No. 22-498

In The
Supreme Court of the United States

KRISTINE KURK, an individual,

Petitioner,

v.

LOS RIOS CLASSIFIED EMPLOYEES ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER OF THE AMERICAN EXPERIMENT IN SUPPORT OF GRANTING THE PETITION

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STATEMENT OF INTEREST[1]

Amicus Curiae Center of the American Experiment (the "Center") is a non-partisan educational organization dedicated to the principles of individual sovereignty, private property and the rule of law. It advocates for creative policies that limit government involvement in individual affairs and promotes competition and consumer choice in a free market environment. The Center is a nonprofit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

This case concerns the Center because the Center has a demonstrated commitment to employees' rights. In the past, the Center has worked with home-based providers (also known under Minnesota law as "PCAs") to prevent harm caused by a Minnesota law that declared them "state employees" but only for the purpose of collective bargaining. Further, the Center has worked with these embattled home-based providers to help them try to decertify the SEIU as their exclusive representative, which certification was wrongly obtained in the first place.

Additionally, one of the Center's projects is Employee Freedom MN ("EFMN"). EFMN is a community for Minnesota public employees, their families, and

[1] All parties received timely notice and have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

any Minnesota citizens interested in talking about workplace unions and employee rights. EFMN's goal is to keep its community up to date on what rights Minnesota public employees have following the *Janus* decision. EFMN also provides a forum for public employees to tell their story and assistance for anyone trying to resign from their union.

SUMMARY OF ARGUMENT

Since the Court decided *Janus* in 2018, unions and their members have been fighting in the lower courts over its scope. The Ninth Circuit, and its "growing chorus," have insisted that *Janus* and its concomitant prohibitions on compelled speech and association are strictly applicable to nonmembers. *Belgau v. Inslee*, 975 F.3d 940, 951 n.5 (9th Cir. 2020).

But *Janus* is broader and applies to those who "joined" their government union when presented with an unconstitutional Hobson's choice—pay the union or pay the union more—argue that. After all, *Janus* held that any waiver of First Amendment rights *related to the act of joining the union* cannot be presumed: "By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018).

Thus, there must be clear and compelling evidence supporting the waiver of First Amendment rights at the time the employee apparently "joined" the union.

The corollary must also be true: where an employee decides she no longer wants to be a member of a government union, she must be allowed to withdraw any apparent "consent," and she must be allowed to dissociate from the government union—especially where the union "agreement" does not mention a right to resign at all.

Here, Petitioner Kristine Kurk signed a "Dues Check-Off Form" on June 24, 1997. The form did not mention any terms for resignation, nor did it suggest that by signing the form Kurk would be waiving her right to resign based upon future terms: the form was simply silent on resignation. Yet almost exactly twenty years later, on July 1, 2017, pursuant to an allowance made in California law, Kurk's employer-school district entered into a new collective bargaining agreement ("CBA") with her union ("LRCEA") that contained a maintenance of membership clause, which read:

> Each employee who is a member of LRCEA on the effective date of this Agreement or who subsequently becomes a member of LRCEA shall, from that date forward, remain as a member of LRCEA and pay its dues for the duration of this Agreement and in accordance with the EERA.

Pet. App. D, 23a-24a. And just like that, with no action on her part, Ms. Kurk suddenly found her right to resign supposedly "waived" without any consideration to her.

Because Kurk's right to resign is also her right to dissociate from the union, whether that right to resign was waived must be subject to the "clear and compelling" standard. Where there is no waiver, there is no restriction, and a union member should have the freedom to resign at any time.

Given the confusion that persists after *Janus* in the area of First Amendment waiver, the Court should take up the petition to further articulate the applicability of *Janus*' rule.

ARGUMENT

I. Absent a Waiver of the Right to Resign Evidenced by Clear and Compelling Evidence, a Union Member Should Be Free to Resign at Any Time.

When there is no "clear and compelling evidence" to demonstrate that a union member has by a voluntary, intelligent, and knowing decision chosen to waive her right to resign, *Janus*, 138 S. Ct. at 2486 (internal quotes omitted), nothing should prevent her from resigning her union membership at any time. She could not have waived it implicitly—"courts indulge every reasonable presumption against waiver of fundamental constitutional rights and *** do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotations omitted). If not waived, her right to resign must be

retained and she should be free to exercise her right to dissociate from the union at will.

This is the case for Kurk: nothing in the dues check-off form she signed in 1997 suggested she was waiving her right to resign from union membership. Not until twenty years passed would there be a provision indicating she needed to maintain her membership for a certain duration. Yet the actions of the union and district-employer—unilateral actions which did not involve any action by Ms. Kurk—cannot give rise to a presumption that a third party (Kurk) has now waived her right to resign (i.e., dissociate). Such an idea is abhorrent to contract law—and even more repulsive to constitutional law.

For one, it is unconscionable to redefine the terms of an agreement such that an employee passively waives a right—a constitutional right. Add to this the waiver's purported durational term and the lack of additional consideration for the waiver, and the circumstances are even more unfair.

Second, the lack of any additional consideration for her forced waiver means the 2017 CBA binds Kurk by a contract of adhesion. Kurk's right to resign is *her* right and it should be for her to decide when she should bargain it away. The 2017 CBA effectively ignores her agency in the matter and prevents her from seeking something of additional value for the bargain of her waiver. Again, her 1997 dues check-off form never contemplated such a waiver: before 2017, her right to resign was never on the bargaining table.

A third abuse entailed in the implicated waiver of a Kurk's right to resign is that of involuntary servitude. U.S. Const. amend. XIII. By waiving Kurk's right to resign for a duration determined by other parties, the 2017 CBA forces her to serve out membership in the union until the CBA expires. Only then, during a thirty-day window, may she resign—that is, assuming the union and government employer don't extend the term of the maintenance of membership clause further, without any consideration to Kurk. But for a union member who never waived her right to resign in the first place, the prolongation of Kurk's membership beyond her desire to associate with the union is an egregious injustice.

Therefore, having never waived her right to resign, Kurk always retained that right and should be free to dissociate from her union at any time.

II. Upholding the Right to Resign Protects Public Employees from Being Compelled to Associate with an Ever-Changing Political Organization.

Ms. Kurk never signed any document except her dues check-off form, and that document did not contemplate the right to resign. However, even if one were to somehow interpret the 1997 agreement as encompassing the waiver of that right at the time the agreement was signed, that waiver cannot persist in perpetuity—over the course of twenty years, circumstances, beliefs, and opinions may change, and a union

that may have fairly represented the beliefs and views of an employee in the 1990s might not still do so in the 2020s.

The First Amendment surely safeguards a right to dissociate from a previously desirable relationship based on changed circumstances. How repugnant would the failure to recognize the right to dissociate be if applied to the dissolution of a marriage? No court would countenance that a marriage agreement entered into in 1997 could force the parties to remain married despite serious changes in the relationship over the course of twenty years or more.

The Ninth Circuit and the lower courts' implicit position that no such right exists is anathema to the freedom of association safeguarded by the First Amendment.

In addition, the enforcement of a First Amendment waiver is effectively a prior restraint on the right to dissociate, and so it bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Even (incorrectly) granting that a hypothetical waiver was made voluntarily and shown by clear and compelling evidence, indefinite duration would still present a constitutional problem: there must be restrictions on the duration of any claimed waiver.

In *Harris v. Quinn*, the Court clarified that in, *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), it "did not suggest that 'industrial peace' could justify a law that 'forces men into ideological and

political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought,' or a law that forces a person to 'conform to [a union's] ideology.'" *Harris*, 573 U.S. 616, 631 (2014) (quoting *Hanson*, 351 U.S. at 232). *Hanson* had concerned "[a] union agreement made pursuant to the Railway Labor Act," which agreement, for that reason, bore "the imprimatur of the federal law upon it." 351 U.S. at 232.

Likewise, in *Knox*, the Court rejected the practice of assessing public employees for "nonchargeable" political activities related to which they are not given new notice and opportunity to understand the purpose of the assessment:

> But a nonmember cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent. When a union levies a special assessment or raises dues as a result of unexpected developments, the factors influencing a nonmember's choice may change. In particular, a nonmember may take special exception to the uses for which the additional funds are sought.

Knox v. SEIU, Local 1000, 567 U.S. 298, 315 (2012). As the *Knox* Court recognized, over time, union politics can change and the actions they take with members' money can become something altogether obnoxious to a formerly enthusiastic member. *See also Hoekman v. Educ. Minn.*, 41 F.4th 969, 975 (8th Cir. 2022) ("Thomas Piekarski. . . . joined his union and served briefly as

union president. By October 2017, he became disenchanted with the union, and asked to change his dues obligations to fair-share fees only.").

Here, the 2017 CBA was made pursuant to the terms of the California Educational Employment Relations Act ("EERA"); specifically § 3540.1, concerning "Organizational security," Pet. App. C, 21a, which gives permission for unions to include in their agreements maintenance of membership provisions like the one found in the 2017 CBA. *See* Pet. App. D, 23a-24a. California stands in a position analogous to the Federal Government in *Harris*, and so the principle must hold true here: "organizational security" cannot justify forcing union members into maintaining their membership when to do so would violate their freedom of association. To compel a union member to abide by a long-past purported waiver after he has indicated his wish to dissociate from the union would be such a violation.

In no other context of constitutional waiver is there a durational element limiting the waiver's withdrawal. For instance, under the Sixth Amendment, "[n]umerous * * * federal circuit courts have held, similar to *Robinson*, that a trial court must give due consideration to a defendant's request for counsel at sentencing, despite a previous waiver of that right." *Robinson v. Ignacio*, 360 F.3d 1044, 1058 (9th Cir. 2004). And under the similar Fourth Amendment consent-to-search analysis, "[w]ithdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by

unequivocal act or statement." *United States v. McMullin*, 576 F.3d 810, 815 (8th Cir. 2009).

In no other context is any purported waiver of constitutional rights subject to indefinite duration. However, the lower courts here are blazing that very trail.

III. The Court Has Never Treated Contracts Which Involve Constitutional Waiver Worse Than Commercial Agreements.

The Court has always treated forced association with political speakers with more First Amendment solicitude than forced association related to commercial speech. Yet the courts below in this case have relegated employee association rights below everyday contracts.

In *Janus*, to emphasize the enhanced protections afforded to employees subject to exclusive representation by a government union, the Court repeatedly cited the famous words of Thomas Jefferson on the subject:

> As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted)

Janus, 138 S. Ct. at 2464 (2018); *see also id.* at 2471.

Prior to *Janus*, in *Knox*, the Court clearly stated that forced commercial subsidies are subject to lesser scrutiny than in the public union context:

> The federal Mushroom Promotion, Research, and Consumer Information Act required that fresh mushroom handlers pay assessments used primarily to fund advertisements promoting mushroom sales. A large producer objected to subsidizing these generic ads, and even though we applied the less demanding standard used in prior cases to judge laws affecting commercial speech, we held that the challenged scheme violated the First Amendment.

Knox, 567 U.S. at 310.

It is peculiar at best that the court below treated the "Hotel California" agreement entrapping Ms. Kurk with more deference than it would have an employee covenant not to compete under state law.

In Minnesota, for example, "[t]he mere continuation of employment can be used to uphold coercive agreements, but the covenant must be bargained for and provide the employee with real advantages." *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983). Thus, in Minnesota, courts routinely apply the "blue-pencil doctrine" to covenants not to compete, in some cases cutting the duration of an "overly broad restriction and enforce[ing] it only to the extent reasonable." *Young v. Meyer*, Nos. C6-88-1543, C7-88-1521, 1989 Minn. App. LEXIS 380, at *4 (Ct. App. Mar. 28, 1989) (it was not error for the trial court to reduce the

term of the covenant from three years to eighteen months).

California state law is even more protective of employees' commercial relationships with employers: noncompetition agreements are void except in narrow circumstances. Cal. Bus. & Prof. Code § 16600.

As noted above, Ms. Kurk had no say in the extension of her union membership in 2017. There was no bargain. And the courts below applied no "blue-pencil" solicitude toward employee rights against forced association which are supposed to occupy a higher echelon of protection under the First Amendment than a standard employment agreement.

The Court should grant the petition to correct this persisting error in the lower courts because the First Amendment "is intended to guarantee the preservation of an effective system of free expression," and "deserves the same protections afforded by the presumption against waiver of constitutional rights because it is a fundamental right." NOTE: Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract, 46 Hastings Const. L.Q. 451, 464-465 (2019).

There is no contract-law basis forbidding the later revocation of constitutional waiver, especially given the importance of the freedom to associate (or not) in our constitutional canon.

IV. The Court Should Correct the Persistent Error of Misattributing Actions Taken Jointly with the State as Mere Private Agreements.

Lower courts, including both the Ninth Circuit here and the Eighth Circuit, have repeatedly mislabeled government union action taken jointly with the state as related to purely private agreements. Pet. App. A, 2a-3a (9th Circuit Decision) (citing *Belgau*, 975 F.3d at 946-49); *Hoekman*, 41 F.4th at 978.

But even if one were to grant that *Belgau* and *Hoekman* were correct on this point (they were not), this case is distinct from those cases, and the court of appeals below was wrong to import *Belgau*'s reasoning into this case.

Here, Ms. Kurk did *nothing* to extend the term of her membership agreement; the state and the union did *everything*. The extension of the membership agreement could not have been grounded in a "private decision" between Ms. Kurk and the union because the 1997 document said nothing about a right to resign, and the agreement was extended by the state and the union's joint action in entering into the CBA.

The court of appeals, nonetheless, arrived at the conclusion that there was no state action in the only way it could: by reducing the "state action" and "under color of state law" tests to a question of whether, at some point in the distant past, there was *a* but-for cause of the alleged damages that "arose from" an

action taken jointly by two private parties. Pet. App. A, 2a.

This has never been this Court's state-action test, yet the court below found shelter in this formulation and avoided the important merits issue presented by the Petition here. Contrary to the court below, this Court has found "state action" where numerous but-for causes of alleged damages arise from the actions of two private parties.

For example, this is so where private parties are "'entwined with governmental policies' or when government is 'entwined in [its] management or control.'" *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).[2]

Likewise, "[t]he action of a city in serving as trustee of property under a private will serving the segregated cause is an obvious example. See *Pennsylvania*

[2] Even not applying the "entwinement" test it criticized, the dissent in *Brentwood Academy* likewise would have held that the respondents here acted under color of state law and are subject to suit under 42 U.S.C. § 1983. *See* 531 U.S. at 309 (Thomas, J., dissenting). To that end, the dissent noted that state action should be found where the private defendant performs "a function that has been traditionally exclusively reserved to the State." *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). The dissent also noted that a "symbiotic relationship" between the government and the private actor would be sufficient to result in a finding of state action. *Id.* at 311. Such is certainly the case here—the state respondent, as required by state law, is required to engage in collective bargaining with the union respondent, Cal. Gov't Code § 3544, *et seq.*, which it did, and which caused the injury alleged by Petitioner.

v. Board of Trusts, supra." *Evans*, 382 U.S. at 299. A public parking authority leasing space to a restaurant which refuses to serve Black clients is another, even where the restaurant's racist decision is not dictated by the parking authority. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Finally, as recognized by the Seventh Circuit, a wage deduction scheme expressly authorized by state law and participated in by both the private union and public employer on a bi-monthly basis, if not more often, is the type of private conduct entwined with governmental policies. *Janus v. AFSCME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019).

The court of appeals, like some other courts examining the union-government-employee relationship, erroneously held that there was no "state action" where the government and the union agreed together to cause the damages to Ms. Kurk. The court of appeals thus departed from the Court's doctrine, and the Court should correct this persistent misapplication of the "state action" doctrine by the lower courts in these contexts.

The Court should review this case and uphold an employee's right to resign and dissociate from a government union.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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