IN THE SUPREME COURT
STATE OF ARIZONA

MARK GILMORE; and MARK HARDER, Plaintiffs/Appellants, v. KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix, Defendants/Appellees, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2384, Intervenor-Defendant/Appellee	Supreme Court No. CV-23-0130-PR Court of Appeals, Division One No. 1 CA-CV 22-0049 Maricopa County Superior Court No. CV 2019-009033

BRIEF AMICUS CURIAE OF LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFFS/APPELLANTS FILED WITH CONSENT OF ALL PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IDENTITY AND INTEREST OF AMICUS CURIAE

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

The Liberty Justice Center represented plaintiff Mark Janus in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), in which the United States Supreme Court held that the First Amendment protects government employees from being forced to subsidize a union's political speech. Since *Janus*, LJC has continued to litigate to protect government employees' right to be free from compelled support for a union. This case interests LJC because LJC agrees with Plaintiffs/Appellants that the release time scheme they challenge forces city employees to subsidize a union in violation the First Amendment and *Janus*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the U.S. Supreme Court held that the First Amendment forbids governments from forcing government employees to subsidize *any* union political speech, in collective bargaining or otherwise. And long before *Janus*—even as it

approved of mandatory agency fees that forced government employees to pay for unions' collective bargaining—the Court held that employees could not be forced to pay for union political and ideological speech that was not germane to collective bargaining on their behalf. It mandated procedural safeguards to ensure that no dissenting employee would be inappropriately forced to subsidize any amount of non-germane union speech for any amount of time.

The "release time" scheme that Plaintiffs/Appellants challenge in this case disregards all of that—compelling *all* employees it covers to subsidize *all kinds* of union activities, with *no* protections for their First Amendment rights. Amicus Curiae Liberty Justice Center asks this Court to reverse the lower court to give government employees the First Amendment protection to which they are entitled.

ARGUMENT

The City of Phoenix's "release time" scheme violates the First Amendment by forcing employees to pay for union political and ideological speech.

The union "release time" scheme that Plaintiffs/Appellants challenge forces employees of the City of Phoenix who are not union members to subsidize a union, namely the American Federation of State, County,

and Municipal Employees, Local 2384, Field Unit II ("AFSCME"). This violates the First Amendment under the U.S. Supreme Court's decision in *Janus v. AFSCME*, which held that the First Amendment forbids government employers from forcing employees to subsidize union political speech. It also violates the protections for employees' First Amendment rights that the Supreme Court recognized even before *Janus*, by forcing them to fund all types of union political activities—including activities for which the Supreme Court has never tolerated compelled subsidies.

From the first time it considered compelled support for government unions, the U.S. Supreme Court has made clear that the First Amendment *never* allows governments to force employees to pay for union political and ideological activities that are unrelated to collective bargaining on their behalf. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court approved of compelled union subsidies in the form of "agency fees"—that is, fees to cover an employee's supposed "fair share" of the union's collective bargaining. But it recognized that the First Amendment forbids governments from compelling employees to pay for a union's use of "funds for the expression of political views, on

behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as a collective-bargaining representative." *Id.* at 235-36. Thus, governments could not force employees to pay full union dues when a portion of the dues could be used for such purposes. Nonetheless, the Court concluded that nonmember employees could be compelled to pay for union activities that are "germane to its duties as collective bargaining representative," which would serve the government's supposed interests in "labor peace" and preventing "free riders" from taking advantage of a union's services without paying. *Id.* at 224, 235.

From the outset, *Abood* had obvious problems. The decision itself recognized—but declined to resolve—the difficulty in "drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.'" *Id.* at 236. Thus, apart from the most obvious cases, a government employee who did not want to fund a union's political and ideological activity had little way to know whether a given expenditure was proper. Worse, employees had little, if any information about how their unions were using their fees, making it

virtually impossible for them to police unions' use of the fees—and giving unions a strong incentive to cheat.

The Supreme Court attempted to address this problem in *Chicago Teachers Union v. Hudson*, recognizing a need for "[p]rocedural safeguards" to "prevent[] compulsory subsidization of ideological activity . . . without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 302 (1986). The Court said that, "although the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement." *Id.* at 302-03. Further, the Court held that "the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." *Id.* at 303. Quoting Madison and Jefferson, the Court said that this was important—and the amount at stake was irrelevant—because

of the "tyrannical character of forcing an individual an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Id.* at 305.

To ensure that no dissenting employee would be improperly forced to subsidize a union's non-"germane" political and ideological activities—in any amount, for any length of time—the Court held that a union that collects agency fees from nonmembers must provide "an adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310.

But that proved inadequate as well. The line between proper and improper uses of nonmembers' fees remained unclear, and employees still faced great difficulty in determining how their fees were used and high barriers to seeking recourse for improper uses.

Finally, in *Janus*, the Court concluded that *Abood*'s distinction between chargeable and non-chargeable union expenditures was "unworkable." 138 S. Ct. at 2481. Experience showed that courts could not provide clear guidance to distinguish between "germane" and non-

"germane" union expenditures. *Janus* also noted that the information nonmembers received about the union's use of their fees—typically, amounts spent on general categories of expenditures, with no further detail—was often useless: "How," the Court asked, "could any nonmember determine whether these numbers are even close to the mark without launching a legal challenging and retaining the services of attorneys and accountants?" *Id.* at 2482.

The Court also recognized that—even putting that problem aside—forcing employees to pay for a union's collective bargaining unacceptably infringed on First Amendment rights. *Abood* did not appreciate the "political valence" that collective-bargaining issues would have in the years after it was decided. *Id.* at 2483. The Court noted that "the ascendance of public-sector unions has been marked by a parallel increase in public spending," in which unions played a "substantial role," and that "[u]nsustainable collective bargaining agreements have . . . been blamed for multiple municipal bankruptcies." *Id.* The Court also noted that public-sector collective bargaining "addresses many other important matters," in addition to spending of public money, such as education policy and "controversial subjects such

as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions"—"sensitive political topics . . . of profound value and concern to the public." *Id.* at 2475-76 (internal marks and footnotes omitted). Thus, collective bargaining involved political speech "occupy[ing] the highest rung of the hierarchy of First Amendment values," meriting "special protection." *Id.* Thus, forcing nonmembers to pay for collective bargaining meant forcing them to pay for political and ideological speech—something the First Amendment virtually never tolerates.

Janus concluded that the government could not justify such a significant infringement on First Amendment rights: its supposed interest in preventing "free riding" was not sufficiently important, and the government could serve its supposed interest in maintaining "labor peace" without compelling nonmembers to pay fees.

Thus, *Janus* overturned *Abood* and established the rule that "[n]either an agency fee *nor any other payment* to [a] 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." *Id.* at 2486 (emphasis added). "By agreeing to pay,

nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (citations omitted).

This history shows that the Supreme Court has *always* considered it essential to protect government employees from being forced to subsidize union political and ideological activities that are not "germane" to collective bargaining. The Court imposed safeguards to attempt to ensure that employees would never be forced to subsidize such activities. And when that proved unworkable, it prohibited forced payments to government unions entirely—additionally recognizing that even a union's collective bargaining is political speech for which the government cannot justify forced funding under the First Amendment.

The City of Phoenix's release time scheme disregards all of this U.S. Supreme Court precedent and forces nonmembers to subsidize union activities of *every kind*, including partisan political activity—giving dissenters no recourse but to quit.

This Court has recognized that "release time is a component of [employees'] overall compensation package" and is paid to the union

"[i]n lieu of increased hourly compensation or other benefits . . . per unit member." *Cheatham v. DiCiccio*, 240 Ariz. 314, 318 ¶14 (2016). In other words, money that the City otherwise would have paid to employees is diverted to the union for the employees' supposed benefit. Thus, release time is a subsidy to the union paid by all employees, including nonmembers, without the affirmative consent that *Janus* requires.

And the record shows that the union uses this employee-funded release time not only for collective bargaining—which would be bad enough, under *Janus*—but also for political and lobbying activities, including, among other things, meeting with and endorsing candidates for elected office and lobbying the City Council. APP.039-43 ¶¶ 62-108. Thus, release time does exactly what *Janus* forbids—only worse, because here the union is completely unrestrained in how it may use the funds.

The City and AFSCME cannot evade Janus and the First Amendment by simply skipping the steps of including the union funding in employees' salaries or wages and then deducting the union subsidies from the employees' paychecks. This arrangement does not change the fact, which this Court has already recognized, that the payments are

part of employees' compensation—that is, money that would otherwise go toward employees' compensation and benefits were it not diverted to the union. Moreover, the Memorandum of Understanding between the City and AFSCME itself says that release time is funded from employees' compensation. APP.032 ¶¶ 31-32, APP.042-43 ¶¶ 140-41.

Contrary to the lower court's decision, it should make no difference that the Memorandum of Understanding at issue in *Cheatham* stated that release time was "charged as part of the total compensation contained in this agreement in lieu of wages and benefits," 240 Ariz. at 319 ¶ 14, while the agreement at issue in this case omits the final six words of that phrase. Opinion ¶¶ 13, 17. Neither the use of release time, nor a slight change in MOU drafting, should allow unions to achieve what *Janus* prohibits. (Besides, the record shows that Plaintiffs/Appellants in particular *have* given up compensation—eight fewer hours of vacation leave—to fund AFSCME's release time. APP.040 ¶ 117.) If *Janus* left open such a gaping, easy loophole, it would mean very little.

Thus, this Court should reverse the decision of the Court of Appeals to ensure that all government employees receive the full protection

against compelled speech to which they are entitled under *Janus* and the First Amendment.

CONCLUSION

The decision of the Court of Appeals should be reversed, and judgment should be entered in favor of Plaintiffs/Appellants.

Respectfully submitted this 12th day of December, 2023, by:

/s/ Jacob Huebert
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