No. 22-219

IN THE

Supreme Court of the United States

CARA O'CALLAGHAN AND JENEÉ MISRAJE,

PETITIONERS,

V.

MICHAEL V. DRAKE, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; TEAMSTERS LOCAL 2010; AND ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

RESPONDENTS.

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

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

Whether a union can trap a government worker into paying dues for longer than a year under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

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INTRODUCTION

On July 25, 2018, Petitioner Cara O'Callaghan sent a letter to Respondent Teamsters Local 2010 (the "Union") asking to resign her membership; on August 8, 2018, Petitioner Jeneé Misraje did the same. They were both denied. Desperate to avoid a ruling from this Court, on November 23, 2020, nearly two and a half years later, nearly two years after this case was filed, and nine months after initial briefing in the Ninth Circuit was complete, the Union sent Petitioners checks for roughly $2,500 and claimed this mooted their claims, even though Plaintiffs rejected this impromptu settlement offer. This Court rejected just such an eleventh-hour attempt by a union to moot a case in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), and should do the same here.

Nor should Petitioners' claims be rejected for a lack of state action. The Union here has an agreement with the University of California ("the University"), entered pursuant to state statute, under which the state university takes money from state employees like Petitioners and remits it to the union. This constitutes joint action between the University and the Union, and this Court should recognize that state action implicates the First Amendment, as it has in numerous cases involving public-sector unions over the course of decades.

This Court should grant the Petition and clarify that *Janus* means what it says: Unions may not fund their political activities by partnering with the state to garnish wages from dissenting employees who have not validly waived their First Amendment right not pay a union, and they certainly can't lock employees

into paying dues for years on end, unable to assert their rights under the First Amendment not to fund the Union's political activism.

ARGUMENT

I. As in *Knox*, the Union's last-minute gamesmanship should not moot this case.

For years, O'Callaghan was denied her constitutional right to withdraw consent to union dues deductions. Misraje was likewise denied the right for months. Yet Respondents now ask this Court to allow them to avoid judicial scrutiny by approving the Union's gamesmanship. The Union mailed checks to Petitioners after briefing before the Ninth Circuit was complete. O'Callaghan and Misraje have rejected the Union's proffered payments. Because of this rejection, a live controversy remains as to monetary damages. O'Callaghan's and Misraje's claims for declaratory judgment also remain. Their claims fall within well-settled exceptions to the mootness doctrine for cases in which defendants voluntarily cease challenged conduct. This Court should not allow the Union to dodge its jurisdiction.

Because Petitioners rejected what they view as a settlement offer, that offer has no legal effect on this case: "[A]n unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table,

and the defendant's continuing denial of liability, adversity between the parties persists." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016).

Moreover, the Union, the University, and the California Attorney General continue to enforce the unconstitutional escape window policy that Petitioners challenge against any employee who lacks the resources to sue. For those, like Petitioners, who do sue, they mail checks to attempt to avoid constitutional scrutiny. The Ninth Circuit had already rejected this same mootness gimmick twice. *See Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020); *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019). It again rejected the argument here in a footnote. *See* App. 2, n.1.

Unions nationwide have attempted to avoid judicial review of their unconstitutional policies by dodging employee lawsuits that challenge their practices, as the Teamsters do here. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (after being sued, union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their memberships without requiring employees to send the notice their policy required). This Court should not allow the Union to avoid judicial review by picking off employees one by one. A "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)). Yet that is precisely what the Union wants the Court to

allow in this case. This Court should not countenance such gamesmanship.

Such avoidance tactics are not new; they are typical of unions seeking to avoid judicial scrutiny. In *Knox*, this Court rejected a union's attempt to moot the case by sending a full refund of improperly exacted dues to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Knox, 567 U.S. at 307. In *Knox*, as here, the late timing of the payment compounded the error; such action "must be viewed with a critical eye." *Id*. The union mailed checks because this Court had just granted cer-

tiorari, and in this case the Union mailed checks because it realized the particular facts of O'Callaghan's case demonstrated the real harms of their policy. And as in *Knox,* Respondents "continue[] to defend the legality" of their practice. *Knox*, 567 U.S. at 307.

It is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), this Court recognized that "[i]t is sufficient . . . that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), *rev'd on other grounds*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. Nor was Jane Roe forced to submit an affidavit of her intention to get pregnant again. The Court explained in *Super Tire* that, even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire*, 416 U.S. at 125. The escape windows to which Appellants were subjected is a policy of the State of California, embodied in an agreement it negotiated with the Union and allowed by statute. This policy continues to impact present interests because Respondents continue to enforce it and assert its legality. This continuing direct effect on the behavior

of public employees is further grounds for this Court's issuance of declaratory relief.

II. This Court should reverse the Ninth Circuit's holding that the state taking money from state employees is not state action.

The district court correctly held that the deduction of union dues from Petitioners' paychecks "qualifies as 'joint action,' because the state is facilitating the allegedly unconstitutional conduct Plaintiffs complain of 'through [the state's] involvement with a private party.'" App. 18 (quoting *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013)). But the Ninth Circuit, relying on its opinion in *Belgau*, found a lack of state action as an alternative basis to deny plaintiffs' First Amendment claim. App. 2. But a state university's use of the state payroll system to deduct dues from state employees' state-issued paychecks constitutes quintessential state action.

As a preliminary matter, the Union asserts that Petitioners' failure to raise state action as a separate question presented should doom their claim under this Court's Rule 14.1, which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Union Br. at 6-8. But the state action defense Respondents have raised is "fairly included" in Petitioners' question presented: "Whether a union can trap a government worker into paying dues for longer than a year under *Janus*." The Ninth Circuit answered this question 'no,' for two reasons: because "Appellants affirmatively agreed to join the Union and authorized the University to deduct dues from their wages pursuant to the terms of their agreements," and "[a]dditionally . . . for lack of

state action under *Belgau*." App. 2. These are two proposed reasons for rejecting the argument Petitioners ask this Court to accept, and the Union is free to present them, but they do not create a free-standing separate claim or legal dispute.

This is not a situation where Petitioners' proposed question addresses only the contractual waiver issue, and answering that question would leave the Ninth Circuit's state action holding in place. In order to answer the question presented, this Court would have to determine whether there was state action because that is an element of Plaintiffs' claim. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 84 (1995) ("An analysis of the permissible scope of the District Court's remedial authority is necessary for a proper determination of whether the order of salary increases is beyond the District Court's remedial authority . . . and thus, it is an issue subsidiary to our ultimate inquiry."); *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978) ("Since consideration of these issues is essential to analysis of the Court of Appeals' reversal of summary judgment on claim 3 of the complaint, we shall also treat these questions as subsidiary issues 'fairly comprised' by the question presented."); *see also R. A. V. v. St. Paul*, 505 U.S. 377, 381 n.3 (1992). The state action issue is therefore "fairly included" in Petitioners' question presented.

On the merits, this is no ordinary contract case—it is a case about when the *state* may take money from an employee and give it to a union. The escape window time limitations that the Teamsters are enforcing—and state's resulting deductions from Petitioners' paychecks—exist pursuant to *state statutes* that expressly grant the Teamsters this special privilege. *See*

Cal. Gov't Code §§ 1157.12(b); 3513(i); 3515; and 3583(a). Cal. Gov't Code § 1157.12(b) authorizes the Union's withdrawal period in this case: "Deductions may be revoked only pursuant to the terms of the employee's written authorization." The California Higher Education Employer-Employee Relations Act ("HEERA") goes further and explicitly sanctions the narrow thirty-day withdrawal period at the end of the multiyear life of the collective bargaining agreement, applied to O'Callaghan: "[N]othing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513 . . . ." Cal. Gov't Code § 3515. A "maintenance of membership" provision is limited only in that it "shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the employee organization by sending a signed withdrawal letter to the employee organization and a copy to the Controller's office." Cal. Gov't Code § 3513(i). The narrow thirty-day time period is repeated in the code section describing the permissible forms for dues authorization: "This arrangement shall not deprive the employee of the right to resign from the employee organization within a period of 30 days prior to the expiration of a written memorandum of understanding." Cal. Gov't Code § 3583(a). The Union took Petitioners' wages with the explicit imprimatur and aid of the State of California.

In contrast with the Ninth, the Seventh Circuit found the deduction of union moneys to constitute state action. *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*). The court held that a union had acted jointly with the state in deducting agency fees from the plaintiff: "if AFSCME's receipt . . . of the fair-share fees is attributable to the state, then

the 'color of law' requirement is satisfied." *Id.* at 361. It went on to quote *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988): "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II* at 361. Indeed, this Court need look no further than its own *Janus* decision, in which the union's deduction of agency fees presumably constituted state action—otherwise there would have been no First Amendment issue for this Court to rule on.

"'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." *Ohno*, 723 F.3d at 996. Here, the government has affirmed, authorized, and facilitated the deduction of dues from Appellants' paychecks. The University and the Union negotiated the contractual terms by which they would take members' dues, and the University carried out the Union's instructions, just as it had regarding agency fee payers in *Janus*, where the Supreme Court never questioned the matter of state action.

Adopting the Ninth Circuit's position on state action would require this Court to overturn a host of its own decisions. In *Knox*, the union's exactions were held to be a First Amendment violation with requisite state action. 567 U.S. at 315. Likewise, union accounting of chargeable and non-chargeable expenses from state employees amounts to state action. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). The Ninth Circuit's view would even mean that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977),

which *Janus* overturned, was likewise improperly heard, because there could be no First Amendment question presented to the Court if the union exaction had not constituted state action. This Court should find that decades of cases applying First Amendment standards to public-sector unions were not in error.

III. This Court should grant the Petition to make clear that *Janus* meant what it said: unions cannot garnish the wages of dissenting employees.

The Ninth Circuit held that the adhesion agreements Petitioners signed, without knowledge of their rights, was sufficient to trap her into paying dues, in the case of O'Callaghan for years on end, even though they entered into that contract without notice of their rights. But *Janus* is clear that employees not only must consent to waive their First Amendment rights not to pay union dues, but also must "clearly and affirmatively consent before any money is taken from them." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). *Janus* further explains:

> By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective the waiver must be freely given and shown by "clear and compelling" evidence.

Id. (internal citations omitted). Nor is *Janus*' use of the term "nonmembers" a limitation. Properly read, the decision protects all public employees who are members of a bargaining unit. This is not just a semantic point. If *Janus* stands for anything at all, it stands for the proposition that you cannot bifurcate union membership from the collection of union dues. Union dues

may only be collected from employees who have consented to their deduction. If that consent is invalid or withdrawn, no money can be taken. A union may not continue to take dues from nonconsenting workers like O'Callaghan and Misraje who signed union authorizations before the *Janus* decision and affirmatively withdrew their ostensible consent to pay once they learned of their rights. *Janus* is explicit about the people to whom it applies: "Unless employees clearly and affirmatively consent before *any money* is taken from them, this standard cannot be met." 138 S. Ct. at 2486 (emphasis added). It is *all* "employees" who must "clearly and affirmatively consent." *Id*.

None of Respondents' citations overcome this problem. For instance, they invoke *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), where reporters agreed with their source not to reveal the source's identity. See Teamsters Br. at 1, University Br. at 12, AG Br. at 10. The newspaper then published the source's identity anyway, invoking the First Amendment, but this Court rejected the defense. *Id.* at 666. *Cohen* simply stands for the proposition that one can waive a First Amendment right by agreement. The question before this Court now is how and under what circumstances such a waiver can be effective—particularly where an individual's ostensible agreement with a union results in the *state* taking money from the individual and giving it to the union, which will use it for political speech.

Here, no clear and compelling evidence of affirmative consent exists because, unlike in *Cohen*, Petitioners had no notice of the right the Union claims they waived. By contrast, the First Amendment rights of newspapers were long established when *Cohen* was decided in 1991. *See, e.g., New York Times Co. v. United*

States, 403 U.S. 713 (1971). In this case, an intervening Supreme Court decision clarified that Petitioners signed their authorizations under an unconstitutional legal regime. This Court should clarify that they could not have waived their rights without notice of those rights.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, this court should grant review in this case.

Respectfully submitted,

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