No. 24-2

IN THE
Supreme Court of the United States

CAMILLE BOURQUE,
Petitioner,

v.

ENGINEERS AND ARCHITECTS ASSOCIATION, ET AL.,
Respondents.

On Petition for a 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 labor union's alleged violation of state law by inaccurately certifying to a public employer that an employee had authorized dues deductions is state action sufficient to support a 42 U.S.C. § 1983 claim.

CORPORATE DISCLOSURE STATEMENT

Respondent Engineers & Architects Association has no parent corporation, and no company owns any stock in Respondent.

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PRELIMINARY STATEMENT

Petitioner Camille Bourque seeks review of a unanimous Ninth Circuit panel's unpublished memorandum disposition concluding that there was no state action where a union allegedly requested dues deductions from the paycheck of one of the thousands of public employees whom it represents, without first obtaining affirmative written consent as required by state law. This Court should deny the Petition as it has the many other petitions raising essentially the same questions.[1]

Petitioner's first question presented, concerning First Amendment protection, deserves little discussion. The Ninth Circuit did not reach this issue. It affirmed the dismissal of the claims against the governmental Defendants on threshold grounds that the Petition does not challenge, and it affirmed the dismissal of the claims against Engineers & Architects Association ("EAA" or "Union") for lack of

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[1] *See, e.g., Laird v. United Tchrs. L.A.*, *cert. denied*, No. 23-1111 (Oct. 7, 2024); *Deering v. Int'l Brotherhood of Elec. Workers, Loc. 18*, *cert. denied*, No. 23-1215 (Oct. 7, 2024); *Hubbard v. Serv. Emps. Int'l Union Loc. 2015*, *cert. denied*, No. 23-1214 (Oct. 7, 2024); *Cram v. Serv. Emps. Int'l Union Loc. 503*, *cert. denied*, No. 23-1112 (Oct. 7, 2024); *Kant v. Serv. Emps. Int'l Union Loc. 503*, *cert. denied*, No. 23-1113 (Oct. 7, 2024); *Craine v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 36 Loc. 119*, *cert. denied*, No. 24-122 (Oct. 7, 2024); *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).

action "under color of" state law. 42 U.S.C. § 1983. Petitioner does not identify any First Amendment issue distinct from the state action question.

Petitioner's second question presented asks the Court to consider the theory, advanced in various forms in at least a dozen unsuccessful petitions by her counsel from the Freedom Foundation, that a private organization's alleged unlawful, unauthorized misconduct is state action because it triggers a public employer's ministerial processing of dues deductions pursuant to a state statute.

The facts of Petitioner's case illustrate why every circuit court that has considered this theory has correctly rejected it as inconsistent with this Court's precedent. Her Complaint alleges that Respondents EAA, the City of Los Angeles ("City"), and California Attorney General Rob Bonta acted together to deprive Petitioner of her First Amendment rights by causing union membership dues to be deducted from her City paycheck without her having ever joined the Union or agreed to deduction of dues. *See Janus v. AFSCME Council 31,* 585 U.S. 878 (2018). But Petitioner did not allege that the Attorney General had anything to do with processing the deductions. Nor did she allege that the City was aware that she disputed having authorized the deductions.

California law protects the rights of public employees who do not wish to provide any support to labor unions. If Petitioner's assertions that she was a non-consenting non-member are true, the Union's request for dues deductions would be indisputably unlawful and contrary to state policy. Petitioner could have raised her contention that she never signed a

dues authorization card with the Union, the City, or the City's Employee Relations Board—any one of which would have had a duty and the ability to correct the Union's error, if in fact an error had occurred.

Instead, in May 2021, she elected to file a § 1983 suit in federal court, even though any federal claim had essentially been foreclosed by the Ninth Circuit's decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021)—another case pursued by Freedom Foundation lawyers. The district court, and in turn the Ninth Circuit, appropriately rejected her claim against the Union for lack of state action. As the Ninth Circuit held, the City's ministerial processing of the Union's payroll deduction requests, pursuant to a statutory scheme that required affirmative consent, did not turn the Union into a state actor, and the Union's alleged "private misuse of a state statute" in a manner "contrary to the policy of the state" would not be conduct attributable to the state. App. 22a (quoting *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 940–41 (1982)). Every circuit court that has looked at a similar set of facts has ruled that when state law prohibits involuntary dues deductions, a union's alleged unlawful request for dues deductions on behalf of non-consenting employees would be independent, private misconduct sanctionable under state law, not state action.

Petitioner attempts to avoid this common-sense understanding of state action, grounded in this Court's decisions in *Lugar* and other cases, by citing *Janus* and a handful of other agency fee cases. But these cases are inapposite because the union defendants were acting pursuant to state policies that

mandated involuntary deductions (i.e. agency fees), not acting in alleged violation of a state policy that required affirmative consent, as California law required here.

For these reasons, this case simply does not implicate the concerns about government-compelled speech that motivated *Janus*. Public employees in California have ample opportunity to remedy allegedly nonconsensual deductions through state law and state procedures. Petitioner could have had any issue quickly remedied by raising her claim of nonconsensual deductions with the City, but she elected not to. Petitioner cites a handful of other cases filed by Freedom Foundation lawyers as evidence of a supposed epidemic of involuntary dues deduction caused by state laws that they suspect are inadequately protective. Pet. 8. But in none of these cases was a finding made that an error occurred, and in none of these cases did the plaintiffs pursue the remedies under state law at their disposal before filing in federal court.[2] Petitioner has alleged no actual failure on the part of the government to protect her rights; all she brings to this Court is a private organization's alleged violation of state law and a

[2] We are aware of only one federal court plaintiff alleging improper post-*Janus* deductions with a claim that was adjudicated under state law. *See Trees v. Serv. Emps. Int'l Union Loc. 503*, 574 F. Supp. 3d 856, 870 (D. Or. 2021) (staying federal proceedings pending state agency resolution of unfair labor practice filed by union defendant against plaintiff). The state employment relations agency ultimately determined that the employee did in fact sign the allegedly forged card, and its determination was upheld on appeal. *Serv. Emps. Int'l Union Loc. 503 v. ST*, 544 P.3d 440, 441-42 (Or. Ct. App. 2024).

repeatedly rejected legal theory for a federal court to remedy it.

Accordingly, the Court should deny the Petition.

STATEMENT OF THE CASE

A. Background

1. California law prohibits compelled union dues deductions for public employees, and the City has no contrary policy.

Petitioner has worked for the Los Angeles Police Department since 1999 and is a member of a bargaining unit represented by EAA, a labor union representing certain professional, technical, and clerical workers employed by the City of Los Angeles. App. 3a ¶¶ 5, 7. EAA and the City are subject to the Meyers-Milias-Brown Act ("MMBA"), Cal. Gov't Code §§ 3500 *et seq*., which regulates labor relations for local government employees.

Local government employees have a right under the MMBA to refuse to join or otherwise support an employee organization. *Id.* §§ 3502, 3506. It is therefore unlawful for an employer or union covered by the MMBA to compel an employee to pay union dues or agency fees. *City of Hayward v. United Pub. Emps*., 126 Cal. Rptr. 710, 713-14 (Cal. Ct. App. 1976); *cf. Cumero v. Pub. Emp't Rels. Bd*., 778 P.2d 174, 181

(Cal. 1989) (interpreting statute with identical language applicable to public school employees).[3]

Nothing in the MMBA or any other law allows bargaining parties to negotiate away these rights, and Petitioner has not alleged that the City maintained a policy of compelling non-member employees to pay agency fees after *Janus* or of deducting membership dues without authorization, which would be in violation of California law. The Petition suggests that a dues maintenance provision in the Memorandum of Understanding between the City and the Union was a source of her injuries, Pet. 3, but this cannot be the case. Petitioner concedes that the dues maintenance clause could not have applied to her situation if, as alleged, she did not sign an authorization card that consented the provision. App. 6a ¶22. Nothing in the Memorandum of Understanding would have permitted the deduction of Union dues from an employee who never consented to any deductions in the first place. And despite the assertions in the Petition, nothing in the record suggests the Union has ever taken a contrary position.

The *state* policy that Petitioner alleges as the source of her injury is a set of state laws that, ever since *Janus*, have required certain public employers to deduct *voluntary* dues from employee paychecks and transmit those dues to an employee organization upon the employee organization's request, subject to

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[3] Prior to *Janus*, compulsory agency fees were authorized by a specific statutory exception to this general rule against compelled support for a union. Cal. Gov't Code § 3502.5. The misconduct alleged in this case could not have fallen within this exception, and there is no allegation that it did.

certain safeguards and restrictions. App. 6a ¶ 26. A public employer generally must honor employee organization requests to deduct dues from the organization's members. Cal. Gov't Code §§ 1152, 1157.3. The employee organization, however, is responsible for certifying to the employer that it has and will maintain written, affirmative deduction authorizations. *Id.* § 1157.12(a). The employer must rely on the employee organization's certification as to whether a given employee has a valid, active authorization "unless a dispute arises about the existence or terms of the authorization," in which case the employer can request a copy of the individual authorization. *Id.* The employee organization must indemnify the employer for employee claims for unauthorized dues deductions made in reliance on the employee organization's representations. *Id.* § 1157.12(a)–(b). The law provides for revocation of an authorization in accord with the terms of the authorization. *Id.* §§ 1157.3(b), 1157.12(b).

Employers are required to direct employee requests to cancel or change deductions to the employee organization responsible for maintaining it. *Id.* § 1157.12(b). The statute, however, expressly contemplates that employees may raise disputes over the existence or terms of their dues authorization with their employer, and it contains no language prohibiting an employee from raising a dispute with any other governmental decisionmaker. *Id.* § 1157.12(a).

2. The City deducts union payments from Petitioner's paychecks for nearly two decades without any dispute.

Petitioner alleges that she was never a union member and never affirmatively consented to support the Union through payroll deductions.[4] App. 4a ¶ 10, 7a ¶ 25. Nonetheless, starting in 2003, the City began deducting money from her wages and transmitting it to the Union. App. 4a ¶ 11.

If, as Petitioner claims, she never affirmatively consented to deductions, all deductions should have ceased upon the publication of *Janus*. But the City continued to deduct dues from her paychecks, allegedly pursuant to Government Code section 1157.12 and the terms of the Memorandum of Understanding. App. 6a ¶ 26.

After more than a year and a half of post-*Janus* dues deductions, Petitioner sent a letter in February 2020 to the Union attempting to revoke a dues authorization that she now claims never existed. App. 6a ¶ 16. In the letter, she purports to resign her membership and requests that ongoing dues deductions cease. 9th Cir. Dkt. 11-4 at 0155. The letter did not suggest that prior deductions, pre- or post-*Janus*, were erroneous or unauthorized. *Id.* At no point in the letter does Petitioner imply or suggest, much less assert, that she never consented to supporting the Union, let alone state it "in no uncertain terms" as the Petition states. Pet. 2.

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[4] The Union has never conceded the truth of these allegations and has consistently made clear that, although the allegations in the Complaint are assumed to be true for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), they are still just allegations. *See*, *e.g.,* App. 31a ("As alleged, there was no consent from Ms. Bourque.").

Petitioner alleged that she followed up on the status of the letter with a June 2020 phone call with a Union representative concerning ongoing deductions. App. 6a–7a ¶¶ 20–21. She does not allege that she told the Union representative that she never agreed to be a member or signed a dues deduction authorization.[5] The Union representative, apparently operating under the impression that Petitioner was trying to resign her membership and revoke her dues deduction authorization, referred Petitioner to the maintenance of dues provision in the Memorandum of Understanding, which was only applicable to employees who had signed dues authorizations. App. 7a ¶¶ 21–24. The Union took no action in response to this call, and the City continued deducting dues.

The letter and phone call are the only two communications concerning deductions mentioned in the Complaint. Petitioner does not allege that she—or anyone on her behalf—contacted or attempted to contact her employer or any other governmental entity concerning her dues deductions, her membership status, or the Union's lack of response to her request. Nor does she allege that, prior to filing the Complaint, she advised the Union that all her prior deductions were erroneous because she had never joined the Union and authorized the deductions.

3. The Union stops dues deductions and issues a

[5]The Petition misleadingly states that the Union representative told Petitioner that the Union would continue to receive deductions "even though she never joined the union or authorized deductions." Pet. 3. This is nowhere in the Complaint.

refund as soon as it receives the Complaint.

Following the filing of Petitioner's federal lawsuit on May 12, 2021, the Union attempted to resolve the matter by refunding all dues it had received since this Court decided *Janus*, plus interest, adding Petitioner's name to a list of employees who no longer had active dues authorizations, and sending the list to the City. App. 20a. The Union has never conceded, however, that Petitioner did not consent to all dues withheld, pursuant to a signed dues authorization.

B. Procedural History

Petitioner, along with Peter Morejon (a City employee whose similar claims were dismissed and are not the subject of this Petition), filed suit under 42 U.S.C. § 1983 against the Union, the City, and Attorney General Bonta on May 12, 2021, seeking an injunction, declaratory relief, and retrospective relief including nominal and compensatory damages. App. 1a–17a. The Complaint alleged that the Union, the City, and the Attorney General violated Petitioner's First Amendment right against compelled speech and deprived her of her procedural and substantive due process rights by causing dues to be deducted from her paycheck without her affirmative consent.

Each Defendant filed a motion to dismiss for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted the motions, dismissing the case with prejudice. App. 39a–74a.

The district court held that Petitioner's claims for prospective relief were moot because she could not reasonably allege a viable threat of future injury, and her retrospective claims for dues and interest were moot because the Union had refunded the dues payments that she claimed were improperly deducted. App. 55a–60a.

The district court dismissed the remaining claims as follows: (1) the § 1983 claims against Attorney General Bonta were barred by sovereign immunity; (2) the § 1983 claim against the Union failed due to a lack of state action; and (3) the § 1983 claim against the City failed because the allegations did not show that the City applied a policy other than what was required under state law or that the City's actions were the moving force that caused the alleged harm. App. 60a–72a.

Petitioner appealed to the Ninth Circuit, which unanimously affirmed the lower court's ruling in a brief, non-precedential memorandum disposition opinion.[6] App. 18a–24a.

The Ninth Circuit first held that Petitioner's prospective claims were moot because it was "absolutely clear that the alleged conduct could not reasonably be expected to occur" (quoting *Friends of*

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[6] The Ninth Circuit combined the *Bourque* case with *Craine v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 36, Loc. 119*, 23-55206, 2024 WL 1405390 (9th Cir. Apr. 2, 2024), and issued a combined memorandum decision. Michael Craine filed a separate petition for certiorari, which this Court recently denied. *Craine v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 36, Loc. 119*, *cert. denied*, No. 24-122 (Oct. 7, 2024).

the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 190 (2000)), and affirmed the dismissal of the remaining claims against the Attorney General based on sovereign immunity. App. 20a–22a.

Next, the court affirmed the district court's dismissal of Petitioner's claims against the Union for lack of state action, relying on *Lugar, Belgau,* and *Wright v. Service Employees International Union Local 503*, 48 F.4th 1112 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023), which was a case involving state agency deductions under a nearly identical statutory scheme in Oregon, with facts that were otherwise indistinguishable from this case. App. 22a–23a. The Complaint failed to satisfy *Lugar's* first "state policy" prong because the Union's alleged misconduct would amount to "private misuse of a state statute" that was "contrary to the relevant policy articulated by the State." App. 22a (quoting *Lugar* at 940–41). The allegations failed to satisfy *Lugar*'s second, "state actor" prong because the City's ministerial processing of union-requested payroll deductions and transmission to the union did not create a sufficient governmental nexus with the union or otherwise constitute joint action. App. 22a–23a.

Finally, the panel concluded that Petitioner failed to establish the City's liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). App 23a–24a. Specifically, the court found that the City was not even allegedly aware of Petitioner's alleged lack of consent and did not intend to withhold unauthorized dues. App. 23a. Further, Petitioner could point to no deliberate policy choice the City made, as California state law required the City to deduct dues pursuant to the Union's certifications.

App. 23a. In so holding, the court implicitly rejected Petitioner's argument that the Memorandum of Understanding between the City and the Union was the moving force behind her alleged injuries.

The Petition does not dispute the Ninth Circuit's holdings concerning mootness, sovereign immunity, or *Monell* liability. She challenges only its ruling concerning state action.

REASONS FOR DENYING THE PETITION

Petitioner fails to show a circuit split, a deviation from this Court's precedent, or any other reason to grant review of this case. The Ninth Circuit's ruling that the Union's alleged misuse of California Government Code section 1157.12 was not state action derived directly from the Court's state action jurisprudence and does not conflict with its decision in *Janus*. *See*, *e.g.*, *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."); *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). The Court should dismiss this Petition, just as it has dismissed several other recent petitions filed by Freedom Foundation lawyers that have presented essentially the same questions.[7]

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[7] *See*, *e.g.*, *Laird v. United Tchrs. L.A.*, *cert. denied*, No. 23-1111 (Oct. 7, 2024); *Deering v. Int'l Brotherhood of Elec. Workers, Loc. 18*, *cert. denied*, No. 23-1215 (Oct. 7, 2024); *Hubbard v. Serv. Emps. Int'l Union Loc. 2015*, *cert. denied*, No. 23-1214 (Oct. 7, 2024); *Cram v. Serv. Emps. Int'l Union Loc. 503*, *cert. denied*, No.

I. The First Question Presented is not Adequately Raised by the Petition.

Petitioner's first question presented, concerning First Amendment protections, is clearly not worthy of review. The Ninth Circuit dismissed all claims for threshold reasons and did not reach the question of whether any of the Respondents violated the First Amendment. Because Petitioner does not challenge the dismissal of the claims against the Attorney General on sovereign immunity grounds or the dismissal of the claims against the City for lack of a deliberate policy under *Monell*, the only question left in this case concerns the liability of the Union, a private actor. The Union did not violate the First Amendment because the First Amendment does not protect against private action. *See*, *e.g.*, *Pub. Utilities Comm'n of D.C. v. Pollak,* 343 U.S. 451, 461 (1952) (explaining First Amendment "appl[ies] to and restrict[s] only the … Government and not private persons"); *Manhattan Cmty. Access Corp. v. Halleck,* 587 U.S. 802, 804 (2019).

II. The Second Question Presented is not Worthy of this Court's Review.

A. There is no circuit split on the state action question.

Every circuit court that has considered the issue has held that when state law prohibits involuntary

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23-1112 (Oct. 7, 2024); *Kant v. Serv. Emps. Int'l Union Loc. 503*, *cert. denied*, No. 23-1113 (Oct. 7, 2024); *Craine v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 36 Loc. 119*, *cert. denied*, No. 24-122, (Oct. 7, 2024).

dues deductions, a union's unlawful request for dues deductions on behalf of non-consenting employees is independent, private misconduct sanctionable under state law, not state action. *Littler v. Ohio Ass'n of Pub. Sch. Emps.,* 88 F.4th 1176, 1181 (6th Cir. 2023*)* (finding union's alleged misconduct in requesting dues from former member who had revoked consent was not state action); *Wright*, 48 F.4th at 1123–25 (holding Union's alleged forgery in violation of state statutory scheme analogous to California's was not state action); *Hoekman v. Educ. Minn.*, 41 F.4th 969, 978 (8th Cir. 2022) ("[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[.]"); *Belgau*, 975 F.3d at 947–49 (holding that where a state law requires a public employer to process dues deductions in reliance on union representations that there is a valid employee authorization in place, the employer's ministerial role in processing payroll deductions does not turn the union into a state actor).

The Petition claims that these holdings on state action conflict with opinions in the Third, Sixth, and Seventh Circuits. Pet. 15–16. This is not true.

The Third Circuit's decision in *Lutter v. JNESO*, 86 F.4th 111 (3d Cir. 2023), has no bearing on this case, as the Third Circuit did not hold that the union's deductions were state action, as Petitioner claims. Instead, the court expressly left the union state action issue unaddressed, remanding it for initial determination by the district court, which had not previously ruled on it. *Id.* at 135 n.27. ("[W]hether [the union] was a state actor subject to suit under §1983 [is] properly addressed in the first instance by the

district court on remand."). Further, the facts of *Lutter* are dramatically different from this case. The New Jersey statute governing the deductions in *Lutter* established a dues authorization revocation window that allegedly compelled the deductions at issue. *Id.* at 120. In contrast, the Union in this case is accused of private misconduct that, as alleged, was prohibited by state law, not compelled by it, and that occurred without the knowledge of any government officials. There can be no state action in such a situation. *Lugar*, 457 U.S. at 940–41.

The Seventh Circuit found a union's participation in a dues deduction scheme to be state action in *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*). But *Janus II* concerned agency fees compelled as a condition of employment, which this Court found to be unconstitutional, not dues deductions pursuant to California's system, enacted in compliance with *Janus,* requiring consent. Additionally, in *Janus*, AFSCME Council 31 was acting in accordance with the errant state policy, not in violation of it. *Janus II* is thus entirely consistent with *Lugar* and the holdings of the Sixth, Eighth, and Ninth Circuits.

As for Petitioner's claim that *Littler v. Ohio* conflicts with the Ninth Circuit's holdings on state action, the Sixth Circuit in fact found *no* state action by the union in that case, as Petitioner admits. Pet. 15-16. The section of the *Littler* opinion that Petitioner quotes merely suggests that a union might be a state actor if it acts *in accordance* with a state law that *does not* require affirmative consent. *See* 88 F.4th at 1182 (citing as example *Janus II*, 942 F.3d at 361).

B. There is no conflict with this Court's precedent.

The alleged Union actions in this case do not meet either of the two required prongs set forth in *Lugar* for determining whether the conduct of a private actor is state action. 457 U.S. at 937.

The "state policy" prong of the *Lugar* test requires the claimed deprivation to have resulted from "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 responsible." *Id.* at 937. In other words, the asserted deprivation of constitutional right must be based on compliance with, or actions consistent with, state policy. In *Lugar*, the Court rejected a § 1983 claim against a private defendant who allegedly misused a state prejudgment attachment statute, holding that to the extent the plaintiff admitted that the private defendant's conduct was in violation of state law, the "conduct … could not be ascribed to any governmental decision." *Id.* at 940. "That [the private defendants] invoked the [state] statute without the grounds to do so could in no way be attributed to a state rule or a state decision." *Id.*

Here, Petitioner claims that the Union misrepresented her status to the City by indicating that she had an active dues deduction authorization in place when she in fact never authorized any deductions whatsoever. This alleged misrepresentation would be "an express violation of existing state law." *Id.* Thus, as in *Lugar*, the resulting alleged harm cannot be attributed to state policy.

As for the second prong of *Lugar*, which looks at whether a private party "may fairly be said to be a state actor," *Id.* at 937, the Ninth Circuit correctly held that that the City's ministerial processing of union-requested payroll deductions and transmission to the union did not create a sufficient governmental nexus with the union or otherwise constitute joint action sufficient to make the Union a state actor. App. 22a–23a (citing *inter alia Belgau*, 975 F.3d at 947–49). Petitioner does not directly challenge this determination.

Petitioner also does not even attempt to distinguish *Lugar*. Instead she cites a number of this Court's cases that she suggests support a different understanding of state action. Pet. 9. But these cases all concern union conduct that was *consistent with* governmental agency fee policies that *did not* require affirmative consent by the employee.[8] Petitioner asserts that she is identically situated to the plaintiffs in these cases, having had money deducted from her public paycheck to fund speech she disagrees with without her consent. But she is not, because her dues were deducted in violation of state law, not in accordance with it.

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[8] *See Janus*, 585 U.S. at 929–930; *Harris v. Quinn*, 573 U.S. 616, 625–26 (2014); *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 302 (2012); *Chicago Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 295 (1986); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 455–457 (1984); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 212 (1977).

The statement quoted by Petitioner from *Lindke v. Freed* that "[m]isuse of power, possessed by virtue of state law" is state action likewise does not detract from *Lugar's* holding concerning private misuse of state statutes. Pet. 14 (quoting *Lindke v. Freed*, 601 U.S. 187, 199 (2024)). *Lindke* concerned the circumstances under which a public official's speech activity could be considered state action. A union is a private actor, not a public official. The Union was not misusing power possessed by virtue of state law here because a private actor's unilateral, independent misuse of a state statute is not the misuse of *power*. *See Lugar*, 457 U.S. at 940–41.

A union cannot reasonably be said to be acting with the authority of the state when it violates state law by requesting deductions from the paycheck of a public employee who never affirmatively consented. This would be *unquestionably* unlawful and contrary to state policy. And no state officials acted together with the Union in its misconduct, compelled it, or otherwise assisted it: All the City here did was ministerially process dues deductions. The City had no policy of processing dues deductions without authorization, in violation of California law, and no reason to know that Petitioner might not have provided affirmative consent.

For these reasons, it is clear that the Ninth Circuit's decision was a correct application of this Court's decisions.

C. California law adequately protects employees who do not consent to dues deductions.

The Petition attempts to distract from the unquestionable illegality under state law of the Union's alleged conduct by misrepresenting the statutory scheme governing union-requested dues deductions and inaccurately implying that Petitioner did not have adequate options for remedying the Union's alleged errors.

Petitioner first claims that Government Code section 1157.12 does not require unions to actually possess signed dues authorizations when it requests dues deductions. Pet. 4. This is an obtuse reading of the statute. To trigger a deduction under the law, the Union must certify that it is maintaining these dues authorizations, and the union can be required to produce them in the event of a dispute. Cal. Gov't Code § 1157.12.

Petitioner then claims that the statute prohibits public employees from raising a dispute with any entity other than the union serving as their exclusive representative, and that a union can delay or prevent other entities from hearing and resolving disputes Pet. 4. This restriction is nowhere to be found in this law. The statute requires that public employers direct requests to cancel or change dues deductions (i.e. revocations or amendments of dues authorizations) to the union that maintains them. Cal. Gov't Code § 1157.12(b). But it does not provide that the employee organization needs to respond to the request before any dispute can be raised, and it certainly would not have prevented Petitioner from immediately raising

her allegedly improper dues deductions with the City—this would have been a dispute over the existence of an authorization, not a request to change or cancel one.

Petitioner could have raised her contention that the union was unlawfully requesting or receiving dues with her employer or with the City of Los Angeles Employee Relations Board ("ERB"), which enforces the MMBA's prohibitions on compelled dues deductions for applicable City employees. *See id.* § 3509(d).[9] And if the MMBA were held not to apply to the conduct at issue, she could have sought relief in state court for the alleged misrepresentation under several different state law theories, including unjust enrichment, breach of contract, conversion, and/or the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* But she did not do any of this. Indeed, she did not even raise the dispute with the Union, but instead tried to resign her allegedly non-existent membership and revoke her allegedly non-existent dues authorization.

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[9] The ERB has exclusive initial jurisdiction over allegations of unfair labor practices against the City or unions representing city employees. Cal. Gov't Code § 3509(d); *Singletary v. Int'l Bhd. of Elec. Workers, Loc. 18*, 151 Cal. Rptr. 3d 107, 112 (Cal. Ct. App. 2012) (holding that initial *jurisdiction* of ERB is exclusive and equivalent in scope to the initial jurisdiction of the California Public Employment Relations Board ("PERB")). PERB (and thus ERB) jurisdiction applies broadly to claims that could be construed as unfair labor practice claims, including claims related to union fee deductions. *See Cal. Teachers' Ass'n v. Livingston Union Sch. Dist.*, 269 Cal. Rptr. 160, 165 (Cal. Ct. App. 1990) (holding that when conduct in a given case could give rise to an unfair practice claim, a court "must construe the activity broadly").

California is perfectly capable of adjudicating these kinds of disputes—which are essentially disputes between private parties—in a manner protective of public employees' right not to support union speech through non-consensual dues deductions. Petitioner's suggestion that there is an important need for federal courts, rather than state employee relations boards, to become the forum for these kinds of disputes between private parties is not in accord with the facts or the law.

CONCLUSION

For the above reasons, the Court should deny the Petition.

Respectfully submitted,

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