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 FOR THE ATTORNEY GENERAL

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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. The union is responsible for informing the employer which employees have provided this written authorization. In this case, petitioner alleges that she never agreed to join the union or authorize dues deductions, but the union nevertheless caused the employer to withdraw union dues from her paychecks. 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 caused the public employer to deduct dues from an employee's paychecks, even though the employee had not authorized those dues deductions.

2. Whether the union's unauthorized collection of dues from a public employee violated the First Amendment.

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STATEMENT

1. California law guarantees public employees the right to join or decline to join a union. *See* Cal. Gov't Code § 3502. Neither the public employer nor the union may "[i]mpose or threaten to impose reprisals on employees," "discriminate or threaten to discriminate against employees," or otherwise "interfere with, restrain, or coerce employees because of their exercise" of these rights. *Id.* § 3506.5(a); *see id.* § 3506. In addition, if an employee declines to join a union, no public employer may require that employee to pay an agency fee. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 882-886 (2018).

Public employees who choose to become members of a union may authorize their employer to deduct union dues from their paychecks. *See* Cal. Gov't Code § 1157.3(a). Before collecting dues in this way, the union must obtain a written "authorization, signed by the individual from whose salary or wages the deduction . . . is to be made." *Id.* § 1157.12(a). Based on this signed authorization, the union may then ask the public employer to deduct "membership dues" and other fees from the employees' paychecks. *Id.* § 1152; *see also id.* § 1157.12(a). The public employer will "honor these requests" only if the union has certified that it "ha[s] and will maintain" the employee's written authorization. *Id.* §§ 1152, 1157.12(a). The union must "indemnify the public employer for any claims made by the employee for deductions made in reliance on [the union's] certification." *Id.* § 1157.12(a).

State law also allows public employees to revoke their previous authorizations to deduct dues. Like the original authorization, "requests to cancel or change deductions" are "[d]irect[ed] . . . to the [union], rather than to the public employer." Cal. Gov't Code

§ 1157.12(b). "Deductions may be revoked only pursuant to the terms of the employee's written authorization," and the union is obliged to process revocation requests and communicate those requests to the public employer. *Id.*; *see, e.g.*, C.A. E.R. 171 (collective bargaining agreement providing that "[t]he Union will provide to the City the appropriate documentation to process . . . membership dues cancellations"). The public employer is required to "rely on information provided by the [union] regarding whether" a previous dues-authorization agreement was "properly canceled or changed." Cal. Gov't Code § 1157.12(b). And as with an employee's initial dues deductions, the union must "indemnify the public employer . . . for deductions made in reliance on that information." *Id.*

2. According to the complaint, petitioner Camil Bourque is a fingerprint expert for the Los Angeles Police Department and has worked for the City of Los Angeles since 1999. *See* Pet. App. 3a, 4a. She has "never joined" respondent Engineers and Architects Association (EAA), which is the union representing employees like Bourque in collective bargaining with the City. *Id.* at 4a; *see also id.* 3a-4a, 6a. She avers that she never "signed a membership card" or dues-authorization agreement with the union that would "allow[] the City to deduct money from her lawfully earned wages for EAA purposes." *Id.* at 4a. Bourque alleges that the union nevertheless began to collect dues from her paychecks in September 2003. *See id.*

Bourque first objected to these dues deductions in February 2020. *See* Pet. App. 5a. That month, she sent a letter to the union informing EAA "that she does not affirmatively consent to the continued withdrawal of her lawfully earned wages," and "demand[ing] that the union immediately cease

deducting all dues, fees, and political contributions." *Id.* (internal quotation marks omitted).[1] The union did not respond to that letter, however, and it continued to collect dues from Bourque's paychecks. *See id.* Bourque then telephoned the union in June 2020, and—rather than cancel her dues deductions—the union's representative "referred her to a maintenance of membership provision clause" in the union's collective bargaining agreement (CBA) with the City. *Id.* at 5a-6a. That clause purported to restrict the timing for when union members may cancel their dues deductions—though it expressly applied only to those employees "who 'have authorized Union dues deductions'" in the first place. *Id.* at 6a.

The union continued to collect dues from Bourque's paychecks until May 2021, when Bourque filed the present lawsuit. *See* Pet. App. 6a, 17a; *see also* C.A. E.R. 125 (declaration of the union's executive director indicating when Bourque's dues deductions were cancelled). After becoming aware of Bourque's complaint, the union added her name to a list of municipal employees who did not have active dues authorizations and sent the list to the City. *See* C.A. E.R. 125.[2] Consistent with its statutory obligations, the City "stopped deducting dues from [Bourque's] paychecks beginning with her paycheck for the May 9 – May 22 pay period." *Id.* Later that month, the union sent

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[1] The complaint does not allege that Bourque ever informed her *public employer* that she objected to the union's collection of dues prior to the filing of her lawsuit in this case. *See* Pet. App. 4a-6a (alleging only that she informed the union of her objections).

[2] The union "provides the City Controller's Office with a list of any new members who have signed dues authorizations and any members who have cancelled their dues authorization" "[o]n at least a biweekly basis." C.A. E.R. 124.

Bourque "an unconditional refund check for $2,850.00," which was the amount of money that Bourque claimed had been improperly deducted from her paychecks, plus interest and $1 in nominal damages. *Id.*; *see also* Pet. App. 6a.

3. a. Although Bourque "received and negotiated" the union's check, she continued to press her lawsuit. Pet. App. 59a. As relevant here, her complaint asserted claims under 42 U.S.C. § 1983 alleging that the union and the City of Los Angeles had violated her First Amendment rights by making unauthorized dues deductions from her paychecks after this Court decided *Janus* in June 2018. *See* Pet. App. 5a, 6a.[3] Bourque sued the union, the City, and the California Attorney General in his official capacity. *See* Pet. App. 3a-4a. She sought compensatory damages for any dues collected after June 2018, nominal damages, attorney's fees and costs, a declaratory judgment, and a permanent injunction preventing the defendants from collecting dues under California Government Code § 1157.12 and the CBA between the union and the City without employees' "affirmative consent." Pet. App. 15a-17a.

The district court dismissed Bourque's complaint. *See* Pet. App. 39a, 73a. The court first held that Bourque's claims against the Attorney General were barred by sovereign immunity under the Eleventh Amendment, because the Attorney General did not have the "fairly direct" connection to the challenged deductions

[3] The complaint included similar allegations concerning a separate plaintiff, Peter Morejon. *See* Pet. App. 3a. But Morejon is not seeking review in this Court. *See* Pet. ii (explaining that "[o]nly Bourque seeks review in this petition"). This brief therefore summarizes and addresses only Bourque's claims.

that *Ex parte Young*, 209 U.S. 123, 157 (1908), requires. *See id.* at 53a-54a.

The court separately held that Bourque's claims against the union and the City for declaratory relief, injunctive relief, and compensatory damages were moot. *See* Pet. App. 55a-60a, 49a. As for compensatory damages, Bourque's demand for damages was moot because the union had already sent Bourque a check for the full damages she sought (including interest), and she had elected to "negotiate[]" that check. *Id.* at 59a. And with respect to her prospective claims for declaratory and injunctive relief, the court explained that Bourque's name had already been added to the union's dues "'cancellation list,'" the allegedly unauthorized dues deductions had already ended, and she had conceded that she was "'unlikely to rejoin [the union] in the near future.'" *Id.* at 55a, 56a. Moreover, a declaration submitted by the union established that it was "'absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 58a (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

Finally, the court held that Bourque's Section 1983 allegations failed to state a claim. *See* Pet. App. 60a-72a. The court reasoned that the Section 1983 claims against the City failed to establish liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). *See id.* at 70a-71a. And the Section 1983 claims against the union failed for want of state action. *See id.* at 61a-70a. The court explained that "the cause of [Bourque's] harm" was not any "state statute or policy." *Id.* at 63a. Instead, Bourque's alleged harm was the result of the union's "misrepresentation or fraud" in failing "to notify the City

that [she] had not affirmatively consented to any future wage deductions." *Id.* Regardless, Bourque could not plausibly allege that the union qualified as a "state actor"—in part because there had not been any "joint action" between the City and the union regarding the challenged dues deductions. *Id.* at 64. The decision to deduct dues from Bourque's paychecks without proper authorization was the union's alone, and the City's purely "administrative" role in processing paychecks was not enough to make "the City and EAA joint actors" in the union's scheme. *Id.* at 64a, 65a.

Because the district court dismissed each of Bourque's claims on other grounds, it did not address whether the union's unauthorized collection of dues violated the First Amendment.

b. The court of appeals affirmed. *See* Pet. App. 18a-24a. It agreed with the district court's conclusion that Bourque's claims for damages from the Attorney General were barred by sovereign immunity. *Id.* at 20a-22a. And Bourque's claims for prospective relief—including declaratory and injunctive relief—were moot because the union had "refunded the money at issue," and the defendants had carried their burden to show that it was "unlikely" that dues deductions would ever resume. *Id.* at 20a.

As to the merits, the court agreed with the district court that Bourque could not establish *Monell* liability against the City. Pet. App. 23a. Nor could Bourque establish that the union's misbehavior was state action under Section 1983. *Id.* at 22a. As the court explained, the union's allegedly unauthorized deductions "amount[ed] to a private misuse of a state statute that is contrary to the relevant policy articulated by the State." *Id.* (internal quotation marks

omitted). In any event, the union could not be considered a state actor: "[T]he mere fact that a state transmits dues payments to a union does not give rise to a Section 1983 claim"; and "a state employer's 'ministerial processing of payroll deductions' does not create sufficient nexus between a state and a union to subject the union to Section 1983 liability." *Id.* at 22a-23a (quoting *Belgau v. Inslee*, 975 F.3d 940, 948 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021)). Like the district court, the court of appeals did not reach the merits of Bourque's First Amendment claim.

ARGUMENT

The courts below properly held that Bourque's Section 1983 claims failed for want of state action. There is no disagreement among the lower courts on that question, nor any other reason for further review by this Court. And Bourque's underlying First Amendment claim—which the lower courts never reached—is meritless. It would not warrant plenary review even if this Court were willing to set aside its strong disinclination to resolve constitutional questions that were never addressed below. This Court should therefore deny the petition—as it did earlier this month in six cases raising the same or similar questions.

1. Bourque offers no persuasive reason for this Court to review whether the union engaged in state action when it collected dues from her paychecks without authorization after June 2018. *See* Pet. i. The court of appeals' ruling was correct; the conflict of authority alleged by Bourque is illusory; and this Court has recently and repeatedly denied other petitions raising similar questions.[4]

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[4] *See, e.g.*, *Laird v. United Tchrs. L.A.*, *cert. denied*, No. 23-1111 (continued…)

a. Section 1983 provides a cause of action for the deprivation of constitutional rights by those acting "under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). "Like the state-action requirement of the Fourteenth Amendment, the 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 claim. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "To establish fair attribution, two criteria must be met." Pet. App. 22a. First, "'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] the [S]tate or by a person for whom the State is responsible.'" *Id.* (quoting *Lugar*, 457 U.S. at 937). Second, "'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Id.* (quoting *Lugar*, 457 U.S. at 937).

Bourque cannot satisfy either criterion. Indeed, in this Court, she does not even contest the lower court's

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(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. 721*, *cert. denied*, No. 23-1113 (Oct. 7, 2024); *Hubbard v. Serv. Emps. Int'l Union Loc. 2015*, *cert. denied*, No. 23-1214 (Oct. 7, 2024); *Deering v. Int'l Brotherhood of Elec. Workers Loc. 18*, *cert. denied*, No. 23-1215 (Oct. 7, 2024); *Craine v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 36, Loc. 19*, *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).

holding that the union was not a "state actor" under *Lugar*'s second prong. *See* Pet. App. 22a-23a; Pet. 6 (acknowledging this aspect of the court of appeals' decision but failing to challenge that holding). Nor could she. This Court has articulated several tests for determining whether a private party "may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937; *see id.* at 939. Most recently, the Court explained that "a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) (internal citations omitted).

None of those circumstances exists here. Bourque has never claimed that the union's collection of dues is the kind of "exclusive public function" that might make it a state actor. *See* Pet. C.A. Br. 47-50. Nor did the City compel the union to collect dues from Bourque. To the contrary, California law prohibits public employers from "interfer[ing] with . . . or coerc[ing] employees" in connection with their rights to join (or not join) a union. Cal. Gov't Code § 3506.5(a); *see Sullivan*, 526 U.S. at 54 (the mere "permission of a private choice" does not give rise to state action). And there was no joint action between the City and the union regarding the allegedly unauthorized dues deductions: The City's role was limited to processing deductions pursuant to the union's certification, which is the kind of ministerial task that is insufficient to "make the State responsible for" the union's conduct. *Sullivan*, 526 U.S. at 53; *see also id.* at 54; *Belgau v. Inslee*, 975 F.3d 940, 948 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021).

Bourque also fails to satisfy *Lugar*'s first prong, which focuses on "the specific conduct of which the plaintiff complains." *Sullivan*, 526 U.S. at 51 (internal quotation marks omitted); *see also Lugar*, 457 U.S. at 940. Bourque contends that the union caused her constitutional injury by collecting dues from her paychecks without her authorization after June 2018. *See* Pet. App. 2a, 6a. But that injury did not "result[] from the exercise of a right or privilege having its source in state authority." *Lugar*, 457 U.S. at 939. State law forbids unions to collect dues from an employee's paychecks without their prior authorization. Indeed, the relevant statute requires unions to obtain a signed authorization from the employee before collecting dues, and the union must certify to the City that it "ha[s] and will maintain" the employee's written authorization. Cal. Gov't Code § 1157.12(a). If Bourque declined to give authorization (or later withdrew authorization), the union was obliged to notify her employer. *See* Cal. Gov't Code §§ 1157.12(a), (b); C.A. E.R. 170, 171 (CBA requiring the union to "identif[y] in writing to the Controller those individuals from whom union-related deduction(s) should be lawfully taken," and to notify the public employer of any "membership dues cancellations").

At most, then, Bourque's allegations suggest that the union violated state law by falsely certifying to the City that she had authorized the deduction of union dues from her paychecks after June 2018. That kind of alleged misconduct is not fairly attributable to the State and does not constitute state action for purposes of Section 1983. As this Court recognized in *Lugar*, "private misuse of a state statute does not describe conduct that can be attributed to the State." 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," which plainly contemplates dues deductions only with the employee's authorization. *Id.* at 940.

Bourque responds that there must have been state action in this case because the union relied on a maintenance-of-membership clause in the CBA it negotiated with the City to continue to deduct dues from her paychecks after she lodged her formal objection to such deductions in February 2020. *See* Pet. 3-4, 13-14; *see also* Br. of Amicus Curiae Nat'l Right to Work Legal Defense Found., Inc. (Nat'l Right to Work Amicus Br.) 4-11. As Bourque sees things, state law "allows for enforcement of terms in a CBA," and thus the union's continued deductions must have been done "under 'color of law.'" Pet. 13.

That is wrong. As an initial matter, "the fact that the government . . . contracts with . . . a private entity does not convert the private entity into a state actor." *Halleck*, 587 U.S. at 814. The mere existence of a CBA between the union and the City thus cannot satisfy *Lugar*'s first prong.

Nor does the union's attempt to enforce the CBA's maintenance-of-membership terms against Bourque transform the union into a state actor in this case. *See* Pet. 3; Nat'l Right to Work Amicus Br. 4-11. State law provides that "[t]he revocability of an authorization shall be determined by the terms of the authorization." Cal. Gov't Code § 1157.3(b). But here, the CBA makes clear that its limitations on revocability of a prior authorization apply only to those employees who have previously "authorized Union dues deductions with the Union." C.A. E.R. 170. So the maintenance-of-membership clause was irrelevant to an employee like

Bourque, who had never previously signed a membership or dues-authorization agreement, and who therefore was not bound by the CBA. *See* Pet. App. 6a.[5] As a result, if Bourque's allegations are true, the union's unilateral decision to continue to collect dues from her paychecks without her authorization violated both the terms of the CBA and state law. It cannot be state action for purposes of Section 1983. *See Lugar*, 457 U.S. at 941.

b. Although Bourque argues otherwise, *see* Pet. 13-15, the decision below does not conflict with this Court's precedents. To begin, this Court's decision in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018), does not support Bourque's argument that the union engaged in state action here. The decision in *Janus* involved a challenge to a statutory scheme that required nonconsenting employees to pay agency fees. *See* 585 U.S. at 887-888. This Court did not expressly address state action, because there was no doubt that such a 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 a statute that *prohibits* deductions from nonconsenting employees, and alleged misconduct by the union—a private party—in violation of that state law. *See* Cal. Gov't Code §§ 1157.3(a), 1157.12(a).

The other cases Bourque cites are similarly unhelpful. *See* Pet. 13. Like *Janus*, all of those cases

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[5] Because the CBA's maintenance-of-membership provision would not have come into play given the facts Bourque alleges, this petition does not implicate the concerns raised by amicus about whether it is constitutional to enforce such provisions. *See* Nat'l Right to Work Amicus Br. 4-6.

involved challenges to the collection of union fees required 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. Brotherhood of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 438-439 (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 a union's allegedly unauthorized deduction of dues in violation of state law. *See, e.g.*, Pet. App. 22a (concluding that there was no state action because the union's misconduct was "'contrary to the relevant policy articulated by the State'" (quoting *Lugar*, 457 U.S. at 940-941)).

This Court's recent decision in *Lindke v. Freed*, 601 U.S. 187 (2024), is also consistent with the decision below. *See* Pet. 14-15. That case considered whether a city manager's activity on Facebook constituted state action that might support a Section 1983 claim. *See Lindke*, 601 U.S. at 190-191. Because a government actor performed the challenged conduct, the Court analyzed "whether a *state official* engaged in state action"—an entirely different question from the one presented here. *Id.* at 196. And although the Court reasoned that "the *misuse* of power, possessed by virtue of state law, constitutes state action," it also made clear that "the state-action doctrine requires that the

State have granted an official the type of authority that he used to violate rights." *Id.* at 199, 200 (internal quotation marks and brackets omitted). The "authority" that the union allegedly "misused" here was its power to collect union dues. *See* Pet. App. 2a. As just described, however, state law does not give the union the power to collect dues from public employees. Only a signed authorization from each particular employee can do that. *See* Cal. Gov't Code §§ 1157.3(a), 1157.12(a).

c. Bourque also fails to establish any genuine conflict among the lower courts regarding the application of the state-action doctrine to union-dues cases. Bourque first points to the Seventh Circuit's decision following this Court's remand in *Janus*. *See* Pet. 15. The Seventh Circuit held that the union there had engaged in state action because it "ma[de] use of state procedures with the overt, significant assistance of state officials." *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019). As explained above, however, *Janus* involved the union's collection of agency fees that were compelled by state law. This case involves a private party's unauthorized collection of union dues that—if proven—would amount to a violation of state law. *See supra* pp. 10-12; *see also Belgau*, 975 F.3d at 948 n.3 (distinguishing the Seventh Circuit's decision on that basis).

The Third and Sixth Circuit decisions referenced by Bourque do not create any conflict of authority either. *See* Pet. 15-16. 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 as Bourque

acknowledges, Pet. 15, the Sixth Circuit "found no state action" in *Littler v. Ohio Association of Public School Employees*, 88 F.4th 1176 (6th Cir. 2023), when it considered Section 1983 claims against a union for improper deduction of dues. Bourque quotes dicta in *Littler* hypothesizing that if the plaintiff had "challenged the constitutionality of [the] statute pursuant to which the state withheld dues," then "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; *see* Pet. 15-16. But that observation does not address the situation presented here, where Bourque challenges the *union's* private misconduct performed in violation of state law—just like in *Littler*.[6]

Instead of creating a conflict, the decision below in fact agrees with decisions from other courts of appeals addressing analogous circumstances. 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 reasoned 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*, 88 F.4th at 1181-

[6] Even if the dicta in *Littler* were read as suggesting a rule that Section 1983 claims against government officials based on their own alleged misconduct necessarily involve state action, that rule would not save Bourque's claims against the Attorney General or the City here. Those claims would remain barred on mootness, sovereign-immunity, and *Monell*-liability grounds—independent holdings that Bourque does not contest. *See, e.g.*, Pet. App. 20a-22a, 23a-24a.

1182, 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."[7]

2. Although Bourque cannot establish the state action necessary to support her Section 1983 claims, she nevertheless asks the Court to grant certiorari to consider the merits of her constitutional arguments. *See* Pet. i. At this point, she has abandoned her claims directed at the Attorney General and the City, but she maintains that this Court should resolve whether the union violated her First Amendment rights when it collected dues from her paychecks without her authorization. *See id*; *supra* p. 15 n.6.

That question likewise does not warrant this Court's review. The courts below did not reach Bourque's constitutional arguments because her Section 1983 claims failed for lack of state action. *See supra* pp. 8-14. And this is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In any event, Bourque's First Amendment claim is meritless, as is her argument that the claim implicates a conflict of authority among the lower

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[7] Bourque also contends that the decision below conflicts with several district court decisions. *See* Pet. 16 n.5. But Bourque's cited cases come from district courts in the Ninth and Sixth Circuits, and—as described above—those appellate courts agree that a union does not engage in state action when it "act[s] *contrary* to any rule of conduct imposed by the state" concerning the collection of union dues. *Littler*, 88 F.4th at 1181; *see also id* at 1181-1182 (citing with approval *Wright*, 48 F.4th at 1123).

courts. Indeed, this court has repeatedly denied petitions raising similar First Amendment questions—nearly 30 times in the last three years.[8]

a. The gravamen of Bourque's First Amendment claim is that her free speech rights were violated when

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[8] *See, e.g.*, *Laird v. United Tchrs. L.A.*, *cert. denied*, No. 23-1111 (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. 721*, *cert. denied*, No. 23-1113 (Oct. 7, 2024); *Hubbard v. Serv. Emps. Int'l Union Loc. 2015*, *cert. denied*, No. 23-1214 (Oct. 7, 2024); *Deering v. Int'l Brotherhood of Elec. Workers Loc. 18*, *cert. denied*, No. 23-1215 (Oct. 7, 2024); *Craine v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 36, Loc. 19*, *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); *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 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).

the union—in violation of state law—misrepresented to her public employer that she had authorized dues deductions. *See* Pet. App. 4a; *see id.* at 63a (Bourque's "alleged harm arises from [the union's] alleged failure to notify the City that [she] had not affirmatively consented to any future wage deductions"). But that is not a First Amendment violation.

The First Amendment prohibits the government from compelling speech. *See Janus*, 585 U.S. at 897; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). It does not protect against the kind of *private* misconduct that Bourque describes. *See Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 461 (1952) (explaining that the First Amendment "appl[ies] to and restrict[s] only the . . . Government and not private persons"). And "its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that [its] interests do not come to harm" at the hands of private actors. *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989) (construing the Due Process Clause); *see Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) (concluding that there was no violation of plaintiff's clearly established "first amendment rights," because "[as] a general rule, a government official is not liable for failing to prevent another from violating a person's constitutional rights, unless the official is charged with an affirmative duty to act").

Bourque invokes *Janus* to argue that there must be a First Amendment violation in this case. *See* Pet. 10. She reads *Janus* as establishing that "no payment can be deducted from a nonmember's lawfully earned wages" absent "affirmative consent" that is "knowing, intelligent, voluntary, and demonstrated through clear and compelling evidence." *Id.* (citing *Janus*, 585

U.S. at 930. And her amicus suggests that California's statutory scheme is inconsistent with this "affirmative consent" requirement because it does not impose any "duty" on the public employer "to ensure that the employees listed in [a union's] certification had duly authorized [the] dues [that were] deducted from their salaries." Nat'l Right to Work Amicus Br. 11-12 (internal quotation marks omitted); *see* Pet. 4.

That argument misunderstands *Janus*. The passage referenced by Bourque 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 *known* to have chosen not to join the union, and who were nevertheless compelled *by state law* to support union speech. *See id.* at 886-887, 929-930. The Court did not address how to analyze a First Amendment claim where—as here—state law is explicit that no deduction may occur unless the employee has authorized it. *See* Cal. Gov't Code §§ 1157.3(a), 1157.12(a). And the Court did not impose any new duty under the First Amendment for government employees to affirmatively double-check the accuracy of a union's certification of particular employees' authorizations. Instead, 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." *Janus*, 585 U.S. at 928 n.27.[9]

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[9] The amicus brief argues that due process requires public employers to "verify[]"employees' consent before withholding pay. Nat'l Right to Work Amicus Br. 13, 14. But this petition presents no opportunity for the Court to consider that theory because

(continued…)

Bourque asserts that California law grants the union a "right" to simply "seize her wages and compel her speech," with Bourque having no "recourse" if the union does so without her authorization. Pet. 4, 19. That, of course, is incorrect. Although Bourque's complaint details her communications with the union, she nowhere alleges that she ever informed her employer about any dispute over the validity of her authorization. State law envisions that if she had made the employer aware of a dispute about "the existence . . . of [her] authorization," the employer could have demanded that the union "provide a copy of [her] individual authorization." Cal. Gov't Code § 1157.12(a).

Moreover, state law allows employees like Bourque multiple avenues to contest and gain redress for a union's incorrect assertion of authorization to withhold dues. For example, employees of the City may present "unfair practices" claims to the City of Los Angeles Employment Relations Board. Cal. Gov't Code § 3509(d); *see id.* §§ 3502, 3506. And they may pursue other potential remedies to address a union's misconduct in state court—including state-law theories of "unjust enrichment, breach of contract, conversion, and/or [violations of] the California Unfair Competition Law." EAA C.A. Br. 25; *see Wright*, 48 F.4th at 1118 n.3 (noting that the aggrieved employee in that case brought "state law claims for common law fraud and wage theft in violation of" Oregon state law). Bourque's choice not to pursue the available state-law remedies for her injuries does not transform her dispute with the union into an "important" federal question requiring a constitutional response. Pet. 19.

Bourque has not preserved it. *See generally* Pet. 6-19; Pet. C.A. Br. 27-30.

b. Finally, Bourque fails to substantiate her assertion that the First Amendment question she seeks to raise implicates any "direct conflict" among lower courts. Pet. 11. Even if the courts below had addressed Bourque's First Amendment claim and rejected it on the merits, *but see supra* p. 16, that decision would not have conflicted with the Third Circuit's decision in *Lutter*, as petitioner contends. *See* Pet. 11-12. In *Lutter*, just like this case, the court did not reach the merits of the former union member's First Amendment claim. *See* 86 F.4th at 119. It addressed only the plaintiff's standing and whether her claim had become moot. *Id.* at 135 n.27.[10]

Regardless, the First Amendment issues at play in *Lutter* were far different from those Bourque sought to raise here. In *Lutter*, the plaintiff attempted to withdraw her authorization for dues deductions, but her request was denied because a "state statute established an annual ten-day period during which public-sector employees could revoke a prior authorization

[10] The district court cases cited by Bourque do not establish any conflict of authority for similar reasons. *See* Pet. 12 n.3. None of those decisions finally resolved the merits of the plaintiffs' First Amendment claims. In one, the court did not address the First Amendment merits at all, holding instead that the plaintiff's claims failed for lack of state action. *See Klee v. Int'l Union of Operating Eng'rs, Local 501*, No. 2:22-cv-00148, Dkt. 45 at 14-17 (C.D. Cal. Aug. 14, 2023). In the other two, the courts addressed the employees' constitutional claims in the context of a motion for a preliminary injunction and the denial of a motion for judgment on the pleadings, respectively. *See Bright v. Oregon*, No. 3:23-cv-00320, Dkt. 8 (D. Ore. Mar. 8, 2023); *Chandavong v. Fresno Deputy Sheriff's Assoc.*, 599 F. Supp. 3d 1017, 1024 (E.D. Cal. 2022). In any event, all three decisions come from courts in the Ninth Circuit, which has held that claims like Bourque's fail for want of state action. *See, e.g.*, *Wright*, 48 F.4th at 1121-1125; *Belgau*, 975 F.3d at 946-949.

for payroll deductions of union dues," and the plaintiff's attempted withdrawal fell outside that statutory window. 86 F.4th at 119. In other words, the union *followed* state law when it continued to collect dues from the plaintiff. But that is not the case here. The laws that Bourque challenges do not allow the union to collect dues without her authorization. *See* Cal. Gov't Code §§ 1157.3(a), 1157.12(a). Bourque thus necessarily alleges that the union *violated* state law when it directed the City to deduct dues from her paychecks. *Lutter* therefore cannot salvage Bourque's factually distinct First Amendment claim. *See Janus*, 585 U.S. at 918 & n.24 (explaining that the mere statutory "'*authorization*' of *private-sector* union shops" raises "a very different First Amendment question" than situations where "a State *requires* its employees to pay agency fees").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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