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 A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Court in *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), held it violates the First Amendment for a state and union to compel employees to subsidize union speech. 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

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases, and it files amicus briefs when it or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. Specifically relevant here, Institute litigators represent attorneys challenging a mandatory association in several cases, including *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) (reversing dismissal of First Amendment challenge to mandatory bar association membership); *Boudreaux v. Louisiana State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021), and *Schell v. Chief Justice & Justices of the Oklahoma Supreme Court*, 11 F.4th 1178 (10th Cir. 2021). The Institute has also litigated and won important victories for other aspects of free speech, including *Arizona Free*

[1] The parties have consented to the filing of this amicus brief. Amicus curiae gave counsel of record for all parties notice of its intention to file this brief at least ten days before the brief's due date. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp.3d 685 (E.D. Ky. 2016) (scheme imposing different campaign contribution limits on different classes of donors violated Equal Protection Clause). The Institute has appeared frequently as amicus curiae in this Court and other courts in free-speech cases. *See*, *e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018).

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit refused to apply either *Janus*'s voluntary waiver analysis or the unconstitutional conditions analysis to the contract at issue, on the ground that the Petitioners "made the affirmative choice to become members" of the union. Pet. App. 3. But the question is not whether they signed the membership agreement—the question is whether they *affirmatively consented* to surrender their right to *resign* their membership. Obscuring the right at stake here was a fallacy central to the decision below, and it demands correction, given the degree to which lower courts are failing to apply *Janus* faithfully. The Court should grant certiorari to make clear that the affirmative consent requirement applies to all waivers of

constitutional rights, whether by those who are classified as union members or not.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals mischaracterized the right at stake.

The First Amendment right at issue here is the right to *disassociate*. The right to resign from an organization as a way of expressing disapproval or disagreement, is an essential facet of one's associational and expressive rights. It is so essential, in fact, that even a member of this Court has employed it.[2] This Court has often recognized the centrality of the right to resign from a union. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969); *cf. Pattern Makers' League of N. Am., AFL-CIO v. NLRB*, 473 U.S. 95, 105 (1985) ("the inconsistency between union restrictions on the right to resign and the policy of voluntary unionism [inherent in the Wagner Act] supports the Board's conclusion that League Law 13 is invalid."); *NLRB v. Augusta Chem. Co.*, 187 F.2d 63, 64 (5th Cir. 1951) (The Wagner Act's "avowed purpose was not to favor or promote unions as such. It was to promote and protect the rights of individual employees to join or not to join unions and to be free from coercion and interference either way."). Yet the court below gave short shrift to this right. Viewing this case only through the lens of voluntary *joining*, it

[2] Justice Benjamin Curtis, who resigned in protest over the *Dred Scott* decision.

concluded that because the Petitioners were not compelled to join—a dubious proposition in itself, given that they were forced to choose between joining and paying unconstitutional agency fees—and were given a one-month opportunity to quit in 2019, there was no constitutional injury, Pet. App. 3, even though they were deprived of the right to disassociate through a collective bargaining agreement that *postdated* their membership.

The right to resign is *more* important than the right not to join in the first place. Being forced to associate with an organization is offensive enough, but it is a one-time injury; being denied the right to *dis*associate if that organization commits an act one regards as wrong is worse—because it stretches that associational and expressive injury into the indefinite future. Being denied the right to quit therefore involves not only associational rights but "the doctrine of unconscionability[] and the Thirteenth Amendment's prohibition against involuntary servitude." Heidi Marie Werntz, *Waiver of Beck Rights and Resignation Rights: Infusing the Union-Member Relationship with Individualized Commitment*, 43 Cath. U. L. Rev. 159, 174 (1993). The right of members or employees to resign is also crucial to ensuring that the organization or employer is responsible to the individuals concerned, as opposed to enjoying a position of authoritarianism from which it can dictate to those individuals.

Professor James Gray Pope has referred to a worker's right to quit as an inalienable right, "because it provides workers with a necessary 'defense against

oppressive hours, pay, working conditions, or treatment.' Without it, there is no 'power below' or 'incentive above' to curb domination or to promote wholesome conditions." *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 Yale L.J. 1474, 1490–91 (2010). Pope's scholarship focuses on the "involuntary servitude" prohibition of the Thirteenth Amendment, but his findings are relevant here because he seeks to balance the right to quit with the person's power to make a contract promising not to quit.

As Pope explains, people must have the ability to make binding promises not to quit, or their freedom of contract would be rendered largely worthless. *Id*. at 1480–81. Yet there must be some boundaries on even self-imposed limitations of the right to resign, since it is an inherently unwaivable part of a person's natural liberty. In balancing these two concerns, Pope argues that courts should follow the rule suggested by *Pollock v. Williams*, 322 U.S. 4 (1944), and hold that an employee's right to quit "should be protected if it is necessary to provide workers with the 'power below' and employers the 'incentive above' to prevent 'a harsh overlordship or unwholesome conditions of work.'" Pope, *supra*, at 1566 (quoting *Pollock*, 322 U.S. at 18). The same should apply to union membership. Restrictions on the right to quit a union must be enforced to the degree necessary to prevent "overlordship" on the part of union bosses.

This is not just a matter of organizational management, but of expression as well. The right to resign

is a form of dissent, no less than the right to refuse to salute the flag in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), or the right to refuse to endorse statements one disagrees with, *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002), or the right not to disclose one's political views, *Hatfield v. Board of County Commissioners of Cotton County*, No. CIV-20-937-J, 2021 WL 6201204, at *2 (W.D. Okla. Dec. 13, 2021).

Werntz, *supra*, at 220–25, argues that a waiver of the right to resign also risks unconscionability unless it includes a specified duration, in addition to the clear notice *Janus* already requires. Although her discussion was limited to private sector unions rather than the public-sector unions at issue here and in *Janus*, her argument is nonetheless instructive: a union must permit members to disassociate, or the membership agreement would be unconscionable. *Id.* at 223. The proper balance, she wrote, required unions to "carefully tailor contracts waiving resignation rights to accommodate concepts of limited duration, independent consideration, and notice." *Id*. The membership agreement here would obviously fail that test, too—if the Ninth Circuit had applied it, or any genuine analysis.

Yet as *Janus* recognized, special concern must apply when the union in question is a public sector union, which represents government employees in labor negotiations against government agencies. For one thing, a private sector union's demands on management are necessarily limited by market forces, because if the demands are excessive, and result in prices that are

too high for consumers, both management and the union will suffer—but in the public sector, no such market discipline applies because the "consumer" is the taxpayer, who is forced to pay, and who has no place at the bargaining table between the government union and the government employer. Also, every expenditure by a government employer is a matter of public concern—whether it be for wages or changes in working conditions—which is not the case in the private sector. *Cf. Janus*, 138 S. Ct. at 2474–77. And public sector employees rarely have the same range of options that private sector employees do—police officers and firefighters are virtually always government employees and are not able, as private-sector workers are, to seek non-union alternatives, or a different union, if they disagree with the policies of a particular union.

These factors warrant greater judicial skepticism toward representation agreements in public-sector union cases. A "maintenance of membership" agreement in the public sector context runs an even greater risk than did the agency fees at issue in *Janus* of reinforcing an in-government faction which can exploit its monopoly position to demand greater and greater shares of public resources—with the taxpayer "consumers" left out of the deal (except to pay the bills).

But the Ninth Circuit considered none of this. It simply said that because the Petitioners signed membership agreements—at a time before *Janus*, when, as the panel admitted, they could only choose between membership and having to pay illegal agency fees—their challenge to the "maintenance of membership"

provision could not be heard, regardless even of the fact that that provision *postdates* the membership agreement and therefore could not have been affirmatively consented to by the Petitioners. That was plainly incorrect and warrants reversal.

II. The Court's refusal to apply *Janus* represents only the latest in the lower courts' refusal to comply with that case's requirements.

Certainly the right to resign, like any other First Amendment right, can be voluntarily surrendered by contract to some degree in appropriate circumstances. But *Janus* made clear that the state bears the burden of proving, by clear and convincing evidence, that a person has knowingly agreed to such a surrender. 138 S. Ct. at 2486.

Here, the Ninth Circuit refused to apply that test on the grounds that *Janus* concerned people who were not union members, whereas this case involves people who did join the union—albeit before the *Janus* decision. Pet. App. 3. Consequently, it simply asserted that Petitioners waived their right to quit. This is plainly inadequate. *Janus*'s analysis was not limited to people who are non-members. On the contrary, it was premised on longstanding First Amendment rules whereby courts refuse to presume a waiver of First Amendment rights by anyone, and instead place the burden on the government to prove such a waiver. Nothing in *Janus* suggests that such constitutional protections are inapplicable to union members.

In fact, limiting *Janus* in that way makes no logical sense. *Janus* was concerned not only with compulsory payment to the union by non-members, but also with "allowing the government to . . . require all *employees* to support the union irrespective of whether they share its views," 138 S. Ct. at 2478 (emphasis added)—a concern not confined to just non-members.

The illogicality of confining *Janus* to non-members was made clear by *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020), in which the Eighth Circuit said that *Janus* and other cases protecting the free speech rights of workers "have involved 'agency shop' relationships . . . in which employees may be non-members," rather than "'union shop' [situations in which] every employee must be a union member." *Id.* at 1118. This Court, *Fleck* said,

> has never decided whether a public-sector *union* shop would violate employees' First Amendment associational rights. If the Court upheld a mandatory membership requirement . . . [w]e have little doubt the Court would impose a requirement that the union adopt procedures "carefully tailored to minimize the infringement" of a dissenting member's First Amendment rights. . . . But because of the practical differences when an organization deals with members and non-members, we do not assume that the "*Hudson* notice" requirements would be the same in every detail.

Id. (emphasis added, citation omitted). This is irrational, because for government to force people to join a

union is *more* constitutionally objectionable than to mandate an agency shop relationship, not less—because it combines a speech and associational injury, whereas a compulsory agency shop relationship at least allows the individual *some* means of disassociation.

Also, even if it were the case that *Janus*'s language regarding *payment* is only applicable to non-members, it cannot be true that its *affirmative consent* requirement is applicable only to people whose names do not appear on membership agreements. If membership itself is a waiver of constitutional rights, then it is illogical to say that only those who refuse to sign can invoke the *Janus* requirement that the state produce clear and compelling evidence of voluntary waiver. Obviously the protections provided by that test are most needed by those who (are alleged to) *have* signed.

The panel here, however, like the panel in *Fleck*, effectively reduced the constitutional protection for workers who are forced, or constructively forced, to join unions. Under the reasoning adopted below, signing a union membership agreement can become a one-time thing, eliminating a person's right to change her mind afterward and even characterizing her as having "consented" to agreements formed only *after* she signed.

Restricting *Janus*'s requirement of clear and compelling evidence to cases of non-members makes the *Janus* decision easy to evade, by the simple expedient of making it prohibitively difficult to quit the union. Unions have engaged in such tactics for generations.

In *Shea v. International Association of Machinists & Aerospace Workers*, 154 F.3d 508 (5th Cir. 1998), for example, the union established a procedure for workers to object to being compelled to join: employees were required to submit a written notice within a thirty-day window during each year of employment; the union also changed its address without notifying would-be objectors, and then treated any objections sent to the wrong address as untimely and void. *Id.* at 510–11. The court of appeals rightly characterized this "unduly cumbersome annual objection requirement" as an intentional effort "to prevent employees from exercising their constitutionally-based right of objection" and to continue "collecting full dues from nonmembers who would not willingly pay." *Id*. at 515. In *Local 647, United Automobile Workers*, 197 NLRB 608, 609 (1972), the union gave members a *ten-day* window in which they could resign—and that ten-day period was carefully timed to coincide with the Christmas holiday: only resignations presented between December 22 and 31 would be accepted. *Id.* at 609. And these were then subjected to a sixty-day "waiting period," so that resignations only became valid in March. *Id.* The NLRB said this "amount[ed], in effect, to a denial to members of a voluntary method of severing their relationship with the Union." *Id. Accord, Marlin Rockwell Corp. (Auto. Workers, Loc. 197) (AFL-CIO)*, 114 NLRB 553, 589 (1955) (same arrangement). *See also Loc. 58, Int'l Bhd. of Elec. Workers (IBEW), AFL-CIO v. NLRB*, 888 F.3d 1313, 1317 (D.C. Cir. 2018) (union required members to resign in person and show picture identification to do so); *Debont v. City of Poway*, No. 98CV0502-

K(LAB), 1998 WL 415844, at *2 (S.D. Cal. Apr. 14, 1998) (collective bargaining agreement that "required [plaintiff] to remain a member of the union for an extended period of time merely because at some point in the past, he chose to join the union" was unconstitutional); *McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp.2d 522, 527 (M.D. Pa. 2007) (where the contract "lock[ed] plaintiffs into union membership for the duration," so that "the only way plaintiffs can resign from the union is to leave their employment," the result was "a direct and deleterious impact on plaintiffs' rights under the First Amendment.").

The logic of the decision below would go even further: presumably, if the contract had made these Petitioners *lifetime* members, or if the union were to declare them *tomorrow* to be *lifetime* members, the Ninth Circuit would have held that they can *never* resign, because they signed a membership agreement that incorporates whatever restrictions on the right to resign the union sees fit to impose on them. That would obviously be legally erroneous—because the proper focus is on whether the individual voluntarily, affirmatively, and knowingly agreed to surrender the right to resign or the right to refuse payment. *Cf. Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke Cnty., N.C.*, 149 F.3d 277, 280 (4th Cir. 1998) ("The contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest in order to be enforceable.").

Amazingly, lower courts' refusals to address concerns like these in the wake of *Janus* has even enabled unions to continue extracting funding from employees whose signatures on union membership documents were *forged*. In many post-*Janus* cases,[3] plaintiffs have argued that their signatures on union membership forms were falsified, but courts have dismissed these claims, largely relying on *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021), which said that such forgery does not qualify as state action and is therefore exempt from *Janus*—with the result that the individuals involved have no remedy for the state-enforced seizure of their earnings to subsidize the unions in question. This conclusion was obviously fallacious because the taking of the employees' moneys was accomplished solely through state action, and the relationship between the unions and the states in those cases was plainly one of "pervasive entwinement." *Brentwood Acad. v. Tenn. Secondary*

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[3] *See*, *e.g.*, *Zielinski v. SEIU Loc. 503*, No. 20-36076, 2022 WL 4298160 (9th Cir. Sept. 19, 2022); *Jarrett v. Marion Cnty.*, No. 6:20-cv-01049-MK, 2021 WL 65493 (D. Or. Jan. 6, 2021), *appeal docketed*, No. 21-35133 (9th Cir. Feb. 19, 2021); *Schiewe v. SEIU Loc. 503*, No. 3:20-CV-00519-JR, 2020 WL 5790389 (D. Or. Sept. 28, 2020); *Wright v. SEIU Loc. 503*, No. 20-35878, 2022 WL 4295626 (9th Cir. Sept. 19, 2022); *Semerjyan v. SEIU Loc. 2015*, 489 F. Supp.3d 1048 (C.D. Cal. 2020), *appeal dismissed*, No. 21-55104, 2021 WL 6881066 (9th Cir. Nov. 12, 2021); *Yates v. Wash. Fed'n of State Emps.*, 466 F. Supp.3d 1197 (W.D. Wash. 2020), *appeal docketed*, *Yates v. AFSCME Council 28*, No. 20-35879 (9th Cir. Oct. 8, 2020); *Quezambra v. United Domestic Workers of Am. AFSCME Local 3930*, 445 F. Supp.3d 695 (C.D. Cal. 2020), *appeal docketed*, No. 20-55643 (9th Cir. June 23, 2020).

Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001). Thus, as Petitioners have said, *Belgau* should be overruled.

In any event, as Petitioners make clear, nothing in this case suggests that they knowingly waived their right to resign or agreed to the unreasonably narrow resignation opportunity involved here. The membership documents they signed only said "there are limitations on the time period in which an employee can withdraw," Pet. at 15, and it was years later that the restrictions at issue here were imposed via the collective bargaining agreement. Obviously, they could not knowingly and affirmatively consent to a restriction on their rights that was not even written until years after the fact. Yet because the Court of Appeals simply refused to apply *Janus*, on the grounds that the Petitioners here are union members, the proper affirmative-consent test was never applied to their claims. That warrants reversal.

III. Proper analysis is unconstitutional conditions.

Even if *Janus* were not applicable here, the proper analysis would be the unconstitutional conditions test—and that, too, was simply ignored.

In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 213–15 (2013), this Court characterized the test as asking (1) whether the contractual conditions would be unconstitutional if they were imposed on the parties directly through a statute or regulations and (2)

whether the conditions affect protected conduct outside the scope of the government program or benefit at issue.

Here, the purported waiver of the right to resign would easily fail that test. First, it would obviously violate the First Amendment for the state to directly deprive a person of the right to quit supporting a group whose principles one disagrees with. Second, the restriction of that right here effectively bars the petitioners from withdrawing from the union for any reason, and thus it applies far beyond whatever narrow limits might be justified by the needs of labor peace.

Another version of the unconstitutional conditions test that specifically addresses waivers of First Amendment rights balances "the condition that a person give up his constitutional rights . . . against the government's interest in promoting the efficiency of public services." *Lake James Cmty. Volunteer Fire Dep't*, 149 F.3d at 282. But here, that balancing would, again, turn in the Petitioners' favor—if the court below had attempted it. In *Janus*, there was no reason to believe that forcing non-members to pay agency fees was the best-tailored means of accomplishing labor peace, 138 S. Ct. at 2465–66, and there is no evidence here that barring the Petitioners from quitting the union is essential to labor peace.

The union might argue that forbidding people from disassociating themselves from it is important to ensuring that it can bring an effective strike if necessary, *see* Werntz, *supra*, at 171–72, but this is

essentially a "free rider" argument, and *Janus* made clear that "avoiding free riders is not a compelling interest" sufficient to overcome First Amendment rights. *Id.* at 2466. If it were, the Court asked, "[c]ould the government require that all seniors, veterans, or doctors pay for that service even if they object?" *Id.* A similar rhetorical question could be asked here: if preventing resignation from the union is a constitutional means of preventing free-riding or ensuring the efficiency of government operations, why not simply forbid members from resigning *at all*? Or forbid them from resigning for the first 25 years of employment? The answers to these questions are obvious: such a burden would vastly outweigh any legitimate government interest and unjustifiably curtail the expressive rights of workers. Yet the court below failed to even ask these questions, or to consider such balancing. That warrants certiorari.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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