No. 23-1112

IN THE

Supreme Court of the United States

RYAN CRAM, ET AL.,

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, 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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QUESTIONS PRESENTED

Petitioners are public employees who voluntarily joined a union, signed written agreements to pay membership dues for a one-year period, and received membership rights and benefits in return.

1. Did the States and public unions violate petitioners' First Amendment rights by making deductions that petitioners affirmatively and unambiguously authorized?

2. Were the unions engaged in "state action" for purposes of 42 U.S.C. § 1983 when they entered into voluntary private membership and dues authorization agreements with public employees?

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INTRODUCTION

Lower courts have unanimously held that States do not violate employees' First Amendment rights by enforcing voluntary contractual agreements permitting the payment of union fees for a set period. The non-precedential, unpublished orders below follow that settled consensus. For the last six years, this Court has denied several petitions for certiorari that raised the same questions about the enforceability of union agreements. Petitioners offer no basis to treat this petition differently. And the unusual procedural posture of this case, which combines two factually distinct cases arising from separate states, makes it an especially poor vehicle for addressing the underlying issue.

STATEMENT OF THE CASE

A. In the Oregon case, the Ninth Circuit affirmed the district court's grant of summary judgment to defendants based on a lack of First Amendment violation and a lack of state action.

1. In Oregon, public employees are free to join or decline to join a union. *Dale v. Kulongoski*, 894 P.2d 462, 464-65, n. 5 (Or. 1995). If employees join a union, the State will deduct union dues from their paychecks only if those employees have authorized deductions and only if the employees' names appear on a list compiled by the union. Or. Rev. Stat. § 243.806(2) (requiring public employer to deduct dues according to authorization); Or. Rev. Stat. § 243.806(7) (requiring a labor organization to provide a list of employees who have authorized deductions

and the public employers to "rely on the list" in making deductions). Employees may revoke such authorization, but only "in the manner provided by the terms of the agreement." Or. Rev. Stat. §§ 243.806(6)–(7). If any dispute arises over the validity of dues deductions, employees may seek relief from the Employment Relations Board, including actual damages for any amount of unauthorized dues, subject to state judicial review. Or. Rev. Stat. § 243.806(10).

2. Petitioners in *Cram v. Serv. Employees Int'l Union Local 503,* No. 22-35321, 2023 WL 6971455 (9th Cir. Oct. 23, 2023), are Oregon state employees represented by Services Employees International Union (SEIU) for collective bargaining. C.A. Dkt. 11 at 130–43 (Excerpts of Record). Each petitioner voluntarily signed a union membership card and joined SEIU. C.A. Dkt. 11 at 130–43. Petitioners' union membership cards included a section providing that they were authorizing their employers to "deduct from [their] wages all Union dues and other fees and assessments as shall be certified by [SEIU and successor entities]" and that "[t]his authorization/delegation is unconditional * * * and is made irrespective of [their] membership in the Union." C.A. Dkt. 11 at 130-43. The cards also specified that the dues-deduction authorization would be irrevocable year-to-year except within a specific, limited time period. C.A. Dkt. 11 at 130-43. Every month of the authorized periods, union dues were deducted from petitioners' wages. C.A. Dkt. 11 at 130–43.

In addition to union dues, an ongoing monthly assessment of $2.75 was deducted and allocated to the SEIU 503 "Issues Fund." C.A. Dkt. 11 at 128, 130–43. The $2.75 assessment was authorized in the late 1990s by SEIU 503's General Council, the union's top governing body, and was approved by a vote of the union's membership. C.A. Dkt. 11 at 128. The assessment appeared as a line-item deduction on petitioners' paychecks separately from union dues. C.A. Dkt. 11 at 129.

In the wake of this Court's holding in *Janus v. American Federation of State, County, & Municipal Employees*, 585 U.S. 878 (2018), each petitioner resigned from the union. C.A. Dkt. 11 at 130–43. SEIU confirmed those resignations and informed petitioners that, under the terms of their union dues-deduction agreements, payroll deductions would continue until the annual window for revoking their authorization. C.A. Dkt. 11 at 130–43. The exception was petitioner Cram whose dues deductions ceased immediately after he resigned from the union. C.A. Dkt. 11 at 142–44.

3. Petitioners filed a complaint under 42 U.S.C. § 1983 on behalf of a putative class alleging that SEIU and the Director of Oregon's Department of Administrative Services (DAS) violated their First Amendment rights. C.A. Dkt. 11 at 164–65, 176–78. Initially, Oregon DAS and SEIU moved to dismiss plaintiffs' complaint on the ground that plaintiffs' claims were nonjusticiable because dues were no longer being deducted from petitioners' paychecks. C.A. Dkt. 11 at 5. The Magistrate Judge recommended that the district court dismiss those

claims with leave to file an amended complaint. C.A. Dkt. 11 at 5. Petitioners voluntarily dismissed three plaintiffs from the case and filed an amended complaint that added one plaintiff, Drake, from whose paycheck dues were still being deducted. Pet. App. 12a; C.A. Dkt. 11 at 152–53. In the amended complaint, Drake sought declaratory and injunctive relief against the Director of Oregon DAS, and all plaintiffs sought declaratory, injunctive, and compensatory relief against SEIU. C.A. Dkt. 11 at 159–61. The parties cross-moved for summary judgment based on stipulated facts and consented to allow a Magistrate Judge to enter final orders and judgment in the case. Pet. App. 12a.

The Magistrate Judge granted summary judgment to the Director of DAS and SEIU. The Magistrate Judge first determined that SEIU did not engage in state action for the reasons explained in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). In *Belgau*, the plaintiffs were public-sector employees who had voluntarily joined the union and agreed to authorize dues deductions for a one-year commitment period. *Id.* at 945. Shortly after *Janus*, they resigned from the union and sought to enjoin any further dues deductions even though they had authorized such deductions until the one-year commitment period expired. *Id.* at 946. The Ninth Circuit held that the union had not engaged in state action under the relevant tests described by this Court. Rather, as the Ninth Circuit explained, "the state's role here was to permit the private choice of the parties." *Id.* at 947. The Ninth Circuit also held that the plaintiffs suffered no First Amendment violation because they

entered into voluntary contracts in which they authorized dues deductions for a one-year period.

Applying *Belgau* to this case, the Magistrate Judge concluded that plaintiffs' "private agreements are not sufficient to establish state action." Pet. App. 40a. It further concluded that the state did not act in concert with SEIU in causing the alleged deprivation of constitutional rights. Pet. App. 40a. Rather, as *Belgau* explained, "[a] merely contractual relationship between the government and the non-governmental party does not support joint action; there must be a 'symbiotic relationship' of mutual benefit and 'substantial degree of cooperative action." *Belgau*, 975 F.3d at 948. Finally, the Magistrate Judge further determined that the union was not a state actor under any other test for state action—including the-exercise-of-state-powers test or the coercive-power test—for the reasons *Belgau* explained. Pet. App. 41a–42a.

The Magistrate Judge also rejected plaintiffs' claim that *Janus* imposed a heightened waiver requirement for dues-deduction authorizations under the First Amendment. It explained that *Belgau* had "squarely rejected a heightened 'clear and compelling waiver' argument that Plaintiffs advance here." Pet. App. 42a. As the Magistrate Judge explained, in *Belgau*, "the Ninth Circuit 'join[ed] the swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union [financial obligations]," and held that "*Janus* does not preclude enforcement of union membership and [payroll] deduction authorization agreements." Pet. App. 43a (quoting *Belgau*, 975 F.3d at 951 & n.5)

(internal quotation marks omitted). The Magistrate Judge likewise rejected petitioners' arguments that petitioners lacked information necessary to understand what assessments would be deducted from their wages, reasoning that plaintiffs "could have declined to sign the membership agreements or asked for more information before agreeing to the assessment." Pet. App. 45a.

In an unpublished decision, the Ninth Circuit affirmed. Pet. App. 2a–3a. Relying on *Belgau*, the Ninth Circuit reasoned that the procedural safeguards that protect nonmembers from the risk of compelled speech did not apply to people who voluntarily joined the union. Pet. App. 2a–3a. Similarly, it determined that *Janus* did not impose a heightened standard for the waiver of First Amendment rights for people "who affirmatively signed up to be union members." Pet. App. 3a. Finally, it concluded that SEIU did not engage in state action under any standard for state action described by this Court's precedent. Pet. App. 3a.

The Ninth Circuit denied a petition for rehearing en banc without any judge requesting a vote. Pet. App. 9a.

B. In the California case, the Ninth Circuit affirmed the district court's grant of dismissal to defendants based on mootness and a lack of state action.

1. As in Oregon, in California, state employees may join or decline to join a union. Cal. Gov't Code § 3515. If employees join a union, they may authorize the California State Controller, who is responsible for

the state payroll system, to deduct union dues from their wages. *See* Cal. Gov't Code § 1153(b). If employees want to resign from union membership or cease paying contributions to the union, they may directly make a request to the union, which is responsible for processing it. *See* Cal. Gov't Code § 1153(h). The State Controller, then, may revoke the dues deduction according to the terms of the employee's written authorization. *Id*.

2. Petitioner in *Espinoza v. Union of Am. Physicians & Dentists, AFSCME Local 206*, No. 22-55331, 2023 WL 6971456 (9th Cir. Oct 23, 2023), was a physician working for California Correctional Health Services. Pet. App. 48a. In 2018, he joined the Union of American Physicians and Dentists (UAPD), and his membership agreement authorized the payment of dues and fees paid to the union's Political Action Program. Pet. App. 48a. In 2020, petitioner informed UAPD that he did not want to make any more union contributions. Pet. App. 48a–49a. UAPD confirmed for Espinoza that his contributions would stop in July 2021. Pet. App. 49a. Because of an administrative error, contributions continued until sometime after July 2021. Pet. App. 49a. UAPD eventually reimbursed all erroneously withheld wages. Pet. App. 53a.

3. In November 2021, Espinoza filed a complaint alleging that UAPD and the state defendants violated his First Amendment rights by deducting union dues and fees from his paycheck after he informed UAPD that he wanted to cease contributions. Pet. App. 49a.

The district court dismissed the case against the state defendants on the ground that Espinoza's claim was moot and denied Espinoza's motion for leave to file an amended complaint against the union to certify a class of similarly situated plaintiffs because the union was not a state actor under *Belgau*. Pet. App. 52a–53a.

In an unpublished decision, the Ninth Circuit affirmed. Pet. 5a–8a. It concluded that the district court properly dismissed Espinoza's claims for declaratory and injunctive relief against the state defendants as moot because Espinoza's dues deductions had ceased, and Espinoza conceded that he was unlikely to rejoin UAPD. Pet. App. 7a–8a. It also concluded that the district court correctly determined that the union did not engage in state action. Pet. App. 6a–7a. Relying on *Belgau*, the Ninth Circuit reasoned that "the mere fact that a state transmits dues payments to a union does not give rise to a section 1983 claim against the union under the 'joint action' test." Pet. App. 6a (quoting *Belgau*, 975 F.3d at 947–49). It further explained that a state employer's "ministerial processing of payroll deductions" did not create a sufficient nexus between a State and the union to transform the union into a state actor. Pet. App. 6a (quoting *Belgau*, 975 F.3d at 947–48 & n.2).

The Ninth Circuit denied a petition for rehearing en banc without any judge requesting a vote. Pet. App. 10a.

REASONS FOR DENYING THE PETITION

Petitioners advance arguments that circuit courts of appeal have consistently rejected and that this Court has repeatedly declined to review. Even if it presented novel or important issues, this case is a poor candidate for review. The circuit split that petitioners perceive is illusory. The claims against state officials are moot. And this case would have limited impacts on public employees and public unions. Finally, in any event, the unpublished Ninth Circuit panel decisions correctly applied First Amendment and state-action precedent. This court should deny certiorari, as it has done in several cases presenting similar issues over the past three years.

A. No circuit split exists.

In *Belgau*, the Ninth Circuit rejected the petitioners' argument that, post-*Janus*, the First Amendment prohibited public employers from making dues deductions from the paychecks of public employees who agreed to dues deductions for a year but resigned from the union before that period was up. Instead, the Ninth Circuit held that the First Amendment "does not support [public employees'] right to renege on their promise to join and support the union." *Belgau*, 975 F.3d at 950. Rather, public employees are free "not to join the union in the first place" and to resign from the union subject to "a limited payment commitment period." *Id.* at 952. The Ninth Circuit also held that unions did not become state actors by asking the State to enforce private agreements. *Id.* at 946–49 (finding no state action because the alleged deprivation was not attributable to a state-created

right, privilege, or rule of conduct and union was not a joint actor with state). This Court denied certiorari in *Belgau*. *Belgau v. Inslee*, 141 S. Ct. 2795 (2021).

Every circuit to consider the First Amendment issue agrees with *Belgau*'s analysis. *Barlow v. Serv. Employees Int'l Union Local 668*, 90 F. 4th 607, 616 (3d Cir. 2024); *Wheatley v. New York State United Teachers*, 80 F.4th 386, 391 (2d Cir. 2023); *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 861 (8th Cir. 2023); *Hendrickson v. AFSCME, Council 18*, 992 F.3d 950, 961 (10th Cir. 2021); *Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO*, 991 F.3d 724, 731 (7th Cir. 2021). And every circuit to consider the state-action question agrees with the Ninth Circuit's approach. *See, e.g.*, *Hoekman v. Educ. Minnesota*, 41 F.4th 969, 978 (8th Cir. 2022) (concluding that union was not state actor in negotiating private contract with state employee even if state employers remit dues deductions to unions); *Littler v. Ohio Assoc. of Pub. of School Employees*, 88 F.4th 1176 (6th Cir. 2023) (agreeing with state action analysis in *Belgau* and other Ninth Circuit cases). This Court has recently denied several petitions presenting the same or similar questions.[1]

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[1] *See Kurk v. Los Rios Classified Employees Ass'n*, cert. denied, No. 22-498 (May 1, 2023); *Savas v. California Statewide Law Enf't Ass'n*, cert. denied, No. 22-212 (May 1, 2023); *O'Callaghan v. Drake*, cert. denied, No. 22-219 (May 1, 2023); *DePierro v. Las Vegas Police Protective Ass'n Metro, Inc.*, 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*,

Footnote continued…

In search of a split, petitioners misread three cases, none of which depart from that consensus. *Janus v. Am. Fed'n of State, Cnty. & Mun. Employees, Council 31*, 942 F.3d 352, 359 (7th Cir. 2019) (*Janus II*), merely confirms the obvious about state action: If a statute categorically requires that all non-union members pay fair-share fees to a union, the union acts jointly with the state and is a state actor. *Id.* at 361. But *Janus II* did not address whether a union becomes a state actor simply by taking advantage of rules permitting private contracts for dues deductions. *Janus* and *Janus II* concerned fair-share fees mandated by statute, not private contracts into which parties may freely enter.

Lutter v. JNESO, 86 F.4th 111 (3rd. Cir. 2023), is no help to petitioners either. There, Lutter alleged First Amendment violations against a union and various state and local governmental entities on the the-

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(...continued)
cert. denied, No. 21-1372 (Oct. 3, 2022); *Few v. United Tchrs. LA.*, 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).

ory that *Janus* invalidated her prior agreement to pay union dues for a fixed period of time. *Id.* at 121. Although the Third Circuit reversed the district court's ruling that the damages claim against the union was moot, it affirmed the district court's ruling that Lutter lacked standing to assert claims for prospective equitable relief against the state and local officials: No declaration or injunction would remedy Lutter's injury because the government had already ceased dues deductions. *Id.* at 126–35. The Third Circuit thus never reached the merits of the First Amendment issue or the state-actor issue. To the contrary, it reserved those issues for resolution by the district court on remand. *See id.* at 135 n 27 (so noting and observing that "those two issues—whether *Janus* invalidated previous, valid authorizations of payroll deductions of union dues and whether [the union] was a state actor subject to suit under § 1983 – are properly addressed in the first instance by the District Court on remand"). *Lutter* did not create a split.

And, in *Littler*, the Third Circuit ultimately affirmed the district court's grant of summary judgment to the union on the ground that the union was not a state actor for purposes of the plaintiff's 1983 claims. Rather than depart from the Ninth Circuit or any other circuit's approach, it expressly joined the Ninth Circuit in concluding that the union did not engage in state action. *See id.* at 1181–82 (citing in *Wright v. Service Employees International Union Local 503*, 48 F.4th 1112 (9th Cir. 2022), *cert. den.*, 143 S. Ct. 749 (2023)). Petitioners' suggestion that, under the surface, the Sixth Circuit was hinting that a

plaintiff need only challenge a labor-relations statute to establish state action falls flat. Pet. 16. To the contrary, the Sixth Circuit was confirming that where a private contract between the union and employees authorizes deductions—as opposed to a state statute that requires them—there is no state action. It even cited *Wright* to bolster that distinction. *See Littler*, 88 F.4th at 1182 n. 2 (noting that plaintiff Littler was challenging a private contract, not a fair-share statute). Put simply, *Littler* only deepened the consensus on the state-action issue.

Given the lack of a split, this Court should deny certiorari, as it has in several similar cases over the last few years.

B. This case is a poor vehicle for reviewing questions that, at this stage, have diminished practical significance six years after *Janus*.

1. This case concerns two unpublished memorandum dispositions by the Ninth Circuit that announced no new law. The Ninth Circuit, moreover, did not rule that "an employee's one-time decision to become a union member nullifies an Employee's First Amendment rights should the employee end that union membership." Pet. 11. The Ninth Circuit and every other circuit recognize that public employees have First Amendment rights and that no public employee may be compelled to join a union or pay a union fee. The only constitutional issue is whether the First Amendment prohibits the enforcement of private contracts to pay union dues and assessments for limited commitment periods. Every circuit agrees that it does not.

2. The Oregon case also presents justiciability issues that would complicate this Court's analysis of the merits. Although Oregon did not challenge justiciability on appeal, this Court still must assure itself that it has jurisdiction over the claims. "[T]o invoke federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or 'personal stake,' in the outcome of the action." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71, (2013). And "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72.

The claims for equitable relief against the state defendants are likely moot. In *Cram*, only petitioner Drake was subject to dues deductions when the amended complaint was filed; for every other petitioner, Oregon ceased making dues deductions. C.A. Dkt. 11 at 130–42. But the record indicates that petitioner Drake could revoke her dues deduction authorization in September 2021. Pet. 32a–33a (quoting dues-deduction agreement specifying that Drake could revoke authorization in September 2021). None of the *Cram* petitioners have alleged that they intend to rejoin the unions or authorize further dues deductions. To reach the First Amendment issue, this Court could consider only the claims against the unions and, even then, only if it agrees with petitioners on the state-action issue.

3. Another complication makes this case a poor candidate for review: The petition consolidates two cases from different states raising different issues

against different procedural and statutory backgrounds. *See* Pet. App. 48a–49a. The district court in *Espinoza* had no occasion to address the First Amendment issue, including the differences between union dues and union assessments on which petitioners base part of their arguments on review. Pet. App. 53a–58a. Moreover, the particular facts concerning the allegedly improper union assessments depend on the wording of different dues-deductions authorizations and varying facts relating to petitioners' notice of the assessments. Finally, on the only common issue in the cases—the state-actor question—this Court would need to consider the effect of differences in the statutes governing the role of the State in dues-deduction agreements. Those complications would make it difficult for this Court to articulate general principles to guide unions, public employees, and lower courts.

4. Finally, the constitutional issues that plaintiffs identify will have diminished practical effect. *Janus* was issued more than six years ago. Public employees have had ample time to sort through their union-membership options, resign from their unions, and revoke dues authorization according to the terms of their agreements. Fewer and fewer public employees find themselves in the situation of petitioners. The time for challenging dues-deductions commitment periods has run its natural course.

C. The Ninth Circuit's decision was correct.

In any event, the Ninth Circuit correctly rejected petitioners' First Amendment claims and correctly determined that SEIU did not engage in state action.

1. The Ninth Circuit correctly rejected petitioners' First Amendment claims. Petitioners argue that the Ninth Circuit's decisions conflict with *Janus* because they violate the rule that "union expenditures for expression of political views 'be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas.'" Pet. 10 (quoting *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235–36 (1977)). But both cases involve public employees who voluntarily became union members, agreed to pay membership dues for one year, and received membership rights and benefits. Petitioners' theory thus runs counter to the 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).

Nor did *Janus* change that well-established rule. *Janus* held that States may not impose compulsory union agency fees on employees who decline to join a union. *Janus*, 585 U.S. at 929–30. But *Janus* did not address employees, like petitioners, who voluntarily joined the union and agreed to pay union dues. If anything, *Janus* made clear that States may otherwise "keep their labor-relations systems exactly as they are." *Id.* at 928 n 27. Oregon and California's labor-relations system, like those in many other jurisdictions, rely on private contracts between the union and employees to determine employees' rights and obligations. *Janus* did not cast doubt on that system.

Plaintiffs misplace their reliance on *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). In petitioners' view, *Knox* applies a heightened standard for waivers of

First Amendment rights when a union imposes additional assessments or fees. But *Knox* involved *nonmembers* of unions from whom additional agency fees or were deducted for political activities without adequate notice. *Knox*, 567 U.S. at 302. Here, petitioners were union members with ample notice of the dues and assessments that would be deducted from their paychecks. *Knox* does not address that circumstance. Nor does *Janus* suggest any heightened waiver requirement if a union member decides to resign from the union under a valid contract providing for continued dues deductions. *Janus*, in fact, made no mention of the standards for voluntary contracts between unions and their members.

2. The Ninth Circuit also correctly rejected petitioners' state action arguments by faithfully applying this Court's precedents. In *Janus,* this Court did not address state action because the dispute in *Janus* involved statutes that required the payment of agency fees without a nonmember employee's consent. *Janus*, 585 U.S. at 887–88. Here, by contrast, a state employee may join or decline to join the union and authorize dues deductions. This Court, moreover, has explained that "a government normally can be held responsible for a private decision only when it has exercised its coercive power or provide such significant encouragement, either over or covert, that the choice must in law be deemed to be that of the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)); *see also S.F. Arts & Athletics, Inc. v. U.S. Olympics Comm.*, 483 U.S. 522, 546 (1987) (applying

same principle). "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 52.

Here, petitioners in *Cram* conceded in their pleadings that Oregon DAS deducts union dues and assessments at the direction of an agreement formed between SEIU and public employees. Ct. App. Dkt. 11 at 150 (alleging that Defendant DAS deducts "at the direction of SEIU and for the benefit of the Union"). But petitioners did not allege that the State played some role in drafting the agreements or otherwise became a party to their terms. To the contrary, Oregon DAS administers the contract as any third-party payment administrator would do for a private contract.

Nor does it matter that "state law grants the unions the privilege designating from which employees to deduct union dues and assessments." Pet. 15. State law that authorizes certain private conduct does not make the State involved in that conduct. "Such permission of a private choice cannot support a finding of state action." *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 54. So too here. The Ninth Circuit correctly determined that the unions did not become state actors merely by taking advantage of state laws to enter and enforce private agreements.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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