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 AMICUS CURIAE
OF GOLDWATER INSTITUTE
IN SUPPORT OF PETITIONERS**

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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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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases, and it files amicus briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. The Institute has appeared frequently as counsel for parties or as amicus curiae in cases implicating speech and associational rights. *See*, *e.g.*, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Anderson Federation of Teachers v. Rokita*, No. 23-1823 (7th Cir. filed June 15, 2021) (regarding State of Indiana's *Janus* compliance); *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) (reversing dismissal of First Amendment challenge to mandatory bar association membership); *Boudreaux v. Louisiana State*

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[1] The parties received timely notice of the Goldwater Institute's intent to file this amicus brief per Supreme Court Rule 37.2. Pursuant to Rule 37.6, counsel for Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than Amicus, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Bar Ass'n, 3 F.4th 748 (5th Cir. 2021); *Schell v. Oklahoma Sup. Ct. Justices*, 11 F.4th 1178 (10th Cir. 2021). The Institute devotes particular attention to government subsidies for special interests such as unions. *See*, *e.g.*, *Rokita, supra*; *Borgelt v. City of Austin*, No. 22-1149 (Tex. Sup. Ct. filed Feb. 6, 2023) (challenging union release time under Texas Gift Clause); *Gilmore v. Gallego*, No. CV-23-0130 PR (Ariz. Sup. Ct. filed May 18, 2023) (same under Arizona Gift Clause).

The Institute believes its litigation experience and public policy expertise will aid this Court in considering the appeal.

SUMMARY OF ARGUMENT

Affirmative consent is the bedrock principle that undergirds the First Amendment right to freely associate.

Although the Court recognized this in *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (affirmative consent required for any payment to a union), lower courts have not gotten the message, even when some states have gone out of their way to comply with *Janus* and protect employees' associational rights. The Alaska Supreme Court's decision here is just the latest example of a decision that, if left undisturbed, would effectively narrow the vital principles of *Janus* to its precise facts.

The time is right for this Court to reaffirm that the First Amendment protects the right of all citizens to

freely associate—and freely *dis*associate—and that states are not only permitted, but *required* to have "clear and compelling evidence" of affirmative consent before engaging in any state action that subsidizes a private organization at the expense of employees and taxpayers or results in compelled association.

ARGUMENT

I. The Alaska Supreme Court's erroneously narrow interpretation of *Janus* eviscerates employees' First Amendment rights to refrain from speaking and to freely disassociate.

In rejecting Alaska's efforts to comply with this Court's holdings in *Janus*, the Alaska Supreme Court posits that *Janus* affects *only* public employees who are not union members, and *only* with regard to agency fees. App. 18. But such a cabined interpretation ignores the fact that the First Amendment protects *all* citizens against compelled speech and compelled association, not just non-union-member public employees.[2] And Petitioners correctly point out that the *Janus* Court expressly said the limitations applied to "any . . . payment," not just agency fees. Pet. at 6 (quoting *Janus*, 138 S. Ct. at 2486). *Janus*'s First Amendment analysis

[2] Restricting *Janus*'s requirement of clear and compelling evidence to cases of non-members makes the *Janus* decision easy to evade, by the simple expedient of making it prohibitively difficult to quit the union.

therefore applies to any form of state action that results in nonconsensual association or subsidization.

The court below also completely ignored the directive in *Janus* that affirmative consent to join a union, pay union dues, and waive First Amendment rights "cannot be presumed." 138 S. Ct. at 2486. The court below declared that "voluntarily joining a union and agreeing to pay dues . . . *itself is clear and compelling evidence* that the employee has waived those rights." App. 19–20 (emphasis added). But that statement *is* a presumption. *Janus* instructs that a waiver of constitutional rights "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." 138 S. Ct. at 2486 (cleaned up; emphasis added). The agreement to join a union cannot by itself satisfy these requirements. While it may be true that the voluntary choice to join a union necessarily waives the rights associated with not being a union member, it is not the case that a person's joining a union in and of itself proves by clear and compelling evidence that the person's choice was actually voluntary, freely given, clear, and affirmative. In using circular reasoning, the Alaska Supreme Court effectively destroys the requirement that consent be shown by clear and compelling evidence.

And, of course, historical experience shows that it has *often* been the case that people have joined unions without actually voluntarily, freely, and affirmatively intending to waive their constitutional rights. Unions

frequently engage in intimidation, manipulation, and other unfair tactics to obtain "agreement" from employees. Unions have spent years concealing from prospective members that they have a right to refuse. *See generally Monson Trucking Inc.*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee Beck rights notice); *Local 74, SEIU*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights."); Jeff Canfield, *Comment, What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049, 1050 (2001) (noting that union behavior "makes it nearly impossible for average employees to successfully assert these rights granted by the Court"); R. Bradley Adams, *Union Dues and Politics: Workers Speak Out Against Unions Speaking For Them*, 10 U. Fla. J. L. & Pub. Pol. 207, 222 (1998) ("[M]ost union members are unaware of their right to prevent the union from spending their fees and dues on political causes.").

Some unions have adopted procedural requirements for workers to object to the unlawful expenditure of their dues that are so complicated as to effectively deprive members of those rights. *See*, *e.g.*, *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 848 (7th Cir. 2000) (union collected full amount of dues from nonmembers rather than 85 percent associated with

collective bargaining, and required year-long process for rebate); *Cummings v. Connell*, 316 F.3d 886, 890–91 (9th Cir. 2003) (confusing and incomplete notice of *Hudson* rights was unconstitutional); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998) (requiring workers to object to paycheck deductions annually in writing, rather than to assert continuing objection). In many cases, unions have forged workers' signatures on their membership cards. *See*, *e.g.*, *Ochoa v. Pub. Consulting Grp., Inc*., 48 F.4th 1102 (9th Cir. 2022); *Wright v. SEIU Local 503*, 48 F.4th 1112 (9th Cir. 2022). Such obstructionist tactics make it clear why the overly simplistic notion adopted below—that a person's membership in a union *per se* waives First Amendment rights—is inadequate.

The Alaska Supreme Court's cabined view of *Janus* threatens the constitutional rights of all public-sector employees—including both "the right to refrain from speaking," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), and "[t]he right to eschew association for expressive purposes," *Janus*, 138 S. Ct. at 2463—because it effectively prohibits the State from gathering, through its own forms and procedures, the clear and compelling evidence of an employee's affirmative consent that *Janus* requires. If the decision below stands, deference will be given to unions when determining who their members (and, therefore, their financiers) are, collective bargaining agreements will continue to be used to contract away the constitutional rights of public employees (union member or not), and public employees may find themselves trapped in union

membership and compelled to pay dues even if they wish to exercise their First Amendment right to no longer associate with or subsidize the union. In other words, the waiver of purported union members' First Amendment rights will be presumed in violation of *Janus*. 138 S. Ct. at 2486.

This Court's precedents make clear that without the right to *disassociate*, the right to associate means little. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate."). In fact, the Court long ago recognized the centrality of the right to resign from a union. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (union members' freedom to leave the union and escape union rule meant rule was not coercive).

Association with *any* organization should not, and constitutionally cannot, be a one-way ticket. In fact, the right to resign is *more* important than the right not to join in the first place.[3] Being forced to associate with an organization is offensive enough, but it is a one-time injury. Being denied the right to *dis*associate if that organization commits an act one regards as wrong is worse—because it stretches the associational and expressive injury into the indefinite future.

To avoid such constitutional injuries, the State of Alaska was well within constitutional boundaries

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[3] Even members of this Court have exercised their right to resign in protest: Justice Benjamin Curtis resigned in the wake of the *Dred Scott* ruling.

when it decided, through Administrative Order 312,[4] to issue its own dues deduction forms, require that the forms be submitted by its employees directly to the state rather than through a union middle-man, and allow employees to opt out of union membership and state-facilitated payroll deductions for union dues at will.

II. The pervasive use of restrictive opt-out windows undermines *Janus* and must be curtailed.

One particularly troubling aspect of the decision below is its indifference (at best) to clever efforts to trap public-sector employees into union membership and—more importantly from the union's perspective—the ongoing obligation to pay dues. "Pursuant to statute, both [of ASEA's collective bargaining agreements at issue] required the State to deduct union dues from ASEA union members' paychecks, upon members' written authorizations *provided by ASEA*, and to transmit the money to ASEA." App. 8 & n.17 (citing AS 23.40.220) (emphasis added). But ASEA's dues deduction form includes an *automatically renewing* annual

[4] ASEA's state separation of powers and administrative law objections to the administrative order are not at issue here and are irrelevant to the question of whether the Alaska Supreme Court properly interpreted and applied *Janus*. *See* App. 17. And, of course, whether the CBA or PERA are enforceable depends on whether they comport with First Amendment requirements as outlined in *Janus*. *See* App. 26 et seq. Therefore, the Court will need only decide whether the changes announced by Administrative Order 312 comply with the First Amendment.

commitment to pay dues, which can only be revoked during a ten-day period each year, the dates of which vary by employee based on when they were hired. App. 9; Petition at 11. Failure to formally resign during[5] that tiny opt-out period—even if consent for dues deductions has already been informally revoked—automatically results in a *full additional year* of union dues withheld by the state from the employee's paycheck.

The First Amendment does not compel a state to participate in such a scheme. And, indeed, it mirrors the kind of manipulation in which unions have frequently engaged, in violation of workers' constitutional rights. For example, in *Off. & Pro. Emps. Int'l Union, Local 29, AFL-CIO*, 331 N.L.R.B. 48 (2000), the union created a mechanism whereby workers could object to the spending of dues for political purposes—rules so complicated that they nullified the right to object. A worker had to specify exactly the amount of fees she believed were wrongly withheld, and what the money had been spent on—information most workers would find too difficult to obtain—and the union "treat[ed] the failure to [provide such information] . . . as a waiver of the right to challenge the expenditures." *Id*. at 49. The National Labor Relations Board found that this "simply place[d] too high a burden on the objector's

[5] ASEA apparently "changed its procedures" in 2020—after *Janus* and after being sued here—so that they could hold any premature requests and process them during the applicable window rather than force employees to wait another year. App. 9. This suggests that the union is aware that "clear and compelling evidence" of affirmative consent cannot be shown where a member has expressed a desire to revoke consent.

exercise of her right to challenge the Union's figures." *Id*. Likewise, in *Shea*, the Fifth Circuit noted that the procedure created for objecting dissenters was intended to prevent them from vindicating their rights:

> It seems to us that the unduly cumbersome annual objection requirement is designed to prevent employees from exercising their constitutionally-based right of objection, and serves only to further the illegitimate interest of the [union] in collecting full dues from nonmembers who would not willingly pay more than the portion allocable to activities germane to collective bargaining.

154 F.3d at 515. The point is simple: even if it could be shown by clear and compelling evidence that employees freely consented in advance to a restrictive opt-out window, rules that make it "unduly cumbersome" to withdraw that consent—to resign and refuse to subsidize the union further—would render such consent essentially meaningless. It would be the equivalent of what political scientists, describing when legitimately instituted governments take subsequent action to remain in power illegitimately, have jocularly called the principle of "one man, one vote, *one time*." Tom G. Palmer, *Democracy and the Contest for Liberty*, 102 Nw. U. L. Rev. 443, 444 (2008) (emphasis added). Of course, insulating the union from the consequences of abrupt membership decline would further reduce the union's accountability to its membership.

Unfortunately, restrictive opt-out windows of myriad forms have become pervasive.[6] For example, in Tucson, Arizona, the Tucson Unified School District's various collective bargaining agreements contain annual opt-out deadlines or windows as narrow as two weeks in length. *See* Parker Jackson, *Goldwater Demands Tucson Unified School District Stop Trapping Its Employees in Unions*, Goldwater Institute (January 18, 2023).[7] The National Treasury Employees Union recently sought to convince the Federal Labor Relations Authority to adopt restrictive annual opt-out periods for all federal employees. *See* Parker Jackson, *Goldwater Tells Federal Agency to Protect Workers' Rights from Union Power Grab*, Goldwater Institute (January 25, 2023).[8] *See also* Petition at 19–20 (citing additional examples).

There is nothing new about such obstructionist tactics. In *Local 647, United Automobile Workers*, 197 N.L.R.B. 608, 609 (1972), the union gave members a ten-day window in which they could resign-and that ten-day period was carefully timed to coincide with the Christmas holiday: only resignations presented

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[6] To say nothing of opt-out windows' pernicious cousins, so-called "maintenance of membership" requirements. *See Savas v. Cal. State Law Enf't Agency*, No. 20-56045, 2022 WL 1262014, at *1–2 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2430 (May 1, 2023) (upholding "maintenance of membership requirement").

[7] https://www.goldwaterinstitute.org/goldwater-demands-tucson-unified-school-district-stop-trapping-its-employees-in-unions/.

[8] https://www.goldwaterinstitute.org/goldwater-tells-federal-agency-to-protect-workers-rights-from-union-power-grab/.

between December 22 and 31 would be accepted. And these were then subjected to a sixty-day "waiting period," so that resignations only became valid in March. *Id*. The N.L.R.B. said this "amount[ed], in effect, to a denial to members of a voluntary method of severing their relationship with the Union." *Id*. *Accord, Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 589 (1955) (same arrangement). *See also Local 58, Int'l Bhd. of Elec. Workers (IBEW), AFL-CIO v. NLRB*, 888 F.3d 1313, 1317 (D.C. Cir. 2018) (union required members to resign in person and show picture identification to do so); *Debont v. City of Poway*, No. 98CV0502-K(LAB), 1998 WL 415844, at *2 (S.D. Cal. Apr. 14, 1998) (collective bargaining agreement that "required [plaintiff] to remain a member of the union for an extended period of time merely because at some point in the past, he chose to join the union" was unconstitutional); *McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp.2d 522, 527 (M.D. Pa. 2007) (where the contract "lock[ed] plaintiffs into union membership for the duration," so that "the only way plaintiffs can resign from the union is to leave their employment," the result was "a direct and deleterious impact on plaintiffs' rights under the First Amendment"). In short, restrictive opt-out windows designed to trap employees in unions are simply compelled association and compelled subsidization in disguise.

Unions could potentially avoid at least some of the associational rights problems caused by restrictive opt-out windows simply by charging annual dues as a lump sum rather than asking to use the state's payroll system to spread dues out over the course of a year. Of

course, that would put more scrutiny on the annual cost of membership, which is easily masked when broken down into monthly or biweekly increments. It would be much easier for a union—or, critically, the State—to show clear and compelling evidence of valid consent if only one payment were at issue and that payment was made prior to the revocation of consent. But when dues deductions are spread out over a long period of time, it becomes difficult if not impossible to prove clear and compelling evidence of affirmative consent for each individual payment, particularly after such consent has been revoked by the employee.[9] That alone justifies the state in seeking means of ensuring that worker consent is indeed knowing, intelligent, and voluntary.

III. The Alaska Supreme Court botched the "state action" analysis by repeatedly ignoring binding precedent.

Not only did the Alaska Supreme Court misinterpret the scope and nature of the rights the state sought to protect, it also erroneously concluded that "[t]he

[9] Note that an employee's obligation to pay dues to the union—a private entity—is separate and apart from the authorization of state payroll deductions. If a state ceases to deduct union dues from an employee's paycheck, the employee remains free to contribute financially to the union by other means. And even if a union can prove a contractual entitlement to a specific employee's union dues, the state is not obligated by the First Amendment to enforce the contract through payroll deductions because the state is not constitutionally required to subsidize a union or any other private organization.

State's acquiescent role facilitating interaction and agreements between two private parties, the union member employee and the union, does not amount to state action." App. 23. But the state is hardly a passive observer when it takes money from someone's paycheck and hands it to someone else. *Janus*, in short, is not the only binding precedent that the court below failed to respect in its analysis.

A. Granting access to state payroll systems is a government subsidy of speech for First Amendment purposes.

In *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 364 (2009), various unions brought a First Amendment challenge against an Idaho law prohibiting payroll deductions for union political activities. The Court rejected that challenge with regard to government employers, explaining that the First Amendment question was "whether the State must *affirmatively assist* [i.e., subsidize] political speech by allowing public employers to administer payroll deductions for political activities." *Id.* (emphasis added). The answer, of course, was "no." *Id.*

Ysursa relied on *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983), which made clear that a government's "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." And federal appellate courts, applying *Ysursa*, have rightly characterized payroll deductions for

union dues (and similar payments) as government subsidies of union speech. *See*, *e.g.*, *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 645 (7th Cir. 2013) ("[T]he Supreme Court has settled the question: use of the state's payroll systems to collect union dues is a state subsidy of speech that requires only viewpoint neutrality."); *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 898 (9th Cir. 2018) (law allowing wage credit contributions to third-party industry advancement funds is a state subsidy of speech subject to rational basis review).

Because the service of taking money from workers' paychecks and giving it to the union is itself a subsidy, the government can refuse to participate without transgressing the First Amendment. *See Utah Educ. Ass'n v. Shurtleff*, 565 F.3d 1226, 1228 (10th Cir. 2009) ("Utah is under no obligation to aid the Unions' exercise of their First Amendment rights utilizing payroll systems. . . . Failing such an obligation the [ban on payroll deductions for union political funds] is subject only to rational basis review."). *See also S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) ("[T]he First Amendment does not impose an affirmative obligation on the state to assist the program of the association by providing payroll deduction services."); *Brown v. Alexander*, 718 F.2d 1417, 1422 (6th Cir. 1983) ("[T]he First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union."); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 320 (6th Cir. 1998) ("[P]ublic employees . . . have no more right than private employees

to compel their employer to assist them in exercising their First Amendment rights.").

As the Ninth Circuit quipped in *Interpipe Contracting*, "what the government giveth it can taketh away." 898 F.3d at 897. That is because "the State is not constitutionally obligated to provide payroll deductions at all." *Ysursa*, 555 U.S. at 359. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) (limiting access to school mail system did not burden a fundamental right and was therefore subject to rational basis review); *San Leandro Tchrs. Ass'n v. Governing Bd. of San Leandro Unified Sch. Dist.*, 209 P.3d 73, 77 (Cal. 2009) (school district could prohibit distribution of campaign flyers in teachers' office mailboxes without transgressing the First Amendment).

And, by the principle that the greater includes the lesser, if payroll deductions can be eliminated entirely, government employers can also place less-restrictive, rational limitations on access to state payroll systems. "Because speech subsidies are not coated with constitutional protection, the government is typically free to limit or remove speech subsidies at its discretion, and such limitations are generally subject to rational basis review." *Interpipe Contracting*, 898 F.3d at 896.

B. State action occurs when private parties invoke the aid of state officials to take advantage of state-created procedures to deprive another private party of property.

Government subsidization of speech is more than a mere "acquiescent role facilitating interaction and agreements between two private parties." App. 23. Choosing to grant access to state payroll systems (whether by statute,[10] contract, or some other method), constitutes state action for First Amendment purposes. It is, frankly, absurd to suggest that the enforcement of a private agreement *is* state action in a case like *Shelley v. Kraemer*, 334 U.S. 1 (1948), and that the "pervasive entwinement of public institutions and public officials" in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 298 (2001), are enough to make the actions of private entities into

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[10] In *Harris v. Quinn*, 573 U.S. 616, 628–31 (2014), the Court criticized *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 238 (1956), which held that the Railway Labor Act, a federal statute authorizing *private-sector* rail unions to enter into union-shop arrangements, "is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." Of course, mandatory bars present similar compelled speech and compelled association problems, but more pressing here is the fact that *Harris* seemed to imply that enacting a statute authorizing *private* contracts that affected workers' speech and associational rights was sufficient state action to merit First Amendment scrutiny. *See generally* Joseph E. Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?*, 96 Neb. L. Rev. 62, 64–65 (2017) (discussing *Harris* and *Hanson*).

state action—but that the state's regulation of its own payroll system with respect to public employee unions is not.[11]

Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) also supports a finding of state action here.[12] *Lugar* concerned the deprivation of property through a private creditor's use of the State of Virginia's prejudgment attachment[13] procedures. *Id.* at 924. After recognizing that "the Court has articulated a number of different factors or tests [for state action] in different contexts," the Court conducted two inquiries: first, "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," and second "whether, under the facts of [the] case, . . . private parties may be appropriately characterized as 'state actors.' " *Id.* at 939. A statute's authorized procedures for the prejudgment attachment (and therefore deprivation) of private property were at issue in *Lugar*, satisfying the first step: "While private misuse

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[11] The Ninth Circuit's decision in *Belgau v. Inslee*, 975 F.3d 940, 948 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021), on which the Alaska Supreme Court heavily relied, should be overruled for a similar state action analysis that characterizes the processing of payroll deductions for union dues as a mere "ministerial" act as opposed to a state subsidy of speech, which is an affirmative act of assistance as discussed in the cases above.

[12] The Alaska Supreme Court cites *Lugar* only in passing, ignoring its facts or analysis. App. 22 & nn. 44–45.

[13] The Court's prior prejudgment attachment cases applied the same constitutional requirements to garnishment procedures. *See*, *e.g.*, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Garnishments are enforced through an employer's payroll system just like dues deductions.

of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints. . . ." *Id.* at 941. On the second question, the Court reiterated that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Id.* Merely "invoking the aid of state officials to take advantage of state-created attachment procedures" is sufficient to render the private creditor a state actor and thus lead to a finding of state action. *Id.* at 942.

Here, as in *Lugar*, one private party—the union—invokes the aid of state officials to take advantage of state-created procedures to take property from another private party. The state created the statute authorizing dues deductions—AS 23.40.220. *See also* App. 8. The state negotiated and was a full party to each of the collective bargaining agreements requiring such deductions. *See id*. The unions actively invoke the aid of state officials in taking advantage of the state's payroll deduction system.[14] And, of course, the state

[14] Moreover, like the *ex parte* attachment application in *Lugar*, the state here has no direct input from the person whose property is being taken; both the statute and the collective bargaining agreements prohibit the state from engaging with the employee without going through the union. App. 8. The written dues deduction authorizations are provided not by the employees directly, but by the union, on a form created exclusively by the union. *Id*. Even though such authorizations are purportedly signed by the employee, the State cannot show by clear and compelling

does the actual deducting from its employees' paychecks and transmits the amount to the union. There is little doubt this conduct constitutes state action.

In short, it is impossible for a government entity to subsidize speech for First Amendment purposes without also engaging in state action that triggers First Amendment scrutiny. And there is no lack of state action when a state assists a private party in taking advantage of state-created procedures to deprive another private party of property.

CONCLUSION

The decision below demonstrates the need for this Court to reemphasize its instructions in *Janus* that affirmative consent to join a union and waive First Amendment rights cannot be presumed, but rather must be shown by clear and compelling evidence. Direction from the Court is needed not just in Alaska, but across the country in response to widespread union and judicial resistance to *Janus*. The Court should take the opportunity to make clear that the days of compelled speech and compelled association through manipulative tactics such as restrictive opt-out windows are over as far as the Constitution is concerned.

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evidence that the signatures are either valid or voluntary, as discussed *supra*.

Just as importantly, the Court should grant certiorari to correct the Alaska Supreme Court's improper state action analysis, which if left uncorrected, threatens not just the First Amendment rights of public-sector employees, but *all* constitutional rights of *all* Alaskans whenever there is a state action component. The threat is particularly acute in cases involving government subsidies or private property rights.

The Court should *grant* the petition.

Respectfully submitted,

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