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

AMICUS CURIAE BRIEF OF THE FAIRNESS CENTER IN SUPPORT OF PETITIONERS

NATHAN J. MCGRATH
Counsel of Record
DANIELLE R. ACKER SUSANJ
TESSA E. SHURR
THE FAIRNESS CENTER
500 N. Third Street
Suite 600B
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org

Counsel for Amicus Curiae

December 2, 2022

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

QUESTIONS PRESENTED

The Court in *Janus v. AFSCME, Council 31* held it violates the First Amendment for a state and union to compel employees to subsidize union speech. 138 S. Ct. 2448, 2486 (2018). Notwithstanding *Janus*, the State of California continues to compel objecting employees to subsidize union speech pursuant to "maintenance of membership" agreements that require all employees who are union members to remain union members, and to pay full union dues, for the duration of the collective bargaining agreement. Also notwithstanding *Janus*, the United States Court of Appeals for the Ninth Circuit held a "maintenance of membership requirement does not implicate the First Amendment." Pet.App. 5.

The questions presented are:

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

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
REASONS FOR GRANTING THE PETITION	2
I. This Petition Seeks Resolution of the Conflict Between the Ninth and Third Circuits	2
II. Given the Important Constitutional Rights at Stake in This Direct Circuit Conflict, the Court Should Grant Review	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page(s)

Janus v. AFSCME, Council,
138 S. Ct. 2448 (2018)............................... 4

Kabler v. United Food & Com. Workers Union, Loc. 1776 Keystone State,
No. 1:19-CV-395, 2020 WL 1479075
(M.D. Pa. Mar. 26, 2020) 4, 6

McCahon v. Pa. Tpk. Comm'n,
491 F. Supp. 2d 522 (M.D. Pa. 2007) 3, 4

Otto v. Pa. State Educ. Ass'n,
330 F.3d 125 (3d Cir. 2003) 2

Weyandt v. Pa. State Corr. Officers Ass'ns,
No. 1:19-cv-1018, 2019 WL 5191103
(M.D. Pa. Oct. 15, 2019)........................... 6

STATUTES

43 P.S. § 1101.401 3

43 P.S. § 1101.705 5

COURT FILINGS

Voluntary Dismissal, *James v. Serv. Emps. Int'l Union, Loc. 668*, No. 2:19-cv-53 (W.D. Pa. 2020), ECF No. 42 6

INTEREST OF THE *AMICUS CURIAE*[1]

The Fairness Center is a nonprofit, public interest law firm that provides free legal services to those hurt by public-sector union officials. The Fairness Center has represented multiple clients who challenged the constitutionality of provisions of Pennsylvania law allowing for forced union membership. It desires to serve and further those clients' interests by supporting the Petition for Writ of Certiorari. This *amicus* brief offers context from the Commonwealth of Pennsylvania and the Third Circuit regarding the conflict in standards applied to the legal issues in the first question presented.

SUMMARY OF ARGUMENT

The Supreme Court should grant the Petition because it presents an issue of constitutional importance to public-sector workers on which there is a developed conflict in the circuits.

In the Third Circuit, it has long been established that public employees are free to choose whether to associate with labor unions. And federal courts within the Third Circuit, applying that rule, have recognized that the Constitution would thus prohibit forcing public employees to be card-carrying union members against their wills through provisions requiring members to "maintain" their union membership for a period of time.

---

[1] Pursuant to this Court's Rule 37.2(a), Petitioners and Respondents have consented to the filing of this brief. Counsel of record for all parties received notice of the *Amicus Curiae*'s intention to file this brief at least ten days prior to the date of filing. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *Amicus Curiae* made a monetary contribution to its preparation or submission.

But the Ninth Circuit in this case took a contrary approach, approving the suffocation of constitutional rights through "maintenance of membership" provisions that allow union members to resign their membership only during a short window of time throughout the year. For public-sector workers in the Ninth Circuit, then, it is possible that, outside of that window, they must remain card-carrying, dues-paying union members.

Pennsylvania and California appear to be the only states with statutory provisions authorizing "maintenance of membership." Because the Ninth Circuit's decision means that federal courts now treat such provisions differently depending on which side of the country a public-sector worker resides, this Court should grant review.

REASONS FOR GRANTING THE PETITION

I. This Petition Seeks Resolution of the Conflict Between the Ninth and Third Circuits

The Ninth Circuit's decision that public employees may be forced to remain union members diverges from the rule in the Third Circuit, where courts have interpreted the Constitution to prevent the state from forcing employees to remain members of a union against their will.

As the Third Circuit has recognized, "[t]he First Amendment affords public-sector employees the freedom not to associate with a labor organization." *Otto v. Pa. State Educ. Ass'n*, 330 F.3d 125, 128 (3d Cir. 2003). In the twenty years since the Third Circuit decided *Otto*, district courts within the Third Circuit have repeatedly recognized public-sector employees' right not to associate with a labor union.

As in California, a state statute in Pennsylvania authorizes public employers and unions to prevent public employees from choosing to end their union membership at will. *See* 43 P.S. § 1101.401 ("[E]mployes shall also have the right to refrain from any or all such [employe organization] activities, except as may be required ***pursuant to a maintenance of membership provision*** in a collective bargaining agreement." (emphasis added)).

Accordingly, public employers and unions in Pennsylvania have negotiated provisions into their collective bargaining agreements that purport to prevent public employees from resigning their union memberships outside of a 15-day window at the end of the contract. The coercive nature of these provisions is significant because only the employer and the union are parties to the contract; the employees have no control over the terms and thus have not agreed to have their rights so limited.

But unlike the Ninth Circuit, courts in the Third Circuit have repeatedly recognized that the Constitution, as interpreted by this Court and the Third Circuit, likely makes those provisions unconstitutional.

One court applied the Third Circuit's *Otto* decision in granting a preliminary injunction against enforcement of the Pennsylvania statute authorizing maintenance of membership, which is akin to the California provision the Ninth Circuit upheld here. There, the court held that the plaintiffs were "reasonably likely to succeed in extending this right [not to associate] to union members who are unable to resign unilaterally because of a 'maintenance of membership' provision." *McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp. 2d 522, 527 (M.D. Pa. 2007) (repeatedly citing *Otto*, 330 F.3d at 128). The court recognized that maintenance of

membership provisions pose a "real or immediate danger to [the] First Amendment right not to associate" and found that the plaintiffs were likely to succeed in establishing that the maintenance of membership provision in question violated the Constitution. *See id.* (cleaned up). Maintenance of membership provisions implicate employees' First Amendment right not to associate with labor unions by "lock[ing] plaintiffs into union membership for the duration of the CBA—the only way plaintiffs can resign from the union is to leave their employment." *Id.* (cleaned up).

A more recent decision within the Third Circuit recognized that this Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), further underscored this right. There, in a case challenging the maintenance of membership provision in a public employee's contract, the court stated, "*Janus* clearly would prohibit an employer from forcing non-union members to join a union as a precondition to their accepting public employment." *Kabler v. United Food & Com. Workers Union, Loc. 1776 Keystone State*, No. 1:19-CV-395, 2020 WL 1479075, at *3 (M.D. Pa. Mar. 26, 2020).

The Ninth Circuit's decision here is in direct conflict with this established line of cases in the Third Circuit. The Ninth Circuit upheld requirements forcing public employees to remain union members because it concluded that the First Amendment rights recognized in *Janus* were "inapplicable" and "applied to nonunion members only." Pet. App. 2. This conflicts with how courts within the Third Circuit have interpreted *Janus*. *See, e.g.*, *Kabler*, 2020 WL 1479075, at *3 ("the *Janus* decision strongly suggests Defendants will not attempt to compel Plaintiff to resume his membership"). Moreover, the Third Circuit's ruling in *Otto*,

years before *Janus*, had already recognized that public employees have a constitutional right to choose not to be union members. Thus, the Ninth Circuit's decision created a direct circuit split between the Third Circuit and the Ninth Circuit.

II. Given the Important Constitutional Rights at Stake in This Direct Circuit Conflict, the Court Should Grant Review

The issue in this case concerns whether a government employer, together with a union, can agree to force a public employee to remain a card-carrying union member for a period of years after that employee no longer wants to be a member. The Ninth Circuit's decision to uphold those requirements, as enshrined in California statute, has severe implications for the First Amendment rights of public employees who come to disagree, for any of a host of reasons, with their union.

Moreover, California and Pennsylvania appear to be the only states with statutory provisions authorizing forced maintenance of union membership. *See, e.g.*, Pet. 1–2 (collecting California statutes); 43 P.S. § 1101.705. So the most likely circuits (the Ninth and Third) to weigh in on the constitutionality of forcing employees to remain union members have already done so. Thus, there is no need to await further development on this issue.

In addition, the constitutionality of these statutory provisions has proven difficult for public employees to challenge. Although labor unions and employers in Pennsylvania may negotiate for the resignation restrictions, putting them in black and white for employees who check their contracts, they often refuse to defend them. Defendant unions and public employers in cases challenging the constitutionality of Pennsylvania's

statute have routinely mooted the challenges by stripping the provision from a contract—but only after employees have sued. *See, e.g.*, *Weyandt v. Pa. State Corr. Officers Ass'ns*, No. 1:19-cv-1018, 2019 WL 5191103, at *4 (M.D. Pa. Oct. 15, 2019) (finding the issue was moot because the union had removed the maintenance of membership provision from its contract); *Kabler*, 2020 WL 1479075, at *3 (state defendants had removed the provision from "a newly-negotiated CBA between the Union and Commonwealth Defendants"); Voluntary Dismissal at 2, *James v. Serv. Emps. Int'l Union, Loc. 668*, No. 2:19-cv-53 (W.D. Pa. 2020), ECF No. 42 (dismissing case challenging maintenance of membership provision because new contract did not contain the challenged provision).

This case presents a clear vehicle for this Court to confirm that public employers and unions cannot constitutionally force public employees to remain card-carrying, dues-paying union members. The right of millions of public employees to choose for themselves whether membership in a union is for them—rather than having their state employer make the choice—is at stake in this Petition. Because the Ninth Circuit's decision to deny public employees that right is in conflict with the law of the Third Circuit, this Court should grant the petition for a writ of certiorari.

CONCLUSION

The Third Circuit has long held that public employees have the right under the First Amendment to the U.S. Constitution not to associate with a labor union. But the Ninth Circuit instead allows government employers and unions to deny public employees the ability to exercise their rights by ending their union membership at any time.

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

NATHAN J. MCGRATH
Counsel of Record
DANIELLE R. ACKER SUSANJ
TESSA E. SHURR
THE FAIRNESS CENTER
500 N. Third Street
Suite 600B
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org

Counsel for Amicus Curiae

December 2, 2022