No. 23-1113

IN THE
Supreme Court of the United States

ATISHMA KANT, ET AL.,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, 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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QUESTION PRESENTED

Whether a union engaged in "state action" for purposes of 42 U.S.C. § 1983 when the union violated state law by failing to inform petitioners' public employer that they had cancelled their authorizations for continued payroll deductions.

CORPORATE DISCLOSURE STATEMENT

Respondent Service Employees International Union, Local 721, has no parent corporation, and no company owns any stock in respondent.

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PRELIMINARY STATEMENT

Petitioners are two public employees in California who joined a union and signed voluntary written authorizations permitting their employers to deduct union dues from their paychecks. Petitioners claim that, after they properly revoked their authorizations for continued deductions, the union did not process the revocations and, as a result, their employer continued to deduct dues. Assuming petitioners' allegations are correct, the union violated state law by failing to process the revocations. The union subsequently sent petitioners a refund.

Petitioners ask the Court to grant review of the non-precedential decision below to resolve a purported "split of authority" about whether, consistent with the First Amendment, the government can deduct union dues for public employees without the employees' "affirmative consent." Pet. 7. But petitioners' own 42 U.S.C. § 1983 claims were dismissed for threshold reasons, not because the Ninth Circuit ruled that the government may require public employees to pay money that they have not affirmatively agreed to pay.

Moreover, there is no split of authority. "Every circuit to consider the matter"—including the Ninth Circuit—"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 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). No court has held that the government may, consistent with the First Amendment,

require public employees to pay union dues they have not affirmatively agreed to pay.

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 pay union dues. Pet. i. To the contrary, *Janus* addressed mandatory agency fees that public employers required their employees to pay as a condition of employment, not voluntary dues deductions. This Court has denied more than a dozen petitions for certiorari that advanced the same meritless argument about *Janus*. *See infra* at 12. There have been no developments since that time that would make the issue worthy of review—even if it were presented by this case.

Petitioners also ask the Court to grant review of the non-precedential decision below to resolve a purported "split of authority" about whether unions are Section 1983 state actors. Pet. i, 11. Again, however, there is no split of authority.

The circuits agree that when state law permits only voluntary dues deductions, an employee's claim that a union violated state law by providing incorrect information to a public employer about whether the employee has authorized deductions is actionable under state law, not Section 1983. That conclusion follows from this Court's precedents that distinguish between private misconduct and misconduct for which the government is responsible.

The cases that petitioners erroneously claim 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. If petitioners' allegations are correct, the union violated state law by failing to process their revocations, and petitioners have 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 17. 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 decision below. The petition should be denied.

STATEMENT OF THE CASE

A. Background

1. Under California law, trial court employees have the right to decide whether to become members of the union that represents their bargaining unit. Cal. Gov't Code § 71631. Employees who choose to join the union may authorize the deduction of union dues from their paychecks by providing "written authorization" for payroll deductions. *Id.* §§ 1157.3, 1157.12, 71638. Employees may cancel their dues deductions in accordance with "the terms of the authorization." *Id.* §§ 1157.3(b), 1157.12(b).

"[E]mployee requests to cancel or change deductions" must be "direct[ed] … to the employee organization." *Id.* § 1157.12(b). Public employers must "rely on information provided by the employee organization regarding whether deductions … were properly canceled or changed." *Id.* The employee organization must indemnify the public employer for any errors made in reliance on that information. *Id.*

California law prohibits public employers and unions from interfering with trial court employees' rights to decline to join and support labor unions. *Id.* §§ 71631, 71635.1. 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.* § 71639.1(c).

2. Petitioners are two employees of the San Bernardino County Superior Court in a bargaining unit represented by SEIU Local 721 ("Union"). App. 3a–4a ¶¶8–11. Petitioners voluntarily became Union members by signing membership applications that included authorizations for dues deductions. App. 4a–5a ¶¶13–18. In those agreements, petitioners agreed that their dues deduction authorizations would "be irrevocable unless revoked by me in writing in accordance with applicable provisions in the memorandum of understanding or agreement between my employer and SEIU Local 721." App. 6a ¶27, 34a. Petitioners also agreed that they would be "bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union." App. 6a ¶26, 34a.

The memorandum of understanding ("MOU") between the Union and the Superior Court that was in effect at the time petitioners authorized dues deductions provided that dues deductions could be cancelled "during the thirty (30) day period commencing ninety (90) days before the expiration of the MOU." App. 6a–7a ¶28, 35a. That MOU had an original expiration date of September 30, 2019. App. 5a ¶16, 33a. On December 21, 2018, the Union and the Superior Court executed a side letter that extended the MOU's expiration to September 30, 2021. App. 33a.

Petitioners resigned from Union membership in July 2019, which was within their original window period for cancelling deductions. App. 5a–6a ¶¶19, 21,

23, 35a. The Union advised petitioners that their payroll deductions would continue, however, because their cancellations were not within the applicable window period. App. 5a–6a ¶¶22, 24; 35a. Petitioners allege that the Union "refused to instruct their Employer to stop deducting their money" on the theory that the December 21, 2018 side letter extending the expiration date of the MOU also prevented them from cancelling deductions during their original window period. App. 14a, ¶65, 36a

Assuming petitioners' allegations are correct, the Union's failure to process the revocations violated state law. California's PERB has ruled that the extension of a memorandum of understanding does *not* change the original window period for terminating dues deductions and has ordered the return of union dues deducted under circumstances indistinguishable from those alleged here. *See Trevisanut v. Cal. Union of Safety Employees*, 1993 WL 13699367 (Cal. Pub. Employment Relations Bd. Dec. 13, 1993). The Union conceded below that "the precise conduct alleged here unlawfully interferes with public employees' rights under state labor law." 9th Cir. Dkt. 22 at 19–20.

B. Proceedings below

1. On July 9, 2021, petitioner Atishma Kant filed the original complaint in this action against the Union and the California Attorney General. App. 33a. On July 21, 2021, petitioners filed a first amended complaint that added petitioner Marlene Hernandez as an additional plaintiff. App. 1a–26a. Petitioners' first amended complaint alleged that the continued deduction of union dues after they resigned their memberships violated their rights under the First

Amendment and the Due Process Clause and gave rise to claims under 42 U.S.C. § 1983. App. 17a–22a. Petitioners also alleged that their Union membership agreements were "void for unconscionability." App. 22a–23a. Petitioners did not sue their employer.

After reviewing the complaint, the Union notified petitioners' employer to stop deductions and sent refunds to petitioners. Pet. 42a. The Union advised the district court that the extension of the MOU was an "unusual situation" and, if it should occur in the future, the Union would "honor dues revocations made during both the old and new window periods so as to avoid any disputes." 9th Cir. Dkt. 23 at 7.

2. The district court granted defendants' motions to dismiss petitioners' Section 1983 claims. App. 32a–55a.

The district court concluded that petitioners did not have viable Section 1983 claims against the Attorney General because he has sovereign immunity from damages claims and because there was "no ongoing violation" of federal law that might justify application of the *Ex parte Young* exception to sovereign immunity for claims seeking prospective relief. App. 40a–42a.

The district court concluded that petitioners' claims for prospective relief against the Union were moot, and that petitioners' damages claims against the Union failed because the Union's alleged misconduct was not state action for purposes of Section 1983. App. 43a–52a. The district court declined to exercise supplemental jurisdiction over petitioners' state law claims against the Union. App. 53a–54a.

3. A Ninth Circuit panel unanimously affirmed the district court's decision in a short, non-precedential memorandum. App. 27a–30a. The Ninth Circuit agreed with the district court that petitioners' claims for prospective relief were moot. App. 28a–29a. The Ninth Circuit also agreed with the district court that petitioners' damages claims against the Attorney General were barred by sovereign immunity. App. 29a–30a.

Finally, the Ninth Circuit agreed with the district court that petitioners' Section 1983 damages claims against the Union were properly dismissed because the Union "did not act as a state actor when it relied on [petitioners'] authorizations to deduct union dues from their wages." App. 29a. The Ninth Circuit reasoned that the Union's conduct was not "fairly attributable to the state." App. 29a (*quoting Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937 (1982)).

The Ninth Circuit denied petitioners' request for rehearing en banc with no judge requesting a vote on the petition. Pet. 31a. In their petition, petitioners do not dispute that their claims for prospective relief are moot and their claims against the Attorney General are barred by sovereign immunity.

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 pay union dues if the employees have not affirmatively agreed to dues deductions. But the Ninth Circuit did not address that issue here, and there is no split of authority. No court has held that

the government may, consistent with the First Amendment, require public employees to pay any money to unions that the employees have not voluntarily and 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 dues 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 ruling below.

I. Petitioners' first question presented was not addressed below and is not worthy of this Court's review.

Petitioners ask the Court to grant review to decide whether "a public sector labor union and government employer [can] unilaterally waive public employees' First Amendment rights without the employee's knowledge or direct involvement." Pet. i (first question presented). According to petitioners, there is a "split of authority … concerning the affirmative consent standard required for union dues deductions." Pet. 7 (capitalization omitted). But the Ninth Circuit did not address the "affirmative consent standard" in this case, and there is no split of authority. Pet. 8. The circuits, including the Ninth Circuit, agree that the government cannot require public employees to pay union dues that the employees have not voluntarily and affirmatively agreed to pay.

A. The Ninth Circuit did not rule that the First Amendment permits public employers to deduct union dues in the absence of affirmative consent by a public employee. Petitioners did not sue their public employer, and the Ninth Circuit held that petitioners'

Section 1983 claims against the Attorney General and the Union were correctly dismissed for threshold reasons—because petitioners' prospective relief claims were moot, the Attorney General has sovereign immunity from damages, and the Union's conduct was not state action. *See supra* at 8.

Petitioners assert that the Ninth Circuit panel "*implie[d]* that if an employee previously consented to union dues deductions, that consent may be extended indefinitely without the employee's knowledge or approval." Pet. 5 (emphasis supplied). The Ninth Circuit decision does not say this or imply this. *See* App. 29a. The Union conceded in the Ninth Circuit that, notwithstanding the extension of the MOU, petitioners had the right to cancel their dues authorizations during the original window period and that "the precise conduct alleged here unlawfully interferes with public employees' rights under state labor law." 9th Cir. Dkt. 22 at 19–20; *see supra* at 6. Petitioners' hypothetical scenario of public employees compelled by MOU extensions to pay dues "in perpetuity" (Pet. 3) is not permitted by California law. *See supra* at 6.

As petitioners acknowledge, moreover, the Ninth Circuit held in *Belgau*, 975 F.3d 950–52, that the First Amendment permits only voluntary agreements to pay union dues. Pet. 8. Even if the Ninth Circuit's non-precedential decision below "implie[d]" that dues may be deducted without an employee's affirmative consent (and it does not), this Court does not grant review to correct dicta in non-precedential opinions—let alone dicta that allegedly conflicts with the same Circuit's controlling precedent. Pet. 5.

That being so, this case would not be a suitable vehicle for addressing petitioners' first question presented.

B. In any event, petitioners are wrong that a "split of authority exists concerning the affirmative consent standard for union deductions." Pet. 7 (capitalization omitted). "[E]very 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.[1] Petitioners do not cite any decisions that permit dues deductions without affirmative consent.

Petitioners argue that all these decisions are wrong because this Court's decision in *Janus* created a heightened constitutional "waiver" standard for voluntary agreements to pay union dues that makes such agreements different from all other contracts. Pet. i, 5, 8. To the contrary, this Court held in *Janus* only that public employers cannot require non-members to pay agency fees to a union as a condition of employment. 585 U.S. at 929. *Janus* did not involve voluntary union membership agreements, and this Court explained that, beyond eliminating compulsory non-

[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.), *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.

member agency fees, "States can keep their labor-relations systems exactly as they are." *Id.* at 928 n.27.

As the lower courts uniformly have concluded, the application of a heightened "waiver" standard to voluntary contracts does not make sense because "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). This Court has denied petitions for certiorari in more than a dozen cases raising the same basic argument about *Janus* that petitioners press here.[2] There have been no developments since then that would make the question worthy of review even if it were presented by this case.

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[2] *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).

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 because the Union's alleged misconduct was not state action. Pet. i (second question presented), 11–15. Contrary to petitioners' contention, there is no "split of authority" about state action in the union dues context. Pet. 11. The Ninth Circuit's case-specific application of state action caselaw in the non-precedential decision 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* dues 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 dues 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 v. Inslee* 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 an alleged conflict about state action (Pet. 6, 11–13) involve a very different situation. In those cases, as in this Court's *Janus* decision, a state law or policy required non-members 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. 6, 11–12 (citing cases). Those cases all involved government requirements that non-

members provide financial support to unions as a condition of public employment.[3]

Petitioners misread the Third Circuit's decision in *Lutter v. JNESO,* 86 F.4th 111 (3d Cir. 2023) as showing a conflict about the proper analysis of state action. Pet. 6, 12–13. The Third Circuit did not find "the presence of state action." Pet. 13. Rather, the Third Circuit held only that a 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 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, petitioners point to the Sixth Circuit's observation that "[h]ad Littler challenged the constitutionality of a statute pursuant to which the state withheld dues, the 'specific conduct' challenged would be the state's withholdings, which would be state action." Pet. 12–13 (*quoting Littler*, 88 F.4th at 1182). But the *Littler* court gave the example of *Janus II*, in which state law

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[3] *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). Petitioners rely upon *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435 (1984), but this Court's decision addressed the interpretation of the Railway Labor Act.

required non-members to pay fair-share fees. *See* 88 F.4th at 1182.

In this case, there is no state statute that requires public employees to pay any dues they have not agreed to pay. California law permits only deductions an employee has authorized in writing and provides that employees can cancel deductions pursuant to the terms of their voluntary authorizations. *See supra* at 4–5. As in *Littler*, the alleged harm here was caused by the union's "failure to … remove [an employee's] name from the deduction list"—which is not state action. *Littler*, 88 F.4th at 1182.

In sum, there is no "split of authority" that would justify review, or even any tension in the caselaw.[4] Pet. 11. 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 misconduct does not become state action simply because, as a result of that private misconduct, a public employer erroneously deducts unauthorized dues. *See*,

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[4] Petitioners are wrong that district court decisions show a conflict on the state action issue. Pet. 13 n.3. Not only do petitioners mischaracterize some of those decisions, but the district court decisions that petitioners rely upon are from the Sixth and Ninth Circuits. Those circuits subsequently resolved the state action issue in *Littler* and *Wright*.

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); *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.").

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 dues 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.

Because public employers process millions of voluntary payroll deductions every month, errors (and alleged errors) are inevitable. Petitioners do not show that state law is inadequate to remedy such errors.

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[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).

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

Petitioners acknowledge that they signed union membership agreements that authorized the payment of dues through payroll deduction and "agreed to be bound to a reasonable window period before opting out of dues deductions." Pet. 1, 15. The essence of petitioners' claim is that they "opted out during the applicable window" but the Union did not process the cancellations. Pet. 16. Assuming petitioners' allegations are correct, the Union violated state law by failing to process the cancellations. *See supra* at 6.

The Union's violation of state law, however, was unilateral, private misconduct, not misconduct for which the government was responsible. *See 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…."); *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.").

Petitioners point out that that their public employer agreed to extend the expiration of the MOU. Pet. 14. But the one-page Side Letter said nothing about the window period for cancelling deductions. *See* Ninth Cir. Dkt. 9 at 0094. Petitioners did not sue their employer, and they did not allege that their employer was responsible for the Union's decision not to

process their cancellations. The Side Letter therefore does not affect the state action analysis.

Petitioners also argue that the Union "used the authority the State of California granted … in [California Government Code] Section 1157.12 to continue the … deductions." Pet. 14. To the contrary, Section 1157.12 permits only authorized deductions and provides that deductions can be cancelled in accordance with the "employee's written authorization." Cal. Gov't Code §1157.12(b). California law makes it illegal to force public employees to join or support unions. *See supra* at 4–5.

That the Union's failure to follow state law resulted in the continued deduction of union dues does not make the government responsible for the Union's misconduct. *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 could have sought a remedy against the Union under state law—although they have already received full refunds.

The Ninth Circuit's ruling about state action was therefore entirely correct. In any event, even if the Ninth Circuit made an error in applying state action caselaw to the allegations of this particular case (and it did not), a case-specific error in a non-precedential decision (affecting petitioners who would have a state law remedy if they had not already received refunds) 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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