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*.

ROBERT ESPINOZA, *Petitioner*,
v.
UNION OF AMERICAN PHYSICIANS & DENTISTS, AFSCME LOCAL 206, *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 CALIFORNIA ATTORNEY GENERAL, THE CALIFORNIA STATE CONTROLLER, AND CALIFORNIA CORRECTIONAL HEALTHCARE SERVICES

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QUESTIONS PRESENTED

Under California law, public employees have the right to join or decline to join a union. For employees who choose to become union members, state law requires the public employer to deduct union dues from the employees' paychecks if the employees provide written authorization for such deductions. When employees withdraw their authorization, the union is responsible for informing the employer and requesting the termination of dues deductions. In this case, petitioner alleges that he withdrew his prior authorization in accordance with the terms of his agreement with the union, but that the union failed to notify the employer to terminate his dues deductions. The questions presented are:

1. Whether the union acted under color of state law for purposes of 42 U.S.C. § 1983 when, in violation of state law, it failed to notify the employer to terminate dues deductions after an employee withdrew a prior authorization.

2. Whether the union's failure to notify the employer to terminate dues deductions after an employee withdrew authorization violated the First Amendment.

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STATEMENT

1. California law guarantees state employees the right to join or decline to join a union. *See* Cal. Gov't Code § 3515. Neither the State nor the union may "[i]mpose or threaten to impose reprisals on employees," "discriminate or threaten to discriminate against employees," or otherwise "interfere with, restrain, or coerce employees because of their exercise" of these rights. *Id.* §§ 3519(a), 3519.5(b). In addition, no public employer may require an employee who chooses not to become a union member to pay an agency fee. *See* Pet. 10-11.

State employees who choose to become members of a union may authorize the California State Controller, the official responsible for administering the state payroll system, to deduct union dues from their paychecks. *See* Cal. Gov't Code § 1153(b). In processing those deductions, the State Controller shall "[o]btain a certification" from the union that it possesses "and will maintain an authorization, signed by the individual from whose salary or wages the deduction . . . is to be made." *Id.*

When an employee seeks to cancel deductions for union dues, his request must be directed to the union, which is responsible for processing that request. *See* Cal. Gov't Code § 1153(h). The State Controller must "rely on information provided by" the union regarding whether dues deductions "were properly canceled or changed," and the union must indemnify the State Controller for any claims made by an employee for deductions made in reliance on the union's information. *Id.* The State Controller may revoke the dues deduction "only pursuant to the terms of the employee's written authorization." *Id.*

2. Petitioner Robert Espinoza is a physician employed by California Correctional Healthcare Services, which is a public agency organized and managed by the State. Cal. Gov't Code § 3501(c); *see* C.A. E.R. 5-6.[1] In 2018, Espinoza joined respondent Union of American Physicians & Dentists, AFSCME Local 206 (UAPD), the union that represents Espinoza's bargaining unit. *See* C.A. E.R. 5-6, 8.

When joining the union, Espinoza signed a membership application that included an authorization for the deduction of union dues and contributions to the union's political action program. *See* C.A. E.R. 8. The application stated that Espinoza "voluntarily authorize[d] and direct[ed] the State Controller to deduct from [his] salary each pay period the amount of dues certified by the Union . . . and the amount for the UAPD Political Action Program, and transmit said sum to the Union." *Id.* at 30. The application further provided that "[t]his authorization will remain in full force and effect for the duration of the existing memorandum of understanding (MOU) . . . and yearly thereafter" unless Espinoza gave "written notice of

[1] This brief responds to the portion of the petition concerning *Espinoza v. Union of American Physicians & Dentists, AFSCME Local 206*, 2023 WL 6971456 (9th Cir. Oct. 23, 2023). The petition also highlights allegations and arguments stemming from a separate case: *Cram v. Service Employees International Union Local 503*, 2023 WL 6971455 (9th Cir. Oct. 23, 2023). *See* Pet. 2-5. But California was not involved in any previous litigation in the *Cram* case, which does not concern the activity of any California state officer or agency, and does not turn on the application of any California law. The California Attorney General, the State Controller, and California Correctional Healthcare Services therefore focus their arguments in this brief on *Espinoza*. This brief refers to the excerpts of record and supplemental excerpts of record in the *Espinoza* court of appeals litigation as "C.A. E.R." and "C.A. S.E.R.," respectively.

withdrawal to both the State Controller's office and the union during the 30 days prior to the expiration of the MOU." *Id.* Finally, the authorization acknowledged that Espinoza's "authorization [would] renew automatically . . . unless revoked during the window period[]." *Id.*

In December 2020, Espinoza sent a letter informing the union of his withdrawal of consent for dues deductions and political action contributions. C.A. E.R. 10. (Espinoza does not allege that he made the State Controller aware of his request to cancel deductions.) The union responded in April 2021, informing Espinoza that—per the terms of his membership agreement—deductions would "continue until the expiration of the MOU then in effect between UAPD and" California Correctional Healthcare Services. *Id.* at 12. The union assured Espinoza that the MOU would expire in July 2021, at which point "the deductions from his lawfully earned wages would cease immediately." *Id.*

Espinoza alleges that dues deductions nevertheless continued after July 2021. *See* C.A. E.R. 12-14. Union records indicate that these continued deductions were the result of an administrative oversight that was not communicated to the State Controller until November 2021. *See* C.A. S.E.R. 4-5. On November 18, 2021, the union contacted the State Controller to cancel all deductions from Espinoza's paychecks. *See id.* at 5. But because the request came so close to the end of the monthly payroll cycle, the deductions could not be terminated in time for the December 2021 pay period. *See id.*

On November 19, 2021, the union sent Espinoza a refund check amounting to all dues deductions and po-

litical contributions collected (or to be collected) between July 1 and December 31, 2021. *See* C.A. S.E.R. 5. The union also cancelled all future scheduled deductions and sent Espinoza an additional refund check for the sum of: (1) all political contributions deducted from Espinoza's paychecks from December 2020 through June 2021; and (2) an additional amount of 10 percent of both refunds, to cover any potential interest related to the dues and contributions collected after the union received Espinoza's December 2020 letter. *See id.*; C.A. E.R. 65-66. The State's payroll system terminated all dues deductions and political contributions beginning with Espinoza's January 2022 paycheck. *See* C.A. E.R. 65-66; C.A. S.E.R. 5.

3. a. Shortly before the union contacted the State Controller to cancel Espinoza's dues deductions in November 2021, Espinoza filed a complaint under 42 U.S.C. § 1983, asserting that the allegedly unauthorized deductions from his paychecks violated the First Amendment. *See* C.A. E.R. 4. He sued the union as well as several state defendants, including the California Attorney General, the State Controller, and California Correctional Healthcare Services. *See id.* at 5-6. He sought declaratory and injunctive relief, compensatory damages, nominal damages, attorney's fees and costs, and other relief. *See id.* at 25-27.

The district court dismissed Espinoza's complaint with prejudice, for two reasons. *See* Pet. App. 47a-58a. First, the court held that Espinoza's claims were moot because "UAPD ceased making deductions from [Espinoza's paychecks] and returned the erroneously taken wages," and Espinoza "ha[d] no intention of rejoining UAPD." *Id.* at 53a. As a result, there was no possibility that Espinoza would "be harmed again in a similar way." *Id.*

Second, the court concluded that Espinoza could not state a claim under Section 1983 because his alleged harm was not based on any state action. *See* Pet. App. 53a-57a. As the court explained, "[t]o the extent that UAPD's deductions were unlawful, 'private misuse of a state statute does not describe conduct that can be attributed to the State.'" *Id.* at 55a (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)). Nor could the union "be described in all fairness as a state actor," because there was no "[j]oint action" between the State and the union with regard to the allegedly unlawful deductions. *Id.* at 54a, 56a (internal quotation marks omitted). For example, "[a]t no time did the government affirm, authorize, encourage, or facilitate UAPD in making any unconstitutional deduction." *Id.* at 56a-57a (internal quotation marks and brackets omitted). The union had a private agreement with Espinoza, and the State played only a "ministerial" role in processing the union's deduction requests pursuant to that agreement, which did not make the union's conduct "state action." *Id.* at 57a.

b. The court of appeals unanimously affirmed. *See* Pet. App. 5a. It agreed with the district court that the claims for declaratory and injunctive relief were moot. *See id.* at 7a-8a. It also affirmed the dismissal of Espinoza's nominal damages claims aimed at the Attorney General, the State Controller, and California Correctional Healthcare Services, because those claims were barred by sovereign immunity. *See id.* at 7a. Finally, it affirmed the district court's dismissal of Espinoza's Section 1983 claims. *See id.* at 5a-7a.

As to the Section 1983 claims, the court reasoned that "UAPD did not act under color of state law when it allegedly failed to process Espinoza's request to cancel the deduction of dues from his wages." Pet. App.

5a. The court explained that "[b]y alleging that UAPD continued to request that dues be deducted from his pay even after he had revoked his dues authorization, Espinoza necessarily alleged that UAPD acted contrary to the relevant policy articulated by the State"—and therefore that it did not engage in state action. *Id.* at 6a (internal quotation marks and brackets omitted). In any event, the union was not a "state actor" for purposes of Section 1983 liability, because Espinoza could not point to any "joint action" or "governmental nexus" between the State and the union aside from the State's "ministerial processing of payroll deductions." *Id.* at 6a-7a (internal quotation marks omitted).

Espinoza filed a petition for rehearing en banc. The court denied the petition without any judge calling for a vote. *See* Pet. App. 10a.

ARGUMENT

The court of appeals rejected Espinoza's claims because of a lack of state action: his allegations of harm arose from his private dispute about an alleged violation of a membership agreement between him and the union. Espinoza nevertheless argues that this Court should grant review, asserting that there is a conflict of authority regarding what is necessary to establish state action for a Section 1983 claim, and that his First Amendment theories raise issues of such exceptional importance that the Court should resolve them in the first instance. He is wrong on both counts. The court of appeals properly held that Espinoza's Section 1983 claims failed for want of state action; there is no disagreement in the lower courts on that issue. And Espinoza's underlying First Amendment theories are meritless. They would not warrant plenary review even if this Court were willing to set aside its strong

disinclination to resolve constitutional questions that were never addressed by the courts below.

1. Espinoza offers no persuasive reason for this Court to review whether the union was "act[ing] under color of law" when it failed to notify his employer to stop deductions from his paychecks after December 2020. Pet. i. The court of appeals' ruling was correct; the conflict of authority alleged by Espinoza is illusory; and this Court has repeatedly and recently denied other petitions raising similar questions.[2]

a. Section 1983 provides a cause of action for the deprivation of constitutional rights by those acting "under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). "[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how . . . wrongful." *Id.* at 50 (internal quotation marks omitted). Only conduct that is "fairly attributable to the State" may form the basis of a Section 1983 claim. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

As the court of appeals explained, "two prongs must be met" for a plaintiff "[t]o establish fair attribution." Pet. App. 5a. First, "'the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by [the State] or by a person for whom [the State] is re-

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[2] *See, e.g.*, *Burns v. Serv. Emps. Int'l Union Loc. 284*, *cert. denied*, No. 23-634 (Feb. 20, 2024); *Jarrett v. Serv. Emps. Int'l Union Loc. 503*, *cert. denied*, No. 23-372 (Dec. 11, 2023); *Polk v. Yee*, *cert. denied*, No. 22-213 (Nov. 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); *Belgau v. Inslee*, *cert. denied*, No. 20-1120 (June 21, 2021).

sponsible.'" *Id.* (quoting *Lugar*, 457 U.S. at 937). Second, "'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Id.* (quoting *Lugar*, 457 U.S. at 937). Espinoza cannot satisfy either prong.

Indeed, Espinoza does not even contest the court of appeals' holding that the union was not a "state actor" under *Lugar*'s second prong. *See* Pet. App. 6a-7a. This Court has articulated several tests for determining whether a private party "may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937; *see id.* at 939. Most recently, the Court explained that "a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) (internal citations omitted).

Those circumstances do not exist here. Espinoza has never claimed that the union's continued receipt of dues and political action contributions was the kind of "exclusive public function" that might make it a state actor. *See* Pet. C.A. Br. at 18-22. Nor did the State compel the union to enter into an agreement with Espinoza regarding his dues authorization. To the contrary, California law prohibits the State from "interfer[ing] with . . . or coerc[ing] employees" in connection with their rights to join (or not join) a union. Cal. Gov't Code § 3519(a); *see Sullivan*, 526 U.S. at 54 (the mere "permission of a private choice" does not give rise to state action). And there was no joint action between the State and UAPD regarding the allegedly unauthorized dues deductions: The State's role was

limited to processing deductions pursuant to Espinoza's signed authorization, the kind of ministerial task that is insufficient to "make the State responsible for" the union's conduct. *Sullivan*, 526 U.S. at 53; *see also id.* at 54; *Belgau v. Inslee*, 975 F.3d 940, 948 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021).

Espinoza's Section 1983 claim also fails to satisfy *Lugar*'s first prong, which focuses on "the specific conduct of which the plaintiff complains." *Sullivan*, 526 U.S. at 51 (internal quotation marks omitted); *see also Lugar*, 457 U.S. at 940. Espinoza contends that the union caused him constitutional injury by failing to instruct his public employer to stop dues deductions and political action contributions after he submitted his withdrawal letter in December 2020. *See* C.A. E.R. 4. But that failure did not "result[] from the exercise of a right or privilege having its source in state authority." *Lugar*, 457 U.S. at 939. The source of the union's power to obtain dues and other contributions was Espinoza's private agreement with the union: he voluntarily joined the union and agreed to have dues and political contributions deducted from his paychecks when he signed the union's membership application. *See* C.A. E.R. 8, 30. No government entity or state law required Espinoza to join the union or to start paying dues; rather, California law guarantees public employees the right to refuse to join or participate in the activities of a union. *See* Cal. Gov't Code § 3515; *see also id.* § 1153(b) (requiring a signed "authorization" from the employee for the deduction of union dues).

Espinoza nevertheless claims that the union engaged in state action when it failed to notify his employer to terminate dues deductions after he attempted to withdraw his dues authorization in De-

cember 2020. *See* Pet. 17. Even assuming that Espinoza properly canceled his dues authorization, however, that would not convert the union's continued receipt of dues and political action contributions into state action. There is no basis under state law for a union to continue to obtain dues if an employee properly withdraws his authorization. The employer may deduct dues only pursuant to the employee's authorization. *See* Cal. Gov't Code § 1153(b). And California law gives employees the right to revoke that authorization, subject to the terms of their agreement with the union. *See id.* § 1153(h). When an employee "properly cancel[s]" his authorization, the union is responsible for informing the employer and requesting the termination of deductions. *Id.*

At best, then, Espinoza's allegations suggest that the union violated state law when it failed to inform his employer to stop deducting dues and political action contributions from his paychecks after December 2020. That kind of alleged misconduct is not fairly attributable to the State and does not constitute state action for purposes of Section 1983. As this Court recognized in *Lugar*, "private misuse of a state statute does not describe conduct that can be attributed to the State." 457 U.S. at 941. Put differently, the alleged union misconduct in this case cannot "be ascribed to any governmental decision" because the union was "acting contrary to the relevant policy articulated by the State." *Id.* at 940.

b. This Court's decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018), does not support Espinoza's argument that the union engaged in state action. *See* Pet. 8, 14-15. The Court did not expressly

address state action in *Janus* because the case involved a challenge to a statutory scheme that required nonconsenting employees to pay agency fees. *See* 585 U.S. at 887-888. There was no question that the challenged requirement involved state action. *See id.* at 897 ("[T]he First Amendment does not permit the government to compel a person to pay for another party's speech."). By contrast, this case involves alleged misconduct by the union—a private party—that violates state law. *See* Cal. Gov't Code § 1153(h) (requiring unions to "process[] . . . requests" to "cancel . . . deductions").

The other cases Espinoza cites are similarly unhelpful. *See* Pet. 8, 14-15. Like *Janus*, all of those cases involved challenges to the collection of mandatory union fees authorized by state or federal laws. *See Harris v. Quinn*, 573 U.S. 616, 620 (2014) (resolving whether "the First Amendment permits a State to compel personal care providers" who are not union members to pay agency fees); *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 312-322 (2012) (examining procedures for collecting mandatory union fees from nonmember employees); *Chi. Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 301-309 (1986) (same); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211, 232-237 (1977) (considering state-mandated agency fees). None of those cases conflicts with the decision below, which addressed the deduction of union fees and contributions resulting from a private membership agreement and alleged private misconduct. *See, e.g.*, C.A. E.R. 8, 30.

Nor does this Court's recent decision in *Lindke v. Freed*, 601 U.S. 187 (2024), conflict with the decision below. *See* Pet. 17 n.9. That case considered whether a city manager's activity on Facebook constituted

state action that might support a Section 1983 claim. *See Lindke*, 601 U.S. at 190-191. The Court therefore analyzed "whether a *state official* engaged in state action"—an entirely different question from the one presented here. *Id.* at 196. And although the Court reasoned that "the *misuse* of power, possessed by virtue of state law, constitutes state action," it also made clear that "the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights." *Id.* at 199, 200 (internal quotation marks and brackets omitted). The "authority" that the union allegedly "misused" is its power to obtain union dues and contributions from Espinoza. *See* C.A. E.R. 4. As just described, however, state law does not give the union the power to obtain dues. Only Espinoza's written authorization—a private agreement between Espinoza and the union—can do that. *See* Cal. Gov't Code § 1153(b).

c. Espinoza also fails to establish any genuine conflict among the lower courts regarding the application of the state-action doctrine to union-dues cases.

Other courts of appeals addressing analogous circumstances have agreed with the decision below. In *Hoekman v. Education Minnesota*, 41 F.4th 969 (8th Cir. 2022), for example, the Eighth Circuit held that a union's alleged misconduct in failing to promptly process two members' resignations and continuing to collect dues after the resignations was not state action. *Id.* at 978. Like the court below, the Eighth Circuit recognized that the "harm allegedly suffered by [the resigning members was] attributable to private decisions and policies, not to the exercise of any state-created right or privilege." *Id.* Similarly, in *Littler v. Ohio Ass'n of Public School Employees*, 88 F.4th 1176, 1181-1182 (6th Cir. 2023), the Sixth Circuit cited with

approval both *Hoekman* and the Ninth Circuit's decision in *Wright v. Service Employees International Union Local 503*, 48 F.4th 1112 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023), before holding that a union did not engage in state action when it "improperly instructed the state to withhold union dues after [the employee] withdrew her union membership."

The circuit decisions invoked by Espinoza do not establish any conflict. He first points to the Seventh Circuit's decision following this Court's remand in *Janus*. *See* Pet. 16. The Seventh Circuit held that the union had engaged in state action because it "ma[de] use of state procedures with the overt, significant assistance of state officials." *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019). As explained above, however, *Janus* involved the union's collection of agency fees that were compelled by state law. This case involves a private party's alleged violation of a membership agreement that—if proven—would amount to a violation of state law. *See supra* pp. 9-10; *see also Belgau*, 975 F.3d at 948 n.3 (distinguishing the Seventh Circuit's decision on that basis).

The Third and Sixth Circuit decisions referenced by Espinoza (Pet. 16) do not create any conflict of authority either. The Third Circuit's decision in *Lutter v. JNESO*, 86 F.4th 111 (3d Cir. 2023), addressed only standing and mootness. *Id.* at 123-135. The court explicitly declined to reach the issue of whether the union "was a state actor subject to suit under § 1983." *Id.* at 135 n.27. And Espinoza acknowledges that the Sixth Circuit held in *Littler* that the plaintiff's Section 1983 claims against a union for improper dues deductions "failed for lack of state action." Pet. 16. He focuses on dicta observing that if the plaintiff had

"challenged the constitutionality of the statute pursuant to which the state withheld dues, the 'specific conduct' challenged would be the state's withholdings, which would be state action taken pursuant to the challenged law." *Littler*, 88 F.4th at 1182; *see* Pet. 16. But that observation does not address the situation presented here, where Espinoza challenges the *union's* private misconduct performed in violation of state law—just like in *Littler*.[3]

2. Espinoza also asks the Court to grant certiorari to consider whether his First Amendment rights were violated when the union failed to terminate dues deductions and political action contributions after he withdrew his authorization. *See* Pet. i. That question does not warrant further review. The courts below did not reach it, and thus the decision below could not possibly implicate any conflict of authority on the question. In any event, there is no conflict on this issue among other lower-court decisions; Espinoza's First Amendment theories are meritless; and this Court has repeatedly denied petitions raising similar questions—at least 21 times in the last three years.[4]

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[3] And even if the dicta in *Littler* were read as suggesting a rule that Section 1983 claims against government officials based on their own alleged misconduct necessarily involve state action, that rule would not save Espinoza's claims against the Attorney General, the State Controller, or his public employer here. Those claims would remain barred on mootness and sovereign immunity grounds—independent holdings that Espinoza does not contest. *See* Pet. App. 7a-8a, 53a; *infra* p. 15.

[4] *See, e.g.*, *Burns v. Serv. Emps. Int'l Union Loc. 284*, *cert. denied*, No. 23-634 (Feb. 20, 2024); *Alaska v. Alaska State Emps. Ass'n*, *cert. denied*, No. 23-179 (Jan. 16, 2024); *O'Callaghan v. Drake*, *cert. denied*, No. 22-219 (May 1, 2023); *Savas v. Cal. Statewide L. Enf't Agency*, *cert. denied*, No. 22-212 (May 1, 2023); *Baro v. Lake*

a. This would be an exceptionally poor vehicle for addressing the First Amendment arguments raised in the petition because the courts below did not reach the merits of those claims. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not first view."). Both the court of appeals and the district court held that Espinoza's Section 1983 claims failed for lack of state action. *See* Pet. App. 5a-7a, 53a-57a. And to the extent Espinoza previously sought declaratory relief, injunctive relief, or damages from the state respondents, he either abandoned those claims in the courts below or declined to raise them in his petition to this Court. *See* Pet. App. 7a-8a; Pet. i.

b. Even setting aside the vehicle problem, Espinoza's First Amendment claims are meritless. Under state law, public employees have the right to join or

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Cnty. Fed'n of Tchrs. Loc. 504, *cert. denied*, No. 22-1096 (June 12, 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*, *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).

refuse to join a union. *See* Cal. Gov't Code § 3515. Employees who choose to join may then authorize their employer to deduct union dues from their paychecks. *See id.* § 1153(b). They do so through private agreements with their unions. There is no dispute here that Espinoza entered into that kind of private agreement with UAPD. *See* Pet. 5; C.A. E.R. 8, 30. And the First Amendment does not prohibit the enforcement of private contractual commitments. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) ("[T]he First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law.").

Espinoza nonetheless invokes *Janus* to argue that the deduction of dues and political action contributions from his paychecks violated the First Amendment. *See* Pet. 10-12. But *Janus* does not support that argument. This Court held that a State may not compel a nonconsenting employee to pay agency fees. *Janus*, 585 U.S. at 929-930. It did not address the circumstances here, where an employee voluntarily joined a union and affirmatively agreed to pay union dues in accordance with a written membership agreement—and it did not abandon the general principle that the First Amendment offers no protection against the enforcement of private contracts. *See Cohen*, 501 U.S. at 672. Indeed, the Court emphasized that although States "cannot force *nonmembers* to subsidize public-sector unions," they can otherwise "keep their labor-relations systems exactly as they are." *Id.* at 928 n.27 (emphasis added).

And even assuming that the union continued to obtain dues and political action contributions from Espinoza in violation of the terms of his signed membership agreement, his First Amendment claims

would still fail for want of state action. The First Amendment prohibits "the government" from compelling speech. *Janus*, 585 U.S. at 897; *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). The state-action doctrine "enforc[es] that constitutional boundary between the governmental and the private" and is based on the "text and structure of the Constitution." *Manhattan Cmty. Access Corp.*, 587 U.S. at 808. That doctrine is closely related to the "color of law" analysis in the Section 1983 context. *See Lugar*, 457 U.S. at 928-929. In this case, for the reasons discussed above, *see supra* pp. 7-14, the union's alleged misconduct was not state action.

That does not mean that the union may continue to obtain union dues or other contributions from Espinoza merely because he "at one time agreed to be a union member." Pet. 19. To the extent Espinoza properly withdrew his dues authorization, any continued collection of dues would be a violation of state law that can be resolved in the state courts. The union recognized as much in the courts below. It not only fully refunded the money that Espinoza claimed the union had improperly obtained, it also told the court of appeals that "California's Public Employee Relations Board has jurisdiction to hear claims that a state employer or union representative has engaged in prohibited practices and to issue appropriate remedies." UAPD C.A. Br. 5 (citing Cal. Gov't Code §§ 3513(h), 3541.3(i), 3541.5); *see also id.* at 26 (acknowledging that "UAPD admitted its error" and "notified the State Controller to stop deductions" after it "learned that [Espinoza's] deductions had not ended" after July 1, 2021, as promised). Especially given the availability of potential state law remedies for Espinoza's alleged injury, this case does not present any "important federal question" warranting certiorari. Pet. 20.

c. Finally, Espinoza fails to substantiate his assertion that the First Amendment question he seeks to raise implicates a split of authority. *See* Pet. 12. Even if the courts below had addressed Espinoza's First Amendment claims and rejected them on the merits, *but see supra* p. 15, that decision would not have conflicted with the Third Circuit's decision in *Lutter* or the Sixth Circuit's decision in *Littler*, as petitioner contends. *See* Pet. 12-13. In both of those cases, just like this one, the courts did not reach the merits of the former union member's First Amendment claims. *See Lutter*, 86 F.4th at 135 n.27 (resolving only plaintiff's standing and whether her claim had become moot); *Littler*, 88 F.4th at 1181 (rejecting former union member's Section 1983 claims because the union's failure to end dues deductions was a "deprivation . . . caused by a private actor . . . and thus [could not] be attributed to the state").

And regardless, the First Amendment issues at play in *Lutter* are far different from those Espinoza sought to raise here. The plaintiff in *Lutter* challenged a "state statute" that "established an annual ten-day period during which public-sector employees could revoke a prior authorization for payroll deductions of union dues." 86 F.4th at 119. In other words, a state law—not a private agreement—caused the plaintiff's alleged injury. But that is not the case here. Espinoza signed a membership agreement with UAPD that included terms for authorizing and revoking the collection of dues. *See* C.A. E.R. 30. Any limitations on Espinoza's ability to stop paying union dues and political action contributions are the result of that private agreement with UAPD—not any state statute or government action with implications under the First Amendment. *See Cohen*, 501 U.S. at 672.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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