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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE ATTORNEY GENERAL

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July 22, 2024

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 allows the employer to deduct union dues from their paychecks only pursuant to the employees' written authorization. When an employee withdraws her authorization, the union is responsible for informing the employer and requesting the termination of dues deductions. In this case, petitioners allege that they withdrew their prior authorizations in accordance with the terms of their agreements with the union, but that the union failed to notify the employer and terminate their 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 petitioners withdrew their prior authorizations.

2. Whether the union's failure to notify the employer to terminate dues deductions after petitioners withdrew their authorizations violated the First Amendment.

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STATEMENT

1. California law gives public employees, including those working in state trial courts, "the right to form, join, and participate in the activities" of a union. Cal. Gov't Code § 71631. At the same time, it guarantees public employees "the right to refuse to join or participate in the activities" of a union. *Id.* Under state law, employers and unions may not "interfere with, intimidate, restrain, coerce, or discriminate against" employees for exercising those rights. *Id.* § 71635.1.

When an employee decides to join a union, she may authorize the employer to deduct union dues from her paycheck. *See* Cal. Gov't Code § 1157.3(a). The employer may deduct dues only pursuant to valid written authorization by the employee. *See id.* § 1157.12(a). State law gives employees the right to revoke that authorization pursuant to the terms of the authorization. *See id.* §§ 1157.3(b), 1157.12(b). Unions are responsible for processing requests to withdraw authorizations for deductions. *See id.* § 1157.12(b). The public employer must "rely on information provided by" the union regarding whether dues deductions "were properly canceled or changed," and the union must indemnify the employer for any claims made by an employee for deductions made in reliance on the union's information. *Id.*

2. Petitioners Atishma Kant and Marlene Hernandez are employees of the superior court in the County of San Bernardino. Pet. App. 33a. Both chose to become members of respondent Service Employees International Union, Local 721, by signing the union's membership agreement. *Id.* Hernandez joined the union in 2016, and Kant joined in 2018. *Id.* Their agreements authorized the deduction of union dues

from their paychecks. *Id.* at 59a, 61a ("I further authorize SEIU Local 721 to instruct my employer to deduct and remit to the Union, any dues, fees and general assessments from my paycheck[.]"). Under the agreements, petitioners could revoke their authorizations for deductions "in accordance with applicable provisions in the memorandum of understanding or agreement between [their] employer and SEIU Local 721." *Id.* The collective bargaining agreement in effect at the time that Kant and Hernandez joined the union allowed employees to resign from the union and terminate deductions during a thirty-day period starting in July 2019. *Id.* at 33a-34a.

In July 2019, Kant and Hernandez notified the union that they wished to resign and terminate their dues deductions. Pet. App. 35a. The union allowed them to resign but refused to process their requests to cancel deductions. *Id.* According to the complaint, the union claimed that the period during which members could terminate deductions had been pushed back by two years because the union had negotiated an extension of the collective bargaining agreement. *Id.* at 13a-14a, 36a. The union later acknowledged that this understanding was contrary to state law, which requires unions to allow members to terminate deductions during the period stated in the original collective bargaining agreement. *See* SEIU, Local 721 C.A. Br. 19-20. In July 2021, the union directed the employer to terminate dues deductions from petitioners' paychecks and provided them with refunds for dues paid after their resignations from the union. Pet. App. 43a; D. Ct. Dkt. 22 at 2.

3. a. Shortly before the termination of their dues deductions, however, petitioners filed this suit against the union and the California Attorney General in his

official capacity. Pet. App. 33a. As relevant here, petitioners alleged that respondents violated their First Amendment rights by deducting dues from their paychecks without their affirmative consent. *Id.* at 17a-18a. The relief they sought included damages under 42 U.S.C. § 1983 from the union for dues paid after their resignations; nominal and compensatory damages from the union and the Attorney General for an asserted violation of their First Amendment rights; an injunction ordering the union and the Attorney General to stop deducting dues from their paychecks; a declaration that the deduction of dues without employees' affirmative consent under California Government Code § 1157.12 is unconstitutional; and an injunction prohibiting the union and the Attorney General from enforcing or deducting dues under that provision. *Id.* at 17a-18a, 23a-25a. Petitioners also brought a state-law contract claim against the union, alleging that their membership agreements were unconscionable. *Id.* at 22a-23a; *see id.* at 22a (claiming that the agreements were "substantively unconscionable because [they] attempted to incorporate indefinite future contracts via extension agreements").

The district court dismissed the complaint. Pet. App. 32a-55a. The court held that petitioners' Section 1983 claims against the union failed for lack of state action. *Id.* at 45a-52a. As the court explained, "[t]he challenged conduct arises from agreements that plaintiffs entered into with the Union," and petitioners "are unable to show that the alleged violation of their First Amendment . . . rights is attributable to a state statute or policy." *Id.* at 47a. The court further held that the claims for prospective relief were moot and that the damages claims against the Attorney General (who was sued in his official capacity) were barred by sovereign immunity. *Id.* at 40a-45a. With the federal

claims dismissed, the court declined to exercise supplemental jurisdiction over petitioners' state-law contract claims. *Id.* at 53a-54a.

b. The court of appeals affirmed. Pet. App. 27a-30a. It held that petitioners' Section 1983 claims against the union failed for lack of state action because the union's "private conduct" was not "'fairly attributable to the State.'" *Id.* at 29a (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Citing its precedent in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021), the court explained that the union "did not act as a state actor when it relied on [petitioners'] authorizations to deduct union dues from their wages." Pet. App. 29a. Nor did the union's conduct become state action when it entered into a collective bargaining agreement with the employer. *Id.*

The court also held that petitioners' claims for prospective relief were moot, noting that dues deductions for petitioners had stopped and respondents had "refunded the money at issue." Pet. App. 28a-29a. It concluded that the voluntary cessation exception to mootness did not apply because respondents had shown that it was "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 28a (internal quotation marks omitted). As the court explained, since California law allows union dues to be deducted only pursuant to an employee's authorization, and petitioners were "unlikely to authorize such deductions again," dues deductions for petitioners were "unlikely ever to resume." *Id.* at 28a-29a.

The court further held that petitioners' claims for nominal and compensatory damages against the Attorney General were barred by sovereign immunity.

Pet. App. 29a-30a. The Attorney General was sued only in his official capacity, and "'state sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, including nominal damages.'" *Id.* at 30a. Finally, the court held that the district court did not err in declining to exercise supplemental jurisdiction over petitioners' state-law contract claims. *Id.*

Petitioners filed a petition for rehearing en banc, which was denied by the court of appeals without any judge requesting a vote. Pet. App. 31a.

ARGUMENT

Petitioners' allegations arise from their dispute with the union, a private party. Assuming those allegations are true, the union's private misconduct violated state law and cannot be attributed to the State. The court of appeals thus correctly held that the union did not act under color of state law for purposes of 42 U.S.C. § 1983. That holding is consistent with decisions from this Court and other federal appellate courts, and there is no need for further review. Petitioners also ask this Court to consider whether the union's conduct violated their First Amendment rights. But the court below did not reach that issue, and petitioners offer no persuasive reason for this Court to decide it in the first instance. In any event, petitioners' First Amendment theories are meritless and do not implicate any conflict of authority. This Court should deny the petition—just as it has denied numerous recent petitions raising similar questions.

1. Petitioners first ask this Court to review the court of appeals' holding that the union in this case did not act under color of law for purposes of Section 1983. *See* Pet. i, 11-15. This Court has denied at least six

petitions in the last three years presenting the same or a similar question, and there is no reason for a different result here.[1]

a. The courts below correctly held that petitioners' Section 1983 claims failed for lack of state action. Section 1983 provides a cause of action for the deprivation of constitutional rights by persons 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 action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

This Court's analysis of the state-action question "begins by identifying the specific conduct of which the plaintiff complains." *Sullivan*, 526 U.S. at 51 (internal quotation marks omitted). To determine whether a private actor (like the union) engaged in state action, the Court asks "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Lugar*, 457 U.S. at 939.

Here, petitioners allege that the union injured them by collecting dues without their affirmative con-

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[1] *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).

sent. *See* Pet. App. 17a-18a. But the source of the union's power to collect dues was petitioners' private agreement with the union—not any state statute. Petitioners voluntarily joined the union and agreed to have dues deducted from their paychecks when they signed the union's membership form. *See id.* at 33a-34a, 59a, 61a. No government entity or state law required petitioners to join the union or start paying dues. Indeed, California law guarantees public employees "the right to refuse to join or participate in the activities" of a union. Cal. Gov't Code § 71631. And it requires signed "authorization" from the employee for the deduction of union dues. *Id.* § 1157.12(a). Petitioners' private membership agreements with the union provided exactly that kind of authorization. *See* Pet. App. 59a, 61a.

Petitioners nevertheless claim that the union engaged in state action when it failed to instruct the employer to end deductions after they resigned from the union and attempted to withdraw their dues authorizations in July 2019. *See* Pet. 14-15. But even assuming that petitioners properly canceled their dues authorizations, that would not convert the union's continued receipt of dues into state action. There is no basis under state law for a union to continue to receive dues if an employee properly withdraws her authorization. Instead, the employer may deduct dues only pursuant to the employee's authorization. *See* Cal. Gov't Code § 1157.12(a). And California law gives employees the right to revoke that authorization, subject to the terms of their agreement with the union. *See id.* §§ 1157.3(b), 1157.12(b). When an employee "properly cancel[s]" her authorization, the union is responsible for informing the employer and requesting the termination of deductions. *Id.* § 1157.12(b).

At best, then, petitioners' allegations would establish that the union continued to receive dues in violation of state law. *See* SEIU, Local 721 C.A. Br. 19-20 (acknowledging that its alleged receipt of dues after July 2019 violates state law). But "private misuse of a state statute does not describe conduct that can be attributed to the State." *Lugar*, 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.

Ignoring *Lugar*, petitioners contend that the union engaged in state action because it relied on statutory authority to negotiate an extension of its collective bargaining agreement with the employer, bind petitioners to that extension, and then continue dues deductions after petitioners withdrew their authorizations. *See* Pet. 6, 14. But "the fact that the government . . . contracts with . . . a private entity does not convert the private entity into a state actor." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 814 (2019). In any event, the union's alleged reliance on the contract extension to continue dues deductions past July 2019 was not authorized by state law, which provides that a public employee union may not "use contract extensions to deprive members of their right to withdraw from union membership." *Trevisanut v. Cal. Union of Safety Emps.*, Cal. Pub. Emp. Rels. Bd. Decision No. 1029-S, at 8 (1993), 1993 WL 13699367; *see also* SEIU, Local 721 C.A. Br. 19-20 (conceding that its alleged refusal to terminate dues based on the extension of the collective bargaining agreement violated California law).

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 petitioners' argument that the union engaged in state action. *See* Pet. 6, 11. 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.

The other cases cited by petitioners are similarly unhelpful. Like *Janus*, the bulk 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); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 455-457 (1984) (addressing permissible uses of mandatory agency fees authorized by federal law); *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 resulting from a private dues-authorization agreement and alleged private misconduct. Nor do any other cases from this Court conflict with the decision below. *See* Pet. 15 (citing *Lindke v.*

Freed, 601 U.S. 187, 196 (2024), which "analyz[ed] whether a *state official* engaged in state action or functioned as a private citizen").

c. Petitioners also contend that the decision below creates "a split of authority" with decisions of other federal courts of appeals. Pet. 11. But there is no conflict. 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 decisions cited by petitioners do not establish a circuit conflict. They first point to the Seventh Circuit's decision in *Janus* following this Court's remand. Pet. 12. The Seventh Circuit held that the union in that case engaged in state action because it "ma[de] use of state procedures with the overt, significant assistance of state officials." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361

(7th Cir. 2019); *see* Pet. 12. As explained above, however, *Janus* involved the union's collection of agency fees that were compelled by state law, whereas this case involves the union's alleged collection of dues in violation of state law. *See supra* pp. 8-9.

The Third and Sixth Circuit decisions referenced by petitioners (Pet. 12-13) 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 petitioners acknowledge that the Sixth Circuit "found no state action" in *Littler* when it considered an employee's Section 1983 claims against a union for the improper deduction of dues. Pet. 12. They focus on dicta observing that, had the plaintiff "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 taken pursuant to the challenged law." *Littler*, 88 F.4th at 1182. But that observation does not address petitioners' contention that the *union* engaged in state action for purposes of their Section 1983 claims.[2]

Petitioners also assert that the decision below conflicts with several district court decisions. *See* Pet. 13 n.3. Two of those cases involved public employees who

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[2] And even if the dicta in *Littler* were read as suggesting that a government official's conduct taken pursuant to a statute is necessarily state action, that would not save petitioners' Section 1983 claims against the Attorney General. Those claims would remain barred on mootness and sovereign-immunity grounds—independent holdings that petitioners do not contest. *See* Pet. App. 28a-30a; *infra* pp. 13-14.

were not union members with dues-authorization agreements, unlike petitioners here. *See Chandavong v. Fresno Deputy Sheriff's Ass'n*, 599 F. Supp. 3d 1017, 1020-1024 (E.D. Cal. 2022); *Warren v. Fraternal Ord. of Police, Ohio Lab. Council, Inc.*, 593 F. Supp. 3d 666, 668, 673-676 (N.D. Ohio 2022). The third, *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 918-922 (E.D. Cal. 2019), is in tension with the decision below; but subsequent circuit decisions made clear that the district court was mistaken. *See Belgau v. Inslee*, 975 F.3d 940, 946-949 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021); *Hernandez v. AFSCME Cal.*, 854 F. App'x 923, 925 (9th Cir. 2021).

2. Petitioners also ask this Court to address their argument that the continued deduction of dues from their paychecks after July 2019 violated their First Amendment rights. *See* Pet. i, 7-11. But that question likewise does not warrant review. Petitioners do not contend that the question implicates any circuit conflict.[3] This Court has repeatedly denied petitions raising similar First Amendment questions—at least 21 times in the last three years.[4] And petitioners do not

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[3] The petition does contain an argumentative heading asserting that a "split of authority exists" on this question. Pet. 7. But the body of the argument does not attempt to support that assertion by citing any allegedly conflicting lower-court decisions. *See id.* at 7-11.

[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 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*

identify any persuasive reason why the Court should handle this case differently.

a. Indeed, this would be an exceptionally poor vehicle for addressing petitioners' First Amendment claims because the court of appeals did not reach the merits of those claims in the decision below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view[.]"). It instead held that the claims failed for other reasons.

As to petitioners' claims for prospective relief based on the First Amendment, the court of appeals held that they were moot. Pet. App. 28a-29a. Petitioners do not challenge that holding here. Nor could they: as the court below explained, the challenged dues have been returned to petitioners, their dues deductions have terminated, and there is no reasonable basis for expecting that those deductions would ever resume. *Id*. As to petitioners' claims for nominal and compen-

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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).

satory damages against the Attorney General for allegedly violating the First Amendment, the court of appeals held that they were barred by sovereign immunity. *See id.* at 29a-30a. Petitioners do not challenge that holding either. Finally, the court of appeals held that petitioners' Section 1983 claims failed for lack of state action. *See id.* at 29a. Petitioners do challenge that holding, but the decision below is correct on the merits for the reasons explained above. *See supra* pp. 5-12.

b. Even setting aside the vehicle problem, petitioners' First Amendment arguments are meritless and do not warrant plenary review. Under state law, public employees have the right to choose to join or "refuse to join" a union. Cal. Gov't Code § 71631. Public employees who choose to join may authorize their employer to deduct union dues from their paychecks. *See id.* § 1157.3(a). They do so through private agreements with their unions. There is no dispute here that petitioners entered into that kind of private agreement. *See* Pet. 1-2; Pet. App. 4a-5a, 59a, 61a. 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[.]").

Petitioners nonetheless invoke *Janus* to argue that the challenged dues deductions violated their First Amendment rights. *See* Pet. 7-11. They read *Janus* as establishing that unions may not collect dues without "knowing, voluntary, and informed consent." *Id.* at 10. And they argue that there was no such "affirmative consent" in this case because the union negotiated an extension of the collective bargaining

agreement without their knowledge or approval and then relied on that extension to continue collecting dues after they withdrew their authorizations. *See id.* at 9-11.

But petitioners' argument misunderstands *Janus*. The passage referenced by petitioners observed that courts could not "presume[]" that "nonmembers are waiving their First Amendment rights"; instead, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Janus*, 585 U.S. at 930. Those conclusions concerned employees who were not union members and who did not agree to pay membership dues. The Court did not address how to analyze a First Amendment claim advanced by employees who voluntarily chose to join a union and enter contractual agreements to pay dues—and it did not abandon the general principle that the First Amendment offers no protection against the enforcement of contractual promises. 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 collect dues from petitioners' paychecks without proper "affirmative consent," petitioners' 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. And here, for the reasons discussed above, *see supra* pp. 5-8, the union's alleged misconduct was not state action.

That does not mean that the union may obtain dues from employees "in perpetuity" (Pet. 3, 16) after they choose to join the union—or that employees would have no recourse if the union attempted to do so. As previously explained, California law does not allow unions to "use contract extensions to deprive members of their right to withdraw from union membership." *Trevisanut*, Cal. Pub. Emp. Rels. Bd. Decision No. 1029-S, at 8, 1993 WL 13699367. Unions must instead allow members to terminate dues deductions based on the expiration date of the original collective bargaining agreement—*i.e.*, the one in place when the employee voluntarily joined the union and authorized deductions—even if an extension is later negotiated. *Id.* Based on this understanding of California law, the union in this case agreed to return the dues collected from petitioners after they withdrew their consent in July 2019. *See* Pet. App. 28a, 42a; *see also* SEIU, Local 721 C.A. Br. 6-7, 19-20.

State law also provides potential remedies for a union's misconduct or improper contracting practices. Petitioners recognized as much by pleading state-law contract claims and making other contract law arguments. *See* Pet. App. 22a-23a (alleging that petitioners' membership agreements are unconscionable); Pet. 10 (arguing that the terms of the extension of the collective bargaining agreement were not properly incorporated into petitioners' membership agreements, and disputing the meaning of a provision in the membership agreements); *see also, e.g.*, *Kleveland v. Chi. Title Ins. Co.*, 141 Cal. App. 4th 761, 765 (2006) (contractual

term unenforceable where not sufficiently incorporated by reference). State law also allows employees to file administrative charges against a union for interfering with their right to withdraw from a union. *See* Cal. Gov't Code § 71631 (giving employees "the right to refuse to join or participate in the activities" of a union); *id.* § 71639.1 (allowing employees to file unfair practice charges with the California Public Employment Relations Board for violations of that right); *Trevisanut*, Cal. Pub. Emp. Rels. Bd. Decision No. 1029-S, 1993 WL 13699367. There is no need for the Court to constitutionalize this private dispute between petitioners and the union, especially in light of the availability of potential state-law remedies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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