No. 23-1112

IN THE
Supreme Court of the United States

RYAN CRAM, ET AL.,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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[Additional Caption Information on Inside Cover]

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ROBERT ESPINOZA,

Petitioner,

v.

UNION OF AMERICAN PHYSICIANS AND DENTISTS, AFSCME LOCAL 206, ET AL.,

Respondents.

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QUESTIONS PRESENTED

1. Whether public employees who voluntarily joined a union and agreed to pay dues and assessments in exchange for membership rights and benefits suffered a violation of their First Amendment rights when they paid the money they agreed to pay.

2. Whether a union engaged in "state action" for purposes of 42 U.S.C. § 1983 when the union entered into voluntary contracts with public employees who were under no obligation to join the union.

3. Whether a union engaged in "state action" for purposes of 42 U.S.C. § 1983 when the union allegedly violated state law by failing to inform one petitioner's public employer that he had cancelled his voluntary authorization for continued payroll deductions.

CORPORATE DISCLOSURE STATEMENT

Respondent Service Employees International Union Local 503, also known as the Oregon Public Employees Union, and respondent Union of American Physicians and Dentists, also known as AFSCME Local 206, have no parent corporations, and no company owns any stock in respondents.

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PRELIMINARY STATEMENT

Petitioners are public employees in Oregon and California who voluntarily joined unions and signed membership agreements that included authorizations for payroll deductions.

The petitioners in *Cram* agreed to pay union dues and assessments through payroll deduction unless they cancelled their authorizations during an annual window period. They received membership rights and benefits in return. After petitioners resigned their memberships, their employer continued to make deductions until the window period commenced, at which point the petitioners' dues deductions ceased in accordance with petitioners' own authorizations.

The petitioner in *Espinoza* claims that, after he validly revoked his authorization for continued deductions, the union violated state law by failing to process the revocation and, as a result, the State Controller erroneously continued to deduct dues and political program contributions. The union subsequently sent petitioner a refund.

Petitioners ask the Court to grant review of the non-precedential decisions below to resolve a purported split of authority about whether "public employees who are former union members possess the First Amendment right to refuse to contribute to union political campaign funds?" Pet. i, 10–14. There is no split of authority to resolve.

No court has ruled that the government may, consistent with the First Amendment, compel any public employees to provide any financial support to unions

or union campaign funds. On the other hand, "[e]very circuit to consider the matter"—including the Ninth Circuit—has concluded that payroll deduction "*under a valid contract* between the union and a member does not violate the First Amendment." *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 860 (8th Cir. 2023) (emphasis supplied), *cert. denied,* 144 S. Ct. 814 (2024); *see also Belgau v. Inslee*, 975 F.3d 940, 950–52 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021).

Petitioners contend that this Court's decision in *Janus v. AFSCME, Council* 31, 585 U.S. 878 (2018), requires the application of a heightened "waiver" standard to voluntary agreements to provide financial support to unions. To the contrary, *Janus* addressed mandatory agency fees that public employers required their employees to pay as a condition of employment, not voluntary deductions. This Court has denied more than a dozen petitions for certiorari that advanced the same meritless argument about *Janus*. *See infra* at 16. There have been no developments since that time that would make the issue worthy of review.

Petitioners also ask the Court to grant review of the non-precedential ruling below to resolve a purported split of authority about whether unions are Section 1983 state actors. Pet. i, 14–18. Again, however, there is no split of authority to resolve.

The circuits agree that when state law makes union membership and union deductions voluntary, unions are not state actors when they enter into agreements with their members or when they provide information to public employers about which employees have authorized deductions. That conclusion follows from this Court's precedents that distinguish

between private conduct and conduct for which the government is responsible.

The cases that petitioner erroneously claims create a conflict on the state action issue are cases like *Janus*, in which the government required employees to pay fees to a union as a condition of employment. In those cases, *the government's mandatory fees requirement* was the alleged First Amendment infringement. The unions' conduct in those cases was attributable to the government because the unions were acting jointly with the government in implementing the government's mandatory fees requirement.

Here, there was no government requirement to pay fees to a union—state law permits deductions only with the employee's affirmative authorization. The *Cram* petitioners entered into voluntary contracts that authorized the union deductions at issue. By contrast, if the petitioner's allegations in *Espinoza* are correct, the union violated state law by failing to inform the State Controller that he validly cancelled his deductions, and that petitioner has a state law remedy against the union for the union's private misconduct.

Petitioners' state action analysis would flood the federal courts with run-of-the-mill payroll disputes. State and local public employers process millions of voluntary employee payroll deductions every month for union dues, charitable contributions, insurance programs, and other purposes. The lower courts have wisely rejected a state action analysis that is inconsistent with this Court's precedents and would make the federal courts responsible for addressing payroll disputes that state labor boards and state courts are competent to resolve.

This Court recently denied another petition for certiorari, filed by the same advocacy organization, that made the same state action argument. *See infra* at 23. There have been no developments since then that would make the question worthy of review.

In the absence of a split of authority, there is no good reason for granting review of the non-precedential rulings below. The petition should be denied.

STATEMENT OF THE CASE

The petition seeks review of two unrelated cases resolved by non-precedential Ninth Circuit decisions: *Cram v. SEIU Local 503* (D. Or.) and *Espinoza v. Union of Physicians and Dentists* (C.D. Cal.).

A. *Cram v. SEIU Local 503*

1. Background

The *Cram* petitioners are employees of the State of Oregon. App. 2a. Their bargaining unit is represented by Service Employees International Union, Local 503 ("SEIU 503"). App. 2a, 12a. Public employees in Oregon are not required to become union members as a condition of employment. App. 13a ¶2. Employees who choose to join a union may authorize the deduction of union "dues, fees and … assessments" from their paychecks in their union membership agreements. Or. Rev. Stat. § 243.806(1). Employees may cancel their deductions in accordance with "the terms of the agreement." *Id*. § 243.806(6).

In 1999, SEIU 503 members voted to increase their membership dues by adding a $2.75 monthly assessment for an "Issues Fund" that would be used to

support public issue and ballot measure campaigns. App.13a–14a ¶4. The Issues Fund is not a political action committee that makes contributions to political candidates. App. 15a ¶9. SEIU 503 sponsors a separate political action committee, funded with optional donations by members, that makes contributions to candidates. *Id.*

The *Cram* petitioners voluntarily joined SEIU 503 by signing membership agreements. App. 15a, 18a–19a, 21a–22a, 24a–25a, 26a–27a, 28a–29a, 31a–32a, 33a–34a ¶¶11, 18–22, 28–31, 37, 43, 49-51, 57, 63. In those membership agreements, petitioners authorized their employer to make payroll deductions for "all Union dues and other fees or assessments" and provided that the deductions would continue unless cancelled during an annual window period. *Id.*

In exchange for their agreements to pay "all Union dues and other fees or assessments," petitioners received the rights of union membership, including the rights to vote in union elections, hold union office, and participate in internal union affairs. App. 31a ¶57. Petitioners also received other benefits of union membership, including access to life, disability, legal, and other insurance, scholarship opportunities, mortgage programs, and discounts on travel, lodging, theme parks, and restaurants. App. 13a ¶3. Petitioners took advantage of those rights and benefits. *Id.*

Petitioners subsequently resigned their union memberships. Pursuant to the terms of their membership agreements, all but one of the petitioners continued to have dues and the Issues Fund assessments deducted from their wages until the window period for cancelling deductions. App. 17a, 20a–21a,

23a, 25a–26a, 28a, 30a–31a, 33a ¶¶15, 16, 26, 35, 41, 47, 55, 61. The remaining petitioner's deductions stopped immediately. App. 34a–35a ¶¶66-69.

2. Proceedings Below

The *Cram* petitioners filed suit under 42 U.S.C. § 1983 against SEIU 503 and Kathy Coba in her official capacity as Director of the Oregon Department of Administrative Services. App. 11a. Petitioners alleged that the deduction of the Issues Fund assessment violated their First Amendment rights because they had not provided sufficient consent to the deductions and had not received an adequate explanation of the purpose of the deductions. Ninth Cir. Dkt. 11 at 147–162.

The district court granted the defendants' summary judgment motions. App. 11a–46a. The district court concluded, based on stipulated facts, that petitioners' "First Amendment claims fail as a matter of law because [petitioners] voluntarily authorized the collection of the assessment." App. 46a.

The district court found that "each [petitioner] voluntarily joined SEIU and signed membership agreements that included payroll deduction authorization agreements," and the district court quoted the language from petitioners' membership agreements that authorized the deduction of "all Union dues and other fees or assessments." App. 43a. The district court rejected petitioners' argument that "dues" and "assessments" should be treated differently for First Amendment purposes, explaining that "[b]oth dues and assessments constitute financial support contractually owed … by union members." App. 44a n.4.

The district court rejected petitioners' claim that they were not bound by their membership agreements because they had received insufficient information about the purpose of the assessment. App. 45a–46a. The district court reasoned that "[a] party who signs a written agreement is bound by its terms, even though the party neither reads the agreement nor considers the legal consequences of signing it." App. 45a (citation, internal quotation marks omitted). The district court further reasoned that petitioners "could have … asked for more information before agreeing to the assessment," and their failure to do so "is no reason to excuse [petitioners] from the agreements into which they voluntarily entered." App. 45a.

The district court also ruled that petitioners' Section 1983 claims against SEIU 503 failed because SEIU 503 did not qualify as a state actor. App. 38. The district court relied on the Ninth Circuit's analysis in *Belgau v. Inslee*, 975 F.3d at 946, which held that a union is not a Section 1983 state actor simply because the government has a system for processing voluntary payroll deductions authorized by bargaining unit employees who wish to support the union. App. 38a.

A Ninth Circuit panel unanimously affirmed the district court's decision in a short, non-precedential memorandum. App. 1a–3a. The Ninth Circuit rejected petitioners' argument that their First Amendment rights were violated because they did not receive the "procedural safeguards" required in *Knox v. Serv. Emps. Int'l Union, Loc. 1000,* 567 U.S. 298 (2012). App. 2a. The Ninth Circuit reasoned that *Knox* applied to nonmembers compelled to pay agency fees as a condition of employment, whereas petitioners "were voluntary union members." App. 2a–3a. The Ninth

Circuit rejected petitioners' argument that language about "waiver" in this Court's decision in *Janus v. AFSCME, Council 31*—another case about mandatory agency fees—applied to voluntary union membership agreements. App. 3a (citing *Belgau,* 965 F.3d at 944). The Ninth Circuit also agreed with the district court that SEIU 503's conduct was not state action. App. 3a (citing *Belgau*, 975 F.3d at 947–49).

The Ninth Circuit denied petitioners' request for rehearing en banc with no judge requesting a vote on the petition. App. 9a.

B. *Espinoza v. UAPD*

1. Background

Petitioner Robert Espinoza is employed by a state agency in California. App. 48a. Espinoza's bargaining unit is represented by the Union of American Physicians and Dentists, AFSCME Local 206 ("UAPD"). App. 5a.

State employees in California have the right to decide whether to become members of the union that represents their bargaining unit. Cal. Gov't Code § 3505. Employees who choose to become union members may authorize the State Controller to make payroll deductions to support their union and its activities. *Id.* § 1153(b). Employees may cancel such deductions "pursuant to the terms of the employee's written authorization." *Id.* § 1153(h). "Employee requests to cancel or change deductions" must be "directed to the employee organization," which is "responsible for processing these requests." *Id.* The Controller "rel[ies] on information provided by the

employee organization regarding whether deductions … were properly canceled or changed," and the employee organization must "indemnify the Controller for any claims made by the employee for deductions made in reliance on that information." *Id.*

California law bars public employers and unions from interfering with state employees' rights to decline to join or support unions. *Id.* §§ 3519, 3519.5. A union's failure to process the revocation of an employee's written dues deduction authorization in accordance with the terms of that authorization would violate this state law. California's Public Employment Relations Board ("PERB") has the authority to remedy violations of public employees' rights. *Id.* §§ 3513(h), 3541.3(i), 3541.5.

Espinoza joined UAPD by signing a membership application that included an authorization for the deduction of union dues and Political Action Program contributions. App. 48a; Ninth Cir. Dkt. 9 at 8, ¶16; Ninth Cir. Dkt. 9 at 30 ("I hereby voluntarily authorize and direct the State Controller to deduct from my salary each pay period the amount of dues certified by the Union … and the amount for the UAPD Political Action Program …."). Under the terms of petitioner's membership application, his authorization for deductions would remain in effect unless cancelled during a window period. Ninth Cir. Dkt. 9 at 30.

In December 2020, Espinoza sent a letter to UAPD stating that he was resigning his membership and cancelling his authorization for union deductions. Ninth Cir. Dkt. 9 at 10, ¶32; *id.* at 43. UAPD notified Espinoza that UAPD would process his request during the window period in his membership application and

his deductions would end on July 1, 2021. Ninth Cir. Dkt. 9 at 12, ¶¶52–54; *id.* at 56.

2. Proceedings Below

On November 17, 2021, Espinoza filed suit in the district court against UAPD, State Controller Betty Yee, Attorney General Rob Bonta, and his state agency employer. App. 49a. Espinoza alleged that, notwithstanding UAPD's representation that his union payroll deductions would end on July 1, 2021, the deductions had not ended. Ninth Cir. Dkt. 9 at 12–13. Espinoza did not allege that, when his deductions continued after July 1, 2021, he notified UAPD (or anyone else) of the error before filing a federal lawsuit. Petitioner also alleged that, notwithstanding the language of his membership application, his deductions for Political Action Program contributions should have ended when he resigned. *Id.* at 12.

Espinoza's complaint asserted claims under 42 U.S.C. § 1983 for violation of his First Amendment and due process rights. Ninth Cir. Dkt. 9 at 17–24, ¶¶75–124. After filing his lawsuit, Espinoza immediately moved for a temporary restraining order to halt further deductions. App. 49a. UAPD advised the district court that Espinoza's continued deductions appeared to be "an administrative error" that "could have easily been rectified promptly, had [Espinoza] … brought it to the attention of UAPD" and that UAPD would "rectify the error" and "provide [Espinoza] a refund." Ninth Cir. Dkt. 32 at 17. The district court denied Espinoza's application for a temporary restraining order as well as a second such application, concluding that "the continued deductions were the result of an administrative error." App. 49a.

The district court subsequently granted defendants' motions to dismiss Espinoza's lawsuit. App. 47a–57a. The district court concluded that Espinoza's claims were moot because UAPD had "ceased making deductions from [Espinoza] and returned the erroneously taken wages;" because "[Espinoza] has no intention of rejoining UAPD;" and because "[Espinoza] concedes that he will not be harmed again in a similar way." App. 53a.

The district court concluded that Espinoza's Section 1983 claims would fail in any event because the erroneous deductions were not caused by "state action," as required for a Section 1983 claim. App. 53a. The district court reasoned that the applicable state law (Cal. Gov't Code § 1153) permitted only authorized deductions and, if UAPD acted unlawfully in providing information to the State Controller, "private misuse of a state statute does not describe conduct that can be attributed to the State." App. 55a (citations, internal quotation marks omitted). The district court further reasoned that the Controller's ministerial role in processing deductions based on information from UAPD did not make the State responsible for UAPD's misconduct, such that UAPD would be considered a state actor. App. 56a–57a.

A Ninth Circuit panel unanimously affirmed the judgment in a short non-precedential memorandum decision. App. 4a–8a. The Ninth Circuit decision was based on slightly different reasoning than the district court's decision.

The Ninth Circuit held that Espinoza's claims for prospective injunctive and declaratory relief were moot because "the dues deductions have ceased, and

Espinoza admits that he is no longer a member of UAPD and that he is unlikely to rejoin." App. 7a–8a. The Ninth Circuit held that Espinoza's damages claims against the government defendants were barred by sovereign immunity. App. 7a.

The Ninth Circuit held that Espinoza's damages claims against UAPD were correctly dismissed because UAPD did not act under color of state law when it requested that the State continue deducting Espinoza's dues from his wages and because that conduct was not "fairly attributable to the State." App. 5a (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)). The Ninth Circuit reasoned that Espinoza "originally authorized UAPD to request such deductions," and his allegations that UAPD failed to stop the deductions after he withdrew authorization amounted only "to an allegation of 'private misuse of a state statute,'" not state action. App. 6a (quoting *Lugar*, 457 U.S. at 941). The Ninth Circuit also reasoned that the State's system for processing voluntary payroll deductions is not sufficient to make UAPD a state actor. App. 6a–7a (citing *Belgau*, 975 F.3d at 947–49).

The Ninth Circuit denied petitioners' request for rehearing en banc with no judge requesting a vote on the petition. Pet. 10a. The petition does not challenge the Ninth Circuit's dismissal of Espinoza's claims for prospective relief or the dismissal of his claims against the government defendants.

REASONS FOR DENYING THE PETITION

Petitioners ask the Court to grant review to resolve a purported split of authority about whether the First Amendment permits the government to require

public employees to provide financial support for union political activities simply because the employees once were union members. There is no split of authority. No court has held that the government may, consistent with the First Amendment, require public employees, including former union members, to pay any money to unions that the employees have not affirmatively agreed to pay. Petitioners also ask the Court to grant review to resolve a purported split of authority about whether unions that receive voluntary payments through payroll deduction are Section 1983 state actors. Again, there is no split of authority. Nor is there any other reason for the Court to grant review of the non-precedential decisions below.

I. Petitioners' first question presented is not worthy of this Court's review.

Petitioners ask the Court to grant review to resolve a purported "conflict" and "circuit split" about whether "public employees who are former union members possess the First Amendment right to refuse to contribute to union political campaign funds." Pet. i (first question presented), 10–14. There is no conflict to resolve. Every court, including the Ninth Circuit, agrees that the government cannot, consistent with the First Amendment, require public employees (including former union members) to pay money to unions that the employees have not voluntarily and affirmatively agreed to pay. On the other hand, courts have uniformly held that public employees do not have a First Amendment right to repudiate otherwise valid contracts.

Petitioners do not accurately characterize the Ninth Circuit's non-precedential rulings below, which

are entirely consistent with the uniform authority on this issue. In any event, an error in a non-precedential ruling would not be worthy of this Court's review.

A. This Court held in *Janus* that public employers cannot require non-members to pay mandatory agency fees to a union as a condition of public employment. 585 U.S. at 929. On the other hand, *Janus* did not involve voluntary union membership agreements, and "every circuit to consider the matter has concluded that the deduction of union dues *under a valid contract* between the union and a member does not violate the First Amendment." *Burns,* 75 F.4th at 860 (emphasis supplied).[1] These decisions are consistent with settled precedent 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).

Petitioners argue that all these decisions conflict with *Janus* because *Janus* created a heightened constitutional "waiver" standard for voluntary agreements to pay money to unions that makes such agreements different from all other contracts. Pet. 11–

[1] *See Wheatley v. N.Y. State United Tchrs.*, 80 F.4th 386, 390–91 (2d Cir. 2023); *Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, 57 F.4th 582, 586 (7th Cir.), *cert denied*, 143 S. Ct. 2614 (2023); *Hoekman v. Educ. Minn.*, 41 F.4th 969, 978 (8th Cir. 2022); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961 (10th Cir.), *cert. denied*, 142 S. Ct. 423 (2021); *Bennett v. Council 31 of the AFSCME, AFL-CIO*, 991 F.3d 724, 729–33 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (2021); *Fischer v. Governor of N.J.*, 842 F. App'x 741, 753 & n.18 (3d Cir.), *cert. denied*, 142 S. Ct. 426 (2021); *Oliver v. SEIU Loc. 668*, 830 F. App'x 76, 80 (3d Cir. 2020); *Belgau*, 975 F.3d at 951.

12. To the contrary, *Janus* did not involve voluntary union membership agreements, and this Court explained that, beyond eliminating compulsory nonmember agency fees, "States can keep their labor-relations systems exactly as they are." *Id.* at 928 n.27.[2]

Petitioners argue that there is a circuit split because the Third and Sixth Circuits "apply the First Amendment to protect the rights of … previous union members." Pet. 12–13. But the decisions that petitioners cite do not hold, or even remotely suggest, that the First Amendment precludes the government from making union deductions that employees authorized in written membership agreements.

In *Lutter v. JNESO*, 86 F.4th 111 (3d Cir. 2023), a public employee argued that a new state statute impermissibly restricted her right to cancel her authorization for dues deductions because she never agreed to the restriction. *Lutter,* 86 F.4th at 120, 131. The Third Circuit held in *Lutter* only that the plaintiff's claims were justiciable. *Id.* at 124–35. The Sixth Circuit held in *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176 (6th Cir. 2023), that the plaintiff's

[2] Petitioners rely on this Court's pre-*Janus* agency fee cases, under which the government could, consistent with the First Amendment, require nonmember public employees to pay mandatory agency fees for union activities germane to collective bargaining representation but not for other union activities. Pet. 10–11. None of those cases addressed *voluntary* union membership agreements, so they have no application here. *See Harris v. Quinn*, 573 U.S. 616, 625–26 (2014) (mandatory agency fees); *Knox v. Serv. Employees Intern. Union, Loc. 1000*, 567 U.S. 298, 302 (2012) (same); *Chicago Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 295 (1986) (same); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 212 (1977) (same).

Section 1983 claims failed because the union's alleged misconduct was not attributable to the government. *Id.* at 1178. Neither decision addressed the merits of the plaintiff's First Amendment claims. There is no split of authority or even any tension in reasoning.

This Court has denied petitions for certiorari in more than a dozen cases raising the same basic argument about *Janus* that petitioners press here.[3] There have been no developments since then that would make the question worthy of review.

B. Petitioners mischaracterize the Ninth Circuit's rulings below, which are entirely consistent with the uniform authority discussed above. In any event, an

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[3] *Alaska v. Alaska State Emps. Ass'n/AFSCME Loc. 52, AFL-CIO*, No. 23-179, 144 S. Ct. 682 (2024); *Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, No. 22-1096, 143 S. Ct. 2614 (2023); *O'Callaghan v. Drake*, No. 22-219, 143 S. Ct. 2431 (2023); *Savas v. Cal. Statewide Law Enf't Ass'n*, No. 22-212, 143 S. Ct. 2430 (2023); *Polk v. Yee*, No. 22-213, 143 S. Ct. 405 (2022) (denying petition covering two cases); *Cooley v. Cal. Statewide Law Enf't Ass'n*, No. 22-216, 143 S. Ct. 405 (2022); *Yates v. Hillsboro Unified Sch. Dist.*, No. 21-992, 142 S. Ct. 1230 (2022); *Woods v. Alaska State Emps. Ass'n*, No. 21-615, 142 S. Ct. 1110 (2022) (denying petition covering two cases); *Anderson v. Serv. Emps. Int'l Union Loc. 503*, No. 21-609, 142 S. Ct. 764 (2022) (denying petition covering four cases); *Grossman v. Hawaii Gov't Emps. Ass'n*, No. 21-597, 142 S. Ct. 591 (2021); *Smith v. Bieker*, No. 21-639, 142 S. Ct. 593 (2021); *Wolf v. UPTE-CWA 9119*, No. 21-612, 142 S. Ct. 591 (2021); *Hendrickson v. AFSCME Council 18*, No. 20-1606, 142 S. Ct. 423 (2021); *Bennett v. AFSCME, Council 31, AFL-CIO*, No. 20-1603, 142 S. Ct. 424 (2021); *Troesch v. Chicago Tchrs. Union*, No. 20-1786, 142 S. Ct. 425 (2021); *Fischer v. Murphy*, No. 20-1751, 142 S. Ct. 426 (2021); *Belgau v. Inslee*, No. 20-1120, 141 S. Ct. 2795 (2021).

error in a non-precedential ruling would not provide a sufficient reason for review.

1. The Ninth Circuit did not rule in *Espinoza* that the government could, consistent with the First Amendment, continue to deduct dues and political program contributions from petitioner Espinoza's paychecks after he had revoked his authorization. Rather, Espinoza's claims against the government defendants were dismissed for threshold reasons (mootness and sovereign immunity) that the petition does not dispute. *See supra* at 11–12. Espinoza's Section 1983 claims against UAPD were dismissed because UAPD's alleged misconduct was not state action. *Id.* at 12.

Thus, the Ninth Circuit did not even address the merits of the First Amendment issue in *Espinoza.* The Ninth Circuit certainly did not hold, as petitioners' claim, that "unions may take political assessments from public employees … because they previously agreed to be union members." Pet. 7–8.

2. Similarly, the Ninth Circuit did not rule in *Cram* that the government could, consistent with the First Amendment, continue to deduct dues and assessments from petitioners' paychecks simply because they "previously joined the union." Pet. i. Rather, the district court found that petitioners entered into valid contracts to pay dues and assessments until an annual window period. *See supra* at 6. They received valuable consideration in return. *Id.* at 5.

Petitioners misinterpret a sentence in the Ninth Circuit's *Cram* decision stating that "the 'procedural safeguards' that protect non-members from the risk of

compelled political speech do not apply here since [petitioners] were voluntary union members." App. 2a–3a (citing *Knox*, 567 U.S. at 316); Pet. 4. *Knox* involved public employees who were compelled to pay mandatory agency fees as a condition of public employment. 567 U.S. at 302. This Court held that the union was required to use an opt-in system rather than an opt-out system when applying a mid-year "special assessment or dues increase" to nonmember agency fee payors. *Id.* at 312–22. The Ninth Circuit was correct that the *Knox* decision has no application in a post-*Janus* world to employees who voluntarily and affirmatively enter into membership agreements.

The *Cram* petitioners dispute that their agreements were valid contracts. They argue that "[b]ecause SEIU [503] never informed [petitioners] that the political campaign assessment was, in fact, for political campaigns, any so-called 'agreement' to pay was illusory." Pet. 12. That is a case-specific argument unworthy of this Court's review. Moreover, the district court correctly held that the *Cram* petitioners' argument failed under standard contract law principles. *See supra* at 7.

The *Cram* petitioners agreed, in exchange for the rights and benefits of union membership, that they would pay "all Union dues *and other fees or assessments*." App. 43a (emphasis supplied); *see supra* at 5, 6. The assessment had been in place since 1999, before any of the petitioners signed the operative membership agreements. App. 14a–33a. Petitioners' decisions not to request more information did not invalidate their contracts. *See* App. 45a–46a.

Moreover, the distinction between "dues" and "assessments" in *Cram* was just a matter of internal union nomenclature. SEIU 503 could have used regular dues to pay for the same activities. *See* Pet. 44a n.4. Petitioners point out that the assessment was used for political purposes, but petitioners do not offer a coherent argument as to why that matters for purposes of contract law. Nor does the distinction matter for purposes of the First Amendment, which prohibits public employers from making *any* union deductions that employees have not voluntarily authorized. The *Cram* petitioners' claims failed because they did voluntarily authorize the deductions at issue in written contracts, and they received consideration in return.

Even if the Ninth Circuit panel erred in applying precedent to the specific facts in *Cram* (and it did not), that would not provide a good reason for the Court to review a non-precedential decision.

II. The state action issue is not worthy of this Court's review.

Petitioners also ask the Court to grant review to decide whether the lower courts correctly dismissed their Section 1983 claims against the union defendants because the unions' alleged misconduct was not state action. Pet. i (second question presented), 14–18. Contrary to petitioners' contention, there is no "conflict[]" in the caselaw about state action as applied to union deductions. Pet. 14. The Ninth Circuit's case-specific application of state action caselaw in the non-precedential decisions below was entirely correct and, in any event, is not worthy of the Court's review.

A. Section 1983, which provides a cause of action for constitutional deprivations that occur under color of state law, "protects against acts attributable to a State, not those of a private person." *Lindke v. Freed*, 601 U.S. 187, 194 (2024). "This limit tracks that of the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that §1983 protects." *Id.* at 194–95 (emphasis in original). "[T]he statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar*, 457 U.S. at 929.

1. Unions are private parties. The circuit courts agree that, when state law permits only *voluntary* union deductions, a union does not engage in state action when the union enters into private membership agreements with its members or when the union provides information to public employers about which employees have voluntarily authorized deductions. Misconduct by a union in those contexts is therefore actionable under state law, not Section 1983.

The Ninth Circuit addressed this issue in *Belgau* and in *Wright v. SEIU Local 503*, 48 F.4th 1112 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023). *Belgau* held that a union was not engaged in state action when the union entered into agreements with its members that contained "allegedly insufficient consent for dues deduction." 975 F.3d at 946–49. *Wright* held that a union's alleged forgery of a public employee's dues authorization was not attributable to the government. 48 F.4th at 1123–25. In both cases, the employee's remedy against the union would be under state law, not Section 1983. This Court denied petitions for certiorari in both cases.

The Eighth Circuit reached the same conclusion in *Hoekman v. Education Minnesota*, 41 F.4th 969 (8th Cir. 2022). In that case, a public employee (Piekarski) alleged that his union failed to promptly process his resignation request and that the delay resulted in the deduction of additional membership dues. *Id.* at 978. Judge Colloton, writing for the Eighth Circuit panel, explained that "[w]hether or not the union officials were correct in declining to honor the e-mail request, the decision was made by the union officials alone, and does not constitute state action. That the State continued to deduct dues from Piekarski as long as he remained on the union rolls does not make the State responsible for the decision of union officials…." *Id.*

The Sixth Circuit reached the same conclusion in *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176 (6th Cir. 2023). The Sixth Circuit held that the plaintiff's allegations that a union "improperly instructed the state to withhold union dues after she withdrew her union membership" did not state a Section 1983 claim against the union because the union's alleged misconduct was not attributable to the State. *Littler*, 88 F.4th at 1181.

2. The decisions that petitioners rely upon as showing a "conflict," "division," and "split" about state action (Pet. 9, 14–18) involve a very different situation. In those cases, a state law or policy required nonmembers to provide financial support to a union as a condition of employment. The alleged First Amendment infringement was *the government's mandatory fees requirement*, so it was attributable to the government. The union was a state actor because the union was acting jointly with the government in implementing that government requirement.

In *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*), for example, the government required non-members to pay compulsory agency fees to a union. The union was "a joint participant with the state in the agency-fee arrangement." *Id.* at 361. *See Littler*, 88 F.4th at 1182 n.2 (distinguishing *Janus II* because the deductions were required by "a fair share statute"); *Wright*, 48 F.4th at 1122 n.7 (distinguishing *Janus II* for the same reason).

The same is true of this Court's agency fee precedents, which assumed sub silentio that public employee unions were proper Section 1983 defendants in those cases. *See* Pet. 8, 14–15 (citing cases). Those cases all involved government requirements that non-members provide financial support to unions as a condition of public employment.[4]

Petitioner misreads the Third Circuit's decision in *Lutter v. JNESO* as showing a conflict about the proper analysis of state action. Pet. 9, 16. The Third Circuit did not "indicate[] there would be state action through union activities in circumstances such as those presented here." Pet. 9. Rather, the Third Circuit held only that the plaintiff had standing and her claim was not moot. *Lutter*, 86 F.4th at 129. The Third Circuit expressly did not decide whether the union defendant in that case qualified as a Section 1983 state

[4] *See Janus,* 585 U.S. at 929–930 (mandatory agency fees); *Harris v. Quinn*, 573 U.S. 616, 625–26 (2014) (same); *Knox v. Serv. Employees Intern. Union, Loc. 1000*, 567 U.S. 298, 302 (2012) (same); *Chicago Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 295 (1986) (same); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 212 (1977) (same).

actor. *See id.* at 135 n.27 ("[W]hether JNESO was a state actor subject to suit under § 1983 [is] properly addressed in the first instance by the District Court on remand."). There is no conflict or even any tension in reasoning.

Finally, although the Sixth Circuit held in *Littler* that the union defendant was *not* a state actor, petitioner points to the Sixth Circuit's observation that " '[h]ad Littler challenged the constitutionality of a statute pursuant to which the state withheld dues' … there would be state action." Pet. 13 (*quoting Littler*, 88 F.4th at 1182). But the *Littler* court gave the example of *Janus II*, in which state law required nonmembers to pay fair-share fees. *See* 88 F.4th at 1182.

In these cases, there was no state statute that requires public employees to pay any money to a union. Both California law and Oregon law permit only union deductions that public employees have voluntarily authorized and provide that employees can cancel deductions pursuant to the terms of their voluntary authorizations. *See supra* at 4, 8.

In sum, there is no conflict about state action that would justify review, or even any tension in the relevant caselaw. Moreover, this Court recently denied another petition for certiorari, filed by the same advocacy organization, that raised the same argument about state action. *See Jarrett v. Serv. Emps. Int'l Union Loc. 503*, No. 23-272, 144 S. Ct. 494 (2023). There have been no developments since that time that would make the question worthy of review.

3. Petitioners' proposed state action analysis is also inconsistent with this Court's precedents. Private

conduct does not become state action because, as a result of that private conduct, a public employer makes payroll deductions. *See*, *e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) ("That the State responds to [private] actions … does not render it *responsible* for those actions.") (Emphasis in original).

Petitioners' analysis would also flood the federal courts with lawsuits about alleged payroll errors. About six million state and local public employees are union members.[5] Most of them pay their union dues through payroll deduction, so public employers are processing millions of union deductions every month. Public employees also authorize voluntary payroll deductions for charitable contributions, insurance premium payments, and other purposes. The lower courts have wisely and correctly rejected a state action analysis that both is inconsistent with this Court's precedents and would turn the federal courts into substitutes for state labor boards and state courts in addressing disputes about employee payroll deductions, where state law already requires affirmative consent.

B. The Ninth Circuit's analysis of state action in the two cases below was entirely correct. In any event, a case-specific error in a non-precedential decision would not be worthy of review.

1. Petitioner Espinoza acknowledges that he signed a union membership application that

[5] News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2023 (Jan. 23, 2024), Table 3, available at https://www.bls.gov/news.release/pdf/union2.pdf (last visited July 2, 2024).

authorized the voluntary payment of dues and political action program contributions through payroll deduction. Pet. 5–6; *see supra* at 9. California law provides that employees can cancel such deductions "pursuant to the terms of the employee's written authorization." Cal. Gov't Code § 1153(h). Unions are "responsible for processing these requests." *Id.*

The essence of Espinoza's claim is that he validly cancelled his deductions, but UAPD did not process the cancellation and inform the State Controller to stop the deductions. *See* App. 5a–6a; *supra* at 10. If petitioner is correct, then UAPD violated state law. App. 6a. UAPD acknowledged that the continued deductions were an administrative error and provided Espinoza with a refund. *See supra* at 10.

UAPD's failure to process Espinoza's cancellation did not qualify as state action because it was private misconduct by the union, not conduct attributable to the government. App. 6a (Espinoza's allegations show "private misuse of a state statute" not "conduct that can be attributed to the State") (quoting *Lugar*, 457 U.S. at 941); *see also Hoekman,* 41 F.4th at 978 ("[T]he decision was made by the union officials alone, and does not constitute state action. That the State continued to deduct dues … does not make the State responsible for the decision of union officials…."). Espinoza did not allege that the Controller was even aware of the problem.

Petitioners insist that UAPD should have been treated like a government official for purposes of Section 1983 because "state law grants the union[] the privilege of designating from which employees to deduct union dues and assessments." Pet. 15. That is

simply wrong. California law forbids involuntary deductions. The Controller may request that a union produce "a copy of an [employee's] individual authorization" if "a dispute arises about the existence or terms of the authorization." Cal. Gov't Code § 1153(b). A union's failure to process a valid request to revoke voluntary deductions would constitute a violation of state law redressable by PERB. *See supra* at 9. California law also recognizes all the usual state law civil claims, such as for conversion and unjust enrichment. 5 Witkin, Summary of California Law, Torts § 810 et seq., § 1053 (11th Ed. 2024). Petitioner could have sought a remedy under state law—although he has already received a full refund with interest.

Petitioners point out that state officials, acting in their official capacities, are considered Section 1983 state actors even when they abuse their authority in violation of state law. Pet. 17 n.9 (citing *Lindke*, 601 U.S. at 191 (city manager); *United States v. Classic*, 313 U.S. 299, 307 (1941) (state election commissioners)). The same analysis, however, does not apply equally to private parties. *See, e.g., Lugar*, 457 U.S. at 940 ("That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision.").

In any event, even if the Ninth Circuit made an error in applying state action caselaw to the allegations of the *Espinoza* case (and it did not), an error in a nonprecedential decision (affecting a petitioner who would have a state law remedy if he had not already received a refund) would not provide a sufficient basis for this Court's intervention.

2. The *Cram* petitioners signed voluntary union membership agreements in which they authorized the deduction of dues and assessments. *See supra* at 5. SEIU 503's private conduct in entering into voluntary agreements with its members was not attributable to the government simply because the government processed voluntary deductions based on those employee authorizations. *See, e.g.*, *Belgau*, 975 F.3d at 946–49.

Moreover, the *Cram* petitioners' First Amendment claims failed on the merits because they suffered no First Amendment violation when they paid money they voluntarily agreed to pay. *See supra* at 6–7. The same merits holding would foreclose petitioners' claims against SEIU 503 even if those claims did not also fail for lack of state action. *See, e.g., Hendrickson*, 992 F.3d at 961 n.17 ("Because we find that Mr. Hendrickson's underlying claim for back dues against the Union fails, we do not additionally consider whether the Union meets the 'state actor' element for this § 1983 claim."); *Bennett*, 991 F.3d at 730–33 (rejecting indistinguishable First Amendment claim against union on the merits without addressing "state action" issue); *Fischer*, 842 F. App'x at 752–53 (same).

In any event, even if the Ninth Circuit made an error in applying state action caselaw to the allegations of the *Cram* case (and it did not), an error in a nonprecedential decision (that did not even affect the outcome of that case) would not provide a sufficient basis for this Court's intervention.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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