No. 22-212

In the Supreme Court of the United States

JONATHAN SAVAS, ET AL., *Petitioners*

v.

CALIFORNIA STATE LAW ENFORCEMENT AGENCY, ET AL.

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

BRIEF OF *AMICUS CURIAE* PROTECT THE FIRST FOUNDATION SUPPORTING PETITIONERS

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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

Other Authorities

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

The front page of the California State Law Enforcement Agency ("CSLEA") website[2] currently sports a banner reading "My Union, My Choice!"[3] But when Petitioners asserted their choice to leave that union, the union and the state of California sang a different tune. California has a "maintenance of membership" agreement with CSLEA, which forces employees to remain union members and pay full union dues for four years, all the while subsidizing union speech they no longer wish to support.

Compelled speech and association—especially of a political nature—is not permissible under the First Amendment. And it is particularly shocking in this case, where the State seizes money from Petitioners' paychecks and gives it to the union, which in turn supports political candidates and legislation through multiple election cycles. This constitutional violation would be intolerable, even if it lasted mere days or weeks, because there is no such thing as a *de minimis*

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented in writing to the filing of this brief; all parties were notified by *amicus curiae* of its intent to file this brief more than 10 days prior to its due date.

[2] On the docket, Respondent is listed as "California State Law Enforcement Agency," but CSLEA has referred to itself as "California Statewide Law Enforcement Association" in prior briefing and on its website. Pet. App. 7.

[3] CSLEA.com (last visited Dec. 1, 2022).

First Amendment violation. That the compelled speech in this case lasts for years is unconscionable.

This is far from an isolated error. It is not even the Ninth Circuit's first holding that improperly limits this Court's decision in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Other circuits, including the Third and the Seventh Circuits, have followed suit. This Court's review is necessary to prevent further evisceration of *Janus's* constitutional bulwark.

This Court's review is of particular importance to *Amicus* Protect the First Foundation ("PT1") a non-profit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of all people across the ideological spectrum, including people who may not even agree with the organization's views. This case involves issues of compelled speech and association that are of particular interest to PT1 and its mission to protect First Amendment rights and values.

STATEMENT

This Court made clear in *Janus* that "compelled subsidization of private speech seriously impinges on First Amendment rights." *Janus*, 138 S. Ct. at 2464. But California has tried to dodge *Janus*'s clear implications through "maintenance of membership" agreements. Cal. Gov. Code 2 § 3515.7(a). Under these agreements, employees that have joined a union are required to remain part of the union's membership roster for the term of the collective bargaining agreement, during which time the State seizes full union dues directly from their wages. Cal. Gov. Code 22 §§ 3513(i);

3515.7(b). Because the agreement terms often span multiple years, employees who wish to leave the union are forced to remain union members and continue subsidizing speech they disagree with for months or even years against their will. Pet. App. 8.

Here, a class of twenty-one current and former lifeguards for the California Department of Parks and Recreation signed forms that authorized union dues deduction from their wages and membership in the California State Law Enforcement Agency (CSLEA). Pet. App. 7. One of the membership forms Petitioners signed vaguely stated that there were limitations on when a member could resign union membership, but that form neither explained those limitations nor included a copy of the contract stating that members could only withdraw from the union during a single thirty-day period every four years. Pet. App. 7.

The lifeguards learned they were subject to such an agreement when they tried to leave the CSLEA in September 2019. Pet. App. 8. At that time, the lifeguards expressed their intention to CSLEA to withdraw their membership. But CSLEA said no. It told the lifeguards they had to maintain their membership and pay dues through the term of the collective bargaining agreement, which does not end until July 2023. Pet. App. 8.

The lifeguards' only way out of the obligation, therefore, is to withdraw their membership during the last 30 days of the agreement in June 2023. Pet. App.8. Otherwise, the agreement will automatically renew for another four years. The lifeguards seek simply to realize *Janus*' promise—to be free from the "compelled subsidization of private speech" and association with a union they do not want to support. *Janus*, 138 S. Ct. at 2464.

REASONS FOR GRANTING THE PETITION

Amicus writes to highlight four key reasons the Petition should be granted. First, while Petitioners correctly emphasize that First Amendment issues at stake in this case, Pet. 28-29, the member maintenance agreement here is particularly problematic because it not only compels speech related to collective bargaining, but also core political speech and association over a period of four years and multiple election cycles. Second, that burden on First Amendment rights cannot be justified on the grounds that it is *de minimis*, because there are no *de minimis* First Amendment violations. Third, enough lower courts have read *Janus* in an unreasonably cramped fashion as to require this Court's intervention now. Finally, this case is a good vehicle for the Court to remedy these errors.

I. California's Member Maintenance Agreement Compels Political Speech and Association in Violation of the First Amendment.

As Petitioners note, member maintenance agreements generally violate fundamental speech and association rights. Pet. 28-29. But it bears emphasis that the member maintenance agreement at issue compels political speech and association for a period of *four years*, through multiple primary and general federal, state, and municipal elections. That is a severe burden on First Amendment rights. Indeed, as Petitioners note, the member maintenance agreement here poses an even greater burden than the agency fee agreement struck down in *Janus*. Pet. 11-15. That agreement, unlike this one, at least permitted employees to pay reduced union fees that excluded expenses for political activities and did not compel employees to belong to a

union they did not support. *Janus*, 138 S. Ct. at 2460-2461.

The First Amendment's "robust protection" is at its strongest where core political speech and association are concerned. See *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 480 (2010). Indeed, even *Abood*, which was overruled in *Janus,* recognized that compelling contributions used for political purposes strikes "at the heart of the First Amendment," which requires that union political expenditures "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas," rather than by government coercion. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-236, (1977), overruled by *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). And this Court reiterated in *Janus* that the government may not compel employees to "subsidize private speech on matters of substantial public concern." *Janus*, 138 S. Ct. at 2460.

Yet that is precisely what California's member maintenance agreement does: it compels Petitioners to support union speech, including political speech, that they no longer wish to support. That is because CSLEA, using Petitioners' dues, engages in political speech by endorsing candidates for office and supporting legislation.[4]

The member maintenance agreement thus forces Petitioners to continue to support political candidates

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[4] CSLEA, *PAC Endorsements*, https://tinyurl.com/CSLEAendorse (last visited Dec. 1, 2022) (stating that CSLEA endorses various candidates, including Governor Gavin Newsom); CSLEA, *Why California State Workers Support Union Membership!*, https://tinyurl.com/mvkrr9hx (last visited Dec. 1, 2022) (stating that CSLEA has "supported" and "sponsored" various bills).

and causes over a period of four years. So if, during the first year of that four-year period, the union endorses a slate of candidates with whom an employee vehemently disagrees, the employee has no way to stop supporting the union and those candidates. Indeed, she will be forced to continue paying full union dues that may support many of those same candidates *again*—for example, in a general election after support in a primary, or in a re-election two years later. Even if the Ninth Circuit were correct[5] that a one-year member maintenance agreement is constitutionally permissible—and it is not, as *Amicus* explains in Section II—a four-year member maintenance agreement is plainly different. The First Amendment cannot tolerate the repeated injuries to constitutional rights that occur in the four-year period over which California compels association and support for political speech.[6]

Permitting member maintenance agreements with years-long durations is particularly problematic because of the potential for self-dealing by government officials. Under this regime, incumbent officials can pass and enforce agreements that require employees to remain part of a union that supports those very same incumbents. This concern is not hypothetical: CSLEA produced an endorsement video for Xavier Becerra, who (until he stepped down from the Attorney

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[5] Pet. App. 4-5.

[6] The difference between a one-year agreement and a four-year agreement may also be significant within the strict-scrutiny analysis, which should clearly apply here due to the speech and association rights at stake. Compelling core political speech for a period of four years is not likely to be the least restrictive means of achieving any interest the government may assert in support of the member maintenance agreement.

General's office) was a defendant in this case.[7] This potential for self-dealing raises a serious constitutional question, for, as this Court has stated, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon* v. *Fed. Election Comm'n*, 572 U.S. 185, 192 (2014).

This Court should grant the petition to make clear that, under *Janus*, California's member maintenance agreement and similar agreements around the country impermissibly burden First Amendment-protected political speech and association.

II. The First Amendment Violation Here Cannot Be Excused on the Ground That It Is *De Minimis*.

Respondents may assert that the compelled speech and association in this case is permissible because Petitioners will be able to resign their union membership a handful of months from now. But that does not eliminate the constitutional violation presented here. Absent a clear waiver,[8] compelled speech and association violates the First Amendment, even if the compelled speech or association lasts mere moments, consists of only a few words, or takes the form of a forced contribution of one penny. As this Court has held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). See

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[7] CSLEA, *CSLEA Produces Endorsement Video for AG Becerra*, https://cslea.com/xavierbecerra/ (last visited Dec. 1, 2022); Pet. App. 10.

[8] As Petitioners explain in depth, there is no such waiver here. See Pet. 15-20 (discussing the Ninth Circuit's failure to conduct a proper waiver analysis under *Janus* and demonstrating that Petitioners did not knowingly waive their First Amendment rights).

also *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020). From that principle it follows, as Justice O'Connor recognized, that "[t]here are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 36-37 (2004) (O'Connor, J, concurring).

Consistent with that principle, this Court has long held that compelled speech is not permissible even where it compels only a few words. Thus, the Court held in *Barnette* that requiring children to say the Pledge of Allegiance—which typically takes fewer than 30 seconds—was unconstitutional. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Similarly, in another famous case, requiring a driver to display four short, simple words on his license plate was still impermissible compelled speech. *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977). These cases are integral to our constitutional fabric because they show that there are no "small" instances of compelled speech. In matters of "politics, nationalism, religion, or other matters of opinion," there are no *de minimis* violations, and "no official, high or petty, can prescribe what shall be orthodox" therein. *Barnette*, 319 U.S. at 642.

Despite this Court's clear warnings, California and CSLEA have created a scheme that compels speech and association not for days, not for months, but for years. As this Court admonished in *Schempp*, "it is no defense to urge that" challenged government actions "may be relatively minor encroachments on the First Amendment." *Sch. Dist. of Abington Twp., Pa.* v. *Schempp*, 374 U.S. 203, 225 (1963). For a First Amendment violation "that is today a trickling stream may all too soon become a raging torrent, and, in the words

of Madison, 'it is proper to take alarm at the first experiment upon our liberties.'" *Id.* (citation omitted). It is critical that this Court grant the petition to correct the Ninth Circuit's error.

III. Other Lower Courts Are Routinely Eviscerating *Janus's* Protections.

Granting the petition is also critical to put an end to the lower courts' systematic evisceration of *Janus's* protections. As this Court well knows, there has been an ongoing flood of petitions seeking reversal of the decisions of the courts of appeals, which have repeatedly ignored *Janus's* requirements and erroneously narrowed its application. This skirting of *Janus* is intolerable both as a matter of sound administration of the Courts and as a matter of First Amendment rights. Only clarification from this Court will stop the torrent of lower court decisions evading *Janus's* implications.

1. As Petitioners have explained, the Ninth Circuit's decision in *Belgau* v. *Inslee* deviates from *Janus's* holding. Pet. 22-25. But *Belgau* was far from the only time the Ninth Circuit has ignored the First Amendment's dictates to prop up unions.

The Ninth Circuit committed a similar error in *Mentele* v. *Inslee*, holding that Washington's requirement that the Service Employees International Union 925 ("SEIU") act as the exclusive bargaining representative for publicly subsidized childcare providers who were state employees "only for purposes of collective bargaining" did not unconstitutionally compel association with the union. 916 F.3d 783, 785, 790-91 (9th Cir. 2019)*, cert. denied Miller* v. *Inslee*, 140 S. Ct.

114 (2019).[9] To reach that holding, the Ninth Circuit chose to rely on *Knight*, rather than *Janus's* superseding requirements. *Id.* at 788. And the court's errors were not limited to its narrow reading of *Janus*. It also suggested that the burden to prove that there were no less restrictive means available fell to the plaintiff-childcare provider, rather than the government. *Id.* at 791 (Plaintiff "has not suggested an alternative way for the State to solicit meaningful input from childcare providers while simultaneously avoiding the chaos and inefficiency of having multiple bargaining representatives or negotiating with individual providers").

2. Other circuits have also done their best to limit *Janus*. In *Fischer* v. *Governor of New Jersey*, the Third Circuit foisted an implausibly narrow interpretation of *Janus* onto a class of public school teachers seeking relief from an unconstitutional union membership agreement. *Fischer* v. *Gov. New Jersey,* 842 Fed. App'x 741, 753 (3rd Cir. 2021) (unpublished), *cert. denied Fischer* v. *Murphy*, 142 S. Ct. 426 (2021).[10] Although the teachers sought to revoke their union membership within three weeks of this Court's decision in *Janus*, the Third Circuit required them to remain in the union, reasoning that *Janus* only protected employees who

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[9] *Mentele* is one instance among many of the lower courts skirting *Janus*, but the question in that case concerned exclusive collective bargaining. *Mentele*, 916 F.3d at 785. The denial of certiorari in *Mentele* does not mean that the Court should deny this petition, which concerns member maintenance agreements.

[10] This case is a better vehicle than *Fischer* because it concerns a member maintenance agreement, not just dues deductions. As Petitioners correctly explain, that difference is significant because, here, the State is a party to an organizational security agreement with CSLEA that compels speech and association. Pet. 26-27.

had the foresight to opt out of the union even when doing so would require them to pay significant agency fees. *Id.* at 745, 753 n.18. Because the *Fischer* plaintiffs had chosen union membership over agency fees when *Abood* governed, the Third Circuit held there was no compelled speech and refused even to conduct a waiver analysis. *Id.* at 753 n.18. But speech is not uncoerced when the State props up a union by forcing employees to pay agency fees, then refuses to let those who chose union membership withdraw when they no longer wish to subsidize the union's speech. The Third Circuit's cramped view of *Janus* is constitutionally intolerable.

Relying on the Ninth and Third Circuit's errors, the Seventh Circuit recently refused to apply *Janus's* waiver requirement. *Bennett* v. *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 991 F.3d 724, 730 (7th Cir.), *cert. denied sub nom. Bennett* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, AFL-CIO*, 142 S. Ct. 424 (2021).[11] Thus, the plaintiff-school district employees in that case were also compelled to support speech they did not agree with.

In short, the circuit courts have consistently ignored and evaded *Janus's* constitutional directives. It is time for this Court to clarify *Janus* and put a stop to the unacceptable narrowing of its holding.

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[11] As Petitioners note, this case is a better vehicle than *Bennett* because (like *Fischer*) *Bennett* concerned only dues deductions, not a member maintenance agreement. Pet. 26.

IV. This Case Presents an Excellent Vehicle to Enforce And, If Necessary, Clarify *Janus*.

Amicus also agrees with Petitioners that this case presents an ideal vehicle for resolving these First Amendment issues because the questions are squarely presented, and the case is free of justiciability issues. Pet. 25. *Amicus* writes to expand on some reasons highlighted by Petitioners that are particularly important to *amicus's* mission of protecting First Amendment rights, and to highlight additional reasons this case is a good vehicle that were not discussed in the petition.

1. As Petitioners note, unlike previous cases, this petition challenges the constitutionality of a four-year member maintenance agreement enforced by the State. This case thus concerns significant state action, not simply the enforcement of private agreements. And, as discussed in Section I above, a member maintenance agreement that compels Petitioners to support the union for four years is particularly egregious because of the sheer amount of political speech Petitioners may be compelled to support.

Furthermore, requiring Petitioners to remain union members encroaches on associative freedoms. For up to four years, Petitioners are compelled to bolster the union's membership numbers and effectively lend their names to its causes. Unless this Court intervenes, California will continue to compel Petitioners to associate with an organization they do not wish to associate with and to support political speech they do not wish to support.

2. This Petition is also a good vehicle because it arrives before the court in a non-interlocutory posture, avoiding the possibility of lower courts' later finding

facts or justiciability concerns that would cast this case in a different light.

Moreover, because the lower courts are consistently skirting *Janus*, more percolation will likely produce only further evisceration of *Janus's* holding. As discussed in Section III above, the Third, Seventh, and Ninth Circuits have already hollowed out *Janus's* holding by ignoring this Court's mandate that a "waiver must be freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486. By providing clarity on that point of law now, this Court can halt further neutering of *Janus* in the lower courts.

CONCLUSION

The Ninth Circuit and other courts of appeals have consistently tried to evade the First Amendment's requirements as articulated in *Janus*. In doing so, they have blessed member maintenance agreements that burden speech and association at the core of the First Amendment's protections. Compelled speech and association, whether it lasts a few months or, as in this case, a few years, violates the First Amendment unless it passes strict scrutiny. This Court should grant the petition to affirm *Janus's* underlying principle that states and unions may not conspire to compel speech or association on matters of public concern.

Respectfully submitted,

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