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

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

Respondents would like the Court to believe this case is about enforcing a private agreement between a union and its voluntary members. But the opposite is true. This case concerns the enforcement of a maintenance of membership agreement between a union and the *State of California* that compels dissenting employees to *involuntarily* remain dues-paying union members for four years. This state compulsion is even worse than that held unconstitutional in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). The Ninth Circuit's holding that a "maintenance of membership requirement does not implicate the First Amendment," Pet.App. 5, requires this Court's review.

I. The Ninth Circuit's Decision Conflicts with *Janus*.

A. California and CSLEA's maintenance of membership requirement is not a private agreement, but a union security requirement that is unconstitutional under *Janus*.

1. Respondents cannot defend the constitutionality of their maintenance of membership requirement under *Janus*. So they try to change the subject to whether it is constitutional to enforce a private agreement between the union and employees. But the maintenance of membership requirement that has compelled the Lifeguards to remain dues-paying members of CSLEA since the summer of 2019 is not a private agreement. It is a self-styled "Union Security" agreement between the State and CSLEA. Pet.App. 28. California law recognizes that this "organizational

security" arrangement arises from an agreement between the State and a union, just like an agency fee requirement. *See* Cal. Gov. Code § 3515.7(a) (Pet.App. 24) (stating an "exclusive representative . . . may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction.").

CSLEA's membership and dues deduction form confirms that it is "the Unit 7 contract and State law" that impose "limitations on the time period in which an employee can withdraw as a member." Pet.App. 7. The form itself is not the source of those limitations or of the Lifeguards' injuries. The form is relevant only to whether the Lifeguard's acquiesced to the maintenance of membership requirements of the Unit 7 contract and State law by waiving their First Amendment rights. As discussed in the Petition (at 16–20), the form is a far cry from the "clear and compelling' evidence" of a waiver that the Court required in *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967)).

Accordingly, Respondents' incessant assertions that this case is about private contractual commitments are as baseless as they are misleading. This case concerns a state's union security requirement, just like *Janus*.

Cohen v. Cowles Media, 501 U.S. 663 (1991) is inapposite for this reason. The Court held in *Cohen* that a state court did not violate the First Amendment by enforcing the common law of promissory estoppel against a newspaper for breaching a private contract because the "doctrine of promissory estoppel is a law of general applicability." *Id.* at 669–70. This case does

not involve a court enforcing a private contract with a law of general applicability. It concerns California and a union enforcing their maintenance of membership requirement against state employees pursuant to narrow state laws that authorize the requirement. Cal. Gov. Code §§ 3513(i), 3515.7(a–b) (Pet.App. 24–25). While the conduct in *Cohen* may not have violated any constitutional rights, it certainly violates the First Amendment under *Janus* for the State and union to compel dissenting employees to remain union members and to pay for union speech. 138 S. Ct. at 2486.

2. CSLEA tries to resist that conclusion by arguing *Janus* should not apply to the Lifeguards because they are union members, CSLEA Br. 9–11, 13–14. The Lifeguards only are union members because the State and CSLEA *compel* them to involuntarily remain union members notwithstanding their notices of resignation in September 2019. Pet.App. 8. This compelled membership does not strip the Lifeguards of their First Amendment right to stop subsiding the union's speech. Instead, it only shows the Lifeguards are suffering even worse First Amendment injuries than the agency fee payer in *Janus*, who was compelled only to pay reduced union fees. *See* Pet. 11–14.[1]

CSLEA then changes tack and inconsistently claims (at 11–13) that maintenance of membership clauses do not require employees to remain union members but only to pay union dues. The claim is belied by CSLEA compelling the Lifeguards to remain union

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[1] CSLEA's assertion in footnote 5 of its brief that the Lifeguards did not argue below that Respondents violated the Lifeguards' First Amendment rights by compelling them to remain union members is unfounded. *See* Lifeguards' C.A. Br. 17–21.

members over their objections. The State and CSLEA's maintenance of membership requirement provides that "any employee may *withdraw from CSLEA* by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract." Pet.App. 28 (emphasis added). Based on that requirement, CSLEA rejected the Lifeguards' resignations in October 2019. Pet.App. 8. In its brief, CSLEA continues to insist the Lifeguards are "full members." CSLEA Br. 14.

California law also belies CSLEA's claim because "maintenance of membership" is defined by statute to mean that certain employees "shall remain *members* of that employee organization *in good standing* for a period as agreed to by the parties pursuant to a memorandum of understanding." Cal. Gov. Code § 3513(i) (Pet.App. 24) (emphasis added). The statute also authorizes the thirty-day period for withdrawing from a union. *Id.*[2] Maintenance of membership provisions compel employees to remain union members in addition to requiring they pay union dues.

CSLEA's acknowledgement (at 11–13) that the provisions require state deductions of union dues confirms the provisions are, in that respect, indistinguishable from the agency fee requirement *Janus* held unconstitutional. The Ninth Circuit's decision upholding maintenance of membership requirements cannot be reconciled with *Janus* no matter how one cuts it.

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[2] CSLEA's reliance on cases construing 29 U.S.C. § 158(a)(3) of the National Labor Relations Act is misplaced because California Government Code § 3513(i) is differently worded.

B. The Ninth Circuit's refusal to conduct a waiver analysis contravenes *Janus*.

The Ninth Circuit also defied *Janus* by refusing to use a constitutional-waiver analysis to determine whether the Lifeguards acquiesced to the State and CSLEA's four-year restriction on when they can exercise their First Amendment right to stop paying for union speech. *See* Pet. 15–20. Indeed, if the State and union had required the Lifeguards to pay agency fees after they sent their resignation letters in September 2019, that conduct certainly would be unconstitutional under *Janus* absent "clear and compelling' evidence" the employees waived their speech rights. 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). The same is true when a state and union subject employees to a maintenance of membership requirement after they send resignation letters. Unless these employees earlier waived their rights, compelling them to remain union members and to pay union dues violates their First Amendment rights under *Janus*.

State Respondents again try to distract the Court from the elephant in the room—the State's maintenance of membership requirement—by arguing that proof of a constitutional waiver is not required to enforce a private agreement. State Resp. Br. 9–10. The Court should see through this obfuscation for the reasons already discussed.

CSLEA's argument (at 14) that *Janus*' waiver holding should not apply to the Lifeguards because they are union members also fails for a reason already discussed: the union is forcing the Lifeguards to involuntarily maintain their membership. This infringement on the Lifeguards' associational rights only makes the

need for proof that they waived their constitutional rights more apparent.

Respondents do not deny their membership and dues deduction form lacks clear and compelling evidence that the Lifeguards knowingly and intelligently waived their First Amendment rights to stop associating with CSLEA and funding its speech. *See* Pet. 17–20. The form's vague statement that "[p]er the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member," Pet.App. 7, does not even establish a contractual commitment to abide by an organizational security requirement. *See* Pet. 15–16. The Ninth Circuit's conclusion that this insignificant sentence in a dues deduction form permits a severe infringement on individuals' speech and associational rights—i.e., compelling individuals to remain dues-paying members of a union for four years—shows why this Court's review is needed.

C. The Ninth Circuit's state action holding imperils First Amendment rights and conflicts with this Court's precedents and Seventh Circuit case law.

The Court's review also is needed because the Ninth Circuit has held the First Amendment does not constrain the conduct of unions that have states deduct union payments from employees' wages. According to the Ninth Circuit, these unions are not state actors subject to 42 U.S.C. § 1983. *See* Pet.App. 4 n.2; *Belgau v. Inslee*, 975 F.3d 940. 947–49 (9th Cir. 2020), *cert. denied* 141 S. Ct. 2795 (2021); *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1123–25 (9th Cir. 2022), *pet. for cert. filed*, No. 22-577 (Dec, 19, 2022).

The proposition is untenable, especially when the union is a party to a union security agreement with a state, as is the case both here and in *Janus*, 138 S. Ct. at 2486. The Ninth Circuit's state action holding contravenes *Janus*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and Seventh Circuit cases law. *See* Pet. 20-22; Br. of Amicus Curiae Americans for Fair Treatment 11-16.

The State and CSLEA cannot dispute that the "Union Security" requirement in Article 3.1(A)(1) of their collective bargaining agreement is the product of state action. Pet.App. 28. Contrary to Respondents' arguments,[3] a reference to that requirement in employees' membership and dues deduction forms does not transform that state requirement into a private arrangement. Nor does it erase the state action inherent in the State and union jointly requiring certain employees to, as a condition of their employment, remain union members and pay union dues for the four-year term of the collective bargaining agreement.

State Respondents counterintuitively argue (at 13) that CSLEA is not a state actor under *Lugar* because the union controls from whom the California State Controller will deduct union dues and when those deductions will stop. State Respondents have it backwards. That California Government Code §§ 1153(g–h) and the collective bargaining agreement (Pet.App. 28) grant CSLEA control over State payroll deductions proves the union is a state actor participating in a state action, namely the State's garnishment of employees' wages. The Court has consistently held the

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[3] *See* CSLEA Br. 15–17; State Br. 12–13.

constitution applies when a party uses "state-created garnishment procedures" to seize monies from another party. *Lugar*, 457 U.S. at 932–33.

The Court should review the Ninth Circuit's state action decision even though it "is a footnote of its unpublished decision." CSLEA Br. 15. The Ninth Circuit held its decision here was required by its published opinion in *Belgau*. Pet.App. 4 n.2. That opinion's state action holding, which is wrong on its own terms, is indefensible when applied to a union that is a party to a maintenance of membership agreement with a state. Pet. 23-34. After this petition was filed, the Ninth Circuit held that, under *Belgau*, a union is not a state actor even when it causes a state to take union dues from employees' wages *without* their authorization. *Wright*, 48 F.4th at 1123-24. These decisions give unions license to violate employees' First Amendment rights under *Janus* with impunity. The Court can address the Ninth Circuit's flawed state action jurisprudence in this case.[4]

II. This Case Is a Unique Vehicle for Resolving the Important Questions Presented.

1. This case is exceptionally important because the Ninth Circuit sanctions an arrangement that prohibits employees from exercising their First Amendment right under *Janus* to stop subsidizing union speech

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[4] Contrary to CSLEA's claim in footnote 7 of its brief, the state action issue falls within the first question presented. The question of whether "it violate[s] the First Amendment for a state *and union* to compel objecting employees to remain union members and to subsidize the union and its speech," Pet. (i) (emphasis added), encompasses the subsidiary issue of whether the union is a state actor subject to the First Amendment.

except during one thirty-day period every four years. CSLEA claims (at 21) this is not problematic because, after *Janus* was decided in June 2018, employees had one chance to withdraw from the union in June 2019 and will have another chance in June 2023. In asserting there is nothing wrong with this shocking state of affairs, CSLEA displays the same callous indifference to employee speech rights as the Ninth Circuit when it found "no plausible reason" why a four-year irrevocability period for union dues deductions would not be "constitutionally permissible." Pet. App. 4–5.

In reality, granting employees one thirty-day period every four years to escape a maintenance of membership requirement does not mitigate the harm it inflicts before that escape period. "[C]ompelled subsidization of private speech seriously impinges on First Amendment rights." *Janus*, 138 S. Ct. at 2464. And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). To compel dissenting employees to remain union members and financially support union speech for even a short time irreparably infringes on their speech and associational rights. *See* Pet. 28–29; Br. of Amicus Curiae Protect the First Foundation 4–9. To subject dissenting employees like the Lifeguards to this compulsion for years on end is unconscionable.

And yet, the Ninth Circuit held that a "maintenance of membership requirement does not implicate the First Amendment." Pet.App. 5. This holding endangers the constitutional rights of hundreds of thousands of employees. *See* Br. of Amicus Curiae Mackinac Center 4 n.2. California law authorizes maintenance of membership requirements not only for State

employees like the Lifeguards, but also for judicial employees, public school employees, and higher education employees. *See* Cal. Gov't Code §§ 3513(i), 3524.59(a), 3540.1(i)(1), 3583(a). The requirements also exist in Pennsylvania and Ohio, *see* Pet. 4–5, and likely will spread to other states if this Court does not reverse the Ninth Circuit's decision.

2. State Respondents show the danger the Ninth Circuit's decision poses by asserting (at 7–8) that the lower court held it constitutionally permissible for the State to enforce the maintenance of membership requirement because it was incorporated by reference in employees' dues deduction agreements. This rationale is a blueprint for resurrecting union security requirements after *Janus*. Under the Ninth Circuit's opinion, all states and unions have to do to impose maintenance of membership and agency fee requirements is reference them in dues deduction forms. A vague sentence about the "contract and State law" imposing "limitations on the time period in which an employee can withdraw as a member" suffices to allow governments and unions to impose any limitations they desire on employees' right to dissociate from a union and stop funding its speech. Pet.App. 7.

The Court should not permit states and unions to so easily undermine the speech rights it recognized in *Janus*. In fact, the Court's decision in *Janus* makes clear it is not so easy. The Court held that, for a state and union to constitutionally seize union payments from nonconsenting employees, a "waiver must be freely given and shown by 'clear and compelling' evidence.'" 138 S. Ct. at 2486 (quoting *Curtis Publ'g Co.*, 388 U.S. at 145). If this waiver requirement is enforced, it will protect employees from government and

union efforts to suppress their right to stop paying for objectionable union speech. *See* Pet. 29-31. The arrangement here certainly would not pass constitutional muster. *Id*. at 17–20. The Ninth Circuit's steadfast refusal to enforce *Janus'* waiver requirement, even in a case involving a union security requirement, warrants this Court's review.

3. Respondents do not dispute this case is a procedurally sound vehicle for resolving the questions presented. Pet. 25–27; However, Respondents claim the Court has denied many petitions raising similar questions. CSLEA Br. 7; State Resp. Br. 7. Not so. This petition differs from almost all others that were denied because those petitions did not concern a maintenance of membership requirement. Pet. 26–27.[5]

Respondents miss the forest for the trees when arguing the Ninth Circuit's decision is not worthy of review because it is unpublished. The court's decision here is not an isolated mistake, but part of a series of similarly reasoned Ninth Circuit decisions that are systematically eviscerating employee speech rights under *Janus*. This includes the court's troubling state-action decisions. *See infra* 6–8. The Ninth Circuit is routinely upholding onerous restrictions on when employees can stop subsidizing union speech. *See O'Callaghan v. Napolitano*, No. 19-56271, 2022 WL 1262135, (9th Cir. Apr. 28, 2022), *pet. for cert. filed*, No. 22-219 (Sept. 9, 2022) (four-year restriction on stopping payroll deductions of union dues); *Cooley v. Cal. Statewide Law Enf't Ass'n*, No. 19-16498, 2022

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[5] The exception is that, after this petition was filed, the Court denied a petition in *Cooley v. California State Law Enforcement Association*, 143 S. Ct. 405 (Nov. 7, 2022).

WL 1262015, (9th Cir. Apr. 28, 2022), *cert denied* 143 S. Ct. 405 (Nov. 7, 2022) (four-year maintenance of membership requirement); *Kurk v. Los Rios Classified Emps. Ass'n*, No. 21-16257, 2022 WL 3645061 (9th Cir. Aug. 24, 2022), *pet. for cert. filed*, No. 22-498 (Nov. 28, 2022) (three-year maintenance of membership requirement). The compelling facts of this case make it an excellent vehicle to address the expanding constellation of Ninth Circuit decisions that are subverting the Court's decision in *Janus*.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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