No. 22-212

# In the Supreme Court of the United States

JONATHAN SAVAS, *et al.*,

*Petitioners*,

v.

CALIFORNIA STATEWIDE LAW ENFORCEMENT ASSOCIATION, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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## QUESTION PRESENTED

Under California law, state employees have the right to join or decline to join a union. For employees who choose to become union members, the State may deduct membership dues from their paychecks only pursuant to the terms of their written authorization. The question presented is:

Whether the First Amendment prohibits the enforcement of an employee's voluntary agreement to remain a union member and to pay union dues for a prescribed period of time.

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## STATEMENT

1. California law guarantees state employees the right to join or decline to join a union. Cal. Gov't Code § 3515. Neither the State nor the union may "[i]mpose or threaten to impose reprisals on employees," "discriminate or threaten to discriminate against employees," or otherwise "interfere with, restrain, or coerce employees because of their exercise" of these rights. *Id.* §§ 3519(a), 3519.5(b). In addition, no public employer may require an employee who chooses not to become a union member to pay an agency fee. *See* Pet. App. 8; Pet. 3.

Employees who choose to become members of a union may authorize the California State Controller, the official responsible for administering the state payroll system, to deduct union dues from their paychecks. *See* Cal. Gov't Code § 1153(b). In processing those deductions, the Controller shall "[o]btain a certification" from the union that it has "and will maintain an authorization, signed by the individual from whose salary or wages the deduction . . . is to be made." *Id.* When an employee seeks to cancel deductions for union dues, his request must be directed to the union; the union is responsible for processing that request; and the Controller may revoke the deduction "only pursuant to the terms of the employee's written authorization." *Id.* § 1153(h). The Controller must "rely on information provided by" the union regarding whether dues deductions "were properly canceled or changed," and the union must indemnify the Controller for any claims made by an employee for deductions made in reliance on the union's information. *Id.*

In addition to permitting member dues deductions, state law allows a union recognized as the exclusive

representative for employees in a defined unit to include a "maintenance of membership" provision in its collective bargaining agreement with the State. Cal. Gov't Code § 3515.7(a). State law defines "[m]aintenance of membership" to mean that "all employees who voluntarily are, or who voluntarily become, members of" the union "shall remain members of that [union] in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding, commencing with the effective date of the memorandum of understanding." *Id.* § 3513(i). The definition further provides that a "maintenance of membership provision shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the [union] by sending a signed withdrawal letter" to the union and a copy to the Controller. *Id.*

2. The 21 petitioners here are lifeguards who are or were employed by the California Department of Parks and Recreation. Pet. App. 7; Pet. ii, 5. At varying times, each petitioner joined respondent the California Statewide Law Enforcement Association (CSLEA), which is the union representing lifeguards in collective bargaining with the State. Pet. App. 7; C.A. Dkt. 17 at 30 (Excerpts of Record). Each petitioner signed a membership application and authorized the deduction of union dues. Pet. App. 7; Pet. 5.

The agreement in the union's membership application since about 2005 has provided: "'I elect to become a member of CSLEA and the applicable affiliate organization for my classification and department. I hereby authorize deduction from my salary of CSLEA/Affiliate dues. [. . .] Per the Unit 7 contract and State law, there are limitations on the time period for withdrawal from membership.'" Pet. App. 7 (alterations in

petition appendix); *see also* C.A. Dkt. 17 at 29-30. The "Unit 7 contract" is a collective bargaining agreement between the State and the union. It provides that "[u]nder no circumstances is membership in CSLEA . . . a condition of State employment for employees covered by" the contract. C.A. Dkt. 33-2 at 17 (Supplemental Excerpts of Record). It further states that a "'written authorization for CSLEA dues deductions in effect on the effective date of this Contract or thereafter submitted shall continue in full force and effect during the life of this Contract; provided, however, 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. 9.

In the summer and fall of 2019, petitioners communicated with the union to resign as members. Pet. App. 8. The union responded that it could not approve "the request to opt out" because "the window [had] closed." C.A. Dkt. 17 at 57.

3. a. In January 2020, petitioners filed suit on behalf of a putative class of state lifeguards against the union, the California Attorney General, and the California State Controller. Pet. App. 10. As amended, their complaint alleged that their inability to resign from the union and the continued deduction of union dues from their paychecks violated their rights under the First Amendment. *Id.* Petitioners asserted that they "were not notified of the terms and conditions of their membership and did not knowingly, intelligently, and voluntarily consent to restrict their right to resign union membership pursuant to the period specified" in the collective bargaining agreement. C.A. Dkt. 17 at 36. Among other forms of requested relief,

they sought a declaratory judgment that the California statutes authorizing maintenance-of-membership requirements and dues deductions, as well as the collective bargaining agreement between the State and the union, offended the First Amendment by forcing petitioners to pay union dues without their clear and affirmative consent and by limiting their right to withdraw from union membership. *Id.* at 41-42.

The complaint also pleaded two state-law claims against the union: fraudulent concealment and unconscionability. Pet. App. 10. Petitioners claimed that the union did not "explain the terms of the [membership] application such as the membership restrictions" and that it intentionally, or with reckless disregard for the truth, concealed the time limitations on withdrawal by failing to set them forth in the membership application. C.A. Dkt. 17 at 30, 39; *see also id.* at 39 (alleging that "deception and artifice is evident on the face of" union membership applications that petitioners signed). They additionally alleged that they were "subjected to an unconscionable contract," because the membership applications were presented as "take-it-or-leave-it form contracts" and because the union failed to provide prospective members with the Unit 7 contract referenced in the application. *Id.* at 35, 40.

b. The district court dismissed petitioners' claims against all three respondents. Pet. App. 6-21. With respect to petitioners' constitutional challenge to California law and the State's collective bargaining agreement with the union, the court concluded that neither one mandated involuntary membership or dues deductions. *Id.* at 18. The court explained that "California law does not compel employees to enter into union

membership." *Id.* To the contrary, "at all times" petitioners "had a right to not join a union." *Id.* The court reasoned that petitioners nevertheless made a choice to become union members, to authorize dues deductions, and to agree to limitations on when they could resign. *Id.* at 18-19; *see also id.* at 13 (membership application is a contract between petitioners and the union).

The court recognized petitioners' contentions that they did not voluntarily consent to the terms of the membership agreements and that the agreements were otherwise invalid. Pet. App. 19. The court explained, however, that those assertions reflected a contract dispute between petitioners and the union and provided no basis for a federal constitutional challenge to state law. *Id.*; *see also id.* (recognizing that the "State is not a party to the membership agreement"). The district court declined to exercise supplemental jurisdiction over petitioners' state-law tort and contract claims following its dismissal of their federal causes of action. *Id.* at 20; *see also id.* at 21 (dismissing state-law claims without prejudice).

c. The court of appeals affirmed. Pet. App. 1-5. Citing its prior decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), and this Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the court explained that when a legal obligation is "'self-imposed, state law, not the First Amendment, normally governs.'" Pet. App. 4. Here, petitioners did "not argue that union membership was a requirement of employment." *Id.* at 2. And they "agree[d] that they voluntarily chose to join the union." *Id.* In making that choice, the court concluded, petitioners "entered into a contract with the union through which they agreed to

be bound by certain limitations on when they could resign that membership." *Id.* at 3 (footnote omitted). The challenged maintenance-of-membership requirement thus "stem[med] from a private agreement" and was "not invalidated by the First Amendment." *Id.* (footnote omitted). The court also held that petitioners' First Amendment claims against the union failed for lack of state action. *Id.* at 4 n.2.

The court of appeals recognized that its ruling on the merits of petitioners' First Amendment claims was premised on the district court's finding that there was a valid contract between petitioners and the union. Pet. App. 3-4 n.1. It explained that it was required to accept that finding, absent a "'definite and firm conviction that a mistake [was] committed.'" *Id.* Because petitioners provided no "more than brief allegations that the district court committed clear error, no mistake was committed." *Id.* Accordingly, the court of appeals concluded that there was a valid contract between petitioners and the union. *Id.*

The court of appeals denied the petition for rehearing en banc without any judge requesting a vote. Pet. App. 22-23.

## ARGUMENT

Petitioners principally contend that the decision below misapplied this Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), in two respects. Their arguments are incorrect. First, petitioners argue that the decision below wrongly upheld a state- and union-imposed maintenance-of-membership requirement. But that is not what the court of appeals held. To the contrary, the decision below con-

cluded that petitioners had entered into a *private* contract with the union, through which petitioners voluntarily agreed to certain limitations on their ability to resign union membership and cease paying member dues. Second, petitioners argue that the court of appeals departed from *Janus* by not applying a heightened constitutional waiver analysis. But *Janus* addressed compulsory agency fees imposed on *non*-members—not voluntary agreements by union members to pay member dues.

In any event, petitioners' arguments do not warrant this Court's review. Petitioners do not assert that the court of appeals' dismissal of their claims against the state respondents implicates any conflict of authority in the lower courts. They maintain that the court of appeals' state-action analysis concerning the union respondent conflicts with decisions of the Seventh Circuit; but the cited cases involved state-compelled fees, not private agreements between unions and employees like those at issue here. Moreover, this Court has previously denied certiorari in at least 15 cases presenting the same or similar question as framed in the petition. There is no reason for any different result here.

1. Petitioners first assert that the decision below conflicts with *Janus*'s holding that States may not compel nonmember employees to pay an agency fee to the union. Pet. 11-14; *see Janus*, 138 S. Ct. at 2486. That is not correct. As the courts below recognized, California does not require any public employee to join a union or assume any obligation to financially support its activities. Pet. App. 2-3, 18. To the contrary, state law guarantees employees the right to decline union membership and any associated obligation to

pay membership dues. *Supra* p. 1. The State Controller may deduct union dues only pursuant to an employee's affirmative authorization. Cal. Gov't Code § 1153(b). And the California Public Employment Relations Board, the agency charged with administering state labor relations statutes, has explained that "California law does not authorize public employers to discipline or discharge employees if they do not join the union or later resign from the union." C.A. No. 21-16257 Dkt. 25 at 7 (declaration of Board's General Counsel in *Kurk v. Los Rios Classified Emps. Ass'n*).

Petitioners seek to elide the distinction between voluntary union dues and compulsory agency fees (Pet. 11-13), but their arguments have no merit. With respect to voluntary dues, an employee chooses to become a union member and pay membership dues. That is not the same as the compulsory agency fees addressed in *Janus*, which the State required *non*-members, including those who objected to the union and opposed its activities, to pay. *See* 138 S. Ct. at 2486.

Petitioners contend that the court of appeals approved a state- and union-imposed maintenance-of-membership requirement. Pet. 13-14. But that is not what the decision below held. As explained above, the court of appeals concluded that petitioners had entered a valid, *private* contract with the union through which they voluntarily agreed to certain limitations on their ability to resign and discontinue paying dues. Pet. App. 3-4. Far from holding that the State itself compelled petitioners to support union speech, the court held that petitioners' legal obligations in this case were "'self-imposed.'" *Id.* at 4.

2. Petitioners also ask this Court to address their argument that the court of appeals erred by relying on

their contractual agreement with the union and by not applying a heightened "constitutional-waiver" analysis. Pet. 16. That argument likewise does not warrant review.

a. This Court has long held that "the First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law[.]" *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Here, petitioners affirmatively agreed to join the union and pay member dues. No First Amendment violation occurred when they were required to abide by their contractual commitments.

Petitioners ignore *Cohen* and rely on this Court's decision in *Janus*. Pet. 16-20. As noted above, *Janus* held that States may not impose compulsory union agency fees on employees who declined to join a union. 138 S. Ct. at 2486. It did not address employees who voluntarily chose to become union members and affirmatively agreed to pay member dues. Indeed, *Janus* emphasized that, while States "cannot force *nonmembers* to subsidize public-sector unions," they otherwise "can keep their labor-relations systems exactly as they are." *Id.* at 2485 n.27 (emphasis added).

Petitioners point (Pet. 16-18) to a passage in *Janus* observing that, "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." 138 S. Ct. at 2486. The Court further observed that, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.* (citations omitted). But those conclusions concerned employees who *declined* to join the union and who did *not* agree to pay union dues. *Id.* The cited passage clarified that

States could not presume nonmembers' consent to pay union fees based on their failure to object. *See* Br. for Petitioner at 61-63, *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, No. 16-1466 (requesting that clarification); Reply Br. at 22-25, *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, No. 16-1466 (same). The Court was not addressing standards governing affirmative contractual agreements between unions and their members.[1]

b. Petitioners do not assert that the court of appeals' unpublished resolution of the merits of their First Amendment claim implicates any circuit conflict. Indeed, the courts of appeals that have considered the

[1] The cases the Court cited in the referenced *Janus* passage confirm the point. *See* Pet. 18. They involved the principle that courts will not "'presume acquiescence'" to the loss of a constitutional right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 312-313, 317 (2012), the Court held that a special union assessment could be imposed only on those nonmembers who opted in; the union could not require objecting nonmembers to opt out. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676-682 (1999), the Court rejected the argument that a state entity had impliedly or constructively waived its sovereign immunity by engaging in regulated commercial activities. And in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-145 (1967) (plurality opinion), the Court addressed whether a litigant waived the ability to press constitutional arguments on appeal by failing to assert them before trial.

issue have rejected the theories advanced by petitioners.[2] And this Court has denied at least 15 petitions presenting this question or similar ones.[3]

Petitioners assert that this case is different from others because, in their view, it concerns a maintenance-of-membership agreement to which the State is a party rather than a voluntary dues-deduction agreement. Pet. 26-27. As explained above, however, the decision below rested on the existence of a valid private contractual arrangement between petitioners and the union—not any state-imposed requirement. *Supra* pp. 5-6.

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[2] *See, e.g.*, *Bennett v. Council 31 of Am. Fed'n of State, Cnty. & Mun. Emps.*, 991 F.3d 724, 729-732 (7th Cir. 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961-962, 964 (10th Cir. 2021); *Belgau v. Inslee*, 975 F.3d 940, 950-952 (9th Cir. 2020).

[3] *See Cooley v. Cal. Statewide L. Enf't Ass'n*, cert. denied, No. 22-216 (Nov. 7, 2022); *Polk v. Yee*, cert. denied, No. 22-213 (Nov. 7, 2022); *Adams v. Teamsters Union Loc. 429*, cert. denied, No. 21-1372 (Oct. 3, 2022); *Few v. United Tchrs. L.A.*, cert. denied, No. 21-1395 (June 6, 2022); *Yates v. Hillsboro Unified Sch. Dist.*, cert. denied, No. 21-992 (Mar. 7, 2022); *Woods v. Alaska State Emps. Ass'n, AFSCME Loc. 52*, cert. denied, No. 21-615 (Feb. 22, 2022); *Anderson v. Serv. Emps. Int'l Union Loc. 503*, cert. denied, No. 21-609 (Jan. 10, 2022); *Smith v. Bieker*, cert. denied, No. 21-639 (Dec. 6, 2021); *Wolf v. Univ. Pro. & Tech. Emps., Commc'n Workers of Am. Loc. 9119*, cert. denied, No. 21-612 (Dec. 6, 2021); *Grossman v. Haw. Gov't Emps. Ass'n*, cert. denied, No. 21-597 (Dec. 6, 2021); *Troesch v. Chi. Tchrs. Union*, cert. denied, No. 20-1786 (Nov. 1, 2021); *Fischer v. Murphy*, cert. denied, No. 20-1751 (Nov. 1, 2021); *Hendrickson v. AFSCME Council 18*, cert. denied, No. 20-1606 (Nov. 1, 2021); *Bennett v. AFSCME, Council 31*, cert. denied, No. 20-1603 (Nov. 1, 2021); *Belgau v. Inslee*, cert. denied, No. 20-1120 (June 21, 2021).

3. Finally, petitioners challenge the court of appeals' conclusion that the union is not a state actor. Pet. 20-22. They contend that the decision below contravenes *Janus* and conflicts with two decisions of the Seventh Circuit. *Id.* This Court has previously denied petitions advancing similar arguments.[4] And petitioners' arguments lack merit in any event.

In *Janus*, the Court did not address any state action argument. Nor was it necessary to do so: the case involved a challenge to a state requirement compelling the payment of agency fees without the employee's consent. *Janus*, 138 S. Ct. at 2479, 2486. The two Seventh Circuit decisions cited by petitioners likewise involved a union's collection of state-mandated fees. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 354, 360-361 (7th Cir. 2019) (compulsory agency fees); *Hudson v. Chi. Tchrs. Union Loc. No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984) (procedures regarding same). Here, in contrast, California law does not compel any employee to support a union financially. Petitioners' asserted injuries stem instead from the union's decision to enforce a private membership agreement between the union and petitioners. *Supra* p. 6.

Petitioners argue that a private party should be considered a state actor when it uses an allegedly unconstitutional state procedure to obtain money from another private party. *See* Pet. 21. But this Court has

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[4] Pet. for a Writ of Certiorari at 18-21, *Polk v. Yee*, No. 22-213 (cert. denied Nov. 7, 2022); Pet. for a Writ of Certiorari at 25-29, *Woods v. Alaska State Emps. Ass'n, AFSCME Loc. 52*, No. 21-615 (cert. denied Feb. 22, 2022); Pet. for a Writ of Certiorari at 25-29, *Anderson v. Serv. Emps. Int'l Union Loc. 503*, No. 21-609 (cert. denied Jan. 10, 2022); Pet. for a Writ of Certiorari at 18-24, *Belgau v. Inslee*, No. 20-1120 (cert. denied June 21, 2021).

made clear that "a government normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." *S.F. Arts & Athletics, Inc. v. U.S. Olympics Comm.*, 483 U.S. 522, 546 (1987) (internal quotation marks and alteration omitted). "[M]ere approval of or acquiescence in the initiatives of" a private party is not sufficient. *Id.* (internal quotation marks omitted).

Here, petitioners' complaint acknowledged that dues deductions were "at the sole discretion" of the union. C.A. Dkt. 17 at 33 (union "controls the amount of dues and/or fees deducted from" petitioners' wages); *id.* (Controller "relies solely" on union's claim that petitioners authorized deductions). That sort of unilateral action does not qualify as an exercise of the State's coercive power. Nor does the union's enforcement of a voluntary private dues agreement reflect the kind of "'willful particip[ation] in joint activity with the State or its agents'" that the Court discussed in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941 (1982), the case on which petitioners principally rely. *See* Pet. 21-22. Moreover, *Lugar*'s holding was "limited to the particular context of prejudgment attachment." 457 U.S. at 939 n.21; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 58 (1999) (*Lugar* "must not be torn from the context out of which it arose").

Finally, petitioners' fear of a "free pass" for unions is misplaced. *See* Pet. 22. State law provides various remedies for misconduct or improper contracting practices by unions—as petitioners recognized by pleading state-law claims (for fraudulent concealment and unconscionability) challenging their membership agreements. *See* Pet. App. 20. California law also provides

that a purported contractual obligation in another document is not enforceable if the parties' agreement does not clearly refer to that document, among other requirements. *See, e.g.*, *Kleveland v. Chi. Title Ins. Co.*, 141 Cal. App. 4th 761, 765 (2006) (contractual term unenforceable if not sufficiently incorporated by reference). And unions may not interfere with employees' right under state law to refrain from participating in union activities. Cal. Gov't Code § 3519.5(b); *see also id.* § 3514.5 (Board jurisdiction over unfair practices claims). State law thus provides ample means to address concerns that a membership agreement did not validly impose restrictions on withdrawing from the union. But those concerns provide no basis for a First Amendment challenge to California law, or for further proceedings in this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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