No. 22-498

IN THE

Supreme Court of the United States

KRISTINE KURK,

Petitioner,

v.

LOS RIOS CLASSIFIED EMPLOYEES ASSOCIATION *et al.*,

Respondents.

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

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

California law requires Kristine Kurk to maintain her union membership as a condition of public employment. Kurk attempted to resign her union membership on September 13, 2018. It is undisputed that her public employer refused to honor the resignation based on California statute. It is also undisputed that the union refused to permit her to resign based on the collective bargaining agreement with her public employer, the relevant terms of which were authorized and controlled solely by the same state statute.

This system violates the freedom of association of all employees subjected thereto by compelling membership in an inherently political organization.

The question presented is: Does the First Amendment protect a public employee's right to resign union membership at will?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

As part of its mission to defend fundamental rights, the Liberty Justice Center works to protect public-sector workers' right to freedom from forced union association, support, or speech. *See e.g., Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The Liberty Justice Center has pending petitions for writs of certiorari in two cases involving compelled financial support of public-sector unions: *Mattos v. AFSCME Council 3*, 2022 U.S. App. LEXIS 25973 (4th Cir. Md., Sept. 16, 2022), *petition for cert. filed* No. 22-567 (Dec. 15, 2022), and *O'Callaghan v. Drake*, 2022 U.S. App. LEXIS 11559 (9th Cir. Apr. 28, 2022), *petition for cert. filed* No. 22-219 (Sept. 6, 2022). The petition in this case similarly addresses compelled association with public-sector unions.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondents received notice more than 10 days before its filing that Amicus intended to file this brief, and all parties consented to its filing.

SUMMARY OF ARGUMENT

In *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2460 (2018), this Court held that compelled speech includes compelled subsidization of speech, holding that agency fees could not be taken from government employees who did not join a public sector union. In doing so, this Court recognized that many state laws provide huge benefits to public-sector unions by, among other things, allowing those unions to serve as the exclusive bargaining agent of all employers in a bargaining unit. *Id*. at 2467. Notwithstanding these laws, this Court acknowledged in *Janus* that state laws could not infringe of workers' First Amendment right against forced subsidization of union political speech.

The petition before this Court seeks to extend the Court's principle that state laws providing benefits to public-sector unions cannot infringe on workers' First Amendment rights. This time, by protecting workers' First Amendment right from being compelled to associate with a union by state "maintenance of membership" laws that prohibit a union member from resigning his or her union membership until the end of the relevant collective bargaining agreement.

Given the proliferation of state legislation that provides public-sector unions with additional privileges and benefits on top of the benefits extended by their status as exclusive representative—often at the expense of government employees' constitutional rights—this Court should grant the petition and hold that state laws cannot compel government workers to forfeit their First Amendment right to associate freely.

ARGUMENT

Certiorari should be granted to protect government employees when state-created procedural systems that seek to benefit public-sector unions violate those employees' constitutional rights.

This Court has established the principle that government employees may not be coerced by state law to financially support a public-sector union's political speech. *Janus*, 138 S. Ct. at 2460. That protection was necessary because state law-created systems providing unions with enormous benefits and privileges infringed on government worker's First Amendment right against compelled speech.

Since then, many state have only increased the number of benefits and privileges afforded by law to public-sector unions. When state laws create a system that seeks to provide benefits and privileges to public-sector unions, this Court should be vigilant to ensure those systems do not infringe the First Amendment rights of government workers.

The petition before this Court involves a serious violation of government workers' First Amendment rights by a state law that seeks to provide benefits and privileges to public-sector unions. This Court should grant the petition to protect workers' First Amendment right to be free from compelled association by prohibiting states from compelling employees to remain union members until the expiration of the collective bargaining agreement between their union and government employer.

A. This Court has applied First Amendment protection to government employees forced to subsidize the political speech of public-sector unions.

In recent years, this Court has ensured the protection of workers' constitutional rights against states' attempts to compel support of public-sector unions. First, in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), this Court held that although state law could (then) allow unions to extract "agency fees" from employees who were not union members, those employees could not be compelled to subsidize unions' legislative lobbying or other political activities outside the limited context of contract ratification or implementation, and therefore when a union imposes a special assessment or dues increase, the union must provide a fresh notice and may not exact any funds from nonmembers without their consent. *Id.* at 322.

Second, in *Harris v. Quinn*, 573 U.S. 616 (2014), this Court refused to extend *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977), and held that the First Amendment prohibits the collection of an agency fee from personal care workers who receive compensation through a state-funded program and do not wish to become members of a public-sector union. *Harris*, 573 U.S. at 656.

And most recently, in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court overturned *Abood*, and held that state governments may not force public employees to pay agency fees or other money to a union unless that employee provided affirmative consent. *Janus*, 138 S. Ct. at 2460. This Court held that any requirement for nonmembers to subsidize public-sector unions violated the Free Speech Clause

because almost everything that public-sector unions do, including engaging in collective bargaining, constitutes speech on matters of public concern. *Id.* at 2459-60. The Court stated that "[c]ompelling individuals to mouth support for views they find objectionable violates [this] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.*

This Court, in these three cases, found unconstitutional state laws by which the state sought to benefit public-sector unions by compelling non-consenting government employees to pay money to those unions. But forced subsidization of public-sector unions' speech is not the only constitutionally problematic aspect of state public-sector union laws. Indeed, many states have enacted laws that push government employees to join and pay unions by giving unions privileges that no other private entities have. These systems often come at the expense of government workers' constitutional rights.

B. State law-created systems that seek to provide privileges and benefits to public-sector unions may not violate government employees' constitutional rights.

While states may give benefits and privileges to public-sector unions, such systems may not violate government employees' constitutional rights. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) ("procedural scheme created by [a] statute" for the benefit of a private entity was "subject to constitutional restraints").

1. State laws giving unions status as exclusive bargaining agents provide unions with enormous power and privileges that can threaten employees' constitutional rights.

Many states have laws that require a union to serve as the exclusive bargaining agent of government employees, allowing the union to act for and negotiate agreements covering all employees in the bargaining unit and to represent the interests of all such employees, even employees who choose not to be members of the union. *See Janus*, 138 S. Ct. at 2463.

"By its selection as bargaining representative, [a union] . . . become[s] the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). This mandatory agency relationship is akin to "the relationship . . . between attorney and client," and to that between trustee and beneficiary. *ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991).

Unlike other agency relationships, however, "an individual employee lacks direct control over a union's actions." *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567 (1990). That is because exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). In this way, "[t]he powers of the bargaining representative are 'comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.'" *Sweeney v. Pence*, 767 F.3d 654,

666 (7th Cir. 2014) (quoting *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944)).

This Court noted that "[d]esignation as exclusive representative thus 'results in a tremendous increase in the power' of the union." *Janus*, 138 S. Ct. at 2467 (citation omitted). Exclusive bargaining status "gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union." *Id.* (citations omitted).

Exclusive-representative unions thus have a large amount of power over individual employees in the bargaining unit—even those who are not union members. Exclusive representatives can, and often do, pursue agendas that do not benefit individuals subject to their mandatory representation. *See Knox*, 132 S. Ct. at 2289; *Abood*, 431 U.S. at 222. Exclusive representatives also can enter into agreements that bind everyone subject to their representation. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Thus, for example, union representatives can waive employees' right to bring discrimination claims against their employer in court by agreeing that employees must submit such claims to arbitration. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Union exclusive-bargaining agents are granted many special privileges that other private entities are never given, such as "obtaining information about

employees . . . [and] having dues and fees deducted directly from employee wages," as well as other privileges a union can negotiate with the government employer in the collective-bargaining agreement. *Janus*, 138 S. Ct. at 2467.

Unsurprisingly, given the privileges and benefits states confer on public-sector unions, including the power to speak and contract for individuals against their will, this Court has long recognized that exclusive representation impacts and restricts individual liberties. *See Janus*, 138 S. Ct. at 2463 (finding State laws that require that a union serve as exclusive bargaining agent for its employees "a significant impingement on associational freedoms that would not be tolerated in other contexts"); *Pyett*, 556 U.S. at 271 (holding "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands"); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (noting "[t]he collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit"); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (holding "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, and that "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union").

Because of the enormous amount of power and privilege exclusive bargaining laws provide unions, courts should be even more attentive when state laws

seeking to benefit unions potentially infringe on constitutional rights.

Indeed, this Court in *Janus* specifically recognized that exclusive bargaining involves compelled association that would otherwise be constitutionally problematic. *See Janus*, 138 S. Ct. at 2463. "The right to eschew association for expressive purposes is likewise protected." *Id.* (citing *Roberts v. United States Jaycees*, 468 U. S. 609, 623 (1984) for the proposition that "[f]reedom of association . . . plainly presupposes a freedom not to associate").

But even if this Court is willing to tolerate the infringement on associational freedoms in the exclusive-bargaining context,[2] that does not mean that it should expand the infringement on the right to associate by condoning any state law that falls under the rubric of exclusive representation; the state still must respect employees' First Amendment associational rights. *See Harris*, 573 U.S. at 656 (refusing to extend the scope of *Abood*); *Knox*, 567 U.S. at 322 (same).

Here, state law allows a government employer to force an employee to remain associated with a union through membership, even if that employee no longer wishes to remain associated with the union. This

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[2] Although this Court has previously justified the mandatory association imposed by exclusive representation laws by relying on the government's interest in workplace "labor peace," *see Abood*, 431 U.S. at 220-21, this Court has since rejected *Abood's* recognition of "labor peace" as a sufficient basis to impinge First Amendment rights. *See Janus*, 138 S. Ct. at 2465-66.

"significant impingement on associational freedoms" should not be tolerated by this Court.

2. State laws enacted in the wake of *Janus* provide numerous benefits to public-sector unions.

In addition to exclusive bargaining laws, states have adopted numerous other laws that benefit public-sector unions. After this Court decided *Janus*, public-sector unions lobbied for and secured state legislation to enhance their special privileges.[3] All too often, however, these laws are at least in part an attempt by unions to use government power to stack the deck in favor of obtaining government employees' signature on a union membership card and, in turn, obtaining employees' money to support union political speech.

For example, after *Janus* struck down the Illinois agency fee statute, Illinois amended Section 11.1 of Illinois's Education Labor Relations Act ("IELRA") to require public educational employers to enforce escape periods as short as ten days, and to make it easier for public-sector unions to control the flow of information about union membership to employees in their bargaining unit. 115 Ill. Comp. Stat. §5/11.1 (as amended by P.L. 101-0620, eff. Dec. 20, 2019). IELRA not only requires employers to give unions contact information about employees in their bargaining unit; it also explicitly prevents any private third-party from obtaining the same contact information. This makes it more difficult for third-party organizations to inform

[3] See list of relevant legislation passed from 2018 to present collected here: https://ballotpedia.org/Public-sector_union_policy_in_the_United_States,_2018-present.

public-sector workers about their *Janus* rights. Further, IELRA prevents employers from "discouraging" union membership, which makes it less likely that an employer will risk informing its employees about their rights to not join or pay a union under *Janus*, because doing so could be seen as an unfair labor practice.

New Jersey enacted the Workplace Democracy Enhancement Act ("WDEA") roughly one month before the Court issued *Janus*, in an apparent effort to preemptively undermine the workers' rights this Court would soon recognize. P.L. 2018, ch.15, § 6, eff. May 18, 2018. WDEA not only requires compulsory union orientations for employees but also amends the State's dues-deduction statute, New Jersey Statutes Annotated Section ("N.J. Section") 52:14-15.9e, to make it harder for employees to revoke dues deduction authorizations. Prior to the amendment, employees who wanted to stop government dues deductions could submit a revocation notice effective as of the January 1 or July 1 "succeeding the date on which notice of withdrawal is filed." The WDEA amended the statute to limit the revocation window to "10 days following each anniversary date of their employment," which shall not be effective until the "30th day after the anniversary date of employment." N.J. Section 52:14-15.9e (as amended by P.L. 2018, c.15, § 6, eff. May 18, 2018).

Similarly, on the day this Court decided *Janus*, California's then-Governor Jerry Brown signed Senate Bill 866 into law. A "budget rider" bill that went into effect immediately, it contains provisions that prohibit public employees from talking to their own employers—and employers from talking to their

own employees—about payroll deductions, union membership, or their constitutional rights recognized by the *Janus* decision.

And this petition in this case involves California's "maintenance of membership" statutes, which allow an exclusive-bargaining agent union to negotiate a collective bargaining agreement with a government employer that requires a government employee who joins a public-sector union to maintain his or her membership in good standing for the duration of the collective bargaining agreement. California Government Code §§ 3543.2 and 3540.1; § 3524.52(h) (applicable to judicial employees); § 3513(i) (applicable to specified state employees including state administrative personnel). As the petition points out, at least two other states enforce maintenance of membership agreements. Pet. 8-9.

When state laws create a system that seeks to benefit public-sector workers, courts should be attentive when such laws potentially infringe on constitutional rights.

3. Illinois's recently adopted Amendment 1 will provide special privileges and benefits to public-sector unions and could allow maintenance of membership provisions like the one at issue in this petition.

More recently, Illinois adopted a constitutional amendment ("Amendment 1") that purports to provide Illinois workers with a constitutional right to

collectively bargain.[4] Amendment 1 provides, in pertinent part:

> Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.[5]

Amendment 1 goes farther in providing unions special legal privileges than any other state law or constitutional provision.[6] Amendment 1's language is

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[4] https://www.politico.com/f/?id=00000184-e5ee-de47-a3e6-e7eeb6be0000&nname=illinois-playbook&nid=00000150-1596-d4ac-a1d4-179e288b0000&nrid=3fd82ed0-6af3-411a-b891-e9fff377892b&nlid=639163.

[5] https://www.ilga.gov/legislation/billstatus.asp?DocNum=11&GAID=16&GA=102&DocTypeID=SJRCA&LegID=136166&SessionID=110.

[6] *See* Mailee Smith, *Fact Check: No Other State Constitution Has a Provision Similar to Amendment 1*, Illinois Policy Institute,

intentionally broad and could be interpreted by Illinois courts as establishing a number of benefits for public-sector unions that Illinois law does not yet establish.[7] For example, Amendment 1 purports to protect the fundamental right to collectively bargain "for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work." But the Amendment does not define "working conditions," "economic welfare," or "safety at work." Interpreted broadly, Amendment 1 could be held to allow maintenance-of-membership requirements in collective bargaining agreements in Illinois. Or to prevent the Illinois legislature from prohibiting such measures in collective bargaining agreements, thus allowing public-sector unions and government employers to force union members to maintain their membership until the end of the term of a collective bargaining agreement, even if that member wishes to resign.

While the petition acknowledges that only several states currently have maintenance of membership requirements set forth in state law, Amendment 1 rep-

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Aug. 10, 2022, https://www.illinoispolicy.org/fact-check-no-other-state-constitution-has-a-provision-similar-to-amendment-1/.

[7] Amendment 1 is so broad that it does not limit itself to protecting the "fundamental right" to collectively bargain only to public-sector unions, but also appears to apply to private-sector unions. However, the National Labor Relations Act ("NLRA") governs private-sector collective bargaining nationwide and preempts state laws that would regulate activities that the NLRA protects or prohibits. State laws that regulate private-sector collective bargaining therefore violate the Supremacy Clause of the United States Constitution. Therefore, it is possible that Amendment 1's application to private-sector unions violates the U.S. Constitution.

resents an example of how such provisions could become more prevalent unless this Court prevents such requirements by protecting government employee's First Amendment right to not be forced to associate with a public-sector union by being coerced to maintain their membership in such an organization.

C. This Court should grant certiorari to protect government workers from state laws that violate their First Amendment right to association by compelling them to remain union members after they wish to terminate their membership.

Many states, through exclusive bargaining laws and other legislation, have created systems that give public-sector unions special privileges and benefits. Often, these systems seek to benefit public-sector unions at the expense of government workers' constitutional rights, as Illinois law did by allowing unions to collect "agency fees" from government workers who were not union members and never consented to paying the union, which this Court in *Janus* found unconstitutional. When the state's procedural system set up for the benefit of public-sector unions violates government employees' constitutional rights—as it does here, by forcing employees to remain union members even after those employees wish to leave the union—then Courts must act to enforce constitutional restraints on the use of government procedures. *See Lugar*, 457 U.S. at 941.

This Court has held that the "[f]reedom of association . . . plainly presupposes a freedom not to associate," *Roberts*, 468 U.S. at 623, and that compelling association for expressive purposes infringes on First Amendment rights. *See id*. at 622-

23. Mandatory associations are "exceedingly rare because . . . [they] are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts*, 468 U.S. at 623).

This Court has required the government to satisfy at least this level of scrutiny in *Janus*, 138 S. Ct. at 2465, *Harris*, 134 S. Ct. at 2639; and *Knox*, 132 S. Ct. at 2288-89. And therefore, at a minimum, here the Court should apply the same level of "exacting scrutiny." *See id*.

Here, the state has no compelling interest in forcing government employees to remain union members until the end of a collective bargaining agreement. The state has no compelling interest in providing a benefit to public-sector unions that could justify infringing employees' First Amendment rights. There is no reason that the government, via state law and a collective bargaining agreement, must force employees who join a union to remain union members until the expiration of the collective bargaining agreement without those employees' consent. The union is free to ask members to *voluntarily* consent to remain members until the expiration of the collective bargaining agreement, but that is not what it is doing here. It is state law and the collective bargaining agreement between the union and the employer—not the union membership agreement Petitioner signed—that serves as the purported basis to compel Petitioner to remain a union member. The First Amendment prohibits the government from *forcing* employees without consent to remain union members.

The Court should grant the petition to hold that this sort of government-backed arrangement violates the right to association protected by the First Amendment.

CONCLUSION

This Court through *Knox*, *Harris*, and *Janus* set forth a principle that government employees may not be coerced by state law to financially support a public-sector union's political speech. In those cases, the Court established that when state law provides privileges and benefits for public-sector unions, it is subject to constitutional scrutiny when that system infringes on the First Amendment rights of government workers. This Court should grant the petition to protect workers' First Amendment right to be free from compelled association.

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