No. 22-498

In the Supreme Court of the United States

KRISTINE KURK, *Petitioner*

v.

LOS RIOS CLASSIFIED EMPLOYEES ASSOCIATION, ET AL.

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

BRIEF OF *AMICI CURIAE* PROTECT THE FIRST FOUNDATION AND MANHATTAN INSTITUTE SUPPORTING PETITIONER

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QUESTION PRESENTED

California law requires Kristine Kurk to maintain her union membership as a condition of public employment. Kurk attempted to resign her union membership on September 13, 2018. It is undisputed that her public employer refused to honor the resignation based on California statute. It is also undisputed that the Union refused to permit her to resign based on the collective bargaining agreement with her public employer, the relevant terms of which were authorized and controlled solely by the same state statute. This system violates the freedom of association of all employees subjected thereto by compelling membership in an inherently political organization.

The question presented is:

Does the First Amendment protect a public employee's right to resign union membership at will?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

When Kristine Kurk signed a "Dues Check-off Form" twenty-five years ago, she agreed to allow her employer, the Los Rios Community College District ("the District"), to deduct union dues from her paycheck and send them to the Los Rios Classified Employees Association ("Union"). Pet. 2. But she never agreed to remain a union member until the end of time. After all, the 1997 form included no conditions on her ability to resign from the Union. Pet. 3. And, unlike many other agreements at issue in petitions considered by this Court, this agreement didn't even refer to a limiting window that specifies when a Union member may withdraw her membership. *Id.*

But when Ms. Kurk tried to resign her union membership, she was told no. Although the First Amendment does not allow compelled speech and association, the Union used a California statute's authorization of "organizational security agreements" to force Ms. Kurk to remain a full member—including requiring her government employer to seize money from her paycheck and give it to the Union. This constitutional violation would be intolerable even if it lasted mere days or weeks, because there is no such thing as a *de minimis* First Amendment violation. That the compelled speech here lasted years—and could have done so indefinitely, see Pet. 9—is unconscionable. And the

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward its preparation or submission. All parties were notified by *amici curiae* of their intent to file this brief more than 10 days prior to its due date and gave written consent.

Ninth Circuit's error is particularly shocking because the Union, despite Ms. Kurk's attempted resignation, could continue to count her on its membership roster and receive her State-extracted membership dues and use them to support political candidates and legislation through multiple election cycles.

This is far from an isolated error. It is not even the Ninth Circuit's first holding that improperly limits this Court's decision in *Janus* v. *American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Other circuits, including the Third and Seventh Circuits, have followed suit. This Court's review is necessary to prevent further eviscer-ation of *Janus*'s constitutional bulwark.

This Court's review is of particular importance to both of the *amici*. *Amicus* Protect the First Foundation (PT1) a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of all people across the ideological spectrum, including people who may not even agree with the organization's views.

Amicus The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has sponsored scholarship and filed briefs supporting free speech and workers' rights.

This case concerns *amici* because it involves issues of compelled speech and association that are of partic-

ular interest to their missions to protect First Amendment rights and values, including in public-sector employment.

STATEMENT

When Kristine Kurk tried to resign her union membership in September 2018, the District and the Union told her she was stuck. Pet. 4. California law authorizes "organizational security" arrangements, which require public school employees "as a condition of continued employment *** to maintain [their] membership in good standing for the duration" of the collective-bargaining agreement (CBA). Cal. Gov't Code § 3540.1(i). Under that law and the CBA, Ms. Kurk was trapped into full union membership, complete with discipline and dues, until June 30, 2020—21 months after she tried to resign. Pet. 4. And the Union tried to keep her on the hook even longer than that: Mere weeks before the CBA was set to expire, the Union and the District decided to extend it another six months. The Union informed Ms. Kurk that she would now be stuck in the Union until December 2020. The only reason she was eventually permitted to resign in June 2020 was because she had sued. Pet. 9.

In an unpublished two-page order, the Ninth Circuit held (relying on *Belgau* v. *Inslee*, 975 F.3d 940, 946-949 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021) (mem.)) that Ms. Kurk had lawfully been kept in the Union because of a "private membership agreement" that was not subject to constitutional scrutiny. Pet. App. 2a. But the panel did not explain how a Dues Check-off Form which contained *no* language limiting Ms. Kurk's ability to resign constituted a "private

agreement" to remain in the Union until the expiration of the CBA.

Ms. Kurk seeks vindication of *Janus*'s promise—the right to be free from the "compelled subsidization of private speech" and association with a union which she does not support. *Janus*, 138 S. Ct. at 2464.

REASONS FOR GRANTING THE PETITION

Amici write to highlight three key reasons the Petition should be granted. First, even though Ms. Kurk was *eventually* permitted to resign her Union membership, the injury California's law imposed on her (and other public-school employees') speech and association rights still requires redress because there are no *de minimis* First Amendment violations. Second, the California law at issue here is particularly problematic because it not only indefinitely compels speech related to collective bargaining, but also core political speech and association. Finally, enough lower courts have read *Janus* in an unreasonably cramped fashion as to require this Court's intervention now.

I. The First Amendment Violation Here Cannot Be Excused on the Ground That It Is *De Minimis*.

As Petitioner notes, the right to resign union membership is foundational to the right to be free from compelled speech. Pet. 2. Respondents may assert that the compelled speech and association here is permissible because Ms. Kurk was *eventually* permitted to resign her union membership—nearly two years after she tried to resign. But that does not eliminate the constitutional violation presented here. Absent a clear waiver—and as Petitioner notes, there was *no* waiver

here, Pet. 11—compelled speech and association violates the First Amendment, even if the compelled speech or association lasts mere moments, consists of only a few words, or takes the form of a forced contribution of one penny. As this Court has held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). See also *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020). From that principle it follows, as Justice O'Connor recognized, that "[t]here are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 36-37 (2004) (O'Connor, J., concurring).

Consistent with that principle, this Court has long held that compelled speech is not permissible even where it compels only a few words. Thus, the Court held in *Barnette* that requiring children to say the Pledge of Allegiance—which typically takes fewer than 30 seconds—was unconstitutional. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Similarly, in another famous case, the Court held that a state law requiring a driver to display four short, simple words on his license plate violated the First Amendment. *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977). These cases are integral to our constitutional fabric because they show that there are no "small" instances of compelled speech. In matters of "politics, nationalism, religion, or other matters of opinion," there are no *de minimis* violations, and "no official, high or petty, can prescribe what shall be orthodox" therein. *Barnette*, 319 U.S. at 642.

Despite this Court's clear warnings, California, the District, and the Union have created a scheme that compels speech under the guise of a collective bargaining agreement that lasts for years, subject to extension at the whim of the Union and the District. See Pet. 9. As this Court admonished in *Schempp*, "it is no defense to urge that" challenged government actions "may be relatively minor encroachments on the First Amendment." *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963). For a First Amendment violation "that is today a trickling stream may all too soon become a raging torrent, and, in the words of Madison, 'it is proper to take alarm at the first experiment upon our liberties.'" *Id.* (citation omitted). It is critical that this Court correct the Ninth Circuit's error.

II. California's Maintenance-of-Membership Statute Compels Political Speech and Association in Violation of the First Amendment.

Although *any* length of compelled speech and association is impermissible, the Union here compelled Ms. Kurk's speech and association for nearly two years, through multiple legislative sessions and primary and general federal, state, and municipal elections. The Union even sought to extend that compelled speech and association to last through the 2020 election cycle. Pet. 9. That is a severe burden on First Amendment rights. Indeed, the California law and CBA here pose an even greater burden than the agency fee agreement struck down in *Janus*. Unlike this agreement, the agreement there at least permitted employees to pay reduced union fees that excluded expenses for political activities and did not compel employees to remain full

members of a union they did not support. *Janus*, 138 S. Ct. at 2460-2461.

California's active prevention of union resignations in these circumstances is an affront to the First Amendment. That is because the First Amendment's "robust protection" is at its strongest where core political speech and association are concerned. See *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 480 (2010). Indeed, even *Abood*, which was overruled in *Janus,* recognized that compelling contributions used for political purposes strikes "at the heart of the First Amendment," which requires that union political expenditures "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas," rather than by government coercion. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-236, (1977), *overruled by Janus* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). And this Court reiterated in *Janus* that the government may not compel employees to "subsidize private speech on matters of substantial public concern." *Janus*, 138 S. Ct. at 2460.

Yet that is precisely what California law did: it compelled Ms. Kurk, "as a condition of continued employment" as a public-school employee, to support Union speech, including political speech, that she no longer wished to support. Cal. Gov't Code § 3540.1(i). That is because the Union is an "inherently political organization," Pet. i., that, using members' dues, may "take such action as it deems necessary to support, oppose, or otherwise act on any candidate for elective office" or "any initiative, legislation, or regulations" that the Union deems relevant." Los Rios Classified Emps. Ass'n, *LRCEA Finance Policy* at 5-6, available at

https://tinyurl.com/LRCEApac (last visited Dec. 27, 2022).

California law thus forces public school employees to continue to support political candidates and causes for years—or perhaps in perpetuity, if the government employer and union decide to continually extend the CBA. Pet. 2, 8-9. So, if the Union, *after* an employee joins it, endorses a slate of candidates with whom an employee vehemently disagrees, the employee has no way to stop supporting the Union and those candidates. Indeed, she will be forced to continue paying full union dues that may support many of those same candidates *again*—for example, in a general election after support in a primary, or in a re-election two years later. The First Amendment cannot tolerate repeated injuries to constitutional rights throughout the years-long period during which California compels association and support for political speech.

Permitting such perpetual maintenance-of-membership agreements is particularly problematic because of the potential for self-dealing by government officials. Under this regime, incumbent officials can pass and enforce agreements that require employees to remain part of a union that supports those very same incumbents. This potential for self-dealing raises a serious constitutional question, for, as this Court has stated, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 192 (2014).

This Court should grant the petition to make clear that, under *Janus*, California's maintenance-of-membership statute and similar laws around the country

impermissibly burden constitutionally-protected political speech and association.

III. The Lower Courts Are Routinely Eviscerating *Janus*'s Protections.

Granting the petition is also critical to end the lower courts' systematic evisceration of *Janus*'s protections. This Court held that "nonconsenting employees" cannot be compelled "to subsidize private speech on matters of substantial public concern." *Janus*, 138 S. Ct. at 2460, 2486. Yet, as this Court well knows, there has been an ongoing flood of petitions seeking reversal of the decisions of the courts of appeals, which have repeatedly ignored *Janus*'s requirements and erroneously narrowed its application.[2] This skirting of *Janus*

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[2] See, *e.g.*, *Savas* v. *California State L. Enf't Agency*, No. 20-56045, 2022 WL 1262014 (9th Cir. Apr. 28, 2022), *petition for cert. pending*, No. 22-212 (Sept. 8, 2022); *Wright* v. *Service Emps. Int'l Union Local 503*, 48 F.4th 1112 (9th Cir. 2022), *petition for cert. pending,* No. 22-577 (Dec. 19, 2022); *Mattos* v. *American Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, *Council 3*, No. 20-1531, 2022 WL 4285717 (4th Cir. Sept. 16, 2022) (per curiam), *petition for cert. pending*, No. 22-567 (Dec. 15, 2022); *Cooley* v. *California Statewide L. Enf't Ass'n*, No. 19-16498, 2022 WL 1262015 (9th Cir.), *cert. denied*, 143 S. Ct. 405 (2022); *Troesch* v. *Chicago Tchrs. Union, Local Union No. 1, Am. Fed'n of Tchrs.*, No. 21-1525, 2021 WL 2587783 (7th Cir.), *cert. denied sub nom. Troesch* v. *Chicago Tchrs. Union,* 142 S. Ct. 425 (2021); *Bennett* v. *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 991 F.3d 724 (7th Cir.), *cert. denied sub nom. Bennett* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31, AFL-CIO*, 142 S. Ct. 424 (2021); *Fischer* v. *Governor of New Jersey*, 842 F. App'x 741, 753 (3rd Cir.) (unpublished), *cert. denied sub nom. Fischer* v. *Murphy*, 142 S. Ct. 426 (2021); *Hendrickson* v. *AFSCME Council 18*, 992 F.3d 950 (10th Cir.), *cert. denied*, 142 S. Ct. 423 (2021); *Doughty* v. *State Emps.' Ass'n of New Hampshire, SEIU Local 1984, CTW, CLC*, 981 F.3d 128 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2760

is intolerable both as a matter of sound judicial administration and as a matter of First Amendment rights. Only clarification from this Court will stop the torrent of lower court decisions evading *Janus*'s implications.

1. The panel below relied on the Ninth Circuit's decision in *Belgau* v. *Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 2795 (2021) (mem.).[3] In that case, state employees resigned their union memberships, but the state continued to deduct union dues throughout an "irrevocability" period. The Ninth Circuit sidestepped the First Amendment violation at issue there by reasoning that the objecting employees had not been "compelled" to support union speech because they had chosen to join the union. *Id.* at 952. That they now objected and wished to resign was, in the lower court's view, irrelevant.

2. Other circuits have also done their best to limit *Janus*. For example, in *Fischer* v. *Governor of New Jersey*, the Third Circuit foisted an implausibly narrow interpretation of *Janus* onto a class of public-school teachers seeking relief from an unconstitutional union-membership agreement. 842 F. App'x 741, 753 (3rd

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(2021); *Belgau* v. *Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 2795 (2021) (mem.).

[3] This case offers a better vehicle than *Belgau* to address the constitutionality of laws limiting the right to resign union membership. In *Belgau*, the plaintiffs were (unlike Ms. Kurk) at least permitted to resign their memberships, although they were required to continue paying dues. 975 F.3d at 946. And the *Belgau* plaintiffs signed a revised membership agreement that stated that their authorization of dues deduction would be irrevocable for one year. *Id.* at 945. The Dues Check-off Form in this case contained no reference to irrevocability or limitations on the right to resign membership. Pet. 3.

Cir.) (unpublished), *cert. denied sub nom. Fischer* v. *Murphy*, 142 S. Ct. 426 (2021).[4] Although the teachers there, like Ms. Kurk, sought to revoke their union membership shortly after this Court's decision in *Janus*, the Third Circuit required them to remain in the union, reasoning that *Janus* only protected employees who had the foresight to opt out of the union even when doing so would require them to pay significant agency fees. *Id.* at 745, 753 n.18. Because the *Fischer* plaintiffs had chosen union membership over agency fees when *Abood* governed, the Third Circuit held there was no compelled speech and refused even to conduct a waiver analysis. *Id.* at 753 n.18.

Relying on the Ninth and Third Circuit's errors, the Seventh Circuit has also held that there was no First Amendment violation where a school district employee was not permitted to stop paying union dues upon her resignation. *Bennett* v. *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 991 F.3d 724, 730 (7th Cir.), *cert. denied sub nom. Bennett* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31, AFL-CIO*, 142 S. Ct. 424 (2021).[5] Thus, the plaintiff in

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[4] This case is a better vehicle than *Fischer* because in *Fischer*, the plaintiffs-public school teachers had agreed to limitations on when they could revoke their authorization for payroll deductions. 842 F. App'x at 745. Ms. Kurk did not agree to any such limitation when she signed the Dues Check-off Form in 1997. Pet. 3. Here, "*only* a state statute and CBA compel association in the form of membership." Pet. 12.

[5] This case presents a better vehicle than *Bennett* because unlike Ms. Kurk, Bennett was allowed to resign her membership, although she was required to continue paying dues. 991 F.3d at 728. And unlike Ms. Kurk, Bennett signed a membership and dues deduction authorization card that stated the deduction would be irrevocable for one year. *Ibid.*

that case was similarly compelled to support speech with which she did not agree.

In short, the circuit courts have consistently ignored and evaded *Janus*'s constitutional directives. By granting the Petition, this Court can halt further neutering of *Janus* and make clear to the lower courts that government cannot compel employees to continue to associate with and support unions.

CONCLUSION

The Ninth Circuit and other courts of appeals have consistently tried to evade the First Amendment's requirements as articulated in *Janus*. In doing so, they have blessed "maintenance-of-membership" statutes that burden speech and association at the core of the First Amendment's protections. Compelled speech and association, whether it lasts a few months or, as in this case, a few years, raises the specter of a First Amendment violation. This Court should grant the petition to affirm *Janus*'s underlying principle that states and unions may not conspire to compel speech or association on matters of public concern.

Respectfully submitted,

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