No. 23-____

IN THE

Supreme Court of the United States

ATISHMA KANT, *et al.*,

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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April 10, 2024

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QUESTIONS PRESENTED

Public sector labor unions cannot use state law to take money from a nonmember public employee's lawfully earned wages for use in political speech unless the employee affirmatively consents. *Janus v. Am. Fed'n of State, Cnty., Mun. Emps. Council 31*, 138 S. Ct. 2448, 2486 (2018). Since this waiver must be demonstrated by clear and compelling evidence showing the employee acted voluntarily, and with sufficient information and knowledge, a third party cannot act on the employee's behalf. That is to say, affirmative consent requires affirmative action on the part of the consenting employee. Any procedure failing this standard enables the union and government to compel the employee's speech, and runs afoul of the First Amendment. *Id.*

The questions presented are:

1. Can a public sector labor union and government employer unilaterally waive public employees' First Amendment rights through a collective bargaining agreement without the employee's knowledge or direct involvement?

2. Does a public sector labor union act under "color of law" when it collectively bargains with the government for a waiver of an employee's First Amendment right to freedom from compelled speech?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners' Atishma Kant and Marlene Hernandez were the Plaintiffs-Appellants in the court below.

Respondents Service Employees International Union, Local 721; and Rob Bonta, in his official capacity as Attorney General for California, were Defendant-Appellees in the court below.

Because the Petitioners' are not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This petition arises from and is directly related to the following proceedings:

1. *Kant v. Serv. Emps. Int'l Union, Loc. 721, et al.,* 2023 WL 6970156 (unpublished), U.S. Court of Appeals for the Ninth Circuit. Judgment entered on October 23, 2023.

2. *Kant v. Serv. Emps. Int'l Union, Loc. 721, et al.,* No. ED CV 21-1153, WL 5239532 (C.D. Cal. 2022). Judgment entered September 1, 2022.

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The Ninth Circuit affirmed the district court's dismissal of Petitioners' complaint in a memorandum opinion, reported as *Kant v. Serv. Emps. Int'l Union, Loc. 721,* No. 22-55904, 2023 WL 6970156 (9th Cir. 2023), reproduced as Appendix B, Pet.App. 27a.

JURISDICTION

The Ninth Circuit issued its memorandum opinion on October 23, 2023. Pet.App. 27a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution states, in pertinent part: "Congress shall make no law…abridging the freedom of speech…" The text of the First Amendment is reproduced as Appendix E, Pet.App. 56a.

The relevant sections of California's Trial Court Employment Protection and Governance Act (California Government Code §§ 71631, 71633, 71634.3) are reproduced as Appendix G, Pet.App. 57a.

California Government Code §§ 1157.12 is reproduced as Appendix G, Pet.App 58a.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Atishma Kant and Marlene Hernandez are Business Process Specialists for the Superior Court of California, County of San Bernardino (the Employer). Pet.App. 3a. Both Petitioners signed membership and dues authorization cards (the Cards) with Service Employees International Union, Local 721

(SEIU). *Id.* at 5a. The Cards stated that, irrespective of their membership status, any withdrawal of their dues deduction authorization had to conform with applicable provisions in the collective bargaining agreement (CBA),[1] in effect between SEIU and the Employer. *Id.* at 59a, 61a. The CBA provided that members could cease deductions "during the thirty (30) day period commencing ninety (90) days before the expiration of the [CBA] by notifying the Union of their termination of the Union dues deduction." *Id.* at 5a. The CBA then in effect was set to expire on September 30, 2019, so the appropriate opt-out window for the Petitioners was July 1 – July 30, 2019. *Id*. The Cards also stated the Petitioners agreed to be "bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union." *Id.*

In 2019, Kant discovered that SEIU makes political contributions to a political party she does not support. Pet.App. 10a. During this same period, Hernandez also became unhappy with SEIU based on its public political stances. *Id.* at 11a. On July 11, 2019, Kant sent SEIU a letter via certified mail ending her union membership and withdrawing authorization for dues deductions. *Id*. On July 25, 2019, Hernandez submitted an identical letter to SEIU. *Id*. The Petitioners' letters were successfully submitted during the applicable opt-out window from July 1 – July 30, 2019, based on the CBA in effect when they executed the Cards with SEIU. *Id.*

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[1] Here, as is often the case, the CBA is labelled a "memorandum of understanding," or MOU. But there is no material difference between an MOU and a CBA.

However, SEIU informed the Petitioners that while they would be released from union membership, the union would continue taking money from their wages "as outlined in your membership application." *Id.* at 11a, 12a. The letters provided no further information. *Id*. After frustrating attempted communications with SEIU and the Employer, including unanswered letters, phone calls, and emails, *id.* at 12, 13a, the union finally informed the Petitioners that on December 21, 2018, the union and the Employer's representative, Presiding Judge of the Judge's Executive Committee, John P. Vander Feer, signed a "Side Letter" agreement which extended the CBA's expiration by two years, to September 30, 2021, *id.* at 13, 14a. Hence, SEIU and the Employer unilaterally extended the opt-out window applicable to the Petitioners by *another two years* without their knowledge or participation. *Id.* Because SEIU and the Employer executed the Side Letter in December 2018, seven months before the Petitioners' original opt-out window in July 2019, there never was a time the Petitioners could have successfully rescinded their dues authorizations. *Id.* at 5a.

Only after being sued, SEIU and the Employer finally stopped taking the deductions, two full years after the Petitioners attempted to opt out in accordance with the Cards. *Id.* at 43a. Meanwhile, SEIU and the Employer signed *another* Side Letter, further extending the applicable opt out window from September 30, 2021, to September 30, 2022. In effect, SEIU and the Employer claimed the power to continue deductions from the Petitioners' wages *in perpetuity*, so long as the Petitioners continued their employment and the Employer and SEIU continued to extend the expiration of the CBA.

B. Proceedings Below

The Petitioners filed suit pursuant to 42 U.S.C. § 1983 (Section 1983), seeking compensatory and nominal damages against SEIU for the violation of their First Amendment right to freedom from compelled speech. *Id.* at 1a. The district court granted SEIU's Fed. R. Civ. Proc. 12(b)(1) and (b)(6) motion to dismiss. *Id.* 32a. Petitioners appealed. *Id.* at 27a.

On appeal, the Ninth Circuit issued a summary memorandum opinion affirming the district court in reliance on *Belgau v. Inslee*, 975 F.3d 940, 946-49 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021). In *Belgau*, the Ninth Circuit held that public employees cannot void contractual agreements by alleging the agreements failed *Janus*'s affirmative waiver standard. *Id*. Additionally, the court held the union was not acting under "color of law" because the state was only aiding it in enforcing private union-crafted dues authorization cards. *Id.*

In relying upon *Belgau* below, the Ninth Circuit stretched application of the decision beyond its reasonable scope. The court implied that a union and government employer can substitute their own waiver of an employee's First Amendment rights for the affirmative waiver standard required by *Janus*. *Id.* at 29a. According to the Ninth Circuit, a union may thus continue instructing the government to deduct dues even when the employees complied with the terms of the Cards, opted out during the applicable window in the CBA in effect when the employees executed their union Cards, and after the employees have been released from membership. *Id.*

The Petitioners sought review through a petition for rehearing en banc before the full Ninth Circuit. *Id.* at 31a. The Ninth Circuit denied the petition. *Id.*

INTRODUCTION AND REASONS FOR GRANTING THE PETITION

By ruling that Petitioners suffered no First Amendment injuries when SEIU and their Employer waived their First Amendment rights without their knowledge or participation, the Ninth Circuit departed from the precedents of this Court. Additionally, the Ninth Circuit departed from the holdings of the Third, Sixth and Seventh Circuits. As a result, a conflict of authority exists which threatens to seriously undermine, or render meaningless, this Court's landmark decision in *Janus v. Am. Fed'n of State, Cnty., Mun. Emps. Council 31*, 138 S. Ct. 2448 (2018). This situation justifies an exercise of this Court's supervisory authority.

In *Janus*, this Court held that public sector labor unions cannot take a nonmember employee's lawfully earned wages for use in the union's political speech unless the employee has waived his or her First Amendment rights through affirmative consent. 138 S. Ct. at 2486. This waiver must be knowing, voluntary, informed, and demonstrated by clear and compelling evidence. *Id.* But in the case below, the Ninth Circuit implies that if an employee previously consented to union dues deductions, that consent may be extended indefinitely without the employee's knowledge or approval *by the union itself*. This makes a mockery of *Janus*'s wavier standard. At a minimum, a third party cannot "affirmatively" consent on an employee's behalf. And surely consent *by the union and government employer*, is not the same as consent by the employee. Pet.App. 5a, 17a, 18a.

Additionally, for nearly fifty years this Court has recognized the legal reality that public sector unions that use state authority to compel public employees' speech through wage deductions act under "color of law" for purposes of Section 1983. *See, e.g.*, *Janus*, 138 S. Ct. at 2486; *Knox v. Service Employees International Union, Local 1000,* 567 U.S. 298 (2012); *Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1977). Subsequent to the *Janus* decision, the Third Circuit, *Lutter v. JNESO*, 86 F.4th 111, 127 (3d Cir. 2023), Sixth Circuit, *Littler v. Ohio Assoc. of Pub. School Employees*, 88 F.4th 1176 (6th Cir. 2023), and Seventh Circuit, *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) (*Janus II*), have all recognized that union reliance on state authority to deduct money from public employees warrants a finding of state action. In affirming the dismissal of the Petitioners' claims, the Ninth Circuit has departed from these precedents.

First, the Ninth Circuit refused to find that the union acted under "color of law" when taking dues from public employees after they were released from membership, and they withdrew affirmative consent. The court reached this conclusion despite the fact that SEIU used the California's Trial Court Employment Protection and Governance Act (the Trial Court Act) to effectuate the Side Letter that justified the continued deductions, and the Side Letter was negotiated and executed with a government Employer (in this case, a state court judge). Pet.App. 5a. Second, the Ninth Circuit also failed to find the union acted under "color of law" when it used another statute, California Government Code § 1157.12 (Section 1157.12), to continue the deductions even after the Petitioners made clear they did not affirmatively consent.

Pet.App. 17a, 18a. Had the Petitioners brought their claims in the Third, Sixth, or Seventh Circuits, the results of their case would have been different than it was in the Ninth Circuit. The same is also true of the Eighth Circuit, which has adopted the Ninth Circuit's understanding. *See Hoekman v. Education Minnesota*, 41 F.4th 969 (8th Cir. 2022). This conflict of authority also warrants resolution by this Court.

Finally, the Petitioners' case is an ideal vehicle to address the questions presented. Unlike other post-*Janus* cases seeking to clarify the contours of the First Amendment's protections in the union deduction context, the instant case presents a clean and simple record. Even since this Court's decision in *Abood,* public employees like the Petitioners could not be compelled to support overtly political speech. At best before *Janus* employees could be compelled to support union activities germane to collective bargaining. Here, SEIU used state law to compel overtly political speech through *full union dues*, an action that would have been unconstitutional even before *Janus* was decided. The Petitioners' First Amendment injuries are thus even more severe, and deserve even greater constitutional scrutiny, than the injuries suffered by Mark Janus.

The petition for a writ of certiorari to the Ninth Circuit should be granted.

I. A SPLIT OF AUTHORITY EXISTS CONCERNING THE AFFIRMATIVE CONSENT STANDARD REQUIRED FOR UNION DUES DEDUCTIONS

In *Janus*, a non-member public employee was compelled, via an Illinois statute, to contribute so-called "agency fees" to a public sector labor union. 138

S. Ct. at 2459-60. Under the agency fee scheme in effect prior to *Janus*, agency fees represented money the union spent on activities germane to collective bargaining, but not express political speech and electioneering. *Abood*, 431 U.S. at 209. However, in *Janus* this Court found that taking agency fees "violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* In order to comply with the First Amendment, the Court held that no payment can be deducted from a nonmember's lawfully earned wages, nor even an attempt made to collect such a payment, unless the employee provides affirmative consent. *Id.* at 2486. This affirmative consent requires that the employee acted freely, with knowledge of the effect of the waiver, and with sufficient information, as demonstrated by clear and compelling evidence. *Id.*

Below, the Ninth Circuit relied on its decision in *Belgau*, in which a group of public employees alleged that the union membership cards they signed did not comport with the affirmative consent standard laid down in *Janus*. *Belgau*, 975 F.3d at 946-49. The Ninth Circuit held the membership cards were contractual obligations, and hence no constitutional standard need be applied, and the employees could be forced to pay full union dues until the expiration of the time stated in their membership cards. *Id*. Here, however, the Cards allowed Petitioners to opt out during a given window, and the Petitioners *complied* with this timing requirement. Pet.App. 5a. In other words, they did what the Ninth Circuit advised in *Belgau*: "[T]here is an easy remedy for [] public employees who do not want to be part of the union…they can resign their union membership after joining." 975 F.3d at 952.

This judicial advice to public employees recognizes that those who may have once joined a union and affirmatively consented in the past do not forever forego the benefit of the First Amendment's protection from compelled speech. Rather, as this Court recognized in *Knox,* the circumstances that lead an individual to waive a fundamental right may change, as may an individual's beliefs or opinions, and cause the individual to rethink a previous waiver. 567 U.S. at 315 (noting that the choice to support a union's political activities may change "as a result of unexpected developments" in the union's political advocacy). But even after complying with the terms to which they agreed and attempting to opt out in the proper window, Petitioners were still forced to pay, because SEIU and the Employer acted in reliance on the Side Letter executed without the Petitioners' knowledge or participation. Pet.App. 13a, 14a.

The Ninth Circuit's sanction of this procedure conflicts with this Court's affirmative consent standard set out in *Janus*. At minimum, "affirmative consent" requires some affirmative action on the part of *the employee*. *Janus*, 138 S. Ct. at 2486 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver" depends "upon the particular facts and circumstances."). Passive consent does not suffice to waive constitutional rights. *Id*. If some other person or party can effectuate the waiver on an employee's behalf and without their knowledge, employees cannot have acted voluntarily, knowingly, and intelligently. The Ninth Circuit, however, upheld exactly that by allowing SEIU and the Employer to substitute their own waiver for that of the Petitioners. Pet.App. 29a. In fact, SEIU

and the Employer claimed the ability to extend the opt out window more than once, which leads to the conclusion that they could extend it indefinitely so long as the Employer and SEIU agreed to CBA extensions and the Petitioners remained at their jobs.

The Ninth Circuit's misplaced reliance on the clause in the Cards under which the Petitioners agreed to be "bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union" is unavailing. First, the 2018 Side Letter could not have been incorporated into the Cards signed by the Petitioners, because the Side Letter did not exist at the times the Cards were signed. *See, e.g.*, *Gilbert St. Devs, LLC v. La Quinta Homes, LLC*, 174 Cal.App.4th 1185, 1194 (2009) ("[W]hat is being incorporated must actually exist at the time of the incorporation, so the parties can know exactly what they are incorporating."). In other words, the Petitioners could not have contractually agreed to something that did not yet exist. Further, from its placement on the card, it is far from clear that the clause was intended to relate to membership at all. The plain meaning of the clause is that it referred to following the union's future policies and procedures as union members, *see, e.g.*, *Navarro v. Mukasey*, 518 F.3d 729, 734 (9th Cir. 2008) ("If the contract language is clear, we give effect to its plain meaning."), not that it would function to empower SEIU and the Employer to waive the Petitioners' First Amendment rights. Second, and more relevant to the constitutional analysis here, *Janus* requires knowing, voluntary, and informed consent. This standard is not met when the employee lacks sufficient knowledge that future Side Letters can indefinitely end the employee's ability to opt out. If the government and union can waive an

employee's right vicariously by entering a collective bargaining agreement, it can ensure that those agreements are continually extended, and employees can never stop paying union dues. But as this Court has noted, "unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007).

By ruling that Petitioners' compelled speech claims warranted no constitutional scrutiny, even though it was clear that the Petitioners properly resigned their memberships and dues authorizations, the Ninth Circuit has increased unions' rights to the detriment of employees' rights. Pet.App. 29a. If nonmember employees' consent to waive their First Amendment rights is extended without their knowledge or participation, that consent becomes meaningless. The Ninth Circuit's opinion conflicts with this Court's ruling in *Janus*, and the petition should be granted to settle the conflict.

II. A SPLIT OF AUTHORITY EXISTS CONCERNING WHEN A UNION'S USE OF STATE AUTHORITY TO COMPEL SPEECH OCCURS UNDER "COLOR OF LAW"

This Court has unequivocally stated that "having [union] dues and fees deducted directly from employees' wages" is a "special privilege[]" granted to unions by state law." *Janus*, 138 S. Ct. at 2567. This commonsense observation springs from nearly fifty years of this Court's precedents applying the First Amendment to unions in Section 1983 actions alleging compelled speech. *E.g.*, *Harris v. Quinn*, 573 U.S. 616, 645 (2014) (prohibiting a union from charging agency fees to partial-public employees); *Knox,* 567 U.S. at 312 (prohibiting a union from charging a special political assessment to objecting nonmembers and

requiring them to opt out of its payment); *Hudson*, 475 U.S. at 309 (prohibiting a union from enforcing an inadequate procedure to handle nonmember objections to calculation of agency fee); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435 (1984) (prohibiting a union from exacting an involuntary loan from nonmembers and charging for nonchargeable expenses); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (prohibiting a union from requiring nonmembers to pay a full dues-equivalent charge funding political expression). Three federal circuits have followed this understanding.

In *Janus* on remand, the Seventh Circuit recognized that when unions "make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II*, 942 F.3d at 361 (quoting *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)). The Seventh Circuit deemed AFSCME a "joint participant with the state" because the union certified to the employer which employees' wages should be deducted (and how much). *Id.*

This reasoning was followed by the Sixth Circuit in *Littler*, 88 F.4th at 1176. Although the court found no state action under the specific circumstances alleged by the plaintiff in *Littler*[2], the court stated that "[h]ad Littler challenged the constitutionality of a statute pursuant to which the state withheld dues, the 'specific conduct' challenged would be the state's

[2] In *Littler,* a public employee's First Amendment challenge to a "maintenance of membership" provision failed for lack of state action because she challenged the union's improper instruction to continue to deduct dues, rather than challenging the validity of the collective bargaining agreement itself or the state statute allowing for the involuntary deductions. *Id.* at 1182.

withholdings, which would be state action taken pursuant to the challenged law."

The Third Circuit has adopted the same reasoning as the Sixth and Seventh. In *Lutter*, an employee did not wish to fund a union's political speech, but as directed by a state statute, the union and employer deducted dues from her paycheck for ten months after she requested they cease. 86 F.4th at 127. Under these circumstances, the court found the presence of state action. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 933 (1982) ("[P]rivate use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment.")).[3] There can be no doubt, had Petitioners brought their action against the union in the Third, Sixth or Seventh Circuit, the courts would have found the union acted under "color of law." The Ninth Circuit's decision in the case below finding that SEIU did not act under "color of law," based on the *Belgau* case, conflicts with the precedents of this Court, and the Third, Sixth, and Seventh Circuits.

In *Belgau*, the Ninth Circuit concluded that because the union and government were merely enforcing a private agreement to pay union dues for a given

[3] Multiple district courts considering the same issue have found unions are state actors. *See Chandavong v. Freson Deputy Sheriff's Ass'n*, 599 F. Supp. 3d 1017, 1022 (E.D. Cal. 2022) ((union reliance on the CBA and state statutes to compel speech was state action); *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 921 (E.D. Cal 2019) (garnishment of wages of involved the application of a state-created rule of conduct is state action); *Warren v. Fraternal Order of Police*, 593 F. Supp. 3d 666, 672 (N.D. Ohio 2022) ("It is not simply that the FOP and the County had a contract that renders the FOP a state actor here, but that the FOP repeatedly made use of the County's automatic withholding procedures to seize portions of Warren's wages...").

period, there was no state action for purposes of Section 1983. Pet.App. 29a. The Eighth Circuit has followed the Ninth Circuit's lead in departing from this Court's understanding of state action in the context of involuntary union deductions. In *Hoekman v. Education Minnesota*, the Eighth Circuit ruled that claims brought by two of the employee plaintiffs lacked a showing of state action since the plaintiffs previously agreed to be union members, 41 F.4th at, 977-78. Thus, their injury, being forced to pay dues after they resigned union membership, had its source in the private membership agreements, despite operation of a state statute allowing the union to unilaterally demand dues deductions through their employer. *Id.*

Here, Petitioners complied with all the requirements of the Cards, including the requirement to opt out in the specified window, Pet.App. 5a, but were forced to continue paying dues as a result of the Side Letter between SEIU and the Employer, *id.* at 17a, 18a. The Ninth Circuit ignored the fact that the Petitioners satisfied the terms for opting out stated in the Cards, which left state law as the *only basis* for SEIU and the Employer to take their wages for the union's political speech. First, the Trial Court Act specifically empowers SEIU to negotiate and enter into CBAs and "Side Letters" binding on employees like the Petitioners. Pet.App. 57a. This is true even where, as here, the Petitioners had no knowledge or information regarding SEIU's Side Letter prior to it being approved by SEIU and the Employer. *Id.* at 23a. Second, SEIU used the authority the State of California granted SEIU in Section 1157.12 to continue the involuntary deductions. *Id.* at 58a.

This use of state statutory authority to take Petitioners money should have been sufficient for a finding of state action. *Lindke v. Freed*, No. 22–611, slip op. at 11 (U.S., Mar. 15, 2024). Under California's statutory procedures, SEIU controls the Employer's payroll system by deciding on its own from whom to collect full union dues. Pet.App. 58a. But for this system, SEIU would have no practical ability to take even a single penny of the Petitioners' lawfully earned wages to fund its political speech. *Id.* at 10a, 11a. For nearly fifty years this Court has treated unions as state actors when a union exercises the authority of the state to take public employees' wages. Like Mark Janus, the Petitioners challenge state procedures under which their speech was compelled. In the Third, Sixth, and Seventh Circuit, these procedures qualify as state action, following the framework laid down by this Court. In the Ninth and Eighth Circuits, such procedures receive no constitutional scrutiny. The petition should be granted to settle the conflict.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO SETTLE THE QUESTIONS PRESENTED

Unlike other post-*Janus* cases seeking to clarify the contours of the First Amendment protections laid down in that case, the instant action presents a clean and simple record. Like the plaintiffs in the *Belgau* case upon which the Ninth Circuit relied in affirming the district court, Petitioners agreed to be bound to a reasonable window period before opting out of dues deductions, and they waited until this window period to opt out. But there the similarity to *Belgau* ends. The Petitioners did not expressly agree to be bound to deductions beyond the initial window period contained in the CBA in effect when they signed the cards.

Instead, it is undisputed that the Petitioners complied with the requirements in their Cards, and opted out during the applicable window. SEIU and the Employer have simply claimed the ability to waive the Petitioners rights through collective bargaining agreements, potentially in perpetuity, purely as a matter of their authority under the Trial Court Act and Section 1157.12.

The Petitioners allegations and injuries are squarely within this Court's previous jurisprudence. Even prior to the *Janus* case, this Court held for nearly fifty years that unions could not compel public employees to subsidize the political speech of unions against their will. Prior to *Janus*, at best, the unions could collect "agency fees" to support collective bargaining activities. *Abood*, 431 U.S. at 209 (agency fee collection permissible, but not funds for political speech); *Hudson*, 475 U.S. at 292; *Davenport*, 551 U.S. at 177 (requirement of affirmative consent for non-agency fees constitutional); *Knox*, 567 U.S. at 298 (new *Hudson* notice required for fee change change); *Harris*, 573 U.S. at 616 (2014) (agency fees permissible for full state employees only); *Janus*, 138 S. Ct. at 2448 (all deductions from employees' lawfully earned wages require affirmative consent).

This limitation makes sense given that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234–35; *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess

by word or act their faith therein."). As the Court has noted by quoting James Madison and Thomas Jefferson, it is tyrannical to force an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves." *Hudson*, 475 U.S. at 305. But in this case, SEIU and the Employer compelled the Petitioners to support political speech not only falling within the ambit of collective bargaining, but political speech that would have been unconstitutional even under *Abood*.

The involuntary deductions taken from the Petitioners' wages thus resulted in even more egregious injuries than those suffered by Mark Janus. *Janus*, 138 S. Ct. at 2464 ("Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning."). The purpose of the holding in *Janus* was to prevent exactly this kind of First Amendment violation by requiring affirmative consent on the part of the employee. Courts "do not presume acquiescence in the loss of fundamental rights." *Knox*, 567 U.S. at 312 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682, (1999), and unions like SEIU have no constitutional entitlement to the lawfully earned wages of nonconsenting employees. *Davenport*, 551 U.S. at 184–185 ("I]t is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees."). A government facilitated system to the contrary represents a "remarkable boon" for unions. *Knox*, 567 U.S. at 312. The Petitioners' case represents precisely the type of abuse of state authority the *Janus* case was intended to remedy, and the Petition should be granted to address the questions presented.

CONCLUSION

The petition for a Writ of Certiorari to the Ninth Circuit should be granted.

Respectfully submitted,

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April 10, 2024

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: 5:21–cv–01153 JGB (SHK)

ATISHMA KANT and MARLENE HERNANDEZ, individuals,

Plaintiffs,

v.

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

Defendants.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND DAMAGES FOR VIOLATION OF CIVIL RIGHTS.

[42 U.S.C. § 1983]

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INTRODUCTION

1. This case is about a complicit government employer and abusive legislation which rendered Plaintiffs Atishma Kant ("Ms. Kant") and Marlene Hernandez ("Ms. Hernandez") mute and marginalized as Service Employees International, Local 721 ("SEIU") leveraged its considerably unequal power against them to not only garnish their paychecks without consent for years, but also to brazenly reserve the right to extend those continued seizures into the indefinite future.

2. This case is also about SEIU's efforts to separate Ms. Kant and Ms. Hernandez from their liberty interests secured by the Constitution and vindicated by the Supreme Court in *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448, 2486 (2018), through unconscionable tactics built into its membership forms in order to circumvent the will of the Court. The facts expose that membership authorization agreement to be an adhesion contract which is procedurally and substantively unconscionable and therefore void and unenforceable under California law. Thus, it provides Defendants with no consent or waiver of Ms. Kant and Ms. Hernandez's First Amendment right not to fund SEIU's political activity.

3. The United States Constitution mandates that consent to fund union advocacy be freely and intelligently given and based on transparently disclosed information. It does not sanction an unconscionable membership agreement and manipulation of an opt-out window so that SEIU can continue to collect dues from Ms. Kant and Ms. Hernandez with no real option to resign. These state actions violate Ms. Kant and Ms. Hernandez's First Amendment right not to have their wages forcibly taken and used for political activity with which they disagree absent voluntary, intelligent,

and knowing consent to waive that right. *Id.* Additionally, the continued deductions violate Ms. Kant and Ms. Hernandez's right to procedural and substantive due process.

4. For these reasons, Ms. Kant and Ms. Hernandez bring this lawsuit under 42 U.S.C. § 1983 to recover their unconstitutionally seized wages and to vindicate their First Amendment rights as recognized by the United States Supreme Court.

JURISDICTION AND VENUE

5. This action arises under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 (action for deprivation of federal civil rights), and 28 U.S.C. §§ 2201-2202 (action for declaratory relief).

6. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (jurisdiction for deprivation of federal civil rights).

7. Venue is proper in this Court because a substantial portion of the events giving rise to the claims occurred in San Bernardino County within the Central District of California. 28 U.S.C. § 1391(b)(2).

PARTIES

8. Plaintiff Atishma Kant is a Business Process Specialist for the Employer. She has worked for the Superior Court of California, County of San Bernardino ("Employer") for over 16 years.

9. Plaintiff Marlene Hernandez is a Business Process Specialist for the Employer. She has worked for the Employer for over 20 years.

10. Ms. Kant and Ms. Hernandez seek relief pursuant to the Civil Rights Act, 42. U.S.C., § 1983 for

declaratory and injunctive relief, compensatory and nominal damages, and any other remedy this Court deems proper.

11. Defendant, Service Employees International Union, Local 721, is the exclusive bargaining representative for Ms. Kant and Ms. Hernandez's bargaining unit. Under California state law, Cal. Gov't Code § 1157.12, and the terms of the applicable collective bargaining agreement, SEIU is empowered to represent to Employer whether Ms. Kant and Ms. Hernandez have affirmatively consented to have union dues withdrawn from their pay. The Union office is located at 1545 Wilshire Blvd., Los Angeles, CA 90017.

12. Defendant Rob Bonta, California's Attorney General, is sued in his official capacity as the representative of the State of California charged with the enforcement of state laws, including the provisions challenged in this case. His address for service of process is 300 South Spring Street, Los Angeles, California, 90013 in Los Angeles County.

FACTUAL ALLEGATIONS

13. Ms. Hernandez was hired by Employer in 2000 as a Business Process Specialist and joined SEIU in 2016 by signing one of the union's pre-printed standardized membership authorization forms (the "Membership Form").[1]

14. Ms. Kant was hired by the Employer on October 30, 2004, as a Legal Processing Assistant and was promoted to Operations Supervisor.

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[1] SEIU was the exclusive representative for Kant's new department when she changed job classification to Business Process Specialist.

15. She became a Business Process Specialist on May 12, 2018, and joined SEIU May 29, 2018, by signing a Membership Form.[2]

16. On April 28, 2016, SEIU and Employer signed a Memorandum of Understanding ("MOU") designating SEIU as the exclusive representative for Ms. Kant and Ms. Hernandez's bargaining unit. Exhibit A. The MOU's stated expiration date was September 30, 2019.

17. In 2016, Ms. Hernandez joined SEIU by signing a membership form.

18. On May 29, 2018, Ms. Kant joined SEIU by signing a membership form.

19. The membership form purported to incorporate maintenance of membership language from the MOU, providing that Ms. Kant and Ms. Hernandez could cease payments to SEIU between the dates of July 2 through August 1, 2019. Exhibit B.

20. On December 21, 2018, SEIU and Employer signed a Side Letter (the "2019-2021 Side Letter") agreement which extended the MOU's expiration forward two years to September 30, 2021. Exhibit C.

21. Ms. Hernandez sent an opt-out letter to SEIU. Upon information and belief, the letter was sent via certified mail on approximately July 25, 2019.

22. In late July 2019, SEIU acknowledged Ms. Hernandez's resignation, but stated that dues deductions would not cease.

23. On July 11, 2019, Ms. Kant sent an opt-out letter to SEIU via certified mail. Exhibit D.

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[2] SEIU was the exclusive representative for Kant's new department when she changed job classification to Business Process Specialist.

24. On July 17, 2019, SEIU acknowledged Ms. Kant's resignation, but stated that dues deductions would not cease. Exhibit E.

A. The Membership Form was an adhesive contract of indefinite duration

25. The Membership Form that Ms. Kant and Ms. Hernandez signed had been uniformly drafted, prepared, and printed by SEIU. It was offered to Ms. Kant and Ms. Hernandez on a take-it-or-leave-it basis, as they were given no option to negotiate, modify, or waive any of portion of the standardized terms.

26. SEIU's membership forms displayed the following provision, in small print and positioned at the end of a paragraph: "I agree to be bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application *or that may be negotiated by the Union*." (Emphasis added.) Exhibit B.

B. The Membership Form did not display the MOU's binding terms

27. The Membership Form incorporated extrinsic provisions that were located in the MOU but not on the Membership Form. Specifically, the Membership Form stated:

> "Irrespective of my membership in the Union, deductions for this purpose shall remain in effect and be irrevocable unless revoked by me in writing *in accordance with applicable provisions* in the memorandum of understanding or agreement between my employer and SEIU Local 721." (Emphasis added.) Exhibit B.

28. The "applicable provisions" in the MOU referenced the Maintenance of Membership provision

in Article 5, which specified the future escape window by which Ms. Kant and Ms. Hernandez might halt payroll deductions. The provision states in pertinent part:

> "Employees who have authorized Union dues deductions at such time of a Supreme Court decision shall continue to have dues deductions or at any time subsequent to a Supreme Court decision shall continue to have such dues deduction made by the Court during the term of this MOU; provided, however, that any employee in the Unit may terminate such Union dues during the thirty (30) day period commencing ninety (90) days before the expiration of the MOU by notifying the Union of their termination of the Union dues deduction." Exhibit A, Art. 5.

29. The MOU was not present or "easily available" to Ms. Kant and Ms. Hernandez at the time they signed the card which incorporated its terms.

C. The specter of forced and inevitable fees robbed Plaintiffs of meaningful choice

30. Under the applicable MOU,[3] on the date that Ms. Kant and Ms. Hernandez joined SEIU, agency or "fair share fees" equal to the cost of union dues were automatically deducted from the earnings of all nonmembers as a "condition of new or continued employment."[4] Exhibit A.

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[3] *See* MOU Article 5.

[4] The "AGENCY SHOP" clause in Article 5 states: "As a condition of new or continued employment, all employees shall become a member of SEIU or pay to SEIU an agency fee or fair share fee while SEIU serves as their exclusive bargaining

31. Thus, Ms. Kant and Ms. Hernandez signed the Membership Form under the belief that they would be forced to pay a fee equal[5] to the full amount[6] of membership dues whether they joined SEIU or not.

32. At the time that Ms. Kant and Ms. Hernandez signed the Membership Form, SEIU held disproportionate power to compel them to pay deductions in an equal amount of membership dues, regardless of membership.

33. Being forced to pay the same amount regardless of membership, robbed Ms. Kant and Ms. Hernandez

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representative over wages, benefits and working conditions. New employees have five (5) working days following the initial date of employment to fully execute the dues authorization form and return said form to Human Resources Payroll. If the form is not completed properly or returned within five (5) working days, service fees at the full member dues rate will be deducted from the employee's regular bi-weekly pay. Excepted from the above are extra-help employees. All dues and fees withheld by the Court shall be transmitted to the SEIU Officer designated in writing by SEIU as the person authorized to receive such funds, at the address specified." Ex. A, Art. 5.

[5] Article 5 MOU provides that "The Court shall deduct an amount equal to SEIU's biweekly dues and remit that amount to SEIU if an employee has not authorized payroll deduction of such fee and SEIU certifies to the Court that such employee has not made payment to SEIU nor made arrangements with SEIU to satisfy his or her obligation by donating the equivalent amount of dues as specified above."

[6] The amount of the agency fees assessment being equal to union dues is legally suspect. New employees had five days to either join SEIU and pay union dues. If a new employee did not join SEIU, the same amount was automatically deducted in agency fees. Any portion of agency fees which subsidized SEIU's political activities was in violation of the Supreme Court's requirement in *Teachers v. Hudson,* 475 U.S. 292 (1986) that categories of expenses be exempted.

of a meaningful choice whether or not to sign the Membership Form.

D. At the time Plaintiffs signed, SEIU was on notice that forced agency fees were unconstitutional

34. Article 5 of the 2015-2019 MOU references a future "Supreme Court decision," *see supra.*

35. The reference to a "Supreme Court Decision" reveals that SEIU was on notice that the agency shop arrangements were subject to legal challenge.

36. The reference to a "Supreme Court Decision" also reveals SEIU's awareness that a Supreme Court ruling protective of free and informed consent would result in less income for the union.

37. The window period language of Article 5, *see supra,* was inserted to restrain members who might seek to exercise their Constitutional rights "at such time of a Supreme Court decision"[7] which would vindicate those rights.

38. The window period language prevented Ms. Kant and Ms. Hernandez from withdrawing their authorizations to fund SEIU and relinquished power over their private budgetary decisions to SEIU.[8]

39. And yet, the actual window period language, which trapped the Ms. Kant and Ms. Hernandez into forced deductions years into the future, is absent from

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[7] MOU Article 5.

[8] Ms. Kant and Ms. Hernandez's signature on the authorization empowered the Employer to take union fees out of their earnings before they were even received. By signing the card, Plaintiffs purportedly relinquished their right to prevent those deductions, as state law designates SEIU, the recipient of the funds, as the sole arbiter of her consent -- to the exclusion of the Ms. Kant and Ms. Hernandez. *See* Cal. Gov. Code § 1157.12.

the Membership Form that the Plaintiffs actually saw and signed.[9] *See,* Exhibit B.

40. The U.S. Supreme Court struck down forced agency fees in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). The ruling took place approximately two years after Ms. Hernandez joined SEIU, and 29 days after Ms. Kant joined SEIU.

E. Plaintiffs decided to resign from SEIU

41. In 2019, Ms. Kant discovered that SEIU makes large political contributions to a political party with whom she chooses not to affiliate.

42. Because she did not wish to contribute even a penny of her earned income toward causes that I fundamentally disagree with, Ms. Kant decided to withdraw her membership from SEIU.

43. In 2019, Ms. Hernandez also decided to resign from SEIU.

44. Ms. Kant and Ms. Hernandez learned that that their freedom of choice to stop funding SEIU would not be restored until a future window period.

45. According to the Membership Form Ms. Kant and Ms. Hernandez signed, which purported to

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[9] The Membership Form only incorporates the maintenance of membership "window" provision in Article 5 of the MOU by reference, and states in pertinent part: "Irrespective of my membership in the Union, deductions for this purpose shall remain in effect and be irrevocable unless revoked by me in writing in accordance with applicable provisions in the memorandum of understanding or agreement between my employer and SEIU Local 721. In the absence of such provision, this authorization shall remain in effect and can only be revoked by me in writing during the period not less than thirty (30) days and not more than forty-five (45) days before the annual anniversary date of this authorization " Ex B.

incorporate[10] the maintenance of membership provision from the MOU, that window period would begin in July 2019.

46. Ms. Kant and Ms. Hernandez waited until July 2019.

47. On July 11, 2019, Ms. Kant informed SEIU via certified mail that she does not affirmatively consent to the continued withdrawal of her lawfully earned wages and demanded that the union "immediately cease deducting all dues, fees, and political contributions." Exhibit D.

48. On approximately July 25, 2019, Ms. Hernandez informed SEIU via certified mail that she does not affirmatively consent to the continued withdrawal of her lawfully earned wages and demanded that the union "immediately cease deducting all dues, fees, and political contributions."

49. On July 17, 2019, SEIU wrote Ms. Kant, stating that SEIU would remove her membership but would not direct the Employer to stop deducting dues from her earnings. Exhibit E.

50. In late July 2019, SEIU likewise wrote Ms. Hernandez, stating that SEIU would remove her

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[10] The incorporation term in the membership card, is unconscionable and unenforceable, as the MOU was not made "readily available" to her at the time that she signed the membership agreement. "A secondary document becomes part of a contract as though recited verbatim when it is incorporated into the contract by reference provided that the terms of the incorporated document *are readily available to the other party*." (Emphasis added.) (*Williams Constr. Co. v. Standard-Pacific Corp.* (1967) 254 Cal.App.2d 442, 454, 61 Cal.Rptr. 912.) *King v. Larsen Realty, Inc.,* 121 Cal. App. 3d 349, 357, 175 Cal. Rptr. 226, 231 (Ct. App. 1981).

membership but would not direct the Employer to stop deducting dues from her earnings.

51. The letter stated that the dues deduction would continue until a future date "as outlined in your membership application." The letter provided no further information to explain when the deductions would cease. Exhibit E.

52. Ms. Kant began telephoning SEIU to inquire about how to obtain a copy of the Membership Form so that she could read the terms and determine when SEIU would cease the garnishments.[11]

53. After three attempts, she finally spoke to an SEIU representative who provided no information other than to refer Ms. Kant to the Employer.

54. Ms. Kant obtained the information from Employer and was able to read the binding terms SEIU was enforcing over her.

55. On July 31, 2019, Ms. Kant and Ms. Hernandez sent Cease and Desist letters to SEIU via certified mail. Exhibit F.

56. In those letters Plaintiffs demanded that SEIU communicate to the Employer that they were no longer members of SEIU and had withdrawn authorization for the dues deductions.

57. On August 14, 2019, SEIU sent Plaintiffs letters acknowledging receipt of the Cease and Desist letters, stating that the matter was under investigation and

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[11] Ms. Kant and Ms. Hernandez were not provided with the MOU at the time they signed the Membership Form, and SEIU did not provide a copy when it exercised the incorporated terms against her, instead referring her to the employer.

that Plaintiffs would receive a response no later than August 30, 2019. Exhibits G, I.

58. SEIU did not respond to Plaintiffs' Cease and Desist letter on August 30, 2019, or any other time.

59. SEIU did not direct the Employer to stop deducting union dues from Plaintiffs' earnings and remitting them to SEIU.

60. To date, Employer continues to deduct monies from Ms. Kant and Ms. Hernandez's paychecks and remit them to SEIU.

F. SEIU imposed unconscionable, open-ended terms upon Plaintiffs which afford no firm expectation that dues deductions will ever end

61. In anticipation that the Supreme Court would eliminate forced agency fees, SEIU began to employ a new tactic to ensure that dues would continue to flow into their coffers indefinitely.

62. For example, because Plaintiffs opt-out window – which is calculated from the MOU's expiration – was from July 2 to August 1, 2019, SEIU made sure to sign an extension before the MOU expired. By doing so, SEIU effectively changed the opt-out window for members, without their knowledge, two years into the future. As long as SEIU and Employer continue to extend the MOU, they could conceivably extend opt-out windows and forced payments into perpetuity.

63. On December 21, 2018, SEIU and Employer signed the 2019-2021 Side Letter which extended the MOU's expiration to September 30, 2021. Exhibit C.

64. The agreement stated in pertinent part:

> "The Superior Court of California, County of San Bernardino and the Service Employees

> International Union, Local 721 met and have agreed to an extension of the 2015-2019 Memorandum of Understanding for an additional two years. The two-year extension will continue the terms of the current memorandum of understanding in full, except as modified below."

65. Then, when Ms. Kant and Ms. Hernandez resigned membership with SEIU, the union refused to instruct the Employer to stop deducting their money on the basis of that extension, asserting that Ms. Kant and Ms. Hernandez must continue to pay SEIU for another two years after they had resigned membership.[12] Exhibit C.

66. Since the Employer and SEIU agreed that Ms. Kant and Ms. Hernandez must pay SEIU for an additional two years, Plaintiffs had no choice. This was made possible by Cal. Gov't Code § 1157.12, the "contracts... that may be negotiated" term of the membership agreement,[13] and Article 5 of the 2015-2019 MOU.

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[12] In a 4/29/21 email from SEIU Membership Coordinator, Ashley Kerner, to SEIU's counsel, Glenn Rothner, regarding a different member, Kerner referred to Ms. Kant as "part of a group who sent us Cease and Desist letters when they originally tried to opt out but were not within their window period due to the contract extension agreement." Ms. Kerner further stated: "At that time, Legal advised us to tell these members who submitted opt-out requests during the period where the extension agreement was in place that the two-year extension of the MOU changed the expiration of the MOU to 2021." Kerner referenced an email sent to a different individual who was told that "Your employer and the union signed a two-year extension of the MOU which changed the expiration of the MOU to 2021." Ex. H.

[13] As the "contracts that may be in existence or that may be negotiated" term on the adhesive membership form which Ms.

67. Thus, SEIU continues to appropriate approximately $45 from Ms. Kant and Ms. Hernandez's biweekly paychecks without their consent and against their express objection.

68. From July 2019 to present, the Employer and SEIU have taken approximately $2000 of Ms. Kant and Ms. Hernandez"s lawfully earned wages without their affirmative consent and against their express objection.

G. Ms. Kant and Ms. Hernandez's signature on the Membership Form rendered them subservient to a state law which cut off control over financial affairs and placed it in the hands of SEIU

69. The Membership Form contained the following provision authorizing SEIU to instruct the Employer to pay dues to SEIU directly from Ms. Kant and Ms. Hernandez"s earnings through payroll deductions:

> "I further authorize SEIU 721 *to instruct my employer* to deduct and remit to the Union, any dues, fees and general assessments from my paycheck and to adjust the amount of this deduction as may be required to comply with changes in premiums under existing agreements with insurance plans, or to comply with dues schedules and general assessments determined by the Union." Exhibit B.

70. That arrangement is buttressed by a California statute, Cal. Gov. Code § 1157.12, which prohibits the

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Kant and Ms. Hernandez signed, was SEIU's unconscionable attempt to reserve for itself unilateral power to hold Plaintiffs to a contract of indefinite duration, and its use as a basis for future extension agreements or Side Letters is unenforceable under California law. *See* C.C. 1670.5 (a).

Employer from communicating directly with Ms. Kant and Ms. Hernandez regarding the deductions, and instead mandates that the garnishments begin and/or end at the direction of SEIU alone.[14]

71. Thus, under California state law, Ms. Kant and Ms. Hernandez's signatures on the Membership Forms effectively cut off their direct communication with Employer regarding the dues deductions and placed dominion over their lawfully earned wages and budgetary priorities under SEIU's control.

72. Nevertheless, Ms. Kant and Ms. Hernandez were not apprised of that at the time of signing, as neither the state law nor its effect over their personal liberty were recited on the Membership Form.

73. Nor were Plaintiffs informed that the statute affords no safety net for their protection should SEIU abuse that trust and continue to instruct the Employer to remit their earnings to SEIU, even after they had withdrawn consent.

74. Pursuant to California state law, there are no negative ramifications for SEIU ignoring Ms. Kant and Ms. Hernandez's demand that it stop instructing the Employer to "deduct and remit" money[15] from their paychecks and to SEIU.

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[14] The Statute states, in pertinent part: "Direct employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed, and the employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that information." Cal. Gov. Code §1157.12(b)

[15] *Id.*

75. Because state law allows SEIU to ignore Ms. Kant and Ms. Hernandez's protests with no negative ramifications, SEIU continues to ignore their protests and take their money to this day.

76. Under the First Amendment, the Employer cannot seize Ms. Kant and Ms. Hernandez's earnings for funding SEIU's political activity without a voluntary waiver of their First Amendment right to be free of compelled funding of objectionable speech, demonstrated by clear and compelling evidence. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486.

77. Nevertheless, state law has silenced Ms. Kant and Ms. Hernandez and blocked Employer from verifying their waiver as it continues to seize earnings and remit them to SEIU.

78. The Defendants maintain the constitutionality of these actions.

COUNT I
Violation of the Right to Freedom from
Compelled Speech Against All Defendants
(42 U.S.C. § 1983)

79. Ms. Kant and Ms. Hernandez re-allege and incorporate by reference each and every paragraph set forth above.

80. Under the First Amendment, the government cannot take money from public employees' wages to pay union dues or fees without the employees' voluntary and informed affirmative waiver of her First Amendment right to be free of compelled funding of objectionable speech, demonstrated by clear and compelling evidence. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486.

81. The Defendants acted under color of state law and pursuant to Cal. Gov't Code § 1157.12 and the

applicable MOUs to seize Ms. Kant and Ms. Hernandez's wages without their affirmative consent and against her express objection, for use in SEIU's political speech.

82. Ms. Kant and Ms. Hernandez repeatedly informed SEIU that they did not affirmatively consent to the deduction of their lawfully earned wages for SEIU speech.

83. SEIU disregarded those repeated requests and took no action to end the unauthorized deductions from Ms. Kant and Ms. Hernandez's lawfully earned wages once informed that they did not affirmatively consent to future deductions.

84. Pursuant to state law, Cal. Gov't Code § 1157.12 and the applicable MOU, SEIU jointly acted with the Employer to seize Ms. Kant and Ms. Hernandez's lawfully earned wages without their affirmative consent.

85. Because it authorizes the confiscation of Ms. Kant and Ms. Hernandez's lawfully earned wages without their affirmative consent, the scheme created by Cal. Gov't Code § 1157.12 and the applicable MOU, on its face and as applied, violates Ms. Kant and Ms. Hernandez's First Amendment rights against compelled speech.

86. The Defendants had no legitimate, let alone compelling, interest in depriving Ms. Kant and Ms. Hernandez of their First Amendment rights.

87. Even if the Defendants' scheme did have a legitimate or compelling purpose, it is not narrowly tailored to support that interest.

88. Ms. Kant and Ms. Hernandez seek compensatory and nominal damages against SEIU for the violation of their First Amendment rights, and injunctive and declaratory relief against both Defendants.

COUNT II
Deprivation of Liberty and Property Interests
Without Procedural Due Process Against All
Defendants (42 U.S.C. § 1983)

89. Ms. Kant and Ms. Hernandez re-alleges and incorporates by reference each and every paragraph set forth above.

90. The Fourteenth Amendment requires the provision of adequate procedures before an individual is deprived of liberty or property.

91. Ms. Kant and Ms. Hernandez have a cognizable liberty interest in their First Amendment rights against compelled speech.

92. Ms. Kant and Ms. Hernandez have a cognizable property interest in their lawfully earned wages seized by the Defendants without their affirmative consent.

93. Defendants' scheme for the seizure of dues for use in SEIU's political speech does not include any procedural protections sufficient to meet the requirements of the Due Process Clause.

94. Neither Cal. Gov't Code § 1157.12 nor the applicable MOU establish any procedures to convey notice to Ms. Kant and Ms. Hernandez before the Employer seized their wages without their affirmative consent for use in SEIU's political speech.

95. Neither Cal. Gov't Code § 1157.12 nor the applicable MOU establish any procedures to provide Ms. Kant and Ms. Hernandez with any pre-deprivation or post-deprivation hearing or other opportunity to object to the Employer regarding the seizure of her wages for use in SEIU's political speech.

96. Pursuant to state law, Cal. Gov't Code § 1157.12 and the applicable MOU, SEIU jointly acted with the

Employer to deny Ms. Kant and Ms. Hernandez their procedural due process rights.

97. Because it lacked the necessary procedural safeguards to protect Plaintiffs' First Amendment liberty interests and their property interests in their lawfully earned wages, Defendants' dues deduction scheme, on its face and as applied, violates Ms. Kant's and Ms. Hernandez's right to procedural due process.

98. Ms. Kant and Ms. Hernandez seek compensatory and nominal damages against the Defendants for the violation of her procedural due process rights, and injunctive and declaratory relief against all Defendants.

COUNT III
Violation of 42 U.S.C. § 1983 for the Inherently Arbitrary Deprivation of Free Speech Liberty Interests Against All Defendants

99. Plaintiffs re-allege and incorporate by reference each and every paragraph set forth above.

100. The substantive component of the Due Process Clause prohibits restraints on liberty that are inherently arbitrary. Hence, substantive due process bars certain government actions regardless of the fairness of the procedures used to implement them.

101. Infringements of substantive due process rights are subject to strict constitutional scrutiny and must be narrowly tailored to serve a compelling state interest.

102. Plaintiffs have a cognizable liberty interest in their First Amendment rights.

103. The sole means available to Plaintiffs and public employees to terminate their union membership and end their dues deductions under Cal. Gov't Code

§ 1157.12 and the applicable CBA, requires their termination requests be directed to SEIU.

104. SEIU is an inherently biased and financially interested party with an incentive for dues deductions continue, whether an employee has given affirmative consent or not.

105. SEIU has no incentive to release Ms. Kant and Ms. Hernandez, or other comparably situated public employees, from their memberships.

106. Rather, SEIU has a direct financial and legal incentive to represent to the Employer that Plaintiffs had provided the clear and affirmative consent required by Janus, even when Ms. Kant and Ms. Hernandez have affirmatively terminated their agreements and clearly withdrawn their consent.

107. Under these provisions, the Employer is allowed neither to independently verify whether Plaintiffs affirmatively consented to the deduction of dues from their pay to be remitted to SEIU, nor request they submit new, verifiable authorizations.

108. As a result, Defendants' scheme has the purpose and effect of arbitrarily burdening Plaintiffs' ability to exercise their First Amendment rights.

109. Plaintiffs have a substantive due process right to exercise their First Amendment rights without suffering the conflict of interest imposed by Defendants' scheme.

110. Because it creates an inherent and arbitrary conflict of interest burdening Plaintiffs' ability to exercise their First Amendment rights, Defendants' dues deduction scheme, on its face and as applied, violates Plaintiffs' right to substantive due process.

111. The Defendants had no legitimate, let alone compelling, interest in depriving Ms. Kant of her First Amendment rights.

112. Even if the Defendants' scheme did have a legitimate or compelling purpose, it is not narrowly tailored to support that interest.

113. Pursuant to state law, Cal. Gov't Code § 1157.12, and the applicable CBA, the Employer jointly acted with SEIU to deny Ms. Kant her substantive due process rights.

COUNT IV
The Membership Forms Signed By Plaintiffs are Void For Unconscionability

114. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

115. The Membership Forms signed by Ms. Kant and Ms. Hernandez are unconscionable because SEIU presented the forms to them as take-it-or-leave-it form contracts.

116. There was no bargaining involved because Plaintiffs do not have equal bargaining power to SEIU.

117. The membership process afforded Plaintiffs no opportunity to make a free and meaningful choice. They were required to either sign the card and pay union dues to SEIU, or not sign the card and pay SEIU an equal amount in agency fees.

118. Based on the above, the Membership Forms are procedurally unconscionable.

119. The Membership Forms are also substantively unconscionable because it attempted to incorporate indefinite future contracts via extension agreements.

120. The Membership Forms stated as follows: "I agree to be bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application *or that may be negotiated by the Union*."

121. Not only were the binding terms of the MOU not readily and easily available to Plaintiffs when they signed the Membership Forms, the 2019-2021 Side Letter was not even in existence at the time they signed their Membership Forms.

122. That means that Ms. Kant and Ms. Hernandez were bound by the terms of a contract that did not exist at the time they signed their Membership Forms.

123. The membership applications are unconscionable because they provided SEIU power to unilateral modify the membership agreements.

PRAYER FOR RELIEF

125. Wherefore, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgement:

- That the Defendants' scheme to seize Plaintiffs' wages without their affirmative consent under Cal. Gov't Code § 1157.12 and the applicable CBA, and all other similarly situated employees, is a violation of the First Amendment;
- That the Defendants' failure to provide Plaintiffs, and similarly situated employees, notice and an opportunity to dispute the seizure of their wages without their affirmative consent, is a violation of the Fourteenth Amendment's guarantee of procedural due process;

- That the Defendants' scheme requiring Plaintiffs, and other similarly situated employees, to direct their membership and dues authorization termination requests to a third-party union with a direct financial incentive to continue dues deductions without their affirmative consent, is inherently arbitrary and a violation of the Fourteenth Amendment's guarantee of substantive due process.
- That Membership Forms are void as unconscionable.

B. Issue a permanent injunction:

- Enjoining the Defendants from seizing the wages of public employees without their voluntary and informed affirmative consent under Cal. Gov't Code § 1157.12 and the applicable MOU;
- Enjoining the Defendants from agreeing to and enforcing a procedure for deducting money from the pay of public employees that violates the First and Fourteenth Amendments; ordering the Defendants to implement a process providing adequate procedures for confirming public employees' voluntary and informed affirmative consent prior to the deduction of any money from their pay;
- Enjoining the Defendants from agreeing to and enforcing an inherently arbitrary procedure that violates the First and Fourteenth Amendments; ordering the Defendants to implement a process by which Employer must directly confirm public employees' voluntary and informed affirmative consent prior to the deduction of any money from their pay.

- Enjoining the Defendants from enforcing the Membership Form and enjoining Defendants from continuing to deduct dues from Ms. Kant and Ms. Hernandez.

C. Enter a judgment:

- Against Defendant SEIU awarding Ms. Kant compensatory damages to be determined at trial for the monies deducted from her lawfully earned wages without her affirmative consent, with interest, including any monies take from her lawfully earned wages without her consent after the filing of this lawsuit;
- Against Defendant SEIU awarding Ms. Hernandez compensatory damages to be determined at trial for the monies deducted from her lawfully earned wages without her affirmative consent, with interest, including any monies taken from her lawfully earned wages without her consent after the filing of this lawsuit;
- Against Defendant SEIU awarding Ms. Kant and Ms. Hernandez compensatory damages for the violation of their First Amendment rights against compelled speech, in an amount to be determined at trial.
- Against Defendants, each awarding Plaintiffs $1.00 each in nominal damages for the deprivation of their First Amendment and Fourteenth Amendment Due Process rights.
- Any other compensatory damages for enforcing an unconscionable agreement against Ms. Kant and Ms. Hernandez.

D. Other applicable relief:

- Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988;
- Award Plaintiffs any further relief to which they may be entitled and such other relief as this Court may deem just and proper.

Date: July 21, 2021

Respectfully submitted,

FREEDOM FOUNDATION

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-55904
D.C. No. 5:21-cv-01153-FMO-SHK

ATISHMA KANT; MARLENE HERNANDEZ, individuals,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

MEMORANDUM[*]

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

Submitted October 19, 2023[**]
San Francisco, California

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

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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

1. Plaintiffs' claims for prospective relief are moot because defendants have refunded the money at issue. Article III jurisdiction extends only to live cases and controversies. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). But voluntary cessation only moots a claim if the defendant carries the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 190 (2000).

SEIU and the Attorney General have carried that "formidable" burden. After this case was filed, SEIU told the Superior Court to stop deducting plaintiffs' wages and reimbursed the union dues that the Superior Court took after plaintiffs withdrew from union membership. Under California Government Code section 1157.12, the Superior Court can only make deductions for union dues if SEIU certifies that plaintiffs

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

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

Belgau is not distinguishable because plaintiffs are challenging the Superior Court's decision to enter the memorandum of understanding with SEIU. When plaintiffs joined SEIU, they agreed to be "bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union." While California contract law might address the legality of such a contract, a union entering into a contract with a government employer does not engage in state action.

3. Sovereign immunity bars the retroactive claims for nominal and compensatory damages against Attorney General Bonta. Parties can sue state officers with "some connection with the enforcement of" a challenged law

for prospective and declaratory relief. *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). However, "state sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, including nominal damages." *Platt v. Moore*, 15 F.4th 895, 910 (9th Cir. 2021). Plaintiffs do not argue that sovereign immunity has been waived or abrogated. The Eleventh Amendment thus bars their claims for damages against the Attorney General.

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

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-55904

D.C. No. 5:21-cv-01153-FMO-SHK
Central District of California, Riverside

ATISHMA KANT; MARLENE HERNANDEZ, individuals,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

ORDER

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

The panel has voted to deny the petition for rehearing en banc (Dkt. No. 48) and Judge W. Fletcher has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. ED CV 21-1153 FMO (SHKx)

ATISHMA KANT, *et al.*,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, *et al.*,

Defendants.

ORDER DISMISSING ACTION

Having reviewed and considered the briefing filed with respect to the Service Employees International Union, Local 721's ("Union" or "SEIU") Motion to Dismiss (Dkt. 25, "Union Motion"), and Attorney General Rob Bonta's ("Attorney General") (collectively, "defendants"), Motion to Dismiss the First Amended Complaint (Dkt. 26, "AG Motion"), the court finds that oral argument is not necessary to resolve the Motions, *see* Fed. R. Civ. P. 78(b); Local Rule 7-15; *Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

PLAINTIFFS' ALLEGATIONS[1]

On July 9, 2021, Atishma Kant ("Kant") filed a complaint against the Union and the Attorney General, in his official capacity, (Dkt. 1, Complaint) and on July 21, 2021, Kant and Marlene Hernandez ("Hernandez" and together with Kant, "plaintiffs"), filed the operative First Amended Complaint ("FAC"), asserting claims under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendment. (*See* Dkt. 13, FAC at %% 79-113). Plaintiffs seek declaratory judgment, injunctive relief, and compensatory and nominal damages. (*See id.* at Prayer for Relief).

Plaintiffs are employed by the Superior Court of California for the County of San Bernardino ("Superior Court"). (*See* Dkt. 13, FAC at %% 8-9). On April 28, 2016, the Union and the Superior Court signed a Memorandum of Understanding ("MOU"), which designated the Union as the exclusive representative for plaintiffs' bargaining unit. (*Id.* at % 16); (Dkt. 13-1, MOU). The MOU was set to expire on September 30, 2019, (Dkt. 13, FAC at % 16); (DKt. 13-1, MOU at 44), so on December 21, 2018, the Union and the Superior Court signed a Side Letter agreement which extended the MOU's expiration to September 30, 2021. (*See* Dkt. 13, FAC at %% 20, 63); (Dkt. 13-3, Side Letter Agmt).

Hernandez and Kant joined the Union in 2016 and 2018, respectively, by "signing one of the Union's pre-printed standardized membership authorization forms." (*See* Dkt. 13, FAC at %% at %% 13, 15, 17-18). According to plaintiffs, the "membership form purported to incorporate maintenance of membership language from the

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[1] Capitalization, quotation and alteration marks, and emphasis in record citations may be altered without notation.

MOU, providing that [plaintiffs] could cease payments to [the Union] between the dates of July 2 through August 1, 2019." (*Id.* at % 19) (citing Dkt. 13-2, Membership Application).[2] Plaintiffs claim the membership forms were "uniformly drafted . . . and printed" by the Union and were offered to them "on a take-it-or-leave-it basis[.]" (*Id.* at % 25). The forms included the following provision: "I agree to be bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union." (*Id.* at % 26); (Dkt. 13-2, Membership Application). The membership forms also contained the following language:

> I . . . authorize [the Union] to instruct my employer to deduct and remit to the Union, any dues, fees and general assessments from my paycheck[.] Irrespective of my membership in the Union, deductions for this purpose shall remain in effect and be irrevocable unless revoked by me in writing in accordance with applicable provisions in the [MOU] or agreement between my employer and [the Union]."

(Dkt. 13, FAC at ¶ 28); (Dkt. 13-2, Membership Application).

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[2] Plaintiffs' counsel are admonished to carefully review the Local Rules, including Local Rule 5.2 regrading the protection of sensitive and private information.

According to plaintiffs, the applicable provision in the MOU provides in relevant part that

> [e]mployees who have authorized Union dues deductions at such time of a Supreme Court decision shall continue to have dues deductions or at any time subsequent to a Supreme Court decision shall continue to have such dues deduction made by the Court during the term of this MOU; provided, however, that any employee in the Unit may terminate such Union dues during the thirty (30) day period commencing ninety (90) days before the expiration of the MOU by notifying the Union of their termination of the Union dues deduction.

(Dkt. 13, FAC at ¶ 28); (Dkt. 13-1, MOU at 4). The "MOU was not present or easily available to [plaintiffs] at the time they signed" the membership cards. (Dkt. 13, FAC at ¶ 29).

On July 11, 2019, and on approximately July 25, 2019, Kant and Hernandez, respectively, sent opt-out letters to the Union, (Dkt. 13, FAC at ¶¶ 21, 23, 47-48), stating that they did "not affirmatively consent to the continued withdrawal of [their] lawfully earned wages and demanded that the union 'immediately cease deducting all dues, fees, and political contributions.'" (*Id.* at ¶¶ 47-48). The Union acknowledged receipt of plaintiffs' opt-out letters, but stated that the dues deductions could not cease. (*See id.* at ¶¶ 22, 24, 49-50); (Dkt. 13-5, Union Letter to Kant). Specifically, the Union stated that, "[a]lthough you are no longer a member, you previously made a commitment to pay an amount equal to dues until the agreed-upon revocation period to revoke dues deductions as outlined in your contract or membership application." (Dkt. 13-5, Union Letter to Kant); (*see also* Dkt. 13, FAC at ¶ 51).

On July 31, 2019, plaintiffs sent cease and desist letters to the Union, (Dkt. 13, FAC at ¶ 55), in which plaintiffs "insist[ed] that [the Union] cease deducting any and all union dues or fees from [their] paycheck[s]" and noted that under California law, the Union was required to "immediately notify" the Superior Court of their change in membership and their "cancellation of all union dues deduction as requested by" plaintiffs. (Dkt. 13-6, Cease and Desist Letter); (Dkt. 13, FAC at ¶ 56). On August 14, 2019, the Union acknowledged receipt of the cease and desist letters, stating that the matter was under investigation. (Dkt. 13, FAC at ¶ 57). The Union did not otherwise respond, and did not direct the Superior Court to stop dues deductions. (*See id.* at ¶¶ 58-59).

Plaintiffs allege that the December 21, 2018 Side Letter extended the MOU's expiration date to September 30, 2021, (Dkt. 13, FAC at ¶ 63) (Dkt. 13-3, Side Letter Agmt), and that the "union refused to instruct the Employer to stop deducting their money on the basis of that extension[.]" (*Id.* at ¶ 65). Thus, plaintiffs "had no choice" but to continue paying dues "for an additional two years[.]" (*Id.* at ¶ 66). According to plaintiffs, this was made possible by California Government Code § 1157.12 ("§ 1157.12") and Article 5 of the MOU. Plaintiffs allege that "[u]nder the First Amendment, [the Superior Court] cannot seize [their] earnings for funding SEIU's political activity without a voluntary waiver of their First Amendment right to be free of compelled funding of objectionable speech, demonstrated by clear and convincing evidence" pursuant to the Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees,*

Counsel 31, 138 S.Ct. 2448, 2486 (2018).[3] (*See* Dkt. 13, FAC at ¶ 76); (*see also id.* at ¶¶ 2, 40, 80, 106).

LEGAL STANDARDS

I. STANDING AND MOOTNESS.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (internal quotation marks omitted). Article III requires a plaintiff seeking injunctive relief to "show that [s]he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 1149 (2009) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services* (*TOC*), *Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 704 (2000)). A plaintiff "bears the burden of showing that [s]he has standing for each type of relief sought." *Id.* at 493, 129 S.Ct. at 1149; *see Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017) ("[W]hen there are multiple plaintiffs . . . [a]t least one plaintiff must have standing to seek each form of relief requested in the complaint.").

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[3] The Supreme Court held in *Janus* that public-sector unions violated the First Amendment by deducting fair-share fees from non-member employees without first obtaining affirmative consent from the employees. 138 S.Ct. at 2486.

Article III further requires that "an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160, 136 S.Ct. 663, 669 (2016) (internal quotation marks omitted). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S.Ct. 1523, 1528 (2013) (internal quotation marks omitted). "A case becomes moot, however, only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald*, 577 U.S. at 161, 136 S.Ct. at 669 (internal quotation marks omitted).

II. MOTION TO DISMISS.

A motion to dismiss for failure to state a claim should be granted if plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009); *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949; *Cook*, 637 F.3d at 1004; *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010). Although the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965; *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949; *see also Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) ("[T]he court is not required to accept legal

conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.") (citations and internal quotation marks omitted), "[s]pecific facts are not necessary; the [complaint] need only give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 2200 (2007) (*per curiam*) (citations and internal quotation marks omitted); *see Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964.

In considering whether to dismiss a complaint, the court must accept the allegations of the complaint as true, *Erickson*, 551 U.S. at 93-94, 127 S.Ct. at 2200; *Albright v. Oliver*, 510 U.S. 266, 268, 114 S.Ct. 807, 810 (1994) (plurality opinion), construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849 (1969); *Berg v. Popham*, 412 F.3d 1122, 1125 (9th Cir. 2005). Dismissal for failure to state a claim can be warranted based on either a lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. *Franklin v. Murphy*, 745 F.2d 1221, 1228-29 (9th Cir. 1984), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827 (1989).

DISCUSSION

I. ELEVENTH AMENDMENT.

Under the Eleventh Amendment, "a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by the state." *In re Mitchell*, 209 F.3d 1111, 1115-16 (9th Cir. 2000), *abrogated on other grounds as recognized by Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 853 n. 6 (9th Cir.2001). The Amendment "bars a suit against state officials when the state is the real, substantial party in interest[,]" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 908 (1984) (internal quotation marks omitted); *Holley v. California Dept. of Corrections*, 599 F.3d 1108, 1111 (9th Cir. 2010) (treating claim for damages against "state officials in their official capacities as a suit against the state"), and applies to claims under § 1983 against the State of California. *Dittman v. California*, 191 F.3d 1020, 1025-26 (9th Cir. 1999) ("The State of California has not waived its Eleventh Amendment immunity with respect to claims brought under § 1983 in federal court" and "the Supreme Court has held that § 1983 was not intended to abrogate a State's Eleventh Amendment immunity") (internal quotation marks omitted); *Semerjyan v. Service Employees Int'l Union Local 2015*, 489 F.Supp.3d 1048, 1055 (C.D. Cal. 2020) (same).

The Attorney General contends that plaintiffs' claims against him and the State are barred under the Eleventh Amendment. (*See* Dkt. 26-1, Memorandum of Points and Authorities in Support of Attorney General Bonta's Motion to Dismiss [] ("AG Memo") at 1-2, 7-8); (Dkt. 34, Reply in Support of Attorney General Bonta's Motion to Dismiss [] ("AG Reply") at 5-6). Plaintiffs counter that they seek "nominal damages against the

State and Attorney General" and that Eleventh Amendment immunity "does not extend to nominal damages." (Dkt. 33, Opposition to Defendants' Motion to Dismiss ("Opp.") at 35).

While "[n]ominal damages claims of one dollar have consistently been understood as categorically different from even small compensatory damages claims, as [c]ompensatory damages and nominal damages serve distinct purposes[,]" *Platt v. Moore*, 15 F.4th 895, 904 (9th Cir. 2021) (internal quotation marks omitted), plaintiffs do not cite any authority for the proposition that Eleventh Amendment immunity does not extend to nominal damages. (*See, generally*, Opp. at 35-36); *see, e.g.*, *Laird v. United Teachers Los Angeles*, 2022 WL 2976824, *6 (C.D. Cal. 2022) (noting that plaintiff "cite[d] legal authority that discusses nominal damages, [but did] not actually cite any authority that supports [the] contention regarding sovereign immunity."). In any event, contrary to plaintiffs' contention, sovereign immunity extends to nominal damages. *Platt*, 15 F4th at 910 (noting that absent waiver "state sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, including nominal damages"); *Johnson v. Rancho Santiago Community College Dist.*, 623 F.3d. 1011, 1021 & n. 4 (9th Cir. 2020) (noting that absent waiver, school district "would be entitled to sovereign immunity with respect to claim for nominal damages").

With respect to prospective relief, the Supreme Court in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), established an exception to Eleventh Amendment immunity. Under *Ex parte Young*, immunity does not bar "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law so long as the

state officer has some connection with the enforcement of the act." *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (internal quotation marks omitted). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 636, 645, 122 S.Ct. 1753, 1760 (2002) (internal quotation marks omitted); *Semerjyan*, 489 F.Supp.3d at 1055-56 (same).

Plaintiffs contend their claims for prospective relief may proceed against the Attorney General because the court is capable of enjoining him from enforcing § 1157.12. (*See* Dkt. 33, Opp. at 25-27). However, plaintiffs have resigned from the Union, opted out of further dues deductions, and as this court previously found, "Plaintiffs have received full reimbursement of all [Union] dues paid since their respective opt-outs, and dues have ceased to be deducted from their respective paychecks." (Dkt. 22, Court's Order of August 18, 2021, at 4); (*see* Dkt. 33, Opp. at 14 n. 1) (conceding that dues deductions ceased in July 2021, and that the Union mailed refund checks to them). Thus, "there is no ongoing violation, so the *Ex parte Young* exception does not apply, and Plaintiff[s'] § 1983 claims against the [Attorney General] are barred by Eleventh Amendment immunity." *Semerjyan*, 489 F.Supp.3d at 1056 ("Plaintiff'[s] factual allegations establish that the State is no longer taking her dues, and there are no factual allegations establishing she somehow remains vulnerable to the practice resuming despite her history with the Union.").

II. MOOTNESS

Defendants contend that plaintiffs' claims for prospective relief are moot. "Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Dittman*, 191 F.3d at 1025 (internal quotation marks omitted); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208 (1980) (same); *Espinoza v. Union of American Physicians and Dentists, AFSCME Local 206*, 562 F.Supp.3d 904, 911 (C.D. Cal. 2022) (same). A case is moot when (1) "the issues presented are no longer live" or (2) "the parties lack a legally cognizable interest in the outcome." *Geraghty*, 445 U.S. at 396, 100 S.Ct. at 1208 (internal quotation marks omitted). In evaluating a Rule 12(b)(1) mootness challenge, the court may consider evidence beyond the complaint and "need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Here, as noted above, plaintiffs have resigned from the Union, opted out of further dues deductions, received full reimbursement of all union dues paid since their respective opt-outs, and dues are no longer being deducted from their respective paychecks. (Dkt. 22, Court's Order of August 18, 2021, at 4). Thus, there is no longer a "live controversy" and plaintiffs lack a "legally cognizable interest in the outcome." *Geraghty*, 445 U.S. at 396, 100 S.Ct. at 1208 (internal quotation marks omitted); *see Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020) ("A live dispute 'must be extant at all stages of review, not merely at the time the complaint is filed'") (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334 (1975)); *Espinoza*, 562 F.Supp.3d

at 911 (finding plaintiff's claim for injunctive and declaratory relief moot because the union "ceased making deductions from Plaintiff and returned the erroneously taken wages").

Nonetheless, plaintiffs contend that their claims for prospective relief qualify for the "capable of repetition yet evading review" and "voluntary cessation" exceptions to mootness. (*See* Dkt. 33, Opp at 35-38). If those exceptions do not apply, they request "leave to amend their complaint to seek class certification on behalf of other state employees." (*Id.* at 35-36, 39). Plaintiffs' contentions are unpersuasive.

"The 'capable of repetition, yet evading review' exception to mootness applies only where (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again." *Johnson v. Rancho Santiago Community College Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010) (cleaned up). Here, there is no reasonable expectation that plaintiffs will be subjected to the challenged action in the future because they have resigned from the Union, and the dues deductions have ceased. (*See, generally*, Dkt. 13, FAC): (Dkt. 33, Opp). For the same reasons, the "voluntary cessation" exception to mootness is inapplicable in this case. *See, e.g.*, *Campos v. Fresno Deputy Sheriff's Assoc.*, 2020 WL 6684606, *6-*7 (E.D. Cal. 2020) (finding voluntary cessation exception did not apply in part because "*Janus* is very similar to an amended statute" and "the Ninth Circuit has recognized that a change in the law by Congress can moot litigation relating to the pre-amendment statute"); *Few V. United Teachers Los Angeles*, 2020 WL 633598, *5 (C.D. Cal. 2020) (Plaintiff's "arguments are aimed at the 'voluntary cessation' and

'capable of repetition, yet evading review' exceptions to the mootness doctrine, neither of which can save his claim for prospective relief."); (*see also* Dkt. 33, Opp. at 36-37) (collecting cases finding prospective claims moot under similar circumstances).

With respect to plaintiffs' request for leave to amend "to seek class certification on behalf of other state employees" to come within the exception to mootness applicable to class actions, (Dkt. 33, Opp. at 36 & 39), the court will deny the request since "seeking class certification would be futile as Plaintiffs' harm cannot be legally attributed to either [the Union] or [the State]." *Espinoza*, 562 F.Supp.3d at 911 ("Additionally, Plaintiff requests that if the Court believes this case is mooted by UAPD's unilateral refund . . . [Plaintiff] seeks leave to amend his complaint to seek class certification. The Court denies this request because, as discussed below, seeking class certification would be futile as Plaintiff's harm cannot be legally attributed to either UAPD or State Defendants."); *see Belgau*, 975 F.3d at 950-52 (finding no First Amendment violation where employees willingly joined union and authorized union dues deductions).

III. MOTIONS TO DISMISS.

Defendants contend that plaintiffs' § 1983 claims fails as a matter of law due to a lack of state action. (*See* Dkt. 26-1, AG Memo at 11-15); (Dkt. 25-1, Memorandum of Points and Authorities in Support of Union's Motion to Dismiss [] ("Union Memo") at 8-13). The court agrees.

Section 1983 provides for the imposition of liability on any person who, acting under color of state law, deprives another of the rights, privileges, or immunities secured by the Constitution or the laws of the United

States. *See* 42 U.S.C. § 1983. It does not create substantive rights, but rather provides remedies for deprivations of rights established elsewhere in the Constitution or federal law. *See Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870 (1989) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2695 n. 3 (1979)). Thus, "[t]o establish a claim under [] § 1983, [plaintiffs] must show that [the Union] deprived them of a right secured by the Constitution and acted 'under color of state law.'"[4] *Belgau*, 975 F.3d at 946 (citation omitted). "Dismissal of a § 1983 claim following a Rule 12(b)(6) motion is proper if the complaint is devoid of factual allegations that give rise to a plausible inference of either element." *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015).

"The state action inquiry boils down to [whether] the challenged conduct that caused the alleged constitutional deprivation [is] 'fairly attributable' to the state[.]" *Belgau*, 975 F.3d at 946 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013)). Courts employ a "two-prong framework for analyzing when governmental involvement in private action is itself sufficient in character and impact that the government fairly can be viewed as responsible for the harm of which the plaintiff complains." *Ohno*, 723 F.3d at 994; *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753-54 (1982) (setting forth two-prong test). "The first prong asks whether the claimed constitutional deprivation resulted from 'the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible.'" *Ohno*, 723 F.3d at 994 (quoting *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2753).

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[4] As noted above, plaintiffs' § 1983 claims against the Attorney General are barred by the Eleventh Amendment.

"The second prong determines whether the party charged with the deprivation could be described in all fairness as a state actor." *Id.* (citing *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754).

Here, plaintiffs fail to satisfy the first prong because they are unable to show that the alleged violation of their First Amendment and due process rights is attributable to a state statute or policy. The challenged conduct arises from agreements that plaintiffs entered into with the Union, (*see* Dkt. 13, FAC at ¶¶ 27-60), rather than a state statute or policy. (Dkt. 26-1, AG Memo at 12); *see, e.g.*, *Belgau*, 975 F.3d at 947 ("[T]he claimed constitutional harm is that the agreements were signed without a constitutional waiver of rights. Thus, the source of the alleged constitutional harm is not a state statute or policy but the particular private agreement between the union and Employees.") (internal quotation marks omitted).

Plaintiffs, however, contend that the Union is a state actor by virtue of § 1157.12, (Dkt. 33, Opp. at 18), which provides, in relevant part, that public employers

> shall . . . [d]irect employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed, and the employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that information. Deductions may be revoked only pursuant to the terms of the employee's written authorization.

Cal. Gov. Code § 1157.12(b). More specifically, plaintiffs contend that the statute "blocked the Superior Court from listening to [their] protests regarding SEIU's monthly authorizations of their consent" and, therefore, "the statute itself authorized the collections of the dues and is thus state action." (Dkt. 33, Opp. at 18). Again, plaintiffs' contentions are unpersuasive.

Section 1157.12(b) merely requires public employees to direct requests to change deductions to the employee organizations themselves, and requires that such changes be made "pursuant to the terms of the employee's written authorization." *Cal. Gov*'t Code § 1157.12(b). As the Attorney General puts it: "It remains entirely up to each worker whether to associate with or financially support the Union, and it remains the Union's responsibility to inform Plaintiffs' employer when to commence or terminate deductions." (Dkt. 26-1, AG Memo at 13). Moreover, as one court stated in addressing a similar statute, "Plaintiff authorized [the union] to make [] deductions until he revoked consent" and "[t]o the extent that [the union's] deductions were unlawful, 'private misuse of a state statute does not describe conduct that can be attributed to the State.'" *Espinoza*, 562 F.Supp.3d 904, 912 (C.D. Cal. 2022). "As such, it cannot be said that [§ 1157.12] deprived Plaintiff[s] of any constitutional right." *Id.*

Plaintiffs also contend that their "earnings were seized for two years after SEIU received their timely and proper withdrawals" and that "[t]he state policy in this case is [] the same as that in *Lugar:* a state-created 'system whereby state officials will attach property on the ex parte application of one party.'" (Dkt. 33, Opp. at 19) (quoting *Lugar*, 457 U.S. at 942, 102 S.Ct. at 2756). However, unlike in *Lugar*, plaintiffs consented to the dues deductions at issue, and the

manner for changing or terminating such deductions. Moreover, courts have rejected the notion that invocation of similar statutes leads to a finding of state action. *See Espinoza*, 562 F.Supp.3d at 912 ("Plaintiff alleges First Amendment injuries as a result of the deduction of both union dues and political action contributions from his paycheck, as well as Fourteenth Amendment injuries as a result of a deduction scheme lacking in adequate procedural safeguards are caused by section 1153" of California Government Code. . . . To the extent that [the union's] deductions were unlawful, 'private misuse of a state statute does not describe conduct that can be attributed to the State.' As such, it cannot be said that section 1153 deprived Plaintiff of any constitutional right.") (quoting *Collins*, 878 F.2d at 1152) (citations omitted); *Laird*, 2022 WL 2976824, at *8 (finding California Education Code § 45060(a) did not supply means by which plaintiff could establish that the allegedly wrongful deductions of union dues "resulted from the exercise of a right or privilege created by the state or a rule imposed by the state"). In short, "the source of the alleged constitutional harm is not a state statute or policy but the particular private agreement between the [U]nion and [plaintiffs]." *Belgau*, 975 F.3d at 947 (internal quotation marks omitted).

With respect to the second prong,"[t]he Supreme Court has articulated four tests for determining whether a private [party's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (internal quotation marks omitted). Plaintiffs contend that the joint action and governmental nexus tests are satisfied by the Union's actions

in this case. (Dkt. 33, Opp. at 20). The court addresses each in turn.

"A joint action between a state and a private party may be found in two scenarios: the government either (1) affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, or (2) otherwise has so far insinuated itself into a position of interdependence with the non-governmental party, that it is recognized as a joint participant in the challenged activity." *Belgau*, 975 F.3d at 947 (internal quotation marks omitted). According to plaintiffs, this test is satisfied because the State requires that an employee's request to cancel or change deductions be directed to the employee organization rather than to the public employer itself. (Dkt. 33, Opp. at 21) (citing *Cal. Gov*'t Code § 1157.12). However, § 1157.12 did not dictate the terms of plaintiffs' agreements or the collective bargaining agreement. Rather, plaintiffs entered into the agreements "without any direction, participation, or oversight by" the State, *Belgua*, 975 F.3d at 947, which merely "permit[ted] the private choice of the parties, a role that is neither significant nor coercive." *Id.* Indeed, as the Attorney General points out, (*see* Dkt. 26-1, AG Memo at 15), this is underscored by the text of § 1157.12(b), which states that "[d]eductions may be revoked only *pursuant to the terms of the employee's written authorization.*" *Cal. Gov*'t Code § 1157.12(b) (emphasis added). Thus, plaintiffs' contention that § 1157.12(b) "affirmed" and "facilitated" the Union's conduct, (Dkt. 33, Opp. at 21), and thus establishes joint action, (*id.*), is undermined by the fact that under § 1157.12(b), the State and the Union are not joint actors since that provision requires that requests to cancel or change deductions be sent directly to the Union. In other words, the State is indifferent to an

employee's choice. *See Belgau*, 975 F.3d at 948 ("Washington's mandatory indifference to the underlying merits of the authorization refutes any characterization of [the union] as a joint actor with Washington.") (internal quotation marks omitted); *see, e.g.*, *Espinoza*, 562 F.Supp.3d at 912 (finding "unavailing" plaintiff's "contention that [the union] was acting under color of law because section 1153 does not permit the state employer to communicate with its own employees and requires it to accept as gospel only what [the union] certifies as true") (cleaned up).

"Under the governmental nexus test, a private party acts under color of state law if there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Ohno*, 723 F.3d at 995 n. 13 (internal quotation marks omitted). Here, there is no "sufficiently close nexus" between the State and the Union's alleged improper collection of union dues such that the Union's conduct "may fairly be treated as that of the State itself." *Id.* (internal quotation marks omitted). As noted above, § 1157.12(b) merely requires that requests to cancel or change dues deductions be sent directly to the Union. *See Cal. Gov*'t Code § 1157.12(b).

In short, the court finds that plaintiffs have failed to allege that the Union was acting under color of law or that its conduct amounted to state action, and thus their § 1983 claims fail as a matter of law.[5] Plaintiffs'

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[5] Plaintiffs contend that this case should be analyzed under the Seventh Circuit's decision in *Janus v. American Federation of State, County and Municipal Employees, Counsel 31*, 942 F.3d 352 (7th Cir. 2019) (*"Janus II"*) rather than *Belgau* because "the circumstances analogize to those of Mark Janus not Melissa Belgua, whose agreement with the union was still executory at

alleged injuries arise from their dispute with the Union regarding their membership agreements and whether those agreements are valid. (*See* Dkt. 22, Court's Order of August 18, 2021, at 3) (concluding that plaintiffs' "§ 1983 claims fail as a matter of law" under *Belgau* for lack of state action); (Dkt. 26-1, AG Memo at 11).

IV. LEAVE TO AMEND.

Rule 15 of the Federal Rules of Civil Procedure provides that the court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); *see Morongo Band of Mission Indians v. Rose*,

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the time of the action" while "Plaintiffs' deductions did not occur within a voluntary agreement, as did Ms. Belgau's." (Dkt. 33, Opp. at 25). However, as the Union points out, (*see* Dkt. 35, Union Reply at 6), the plaintiffs in *Belgau* were in the same situation as plaintiffs here – they continued to have dues deducted following their resignations from the union, and they argued that they had not validly agreed to such deductions. *See* 975 at 946 ("After the *Janus* decision, Employees notified [the union] that they no longer wanted to be union members or pay dues. Per this request, [the Union] terminated Employees' union memberships. However, pursuant to the terms of the revised membership agreements, Washington continued to deduct union dues from Employees' wages until the irrevocable one-year terms expired."). Moreover, with respect to plaintiffs' assertion of a so-called *Janus* standard for determining whether a private party is a state actor, (*see* Dkt. 33, Opp. at 23-24), the Ninth Circuit noted that cases involving compelled mandatory agency fees were not relevant to this issue. *See Belgau*, 975 F.3d at 948 ("Neither are we swayed by Employees' attempt to fill the state-action gap by equating authorized dues deduction with compelled agency fees. The actual claim is aimed at deduction of dues without a constitutional waiver, not a deduction of agency fees, which did not occur."); *id.* at n. 3 ("Our conclusion that state action is absent in the deduction and the transfer of union dues does not implicate the Seventh Circuit's analysis on the collection of agency fees.").

893 F.2d 1074, 1079 (9th Cir. 1990) (The policy favoring amendment must "be applied with extreme liberality."). However, "[i]t is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802 (1971). "[T]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (internal quotation marks omitted); *see Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 830 (9th Cir. 2003), *overruled on other grounds*, *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (*en banc*) ("The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint.").

Having liberally construed and assumed the truth of the allegations in the FAC with respect to the 12(b)(6) motion, and taking into consideration the 12(b)(1) contentions, the court is persuaded that plaintiffs' federal claims cannot be saved through amendment. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) ("Courts are not required to grant leave to amend if a complaint lacks merit entirely."). Accordingly, plaintiffs' federal claims will be dismissed without leave to amend.

V. SUPPLEMENTAL JURISDICTION.

To the extent plaintiffs assert a state-law claim, (*see* Dkt. 25-1, Union Memo at 17); (Dkt. 22, Court's Order of August 18, 2021, at 4), the court declines to exercise supplemental jurisdiction over such a claim. Section 1367(c) of the United States Code provides that "district courts may decline to exercise supplemental jurisdiction [ ] if . . . the district court has dismissed

all claims over which it has original jurisdiction[.]" 28 U.S.C. § 1367(c)(3). When considering the factors of judicial economy, convenience, fairness, and comity, the court is persuaded that the balance favors declining supplemental jurisdiction. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 619 n. 7 (1988) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered [ ] – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims."); *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1101 (9th Cir. 1996) ("Where a district court dismisses a federal claim, leaving only state claims for resolution, it should decline jurisdiction over the state claims and dismiss them without prejudice."). Given the above, the court will dismiss plaintiff's state-law claims without prejudice to the extent any exist. *See* 28 U.S.C. § 1367(c)(3); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 478 (9th Cir. 1998) (holding that there is no requirement of an "explanation for a district court's reasons [for declining supplemental jurisdiction] when the district court acts under" 28 U.S.C. §§ 1367(c)(1)-(3)).

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. The Service Employees International Union, Local 721's Motion to Dismiss (Document No. 25) is granted as set forth in this Order.

2. Attorney General Rob Bonta's Motion to Dismiss the First Amended Complaint (Document No. 26) is granted as set forth in this Order.

3. Plaintiffs' federal claims in the First Amended Complaint (Dkt. 13) are dismissed with prejudice.

4. To the extent plaintiffs assert a state law claim, it is dismissed without prejudice.

5. Judgment shall be entered accordingly.

Dated this 1st day of September, 2022.

/s/
Fernando M. Olguin
United States District Judge

APPENDIX E

United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

APPENDIX F

Trial Court Employment Protection and Governance Act Cal. Gov't Code §§ 71631, 71633, 71634.3

Cal. Gov't Code § 71631

Except as otherwise provided by the Legislature, trial court employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Trial court employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the trial court.

Cal. Gov't Code § 71633

Recognized employee organizations shall have the right to represent their members in their employment relations with trial courts as to matters covered by this article. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this article shall prohibit any employee from appearing on his or her own behalf regarding employment relations with the trial court.

Cal. Gov't Code § 71634.3

If agreement is reached by the representatives of the trial court and a recognized employee organization or organizations, they shall jointly prepare a written memorandum of the agreement or understanding, which shall not be binding, and present it to the trial court or its designee for determination.

APPENDIX G

Cal. Gov't Code § 1157.12

Public employers other than the state that provide for the administration of payroll deductions authorized by employees for employee organizations as set forth in Sections 1152 and 1157.3 or pursuant to other public employee labor relations statutes, shall:

(a) Rely on a certification from any employee organization requesting a deduction or reduction that they have and will maintain an authorization, signed by the individual from whose salary or wages the deduction or reduction is to be made. An employee organization that certifies that it has and will maintain individual employee authorizations shall not be required to provide a copy of an individual authorization to the public employer unless a dispute arises about the existence or terms of the authorization. The employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that certification.

(b) Direct employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed, and the employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that information. Deductions may be revoked only pursuant to the terms of the employee's written authorization.

SEIU Local 721, CTW, CLC
Membership Application
San Bernardino Courts

Mail to: SEIU Local 721, CTW, CLC
6177 River Crest Dr., Ste. B
Riverside, CA 92507
Phone: (951) 571-7700
Fax: (951) 653-6310

LOCAL 721 SEIU

PLEASE PRINT CLEARLY

dso opeiu 537, afl-cio 6/15

Employer Name San Bernardino County, Superior Court

Employee ID # [redacted] Social Security # (optional)

Last Name KANT First Name ATISHMA M.I.

Date of Birth [redacted] Gender: [redacted]

Home Address [redacted] City [redacted] Code [redacted]

Home Phone Work Phone 909-521-3692

Personal Cell Phone [redacted] Personal Email

☐ Yes, I want to receive text messages from SEIU 721. *SEIU 721 will never charge for mobile messages. Standard data rates may apply—please check with your cell phone provider.*

Job Title BUSINESS PROCESS SPECIALIST Date Hired 5/12/2018

Department Name PROJECT MANAGEMENT OFFICE

Work Address 351 N. ARROWHEAD AVE. City SAN BERNARDINO Zip Code 92415

I hereby request and accept membership in SEIU Local 721 and authorize the Union as my designated exclusive bargaining agent to represent me and to negotiate and conclude on my behalf any and all agreements as to wages, hours, and other conditions of work. I agree to be bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union.

Date 5/24/18 Signature 5/24/18

I further authorize SEIU Local 721 to instruct my employer to deduct and remit to the Union, any dues, fees and general assessments from my paycheck and to adjust the amount of this deduction as may be required to comply with changes in premiums under existing agreements with insurance plans, or to comply with dues schedules and general assessments determined by the Union. Irrespective of my membership in the Union, deductions for this purpose shall remain in effect and be irrevocable unless revoked by me in writing in accordance with applicable provisions in the memorandum of understanding or agreement between my employer and SEIU Local 721. In the absence of such provision, this authorization shall remain in effect and can only be revoked by me in writing during the period not less than thirty (30) days and not more than forty-five (45) days before the annual anniversary date of this authorization.

It is my responsibility as a member to notify the Union if I believe my deductions are incorrect or if I am no longer in a bargaining unit represented by SEIU Local 721. The Union will not refund any dues payments beyond six (6) months from the date of the member's request for refund. While dues, fees and assessments to SEIU Local 721 are not tax deductible as charitable contributions for federal income tax purposes, they may be deductible under other provisions subject to various restrictions imposed by the Internal Revenue Code.

Date 5/24/18 Signature

COPE CONTRIBUTION FORM

Contribute to the SEIU Local 721 Committee on Political Education (COPE)

I am volunteering to contribute to SEIU Local 721 COPE to help elected officials stand up for working people.

I authorize my union, SEIU Local 721, to file this payroll deduction with my employer and for my employer to forward that amount specified to SEIU Local 721 COPE.

I understand that: 1) I am not required to sign this form or make COPE contributions as a condition of my employment by my employer or membership in the union; 2) I may refuse to contribute without any reprisal; 3) Only union members and executive/administrative staff who are U.S. Citizens or lawful permanent residents are eligible to contribute to SEIU Local 721 COPE; 4) The amounts on this form are merely a suggestion, and I may contribute more or less by this or some other means without fear of favor or disadvantage from the union or my employer; 5) SEIU Local 721 COPE uses the money it receives for political purposes, including but not limited to addressing political issues of public importance and contributing to and spending money in connection with federal, state and local elections.

Contributions to SEIU Local 721 COPE are not deductible for federal income tax purposes. This authorization shall remain in effect until revoked in writing by me.

Are You Registered to Vote?: ☐ Yes ☐ No

I authorize my employer to deduct: ☐ $10 ☐ $15 ☐ $20 ☐ $25 every month from my paycheck and transfer the funds to SEIU Local 721 COPE. My signature shows that I have reviewed and agree with the terms on this form.

Date **Signature**

SEIU 721 MEMBER LIFE INSURANCE

Active SEIU 721 members are automatically covered for $2,000 life insurance and an additional $2,000 for accidental death and dismemberment insurance (a total of $4,000 if accidental death). Please indicate up to two beneficiaries below.

Primary Beneficiary [redacted]

Secondary Beneficiary [redacted]

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SEIU Local 721, CTW, CLC
Membership Application
San Bernardino Courts

Mail to: SEIU Local 721, CTW, CLC
6177 River Crest Dr., Ste. B
Riverside, CA 92507
Phone: (951) 571-7700
Fax: (951) 653-6310

(SEIU 721 use only)

LOCAL 721 SEIU

MEMBER CONNECTION

PLEASE PRINT CLEARLY

Employer Name

Employee ID # A5474 Social Security # (optional)

Last Name Galindo First Name Marlene M.I.

Date of Birth [redacted] Gender: ☐ Male ☒ Female

Home Address [redacted] City Rialto State CA Zip Code [redacted]

Home Phone Work Phone

Personal Cell Phone [redacted] Personal Email [redacted]

☐ Yes, I want to receive text messages from SEIU 721. SEIU 721 will never charge for mobile messages. Standard data rates may apply—please check with your cell phone provider

Job Title Judicial Asst Date Hired 4/100

Department Name Criminal

Work Address 247 W. 3rd St City San Bdo Zip Code 92410

I hereby request and accept membership in SEIU Local 721 and authorize the Union as my designated exclusive bargaining agent to represent me and to negotiate and conclude on my behalf any and all agreements as to wages, hours, and other conditions of work. I agree to be bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union.

Date 2/11/15 Signature [signature]

I further authorize SEIU Local 721 to instruct my employer to deduct and remit to the Union, any dues, fees and general assessments from my paycheck and to adjust the amount of the deduction as may be required to comply with changes in premiums under existing agreements with insurance plans, or to comply with dues schedules and general assessments determined by the Union. Irrespective of my membership in the Union, deductions for this purpose shall remain in effect and be irrevocable unless revoked by me in writing in accordance with applicable provisions in the memorandum of understanding or agreement between my employer and SEIU Local 721. In the absence of such provision, this authorization shall remain in effect and can only be revoked by me in writing during the period not less than thirty (30) days and not more than forty-five (45) days before the annual anniversary date of this authorization.

It is my responsibility as a member to notify the Union if I believe my deductions are incorrect or if I am no longer in a bargaining unit represented by SEIU Local 721. The Union will not refund any dues payments beyond six (6) months from the date of the member's request for refund. While dues, fees and assessments to SEIU Local 721 are not tax deductible as charitable contributions for federal income tax purposes, they may be deductible under other provisions subject to various restrictions imposed by the Internal Revenue Code.

Date 2/11/15 Signature [signature]

COPE CONTRIBUTION FORM

Contribute to the SEIU Local 721 Committee on Political Education (COPE)

I am volunteering to contribute to SEIU Local 721 COPE to help elected officials stand up for working people.

I authorize my union, SEIU Local 721, to file this payroll deduction with my employer and for my employer to forward that amount specified to SEIU Local 721 COPE.
I understand that: 1) I am not required to sign this form or make COPE contributions as a condition of my employment by my employer or membership in the union; 2) I may refuse to contribute without any reprisal; 3) Only union members and executive/administrative staff who are U.S. citizens or lawful permanent residents are eligible to contribute to SEIU Local 721 COPE; 4) The amounts on this form are merely a suggestion, and I may contribute more or less by this or some other means without fear of favor or disadvantage from the union or my employer; 5) SEIU Local 721 COPE uses the money it receives for political purposes, including but not limited to addressing political issues of public importance and contributing to and spending money in connection with federal, state and local elections.
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I authorize my employer to deduct: ☐ $10 ☐ $15 ☐ $20 ☐ $25 every month from my paycheck and transfer the funds to SEIU Local 721 COPE. My signature shows that I have reviewed and agree with the terms on this form.

Date Signature

SEIU 721 MEMBER LIFE INSURANCE

Active SEIU 721 members are automatically covered for $2,000 life insurance and an additional $2,000 for accidental death and dismemberment insurance (a total of $4,000 if accidental death). Please indicate up to two beneficiaries below.

Primary Beneficiary Relationship

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