No. _____

In the
Supreme Court of the United States

ROBERT ESPINOZA,

Petitioner-Applicant,

v.

UNION OF AMERICAN PHYSICIANS AND DENTISTS, AFSCME LOCAL 206, AN EMPLOYEE ORGANIZATION; CALIFORNIA CORRECTIONAL HEALTHCARE SERVICES, A PUBLIC AGENCY; BETTY T. YEE, IN HER OFFICIAL CAPACITY AS CALIFORNIA STATE CONTROLLER; AND ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Respondents.

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

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

The Ninth Circuit Court of Appeals issued a decision in Petitioner-Applicant Robert Espinoza's case on October 23, 2023, affirming the district court's order dismissing Petitioner-Applicant's claims (Exhibit A), and issued its order denying rehearing en banc on December 12, 2023 (Exhibit B).

The Petition for Writ of Certiorari is due in this Court no later than March 11, 2024. As required, this application precedes that date by more than 10 days. This Court has jurisdiction under 28 U.S.C. § 1254.

Pursuant to Supreme Court Rule 13.5, Petitioner-Applicant respectfully requests an extension of 30 days to file his Petition in this Court. Granting this application would extend the deadline for the filing of the Petition to April 10, 2024.

This case raises important federal questions regarding public employees' First Amendment right to

decline to subsidize the political speech of public sector labor unions. Specifically, the forthcoming Petition concerns whether the affirmative consent and constitutional waiver standard this Court laid down in its landmark decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018), applies to former union members who previously consented to deductions, but have since withdrawn their consent, or whether it only applied to agency fee payers under regimes which no longer exist. This issue has become the subject of a circuit split between the Ninth, and Seventh, Sixth, and Third Circuits.

Petitioner-Applicant's Counsel of Record has had extensive litigation duties during the preparation period for the Petition, including preparing for two oral arguments scheduled before the Ninth Circuit in *Craine v. Am. Fed'n of State, Cnty et al.,* No. 22-03310 (C.D. Cal. 2023), *appeal docketed*, No. 23-55206 (9th Cir. Mar. 6, 2023), and *Bourque, et al., v. Engineers*

and Architects Association, et al., No. 21-04006 (C.D. Cal. 2023), *appeal docketed*, No. 23-55369 (9th Cir. Apr. 20, 2023), preparing an opening brief at the Ninth Circuit in *Klee v. International Union of Operating Engineers, Local 501*, *et al.,* No. 22-00148 (C.D. Cal. 2023), *appeal docketed*, No. 23-3304 (9th Cir. Nov. 3, 2023), and preparing and filing a first amended complaint in *Baker v. CSEA, et al.,* No. 23-02857 (E.D. Cal. filed January 29, 2024).

Due to these time constraints, and in order to cogently prepare the pending Petition, Petitioner-Applicant respectfully requests an order be entered extending his time to file for a Petition for Writ of Certiorari by 30 days, up to and including April 10, 2024.

DATED: February 21, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the Supreme Court of the United States that on February 21, 2024, I electronically filed with the Supreme Court of the United States the foregoing document, Application for Extension of Time to File Petition for Writ of Certiorari, and caused a true and correct copy of the same to be delivered via e-mail to the following:

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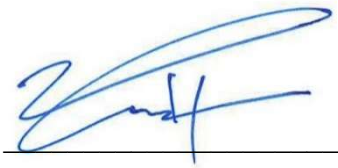

Timothy R. Snowball

EXHIBIT A

NOT FOR PUBLICATION

FILED

OCT 23 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ESPINOZA, Plaintiff-Appellant, v. UNION OF AMERICAN PHYSICIANS AND DENTISTS, AFSCME LOCAL 206; et al., Defendants-Appellees.	No. 22-55331 D.C. No. 8:21-cv-01898-DOC-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted October 19, 2023**
San Francisco, California

Before: W. FLETCHER, NGUYEN, and R. NELSON, Circuit Judges.

Robert Espinoza appeals from the district court's dismissal of his 42 U.S.C. § 1983 action alleging that the unauthorized deduction of union dues from his pay violated his First and Fourteenth Amendment rights under *Janus v. American*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Federation of State, County, & Municipal Employees, Council 31, 138 S. Ct. 2448 (2018). We have jurisdiction pursuant to 28 U.S.C. § 1291 and review de novo. *Wright v. Serv. Emp. Int'l Union Loc. 503*, 48 F.4th 1112, 1118 n.3 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023). We may affirm on any ground supported by the record. *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1106 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 783 (2023). We affirm.

1. The district court properly dismissed the § 1983 claims Espinoza alleged against his former union, the Union of American Physicians and Dentists, AFSCME Local 206 ("UAPD"). 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.

Actions by a private actor may be subject to § 1983 liability if the plaintiff can show that the conduct was "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). To establish fair attribution, two prongs must be met: (1) "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 it or by a person for whom it is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id*. Neither prong is met here.

First, Espinoza argues that UAPD "uses the authority of the state" through

California Government Code § 1153. That provision requires employees who wish to cancel wage deductions for union dues to direct requests to the union, which is responsible for processing such requests. Cal. Gov't Code § 1153(h) ("Employee requests to cancel or change deductions . . . shall be directed to the employee organization rather than to the [State]. The employee organization shall be responsible for processing these requests."). Espinoza concedes that he originally authorized UAPD to request such deductions, and his claims are premised on the allegation that UAPD continued to request such deductions after he validly withdrew authorization. This amounts to an allegation of "private misuse of a state statute," which "does not describe conduct that can be attributed to the State." *Lugar*, 457 U.S. at 941. By alleging that UAPD continued to request that dues be deducted from his pay even after he had revoked his dues deduction authorization, Espinoza necessarily alleged that UAPD "'act[ed] contrary to the relevant policy articulated by the State.'" *Collins v. Womancare*, 878 F.2d 1145, 1153 (9th Cir. 1989) (quoting *Lugar*, 457 U.S. at 940).

Second, Espinoza argues that UAPD is a "state actor" under the "joint action" or "governmental nexus" tests. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). In *Belgau v. Inslee*, we held that the mere fact that a state transmits dues payments to a union does not give rise to a section 1983 claim against the union under the "joint action" test. 975 F.3d 940, 947–49 (9th Cir.

2020), *cert. denied*, 141 S. Ct. 2795 (2021). Nor would a state employer's "ministerial processing of payroll deductions pursuant to [e]mployees' authorizations" create sufficient nexus between a state and a union to subject the union to section 1983 liability. *Id.* at 947–48 & n.2; *see also Wright*, 48 F.4th at 1122 & n.6. Espinoza argues such a nexus exists because a memorandum of understanding ("MOU") between UAPD and his state agency employer California Correctional Healthcare Services ("CCHCS") created a "contractual partnership" that enabled the continued unlawful deductions. But this MOU merely "provid[es] a 'machinery' for implementing the private agreement by performing an administrative task," which is insufficient to establish state action. *Belgau*, 975 F.3d at 948 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999)).

2. The district court properly dismissed Espinoza's nominal damages claim against CCHCS, the State Controller, and Attorney General because it is barred by Eleventh Amendment sovereign immunity. We have recognized "that, 'absent waiver by the State or valid congressional override,' state sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, including nominal damages." *Platt v. Moore*, 15 F.4th 895, 910 (9th Cir. 2021) (quoting *Kentucky v. Graham*, 473 U.S. 159, 169 (1985)). Espinoza has not shown waiver by the State or valid congressional override.

3. The district court properly dismissed Espinoza's claims for declaratory and injunctive relief as moot. Where circumstances change after commencement of a suit such that the wrongful behavior is no longer likely to recur against the plaintiff (for example, because the plaintiff left his job with the defendant), "his claims for prospective relief [become] moot because he [can] no longer benefit from such relief." *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1048 (9th Cir. 2014). The dues deductions have ceased, and Espinoza admits that he is no longer a member of UAPD and that he is unlikely to rejoin. The voluntary cessation exception therefore does not apply because the "allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

AFFIRMED.

EXHIBIT B

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ESPINOZA, Plaintiff-Appellant, v. UNION OF AMERICAN PHYSICIANS AND DENTISTS, AFSCME LOCAL 206; et al., Defendants-Appellees.	No. 22-55331 D.C. No. 8:21-cv-01898-DOC-KES Central District of California, Santa Ana ORDER

Before: W. FLETCHER, NGUYEN, and R. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc (Dkt. No. 58) and Judge W. Fletcher has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.