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

MOTION FOR LEAVE AND BRIEF OF *AMICUS CURIAE* MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37 of the Rules of this Court, the Mackinac Center for Public Policy respectfully request leave to file the accompanying *Amicus Curiae* Brief in support of the petition for writ of certiorari in the above-referenced case. Petitioners consented to the filing of the brief; Respondents did not respond the ten-day notice of intent to file.

The Mackinac Center for Public Policy is a Michigan based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. It has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws. Since 2013, the Center has experience in informing public employees about their rights related to mandatory bargaining, agency fees, and now this Court's decision in *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018). In this experience, the Center has developed a particular expertise in identifying pockets of public employees and their membership and/or union coverage status. This Court cited some of the Center's work in *Janus*. *Id*. at 2466 n. 3.

The proposed brief sets forth the prevalence of public employees who may be under maintenance-of-membership provisions. Further, it explains how such provisions could undermine *Janus*.

For the foregoing reasons, *Amicus Curiae* Mackinac Center for Public Policy requests leave to file the following *Amicus Curiae* Brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Mackinac Center for Public Policy is a Michigan based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. It has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws.

SUMMARY OF THE ARGUMENT

This Court should recognize that there is a constitutional right to resign from a public sector union. This Court has previously recognized that union shops wherein employees are forced to be full members as opposed to financial support members (more commonly known as agency fee payers) raises significant First Amendment concerns. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). A right to resign allows employees to change their minds and avoid being trapped in full membership for years at a time with that full membership including an obligation to financially support the union.

[1] This brief has not been consented to by all parties at this time although all parties were given ten days' notice of the intent to file it. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Second, this Court should hold, as a matter of clarifying or expanding the no-forced subsidy right recognized in *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018) that any dues authorizations requiring nonmembers who resigned after *Janus* to continue financial support should be limited to a year or less. This would be somewhat akin to the annual process that occurred under *Teachers v. Hudson*, 475 U.S. 292 (1986), whereby the union had to provide the information packet and the nonmember had to make a choice whether or not to challenge the union's chargeability determination. Further, all of the major federal labor laws have settled on this one-year-maximum process.

INTRODUCTION

This case concerns two First Amendment rights that are intertwined in the mandatory public bargaining sphere: (1) the right not to associate; and (2) the right this Court recognized in *Janus* that "public employees" cannot be "forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities." 138 S.Ct. at 2459-60. This *Janus* right prevents forced subsidization of public sector mandatory bargaining unions, which was said to violate the public employees' "free speech rights . . . by compelling them to subsidize private speech on matters of substantial public concern." *Id*. at 2460.

In deciding *Janus*, this Court stated:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

Id. at 2485-86.

Unions still want to obtain the financial support level they had pre-*Janus*. An unobjectionable manner of receiving some of that support is from voluntary members. Here, however, this Court is being asked to review a system whereby public employees can be required to remain public-sector union members over the course of a number of years even after they sought to resign. This "membership" includes a financial obligation to support the union. Thus, contrary to *Janus*, a public employee can be forced to provide financial support for the entire course of a collective bargaining agreement.

These purported years-long obligations are due to so-called maintenance of membership provisions in collective bargaining agreements, which are explicitly

permitted by statute in California and Pennsylvania and permitted by case law in Ohio.[2] This Court has

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[2] The California statutory provisions permitting maintenance of membership include Cal. Gov't Code §§ 3513(i) and § 3515.7 (state employees); Cal. Gov't Code § 3524.59(a) (judiciary employees); Cal. Gov't Code § 3540.1(i)(1) (school employees); and Cal. Gov't Code § 3583(a) (higher education employees).

The Pennsylvania statutory provision permitting maintenance of membership to most public employees is 43 Pa. Const. Stat. § 1101.301(18).

While not explicitly permitted by statute, in Ohio, the State Employment Relations Board has held such provisions are proper. *In re United Steelworkers of America*, State Emp. Rel. Bd. 89-009 (Ohio May 3, 1989), 1988 WL 1519977 at *9 n. 12; see also *Allen v. Ohio Civ. Serv. Emp. Ass'n AFSCME, Local 11*, 2020 WL 1322051 (S.D. Ohio March 20, 2020) (discussing a maintenance-of-membership provision).

In California, according to a July 7, 2022 FOIA response from the State Controller to the Mackinac Center for Public Policy, there were 188,879 state employees and 64,4410 university employees under collective bargaining agreements. Email from Ethan F. Jaffe, Staff Couns., Cal. State Controller (July 7, 2022 01:59 EST (on file with undersigned)). As of February 29, 2020, the California Teachers Association had around 300,000 members. https://www.the74million.org/article/exclusive-as-sacramento-educators-strike-post-covid-numbers-show-accelerated-membership-losses-in-california-teachers-association/. Thus, California has around 450,000 public employees that could be in maintenance-of-membership situations.

According to its 2020-21 LM-2, the Pennsylvania Education Association has just under 140,000 active members. https://olmsapps.dol.gov/query/orgReport.do?rptId=788496&rptForm=LM2Form (schedule 13).

The Ohio Education Association has around 109,000 active members. https://olmsapps.dol.gov/query/orgReport.do?rptId=788504&rptForm=LM2Form (schedule 13).

never ruled on the constitutionality of such provisions and should grant certiorari to do so now.

Public sector unions and their legislative allies have already taken a number of actions to undermine *Janus*.[3] Absent a ruling from this Court, it is expected that such maintenance-of-membership agreements would spread from the three states discussed above to many more of the nineteen other states that had allowed agency fees at the time *Janus* was decided. Allowing forced years-long membership would largely obviate the no-compelled financial support right from *Janus*.

ARGUMENT

I. PUBLIC EMPLOYEES CANNOT BE FORCED TO REMAIN UNION MEMBERS FOR YEARS AT A TIME AFTER EXPRESSING AN INTENT TO RESIGN

What makes this case particularly important is, that through a statutory provision, California sanctions an agreement by which a public employer (in this case the state itself) and public sector union can require public employees to remain members of a union for years at a time. This membership carries with it the

Thus, in the three states where maintenance-of-membership provisions are known to exist, cumulatively around 750,000 public employees could be under such provisions.

[3] Footnote two of Petitioners' brief lists many of these restrictions meant to thwart *Janus*.

obligation of financial support. Allowing years-long membership and financial obligations on public employees would undermine this Court's decision in *Janus*.

A. *Abood*

In *Abood*, this Court considered the constitutionality of the agency shop. The agency-shop provision in question in *Abood* was in a collective bargaining agreement and this Court noted "Nothing in the agreement, however, required any teacher to join the Union, espouse the cause of unionism, or participate in any other way in Union affairs." *Id*. at 212.

This Court began its analysis by discussing *Railway Employees v. Hanson*, 351 U.S. 225 (1956), which upheld a constitutional challenge to a union-shop agreement. The *Abood* Court defined that term:

> Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required. Under both the National Labor Relations Act and the Railway Labor Act, "(i)t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." *NLRB v. General Motors*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670. See 29 U.S.C. § 158(a)(3); 45 U.S.C. §152 Eleventh,

> quoted in n. 11, infra. Hence, although a union shop denies an employee the option of not formally becoming a union member, under federal law it is the "practical equivalent" of an agency shop, *NLRB v. General Motors*, supra, at 743, 83 S.Ct. at 1459. See also *Lathrop v. Donohue*, 367 U.S. 820, 828, 81 S.Ct. 1826, 1830, 6 L.Ed.2d 1191.
>
> *Hanson* was concerned simply with the requirement of financial support for the union, and did not focus on the question whether the additional requirement of a union-shop arrangement that each employee formally join the union is constitutionally permissible. See *NLRB v. General Motors*, supra, 373 U.S. at 744, 83 S.Ct. at 1460. ("Such a difference between the union and agency shop may be of great importance in some contexts. . . ."); cf. *Storer v. Brown*, 415 U.S. 724, 745-746, 94 S.Ct. 1274, 1286, 39 L.Ed.2d 714. As the agency shop before us does not impose that additional requirement, we have no occasion to address that question.

Abood, 431 U.S. at 217 n. 10.

Thus, the First Amendment right not to associate at issue here implicates "that additional requirement" of formal (as opposed to financial-support) membership that even the *Abood* court recognized may be of "great importance."

B. *Janus*

On June 30, 2018, this Court decided *Janus* and, in pertinent part, held that:

> States and public-sector unions may no longer extract agency fees from nonconsenting employees. . . . This procedure violates the First Amendment and cannot continue. Neither an agency fee **nor any other payment** to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, **unless the employee affirmatively consents to pay**. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.

Janus, 138 S.Ct. at 2486 (emphasis added).

Janus made clear and unequivocal that a public-sector union cannot compel payments from nonmembers as doing so violates an employee's First Amendment right. However, *Janus* left open several important corollaries that must be addressed so as to give true meaning to the right set forth in *Janus*.

C. This Court should recognize a constitutional right to resign

First, this Court should hold that a First Amendment right exists to immediately resign union membership. The First Amendment does not permit forced association. The right to resign is essential to protect employees from state statutes that preclude a member

from leaving a union for an extended period of time and therefore, prevents the member from availing themselves from the protections set forth in *Janus*.

D. Circuit split on legal effect of post-*Janus* resignation

1. Third Circuit's *LaSpina* decision

The Third Circuit, despite eventually dismissing the underlying claim for a reason not applicable here, has indicated that a resignation letter ending membership and revoking a dues deduction is presumptively effective immediately and is not trumped by a prior dues authorization. *LaSpina v. SEIU Pennsylvania State Council*, 985 F.3d 278 (3d Cir. 2021).

In *LaSpina*, a librarian had joined the union where an agency shop was in place. *Id*. at 278. The library and union would not withdraw dues without a valid dues authorization and evidence was provided that LaSpina had signed one. *LaSpina v. SEIU Pennsylvania State Council*, 3:18-cv-2018, Docket Entry No. 72 at 2 (¶¶ 5-7).

Janus was decided on June 27, 2018. On August 20, 2018, LaSpina mailed a letter to her union and to the library's human resource director stating: "I am immediately terminating my membership in the union and all its affiliates and revoking any previous dues authorization, check off, or continuing membership form that I may have signed." *LaSpina*, 985 F.3d at 283. For two months, the library continued deducting

dues. *Id*. The union told the library to stop deducting dues and sought to refund the amount collected over the last two months. *Id*. at 284.

LaSpina brought three claims: (1) "a refund of the compulsory portion of the membership dues she made prior to *Janus*"; (2) "a refund of membership dues that were diverted from her wages after she submitted her union-resignation letter and demanded the Union cease deducting membership dues, as well as an injunction to prevent the union and her employer from diverting her wages in the future"; and (3) "classwide injunctive relief on behalf of all public employees who are paying some form of dues to the Union but who have not submitted a waiver of their constitutional rights under *Janus*." *LaSpina*, 985 F.3d at 284.

The first and the third claims were dismissed for justiciability reasons. *Id*. at 284-87, 289-90. But, the second claim was dismissed on the unique circumstances surrounding the merits.

The Third Circuit began its analysis of this claim by indicating that a member presumptively transitions to a nonmember by mailing a resignation letter thereby overriding any previous membership agreement or dues authorization:

> *Janus* does conclude that public-sector unions cannot collect "an agency fee [ ]*or any other payment* . . . from a nonmember's wages" unless the employee "clearly and affirmatively consent[s] before any money is taken." *Janus*, 138 S. Ct. at 2486 (emphasis added).

> Here, LaSpina presumptively became a "nonmember" of the Union when she mailed her resignation letter on August 20, 2018. See App. 110. In that letter, she gave clear and affirmative dissent. *Id*. ("I no longer wish to pay dues or fees to the union[,] . . . and [I am] revoking any previous dues authorization, check off, or continuing membership form that I may have signed."). Despite those instructions, for a period of approximately two months, the Union continued to deduct union dues from LaSpina while she was, in a strict sense, a nonmember.

Id. at 287-88.

What prevented the Third Circuit from finding the union and library liable was not a previously signed dues authorization; rather, it was the unique circumstances and confusion that surrounded implementing *Janus* in its **immediate** aftermath:

> Here, the record evidence suggests that the Union immediately sought to comply with *Janus*' new constitutional rule. The day *Janus* was decided, the president of SEIU Local 668 informed the Scranton Public Library that the "Supreme Court has ruled in *Janus*. . . . [and] has held [that] public-sector employers may no longer deduct agency fees from non-consenting employees." Supp. App. 69. The president directed the Library to "immediately" cease requesting or deducting fair-share fees from nonmember employees. Given the enormity of the task faced by public-sector unions in the wake of *Janus*, and the lack of any

> direction from the Supreme Court that the period in which union members transitioned to nonmembers could give rise to new constitutional violations, we decline to find any First Amendment violation under *Janus* for an employer's or union's **failure to promptly process a member's resignation notice and terminate the associated dues deductions**.

Id. at 288 (emphasis added).

It is no longer two months since *Janus* was decided. It is now over four years. Whatever understandable confusion that existed about processing resignation letters post-dating *Janus* that terminate dues authorizations pre-dating *Janus* should have long since dissipated by this point. Signing a dues authorization is not a life-time ban (or in this case years-long ban) from exercising a constitutional right.[4]

2. Ninth Circuit treatment of resignations

The Ninth Circuit has been somewhat inconsistent and/or unclear with resignations. In *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), a case that originated in the State of Washington and therefore was not a maintenance-of-membership case, the Ninth Circuit noted that public employees' resignations were processed by the union upon receipt, but held the dues

[4] Also, the Third Circuit decision implies that not only is the resignation supposed to take effect immediately, but so is the termination of the dues deductions. As will be seen below, other Circuit Courts are not in agreement on this point.

authorizations still required employee payment to the union until their one-year terms expired. *Id*. at 940.

Cooley v. California Statewide Law Enforcement Association, 2022 WL 1262015 (April 28, 2022), is, like the instant matter, another maintenance-of-membership case. A petition for writ of certiorari in that case is currently pending. *Cooley*, Supreme Court Case No. 22-216. There, the Ninth Circuit held there is no right to resign:

> The district court properly concluded that Cooley does not have a First Amendment right to resign from his union. Although the freedom of association contained within the First Amendment includes the freedom against compelled associations, none of the cases cited to the district court or to this Court establish that there is a constitutional right to end voluntary contractual associations. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Cooley agreed to become a member of CSLEA subject to the stated membership resignation limitations and the First Amendment cannot and does not erase that voluntary association.

Cooley, 2022 WL 1262015 at *1.[5]

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[5] There is another California maintenance-of-membership petition for writ of certiorari before this Court. *O'Callaghan v.*

The Ninth Circuit through its inclusion of California, Washington, Oregon, etc. has the most public employees directly affected by *Janus.* Furthermore, it has the 450,000 California public employees who could statutorily be subject to multi-year maintenance-of-membership provisions. Particularly due to the statutory forced membership, this Court should determine if there is a constitutional right to resign from unions.

3. Other Circuits have not addressed resignations despite ruling on dues authorizations

In *Bennett v. Council 31, AFSCME*, 991 F.3d 724 (7th Cir. 2021), the Seventh Circuit enforced a one-year dues deduction authorization that would automatically renew unless withdrawn during a particular fifteen-day period. In *Bennett*, the union immediately accepted the resignation, but sought to continue withholding dues until the end of the due-deduction agreement. The dues authorization predated the *Janus* decision and the Seventh Circuit treated it as a contract that was not affected by *Janus*' waiver language. *Id*. at 730-33.

In *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), the Tenth Circuit enforced a pre-*Janus* one-year dues deduction authorization that automatically renewed unless the employee revoked it during the first two weeks in December. The initiation

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Napolitano, Supreme Court Case No. 22-219. The Ninth Circuit analysis in that case is so sparse as to be of little use here.

of the lawsuit is what indicated that the plaintiff wanted to resign and the union immediately processed it. *Id*. at 955.

Thus, both of these cases involved immediate acceptance of the resignation and a claim that a one-year dues authorization was permissible. Here, in contrast, the Petitioners are being forced to remain members for years at a time both due to a collective bargaining agreement and a state statute. This forced membership compels them to continue financial support for a public-sector union years after they have indicated a desire to end their affiliation with the union.

E. Pre-*Janus* support for right to resign

Assuming a constitutional right to resign from a public-sector union did not arise from this Court's *Janus* decision, years of lower court decisions indicate such a right should exist. *Janus*' decision that non-members cannot be forced to subsidize a public-sector union is a natural outgrowth of the inherent, but not yet clearly established, First Amendment right to leave a union.

In *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), this Court discussed "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Id.* at 308. In *Abood* this Court stated: "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and

his conscience rather than coerced by the State." 431 U.S. at 234-35, overruled on other grounds by *Janus*, *supra*. Further, in *Abood*, while this Court did not prohibit nonmembers from having to pay agency fees, it did recognize that there is a First Amendment interest in not associating with a union: *Id*. at 234. This Court continued:

> And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, [319 U.S. 624, 642].
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso v. Watkins*, [367 U.S. 488], or to associate with a political party, *Elrod v. Burns*, [427 U.S. 347, 363-364, n. 17], as a condition of retaining public employment.

Abood, 431 U.S. at 233-34.

In *Smith v. Arkansas State Employee, Local 1315*, 441 U.S. 463 (1979), this Court held the First Amendment does not require a state to recognize and bargain with a public employee union. In explaining this decision, this Court noted:

> [T]he First Amendment is not a substitute for the national labor relations laws. . . . [T]he fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution.

441 U.S. at 464. Despite this admonition, *Pattern Makers' League of North America, AFL-CIO v NLRB*, 473 U.S. 95 (1985), wherein this Court discussed the right to resign under the NLRA, is a useful starting point since those rare courts that, pre-*Janus*, have considered whether there is a First Amendment right to resign often refer to it.

In *Pattern Makers*, this Court addressed a case concerning a union bylaw which sought to limit when a member could resign from the union. The bylaw prohibited resignation during a strike or lockout or when either of those events appeared imminent. *Id*. at 97. The union was seeking to fine employees who had resigned during a strike and returned to work.

This Court considered whether the union's resignation prohibition violated Section 7 of the Act, 29 U.S.C. § 157, which grants employees the right to "refrain from any or all [concerted] . . . activities." *Pattern Makers*, 473 U.S. at 100. The issue was defined as "whether a union is precluded from fining employees who have attempted to resign when resignations are prohibited by the union's constitution." *Id*. at 101. This Court noted that its prior cases had left open "the

extent to which contractual restrictions on a member's right to resign may be limited by the Act." *Id*. at n. 9 (emphasis added).

This Court stated that "restrictions on the right to resign" are "inconsistent with the policy of voluntary unionism" found in the NLRA. *Pattern Makers'*, 473 U.S. at 104. The policy behind voluntary unionism is that "allowing employees to resign from a union at any time . . . protects the employee whose views come to diverge from those of his union." *Id*. at 106 (emphasis added). It was noted "restricting the right of employees to resign . . . impairs the policy of voluntary unionism." *Id*. at 107. This Court concluded by overturning the resignation ban, holding it was "inconsistent with the congressional policy of voluntary unionism." *Id*. at 114.

The first case to consider whether there was a First Amendment-based right to resign from a public-sector union was *Debont v. City of Poway*, 1998 WL 415844 (S.D. Cal. 1998). There, the plaintiff challenged an eight-year maintenance-of-membership clause. Four years into it, the employee sought to resign. The union denied the request and indicated he could not leave until one month before the eight-year bargaining agreement ran. *Id*. at *1.

Plaintiff filed suit and alleged a violation of the First Amendment. The matter was reviewed in a preliminary injunction/temporary restraining order context. On the merits, the union claimed that the employee voluntarily joined and therefore had no First

Amendment claim, however the court rejected this argument:

> [The union] ignore[s] the fact that Plaintiff is being required 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. Whether or not he voluntarily chose to join the union some time ago is not the issue. Plaintiff no longer wishes to be associated with the union, nor to pay to support its activities.
>
> . . .
>
> I find that requiring an employee to maintain membership in a union implicates First Amendment freedom to associate or to refrain from associating with the union.
>
> In this case, it is clear that Plaintiff's First Amendment rights are at issue and may be unconstitutionally infringed by the MOU's requirement that he remain a member of the union until the expiration of the agreement.

Id. at *2-3. The trial court continued:

> I would also note that what is at the heart of the First Amendment in this country is the freedom of expression, the freedom of speech, the freedom not to speak, the freedom to associate, the freedom not to associate, and all of which inherently also involve the freedom to change one's mind. That's the great part of the American system, is the right to change your mind.

> Now, that is a problem, I see, with this whole agreement, is one is locked in for a period of time, up to eight years; in this case, about three and a half years or four years after the Plaintiff chose not to become a member because of this particular agreement.
>
> 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.
>
> I find, therefore, that Plaintiff has shown he is likely to succeed on his First Amendment claim.

Id. at *6.[6]

The trial court entered a temporary restraining order preventing the payroll deduction. *Id*. at *6.

In *McCahon v. Pennsylvania Turnpike Commission*, 491 F.Supp.2d 522 (M.D. Pa. 2007), a public employee sough a preliminary injunction to resign from a union despite the collective bargaining agreement containing a maintenance-of-membership clause. The agreement spanned three years and prohibited the employee from resigning until fifteen days prior to its end. *Id*. at 525. The plaintiff filed suit with about six months left on the bargaining agreement. *Id*. at 526. The

[6] Alternatively, noting that the pertinent California bargaining law had right-to-refrain language like that in the NLRA, and citing *Pattern Makers*, the court held that plaintiff would also be likely to succeed on the basis of a statutory right to resign as well. *Id*. at *5.

District Court noted there was "a dearth of case law on the issue of whether 'maintenance of membership' provisions violate the First Amendment." *McCahon*, 491 F.Supp.2d at 526. The court held that union members likely have a constitutional right to leave the union:

> In the matter sub judice, the "maintenance of membership" provision locks plaintiffs into union membership for the duration of the CBA – the only way plaintiffs can resign from the union is to leave their employment. See, e.g., [*Debont v. City of Poway*]. Despite 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. . . . Thus, the "maintenance of membership" provision may have a direct and deleterious impact on plaintiffs' rights under the First Amendment.

Id. at 527. The court entered the injunction. *Id*. at 529.

The key question – recognized in the statutory concept of voluntary unionism in *Pattern Makers* and the First Amendment discussion in *Debont* – is to what extent individuals are able to change their minds about union membership. When a union endorses a candidate the employee abhors, must the employee maintain membership? When the union speaks on a public issue of the day (e.g., abortion, gun control, race relations, religion, etc.) and the employee disagrees, must membership be maintained? A union member cannot predict into the future every position or action

the union may take, and union membership should not compel a union member to continue to associate with speech or actions to which a member does not agree. Again, the bargaining agreement in *Debont* was eight years long. Without a constitutional right, there is no limiting principle.[7]

But, in *Edwards v. Indiana State Teachers Association*, 749 N.E.2d 1220 (Ind. Ct. App. 2001), the Indiana Court of Appeals rejected the idea that public schoolteachers had a constitutional right to resign from their public sector unions at any time. Viewing the matter as one of contract law, the court rejected the concept that *Pattern Makers* should control noting that *Pattern Makers* resolved a statutory and not a constitutional issue. *Edwards*, 749 N.E.2d at 1227-28. The Indiana Court of Appeals based its holding on *Abood*. *Id.* at 1228-29.

Debont and *McCahon* better encapsulate the important First Amendment interests identified by this

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[7] This is not a hypothetical concern. When Michigan enacted a right-to-work the law did not take effect for a couple of months and existing contracts were grandfathered in. Some school districts entered into ten-year collective bargaining agreements in the interim in an attempt to keep agency fees in effect for that period. See *Taylor v. Rhatigan*, 900 N.W.2d 699 (Mich. Ct. App. 2016).

A ruling foreclosing the First Amendment means that public employees would be dependent on state contract law and/or state labor laws for protection. Given the exercise of political power shown by the unions in successfully advocating anti-*Janus* legislation, it seems unlikely the free-conscience considerations of individual public employees would be given much weight.

Court about free will and individual beliefs free of state coercion. *Edwards* is based on that portion of *Abood* that has been overturned – i.e., that individual limitations on the First Amendment rights of public-sector employees are tolerated due to the purported importance of the role of public sector unions and the need to provide adequate funding for them. *Janus*' rejection of that portion of *Abood* makes *Edwards* unpersuasive.

II. AS A MATTER OF CONSTITUTIONAL LAW, A DUES AUTHORIZATION CANNOT REQUIRE PUBLIC EMPLOYEES TO FINANCIALLY SUPPORT A UNION THEY HAVE RESIGNED FROM FOR LONGER THAN A YEAR

Many post-*Janus* cases cite to *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991) for the proposition that there is not a First Amendment violation here. Generally, the argument is that the public employee long ago had a choice whether or not to join a union. Having signed a dues authorization, that document constitutes a contract and remains binding despite the change from *Janus* in the amount of financial support that can be sought from "nonmembers."

There are a number of cases including *Bennett* and *Hendrickson* wherein dues authorizations which only allow a couple of weeks a year to withdraw from that agreement have been upheld. What is unique in the instant petition, is that the union is not just seeking

financial support for a year or less without membership and with an annual window to exit the dues authorization. Instead, the union is seeking multi-year membership and financial support.

First, consider the argument that *Janus* is limited to nonmembers. Note the set of plaintiffs that were allowed to bring suit in *Abood*:

> Some of the plaintiffs were Union members and were paying agency-shop fees under protest; others had refused either to pay or to join the Union; **still others had joined the Union and paid the fees without any apparent protest**. The agency-shop clause itself prohibits the discharge of an employee engaged in litigation concerning his service charge obligation until his legal remedies have been exhausted, and no effort to enforce the clause against any of the plaintiffs has been made.

Id. at 212 n. 2 (emphasis added). In *Abood*, there was no claim that the First Amendment only protected the interests of those that had already left the union (i.e., nonmembers). It was not the case that a long-ago signed dues authorization (and/or a union security provision in a collective bargaining agreement) foreclosed suit.

Second, consider *Cohen*. In that case, this Court held there was no First Amendment violation where the enforcement of "generally applicable laws" against the press "has incidental effects on its ability to gather and report the news." *Id*. at 669. For example, this

Court noted: "The press may not with impunity break and enter an office or dwelling to gather news." *Id*. Nor may the press "publish copyrighted material without obeying the copyright laws." *Id*.

The crux of *Cohen* is that the press does not get heightened First Amendment rights as opposed to regular citizens. It does not stand for the proposition that there can be no First Amendment violation wherever there is a contract of some sort. *Cohen* is the rejection of the press being able to trump generally applicable law if it contends that its action was necessary to gather news.

Turning to the multi-year matter, in *Belgau*, the Ninth Circuit took care to note that these authorizations were of "a limited payment commitment period." *Id*. at 952. Further, it noted that "[n]either state law nor the collective bargaining agreement compels involuntary dues deductions." *Id*. at 944.

That is not the case in the instant petition as the Ninth Circuit noted that the maintenance-of-membership provisions are in the collective bargaining agreement. Further, the Petitioners are state employees of the California Department of Parks and Recreation and therefore Cal. Gov't Code § 3513(i) controls.

Finally, without any analysis in this matter, the Ninth Circuit ignored the "limited payment commitment period" from its published *Belgau* decision and indicated it could see no legal difference between an irrevocability period of one year versus the four here.

In *Hudson*, this Court set forth the procedural safeguards that allowed nonmembers to challenge the computation of agency fees. "Practical reasons" allowed the union to base computation of the current year's fee "on the basis of its expenses during the prior year." *Id*. at 307 n. 18. But the unions had to annually provide the nonmembers with a packet so that they could determine whether to accept or challenge the computation.

Again, in *Smith*, this Court indicated that the First Amendment is not a substitute for federal labor laws. But, it is worth noting that all of the major federal labor laws have settled on a one-year maximum for dues authorizations. 29 U.S.C. § 186(c)(4) (NLRA); 45 U.S.C. § 152, Eleventh (b) (RLA); 39 U.S.C. § 1205(b) (postal service); and 5 U.S.C. § 7115(a) (federal employees).

If this Court were to recognize a year as the maximum time that a dues authorization can issue, it would have to do so as a matter of clarifying or expanding the no-forced financial support holding of *Janus*. Otherwise, state labor or contract law would control and *Janus* could be undermined.[8]

[8] Further, it may be that that language necessary to trigger continued financial support may differ depending on whether the dues authorization was signed before *Janus* was decided or after it was decided. Indiana has passed verbiage that must be included on public school employee dues authorization forms post-*Janus* and choose to make the dues authorizations revocable at will. Ind. Code § 20-29-5-6(c)(3).

CONCLUSION

For the reasons stated above, this Court should grant certiorari in this case.

Respectfully submitted,

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