No. 24-1306

In the
Supreme Court of the United States

TERRY KLEE,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 51, an employee organization; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, a public agency; BETTY T. YEE, in her official capacity as California State Controller; ROB BONTA, in his official capacity as Attorney General of California,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This Court held in *Janus v. AFSCME, Council 31* that "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees" without violating the First Amendment. 585 U.S. 878, 929 (2018). But as respondents do not deny, states and public-sector unions nationwide have spent the past seven years (and counting) developing mechanisms to do just that. California is Exhibit A. It gives unions a badge of authority to control employee dues deductions, and unions like respondent International Union of Operating Engineers (IUOE) have abused that state-conferred authority by instructing state officials to deduct dues even from nonconsenting employees—as petitioner's experience demonstrates. But according to the Ninth Circuit, petitioner may not bring a §1983 action against IUOE to vindicate his First Amendment rights, because IUOE purportedly engages in no state action when it exploits its state-created right and jointly participates with state officials to divert portions of petitioner's paychecks to subsidize union speech over his objection. That decision is dead-wrong, conflicts with decisions from other circuits, and raises a constitutional question of paramount importance.

The submissions from IUOE and the state respondents do nothing to disturb the conclusion that this Court's intervention is warranted. Respondents principally defend the Ninth Circuit's decision on the ground that mere private misuse of a state statute is shielded from review under §1983. That argument not only misconstrues the nature and scope of petitioner's challenge, which also implicates California's statutory

regime itself, but also ignores this Court's precedents holding that those who possess power by virtue of state law cannot evade scrutiny under §1983 when they misuse that power. Respondents' effort to deny the split suffers from similar flaws, as they seek to reconcile the conflicting decisions by doubling down on their misguided statutory-misuse theory. And while respondents try to trivialize the importance of this case by suggesting that petitioner and similarly situated public-sector employees can simply pursue state-law remedies in state court, this Court has repeatedly rejected variations of that theory.

This Court granted certiorari in *Janus* to confirm that public-sector employees have a First Amendment right not to subsidize union speech with which they disagree. Respondents' submissions underscore that certiorari is likewise necessary here to confirm that *Janus* does not safeguard an impotent right.

I. The Ninth Circuit's Precedent Is Plainly Wrong.

The Ninth Circuit's conclusion below (and in similar cases) that IUOE engaged in no state action cannot be squared with this Court's precedent. A private party acts "under color of state law" within the meaning of §1983 if two conditions are satisfied: (1) "the 'deprivation [of a constitutional right] must be caused by 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,'" and (2) "the private party must have 'acted together with or obtained significant aid from state officials' or engaged in conduct 'otherwise chargeable to the State.'" *Wyatt v. Cole*, 504 U.S. 158,

162 (1992) (ellipses omitted). Those two conditions are plainly satisfied here. The state of California has enacted a statutory regime that empowers unions like IUOE to control dues deductions from employee paychecks, and IUOE invoked that authority and enlisted the aid of state officials to effect the deduction of dues from petitioner's paychecks—even though petitioner exercised his rights under *Janus* to opt out of the union. As in *Lugar v. Edmondson Oil, Co.*, "petitioner was deprived of his property through state action." 457 U.S. 922, 942 (1982).

Respondents' submissions do not change the calculus. Starting with the first prong, the state respondents suggest that the deprivation of petitioner's constitutional rights did not result from the exercise of a state-created right or privilege because petitioner initially joined IUOE in a "private agreement," and "[n]o government entity or state law required [him] to join the union or to start paying dues." CA.BIO.10-11. IUOE has not pressed that argument, and for good reason. This case does not concern petitioner's initial enrollment in IUOE; it concerns his efforts to disenroll and stop paying union dues. During that relevant period, IUOE undoubtedly exercised a state-created right or privilege to effect the alleged constitutional deprivation (the nonconsensual payment of union dues). After all, California's statutory regime expressly required petitioner to direct his request to "cancel … deductions" to IUOE, and that regime required the state to continue deducting dues unless and until the union said otherwise. Cal. Gov't Code §1153(g)-(h). If giving unions a statutory right to oversee dues deductions statewide is not a state-created right, it is hard to

imagine what is. And petitioner's decision to join the union on the front-end of the process did not somehow strip him of his ability to challenge nonconsensual dues deductions by the state on the back-end.

Lugar is illustrative. As in this case, "[n]o government entity or state law required" Lugar (the §1983 plaintiff) to enter into the "private" debt agreement that led Edmondson (the §1983 defendant) to invoke Virginia's prejudgment attachment procedures that caused the alleged deprivation of Lugar's constitutional rights. CA.BIO.10-11. Nevertheless, this Court had no trouble reaching the "obvious[]" conclusion that the Virginia state officials' seizure of Lugar's private property following Edmondson's invocation of those attachment procedures involved the exercise of a state-created right or privilege. *Lugar*, 457 U.S. at 924, 941-42. The same conclusion is equally obvious vis-à-vis IUOE's use of California's statutorily created dues-deduction regime here.

Shifting gears, both sets of respondents contend that petitioner cannot satisfy the first prong of the state-action test because he supposedly takes issue with only the "private misuse of a state statute"—namely, IUOE's "refusal to let him leave"—which *Lugar* described as insufficient to qualify as state action. IUOE.BIO.6, 8-9 & n.2; CA.BIO.11-12, 17. That line of attack is doubly flawed.

First, respondents blatantly ignore that petitioner challenges not just IUOE's refusal to let him leave, but also California's statutory regime, which unconstitutionally empowers unions to dictate when the state will stop forcing public-sector employees to

pay union dues without their consent. *See* Pet.20-23; D.Ct.Dkt.1 at 15.¶76; CA9.Dkt.8.1 at 41-43. *Lugar* makes clear that challenges implicating a statutory regime itself *do* involve state action. *See* 457 U.S. at 942 ("Petitioner did present a valid cause of action under §1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute.").

Second, it is precisely because California has delegated to unions like IUOE the power to decide who pays union dues that union "misuse" of that authority is fair game for a §1983 challenge. As this Court has long explained, "liability attaches … to those wrongdoers 'who carry a badge of authority of a State,'" regardless "whether they act in accordance with their authority or misuse it." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). Indeed, the Court reiterated the point only last year in *Lindke v. Freed*, 601 U.S. 187 (2024): "[T]he '[m]isuse of power, possessed by virtue of state law,' constitutes state action." *Id.* at 199 (emphasis omitted).

Respondents seek to minimize *Lindke* by suggesting that it held that the misuse of power can give rise to §1983 liability *only* if the party misusing the power is formally employed as a "state official," which IUOE is not. IUOE.BIO.8 n.2; *see* CA.BIO.12. IUOE buries that argument in a footnote, and rightly so—it is demonstrably incorrect. *Lindke*'s discussion of this Court's decision in *Griffin v. Maryland*, 378 U.S. 130 (1964), proves the point. *Griffin* concerned a "security guard" "employed" by "a privately owned amusement park" to whom the state had delegated

law-enforcement power. *Lindke*, 601 U.S. at 195. As the *Lindke* Court explained, the security guard qualified as a state actor for §1983 purposes even if his "'particular action'—*e.g.*, an arrest made with excessive force—*violated state or federal law*." *Id.* at 200 (emphasis added). And *Griffin* reached that conclusion, the *Lindke* Court emphasized, because it is "the source of the power"—*e.g.*, the general state-conferred "power to arrest"—"not the identity of the employer," that "control[s]" in the §1983 context. *Id.* at 196, 200.

That approach makes good sense. Section 1983 is "easily the most important statute authorizing suits … for violations of the Constitution and [federal] laws." William Baude, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1280 (8th ed. 2025). If a state could delegate authority to private parties and then insulate them from §1983 liability when they misuse that state-given power, that would create a roadmap to eviscerate §1983. That result has nothing to recommend it. In sum, while IUOE certainly has "misused" its dues-deduction authority, that does not immunize either IUOE's actions or California's statutory regime from scrutiny under §1983. IUOE.BIO.9; CA.BIO.12.

Respondents' arguments on the second prong of the state-action tests are equally unpersuasive. The state respondents claim that "joint action" sufficient to satisfy that prong exists only when the state "provided 'significant aid' to the … allegedly unconstitutional conduct." CA.BIO.13. Wrong again. Although a showing of "significant" state aid is certainly one way to satisfy the joint-action prong, it is not the only one.

Lugar explained that the joint-action prong is met in cases involving a private person when "he has acted together with *or* has obtained significant aid from state officials, *or* because his conduct is otherwise chargeable to the State." 457 U.S. at 937 (emphases added). Moreover, *Lugar* reiterated that the joint-action prong does not "require[] something more than invoking the aid of state officials to take advantage of state-created … procedures," *id.* at 942, which plainly happened here.

Because *Lugar*'s analysis on the second prong is fatal to their position, respondents insist that it does not extend beyond *Lugar* itself. *See* IUOE.BIO.10 n.3; CA.BIO.14. But *Lugar* merely applied this Court's "consistent[]" holdings 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.'" 457 U.S. at 941; *see also, e.g.*, *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486-87 (1988). Perhaps recognizing that *Lugar* has relevance beyond *Lugar* alone, respondents try to spin *Lugar* to their advantage, citing its language that the "mere invocation of state legal procedures" is not sufficient to establish joint action. IUOE.BIO.10 n.3; CA.BIO.14 (quoting *Lugar*, 457 U.S. at 939 n.21). Petitioner has never suggested otherwise. But when (as here) "the state [i]s *directly involved in the procedure*," the joint-action prong is satisfied. *Kolinske v. Lubbers*, 712 F.2d 471, 479 (D.C. Cir. 1983) (emphasis added).

For their part, the state respondents seek to sow doubt about the joint-action prong by emphasizing this Court's decision in *American Manufacturers*

Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999). *See* CA.BIO.13-14. But that case is nothing like this one, which likely explains IUOE's reluctance to highlight it. As petitioner has explained, the law in *Sullivan* allowed insurers to make a "private choice" about whether to withhold workers' compensation, and state officials functioned as passive observers in that statutory arrangement. *See* Pet.23. Here, by contrast, California officials are the ones who deduct dues from California employees and send them to the unions, which easily clears the joint-action hurdle described in *Lugar*.

The basic question here is whether the alleged deprivation of petitioner's constitutional rights under *Janus* is "fairly attributable to the State." *Lugar*, 457 U.S. at 937. The answer is yes, and the question is not close.

II. The Decision Below Deepens A Circuit Split.

Respondents fare no better in disputing the circuit split. The Ninth Circuit along with the Sixth and Eighth Circuits have held that unions utilizing state machinery and working with state officials to extract union dues from nonconsenting employees are not proper defendants under §1983 due to the purported absence of state action. *See, e.g.*, *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176 (6th Cir. 2023); *Hoekman v. Educ. Minn.*, 41 F.4th 969 (8th Cir. 2022); *Todd v. AFSCME, Council 5*, 125 F.4th 1214 (8th Cir. 2025). On the other hand, after this Court's remand in *Janus*, the Seventh Circuit held that state action exists in those circumstances, and that unions cannot escape scrutiny under §1983 as a result. *See*

Janus v. AFSCME, Council 31, 942 F.3d 352 (7th Cir. 2019).

Respondents posit that the circuit split must be illusory because this Court did not grant prior petitions discussing it. *See* IUOE.BIO.12 n.4; CA.BIO.8-9. But it is not uncommon for the Court to stay its hand even when there is "an acknowledged Circuit split," *GHP Mgmt. Corp. v. City of Los Angeles*, 145 S.Ct. 2615, 2616 (2025) (Thomas, J., dissenting from the denial of certiorari), as particular petitions may suffer from vehicle (or other) problems, *see* Joseph A. Grundfest, *Quantifying the Significance of Circuit Splits in Petitions for* Certiorari*: The Case of Securities Fraud Litigation* 13 (Rock Ctr. Corp. Governance, Stan. U., Working Paper No. 254, 2024), https://perma.cc/WAN2-KEXF ("Data suggest that the federal courts of appeal generate approximately 400 splits per year," but this Court hears only "approximately 70 cases … each term[.]"). No such problems exist here. *See* Pet.29-30; p.12, *infra*.

Respondents' other arguments miss the mark too. At bottom, respondents' position is that the Seventh Circuit's decision in *Janus* does not conflict with the decision below and the decisions from other circuits because *Janus* did not involve allegations that the union misused state law, whereas the other decisions did. *See* IUOE.BIO.12-13; CA.BIO.16. As already explained, however, when a §1983 plaintiff brings a challenge that implicates a statutory scheme that delegates authority to the §1983 defendant, it is irrelevant whether that defendant misused the state-conferred power, as "the '[m]isuse of power, possessed by virtue of state law,' constitutes state action" all the

same. *Lindke*, 601 U.S. at 199 (emphasis omitted). Just like petitioner here, the plaintiffs in *Janus* challenged "a statutory scheme under which the state withheld [union] fees" in coordination with the unions. *Littler*, 88 F.4th at 1182 (citing *Janus*, 942 F.3d at 361). While the Seventh Circuit found state action in those circumstances, the Ninth Circuit did not—and respondents agree that the Sixth and Eighth Circuits are in the Ninth Circuit's camp. *See* IUOE.BIO.12-13; CA.BIO.15-16. That is a circuit split.

III. The Question Presented Is Exceptionally Important.

As the amicus briefs filed in support of the petition from 15 states and multiple private organizations attest, the question presented is exceptionally important. Respondents' submissions only reinforce the point. Both concede that the question is frequently recurring.* *See* IUOE.BIO.2; CA.BIO.8-9. And the reason for that dynamic is no mystery. As petitioner explained, states and unions nationwide have searched for and deployed creative ways to evade *Janus* ever since it was decided—a point that respondents do not dispute. *See* Pet.28-29. Respondents nevertheless suggest that "[t]here is no … compelling reason for this Court to intervene." IUOE.BIO.13 (capitalization altered); *see* CA.BIO.16-18. But their arguments are unavailing.

Respondents primarily seek to downplay the importance of this case on the ground that petitioner

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* In fact, as respondents observe, there is another pending petition that raises a related issue. *See Todd v. AFSCME, Council 5*, No. 24-1305 (U.S.).

can simply seek refuge in state law—*e.g.*, "breach of contract"—to remedy the injuries they have caused. IUOE.BIO.14; CA.BIO.17. Even setting aside that respondents' proposed solutions would require petitioner to litigate before hostile administrative agencies that offer few remedies, *see, e.g.*, *Pumphrey v. Univ. Pro. & Tech. Emps. CWA Local 9119*, No. 25CU18506C (Cal. Super. Ct. Apr. 7, 2025), it is bedrock law that an aggrieved party "may invoke §1983 regardless of any state[] remedy that might be available to compensate him for the deprivation of" the substantive constitutional rights protected by "the Bill of Rights," including "freedom of speech," *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *accord Patterson v. Coughlin*, 761 F.2d 886, 891 (2d Cir. 1985) ("It has long been settled that unconstitutional conduct that also violates state law is still actionable under §1983."). As this Court explained just one year after *Janus*, "it would defeat the purpose of §1983 'if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.'" *Knick v. Twp. of Scott*, 588 U.S. 180, 194 (2019). Accordingly, even if petitioner's alleged injury "may also be redressable under state law," *Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997)—which is a highly debatable proposition—whether he and similarly situated individuals can vindicate their constitutional rights in a §1983 action remains a vitally important federal question, as "[t]he federal remedy is supplementary to the state remedy," *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

Respondents express concern about an "onslaught of payroll-deduction disputes" if the Court accepts petitioner's arguments, since "[a]bout six million state

and local public employees are union members" across the Nation. IUOE.BIO.1, 14. That argument is self-defeating. Indeed, to the extent respondents are suggesting that unions are violating First Amendment rights left and right under the guise of "payroll errors," IUOE.BIO.14, that is an argument in *favor* of certiorari, not against it. *See* Pet.28.

That leaves the state respondents' claim that petitioner's First Amendment claim would fail on the merits. *See* CA.BIO.17-18. Petitioner, of course, disagrees. But the more pertinent point for present purposes is that this debate is premature. As this Court often reminds litigants, it is a "court of review, not of first view." *Skinner v. Switzer*, 562 U.S. 521, 537 (2011). That admonition applies with full force here, as the lower courts did not even engage with the merits precisely because they discerned no state action in the first place. *See* Pet.12-14; App.2 n.1. Because that state-action question is cleanly teed up and proved outcome-determinative below, this case is an ideal vehicle to resolve it once and for all—and to ensure that *Janus* has continuing vitality.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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