes and procedures. This makes it less likely, and possibly illegal, for a government employer to inform its employees

about their *Janus* rights. IELRA also requires employers to give unions contact information about employees in their bargaining unit, while explicitly preventing any private third-party from obtaining the same contact information. This makes it more difficult for third-party organizations to inform public-sector workers about their *Janus* rights.

New Jersey enacted the Workplace Democracy Enhancement Act ("WDEA") roughly one month before the Court issued *Janus*, in an apparent effort to preemptively undermine the workers' rights this Court would soon recognize. P.L. 2018, ch.15, § 6, eff. May 18, 2018. WDEA not only requires compulsory union orientations for employees but also amends the State's dues-deduction statute, New Jersey Statutes Annotated Section ("N.J. Section") 52:14-15.9e, to make it harder for employees to revoke dues deduction authorizations. Before the amendment, employees who wanted to stop government dues deductions could submit a revocation notice effective as of the January 1 or July 1 "succeeding the date on which notice of withdrawal is filed." The WDEA amended the statute to limit the revocation window to "10 days following each anniversary date of their employment," which shall not be effective until the "30th day after the anniversary date of employment." N.J. Section 52:14-15.9e (as amended by P.L. 2018, c.15, § 6, eff. May 18, 2018).

Similarly, on the day this Court decided *Janus*, California's then-Governor Jerry Brown signed Senate Bill 866 into law. A "budget rider" bill that went into effect immediately, it contains provisions that prohibit public employees from talking to their own employers—and employers from talking to their

own employees—about payroll deductions, union membership, or their constitutional rights recognized by the *Janus* decision.

Laws like these make it less likely that government employees in those states will learn about their constitutional rights under *Janus*. And if the decision at issue in this case is allowed to stand, even governments that seek to protect employees' constitutional rights consistent with *Janus* will be prevented from doing so.

In *Janus*, this Court held that government employers may not withhold any money on behalf of a union from an employee unless that employee provides affirmative consent to waive that right—which means the employee's waiver must be freely given, with knowledge and be shown with clear and compelling evidence. Unions have convinced states, government employers, and the lower courts to reinterpret *Janus's* holding to mean that employers may withhold money from an employee's paycheck so long as they can provide a signed union card—even if that card was not actually signed by the employee and even when that employee did not know they were not required to pay money to the union.

Public-sector unions may no longer have the "considerable windfall [they] received under *Abood*," *Janus*, 138 S. Ct. at 2486, of obtaining agency fees from all nonconsenting employees, but, without this Court's intervention, they will continue to be able to use the power of government to exploit employees' ignorance of their *Janus* rights and to use deception to force employees to subsidize their political speech—exactly what this Court sought to prevent in *Janus*.

CONCLUSION

Janus indeed "was a gamechanger in the world of unions and public employment." *Belgau*, 975 F.3d at 944. And it has, unsurprisingly, led to a significant amount of litigation around the nation. Unfortunately, the decisions by the lower federal courts, and now the Alaska Supreme Court, have been universally hostile to the rights recognized in *Janus*. This Court's intervention is necessary to clarify that it meant what it said in *Janus*: unions may not take money from employees without their affirmative consent.

September 29, 2023

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