No. 22-219

In the Supreme Court of the United States

CARA O'CALLAGHAN, *et al.*,

Petitioners,

v.

MICHAEL V. DRAKE, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, *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 ATTORNEY GENERAL

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QUESTION PRESENTED

Under California law, public employees have the right to join or decline to join a union. For employees who choose to become union members, state law allows public employers to deduct membership dues from their paychecks only pursuant to the employees' authorization to do so. The question presented is:

Whether the First Amendment prohibits the enforcement of an employee's voluntary agreement to pay union dues for a period longer than one year.

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STATEMENT

1. California law guarantees public employees, including those working at public universities, the right to join or decline to join a union. Cal. Gov't Code § 3565. It is unlawful for either the employer or the union to "[i]mpose or threaten to impose reprisals on employees," "discriminate or threaten to discriminate against employees," or otherwise "interfere with, restrain, or coerce employees" for exercising those rights. *Id.* §§ 3571(a), 3571.1(b).

When an employee decides to join a union, she may authorize the deduction of membership dues from her paycheck. Cal. Gov't Code § 1157.3(a). The public employer must "honor" the employee's authorization, *id.* § 1157.3(b), direct requests to cancel or change the authorization to the union, *id.* § 1157.12(b), and terminate deductions only pursuant to the terms of the authorization, *id.*

2. Petitioners are employees at two different campuses of the University of California. Pet. App. 7-9. Both chose to become members of respondent Teamsters Local 2010, a union representing employees on their respective campuses, and signed an agreement authorizing the deduction of membership dues from their paychecks. *Id.*

Petitioner Misraje is an administrative assistant at the University of California, Los Angeles. Pet. App. 9. She joined the union in July 2015. *Id.* At that time, she completed a membership application and signed a "CHECKOFF AUTHORIZATION AND ASSIGNMENT FOR PAYROLL DEDUCTION" stating:

> I, Jenee Misraje hereby authorize my employer to deduct from my wages each and every month an amount equal to the monthly

> dues and/or initiation fees, and uniform assessments of Local Union 2010, and direct such amounts so deducted to be turned over each month to the Secretary-Treasurer of such Local Union for and on my behalf. This authorization is voluntary and is not conditioned on my present or future membership in the Union.

C.A. Dkt. 9 at 61 (Excerpts of Record). Immediately following those provisions, the application addressed the subject of revocation:

> This authorization and assignment shall be irrevocable for the term of the applicable collective agreement between the Union and the employer or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable collective agreement periods thereafter, whichever is lesser, unless I give written notice to the employer and the union at least sixty (60) days, but not more than seventy-five (75) days before any periodic renewal date of this authorization and assignment of my desire to revoke the same.

Id.

In August 2018, Misraje sent correspondence to the union and the university asking to terminate her union membership and dues deductions. Pet. App. 9. The university responded that such requests must come through the union. *Id.* The union cancelled Misraje's membership but informed her that she could end dues deductions only during a particular time window. *Id.* at 9-10. Under the terms of Misraje's union mem-

bership agreement, her authorization of dues deductions could be discontinued at a specified time each year. *Id.* at 10.

Petitioner O'Callaghan is a finance manager at the University of California, Santa Barbara. Pet. App. 7. She worked at the university from 2000 to 2004. *Id.* When she started to work at the university again in 2009, she declined to become a member of the union. *Id.* In May 2018, she joined the union by signing a membership application that stated, "I want to become a member of Teamsters Local 2010[.]" C.A. Dkt. 9 at 56. Her signed agreement further provided: "I voluntarily authorize my employer to deduct from my earnings and transfer to Teamsters Local 2010 an amount equal to the regular monthly dues uniformly applicable to members of Local 2010[.]" *Id.* With respect to revocation, the agreement stated:

> I agree that this authorization shall remain in effect for the duration of the existing collective bargaining agreement, if any, and yearly thereafter until a new CBA is ratified, unless I give written notice via U.S. mail to both the employer and Local 2010 during the 30 days prior to the expiration of the CBA or, if none, the end of the yearly period. My check-off authorization will renew automatically, regardless of my membership status, unless revoked during the window period described.

Id.

In July 2018, O'Callaghan sent correspondence to the union and the university resigning her membership and requesting the termination of dues deductions. Pet. App. 8. The union informed O'Callaghan that she was free to resign as a member but that dues

deductions would continue until she gave notice pursuant to the terms of the applicable collective bargaining agreement. *Id.* Those terms provided that such notice could be given in March 2022, when the collective bargaining agreement expired. *See id.* In response to additional correspondence in October 2018, the university referred O'Callaghan's request to the union, which advised that deductions should continue. *Id.* The university then informed O'Callaghan that dues deductions would remain in place. *Id.* at 8-9.

3. a. In March 2019, Misraje and O'Callaghan filed suit against the California Attorney General, the university, and the union. Pet. App. 10; C.A. Dkt. 9 at 66. As later amended, their complaint alleged (among other claims) that the continued deduction of union dues from their paychecks violated the First Amendment. C.A. Dkt. 18 at 11. They sought an injunction ordering the union and university to "immediately" stop deducting dues from their paychecks; a declaration that "deducting union dues after a government employee has requested that they stop" violates the First Amendment; a declaration that various California statutes providing for the deduction of union dues from members' paychecks offend the Constitution by "prohibiting [petitioners'] immediate withdrawal from the Union and stoppage of" dues deductions; and a refund of "all" dues paid to the union. *Id.* at 11-13.

b. The district court dismissed the complaint. Pet. App. 4-27. The court rejected petitioners' claim that the continued deduction of dues violated their First Amendment rights under this Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Pet. App. 14. In *Janus*, this Court held that States

may not compel employees who have not joined a union to pay a union agency fee without their consent. 138 S. Ct. at 2486. In contrast to the circumstances in *Janus*, the petitioners here "affirmatively agreed to the terms of union membership, including the terms regarding dues deductions." Pet. App. 15.

The district court acknowledged petitioners' theory that their consent to dues deductions was not given "'voluntarily, knowingly, and intelligently'" because, petitioners contended, neither the union nor the university had informed them of their right to abstain from union membership. Pet. App. 15. But it concluded that "nothing in *Janus*'s holding requires unions to cease deductions for individuals who have affirmatively chosen to become union members and accept the terms of a contract that may limit their ability to revoke authorized dues-deductions in exchange for union membership rights, such as voting, merely because they later decide to resign membership." *Id.*

c. The court of appeals affirmed. Pet. App. 1-3. The court first denied the union's motion to remand or dismiss the appeal. *Id.* at 2 n.1. In that motion, the union informed the court that it had previously directed the termination of dues deductions for Misraje, effective July 2019; that in November 2020 the union had directed the university to stop deductions from O'Callaghan's paycheck; and that the union had unconditionally refunded to each petitioner all dues paid in the limitations period for their claims. C.A. Dkt. 44-1 at 8-10. The union contended that those developments rendered petitioners' claims for damages, declaratory relief, and injunctive relief moot. *Id.* at 13-20. In a one-sentence footnote, the court rejected the union's motion. Pet. App. 2 n.1.

Turning to the merits, the court of appeals recognized that "the First Amendment protects against compelled association[.]" Pet. App. 2. But here, petitioners "affirmatively agreed to join the Union and authorized the University to deduct dues from their wages pursuant to the terms of their agreements, including terms limiting when they could withdraw authorization." *Id.* Citing its prior published precedent in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), the court explained that the First Amendment "does not permit one to renege on voluntary agreements." Pet. App. 2. The court further held that petitioners' claim against the union failed for lack of state action. *Id.*

d. Petitioners filed a petition for rehearing or rehearing en banc, arguing that the panel had failed to address their "distinct" argument that the First Amendment forbids the enforcement of any voluntary dues agreement that extends beyond one year. Pet. 11; *see generally* C.A. Dkt. 84-1. The court denied the petition without any member of the court calling for a vote. Pet. App. 28-29.

ARGUMENT

Petitioners ask this Court to consider their contention that the First Amendment prohibits unions from enforcing voluntary agreements to pay membership dues for longer than one year. The decision below did not address that theory. And petitioners cite no court of appeals decision that has adopted their contention that a dues-deduction agreement may extend for only one year. Instead, they ask this Court to address what they describe as an issue of "first impression" (Pet. 11); but they provide no persuasive reason for this Court to take that unusual step. Not only does the unpublished disposition below implicate no conflict among the courts of appeals, but review in this

case would (at a minimum) be complicated by the current posture of the case, where neither petitioner appears to be subject to any ongoing obligation to pay dues and petitioners have failed to preserve a claim for retrospective relief. Moreover, petitioners' arguments on the merits are incorrect. The First Amendment does not invalidate a voluntary contractual commitment to pay union dues for a prescribed period of time.

1. Petitioners identify no sound reason for the Court to take up the question of "first impression" (Pet. 11) advanced by the petition.

a. Petitioners do not contend that the decision below implicates any circuit conflict. They do not cite any court of appeals to have adopted their theory that one year is the constitutionally maximum duration for a voluntary union dues-deduction agreement. And they concede that the decision below did not even address it. Pet. 10.

None of the authorities that petitioners do cite provides any basis for granting certiorari. The referenced appellate decisions (Pet. 18) involved the very different question of whether a criminal defendant can withdraw a waiver of constitutional rights, or whether his waiver has become stale, in light of the passage of time or intervening events.[1] The district court's decision in *Smith v. New Jersey Education Association*, 425 F. Supp. 3d 366 (D.N.J. 2019), on which petitioners principally rely, likewise does not advance their

[1] *See, e.g.*, *United States v. Lee*, 539 F.2d 606, 608-610 (6th Cir. 1976) (waiver of jury trial right and consent to trial by magistrate may be withdrawn in subsequent trial on remand); *People v. Crayton*, 28 Cal. 4th 346, 362-363 (2002) (withdrawal of waiver of right to counsel at later stage of criminal proceedings); *United States v. Hinkley*, 803 F.3d 85, 92 (1st Cir. 2015) (*Miranda* warnings may become stale after extended period).

claim. *See* Pet. 12-13. The district court there questioned the constitutionality of a New Jersey law allowing members to revoke dues authorizations during a ten-day period each year. *Smith*, 425 F. Supp. 3d at 375, 376 n.2. But the Third Circuit held on appeal that the district court acted without jurisdiction in opining on the law's constitutionality because the plaintiffs failed to establish Article III standing to pursue that claim. *Fischer v. Governor of N.J.*, 842 F. App'x 741, 752 n.14 (3d Cir. 2021). The appellate court added that, "'[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.'" *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998)).

b. This is also not a good vehicle for considering the question presented in the petition. The decision below is an unpublished memorandum disposition that does not address the issue framed in the petition, as petitioners acknowledge. Pet. 10, 19. Petitioners' complaint did not expressly plead a claim seeking a one-year limit on dues-deductions arrangements. *See supra* p. 4. They did not assert their proposed one-year rule as a basis for opposing dismissal in the district court. And petitioner Misraje's agreement with the union expressly provided that she could discontinue deductions each year.

Furthermore, before addressing the merits of petitioners' claims, this Court would need to assure itself that the case presents a live controversy in its current posture. *See* U.S. Const. art. III. The sole question presented in the petition is whether the First Amendment forbids voluntary dues-deduction agreements that extend beyond one year. Pet. i. Petitioner Mis-

raje is not a proper plaintiff to assert such a claim, because, as just noted, the agreement she signed allowed her to end dues deductions on an annual basis. Pet. App. 10.

Petitioner O'Callaghan signed a longer dues agreement, but the record indicates that it allowed her to revoke dues deductions nine months ago, in March 2022. Pet. 6; *see also supra* p. 5 (union's statement that it directed termination of deductions from O'Callaghan's paycheck in November 2020). It is thus unclear how any prospective remedy against either of the state respondents (the California Attorney General or the President of the University of California) could provide O'Callaghan with any effective relief. The petition asserts that O'Callaghan "retains her claim for damages" against the union. Pet. 9. But O'Callaghan has failed to preserve any claim against the union in this Court: As noted above, the court of appeals held that petitioners' claims against the union failed not only on First Amendment grounds but also for lack of state action. Pet. App. 2. The petition O'Callaghan filed in this Court does not seek review of that independent state-action holding.

Finally, petitioners argue that the Ninth Circuit has already recognized general time limits on union membership agreements. Pet. 19 (discussing *Belgau*, 975 F.3d at 952). If that is so, there is no reason why a proper plaintiff in a future case could not plead such a claim and press the categorical one-year rule the petition urges this Court to be the first to adopt.

2. Petitioners' arguments on the merits are unavailing in any event. Petitioners do not allege that they were required to join a union or assume an obligation to pay union dues. Nor could they: California

law expressly protects public employees' right to decline union membership. Cal. Gov't Code § 3565; *see supra* p. 1. Petitioners likewise do not assert that the First Amendment categorically prohibits public employers from giving effect to public employees' contractual commitments to pay union dues. Rather, they claim that the First Amendment forbids public employers from deducting dues pursuant to an employee's agreement that extends beyond one year. Pet. 16.

That theory cannot be squared with the long-established rule 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, petitioner O'Callaghan affirmatively agreed to pay union dues for a period longer than one year. No First Amendment violation occurred when she was required to abide by that agreement.

Petitioners ignore *Cohen* and principally rely on this Court's decision in *Janus*. *See* Pet. i, 1, 11-12, 17-18, 22. *Janus* held that States may not impose compulsory union agency fees on employees who decline to join a union. 138 S. Ct. at 2486. *Janus* did not address employees who voluntarily join a union and affirmatively agree to pay member dues for a defined period of time. Indeed, *Janus* made clear 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 to a passage in *Janus* in which the Court observed 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; *see* Pet. 1, 6, 16-18. 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." *Janus*, 138 S. Ct. at 2486 (citations omitted). These conclusions, however, concerned employees who were not union members and who did not agree to pay membership dues. *Id.* The Court did not address standards governing voluntary contractual agreements between unions and their members. Nor did it hint at the sort of categorical time-based limit on such agreements that petitioners advocate for here.

This Court's decisions in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012), *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95 (1985), likewise do not support petitioners' theory. *See* Pet. 12, 14. Like *Janus*, both *Knox* and *Hudson* involved procedures for collecting mandatory agency fees from nonmember employees. *Knox*, 567 U.S. at 302, 312-317; *Hudson*, 475 U.S. at 301-309.[2] As *Hudson* said, the Court there was "considering . . . the procedural adequacy of the agency shop arrangement itself[.]" 475 U.S. at 308 n.20. And in *Pattern Makers' League*, the Court addressed a provision of the National Labor Relations

[2] Petitioners quote *Knox* as saying that "'[g]iving employees only one opportunity per year to make this choice [whether to join the union or be an agency fee payer] is tolerable if employees are able at the time in question to make an informed choice.'" Pet. 12 (quoting *Knox*, 567 U.S. at 315) (alterations in petition). The "choice" *Knox* was actually discussing was nonmembers' decision whether to opt out of paying the part of an otherwise-compulsory agency fee that subsidizes political and ideological speech. *Knox*, 567 U.S. at 314-315.

Act—not the First Amendment, as language omitted from the quotation that appears in the petition makes clear. *See* 473 U.S. at 106.

The four administrative policy statements that petitioners cite (Pet. 15-17) also do not support review. The 2020 guidance issued by the Federal Labor Relations Authority (*see id.* at 15) rested solely on the terms of the governing federal statute and did not address any constitutional question. *See Office of Pers. Mgmt.*, 71 F.L.R.A. 571, 572-573 (2020) (construing text of 5 U.S.C. § 7115(a)); *id.* at 573 (expressly declining to adopt requestor's "policy formulations" concerning scope of *Janus*). The legal opinion of the former Alaska Attorney General (*see* Pet. 16) was permanently enjoined by an Alaska state court because its analysis was "incorrect." *State v. Alaska State Emps. Ass'n*, 2021 WL 6288649, at *1 (Alaska Super. Ct. Aug. 4, 2021), *appeal pending*, No. S18172 (Alaska Sup. Ct.). And the opinion letters authored by the Texas and Indiana Attorneys General (*see* Pet. 15-17) rest on the same mistaken analysis of *Janus* and *Knox* that petitioners advance here and that no court of appeals has adopted.[3]

[3] *See* Att'y Gen. of Tex. Op. No. KP-0310 (May 31, 2020), at 1, 3-4; Att'y Gen. of Ind. Off'l Op. 2020-5 (June 17, 2020), at 3-6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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