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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This Court has made abundantly clear that the "right to eschew association for expressive purposes is … protected" by the First Amendment. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S.Ct. 2448, 2463 (2018). Kristine Kurk tried to exercise that right and end her association with the Union. But for almost two years, the Union refused to let her leave, all while the District kept taking her money and funneling it to the Union. Respondents insist, as the Ninth Circuit did, that this was owing to some "private agreement" between Kurk and the Union that does not even implicate the First Amendment. But that claim is foreclosed by the undisputed facts of this summary-judgment record, as there is not and never was any agreement between Kurk and the Union that she would remain in the Union for the duration of any collective bargaining agreement(s). Kurk simply checked a box more than two decades ago on a form authorizing the District to deduct union dues from her paycheck; she never entered into any agreement of any kind limiting her right to change her mind. The only parties that agreed to relinquish her constitutional right to disassociate with the Union were the Union and the District, who decided that any employee who ever joined the Union should not be allowed out until the current CBA expires. Kurk was thus forced "to subsidize speech by a third party that … she d[id] not wish to support" for 21 months, *Harris v. Quinn*, 573 U.S. 616, 656 (2014), even though she never agreed to do so.

The Ninth Circuit sanctioned that result based on a rule that is incompatible with *Janus*. According to

the Ninth Circuit, *Janus*' holding that the right not to associate with a union can be waived only "freely," "clearly," and "affirmatively" is a right that "applie[s] to nonunion members only." *Savas v. Cal. State L. Enf't Agency*, 2022 WL 1262014, at *1 (9th Cir. Apr. 28, 2022), *pet. for cert. filed*, No. 22-212 (Sept. 6, 2022). Thus, in the Ninth Circuit, once an employee decides to join a union, no free, clear, or even affirmative consent is needed to force her to remain a member and keep paying dues. As the Ninth Circuit itself put it, in its view, "the world did not change" after *Janus* for those who "signed up to be union members." *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020). Whether they knew it or not, the bare act of joining the union forfeited their right to disassociate.

That crabbed reading of *Janus* finds no support in this Court's decision. *Janus* vindicated the First Amendment right not just to decide whether to *join* a union, but to decide whether to *associate* with a union. That necessarily encompasses a right to decide whether to *disassociate* with a union one has joined. And just like the right not to associate in the first place, the right to disassociate may be waived only to the extent an employee "freely," "clearly," and "affirmatively" agrees to relinquish it. *Janus*, 138 S.Ct. at 2486. Nothing in law or logic supports the Ninth Circuit's view that the associational rights *Janus* vindicated are good for one use only.

Respondents double down on that view, insisting that whether public employees may disassociate from unions whose views they no longer support is a purely "private" matter that does not even implicate the First Amendment. But that argument is entirely circular,

as the principal justification the Ninth Circuit has offered for its remarkable rule that there is no "state action" when a state agency takes money from a state employee and gives it to a union against her will is its misguided belief that *Janus* provides no protection to employees who decide to join a union. That holding is thus inextricably intertwined with the question at the heart of this case—namely, whether an employee may be forced to remain in a union when she never "freely," "clearly," or "affirmatively" agreed to any constraints on when and how she could end her association. The Court should grant certiorari and ensure that no more public-sector employees are deprived of the fundamental rights *Janus* recognized simply because they once decided to support a union.

I. The Ninth Circuit's Misguided Decisions Foster Compelled Association And Speech.

By blessing a scheme that compels continued union membership without express consent, the Ninth Circuit's post-*Janus* caselaw poses a double threat to the First Amendment. As *Janus* explained, the right Kurk seeks to vindicate—freedom of association—is intrinsically bound up with freedom of speech. *Janus*, 138 S.Ct. at 2463; *see also NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). And just as "the right to engage in activities protected by the First Amendment" comes with "a corresponding right to associate with others," *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2382 (2021), the right *not* to speak comes with a corresponding right not to be compelled to associate with or subsidize the speech of others, *Janus*, 138 S.Ct. at 2463; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Indeed, "[i]f there

is any fixed star in our constitutional constellation," that is it. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet even though "forced membership and forced contributions impinge on free speech and associational rights," *Harris*, 573 U.S. at 633, the Ninth Circuit sanctioned both here—for *21 months*—and did so without giving the matter any constitutional scrutiny.

The Ninth Circuit reached that remarkable conclusion by stretching its dubious decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), to its breaking point. *Belgau* likewise dealt with an effort by public employees to dissociate with a union. The state and the union insisted that the plaintiffs must continue paying dues for a year, arguing that they agreed to that arrangement because they signed dues-deduction forms that stated that their authorization would be "irrevocable for a period of one year." *Id.* at 945. Given those facts, the Ninth Circuit could have resolved the case by simply finding that the plaintiffs had explicitly waived their right to dissociate with the union for the one-year duration of the CBA. Instead, the court chose to issue a much more sweeping ruling. According to *Belgau*, *Janus*' holding that public employees must "freely," "clearly," and "affirmatively" waive their First Amendment rights not to associate with or subsidize a union applies only to "nonmembers" who never joined the union at all. *Id.* at 952. Thus, once one has chosen to join a union, the calculus changes dramatically in the Ninth Circuit, and an employee may be deemed bound to remain in a union without regard to whether the employee agreed to do so.

There is no better illustration of that than this case. Unlike the plaintiffs in *Belgau*, Kurk never signed *anything* saying that she agreed to stay in the Union for any particular period of time. The only "agreement" she ever "executed" was a barebones dues check-off form back in 1997, which said not a word about any restrictions on the revocability of that dues-deduction authorization or her right to resign from the Union. Pet.3. The Ninth Circuit instead deemed Kurk bound to remain in the Union for 21 months based on an agreement *between the Union and the District* to force employees to maintain membership for the duration of the CBA. *See* Union.BIO.3, 11-12, 16.[1] Kurk never affirmatively agreed to those terms—as the Union itself implicitly recognizes in faulting her for failing to "vote against" the CBA. Union.BIO.3, 14, 16. *But cf. Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 312 (2012) ("the difference between opt-out and opt-in schemes is important"). The only affirmative act she ever took was to check a box on dues-deduction form more than two decades ago.[2] That cannot possibly satisfy the stringent standard *Janus* reiterated for the knowing relinquishment of a constitutional right.

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[1] That readily distinguishes this case from *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), which involved a plaintiff who entered into an agreement *with the defendant*. *Id.* at 665.

[2] Respondents fault Kurk for failing to resign her membership during one of the 30-day windows between CBAs. But they ignore that all of those windows pre-dated *Janus*, meaning Kurk would still have been forced to associate with and support the Union if she had exercised that "opt out" option. Pet.App.25a; *cf. Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-45 (1967) (plurality op.).

It is little surprise, then, that respondents' principal argument is to insist that there are no First Amendment rights at stake here at all. In their view, this case concerns only a "private agreement" between Kurk and the Union, and Kurk's sole recourse is to state contract law, not the Constitution. That blinks reality. Kurk's *public* employer deducted membership fees from her paycheck and handed them over to the Union against her will, pursuant to *a state law* that the state views as empowering state employers to force public employees to remain in a union based on the say-so of the union, without any inquiry into whether an employee has actually agreed to do so. *See* Cal. Gov't Code §3540.1(i)(1); Pet.App.23a-24a. The only conceivable theory under which that arrangement does not implicate First Amendment rights is if there is no First Amendment right to disassociate with a union—which is exactly what the Ninth Circuit has repeatedly held by confining *Janus* to "nonmembers."

That holding cannot be reconciled with *Janus*. While the plaintiff in *Janus* was a public employee who had not agreed to join or contribute to the union in the first place, the First Amendment rights the Court recognized were not confined to similarly situated "nonmembers." The Court vindicated the rights of *all* "nonconsenting employees" not to be forced to pay "agency fee[s] []or any other payment to the union." *Janus*, 138 S.Ct. at 2486. And rightly so, as "[d]isassociation with a public-sector union and the expression of disagreement with its positions and objectives … lie at the core of those activities protected by the First Amendment." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 258 (1977) (Powell, J., concurring

in the judgment); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) ("political belief and association constitute the core of those activities protected by the First Amendment."). Indeed, if anything, the right to *dis*associate is even more critical than the right to join, as an employee cannot know in advance—and certainly not more than two decades in advance—every view the union may one day espouse.

To be sure, like other constitutional rights, that right can be waived to at least some extent. But as this Court has repeatedly instructed—in the specific context of compelled association with public-sector unions—"[c]ourts do not presume acquiescence in the loss of fundamental rights." *Knox*, 567 U.S. at 312. "[T]o be effective, the waiver must be freely given and shown by 'clear and compelling' evidence"—i.e., the employee must "clearly and affirmatively consent." *Janus*, 138 S.Ct. at 2486. The Ninth Circuit has never even tried to explain why waivers of the right to disassociate with a union should be governed by a different standard than waivers of the right not to associate with a union in the first place.[3] Either way, the claim is that public employees have "waiv[ed] their First Amendment rights, and such a waiver cannot be presumed." *Id.* That rule holds no less sway when it comes to compelled "maintenance of membership" than when it comes to compelled association with a

[3] To the extent the court tried to derive that rule from *Janus*' statement that "States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions," 138 S.Ct. at 2485 n.27, surely this Court did not mean to sanction in the span of a single footnote any and all aspects of public-sector union regimes.

union one never chose to join. The Ninth Circuit's contrary conclusion cannot be reconciled with the unambiguous holdings of this Court.

II. This Case Is An Excellent Vehicle To Resolve The Pressing Question Presented.

The circumstances under which a nonconsenting public employee may be forced to remain in a union is a question of exceptional importance. If the Ninth Circuit is really correct that forcing an employee to continue to associate with a union does not even implicate the First Amendment, then nothing in the Constitution would stop unions and state employers from agreeing to CBAs that require employees to remain members in perpetuity. Indeed, other unions have deployed CBAs with "organizational security" provisions requiring members to remain in unions for nearly a decade. *See, e.g.*, *Taylor Sch. Dist. v. Rhatigan*, 900 N.W.2d 699, 708 (Mich. Ct. App. 2016) (ten-year "security agreement"); *Debont v. City of Poway*, 1998 WL 415844, at *1 (S.D. Cal. Apr. 14, 1998) (eight-year span). These long-term deals between unions and public-sector employers to waive employees' First Amendment rights are especially problematic because the politics of a union, a person, or both can shift over time, making a once-agreeable association untenable. Ctr. of Am. Experiment Amicus.Br.7-9. Yet courts have sanctioned them with little or no constitutional scrutiny, producing a troubling pattern of efforts to "under-rule" *Janus*. *See* Protect the First Amicus.Br.10-11 (collecting cases).

Respondents try to downplay the importance of the question presented by noting that this Court has denied other petitions involving maintenance-of-

membership provisions. Union.BIO.17; AG.BIO.11. But the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995). And several of those petitions involved at least some evidence of *actual* waiver. *See* Protect the First Amicus.Br.10-11 & nn.3-5. This case, by contrast, does not even arguably involve any "affirmative" (let alone "clear") waiver, which makes it a particularly good vehicle to finally resolve this pressing question.

Respondents are thus left invoking a variety of purported vehicle problems, but none has merit. They principally fault Kurk for not expressly challenging the Ninth Circuit's holding that the Union did not engage in "state action." Union.BIO.5; AG.BIO.6. At the outset, it is not clear why that matters, as there are multiple state defendants here who obviously engaged in state action that Kurk independently challenged. And while the District may no longer be forcing Kurk to associate with the Union, both the short litigation timetable and the prospect that Kurk may one day join the Union again make this a quintessential issue "capable of repetition yet evading review." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) ("two years is too short to complete judicial review"). Indeed, the Ninth Circuit itself recognized as much when it rejected the same mootness argument in *Belgau*. 975 F.3d at 949-50.

In all events, the Ninth Circuit's no-state-action holding is readily encompassed by the question presented, as it is just a symptom of the same flawed view that *Janus* applies only to "nonmembers." The

Ninth Circuit did not deny that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 941 (1982). For that very reason, the Seventh Circuit rejected the argument on remand in *Janus* that the union had engaged in no state action by accepting the fees it asked the state to collect on its behalf. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019). Nor did the Ninth Circuit deny that Kurk's continued forced association with the Union required the Union and the state to work hand in glove, as the Union was able to continue collecting membership dues from Kurk only with the aid of the District and a state statute. Indeed, the Attorney General highlights that the Union tells the state when an employee has cancelled "her authorization," AG.BIO.9, which underscores how California's "procedural scheme" enables the Union to use the state's powers to compel association. *See Lugar*, 457 U.S. at 941.

Rather than distinguish the maintenance-of-membership context on its facts, the Ninth Circuit has tried to distinguish it on the ground that cases like *Janus* involved the deduction of agency fees, not "deduction of dues without a constitutional waiver." *Belgau*, 975 F.3d at 948 & n.3. But that just begs the question whether deducting dues without a constitutional waiver violates the First Amendment, which the Ninth Circuit keeps getting wrong because it has artificially confined *Janus* to "nonmembers." The Ninth Circuit's holding that the Union engaged in no state action is therefore inextricably intertwined

with its holding that Kurk forever waived her First Amendment rights just by joining the Union, which brings it well within the ambit of the petition. *Cf. Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978).[4] Thus, far from providing a reason to deny the petition, respondents' fixation on that holding just reinforces the need for this Court to finally resolve the pressing question of whether a nonconsenting public employee can really be forced to remain in a union when she never agreed to do so.

[4] That said, the Court could always revise or add to the question presented should it prefer more focus on the state-action issues. *Cf. FERC v. EPSA*, 575 U.S. 995 (2015) (mem.) (adding question addressing alternative holding that petition did not expressly challenge). Indeed, the Ninth Circuit's aggressive view that an employee has no First Amendment recourse against a union even when deductions were based on, e.g., a forged authorization, *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1117 & n.2 (2022), is exceedingly difficult to reconcile with *Janus* in its own right.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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