No. 19-35137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELISSA BELGAU, ET AL.,

Plaintiffs-Appellants,

v.

JAY INSLEE, Governor, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington at Tacoma,
No. 3:18-cv-05620-RJB, Honorable Robert J. Bryan

BRIEF FOR THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

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IDENTITY & INTEREST OF *AMICUS CURIAE*

The State of Alaska submits this brief in support of the Appellants' ("Employees") petition for rehearing en banc. Alaska has a strong interest in this case because the panel's decision impacts the constitutional rights of thousands of Alaska state employees. Alaska employs approximately 15,000 individuals, and most of these employees are represented by public-sector unions.

Since the Supreme Court issued *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the State of Alaska has been at the forefront of efforts to protect the First Amendment rights of state employees. On August 27, 2019, Alaska's Attorney General issued a legal opinion in which he concluded that the State's payroll deduction process was constitutionally untenable under *Janus* and recommended actions the State should take to bring it into compliance. *First Amendment Rights and Union Due Deductions and Fees*, Office of the Attorney General, 2019 WL 4134284, at *2 (Alaska A.G. Aug. 27, 2019) ("AG Opinion"). The Attorney General recognized, *inter alia*, that *Janus* "prohibits a public employer from deducting union dues or fees from a public employee's wages unless the employer has 'clear and compelling evidence' that the employee has freely waived his or her First Amendment rights against compelled speech." *Id.*

After the AG Opinion was issued, Alaska state employees contacted the State and asked it to stop deducting union dues from their paychecks to send to public sector unions. Consistent with *Janus* and the AG Opinion, the State honored these requests. A public sector union opposed this stoppage of dues, however, arguing that

nonconsenting state employees must pay union dues (and thus subsidize the union's speech) unless and until they opted out during a narrow ten-day annual window. Shortly thereafter, Governor Mike Dunleavy issued an administrative order instructing the State to establish new procedures to protect state employees' First Amendment right to choose whether to pay union dues and fees. *See* Administrative Order No. 312 (Sept. 26, 2019), bit.ly/3dpBZgb. The validity of these actions is currently being litigated in state court. *See State of Alaska v. ASEA*, No. 3AN 19-9971CI. This Court, too, is reviewing claims brought by Alaska state employees who wish to stop the continued compelled subsidization of public sector unions. *See Creed v. Alaska State Emps. Ass'n/AFSCME Local 52*, No. 20-35743 (9th Cir.); *see also Woods v. Alaska State Emps. Ass'n/AFSCME Local 52*, No. 20-cv-75-HRH (D. Alaska).

The panel's decision here undermines Alaska's efforts to protect its employees' First Amendment rights. The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463. Because the panel's decision conflicts with the Supreme Court's decision in *Janus* and presents several questions of "exceptional importance," Fed. R. App. P. 35(b)(1)(B), the Court should grant the petition for rehearing en banc.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Alaska agrees that this Court should grant the petition for rehearing en banc. The State writes to emphasize two particular mistakes that the panel made.

First, the panel improperly constrained *Janus* to "nonmembers" paying "agency fees." Opinion ("Op.") 19-20. *Janus* held that *all* state employees have a First Amendment right not to be compelled to subsidize union speech—through "an agency fee [or] *any other payment*." 138 S. Ct. at 2486 (emphasis added). A State can deduct union dues or fees only if the employee has waived his or her First Amendment rights. This waiver must be "freely given and shown by 'clear and compelling' evidence," and such a waiver "cannot be presumed." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967)). Thus, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met." *Id.*

Despite this holding, the panel concluded that the State of Washington could deduct union dues even without this "clear and compelling" evidence because *Janus* applies only to "nonmembers" who were forced to pay "agency fees." Op. 19-20. Not only does this holding conflict with the explicit language of *Janus*, but it also undermines the fundamental principles behind the opinion—that the First Amendment prevents state employees from being compelled to subsidize a union's speech. A state simply cannot withhold monies from a non-consenting employee's wages and transfer those funds to a union because doing so inherently forces that employee to speak on matters when the employee may wish to remain silent—or vociferously object. But under the panel's decision, states can deduct money from employees' paychecks to give to a union—and thus subsidize the speech of a private actor with whom they may disagree—without the employees ever knowingly and intentionally waiving their First

Amendment rights. This is error. The Supreme Court requires "clear and compelling" evidence that individuals have waived their constitutional rights precisely to protect them from unwittingly relinquishing their fundamental freedoms. This is especially true of purported waivers of First Amendment rights, as this amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publ'g Co.*, 388 U.S. at 145.

Second, the panel gave the misimpression that its interpretation of *Janus* is unanimously shared. Op. 19 n.5. The States of Alaska, Texas, and Indiana have all recognized that the First Amendment protections in *Janus* are not narrow ones: they apply to *all* employees and *all* types of compelled financial support to public sector unions. These states' legal opinions are sound and directly refute the panel's constrained interpretation of *Janus*. They also reflect differing legal views on a profound constitutional question of exceptional importance to both states and public employees. The panel's opinion, if allowed to stand, will undermine Alaska's and others' efforts to protect the First Amendment rights of public employees. The Court should grant the petition for rehearing en banc.

ARGUMENT

I. The Panel Improperly Limited *Janus*'s First Amendment Protections to "Nonmembers" Paying "Agency Fees."

The First Amendment protects "'both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430

U.S. 705, 714 (1977)). The right to "eschew association for expressive purposes is likewise protected." *Id.*; *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association … plainly presupposes a freedom not to associate."). Forcing individuals to "mouth support for views they find objectionable violates [these] cardinal constitutional command[s]." *Janus*, 138 S. Ct. at 2463.

"Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* As Thomas Jefferson famously put it, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.'" *Id.* at 2464 (citation omitted). The Supreme Court thus has repeatedly recognized that a "'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Id.* (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310-11 (2012)).

That does not, of course, mean that state employees cannot financially support a union. First Amendment rights, like most constitutional rights, can be waived. But there is a "presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). That is because "courts 'do not presume acquiescence in the loss of fundamental rights.'" *Knox*, 567 U.S. at 312-13.

This is especially true when it comes to the waiver of First Amendment freedoms. Courts will not find a waiver of First Amendment rights "in circumstances which fall short of being clear and compelling" because the First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publ'g Co.*, 388 U.S. at 145.

In *Janus*, the Supreme Court made clear that these longstanding waiver rules apply no differently in the context of compelled subsidies to public sector unions. *Janus*, 138 S. Ct. at 2486. In laying down a roadmap for future cases, the Court relied on a long list of Supreme Court decisions addressing the waiver of constitutional rights. Going forward, the Court warned, public employers, like the State of Washington here, may not deduct "an agency fee *nor any other payment*" unless "the employee affirmatively consents to pay." *Id.* (emphasis added). The Court stressed that employees must waive their First Amendment rights, and "such a waiver cannot be presumed." *Id.* (citing *Zerbst*, 304 U.S. at 464; *Knox*, 567 U.S. at 312-13). Rather, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co.*, 388 U.S. at 145). Thus, the Court explained, "[u]nless employees clearly and affirmatively consent before any money is taken from them, this [clear and compelling] standard cannot be met." *Id.*

The panel's analysis thus should have been straightforward. Employees informed the State of Washington that they objected to dues deduction, but the union believed that Employees already agreed to pay the dues. The panel should have prohibited the

State from deducting further dues from Employees unless the State showed, through "'clear and compelling' evidence," that the employees had waived their First Amendment rights. *Janus*, 138 S. Ct. at 2486.

But the panel did not do that. Instead, the panel held that the State of Washington could deduct union dues from employees even if it had no "clear and compelling" evidence that the employee waived his or her First Amendment rights. Op. 19-20. Evidence of prior membership in a union was enough. *Id.* That was because, the panel believed, the Court in *Janus* had narrowly limited its holding and corresponding constitutional protections to only "nonmembers" who were forced to pay "agency fees." *Id.* This was error.

While *Janus* involved a non-union member, the Court's decision placed prohibitions on public employers generally, and has clear application to members and nonmembers alike. As it often does, the Supreme Court "laid down broad principles" dictating States' obligations when deducting dues and fees from *all* employees. *Agcaoili v. Gustafson*, 870 F.2d 462, 463 (9th Cir. 1989). The Court made clear that state employees cannot be compelled to subsidize the speech of a union with which they disagree. *Janus*, 138 S. Ct. at 2486. Although employees can waive this First Amendment right, "such a waiver cannot be presumed," and it must be shown by "'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co.*, 388 U.S. at 145). The outcome in *Janus* was simply an application of these broader principles.

The panel opinion, however, "'strip[ped] content from principle by confining the

Supreme Court's holding[] to the precise facts before [the Court].'" *Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994). The panel found that the government can take money from employees' paychecks to give to a union—and thus subsidize a private actor's speech with whom they may disagree—without the employees ever knowingly and voluntarily waiving their First Amendment rights. That directly contradicts the reasoning of *Janus*.

Even assuming the "clear and compelling" waiver standard is limited to nonmembers (which it is not), the panel still should have applied it to Employees. As the panel recognized, "compelling nonmembers to subsidize union speech is offensive to the First Amendment." Op. 5. Yet the panel refused to apply *Janus*'s waiver standard even though Employees *were not members* when they tried to stop their dues deduction. After the *Janus* decision, Employees "notified [the union] that they no longer wanted to be union members or pay dues," and the union "terminated Employees' union memberships." *Id.* at 8. The State of Washington, however, "continued to deduct union dues from Employees' wages until the irrevocable one-year terms expired." *Id.*

The panel believed *Janus*'s protections did not apply because Employees had already "affirmatively consented to deduction of union dues" by signing the union's dues deduction form. Op. 5, 7-8. But this reasoning is circular. In *Janus*, the Court did not hold that agency fees could be deducted from nonmembers' paychecks as long as there is some indication that the employee agreed to it. To the contrary, the Court held that "nonmembers are waiving their First Amendment rights," such a waiver "cannot

be presumed," and the waiver must be "shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ'g Co.*, 388 U.S. at 145); *see also* AG Opinion, 2019 WL 4134284, at *5-7 (describing contours of the "clear and compelling" waiver standard).

At bottom, freedoms of speech and association are critical to our democratic form of government, the search for truth, and the "individual freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-634, 637 (1943); *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982). Individuals should not be deprived of these rights unless there is "clear and compelling" evidence that they have waived them. *Curtis Publ'g Co.*, 388 U.S. at 145. The panel opinion disregarded these fundamental principles.

II. The Panel's Opinion Conflicts with Multiple States' Interpretations of *Janus*.

The panel narrowly focused on the various district courts that have interpreted *Janus*'s "clear and compelling" standard as applying only to nonmembers and agency fees, relying on this "swelling chorus" to support its reasoning. *See* Op. 18-19 & n.5. Of course, none of these decisions are binding here. And this Court has repeatedly cautioned against reflexively following other courts' decisions. *See Woods v. Carey*, 722 F.3d 1177, 1183 n.8 (9th Cir. 2013) ("[A]lthough a circuit split is not desirable, we are not required to follow the initial circuit to decide an issue if our own careful analysis of the legal question leads us to [a different result]."); *see, e.g.*, *Leavitt v. Arave*, 383 F.3d 809, 824-25 (9th Cir. 2004) (disagreeing with six circuits, creating a circuit split); *In re Penrod*,

611 F.3d 1158, 1160-61 (9th Cir. 2010) (disagreeing with eight circuits, creating a circuit split).

Critically, these district courts are *not* the only voice on this issue. Multiple State Attorneys General have issued legal opinions in line with Employees' arguments here.

The State of Alaska. In August 2019, Alaska's Attorney General, in response to a request from Governor Mike Dunleavy, issued a legal opinion concluding that the State of Alaska's "payroll deduction process is constitutionally untenable under *Janus*." AG Opinion, 2019 WL 4134284, at *2. Although the plaintiff in *Janus* was a nonmember who was objecting to paying a union's agency fee, the Attorney General recognized that "the principle of the Court's ruling . . . goes well beyond agency fees and non-members." *Id.* at *3. The Court in *Janus* had held that the First Amendment prohibits public employers from forcing *any* employee to subsidize a union *in any way*, whether through an agency fee or otherwise. *Id.* at *3-4.

The Attorney General explained: "Members of a union have the same First Amendment rights against compelled speech that non-members have, and may object to having a portion of their wages deducted from their paychecks to subsidize particular speech by the union (even if they had previously consented)." *Id.* at *3. Thus, "the State has no more authority to deduct union dues from one employee's paycheck than it has to deduct some lesser fee or voluntary non-dues payment from another's." *Id.* In both cases, "the State can only deduct monies from an employee's wages if the employee provides affirmative consent." *Id.* That was why, as the Attorney General explained,

"the Court in *Janus* did not distinguish between members and non-members of a union when holding that '[u]nless *employees* clearly and affirmatively consent before any money is taken from them, this standard cannot be met.'" *Id.* (quoting *Janus*, 138 S. Ct. at 2486).

Following Supreme Court guidance governing the waiver of constitutional rights in other contexts, the Alaska Attorney General concluded that an employee's consent to have money deducted from his paycheck was constitutionally valid only if it met three requirements. The employee's consent must be: (1) "free from coercion or improper inducement"; (2) "knowing, intelligent . . . [and] done with sufficient awareness of the relevant circumstances and likely consequences"; and (3) "reasonably contemporaneous." *Id.* at *5-6 (citations omitted).

In turn, the Attorney General identified three basic problems with the State of Alaska's payroll deduction process. First, because unions design the form by which an employee authorizes the State to deduct his pay, the State could not "guarantee that the unions' forms clearly identify—let alone explain—the employee's First Amendment right *not* to authorize any payroll deductions to subsidize the unions' speech." *Id.* at *7. Nor could the State ensure that its employees knew the consequences of their decision to waive their First Amendment rights. *Id.*

Second, because unions control the environment in which an employee is asked to authorize a payroll deduction, the State could not ensure that an employee's authorization is "freely given." *Id.* at *7. For example, some collective bargaining agreements require new employees to report to the union office within a certain period

of time so that a union representative can ask the new employee to join the union and authorize the deduction of union dues and fees from his pay. *Id.* Because this process is essentially a "black box," the State had no way of knowing whether the signed authorization form is "the product of a free and deliberate choice rather than coercion or improper inducement." *Id.*

Third, because unions often add specific terms to an employee's payroll deduction authorization requiring the payroll deduction to be irrevocable for up to twelve months, an employee is often "powerless to revoke the waiver of [his] right against compelled speech" if he later disagrees with the union's speech or lobbying activities. *Id.* at *8. This is especially problematic for new employees, who likely have no idea "what the union is going to say with his or her money or what platform or candidates a union might promote during that time." *Id.* An employee, as a consequence, may be forced to "see [his] wages docked each pay period for the rest of the year to subsidize a message [he does] not support." *Id.*

To remedy these First Amendment problems, the Attorney General recommended that the State implement a new payroll deduction process to comply with *Janus*. Specifically, the Attorney General recommended that the State have employees provide their consent directly to the State, instead of allowing unions to control the very conditions in which they elicit an employee's consent. The Attorney General recommended that the State implement and maintain an online system and draft new written consent forms. *Id.* He also recommended that the State allow its employees to

regularly have the opportunity to opt-in or opt-out of paying union dues. *Id.* at *8-9. This process would ensure that each employee's consent is up to date and that no employee is forced to subsidize speech with which he disagrees. *Id.*

The State of Texas. After the Alaska Attorney General issued his opinion, the Texas Attorney General issued a legal opinion reaching similar conclusions. *See Application of the United States Supreme Court's Janus Decision to Public Employee Payroll Deductions for Employee Organization Membership Fees and Dues*, Attorney General of Texas, Op. No. KP-0310 (Tex. A.G. May 31, 2020), bit.ly/3cqdcYk. According to the Texas Attorney General, after *Janus*, "a governmental entity may not deduct funds from an employee's wages to provide payment to a union unless the employee consents, by clear and compelling evidence, to the governmental body deducting those fees." *Id.* at 2. The Texas Attorney General recommended that the State create a system by which "employee[s], and not an employee organization, directly transmit to an employer authorization of the withholding" to ensure the employee's consent was "voluntary." *Id.* at 2-3. The Texas Attorney General also recommended that the employer explicitly notify employees that they are waiving their First Amendment rights. *Id.*

The State of Indiana. The following month, the Indiana Attorney General released a similar opinion. *See Payroll Deductions for Public Sector Employees*, Office of the Attorney General, 2020 WL 4209604, Op. No. 2020-5 (Ind. A.G. June 17, 2020). According to the Indiana Attorney General, after *Janus*, "[t]o the extent the State of Indiana or its political subdivisions collect union dues from its employees, they must

provide adequate notice of their employees' First Amendment rights against compelled speech in line with the requirements of *Janus*." *Id.* at *1. Such notice "must advise employees of their First Amendment rights against compelled speech and must show, by clear and compelling evidence, that an employee has voluntarily, knowingly, and intelligently waived his or her First Amendment rights and consented to a deduction from his or her wages." *Id.* Finally, "to be constitutionally valid, a waiver, or opt-in procedure, must be obtained from an employee annually." *Id.*

The Federal Labor Relations Authority. In addition to these States, a member of the U.S. Federal Labor Relations Authority has reached similar conclusions. *See Decision on Request for General Statement of Policy or Guidance*, Office of Pers. Mgmt. (Petitioner), 71 F.L.R.A. 571, 574-75 (Feb. 14, 2020) (Abbott, concurring). In a recent opinion, the Federal Labor Relations Authority was asked by the Office of Personnel Management to decide whether *Janus* required federal agencies to, upon receiving an employee's request to revoke a previously authorized union-dues assignment, process the request as soon as administratively feasible. Although the FLRA ultimately did not reach the issue, one of the members, James Abbott, wrote separately to provide his views on *Janus*. He explained that if *Janus* did not apply to such a situation, it would mean that "once a Federal employee elects to authorize dues withholding, the employee loses any and all rights to determine when, how, and for what reasons the employee may stop those dues." *Id.* at 574. But the whole "theme of *Janus*" is that "an employee has the right to support, or to stop supporting, the union by paying, or to stop paying,

dues." *Id.* Thus, Member Abbott concluded, "restricting an employee's option to stop dues withholding—for whatever reason—to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights." *Id.* at 575.

These authorities undermine the panel's perception of uniformity on this critical issue and its reliance on district court opinions to buttress its holding, and they make clear that the panel's opinion conflicts with *Janus* and the First Amendment principles that underlie the Court's decision. The Employees here, like Mr. Janus, are entitled to the First Amendment's protections against compelled speech.

CONCLUSION

The Court should grant the petition for rehearing en banc.

DATED: October 12, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits because it contains 3,803 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface and type-style requirements because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

DATED: October 12, 2020 */s/ J. Michael Connolly*

CERTIFICATE OF SERVICE

I certify that on October 12, 2020, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 12, 2020 */s/ J. Michael Connolly*