No. 18-910

In the
Supreme Court of the United States

CITY OF SAN DIEGO, CALIFORNIA,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to this Court's Rule 37.2, Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner.

This case presents a First Amendment issue that intersects with labor law in the context of public employee unionism. Amicus has an interest in ensuring that all speakers retain full protection granted by the First Amendment, and submits this brief to highlight the national importance of full and free speech by all speakers on matters of public policy. PLF's broad litigation and advocacy experience in the area of the First Amendment and free speech will offer the Court an important perspective that will be beneficial in assessing the petition for writ of certiorari.

Written consent to the filing of this brief was granted by counsel for Petitioner. Counsel for Respondents Catherine A. Boling, T.J. Zane, and Stephen B. Williams also consent to the filing of this brief. However, counsel for Respondents Public Employee Relations Board, San Diego City Firefighters Local 145, American Federation of State, County and Municipal Employees, Local 127, San Diego Municipal Employees Association, and San Diego Deputy City Attorney's Association denied Pacific Legal Foundation's request for consent, necessitating the filing of this motion.

DATED: February, 2019.

Respectfully submitted,

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QUESTION PRESENTED

Whether California Government Code section 3505, the "meet-and-confer" provision of the California Meyers-Milias-Brown Act [Cal. Gov't Code § 3500, *et seq*.], can preempt an elected public official's First Amendment right to express his or her views on a matter of significant public concern.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as one of the most active and experienced nonprofit legal foundations of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the First Amendment rights of workers. PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989). PLF has participated as amicus curiae in all of the most important cases involving the application of the First Amendment freedoms of speech and association to instances of government compulsion, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016); and *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). PLF submitted amicus briefs in this case in the court below.

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Like many government employers, the City of San Diego faces severe financial distress related to public employee pensions. *See*, *e.g.*, *Janus*, 138 S. Ct. at 2474-75 (noting the "severe budget problems" existing in many counties and cities throughout the nation related to "unfunded pension and retiree healthcare liabilities"). Citizens of the city sought to reform the existing pension plan via a ballot initiative publicly supported by then-Mayor Jerry Sanders. Speaking out on this pressing municipal issue, the mayor urged voters to approve the initiative. In response, public employee unions charged the city with engaging in an unfair labor practice, as defined by a state statute. The unions successfully argued that passage of the pension reform initiative would prospectively affect the terms and conditions of city employment, usually a matter covered by the negotiated collective bargaining agreement, and therefore subject to statutory meet-and-confer requirements. Pet. App. 28a.

As in many cases involving public employee unions, the litigation arising from this dispute implicates both First Amendment law and labor law. However, despite full briefing on both issues, the court below addressed only provisions of statutory labor law, ignoring how its interpretation of the statute infringed on First Amendment rights.

This case raises an issue of increasing national importance. California, which often serves as a bellwether in matters of public policy, illustrates the length to which pro-union state legislatures will go to silence opposition to union objectives. For example,

California law forbids public employees from discussing union membership or dues with any government employer, and grants to unions exclusive access to new employee orientation. The silencing of public employers does lasting damage to a representative democracy and violates public officials' First Amendment freedoms of speech and association. Laws that enable public employee unions to silence competing voices cannot withstand First Amendment scrutiny.

The petition should be granted.

REASONS TO GRANT THE PETITION

I

FIRST AMENDMENT RIGHTS FOR PUBLIC OFFICIALS ARE ESSENTIAL IN A REPRESENTATIVE DEMOCRACY

A well-functioning representative democracy depends on the ability of elected officials to speak their minds on matters of public importance. When labor statutes are interpreted to silence public officials on matters of public policy, including the terms and benefits of government employment, not only are the officials' First Amendment rights violated, but the people they serve are denied the ability to know the officials' positions so as to hold them properly accountable. *See Janus*, 138 S. Ct. at 2474 ("[I]t is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern.") (citing *Harris*, 134 S. Ct. at 2642-43).

The Declaration of Independence labels as self-evident that government legitimacy is predicated on the consent of the governed. 1 Stat. 1, ¶ 2 (1776). In a representative form of government, whether national

or local, consent is secured through participation in the democratic process. *See* Bernard Manin, *The Principles of Representative Government* 175, 178 (Cambridge University Press 1997). *See also* The Federalist No. 39 (James Madison) (defining a republic as "a government which derives all its powers directly or indirectly from the great body of the people"). This participation is expressed through the actions of elected officials on behalf of their constituents, and the ability to remove incumbent candidates from office.

First, it is through the actions of elected representatives that citizens are made "present" in their government. Manin, *supra*, at 178. This includes the ability to speak freely on issues of public importance, such as those affecting public pension plans. The First Amendment protects "the free discussion of governmental affairs," including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. State of Ala.*, 384 U.S. 214, 218-19 (1966). Political speech "occupies the highest rung of the hierarchy of First Amendment values," *Connick v. Myers*, 461 U.S. 138, 145 (1983), "in which the importance of First Amendment protections is at its zenith," *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Accordingly, political speech is "entitled to special protection." *Connick*, 461 U.S. at 145. The people, expressing themselves through their elected officials, should be allowed to speak on matters of public importance unencumbered by speech codes promulgated by public labor unions.

Second, expressing their policy positions is a vital means for the public to assess the performance of candidates' effectiveness in office. Popular elections are the means by which we are justified in describing any form of government as truly "by the people." *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 537 (1998). It is "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966). "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 395 (1962). If elected officials are muzzled on issues of public importance, then the democratic oversight of the people will be equally retarded. *See also* The Federalist No. 21 (Alexander Hamilton) ("The natural cure for an ill-administration, in a popular or representative constitution, is a change of men.").

Here, the court below held that California Government Code section 3505 operated to prevent the duly elected mayor of San Diego from expressing his views on a matter of pressing public importance: how to deal with a two billion dollar unfunded pension liability that consumed close to 20% of the City's annual budget. This is a matter of great concern to the voters of San Diego and one upon which they would reasonably expect their elected mayor to stake a position.

According to the decision below, Mayor Sanders was free to express his views on behalf of his constituents upon any topic of public importance he

chose—except topics that would alter compensation for public workers. Pet. App. 18a-19a. The Comprehensive Pension Reform Initiative, the provision at the heart of Mayor Sanders' disputed speech, was a pension reform initiative proposed by citizens concerned with the future fiscal health of their city government. Mayor Sanders did not propose or sponsor the measure; instead, he expressed his position on the initiative's merits. By speaking out, the mayor not only represented his constituents, he also allowed them to assess his performance in office on this important issue. While Mayor Sanders was ineligible for reelection to the office of mayor due to city term limits, *see* City of San Diego City Charter Article XV § 265(d), the decision below nonetheless undermines the operation of democratic oversight to all elected officials in the state who are not so limited. Moreover, Mayor Sanders himself remains eligible for a wide array of public offices in California where his actions as mayor would be relevant for voter consideration.

The decision of the court below stands in direct conflict with the previous decisions of this Court, the requirements of democratic oversight, and the political philosophy of our republican system of government. Mayor Sanders, like all elected officials, had a First Amendment right and electoral duty to express himself publicly on important issues affecting public policy.

II

LABOR STATUTES CANNOT BE PERMITTED TO SILENCE PUBLIC OFFICIALS IN THE EXERCISE OF THEIR FIRST AMENDMENT PROTECTED SPEECH

The question of whether state statutes can muzzle public officials on matters involving labor law extends well beyond Section 3505's "meet and confer" requirement. It has become an especially important issue in California, which has taken extraordinary measures to silence public officials and employers in all matters concerning unions, particularly with regard to advising their employees of the First Amendment rights to refrain from joining or subsidizing public employee unions. The impetus for these recently-enacted statutes was anticipation of this Court's decision in *Janus*.

As the Court noted, public employee unions had been on notice since 2012 that states were about to lose the ability to garnish workers' wages for forced subsidization of those unions. *Janus*, 138 S. Ct. at 2485-86 ("During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain."). California's pro-union Legislature responded to the writing on the wall by enacting laws intended to protect unions from suffering adverse financial effects when they lost the ability to compel agency shop fees.[2]

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[2] California enacts many laws to protect unions, some of which have been struck down as unconstitutional, *see, e.g.*, *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 71 (2008) (invalidating "a targeted negative restriction on employer speech about

In 2017, California Governor Jerry Brown signed A.B. 119,[3] which guarantees union representatives—and only union representatives—access to all public sector new-employee orientations. Cal. Gov. Code §§ 3556-3558. The law ensures that public-sector unions have a captive audience to solicit new employees to become members. A few months later, the Governor signed S.B. 285,[4] *codified at* Cal. Gov't Code § 3550, providing that "a public employer shall not deter or discourage public employees . . . from becoming or remaining members of an employee organization" and conferring jurisdiction on the Public Employee Relations Board to enforce this law.

Then, on the very day that *Janus* was decided, the Governor signed S.B. 866,[5] as part of the budget bill, and it took effect immediately. The law extends the provisions of S.B. 285 to apply to job applicants and extends the ban on discouraging union membership to public transit agencies. Cal. Gov't Code § 3552(b). It also requires public employers to meet and confer with unions when it proposes to send a "mass communication" to public employees or applicants regarding encouraging or discouraging the

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unionization"), while others retain validity (at least for now). *See Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 903 (9th Cir. 2018) (upholding California law that channels contributions to industry advancement funds through collective bargaining agreements, exclusively), *time extended to file cert. petition until* Feb. 18, 2019.

[3] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB119.

[4] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB285.

[5] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB866.

right to join a union and, if no agreement is reached, the public employer must simultaneously send employees a "comparable" communication from the union. Cal. Gov't Code § 3553. The law further forbids public employers from informing anyone other than public employee unions about the date, time, and location of new employee orientations. Cal. Gov't Code § 3556. This prevents government employers from inviting speakers to educate public workers about their constitutional rights. Finally, the new law forbids any communication between public employers and their employees about whether the union is authorized to take deductions from the workers' paychecks. All employees must inform the union whether they authorize deductions and the union informs the public employer, without providing any documentation demonstrating the workers' affirmative consent. Cal. Gov't Code §§ 1152(a), 1157.10(b).

These laws cover virtually all public employers and employees in California.

Several elements of these laws implicate First Amendment rights to the extent they prohibit public employers from talking to their own employees about payroll deductions and require that public employees speak to a private third-party (the union) that does not process or control the public payroll. Government employers are also at risk of inadvertently violating employees' First Amendment rights because the employers must rely on the unions' representation of employees' opt-in decisions without any ability to see the "clear and affirmative" waiver required by *Janus*. Finally, the laws not only prohibit government employers from talking to their employees about

union matters, but employers are further prohibited from permitting access to constitutional lawyers or others who could explain to employees how the First Amendment protects them in the workplace.[6]

Laws that favor public employee union speech over the speech of government employers and the public employees themselves implicates the First Amendment's protection of freedom of association because requiring workers to associate—even minimally—with the union, to the exclusion of their own employer and other interested third parties, violates their rights to avoid such mandatory association and to avoid speaking when they would prefer to remain silent. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 309 (1965) ("[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."). The First Amendment does not permit a state statute to force workers to associate with a union—even just for the purpose of announcing they do not wish to be associated.

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[6] California's legislation is inspiring other pro-union states to do likewise. For example, pending legislation in Washington (H.B. 1575 and S.B. 5623) similarly requires that public employers "rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of [union] deductions." Text available at http://lawfilesext.leg.wa.gov/Biennium/2019-20/Pdf/Bills/House%20Bills/1575.pdf.
Washington is also considering muzzling legislation that requires public employers and state contractors to refrain from "distribut[ing] literature, letters, emails, or posting to employees regarding the exercise of [collective bargaining] rights." Washington S.B. 5169, http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5169.pdf.

The adverse impact on the employees goes well beyond a 10 minute conversation or submission of paperwork.[7] Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or nonmembers from opposing union political activities. *See* Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004). Workers often feel either compelled to join the union, or to stifle their beliefs, lest their disagreement incur retaliation by union leaders or coworkers. *See, e.g.*, *Martel v. Dep't of Transp., FAA*, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (employee of FAA was intimidated by union members into joining strike); *Ferrando v. Dep't of Transp., FAA*, 771 F.2d 489, 492-93 (Fed. Cir. 1985) (noting that FAA union would "monitor[] the work of non-participating [workers] and report[], and even invent[], infractions until the [worker] los[t] his job or [was] suspended").

This Court acknowledges that it is particularly important to enforce First Amendment protections in environments where heavy peer pressure plays a factor in the exercise of constitutional rights. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (citations omitted) ("[T]he government may no more use social pressure to enforce orthodoxy than it

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[7] It is not a simple matter for workers to extricate themselves from the union. *See* Steven Greenhut, *Despite* Janus *Ruling, Some Unions Still Forcing Public Workers to Pay Annual Dues*, Reason (Nov. 16, 2018), https://reason.com/archives/2018/11/16/despite-janus-ruling-some-unions-still-f (noting various strategies used by California public employee unions to "trap" employees into signing away post-*Janus* rights and concluding, "[m]any public-sector unions are making it inordinately difficult for people to opt out of dues-paying").

may use more direct means."); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (noting the importance of enforcing First Amendment rights especially where a public employee would experience "constant and heavy" pressure to avoid "displeas[ing] those who control his professional destiny"). Aside from fear of retaliation, people may simply wish "to preserve as much of [their] privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

Exercise of First Amendment rights—whether by a public official or employer or a public employee—cannot be dependent on a public employee union's grant of permission.

CONCLUSION

Few of this Court's cases consider the First Amendment speech rights of public officials in their capacity as employers subject to labor law. This case presents that issue in a straightforward, factually-clear manner that warrants consideration.

The petition for writ of certiorari should be granted.

DATED: February, 2019.

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