No. 24-1306

In the Supreme Court of the United States

TERRY KLEE,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 14 OTHER STATES IN SUPPORT OF PETITIONER

JOHN B. MCCUSKEY
Attorney General

OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

DAVID E. GILBERT
Deputy Attorney General

Counsel for Amicus Curiae *State of West Virginia*
[additional counsel listed after signature page]

QUESTION PRESENTED

1. Whether a public-sector union that invokes the aid of state officials to deduct union dues from a nonconsenting public-sector employee acts "under color of law" for purposes of 42 U.S.C. § 1983.

TABLE OF CONTENTS

Question Presented I

Introduction and Interests of *Amici Curiae* 1

Summary of Argument 3

Reasons for Granting the Petition 4

I. California has passed laws designed to evade *Janus* 4

II. States and public-sector unions are in fact evading *Janus* 11

III. A public-sector union acts under color of state law when it employs state law and officials to evade *Janus* 15

Conclusion 22

TABLE OF AUTHORITIES

Pages(s)

Cases

Abood v. *Detroit Bd. of Educ.*,
431 U.S. 209 (1977) 1, 2, 20, 21

Belgau v. Inslee,
975 F.3d 940 (2020) 8, 17

Brentwood Acad. v. *Tenn. Secondary Sch. Athletic Ass'n*,
531 U.S. 288 (2001) 16, 19

Burton v. *Wilmington Parking Auth.*,
365 U.S. 715 (1961) 15

Caperton v. *A.T. Massey Coal Co.*,
556 U.S. 868 (2009) 9

Flagg Bros. v. *Brooks*,
436 U.S. 149 (1978) 16, 17

Fuentes v. *Shevin*,
407 U.S. 67 (1972) 18, 20

Fultz v. *AFSCME, Council 13*,
549 F. Supp. 3d 379 (M.D. Pa. 2021) 14

Harris v. *Quinn*,
573 U.S. 616 (2014) 4, 11, 21

Int'l Ass'n of Machinists Dist. Ten & Loc. Lodge 873 v. *Allen*,
904 F.3d 490 (7th Cir. 2018) 14

Jackson v. *Metro. Edison Co.*,
419 U.S. 345 (1974) 16

Janus v. *AFSCME, Council 31*,
585 U.S. 878 (2018) 1, 2, 3, 4, 5, 10, 11, 15, 18, 20

Knox v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298 (2012) 21

Lehnert v. *Ferris Fac. Ass'n*, 500 U.S. 507 (1991) 19

Lindke v. *Freed*, 601 U.S. 187 (2024) 15, 16, 19

Lugar v. *Edmondson Oil Co.*, 457 U.S. 922 (1982) 15, 16, 17, 18, 19

Manhattan Cmty. Access Corp. v. *Halleck*, 587 U.S. 802 (2019) 21

Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) 19

N. Ga. Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) 18

Ohlendorf v. *United Food & Com. Workers Int'l Union, Loc. 876*, 883 F.3d 636 (6th Cir. 2018)..... 7, 8, 9

Oklahoma v. *Castro-Huerta*, 597 U.S. 629 (2022) 6

Pac. Gas & Elec. Co. v. *Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986) 4

Roberts v. *U.S. Jaycees*, 468 U.S. 609 (1984) 4

Sniadach v. *Fam. Fin. Corp. of Bay View*, 395 U.S. 337 (1969) 18

United Auto., Aerospace & Agric. Implement Workers of Am. Loc. 3047 v. *Hardin Cnty.*, 842 F.3d 407 (6th Cir. 2016)..... 5

Williams v. *N.L.R.B.*,
105 F.3d 787 (2d Cir. 1996) 14

Wooley v. *Maynard*,
430 U.S. 705 (1977) 4

Statutes

42 U.S.C. § 1983 ..... 2, 15

Cal. Bus. & Prof. Code § 17602 15

Cal. Educ. Code § 45060 ..... 7, 8, 9

Cal. Educ. Code § 45168 ..... 7, 8, 9, 10

Cal. Educ. Code § 87833 ..... 7, 8, 9, 10

Cal. Educ. Code § 88167 ..... 7, 8, 9, 10

Cal. Govt. Code § 1151 6

Cal. Govt. Code § 1151.5 6

Cal. Govt. Code § 1152 6

Cal. Gov't Code § 1153 .....1, 2, 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20

Cal. Govt. Code § 1157.3 8

Cal. Govt. Code § 1157.10 ..... 6, 7, 8, 9

Cal. Govt. Code § 1157.12 ..... 7, 8, 9

Cal. Gov't Code § 3513 19

Cal. Gov't Code § 3515.5 19

Cal. Gov't Code § 3515.6 19

Cal. Gov't Code § 3550 10

Cal. Gov't Code § 3553 10

Other Authorities

AFSCME Loc. 3299 v. *Regents of the Univ. of Cal.*,
PERB Dec. No. 2755-H, 40-42 (2021) 5, 10, 18

Arthur Hartinger, Jon Holtzman, & Alex Lemberg,
Janus v. *AFSCME: What Public Employers Need to Know*,
RENNE PUBLIC LAW GROUP
(June 27, 2018),
https://tinyurl.com/23x3mmwj 5

Beth Bolen Chun, et al.,
Auto-Renewal Laws: 2025 Round Up,
KELLEYDRYE.COM (Mar. 31, 2025),
https://tinyurl.com/y44864t9..... 15

Brian A. Powers & Andrew Kelser,
Dues-Checkoff Dreams Do Come True, They Do, They Do,
29 ABA J. LAB. & EMP. L. 299 (2014) 8

Brian Olney,
Paycheck Protection or Paycheck Deception? When Government "Subsidies" Silence Political Speech,
4 UC Irvine L. Rev. 881 (2014) 6

Br. of Amicus Curiae Mackinac Ctr. For Pub. Pol'y in Supp. of Pet'r,
Janus v. AFSCME, Council 31, 585 U.S. 878 (2018) (No. 16-1466),
2017 WL 6311774..... 20

EAGLES,
HOTEL CALIFORNIA
(Asylum Records 1976) 2

Edward Ring,
The Financial Power of California's Government Unions,
CALIFORNIA GLOBE (Aug. 5, 2020, 2:29 am), https://tinyurl.com/2cbp4zuy 5

GARNISHMENT,
BLACK'S LAW DICTIONARY
(12th ed. 2024) 19

Int'l Bhd. of Teamsters Loc. 385,
366 N.L.R.B. No. 96 (June 20, 2018) 14

Jason Fischbein and Joss Teal,
California Legislature Reacts to Supreme Court's Blow Against Unions,
SAN DIEGO BAR ASS'N (Aug. 2018),
https://tinyurl.com/35ftmn28 5

Laurel Rosenhall,
California unions planning next steps if Janus ruling goes against them,
SAN FRANCISCO CHRONICLE
(Mar. 4, 2018, 1:41 pm),
https://tinyurl.com/yc8jyjm8 6

Steven Malanga,
A Cautionary Tale About Union Power, CITY JOURNAL (Apr. 7, 2015),
https://tinyurl.com/ms9hupd8 3

S. Ct. Rule 37 1

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

For decades, States could authorize public employers to sign agency-shop agreements that in turn licensed unions to charge unwilling government employees for the cost of "representing the[ir] interests." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977). Even back then, the Court saw many reasons why a government employee might object to funding union activities. *Id.* at 222. Yet the Court reckoned that these obvious First Amendment infringements were "constitutionally justified," *id.*, so long as they respected minimal limits on "political" activity, *id.* at 235-36.

This Court tried to set things straight in 2018, when it declared that "*Abood* was wrongly decided" and held that it had winked at a "procedure [that] violates the First Amendment." *Janus* v. *AFSCME, Council 31*, 585 U.S. 878, 930 (2018). After *Janus*, "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages … unless the employee affirmatively consents to pay." *Id.*

But California and its public-employee unions saw *Janus* coming and got ready. If they could no longer extract fees from nonmembers, perhaps they could make it harder for existing union members to quit paying dues. So thanks to same-day legislation, 2018 Cal. Legis. Serv. Ch. 53 (S.B. 866) (West), California said that public-employee dues authorizations were no longer revocable at will. Compare Cal. Gov't Code § 1153(h) (eff. 2018) with Cal. Gov't Code § 1153(g) (enact. 1993). Authorizations would "be revoked only pursuant to … terms" that the

---

[*] Under Supreme Court Rule 37, *amici* timely notified counsel of record of their intent to file this brief.

union dictated. Cal. Gov't Code § 1153(h) (eff. 2018). S.B. 866 placed the union fully in charge of the revocation process.

Petitioner Terry Klee became an unfortunate victim of this state-driven regime. After he struggled for years to escape his union, Petitioner sued IUOE, his state employer, the California State Controller, and the California Attorney General under 42 U.S.C. § 1983. Yet the Ninth Circuit reasoned that Petitioner's no-escape problem stemmed from his "private agreement" with IUOE, not some "state statute or policy." App.3 (cleaned up). And the party purportedly at fault—IUOE—"could [not] be described in all fairness as a state actor." App.4 (cleaned up). So Petitioner had no "§ 1983 claims against the Union." App.5.

Amici States urge this Court to intervene. *Abood* was a grave constitutional error that allowed untold "billions of dollars" to be "taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Janus*, 585 U.S. at 929. *Janus* was supposed to halt that, yet the State of California and its public-sector unions have conspired to keep the money flowing. Together, they have turned public-sector union membership into a sort of "Hotel California" where "[y]ou can check out any time you like, but you can never leave," EAGLES, HOTEL CALIFORNIA (Asylum Records 1976)—at least not without quitting your job or perhaps hiring a lawyer to show you the way. Other States and unions have done the same.

All *amici* States—with or without public-employee unions—have a strong interest in seeing First Amendment protections respected nationwide. They also have an interest in opposing scratch-my-back relationships that drive up state and local spending, *see*

Janus, 585 U.S. at 925, and skew federal tax burdens. Public-sector unions may have a right to "elect [their] own boss," Steven Malanga, *A Cautionary Tale About Union Power*, CITY JOURNAL (Apr. 7, 2015), https://tinyurl.com/ms9hupd8 (quoting Victor Gotbaum), but not on someone else's dime.

The Court should grant the Petition and reaffirm that no "payment to the union may be deducted from a nonmember's wages" without the employee's consent. *Janus*, 585 U.S. at 930. And to give that requirement meaning, it should likewise hold that a public-sector union acts under color of state law when it uses state officials and processes to extract money from unwilling employees.

SUMMARY OF ARGUMENT

I. *Janus* confirmed workers' First Amendment right to refuse funding for speech they disagree with. But the State of California and its public-sector unions conspired to limit its effect. S.B. 866 tries to transfer virtually unfettered control over payroll deductions to unions, setting them free to exploit unwilling public employees.

II. Petitioner's experience shows that the State and its unions succeeded. Oppressive terms, lack of information, legal ambiguity, and IUOE stonewalling ensured that Petitioner subsidized IUOE's speech far longer than he intended. Petitioner's experience is common, even though it conflicts with both consumer-protection trends and the usual approach to waiver of a constitutional right.

III. The Ninth Circuit incorrectly said IUOE did not act under color of state law. IUOE exploited a State statutory scheme to access Petitioner's wages, and it could spend those wages only because the Controller handed them over. This mutual effort made IUOE a joint actor

with the State. What's more, substance matters most, and a close look at facts (not labels) demonstrates that IUOE acted under color of state law.

REASONS FOR GRANTING THE PETITION

I. California passed laws designed to evade *Janus*.

Janus reaffirmed basic First Amendment principles when it barred "States and public-sector unions" from "extract[ing] agency fees from nonconsenting employees." 585 U.S. at 929.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). And because the Amendment guarantees our "freedom not to associate" as much as our freedom to join, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984), "forced associations that burden protected speech are impermissible," *Pac. Gas & Elec. Co.* v. *Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 12 (1986). Indeed, the notion that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support"—"except perhaps in the rarest of circumstances"—was already a "bedrock principle" of First Amendment law. *Harris* v. *Quinn*, 573 U.S. 616, 656 (2014).

Janus put to bed the notion that unions get some special exemption from these basic rules. The concern for "labor peace" and "free riders" cannot justify forcing public employees to pay for union speech. *Janus*, 585 U.S. at 895-901. *Janus* also made plain that compelled speech *subsidies* violate the First Amendment, so any consent to pay for such speech amounts to a "waiver" of constitutional significance. *Id.* at 930. "[T]he obligation to pay dues to a union is the practical equivalent of requiring

union membership." *United Auto., Aerospace & Agric. Implement Workers of Am. Loc. 3047* v. *Hardin Cnty.*, 842 F.3d 407, 421 (6th Cir. 2016)). These bedrock principles are as true for union members (like Petitioner) who want out as they are for public employees (like Mr. Janus) who never joined a union.

A. California anticipated *Janus* and hurried to undermine it. The very day *Janus* was handed down, "Governor Jerry Brown signed … Senate Bill 866" "to mitigate the effects of the … Court's decision." Jason Fischbein and Joss Teal, *California Legislature Reacts to Supreme Court's Blow Against Unions*, SAN DIEGO BAR ASS'N (Aug. 2018), https://tinyurl.com/35ftmn28. Timelines like that don't arise by chance. In fact, S.B. 866 capped a year's worth of legislative efforts "to diminish the effect of the *Janus* decision on unions and maximize the likelihood that employees w[ould] agree to voluntary dues deductions." Arthur Hartinger, Jon Holtzman, & Alex Lemberg, *Janus* v. *AFSCME: What Public Employers Need to Know*, RENNE PUBLIC LAW GROUP (June 27, 2018), https://tinyurl.com/23x3mmwj. S.B. 866 "t[ook] effect immediately." *Id.* § 51.

California's urgency is not difficult to understand given the stranglehold unions have over California politics. "California's public sector unions collect and spend well over $900 million per year," and roughly "one-third of" that goes to "explicitly political purposes such as campaign contributions and lobbying." Edward Ring, *The Financial Power of California's Government Unions*, CALIFORNIA GLOBE (Aug. 5, 2020, 2:29 am), https://tinyurl.com/2cbp4zuy. So in explaining why anti-*Janus* measures were necessary, unions said the quiet part out loud: "If we have less money as labor, we're going to be spending less money on Democratic candidates."

Laurel Rosenhall, *California unions planning next steps if Janus ruling goes against them*, SAN FRANCISCO CHRONICLE (Mar. 4, 2018, 1:41 pm), https://tinyurl.com/yc8jyjm8 (quoting a union official).

B. Really, one needn't guess at the State's intentions. The surest way to gauge legislative intent is by examining the text, *see Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 642 (2022), and S.B. 866 confirms the Legislature's intent to keep union payroll deductions flowing. "[P]ayroll deductions" are, after all, how "[u]nions collect nearly all of their funds." Brian Olney, *Paycheck Protection or Paycheck Deception? When Government "Subsidies" Silence Political Speech*, 4 UC Irvine L. Rev. 881, 888 (2014).

Consider how S.B. 866 altered California Government Code § 1153, which covers authorizations for union-dues deductions. Section 1153 requires the Controller to administer public-employee "payroll deductions" for a variety of purposes, ranging from insurance and banking to child support and union dues. *Id.* § 1153 (citing *id.* §§ 1151, 1151.5, and 1152). Before S.B. 866, Section 1153 required "state agenc[ies], employee organization[s]" (unions), and "business entit[ies]" to certify they "have" written authorizations for the deductions they request. Cal Gov't Code § 1153(b) (enact. 1993). S.B. 866 added that *unions* who make this certification can't be compelled to produce their (alleged) authorizations unless someone challenges the authorizations' "existence or terms." Cal Gov't Code § 1153(b) (eff. 2018). Not even state agencies qualify for this exemption. *See id.*; *see also* Cal. Gov't Code § 1157.10(b) (eff. 2018) (replicating this unions-only exemption). So California has written a trust-but-don't-verify principle into its public-sector dues laws.

The Legislature seems to have been very keen to avoid troubling unions with producing copies of authorizations. See Cal. Educ. Code § 45060(f) (eff. 2018); *id.* § 45168(a)(7) (eff. 2018); *id.* § 87833(f) (eff. 2018); *id.* § 88167(a)(7) (eff. 2018); Cal. Gov't Code § 1157.10(b) (eff. 2018); *id.* § 1157.12(a) (eff. 2018). But perhaps sensing just how exploitive this arrangement could be, the Legislature added a duty to "indemnify the Controller for any claims made by the employee for deductions made in reliance on that notification." *Id.* § 1153(g) (eff. 2018); see also, *e.g.*, Cal. Educ. Code § 45060(e) (eff. 2018). Notice, though, that this duty only extends to "claims … for deductions." *Ids.* "Pay it back if you get caught" is a paltry disincentive for cheating.

Now look at Section 1153's timing provisions for beginning and ending deductions. Before S.B. 866, the rule was simple: the Controller had to "[m]ake, cancel, or change a deduction" by "the month subsequent to the month in which the request is received." Cal Gov't Code § 1153(g) (enact. 1993). That month-long lag time is hardly swift action, but at least the rule was symmetrical. S.B. 866 eliminated this symmetry—but only for unions. Now, when a *union* claims an authorization, the Controller must begin deductions "the next pay period." Cal. Gov't Code § 1153(g) (eff. 2018). The deadline for revocations, though, remains the same—"the month subsequent to the month." *Id.* Thus, for unions, it's "heads I win, tails you wait."

But the Legislature did more than introduce a bit of delay; it also made authorizations uniquely sticky. Before S.B. 866, all Section 1153 deductions were revocable at will; the employee just had to wait a month to start enjoying his full paycheck again. *See* Cal Gov't Code § 1153(g) (enact. 1993). After S.B. 866, an employee's

authorization to deduct *union* dues "may be revoked only pursuant to [its] terms." Cal. Gov't Code § 1153(h) (eff. 2018). Other non-union-related authorizations remain revocable at will. *Id.*

Despite what the Ninth Circuit may say about "bargained-for agreements," *Belgau v. Inslee*, 975 F.3d 940, 947 (2020), it's safe to say that employees aren't drafting their own dues authorizations. These authorizations are "Here, sign this" propositions, and nothing in Section 1153 suggests that any term is out of bounds. Indeed, shifting dues authorizations from revocable-at-will to revocable-when-the-union-says-so seems to have been a major priority for the Legislature. Repeatedly, S.B. 866 hands the exit key to the union—and never with any apparent limits on union discretion. Compare Cal. Educ. Code § 45060 (enact. 1982) with *id.* § 45060(a), (c) (eff. 2018); compare *id.* § 45168(a) (enact. 1980) with *id.* § 45168(a)(1), (2) (eff. 2018); compare *id.* § 87833 (eff. 1990) with *id.* § 87833(a), (c) (eff. 2018); compare *id.* § 88167(a) (enact. 1995) with *id.* § 88167(a)(1), (2) (eff. 2018); compare Cal. Gov't Code § 1157.10(g) (enact. 1983) with *id.* § 1157.10(g) (eff. 2018). See also *id.* § 1157.3(b) (eff. 2018); *id.* § 1157.12(b) (eff. 2018).

Despite this lack of guardrails, S.B. 866 leaves no doubt about the status of these potentially ham-handed authorizations. Public employers "shall honor" them, regardless of whatever "terms" the union may concoct. Cal. Educ. Code §§ 45060(e) (eff. 2018), 45168(a)(6) (eff. 2018), 87833(e) (eff. 2018), 88167(a)(6) (eff. 2018); *see also* Cal. Govt. Code § 1157.3(b) (eff. 2018). That mandate leaves plenty of room for unions to throw up obstacles to opting out. For instance, the authorizations might contain only narrow time windows for members to opt out under a "maintenance of dues" provision. See Brian A. Powers &

Andrew Kelser, *Dues-Checkoff Dreams Do Come True, They Do, They Do*, 29 ABA J. LAB. & EMP. L. 299, 303 & n.32 (2014). Or unions might require that revocations be sent only by certified mail. See, *e.g.*, *Ohlendorf* v. *United Food & Com. Workers Int'l Union, Loc. 876*, 883 F.3d 636, 639 (6th Cir. 2018). Or they might write the authorizations in confusing ways. The possibilities are endless.

Yet the Legislature did more than hand over the key; it deputized unions to guard the door. After S.B. 866, Section 1153 requires employees to address their revocation "requests" to the union, not the Controller, and tasks the union with "processing these requests." Cal. Gov't Code § 1153(h) (eff. 2018). And despite (or perhaps because of) what Madison had to say about "be[ing] a judge in [one's] own cause," *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting The Federalist No. 10, p. 59 (J. Cooke ed. 1961)), S.B. 866 compels the Controller to "rely on" the union's determination that a deduction has (or has not) been "properly canceled." Cal. Gov't Code § 1153(h) (eff. 2018). If the Controller relies on an erroneous determination, the union must "indemnify the Controller for any claims made by the employee for deductions." *Id.* But here again, "pay it back if you get caught" is no real guard against temptation. Yet S.B. 866 inserted take-the-union's-word-for-it provisions in section after section. *See* Cal. Educ. Code §§ 45060(e) (eff. 2018), 45168(a)(6) (eff. 2018), 87833(e) (eff. 2018), 88167(a)(6) (eff. 2018); Cal. Gov't Code §§ 1157.10(g) (eff. 2018), 1157.12(b) (eff. 2018).

These provisions aren't the only features of S.B. 866 that tell the tale. S.B. 866, for example, eliminated education employees' express statutory right to refuse further deductions upon an increase in dues. Compare Cal. Educ. Code § 45060 (enact. 1982) with *id.* § 45060(c)

(eff. 2018); compare *id.* § 45168(a) (enact. 1980) with *id.* § 45168(a)(2) (eff. 2018); compare *id.* § 87833 (eff. 1990) with *id.* § 87833(c) (eff. 2018); compare *id.* § 88167 (enact. 1995) with *id.* § 88167(a)(2) (eff. 2018). Now an employee has no right to decline unless the authorization says so. *Ids.* By eliminating at-will revocations under Section 1153, S.B. 866 implicitly imposed the same rule on Petitioner.

S.B. 866 also plussed-up California Government Code § 3550, which governs communications between employers and employees. Before S.B. 866, Section 3550 declared that "public employer[s] shall not deter or discourage public employees … from becoming or remaining members of an employee organization." Cal. Gov't Code § 3550 (enact. 2017). S.B. 866 extended the gag order to "authorizing *dues or fee* deductions." Cal. Gov't Code § 3550 (eff. June 27, 2018) (emphasis added). One detects a theme.

California takes these supersized Section-3550 protections *very* seriously—even talking about *Janus* itself might create trouble for the public employer. See, *e.g.*, *AFSCME Loc. 3299* v. *Regents of the Univ. of Cal.*, PERB Dec. No. 2755-H, 40-42 (2021) (applying a "tendency to influence" test and finding that truthful communications about *Janus* made out a prima facie violation). One can guess what the Board would say if a public employer advised its employees to read dues authorizations before signing them—that is, without consulting the union first. *See* Cal. Gov't Code § 3553 (eff. 2018).

C. In all, S.B. 866 hands the State's payroll system over to public-employee unions, empowering them to erect adhesive-contract walls around employees who might wish to reclaim their right not to fund things they disagree

with. The Court should grant the Petition and remind California and its public-employee unions again that "no person … may be compelled to subsidize speech by a third party." *Harris*, 573 U.S. at 656. Even for unions.

II. States and public-sector unions are in fact evading *Janus*.

Petitioner's experience shows that the State and its unions succeeded in their mission: escaping union dues once and for all requires an unreasonable degree of persistence and patience in California. Though Petitioner got into IUOE with the stroke of a pen, getting out required nearly two years of letters, emails, and dogged efforts. And Petitioner's experience is common even outside California, reflecting a troubling exception to States' more recent concern for consumer protection.

A. Petitioner is no union buster. He reports that he "joined IUOE" in fall 2010 and that he remained a member for nine years. App.11. When he wanted out in October 2019, IUOE obliged him, *id.*, perhaps because the union was operating on a dues authorization from 2010. *See* Cal. Gov't Code § 1153(g) (enact. 1993) (requiring the Controller to "[m]ake, cancel, or change a deduction … not later than the month subsequent to the month in which the request is received"). But work difficulties soon brought Petitioner back to IUOE; if he wanted help, the union informed him, coming back to the union was "the only way." App.11. He joined again in late November 2019. App.12.

As one might expect, IUOE's membership application instructed the "Controller to deduct … all union dues." App.12. But by that point IUOE was aware of what it could do under S.B. 866. It drove a hard bargain, requiring Petitioner to sign an authorization that was

"irrevocable for a period of one year and year-to-year thereafter" unless Petitioner revoked within a specific 15-day window. *Id.* After accepting the union's terms, Petitioner reports that the union ignored him. App.13. So he asked out again. *Id.*

This time was different. Petitioner began his quest in December 2019, with a certified letter to the union. App.13. The letter informed IUOE that Petitioner was "resigning [his] membership" and withdrawing "any previous dues authorization." *Id.* For good measure, the letter added that if the union refused to let him out, then he wanted IUOE to "hold" his letter until it could be effective. *Id.* Petitioner added that, if the union refused his request, he wanted to know "the reason … and the date(s)" when he could "effectively resign," plus "any further steps that are necessary." App.13, 14. "If there [wa]s a 'window' period" for resignations, he wanted "cop[ies] of all controlling documents." App.14. No one responded. Petitioner followed up by email about two weeks later. *Id.* This follow-up elicited a one-sentence response that the "request" would "be processed accordingly." *Id.*

Whatever "processed accordingly" means, it did not mean that IUOE was done collecting dues; they kept on flowing. App.14. So in August 2020, Petitioner e-mailed the union to request "contact information [for] the membership department" and ask "what time of year [he] last submitted [his] membership enrollment." *Id.* When no one responded, Petitioner sent another email the next month. *Id.* This communication prompted a three-word response, "Here you go," with an attached copy of his membership application. *Id.* Still unclear about what to do, Petitioner replied with a pointed follow-up question: "I want to know if I signed my enrollment on 11/22/2019 what

time period is acceptable for me to opt out during the year 2020 and whom do I email a signed opt-out request to?" Compl. ¶ 44, *Klee* v. *IUOE, Loc. 501*, No. 2:22-cv-00148 (C.D Cal. filed Jan. 7, 2022), ECF No. 1. No one answered this email, so five days later, Petitioner tried again. App.15. Still, no one answered, and Petitioner's dues kept getting taken. *Id.* With no guidance from IUOE, Petitioner sent another certified letter on November 10, 2020. App.15. When no one responded to this letter, Petitioner followed up with several emails. *Id.*

Petitioner finally got a response by email on December 10, 2020—almost a year after he first sought to revoke. App.15. Blaming the pandemic for its delayed response, IUOE advised that Petitioner's November 10 letter was too late. *Id.* Notice was due "between October 8th and October 23rd." *Id.* In short, it was fine for IUOE to blame the pandemic for its tardiness, but Petitioner's opt-out had better be on time.

Petitioner sent a third certified letter in January 2021. App.15. This time the union replied right away: Petitioner's letter came too late and IUOE "consider[ed] this matter closed." App.16. Unhappy, Petitioner e-mailed another union official twice in February 2021. *Id.* Those emails also went unanswered. *Id.* Petitioner got no relief until he sent a fourth certified letter on October 20, 2021. *Id.* That finally shut off the tap—nearly two years too late. *Id.*

B. Petitioner's experience illustrates the sort of unconstitutional labyrinth that S.B. 866 licensed unions to create. To obtain union assistance (which allegedly never came), IUOE forced Petitioner to agree to an "irrevocable" and infinitely renewable agreement to pay "all union dues," regardless of how much the union cared to charge. App.12. And once he was in, the only way out

was through a brief, fifteen-day window whose beginning and end were only knowable *if* Petitioner had access to the right documents. The union never warned Petitioner when his escape hatch was approaching, and the Legislature did not require it to tell him. If he wanted out, it was on him to read the fine print, hang onto his documents, and mark his calendar—or hire a skilled lawyer to advise him. Failing that, his only options were to keep paying IUOE or quit his job. The Legislature cast Petitioner into this quagmire when it handed its payroll system over to the union.

C. Petitioner is hardly the first employee to be subjected to this sort of gamesmanship. Indeed, unions have been in the escape-room business for decades. *Williams* v. *N.L.R.B.*, 105 F.3d 787, 789 (2d Cir. 1996) (10-day window). More recent cases show unions have still been using the same methods. *See, e.g.*, *Fultz* v. *AFSCME, Council 13*, 549 F. Supp. 3d 379, 384 (M.D. Pa. 2021) (15-day window); *Int'l Bhd. of Teamsters Loc. 385*, 366 N.L.R.B. No. 96 (June 20, 2018) (describing how a union "failed time and again to respond to [employees'] requests [to revoke their dues authorizations] or, if they did respond, did so only after the employees' window periods closed or charges were filed"). That's not surprising, as "[i]t is in the union's interest to procure the maximum irrevocability period allowed under the law"—or employ other means to retain its funds—"not to bargain for the best interests of its members." *Int'l Ass'n of Machinists Dist. Ten & Loc. Lodge 873* v. *Allen*, 904 F.3d 490, 513 (7th Cir. 2018) (Manion, J., dissenting).

Yet Petitioner's experience is striking because it results from the State's naked intent to *diminish* protections for public-sector employees, even as the State has been cracking down on similar contracts elsewhere.

See Cal. Bus. & Prof. Code § 17602(b)(2), (c) (imposing a 30-day consumer notice requirement before renewal and mandating efforts to facilitate termination). Leaving public-sector employees on their own also cuts against the nationwide "trend toward more prescriptive disclosure, notice, and cancellation requirements" for consumers. Beth Bolen Chun, et al., *Auto-Renewal Laws: 2025 Round Up*, KELLEYDRYE.COM (Mar. 31, 2025), https://tinyurl.com/y44864t9. And it seems particularly wrong to allow this kind of gamesmanship when constitutional issues are at stake. After all, it should be *harder* to waive constitutional rights like the freedom of association, not easier.

III. A public-sector union acts under color of state law when it employs state law and officials to evade *Janus*.

Section 1983 suits might be one of the only ways to stop the gamesmanship and give *Janus* force—but the Ninth Circuit inappropriately shut the door on that option. S.B. 866 furnished "the procedural scheme" that allowed IUOE to extract dues from Petitioner, and IUOE could only extract those dues with the Controller's "joint participation." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). That's enough for the Court to find action under color of state law. State action is also clear from the overall "facts" and "circumstances" that enabled IUOE to reach into Petitioner's wallet for nearly two extra years. *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

A. Section 1983 provides a claim against "[e]very person who" deprives another person of federal rights "under color of [a] [State] statute." 42 U.S.C. § 1983. It only "protects against acts attributable to a State." *Lindke* v. *Freed*, 601 U.S. 187, 194 (2024). Yet, "[p]rivate

parties can"—and often do—"act with the authority of the State." *Id.* at 197. Indeed, "cozy situations, local politics and the pressure of economic overlords" sometimes put "a State[] … 'in cahoots' with a private group." *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 364 (1974) (Douglas, J., dissenting). When that happens, respect for the Constitution requires "the deed of an ostensibly private organization … to be treated … as if a State had caused it." *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

To decide when that is so, the Court generally applies a "two-part" test. *Lugar*, 457 U.S. at 937. The first part asks whether "the deprivation" stems from "the exercise of some right or privilege created by the State." *Id.* The second part asks whether "the party charged with the deprivation" is someone "who may fairly be said to be a state actor." *Id.* That party need not be "a state official." *Id.* Rather, it is enough for the party to have "acted together with or [have] obtained significant aid from state officials." *Id.*

Both factors are present here.

First, IUOE "act[ed] with the knowledge of and pursuant to" Section 1153 when it extracted Petitioner's union dues. *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 156 (1978) (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 161 n.23 (1970)). Section 1153 establishes the Controller's duty to administer union payroll deductions. Cal. Gov't Code § 1153. Unions must only certify "that they have and will maintain" signed authorizations from employees. *Id.* § 1153(b). Thanks to S.B. 866, those authorizations are revocable "only pursuant to [their] terms." *Id.* § 1153(h) (eff. 2018). All these are rights and privileges created by the State of California.

Second, the relevant state actors are obvious: a union who works hand-in-hand with the State Controller. Petitioner's membership application "authorize[d] the State Controller to deduct from [his] wages all union dues," and it stated that IUOE could "use this authorization with the State Controller." App.12. Then, when Petitioner sought to leave the union, IUOE used the terms of this authorization to reject his request. App.15. Under Section 1153, IUOE had sole responsibility "for processing" Petitioner's request, and the Controller was duty bound to "rely on" IUOE's assessment about whether Petitioner's authorization was "properly canceled." Cal. Gov't Code § 1153(h) (eff. 2018). IUOE fully exploited this "procedural scheme," and a "procedural scheme created by the statute obviously is the product of state action." *Lugar*, 457 U.S. at 941. The Ninth Circuit missed this fact when it dismissed Petitioner's case as a mere "dispute over the terms of Union membership." App.3. The Union membership was baked right into the law itself.

IUOE also "obtained significant aid from" the Controller. *Lugar*, 457 U.S. at 937. IUOE was able to spend—and keep on spending—Petitioner's wages only because the Controller handed them over. *Cf.* Cal. Gov't Code § 1153(a) (requiring the Controller to "[m]ake" deductions "at the request of the … organization authorized to receive" them).

This payment collection wasn't mere "ministerial processing." *Belgau*, 975 F.3d at 948. The Court has "consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar*, 457 U.S. at 941; *see also Flagg Bros.* 436 U.S. at 160 n.10

(explaining that "constitutional protection attaches … because as a result of [a] writ the property of the debtor was seized and impounded by the affirmative command of the law"); cf. *N. Ga. Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (applying the Fourteenth Amendment to garnishment statute); *Fuentes* v. *Shevin*, 407 U.S. 67, 84 (1972) (applying Fourteenth Amendment to replevin statutes); *Sniadach* v. *Fam. Fin. Corp. of Bay View*, 395 U.S. 337, 339-42 (1969) (applying Fourteenth Amendment to garnishment statute).

California employed its coercive power as the State to take money to which its employees would otherwise be entitled. In *Lugar*, state law directed the sheriff to merely sequester a debtor's property based on "an *ex parte* petition." 457 U.S. at 924-25. Here, Section 1153 required the Controller to pay Petitioner's earnings to IUOE (presumably to be spent as IUOE saw fit) based on little more than a trust-me. See Cal. Gov't Code § 1153(b). The Seventh Circuit got it right when it found that this sort of arrangement made "AFSCME … a joint participant with the state." *Janus* v. *AFSCME, Council 31; AFL-CIO*, 942 F.3d 352, 361 (7th Cir. 2019). The Court should say the same here.

B. The Ninth Circuit incorrectly found no state action on either a "joint action" or "governmental nexus" test. App.4. Applying circuit precedent, the court found no *joint action* because "the State [purportedly] did not affirm, authorize, encourage, or facilitate unconstitutional conduct by processing dues deductions." App.4 (cleaned up). It found no *governmental nexus* because Petitioner's allegations purportedly failed to show "the State ha[d] exercised coercive power or ha[d] provided such significant encouragement, either overt or covert, that

the" State could be charged with IUOE's actions. *Id.* (cleaned up).

These findings were error. First, we know joint action occurred here because *Lugar* says so. Second, the Ninth Circuit's blinkered analysis ignores the Court's teaching that courts may "[o]nly" assess the State's "involvement … in private conduct" "by sifting facts and weighing circumstances." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972) (quoting *Burton*, 365 U.S. at 722). Courts must attend to the "winks and nods," lest "the [state-action] doctrine … vanish [due] to the ease and inevitability of its evasion." *Brentwood*, 531 U.S. at 301 n.4. What counts is the "substance, not labels," *Lindke*, 601 U.S. at 197, and here the substance favors Petitioner.

IUOE is an exclusive bargaining agent. App.10; Cal. Gov't Code § 3513(b). This label means IUOE was "the only organization that [could] represent [Petitioner's] unit in employment relations with the state." Cal. Gov't Code § 3515.5. Exclusivity is what formerly explained "the state['s] interest in compelling dues," *Lehnert* v. *Ferris Fac. Ass'n*, 500 U.S. 507, 552 (1991) (Scalia, J., concurring in part and dissenting in part), and exclusivity has its privileges. By law, IUOE was the only union with access to Petitioner's wages. *See* Cal. Gov't Code § 3515.6.

Even before S.B. 866, IUOE had access to a process for intercepting Petitioner's wages and making sure it got paid. *See* Cal. Gov't Code § 1153(a) (enact. 1993) (requiring the Controller to make payroll deductions). This was essentially garnishment without a court, where the State, as employer, volunteered to hand over the money. *See* GARNISHMENT, BLACK'S LAW DICTIONARY (12th ed. 2024). And such power is what distinguishes this case from a private contract dispute. Without the State's involvement, IUOE might claim a right to sue Petitioner

for union dues—or pursue similar self-help avenues. See, *e.g.*, Br. of Amicus Curiae Mackinac Ctr. For Pub. Pol'y in Supp. of Pet'r at 41, *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018) (No. 16-1466), 2017 WL 6311774 (describing how unions sent former members to collections after they tried to leave the union and stop paying dues following "right to work" reforms in Michigan). But California laws and California state officials ensure that IUOE need not even pursue those formalities to get the money in hand.

This arrangement was fine for States and public-sector unions (at least legally speaking) while *Abood* survived. But *Janus* changed all that. Now the order of the day was barring the door against union members who might wish to leave and take their money with them. With the State's implicit blessing, IUOE made dues authorizations infinitely renewable for one-year terms and "regardless of … membership status," subject only to a 15-day escape hatch whose bounds were only knowable *if* Petitioner had access to the right documents. App.12. To make matters worse, S.B. 866 handed the revocation process over to IUOE. Now, dues cancelations were to "be directed to" IUOE, not "the Controller." Cal. Gov't Code § 1153(h) (eff. 2018). Now IUOE was "responsible for processing these requests." *Id.* And now the Controller was duty bound to "rely on" IUOE's assessment about "whether" a deduction was "properly canceled." *Id.* What's more, S.B. 866 disavowed—for IUOE and others like it—even a basic duty to show copies of their authorizations, except in the event of "a dispute … about the[ir] existence or terms." Cal. Gov't Code § 1153(b) (eff. 2018).

In short, S.B. 866 "abdicate[d] effective state control over [the] state['s] power" to pay its employees, *Fuentes*, 407 U.S. at 93—all so those wages could keep flowing to

the State's "most powerful political special interest," Ring, *supra*. And thanks to extraordinary foresight and coordination, S.B. 866 arrived—and became effective—before the ink had even dried on this Court's opinion. The Ninth Circuit ignored the obvious when it found an absence of State "encouragement" on these facts. App.4.

C. The Ninth Circuit also missed the way this Court has framed matters in the past. *Abood*, for instance, referred to the "infringement" that happens when public employees "are compelled to make … contributions for political purposes." 431 U.S. at 234. It held that unions "cannot *constitutionally* spend [such] funds for the expression of political views." *Id.* at 235 (emphasis added). *Knox* v. *Service Employees International Union, Local 1000* recognized a "general rule" that "individuals should not be compelled to subsidize private groups or private speech." 567 U.S. 298, 321 (2012). And *Harris* relied on "the bedrock principle that," with only "the rarest of" exceptions, "no person … may be compelled to subsidize speech by a third party that he or she does not wish to support. 573 U.S. at 656.

These statements are telling. For one thing, "the Free Speech Clause prohibits only *governmental* abridgment of speech," *Manhattan Cmty. Access Corp.* v. *Halleck*, 587 U.S. 802, 808 (2019), so the First Amendment could hardly limit public-sector union spending if that spending weren't attributable to the state. For another thing, *Harris*'s "bedrock principle" surely describes Petitioner. *Harris*, 573 U.S. at 656. He is, after all, a "person" who—thanks to S.B. 866 and IUOE's shrewdness—was "compelled to subsidize speech" for months on end "that he … [did] not wish to support." *Id.* In short, there's no need to move tent pegs to find state action, here. IUOE's conduct has been state action since *Abood*.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

JOHN B. MCCUSKEY
Attorney General

Office of the West Virginia
Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

DAVID E. GILBERT
Deputy Attorney General

Counsel for Amicus Curiae *State of West Virginia*

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

LIZ MURRILL
Attorney General
State of Louisiana

TIM GRIFFIN
Attorney General
State of Arkansas

AUSTIN KNUDSEN
Attorney General
State of Montana

JAMES UTHMEIER
Attorney General
State of Florida

MICHAEL T. HILGERS
Attorney General
State of Nebraska

RAÚL LABRADOR
Attorney General
State of Idaho

GENTNER DRUMMOND
Attorney General
State of Oklahoma

THEODORE E. ROKITA
Attorney General
State of Indiana

ALAN WILSON
Attorney General
State of South Carolina

BRENNA BIRD
Attorney General
State of Iowa

KEN PAXTON
Attorney General
State of Texas

KRIS KOBACH
Attorney General
State of Kansas

DEREK BROWN
Attorney General
State of Utah