No. 22-498

In the Supreme Court of the United States

KRISTINE KURK,

Petitioner,

v.

LOS RIOS CLASSIFIED EMPLOYEES 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 ATTORNEY GENERAL

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QUESTION PRESENTED

Petitioner is an employee of a community college district. She entered into a private membership agreement with a union that authorized the deduction of membership dues from her paycheck. The question presented is:

Whether the First Amendment prohibited the union from enforcing its private membership agreement with petitioner and preventing her from withdrawing membership and ceasing dues payments at will.

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STATEMENT

1. Petitioner Kristine Kurk works as an employee benefits technician. Pet. 2. Respondent Los Rios Community College District is her employer. *Id.* And respondent Los Rios Classified Employees Association is a union that represents workers employed by the district. Pet. App. 6a.

In 1997, petitioner was presented with the union's "Dues Check-Off Form" and the collective bargaining agreement in effect at the time. Pet. App. 5a; D. Ct. Dkt. 38-5 at 2; D. Ct. Dkt. 39-2 at 26. Although the check-off form indicated that petitioner was not required to join the union, she chose to join the union and authorize the deduction of membership dues by completing and signing the form. Pet. App. at 5a-6a, 17a. After petitioner was added to the union's membership rolls, the district began deducting union dues from petitioner's paycheck and transmitting them to the union, pursuant to a state statute that allows such deductions upon the employee's "written authorization." Cal. Educ. Code § 88167(a)(1); Pet. 2; *see* Cal. Educ. Code § 88167(a)(3).

Petitioner actively participated in the union's activities while she was a member. She attended union meetings, engaged in discussions at those meetings, offered suggestions for the union's collective bargaining negotiations, and proposed edits to the union's website. D. Ct. Dkt. 39-2 at 20-22, 24, 29-30.

In September 2018, petitioner notified the union that she wished to terminate her membership and withdraw her authorization for dues deductions immediately. Pet. 4; Pet. App. 7a; D. Ct. Dkt. 38-10 at 1-2. California law gives employees such as petitioner the right to revoke their authorizations for union dues, subject to any limitations in the authorization itself or

in the collective bargaining agreement to which the employee's union has agreed. Cal. Educ. Code § 88167(a)(1); Cal. Gov't Code §§ 3540.1(i)(1), 3543.2(a)(1), 3543.3.

After receiving petitioner's resignation request, the union informed her that her obligations to the union continued until June 2020, when its collective bargaining agreement with the community college district was set to expire. Pet. App. 7a; C.A. E.R. 264; D. Ct. Dkt. 38-10 at 4-5. Although petitioner now contends that the district was involved in this decision (Pet. 4), the record shows that the union alone declined petitioner's resignation. D. Ct. Dkt. 38-10. The district processed employee paychecks and, with respect to the deduction of membership dues from those paychecks, relied on information that the union supplied. C.A. E.R. 222, 264; *see* Cal. Educ. Code § 88167(a)(6).

In June 2020, petitioner's union membership and dues deductions were terminated, as she had requested. Pet. 9; Pet. App. 3a, 7a-8a. Although the collective bargaining agreement had been extended to December 2020, the union did not view that as affecting petitioner's resignation rights. *See* D. Ct. Dkt. 45 at 7 & n.3; *see generally Trevisanut v. Cal. Union of Safety Emps.*, Cal. Pub. Emp. Rels. Bd. Decision No. 1029-S, at 8 (1993), 1993 WL 13699367. To the extent petitioner implies that the union stated she could not resign until December 2020 (Pet. 9), that assertion is incorrect.

2. a. Before the termination of her membership, however, petitioner filed this suit. Pet. App. 7a.[1] Petitioner's complaint alleged that the union and the district were violating her First Amendment rights by restricting her ability to resign from the union and continuing to deduct union dues from her paycheck. C.A. E.R. 266-267. She sued the union, the district, and the president of the district's board of trustees, seeking (among other forms of relief) damages for dues paid to the union after her resignation request and an injunction allowing her to resign from the union and stop paying dues. *Id.* at 268-269. She also sued the California Attorney General, seeking a declaration that California Government Code Section 3540.1(i)(1) violates the First Amendment as applied to the States through the Fourteenth Amendment. *Id.* at 268. That statute, in conjunction with others, allows unions to negotiate as a subject of collective bargaining a maintenance-of-membership provision, under which employees who have chosen to become union members must maintain their membership until the expiration of the collective bargaining agreement. *See* Cal. Gov't Code §§ 3540.1(i)(1), 3543.2(a)(1), 3543.3.[2]

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[1] A co-plaintiff, Susan Shroll, raised claims against a different union, a public school district, and the district superintendent in the same complaint. C.A. E.R. 259-260. Shroll voluntarily dismissed her claims in June 2019. Pet. App. 4a n.1.

[2] Petitioner's complaint also challenged the constitutionality of California Government Code Section 3546. C.A. E.R. 268. The General Counsel of the California Public Employment Relations Board, which administers the state's public-sector labor-relations statutes, has since confirmed that Section 3546 is no longer enforced. C.A. Dkt. 25 at 7. Petitioner does not appear to be challenging that provision in this Court. The Board's General

b. The district court denied petitioner's motion for summary judgment and granted summary judgment in favor of the union and the Attorney General. Pet. App. 4a-19a.[3] After satisfying itself as to its jurisdiction, the court held that petitioner's claims failed for lack of state action. *Id.* at 13a-18a.

The court explained that petitioner could not satisfy any of the relevant tests for state action. Pet. App. 14a-18a. The source of petitioner's injury was "the 'particular private agreement' between the union and the employees, not a state statute or policy." *Id.* at 14a. "[G]iven the state's lack of involvement in the drafting and executing of [the union's] agreement with Kurk," the union did not act "in concert" with the State. *Id.* at 14a-15a. Nor did the State "'exercise[] coercive power'" or "engage[] in 'overt or covert encouragement'" to enforce petitioner's private agreement with the union. *Id.* at 15a. And because state law did not require petitioner to join the union, there was no "sufficiently close nexus" between the State and the challenged actions. *Id.* at 15a-18a. For those reasons, the court held that the union was not a state actor and the State was not liable for petitioner's alleged injuries. *Id.* at 18a. Instead, petitioner's remedy was to bring a

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Counsel has also explained that the Board does not interpret Section 3540.1(i)(1) to require public employees to be union members or to pay union membership dues as a condition of employment. *Id.*

[3] The community college district and the president of the district's board of trustees did not actively participate in the litigation before the district court or the court of appeals. Pet. App. 6a n.5; C.A. Dkt. 19 at 3. They had stipulated that they would not contest any of petitioner's factual allegations or legal theories, in exchange for petitioner's waiver of any right to recover attorneys' fees or costs from them. Pet. App. 8a n.6; D. Ct. Dkt. 17.

state-law contract claim for retrospective damages against the union. *Id.*

c. The court of appeals affirmed. Pet. App. 1a-3a. It observed that "Kurk's continued union membership and the deduction of union membership dues arose from the private membership agreement between the union and Kurk." *Id.* at 2a. Such "'private'" agreements, the court reasoned, "'do not trigger state action'" and thus are not subject to constitutional scrutiny. *Id.* (citing *Belgau v. Inslee*, 975 F.3d 940, 946-949 (9th Cir. 2020)). Nor did this Court's precedent "extend a First Amendment right to avoid supporting the union and paying union dues that were agreed upon under voluntarily entered membership agreements." *Id.* (discussing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018)). Accordingly, the court concluded that the damages claim against the union failed. *Id.* at 2a-3a. The court further held that petitioner's claims for declaratory and injunctive relief were moot, noting that petitioner's union membership had already ended and the union and community college district had stopped deducting membership dues from her paycheck. *Id.* at 3a.

ARGUMENT

The court of appeals rejected petitioner's constitutional claim because her allegations arise from her private dispute with the union and do not establish a First Amendment violation. Petitioner now asks this Court to grant plenary review in order to decide whether public employees have a First Amendment right "to resign union membership at will." Pet. i. As petitioner acknowledges, however, there is no circuit conflict on that issue—indeed, "[n]o federal court" has ever recognized the novel right that she proposes. *Id.*

at 5, 7. And this Court has denied multiple recent petitions presenting related questions. There is no good reason for any different outcome here.

1. Petitioner's legal arguments are unpersuasive. As an initial matter, petitioner does not challenge the court of appeals' holding that her claims for prospective relief are moot. *See* Pet. App. 3a. That includes the claim for declaratory relief—which is the only claim that petitioner brought against the state respondent. Nor does petitioner appear to have properly preserved her damages claim against the union: Her petition does not directly challenge the lower courts' application of the state-action doctrine. *See id.* at 2a-3a, 13a-18a. That doctrine is based on "the text and structure of the Constitution" and "distinguishes the government from individuals and private entities." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Despite the centrality of the state-action doctrine to the lower courts' decisions, the petition does not even mention it.

The courts below correctly applied the state-action doctrine in holding that petitioner's constitutional claim lacks merit. The First Amendment, applicable to the States through the Fourteenth Amendment, protects against improper "government interference" with an individual's right to associate with others. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). Here, petitioner's allegations arise from her dispute with the union, a private entity.

As petitioner has acknowledged, no governmental entity required her to join the union. *See* D. Ct. Dkt. 42 at 15 (petitioner's acknowledgment that she "has never complained that she was required to join the Union as a condition of employment"); *see also* Pet. App. 5a-6a, 16a-17a. Indeed, state law does not allow

public employers to require employees to join a union; nor does it "authorize public employers to discipline or discharge employees if they do not join the union[.]" C.A. Dkt. 25 at 7 (declaration of California Public Employment Relations Board's General Counsel); Cal. Gov't Code § 3540.1(i)(1) (providing that employees "may decide whether or not to join" a union). By signing the union's check-off form, petitioner voluntarily joined the union and entered into a private agreement with the union authorizing dues deductions. Pet. App. 17a.

Petitioner now argues (Pet. 4-5, 11-12) that the check-off form was not a membership agreement; indeed, she argues that it was not any sort of agreement with the union. In the district court, however, petitioner stated that the union drafted the form (D. Ct. Dkt. 58 at 4), acknowledged that she signed it "with the Union" (D. Ct. Dkt. 37 at 5; D. Ct. Dkt. 42-9 at 2), and repeatedly described it as the "membership agreement" (D. Ct. Dkt. 37 at 7; D. Ct. Dkt. 43 at 18; D. Ct. Dkt. 49 at 3). No governmental entity was a party to the agreement.

That purely private agreement was the source of petitioner's obligation to maintain union membership and pay dues. Pet. App. 2a, 14a. Under state law, the district could not have begun deducting union dues without petitioner's "written authorization." Cal. Educ. Code § 88167(a)(1). Petitioner's alleged injury stemmed from the union's enforcement of its private agreement with petitioner. Pet. App. 2a, 14a. No First Amendment violation occurred when the union enforced that agreement: as this Court has long held, "the First Amendment does not confer . . . a constitu-

tional right to disregard promises that would otherwise be enforced under state law[.]" *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

Whether or not the union's refusal to allow petitioner to resign at the time of her request was correct under state law, it was not a state action that could provide a basis for a First Amendment claim. California law allows—but does not require—unions to bargain with public school districts over maintenance of membership. Cal. Gov't Code §§ 3540.1(i)(1), 3543.2(a)(1), 3543.3. Under longstanding legal principles, those who voluntarily join a union incur the benefits and are subject to the limitations of the organization's collective bargaining agreement, which may include a maintenance-of-membership provision. *See* 20 Lord, Williston on Contracts § 55.19 (4th ed. 2022) ("It is now also well recognized that all of the terms of a collective bargaining agreement are binding on the individual employees represented by a union that has entered into the agreement on behalf of the employees[.]").[4] To the extent petitioner's claim rests on an assumption that the maintenance-of-membership provision at issue needed to be included in her membership agreement to be binding, that dispute

[4] Petitioner has acknowledged that the union's collective bargaining agreements were readily accessible to its members during her time in the organization. D. Ct. Dkt. 39-2 at 25-26; *see also* D. Ct. Dkt. 38-5 at 2. The 2017-2020 agreement that was the basis of the union's delay in processing her resignation was no exception: as petitioner concedes, it was made available to her and other members before the 2017 ratification vote. D. Ct. Dkt. 39-2 at 25. Moreover, petitioner has admitted that she reviewed some of the union's collective bargaining agreements as part of her work as an employee benefits technician. D. Ct. Dkt. 38-4 at 11.

may be resolved by state contract law. *See, e.g.*, *Kleveland v. Chi. Title Ins. Co.*, 141 Cal. App. 4th 761, 765 (2006) (contractual term's enforceability may depend on sufficiency of incorporation by reference).[5]

However, California law does not allow public employment to be conditioned on the maintenance of union membership or the payment of union dues; nor does it allow public employers to discipline or discharge employees who resign from a union. *See* C.A. Dkt. 25 at 7 (declaration of California Public Employment Relations Board's General Counsel). Indeed, California law provides that an employee's authorization for dues deductions is "revocable," subject to the terms of the employee's agreement with the union. Cal. Educ. Code § 88167(a)(1). And the union is responsible for processing and informing the employer of an employee's cancellation of her authorization. *Id.* § 88167(a)(6). Thus, no governmental entity in this case "'has exercised coercive power or has provided such significant encouragement, either overt or covert'" that the union's actions "'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) (alteration omitted). The government's "'[m]ere approval or acquiescence in the initiatives'" of a private

[5] Petitioner recognized the potential applicability of various contract theories in the courts below. *See, e.g.*, Pet. C.A. Br. 24-25 (arguing that petitioner's dues-deduction form did not properly incorporate by reference the collective bargaining agreement); Pet. C.A. Reply Br. 6-7 (same); D. Ct. Dkt. 58 at 3 (same); D. Ct. Dkt. 42 at 16-17 (arguing it would be a "clear violation of basic contract law" to bind petitioner to the collective bargaining agreement, which she did not sign); D. Ct. Dkt. 48 at 4-5 (arguing it would "violate contract law" to restrict petitioner's ability to resign, since she never agreed to any restrictions in the membership agreement); D. Ct. Dkt. 50 at 4-6 (same).

party is not sufficient to establish state action. *Id.* (alteration in original).

Nor does this Court's precedent support petitioner's claim that the First Amendment grants public employees a right to resign from union membership "at will." Pet. i, 10. Petitioner primarily relies on cases resolving statutory questions in the context of private-sector unions. *Id.* at 6-7; *see, e.g.*, *NLRB v. Granite State Joint Bd., Textile Workers Union of Am., Loc. 1029*, 409 U.S. 213, 218 (1972) (Burger, C.J., concurring) (discussing Section 7 of National Labor Relations Act); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40-41 (1954) (analyzing Section 8 of the Act). The statutory policies discussed in those cases reflect Congress's policy judgments; they do not support petitioner's constitutional theory.

The cases that petitioner invokes regarding the constitutional rights of public-sector employees (Pet. 6, 13) are also inapposite. The cases cited by petitioner involved the collection of mandatory union fees from employees who *declined* to join a union. *See, e.g.*, *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018); *Harris v. Quinn*, 573 U.S. 616, 620, 625 (2014). None addressed the rights of employees who voluntarily joined a union and later sought to resign prematurely. Indeed, *Janus* clarified that while States "cannot force *nonmembers* to subsidize public-sector unions," in other respects States "can keep their labor-relations systems exactly as they are." 138 S. Ct. at 2485 n.27 (emphasis added).

That does not mean that petitioner has no possible recourse. Although the union's alleged misconduct does not constitute a First Amendment violation, state law provides various potential remedies for claims that a union collected unauthorized dues or wrongly

prohibited a member from resigning. As the district court suggested, state contract law could address alleged shortcomings in the private agreement between petitioner and the union. *See* Pet. App. 18a; *supra* pp. 8-9, 9 n.5; *see, e.g.*, *Kleveland*, 141 Cal. App. 4th at 765 (contractual term unenforceable where not sufficiently incorporated by reference). Additional state-law claims may also be available.[6] In light of the availability of traditional state remedies for private misconduct, there is no need for this Court to consider petitioner's novel proposal to constitutionalize a private dispute between her and the union.

2. Petitioner does not contend that the decision below conflicts with any other federal or state appellate precedent. Indeed, petitioner represents that "[n]o federal court" has adopted her argument that a public employee has a First Amendment right to resign union membership at will. Pet. 5, 7. Several circuits have rejected similar arguments. *See, e.g.*, *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 960-962, 964 (10th Cir. 2021); *Bennett v. Council 31 of Am. Fed'n of State, Cnty. & Mun. Emps.*, 991 F.3d 724, 729-733 (7th Cir. 2021); *Belgau v. Inslee*, 975 F.3d 940, 950-952 (9th Cir. 2020). And this Court has denied at least 16 recent petitions presenting related questions.[7]

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[6] *See, e.g.*, Appendix to Pet. for a Writ of Certiorari at 10, *Savas v. Cal. Statewide L. Enf't Ass'n*, No. 22-212 (employees pleading state-law claims for fraudulent concealment and unconscionability for similar alleged union misconduct); *Bank of Am. Corp. v. Superior Court*, 198 Cal. App. 4th 862, 870-871 (2011) (tort of fraudulent concealment); *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1243-1245 (2016) (unconscionability).

[7] *See DePierro v. Las Vegas Police Protective Ass'n Metro, Inc.*,

Petitioner attempts to distinguish her case as involving the question of public employees' right to "disassociate from a union." Pet. 6. But other recent petitions denied by this Court also involved whether the First Amendment requires allowing public-sector employees who voluntarily join a union to resign union membership and cease paying dues at will. *See, e.g.*, Pet. for a Writ of Certiorari at i, 8-9, *DePierro v. Las Vegas Police Protective Ass'n Metro, Inc.*, No. 22-494 (cert. denied Jan. 9, 2023); Pet. for a Writ of Certiorari at i, 14-17, 23, *Cooley v. Cal. Statewide L. Enf't Ass'n*, No. 22-216 (cert. denied Nov. 7, 2022); Pet. for a Writ of Certiorari at 3, 8-13, *Yates v. Hillsboro Unified Sch. Dist.*, No. 21-992 (cert. denied Mar. 7, 2022). And as noted above, California law viewed petitioner's authorization for union dues as "revocable" under whatever terms the parties adopted; the issue in this case is simply whether it was the union or the petitioner—both private parties—that was correct about the terms

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cert. denied, No. 22-494 (Jan. 9, 2023); *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).

for revoking the authorization. *See* Cal. Educ. Code § 88167(a)(1).

Nor is there any other pressing reason to review this case. Although petitioner joined the union before this Court's *Janus* decision, she has disclaimed any argument that the enforcement of agency-fee requirements at the time she joined rendered her choice involuntary. *See* Pet. C.A. Reply Br. 22 (acknowledging that petitioner "does not argue that she was compelled to join the Union"); *see also* D. Ct. Dkt. 42 at 15, 17. This case likewise presents no opportunity to address hypothetical questions that might arise if a public-sector union attempted to require an employee to remain a member indefinitely through repeated extensions of its collective bargaining agreement. *See* Pet. 1, 9; Protect the First Found. Amicus Br. 1, 3-4, 6, 8. The union in this case recognized that California law requires unions to allow members to resign based on the original expiration date of the agreement, without regard to later extensions. D. Ct. Dkt. 45 at 7 n.3; *see Trevisanut v. Cal. Union of Safety Emps.*, Cal. Pub. Emp. Rels. Bd. Decision No. 1029-S, at 8 (1993), 1993 WL 13699367 (holding that unions may not "use contract extensions to deprive members of their right to withdraw from union membership"). The union did not require petitioner to extend her membership when it extended the collective bargaining agreement. *See* D. Ct. Dkt. 45 at 7 & n.3. Instead, the union terminated petitioner's membership and dues deductions in June 2020, when its collective bargaining agreement was originally scheduled to expire. Pet. 9. In enforcing its private agreement with petitioner until that date, the union did not violate any constitutional right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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