No. 22-212

IN THE

Supreme Court of the United States

JONATHAN SAVAS, ET AL.,

PETITIONERS,

V.

CALIFORNIA STATEWIDE LAW ENFORCEMENT AGENCY, ET AL.,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMERICANS FOR FAIR TREATMENT AS *AMICUS CURIAE* SUPPORTING PETITIONERS

David Osborne
Counsel of Record
Patrick Moran
AMERICANS FOR FAIR TREATMENT
225 State St., Suite 301
Harrisburg, PA 17101
(833) 969-3247
david@afft.org

October 11, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Does it violate the First Amendment for a state and union to compel objecting employees to remain union members and to subsidize the union and its speech?

2. To constitutionally compel objecting employees to remain union members and to subsidize the union and its speech, do states and unions need clear and compelling evidence the objecting employees waived their First Amendment rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

SUPREME COURT RULES

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*[1]

Americans for Fair Treatment ("AFFT") is a national, nonprofit organization offering a free membership program to public employees and helping them understand and exercise their First Amendment rights in the context of a unionized workplace. Many AFFT members live and work in Pennsylvania, which has a "maintenance of membership" statute similar to section 3515.7(a) of the California Government Code, the statute at issue here.

This Court recently reinstated the rights of public employees to refuse union fees as a condition of employment and provided them with protections against union attempts to collect agency fees or other union payments. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). AFFT seeks to preserve and defend public employees' rights under *Janus*, including the right to freely associate (or not associate). State laws authorizing maintenance of membership requirements restrict the First Amendment and undermine the Court's decision in *Janus*.

---

[1] Rule 37 statement: Counsel of record for all parties received timely notice of *amicus*'s intention to file this brief and consented to its filing. No person other than *amicus* authored any part of this brief or made any monetary contribution to fund its preparation or submission. No counsel for any party authored any of this brief; *amicus* alone funded its preparation and submission.

SUMMARY OF ARGUMENT

California's State Employer-Employee Relations Act, Cal. Gov. Code §§ 3512-3524 ("SEERA"), allows unions to enter into "organizational security" agreements with the state, including "maintenance of membership or fair share fee deductions," Cal. Gov. Code § 3515.7(a).[2] Generally, "maintenance of membership" provisions compel union members to remain union members for the life of a collective bargaining agreement ("CBA"), providing only a short window before its expiration to withdraw one's membership. *Id.*

By design, this arrangement prevents dissenting employees from withdrawing their union membership and forces them to pay dues, even to support causes they no longer believe in. "[T]he only way [employees] can resign from the union is to leave their employment." *McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp. 2d 522, 527 (M.D. Pa. 2007).

California's public-sector labor unions, including the California State Law Enforcement Agency ("CSLEA"), have taken full advantage, locking public employees into membership and dues payments for *years at a time*—and automatically renewing their membership if they do not receive an effective union resignation within the 30-day period before a new CBA goes into effect. California unions do so under the

---

[2] *Janus* rendered unconstitutional California's "fair share fee" laws, and the California Attorney General's Office stopped enforcing such arrangements shortly thereafter. Cert. Pet. at 3. However, California did not cease enforcing maintenance of membership requirements.

auspices of SEERA, which California enacted specifically "to permit the exclusive representative to receive financial support from those employees who receive the benefits of [exclusive] representation," *inter alia*. Cal. Gov. Code § 3512. Unions in California have the right to seize membership dues from employees' wages, Cal. Gov. Code § 1152, and SEERA has no upward limit on how many years a CBA can keep public employees from leaving the union, *see* Cal. Gov. Code §§ 3513(i), 3515.7(a).

This arrangement is unaccompanied by anything approaching "affirmative consent." Indeed, SEERA allows maintenance of membership to be negotiated between the public employer and union and placed into a CBA even over the *objection* of individual employees. *See* Cal. Gov. Code § 3515.7(a). The team of union-selected negotiators are not required to secure consent from individual employees prior to reaching agreement with a public employer, and when the CBA containing such a provision goes into effect, even employees adamantly opposed to continuing their membership will be bound by its terms.[3] The fact is, there is

---

[3] Employees who remain union members are also regarded as bound by the union's internal rules and may be subjected to union discipline, including monetary fines. *See NLRB v. Local 54, Hotel Emps. & Restaurant Emps. Int'l Union*, 887 F.2d 28, 32 (3d Cir. 1989). AFSCME, for example, permits charges to be filed against members for "[a]ny activity which assists or is intended to assist a competing organization within the jurisdiction of the union" and may impose, among other penalties, "[a] fine in an amount not to exceed one year's dues" and/or "[f]ull or partial

little an employee can do to stop a maintenance of membership arrangement if the government and union want it.[4]

Thus, under SEERA, CSLEA members who wish to resign their union membership at the outset of a collective bargaining agreement must make plans—nearly four years in advance—to resign their union membership within a 30-day window. Cert. Pet. 6. And if they miss the window or do not accomplish their resignation to the satisfaction of their (conflicted) union, they will remain dues-paying members for *another* four years. *See* Cal. Gov. Code § 3513(i). In such an instance, a CSLEA member could be forced to continue their membership and fund the union's political agenda for a total of nearly eight years—perhaps most

---

restitution, where the consequences of the offense can be measured in material terms." AFSCME International Constitution (2020), Art. X §§ 2.E, 15.B-C, https://www.afscme.org/about/governance/AFSCME-International-Constitution.pdf. The SEIU permits internal union proceedings for "[g]ross disloyalty or conduct unbecoming a member" and allows local unions to "impose such penalty as it deems appropriate and as the case requires." SEIU 2020 Constitution & Bylaws, at Art. XVII §§ 1, 5 https://www.seiu.org/cards/what-you-should-know-about-our-constitution-and-leaders/you-can-read-it-yourself/p3.

[4] "[T]he opportunity to comment at the informational meetings and vote against ratification of the contract is sufficient to meet the duty of fair representation." *Himes v. San Juan Teachers Ass'n, CTA/NEA*, PERB Decision No. 1322, 1999 WL 35113951 (Cal. Pub. Emp't Relations Bd. Apr. 8, 1999).

of their career as a state employee[5]—with just 30 days in the middle to exercise their First Amendment rights.

It would be appalling—and perhaps a violation of consumer rights laws—for any private organization to request such an arrangement from an individual without first securing *layers* of affirmative consent. For example, California's Automatic Renewal Law requires businesses to notify consumers of automatic renewal provisions in "a clear and conspicuous manner" and ensure consumers "affirmatively consent" to such renewals; provide consumers with a record of the arrangement and a cancellation policy; give them an "easy-to-use mechanism for cancellation," such as a toll-free number or online service; and provide advance notice of the right to end the arrangement prior to renewal, depending on the details of the arrangement. Cal. Bus. & Prof. Code § 17602.[6]

---

[5] By last count, 43.9% of California state employees within Petitioners' bargaining unit served ten years or less. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES, 2017 CALIFORNIA STATE EMPLOYEE TOTAL COMPENSATION REPORT: FOR BARGAINING UNITS 2, 7, 13, AND 18, at D-6 (Jan. 2019).

[6] Here, Petitioners signed membership cards when they first joined the union stating that "[p]er the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member." Cert. Pet. 6. This vague statement—a far cry from the consumer protections meant to guarantee "affirmative consent"—was not explained to Petitioners, who did not receive a copy of the "Unit 7 contract,"

Even before *Janus*, federal district courts in both California and Pennsylvania concluded that maintenance of membership provisions were likely unconstitutional for purposes of issuing a preliminary injunction. *McCahon*, 491 F. Supp. 2d at 527 ("Despite plaintiffs' apparent disagreement with the Union's ideology or politics, the 'maintenance of membership' provision forces their continued membership."); *Debont v. City of Poway*, No. 98CV0502-K(LAB), 1998 WL 415844 (S.D. Cal. Apr. 14, 1998) ("And I can think of very few provisions that would appear, at least facially, based upon the briefing that's been submitted thus far, to strike so directly into the heart of the First Amendment."). Forcing someone to remain a member of any organization, let alone an organization with overt political activity, seems antithetical to freedoms of association.

Yet the Ninth Circuit disregarded the clear incidence of compelled speech resulting from California's statutory scheme, flatly claiming that "the maintenance of membership requirement does not implicate the First Amendment." Cert. Pet. 7. Contrary to the Ninth Circuit's ruling, California's maintenance of membership arrangement unconstitutionally restricts freedom of association and, despite *Janus*, presumes employees' consent to continue as a dues-paying member if the union does not hear from an employee within the 30-day interval prescribed by SEERA.

Ending this arrangement and correcting the Ninth Circuit's erroneous holding would benefit unionized public-sector workplaces across the country, especially those in California and Pennsylvania. Many states

---

presumably the relevant CBA, at the time they were asked to sign.

place conditions upon a public employee's withdrawal of financial support for their union's political agenda.[7] However, Pennsylvania, like California, affirmatively protects unions' and public employers' ability to foist maintenance of membership on public employees in a CBA and for years at a time, resulting in no small amount of litigation. 43 Pa. Stat. §§ 1101.301(18), 1101.705. More than any other state outside of California, Pennsylvania needs a clear decision on the issue.[8]

ARGUMENT

I. PUBLIC EMPLOYEES IN PENNSYLVANIA NEED A DECISION ON MAINTENANCE OF MEMBERSHIP REQUIREMENTS

Pennsylvania, like California, affirmatively protects unions' and public employers' ability to collectively bargain for maintenance of membership

---

[7] *See* Cal. Gov. Code § 1157.12; Cal. Educ. Code § 45060; Colo. Rev. Stat. § 24-50-1111(2); 2021 Conn. Acts 25 § 1(i–j); Del. Code Ann. tit. 19 § 1304; Haw. Rev. Stat. § 89-4(c); 5 Ill. Comp. Stat. § 315/6(f); Mass. Gen. Laws ch.180 § 17A; Nev. Rev. Stat. § 288.505(1)(b); N.J. Stat. Ann. § 52:14-15.9e; N.Y. Civ. Serv. Law § 208(1)(b); Or. Rev. Stat. § 243.806(6); 43 Pa. Stat. § 1101.705. Wash. Rev. Code § 41.80.100(d).

[8] Wisconsin allows for maintenance of membership agreements covering "public safety employees," but only upon separate referendum of employees within the bargaining unit. Wis. Stat. § 111.85. Wisconsin is obviously sensitive to the procedural concerns attending maintenance of membership, but public employees locked in by maintenance of membership provisions in Wisconsin still suffer a violation of their First Amendment rights.

arrangements. Pennsylvania's Public Employe Relations Act, 43 Pa. Stat. §§ 1101.101-1101.2301, locks public employees into membership for years at a time—and even makes failure to pay dues a fireable offense. 43 Pa. Stat. § 1101.705 ("Membership dues deductions and maintenance of membership are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition."). And instead of a 30-day escape period, Pennsylvania law provides just 15 days:

> [A]ll employes who have joined an employe organization or who join the employe organization in the future must remain members for the duration of a collective bargaining agreement so providing with the proviso that any such employe or employes may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement.

43 Pa. Stat. § 1101.301(18).

Unions in Pennsylvania, like the CSLEA here, have taken full advantage. In a recent survey of 471 CBAs from school districts in Pennsylvania, 265 CBAs had maintenance of membership provisions.[9]

---

[9] COMMONWEALTH FOUNDATION FOR PUBLIC POLICY ALTERNATIVES, TEACHER UNION COLLECTIVE BARGAINING AGREEMENTS 4 YEARS POST-JANUS, at Table (June 27, 2022), https://www.commonwealthfoundation.org/research/teacher-union-collective-bargaining-agreements-post-janus/.

Pennsylvania's largest local governments[10] and its public universities[11] lock many of their employees into union membership, effectively forcing them to fund causes with which they may fundamentally disagree.

It's equally concerning that many aspects of Pennsylvania government seem devoted to continuing this arrangement. For example, Pennsylvania Attorney General Josh Shapiro issued guidance shortly after *Janus*, in part, to make clear his view that maintenance of membership provisions remained constitutional.[12] Even the Commonwealth's largest association

---

[10] *See, e.g.*, CBA between City of Phila. and AFSCME, Local 2187, at Art. 3 § A (extended through 2024), http://afscme2187.org/wp-content/uploads/2021/01/2187-MBA-COP-1992-1996.pdf; CBA between City of Pittsburgh and AFSCME, Local 2719, at Art II § 2, https://locals.afscme13.org/system/files/pwsa_ agreement.pdf.

[11] *See, e.g.*, CBA between Pa. State Univ. and Teamsters, Local 8, at Art. II § 2.2, https://hr.psu.edu/sites/hr/files/TeamstersContract.pdf; CBA between Pa. State Sys. of Higher Educ. and State College & Univ. Prof'l Ass'n, at Art. 6 § 1, https://www.passhe.edu/inside/HR/LR/Documents/SCUPA_July%201,%202019%20-%20June%2030,%202023%20Final.pdf.

[12] Pa. Office of Att'y Gen. Josh Shapiro, Guidance on the Rights and Responsibilities of Public Sector Employees and Employers Following the U.S. Supreme Court's Janus Decision 2 (Aug. 8, 2018), https://www.attorneygeneral.gov/wp-content/uploads/2018/08/2018-08-03-AG-Shapiro-Janus-Advisory-FAQ.pdf ("An employer cannot unilaterally change the terms of a collective bargaining agreement

of public school boards—teachers unions' ostensible adversaries in collective bargaining—issued guidance shortly after *Janus* sharing its view that maintenance of membership was unaffected and advising schools that "any union members who express a desire to terminate their regular union membership should be instructed to contact their local union leadership about that."[13] In Pennsylvania, as elsewhere, maintenance of membership serves to keep union membership high and dues money flowing.

It should come as no surprise that litigation concerning maintenance of membership abounds in Pennsylvania. Since *Janus*, public employees in Pennsylvania have challenged the provisions in a myriad of lawsuits, including class actions. *See, e.g., Rhodes v. AFSCME Council 13,* No. 4:20-cv-01313-MWB (M.D. Pa., dismissed Aug. 26, 2020); *Neely v. AFSCME Council 13,* No. 1:18-cv-02043-JEJ (M.D. Pa., dismissed Feb. 8, 2019); *Wessner v. AFSCME Council 13,* No. 1:19-cv-0537-SHR (M.D. Pa., dismissed Sept. 11, 2019); *James v. SEIU, Local 668,* No. 2:19-cv-53-CB (W.D. Pa., dismissed July 14, 2020); *Thompson v. AFSCME, District Council 89,* No. 1:19-cv-00536-SHR, (M.D. Pa., dismissed July 29, 2019).

However, none of these cases have resulted in a decision on the merits concerning maintenance of

---

or a binding past practice, such as demanding new dues authorization cards for payroll deductions from union members.").

[13] Memo from Pennsylvania School Boards Association to Pennsylvania School Board Solicitors Association (Jun. 27, 2018), https://www.psba.org/2018/06/solicitors-association-janus-guidance/.

membership in Pennsylvania; unions have strategically "mooted" many of these cases in an effort to avoid a ruling. *See* Cert. Pet. at 4. Without a court ruling, unions' and public employers' ability to return to and impose maintenance of membership over and against the wishes of public employees is still protected by state statute.[14]

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT MAINTENANCE OF MEMBERSHIP REQUIREMENTS ARE NOT STATE ACTION

A. Unions as State Actors Prior to *Janus*

Before *Janus*, there was little debate that collecting union payments from public sector union nonmembers constituted state action for § 1983 purposes. *See, e.g.*, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (mem) (2016); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Locke v. Karass*, 555 U.S. 207 (2009); *Lehnert v. Farris Faculty Ass'n*, 500 U.S. 507 (1991); *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (itself noting "a long line of decisions holding that public employment cannot be conditioned upon the surrender of First Amendment rights."). In fact, state action sufficient to confer constitutional protections was largely assumed. *See Price v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 927 F.2d 88, 92 (2d Cir. 1991) ("However, since the *Hudson* case involved public employees, state action was concededly

---

[14] *See* David R. Osborne, *Ending Unions' First Amendment 'Attack and Retreat,'* LAW & LIBERTY, Nov. 12, 2020, https://lawliberty.org/ending-unions-first-amendment-attack-and-retreat/.

involved and it was therefore necessary to impose heightened procedural safeguards 'to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns.'").

The answer was no different when lower courts were confronted specifically with maintenance of membership. For example, in *Debont*, 1998 WL 415844, a city employee filed a § 1983 claim against his union after it refused to let him resign his membership and end dues obligations. A memorandum of understanding between the union and the city disallowed union membership resignations until an eight-year collective bargaining agreement expired. *Id.* at *3. The union argued that the First Amendment did not apply to nonmembers, but the *Debont* court rejected the union's argument, holding that "Plaintiff's First Amendment rights are at issue and may be unconstitutionally infringed by the . . . requirement that he remain a member of the union until the expiration of the agreement." *Id.* The court granted the employee's preliminary injunction motion preventing enforcement of the memorandum of understanding. *Id.*

Similarly, First Amendment protections were extended to public employees attempting to resign their union memberships in *McCahon*, 491 F. Supp. at 527. Like the city employee in *Debont*, the state employees in *McCahon* were unable to resign their memberships because the union had secured a contractual provision with their employer preventing union membership resignations for years at a time. The *McCahon* court reasoned that,

> [d]espite plaintiffs' apparent disagreement with the Union's ideology or politics, the "maintenance of membership" provision forces their

> continued membership. And the Union continues to collect full union dues from plaintiffs. These dues are in excess of the fair share fee paid by non-members and can be used by the Union for *any* purpose. As union members, plaintiffs are also subject to discipline under the CBA. . . . Thus, the "maintenance of membership" provision may have a direct and deleterious impact on plaintiffs' rights under the First Amendment.

Id. at 527 (emphasis added). The court in *McCahon* granted an injunction against the collective bargaining agreement provision that prevented union membership resignations. *Id.* at 529.

Even if state action was largely assumed in maintenance of membership cases prior to *Janus*, the nature of the government's involvement in *Debont*, *McCahon*, and similar cases could have led to an explicit determination of state action, for at least two reasons. First, the unions in those cases had convinced the public employer to agree to maintenance of membership provisions in CBAs to which both parties were signatories. And "[i]n bargaining with, and collaborating on such an agreement, and ultimately relying on the state for the agreement's execution to an extent, . . . a public-sector union has sufficiently forayed into the waters of state action such that it may be sued pursuant to § 1983." *Misja v. Pa. State Educ. Ass'n*, No. 1:15-CV-1199, 2016 WL 11651732, at *6 (M.D. Pa. Mar. 28, 2016).

Second, the unions in *Debont* and *McCahon* had also secured provisions for automatic payroll deductions and mandated dues payments from members as a condition of employment. *McCahon*, 491 F. Supp. 2d

at 525; *Debont*, 1998 WL 415844, at *1. That is, the union had secured the government's assistance in collecting membership dues—withholding and transmitting to the union—and enforcing the union's membership policies.[15]

B. Unions As State Actors After *Janus*

These pre-*Janus* considerations have supported a determination that unions are engaged in state action in cases decided after *Janus*. And on this question, the Ninth Circuit is out of step with other Circuits.

Most notably, in 2019, following remand of *Janus*, the Seventh Circuit determined that state action was present merely because the state deducted fees from public employees and transferred those funds to a union:

> A "procedural scheme created by . . . statute obviously is the product of state action" and "properly may be addressed in a section 1983 action." [*Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 (1982)]. "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988); *see also Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992). Here, AFSCME was a joint participant with the state in the agency-fee arrangement. CMS deducted fair-share fees from the employees' paychecks and transferred that

[15] The union in *Debont*, 1998 WL 415844, at *3, restricted public employees from resigning for *eight* years.

> money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement. This is sufficient for the union's conduct to amount to state action.

Janus v. AFSCME, Council 31 ("*Janus II*"), 942 F.3d 352, 361 (7th Cir. 2019).

Likewise, in the course of addressing employees' "clawback" claims for pre-*Janus* fees, the Second, Third, Sixth, and even Ninth Circuit have each applied the so-called "good faith" defense[16]—a defense only relevant if the defendant is first a state actor. *See Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (refusing to "foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause." (emphasis added)). The implication is clear: while there may be other reasons a public employee's claim may fail in this context, state action should not be the reason.

Here, of course, the CSLEA relies on a CBA negotiated and executed with the state under the auspices of state law, Cert. Pet. 4, and it continues to rely on the state's payroll system in order to collect, Cert. Pet. 6-7. Thus, whether one applies a pre- or post-*Janus* understanding of state action, the conduct at issue here

---

[16] *Wholean v. CSEA*, 955 F.3d 332 (2d Cir. 2020); *Oliver v. SEIU Local 668*, No. 19-3876, 2020 WL 5946727 (3d Cir. Oct. 7, 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020) (plurality opinion); *Ogle v. Ohio Civil Serv. Emps. Ass'n*, AFSCME Local 11, 951 F.3d 794 (6th Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019).

is either directly attributable to the State or presents the "such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as those of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345 at 349, 351 (1974)).

The fact that Petitioners signed membership cards alluding to the CBA means little, especially in terms of state action. Indeed, by prohibiting "any other attempt . . . to collect such a payment," *Janus* brings a whole host of activity within the realm of state action. *Id.* One could imagine, for example, a union's unsupervised access to the workplace[17] or to newly hired employees[18] resulting in an "attempt" to collect "an agency fee or any other payment to the union." *Janus*, 138 S. Ct. at 2486. One could also imagine the union "attempt[ing] to collect" payments of any kind by effectively running a state's payroll system.[19] *Janus* would

---

[17] *See, e.g.*, 2021 Conn. Acts 25 §1(c) (broadly mandating that public employers provide unions with "access to the public employees," including but not limited to "the right to conduct worksite meetings" and "to meet with newly hired employees."

[18] *See, e.g.*, Cal. Gov. Code § 3557(a) ("[U]pon request of the employer or the exclusive representative, the parties shall negotiate regarding the structure, time, and manner of the access of the exclusive representative to a new employee orientation.").

[19] *See, e.g.*, Cal. Gov. Code § 1157.12 (requiring that public employers "shall . . . direct requests to cancel or change deductions for employee organizations to the employee organization" and "rely on information

appear to suggest, at the very least, that state action was present at the moment CSLEA attempted to secure such an agreement.

III. MAINTENANCE OF MEMBERSHIP REQUIREMENTS VIOLATE THE FIRST AMENDMENT

A. Taking Dues from Nonconsenting Employees is Unconstitutional Compelled Speech

This Court has long held that people have a right to refuse to speak in ways that they find objectionable. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

"[I]ndividual freedom of mind" is the core principle undergirding a "First Amendment right to avoid becoming the courier" for someone else's speech. *Id.* at 714, 717. The government cannot "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec. v. Pub. Utils. Comm'n,* 475 U.S. 1, 16 (1986). As *Janus* reiterated, "measures compelling speech are at least as threatening" as laws that restrict speech. 138 S. Ct. at 2464.

It is also an established principle in this Court's jurisprudence that money is, in many instances, inseparable from speech. *See*, *e.g., Citizens United v. FEC*, 558 U.S. 310, 351 (2010) ("All speakers, including individuals and the media, use money amassed from the

---

provided by the employee organization regarding whether deductions . . . were properly canceled or changed.").

economic marketplace to fund their speech."). A person's speech, therefore, may be expressed through spending. Like speaking, spending can't be compelled lightly. *See Janus*, 138 S. Ct. 2464 ("Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed.").

In *Hudson*, 475 U.S. 292, this Court overturned a union's procedure for collection of agency fees on the basis that it compelled speech without an adequate process: "whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Id.* at 305. And *Knox*, 567 U.S. 298, applied the *Hudson* requirements in the context of special assessments issued by unions to nonmembers, affirming that state action compelling subsidization of private speech must meet a high standard:

> Far from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights . . . And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures burdening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest.

Knox, 567 U.S. at 313-314, quoting *Hudson,* 475 U.S., at 303.

Janus took this principle a step further, stating that "[n]either an agency fee *nor any other payment* to

the union may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486 (emphasis added). Affirmative consent under *Janus*, much like under the *Knox* test, goes beyond a vague, blanket consent or an inference; instead, the Court asserted in no uncertain terms that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* Instead, such a waiver of fundamental rights must be "freely given and shown by 'clear and compelling' evidence." *Id.*

Here, neither the state nor the union has taken the requirements of *Janus* or its predecessor, *Knox*, to heart. The maintenance of membership arrangement locks public employees into an unwanted relationship with the union and then, contrary to *Janus*, automatically renews their membership—presuming consent—if the union does not hear from the employee during the escape period.

This would not be tolerated in other contexts, but especially where, as here, membership implies agreement to follow and uphold the organization's bylaws and internal rules and subjects members to "discipline." *See NLRB*, 887 F.2d at 32 ("To be sure, the general rule is that a labor organization may lawfully invoke internal disciplinary machinery against full members, who remain in that capacity and have violated internal rules."). These internal rules generally prohibit support of rival unions and even, in the case of the SEIU, "[g]ross disloyalty or conduct unbecoming a member," subjecting members to fines or other penalties.[20]

---

[20] *See supra*, at n.3.

This Court should grant certiorari to address maintenance of membership and ultimately hold that the First Amendment protects public employees from this abuse.

B. Refusal to Let Employees End Union Membership Impinges on Freedom of Association

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The right to freely associate carries with it an equal and opposite right *not* to associate. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"). In the same way, freedom of speech and association are inexorably linked—the government cannot force someone to associate in a way that impairs speech. *Pacific Gas,* 475 U.S. at 12 ("Forced associations that burden protected speech are impermissible."). State infringements on freedom of association must therefore be independently justified by "compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623.

Here, California's maintenance of membership arrangement forcing public employees to remain union members and pay union dues violates their right to freely associate *and* impairs their speech by requiring them to subsidize the union's political agenda. It is hard to imagine any state interest compelling enough to justify such an impingement.

CONCLUSION

This Court should grant certiorari to address California's maintenance of membership arrangement and to correct the Ninth Circuit's ruling on state action. Here, as in *Janus*, "[f]undamental free speech rights are at stake." 138 S. Ct. at 2460.

Respectfully submitted,

David Osborne
Counsel of Record
Patrick Moran
AMERICANS FOR FAIR TREATMENT
225 State St., Suite 301
Harrisburg, PA 17101
(833) 969-3247
david@afft.org

October 11, 2022