No. _____

In the

Supreme Court of the United States

ATISHMA KANT; MARLENE HERNANDEZ, as individuals;

Petitioners-Applicants,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, a labor organization; and ROB BONTA, in his official capacity as Attorney general of California,

Respondents.

Application to the Hon. Justice Elena Kagan for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

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Counsel for Petitioners-Applicants

Pursuant to Supreme Court Rule 13(5), the above-captioned Petitioners-Applicants hereby move for an extension of time of 30 days, up to and including April 10, 2024, for the filing of a Petition for a Writ of Certiorari.

In support of this request, Petitioners-Applicants Atishma Kant and Marlene Hernandez state as follows:

1. The United States Court of Appeals for the Ninth Circuit issued its opinion on October 23, 2023 (Exhibit 1), and issued its order denying rehearing en banc on December 12, 2023 (Exhibit 2). The mandate issued December 20, 2023. Unless an extension is granted, the deadline for filing a petition for certiorari will be March 11, 2024. Applicants are filing this application at least ten days before that date, in accordance with Supreme Court Rule 13.5. This Court has jurisdiction under 28 U.S.C. §1254(1).

2. Atishma Kant and Marlene Hernandez signed membership agreements with their union, Service

Employees International Local 721, that stated that they may resign "in accordance with applicable provisions in the memorandum of understanding [collective bargaining agreement or CBA]" that was in effect at the time they signed those membership agreements. When they resigned in the correct window period pursuant to the applicable CBA, a fact not disputed by any party, they were told that without their knowledge that the union had extended it for another two years. Their public employer and union continued to take their wages for two years without their consent, and then extended the CBA a second time. Despite the fact that the CBA was between a union and a public employer, the Ninth Circuit Panel opinion states, without any legal precedent, that "a union entering into a contract with a government employer does not engage in state action."

3. This Ninth Circuit panels' decision presents an issue of exceptional importance as to whether public employees suffering compelled speech injuries related

to nonconsensual union dues deductions can seek relief pursuant to 42 U.S.C. § 1983. This case presents the issue of whether a union is a state actor when acting pursuant to state policy under Section 1983 because it both uses a state statute to collect worker's lawfully earned wages and also acts in contractual partnership with a government employer through a Collective Bargaining Agreement. Lastly, the Ninth Circuit's decision conflicts with Supreme Court precedent and Seventh Circuit case law with respect to the issue of state action in the context of nonconsensual union dues. In *Janus*, the Supreme Court made clear both government officials and unions operating under state deduction systems and without contractual authorization or affirmative consent are state actors under Section 1983 when they take and spend a public employee's lawfully earned wages on objectionable political speech. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018). As in the *Janus* cases,

Petitioners challenge an unconstitutional state system utilized by state actors. *See* Exhibit 1.

4. Petitioner's Counsel of Record, Ms. Shella Alcabes, has been on maternity leave since December 25, 2023. Ms. Alcabes also has substantial argument and briefing obligations when she returns from maternity leave, including two other petitions for Writs of Certiorari in *Hubbard v. Service Employees International Union, Local 2015, et al*., No. 21-16408 (9th Cir. 2024) (due March 11, 2024) and *Jimenez v. Service Employees International Union, Local 2015*, et al., No. 22-55331 (9th Cir. 2024) (due March 11, 2024)[1]; an oral argument in *Parde v. Service Employees International, 721, et al.*, No. 22-03320 (C.D. Cal 2022), appeal docketed, No. 23-55021 (9th Cir. Jan. 11, 2023) (pending May or June 2024 date); oral argument in *Freedom Foundation v. DCAS*, No.

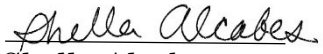
[1] Requests for extensions will be filed in *Hubbard v. Service Employees International Union, Local 2015, et al.*, No. 21-16408 (9th Cir. 2024) (due March 11, 2024) and *Kant, et al., v. Service Employees International, et al.*, No. 22-55904 (9th Cir. 2024) (Due March 11, 2024).

152725/22 (NY Sup. Dec. 6, 2022), *appeal docketed*, No. 2023-01154 (NY App Div. Mar. 6, 2023) (scheduled April 16, 2024); and oral argument in *Freedom Foundation v. Jefferson County*, No. EF2022-00002775 (NY Sup. Jan. 20, 2023) *appeal docketed*, No. CA-23-00339 (NY App Div. Feb. 24, 2023) (scheduled April 17, 2024).

5. WHEREFORE, for the foregoing reasons, and in order to cogently prepare for the pending Petition, Applicants request that an extension of time up to and including April 10, 2024, be granted within which Applicants may file a petition for a writ of certiorari.

Dated: February 21, 2024

Respectfully submitted,



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SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, a labor organization; and ROB BONTA, in his official capacity as Attorney general of California,

Respondents.

Certificate of Service

I, Shella Alcabes, declare under penalty of perjury under the laws of the Supreme Court of the United States that on February 21, 2024, I, Shella Alcabes, a member of the Supreme Court Bar, 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 email to the following:

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EXHIBIT 1

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

ATISHMA KANT; MARLENE HERNANDEZ, individuals, Plaintiffs-Appellants, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, a labor organization; ROB BONTA, in his official capacity as Attorney General of California, Defendants-Appellees.	No. 22-55904 D.C. No. 5:21-cv-01153-FMO-SHK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Submitted October 19, 2023**
San Francisco, California

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

After they resigned their union membership, Atishma Kant and Marlene

* 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).

Hernandez (plaintiffs) sued their former union Service Employees International Union Local 721 (SEIU) and Rob Bonta, the Attorney General of California. They alleged that—under laws enforced by Attorney General Bonta—their employer, the Superior Court of California, continued deducting union dues from their wages and giving those dues to SEIU in violation of their First and Fourteenth Amendment rights under *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). They also raised state contract-law claims. The district court dismissed their claims, and they appealed. We have jurisdiction under 28 U.S.C. § 1291 and review de novo. *Wright v. SEIU Loc. 503*, 48 F.4th 1112, 1118 n.3 (9th Cir. 2022) (subsequent history omitted). We affirm.

1. Plaintiffs' claims for prospective relief are moot because defendants have refunded the money at issue. Article III jurisdiction extends only to live cases and controversies. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). But voluntary cessation only moots a claim if the defendant carries the "formidable burden of showing that it is absolutely clear 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).

SEIU and the Attorney General have carried that "formidable" burden. After this case was filed, SEIU told the Superior Court to stop deducting plaintiffs' wages and reimbursed the union dues that the Superior Court took after plaintiffs withdrew

from union membership. Under California Government Code section 1157.12, the Superior Court can only make deductions for union dues if SEIU certifies that plaintiffs authorized such deductions. Plaintiffs are unlikely to authorize such deductions again, and the deductions are therefore unlikely ever to resume. Attorney General Bonta is entitled to a presumption of regularity and there is no evidence that he would violate California law by certifying to the Superior Court that plaintiffs reauthorized deductions. *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926). Even if plaintiffs did reauthorize deductions at some future point, the task of telling the Superior Court to resume those deductions falls to SEIU, not the Attorney General.

2. Plaintiffs cannot bring retrospective section 1983 claims against SEIU. SEIU did not act as a state actor when it relied on plaintiffs' authorizations to deduct union dues from their wages. Section 1983 liability attaches to private action if the private conduct was "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). That requirement is not met here. *See Belgau v. Inslee*, 975 F.3d 940, 946–47 (9th Cir. 2020).

Belgau is not distinguishable because plaintiffs are challenging the Superior Court's decision to enter the memorandum of understanding with SEIU. When plaintiffs joined SEIU, they agreed to 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." While California contract law might address the legality of such a contract, a union entering into a contract with a government employer does not engage in state action.

3. Sovereign immunity bars the retroactive claims for nominal and compensatory damages against Attorney General Bonta. Parties can sue state officers with "some connection with the enforcement of" a challenged law for prospective and declaratory relief. *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). However, "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). Plaintiffs do not argue that sovereign immunity has been waived or abrogated. The Eleventh Amendment thus bars their claims for damages against the Attorney General.

4. The district court properly declined to exercise supplemental jurisdiction and dismissed the state contract-law claims without prejudice after it dismissed the federal claims against SEIU and Attorney General Bonta. *See Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1101 (9th Cir. 1996).

AFFIRMED.

EXHIBIT 2

FILED

DEC 12 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ATISHMA KANT; MARLENE HERNANDEZ, individuals, Plaintiffs-Appellants, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, a labor organization; ROB BONTA, in his official capacity as Attorney General of California, Defendants-Appellees.	No. 22-55904 D.C. No. 5:21-cv-01153-FMO-SHK Central District of California, Riverside ORDER

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

The panel has voted to deny the petition for rehearing en banc (Dkt. No. 48) 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.