No. 20-____

IN THE

Supreme Court of the United States

MELISSA BELGAU, *et al.*,

Petitioners,

v.

JAY INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, this Court held that states and unions cannot take money from public employees' wages unless the employees first waive their First Amendment right not to subsidize union speech. *See* 138 S. Ct. 2448, 2486 (2018). The Ninth Circuit failed to apply this standard below and, instead, held that (i) evidence of union membership alone, rather than proof of a knowing waiver, shows affirmative consent to a state's deduction of union dues or fees from its employees' wages, and (ii) unions do not act under "color of law" for the purposes of 42 U.S.C. § 1983 when they collectively bargain with states to authorize and enforce restrictions on employees' right not to subsidize union speech, and then work with states to deduct money from employees' wages. In so doing, the court sanctioned Washington's practice of preventing its employees from exercising their right under *Janus* not to subsidize union speech without proof they knowingly waived that right.

The questions presented are:

1. Whether it violates the First Amendment for a state and union to seize union dues or fees from employees' wages without proof the employees waived their First Amendment right not to subsidize a union and its speech.

2. Whether a union engages in conduct under color of law for the purposes of 42 U.S.C. § 1983 when it collectively bargains with a state to authorize and enforce restrictions on public employees' First Amendment right not to subsidize union speech, and then works with a state to deduct union dues or fees from employees' wages.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Melissa Belgau, Donna Bybee, Richard Ostrander, Katherine Newman, Miriam Torres, Gary Honc, and Michael Stone. Petitioners were the plaintiff-appellants in the court of appeals.

Respondents are Jay Inslee, in his official capacity as governor of the state of Washington; David Schumacher, in his official capacity as Director of the Washington Office of Financial Management; John Weisman, in his official capacity as Director of the Washington Department of Health; Cheryl Strange, in her official capacity as Director of the Washington Department of Social and Health Services; Roger Millar, in his official capacity as Director of the Washington Department of Transportation; Joel Sacks, in his official capacity as Director of the Washington Department of Labor and Industries;[1] and the Washington Federation of State Employees, AFSCME, Council 28, a labor union. Respondents were defendant-appellees at the court of appeals.

A corporate disclosure statement is not required under Supreme Court Rule 29.6, as no Petitioner is a corporation.

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[1] Employees work for different state agencies but are all represented by the Washington Federation of State Employees, AFSCME, Council 28 under a single collective bargaining agreement negotiated with the state of Washington. Employers are collectively referred to as "the State."

LIST OF PROCEEDINGS

There are no other court proceedings "directly related" to this case within the meaning of Rule 14(1)(b)(iii).

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The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 975 F.3d 940 (9th Cir. 2020) and reproduced at App., *infra* ("Pet. App."), 1a-20a. The Ninth Circuit order denying rehearing *en banc* is reproduced at Pet. App. 50a.

The opinion of the U.S. District Court for the Western District of Washington is reported at 359 F. Supp. 3d 1000 (W.D. Wash. 2019) and reproduced at Pet. App. 21a-47a.

JURISDICTION

The Ninth Circuit entered judgment on September 16, 2020. It denied a petition for rehearing *en banc* on October 26, 2020.

On March 19, 2020, in light of the ongoing public health concerns related to COVID-19, this Court extended the deadline to file petitions for writs of certiorari to 150 days from the date of an order denying a timely petition for rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in the appendix to this petition: the First Amendment to the U.S. Constitution; the Fourteenth Amendment to the U.S. Constitution; 42 U.S.C. § 1983; and pre-amended and amended RCW 41.80.100. Pet. App. 51a-65a.

STATEMENT OF THE CASE

This case challenges Washington's practice of authorizing and enforcing restrictions on its employees' First Amendment right under *Janus* not to subsidize a

union and its speech, and seizing union dues and fees from its employees' wages without proof that they voluntarily and knowingly waived that right.

A. This Court recognized in *Janus* that public employees have a First Amendment right not to subsidize a union and its speech.

This Court held in *Janus* that public employees have a First Amendment right not to subsidize a union and its speech, overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), which had held compelled union fee regimes to be constitutional. *See Janus*, 138 S. Ct. at 2486. The Court further held it unconstitutional for a state and unions to deduct or collect union dues or fees from employees' wages without affirmative consent demonstrating that employees waived that First Amendment right. *Id*. The Court emphasized that "such a waiver cannot be presumed." *Id*. (*citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1930)).

B. The State and WFSE agreed to restrict employees' First Amendment *Janus* rights using new payroll deduction authorization cards and a narrow escape period policy.

Anticipating this Court's decision in *Janus*, the state of Washington and the Washington Federation of State Employees, AFSCME, Council 28 ("WFSE") agreed to amend the 2017-2019 Collective Bargaining Agreement ("CBA") covering Washington's state employees. Pet. App. 7a-8a, 74a-75a. In a Memorandum of Understanding ("MOU") dated August 10, 2017, the State and WFSE authorized restrictions that would prevent employees from later exercising the First Amendment rights this Court would recognize in

Janus. Specifically, they agreed to require the State to "honor the terms and conditions" of new payroll deduction authorization cards, which for the first time restricted when employees could stop subsidizing WFSE. *Id*. at 74a, 83a-84a, 86a.[1] The new cards included union membership provisions and allowed employees to resign their membership at any time but compelled them to continue paying dues-equivalent union fees as objecting nonmembers until a narrow, ten-day escape period occurring only once a year. *Id*. at 83a. Absent a timely objection during that period, the cards would renew automatically. *Id*. As of 2018, the State and WFSE had gotten over 16,000 WFSE-represented public employees to sign these cards. Pet. App. 88a.

The cards said nothing about a (then) soon-to-be-acknowledged First Amendment right not to subsidize union speech or the *Janus* case pending in this Court at that time. *Id*. On the contrary, the cards explicitly stated that, should employees decline union membership, they would be compelled to pay a nonmember fee as a condition of employment pursuant to the agency fee requirement in the version of RCW 41.80.100(3) effective at that time. *Id*. at 62a-63a, 84a.[2]

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[1] Payroll deduction authorization cards prior to August 10, 2017 did not contain restrictions on when employees could stop subsidizing WFSE (to the extent permitted under Washington's agency fee law at the time). Pet. App. 81a. The State agreed to accept the new cards as the prior "authorization" (for state union dues and fee deductions) required by the version of RCW 41.80.100(3) effective at that time. *Id*. at 62a-65a.

[2] This language appears in cards employees signed upon hiring prior to August 2017 and the new cards signed shortly before *Janus*. One example each is included in the appendix. Pet. App. 81a, 84a.

After *Janus*, rather than inform employees of their newly-acknowledged rights, the State and WFSE agreed to amend the 2017-2019 CBA a second time to continue restricting employees' ability to exercise their *Janus* rights. *Id*. at 66a-73a, 86a. In a MOU dated July 6, 2018, the State and WFSE removed the CBA's agency fee provision, but again agreed pursuant to RCW 41.80.100(3)(a) to continue to honor "the terms and conditions" of the payroll deduction authorization cards as the "written authorization" to dues and fee deductions required by that statute – regardless whether employees signed the cards before or after *Janus*. *Id*. at 73a, 62a. The State also agreed to distribute the cards to employees, *id*. at 66a, and cease the deductions only upon "confirmation from the Union" that the terms of the cards had been honored. *Id*. at 73a. The Washington Legislature explicitly codified these policies into law when it amended RCW 41.80.100 on July 28, 2019.[3] Like the MOUs here, the current statute authorizes, but places no limits on, restrictions on employees' First Amendment rights and does not require that employees be informed of those rights.

Nowhere in this process did the State take it upon itself to notify employees of their newly-recognized constitutional rights, or require WFSE to do so; nor did WFSE ever take steps to inform employees of those rights. Instead, in the face of this Court's decision in *Janus* to recognize expanded constitutional freedoms

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[3] "An employee's request to revoke authorization for payroll deductions must be. . .in accordance with the terms and conditions of the authorization" and "[t]he employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions." *See* RCW 41.80.100(2)(d) and (g). *Id*. at 54a-55a. These provisions continue to be applicable to putative class members.

for individual public employees, the State and WFSE worked together to protect WFSE's pecuniary interests by inducing employees to restrict rights they did not know they had.

C. Public employers and unions commonly use narrow escape period policies to restrict when employees can exercise their right under *Janus* not to subsidize a union and its speech.

Washington and WFSE are not the only governmental entity and union that have employed such methods before and after *Janus* to suppress employees' exercise of their constitutional rights under *Janus*, as evidenced by the host of cases across the country involving these policies. *See id*. at 19a. Additionally, since this court issued *Janus*, states throughout the country have enacted statutes that authorize and enforce restrictions on when employees can choose to stop subsidizing union speech. These include California (Cal. Gov't Code § 1153(g)-(h)), Nevada (Nev. Rev. Stat. § 288.505(1)(b)), Oregon (Or. Rev. Stat. § 243.806(4)(b) and (6)), Hawaii (Haw. Rev. Stat. § 89-4(c)),[4] Colorado (Colo. Rev. Stat. § 24-50-1111(2)), Illinois (5 Ill. Comp. Stat. § 315/6(f)) and 115 Ill. Comp. Stat. § 5/11.1(a)), New Jersey (N.J. Stat. §52:14-15.9e), and Delaware (Del. Code Tit. 19 § 1304). These statutes impose no limit on restrictions on employees' exercise of their *Janus* rights and do not require public employers or unions to notify employees of their rights. In short, states and unions across the country have taken measures to protect union interests by preventing public employees from learning

[4] Hawaii's statute took effect shortly before *Janus* on April 24, 2018. *See* Haw. Rev. Stat. § 89-4(c).

of and exercising their newly-acknowledged First Amendment rights under *Janus*.

D. The State and WFSE prevented Petitioners from exercising their *Janus* rights based on alleged "consent" obtained in payroll deduction authorization cards signed before *Janus*.

Petitioners Melissa Belgau, Donna Bybee, Richard Ostrander, Katherine Newman, Miriam Torres, Gary Honc, and Michael Stone ("Employees") are Washington state employees who were prevented by the State and WFSE from exercising their *Janus* rights pursuant to the scheme described above.

The State forced Employees to be exclusively represented by WFSE and pay, at a minimum, agency fees to fund WFSE's speech. Pet. App. 62a-64a, 86a, 88a. Employees became WFSE members in this context shortly after being hired (between May 2005 and January 2017). *Id*. at 6a, 61a-64a, 88a-89a. In the months before this Court's *Janus* decision (between November 2017 and April 2018), WFSE leveraged the threat of compelled agency fees and its own status as exclusive bargaining representative to induce Employees into signing the new restrictive payroll deduction authorization cards that the State authorized and agreed to enforce. *Id*. at 7a, 83a-84a, 87a-88a.[5] However, within days after *Janus*, Employees

[5] The new cards contain language suggesting that employees who were already WFSE members must sign them to remain WFSE members, and thus avoid losing the ability to vote on their employment contract. Pet. App. 83a-84a. ("YES! I want to be a union member."). In fact, however, WFSE did not require members to sign the new cards to remain members; nor did WFSE offer employees new consideration in the form of new or increased

learned of and attempted to exercise their right under *Janus* not to subsidize WFSE and its speech by resigning their union memberships and objecting to the deduction of any union dues or fees from their wages. *Id*. at 8a, 89a. Neither the State nor WFSE honored Employees' objections.

Instead, WFSE processed their membership resignations and withdrew their membership benefits, but pursuant to RCW 41.80.100, the amended 2017-2019 CBA, and the cards Employees signed before *Janus*, the State and WFSE prevented Employees from exercising their *Janus* rights by continuing to deduct "union dues" from Employees' wages over their objections as nonmembers until each Employee's next escape period – the last of which expired in April 2019. *Id*. at 8a, 90a.

The State and WFSE continue to apply these policies under current RCW 41.80.100 to putative class members who have resigned union membership and objected to union dues and fee deductions, but who have been, or continue to be, prevented from exercising their *Janus* rights based on payroll deduction authorization cards signed before *Janus*. Pet. App. 14a-16a, 54a-55a, 104a.

E. Proceedings Below

On August 2, 2018, Employees filed this class action lawsuit on behalf of themselves and similarly situated individuals in the U.S. District Court for the Western District of Washington against the State and WFSE, seeking to enjoin the continued deduction of union fees from their wages as nonmembers and, *inter alia*,

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membership benefits in exchange for restricting their right not to subsidize WFSE as nonmembers. *Id*. at 83a-84a, 87a-88a.

compensatory damages from WFSE in the form of all dues and fees deducted from their wages in violation of the First and Fourteenth Amendments. *Id*. at 8a, 112a-115a.[6] Employees argued that the deductions were unconstitutional because they never voluntarily and knowingly waived their First Amendment right under *Janus* not to subsidize union speech. *Id*. at 8a, 112a-115a. Employees claimed that RCW 41.80.100 and the 2017-2019 CBA (and its amendments) were unconstitutional because they authorized and required the State to deduct union dues and fees from their wages based on "authorization" falling short of the affirmative consent required by the First Amendment, *i.e*., without a waiver of their First Amendment *Janus* rights. *Id*.

On stipulated facts, Pet. App. 85a-93a, the district court denied injunctive relief and granted summary judgment in favor of the State and WFSE, finding that "*Janus* does not apply" to Employees because they had joined WFSE and were, therefore, not entitled to a knowing waiver of their First Amendment rights. *Id*. at 44a. The district court also found that WFSE could not be liable under 42 U.S.C. § 1983 because unions are not state actors when they collectively bargain with states to authorize restrictions on employees' right not to subsidize union speech, and work together

[6] Employees seek repayment of union dues deducted from their wages going back to the limitations period, because neither the State nor WFSE can show that, at any point, Employees voluntarily, knowingly, and intelligently waived their right under *Janus* not to subsidize union speech. Pet. App. 116a. Alternatively, Employees seek repayment of union fees deducted from their wages post-*Janus* after they resigned their union memberships. *Id.*

with states to deduct union dues or fees from employees' wages. *Id*. at 40a-41a.

The Ninth Circuit affirmed, finding that evidence of union membership alone, rather than proof of a voluntary and knowing waiver, showed consent for the State to deduct money from Employees' wages and remit it to WFSE – not only while Employees were union members but also post-*Janus* as nonmembers after they attempted to exercise their *Janus* rights. *Id*. at 16a-20a. The court reasoned that employees who join a union do not enjoy *Janus'* protections because "*Janus* does not address [the] financial burden of union membership." *Id*. at 18a. The court also quickly concluded without analysis in its final paragraph that Employees remained "subject to a limited payment commitment period" after *Janus* as objecting nonmembers even in the absence of a waiver. *Id*. at 20a. The court also affirmed the district court's conclusion that WFSE was not a state actor. *Id*. at 14a.[7]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit found that evidence of union membership alone, rather than a voluntary and knowing waiver, shows that employees consent to union dues and fee payments, and that *Janus'* protections do not extend to public employees who become, or once were, union members. *Id*. at 16a-20a. This conflicts with this Court's clear language in *Janus*, which requires employees to waive their First Amendment right under *Janus* not to subsidize union speech before a state deducts union dues or fees from their wages. *See*

[7] The district court had jurisdiction of Employees' case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, 28 U.S.C. § 1343, 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 1367. The Ninth Circuit had jurisdiction over this action under 28 U.S.C. § 1291.

138 S. Ct. at 2486. Additionally, the Ninth Circuit's holding that unions are not state actors conflicts with *Janus* and other Supreme Court precedent. It also creates a split with the Seventh Circuit Court of Appeals on the same issue. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 942 F.3d 352, 356-57 (7th Cir. 2019) ("*Janus II*").

The questions presented for review are of critical importance because the decision below eviscerates *Janus'* protections against compelled speech, and presents important federal questions concerning *Janus'* application to policies widely practiced across the country. Rather than allowing *Janus* to end the "practical problems and abuse" wrought by the *Abood* regime, *Janus*, 138 S. Ct. at 2460, the decision below resurrects these unfortunate benchmarks, and reintroduces uncertainty in an area where *Janus* should have given the lower courts clear guidance. The Ninth Circuit's attempt to "cabin[]" *Janus'* application effectively nullifies *Janus'* entire holding regarding waiver and strips public employees of the presumption against the waiver of constitutional rights. Pet. App. 18a-19a. The decision incentivizes legislatures and unions to use union membership to inoculate their conduct from constitutional scrutiny and impose even harsher restrictions on employees' First Amendment rights than those involved here.

The Court should review and correct the Ninth Circuit's distortion of *Janus* to prevent *Janus'* waiver requirement from becoming a dead letter, resolve the circuit split, and ensure going forward that *Janus'* First Amendment protections are recognized and respected.

I. This Court Should Grant Review To Make Clear That A Voluntary And Knowing Waiver of the First Amendment Right Not To Subsidize A Union And Its Speech Is Required Before States and Unions Seize Money From Public Employees' Wages, And That Evidence Of Union Membership Alone Does Not Satisfy This Standard.

This Court held in *Janus* that the First Amendment guarantees public employees the right not to subsidize union speech. *See* 138 S. Ct. at 2486. In so doing, the Court issued the following rule:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938); see also *Knox*, 567 U.S., at 312–313, 132 S. Ct. 2277. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682, 119 S. Ct. 2219, 144 L.Ed.2d 605 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. In short, the government and unions cannot take monies for union speech from public employees without clear and compelling evidence that the employees waived their First Amendment right not to subsidize union speech. Yet, this is precisely what the State and WFSE did here.

A. The Ninth Circuit's decision conflicts with *Janus* because a state cannot seize union dues from the wages of its employees who become union members without proof they waived their First Amendment right not to subsidize a union and its speech.

The Ninth Circuit's decision conflicts with *Janus* by holding that proof of a constitutional waiver is *not* required for a state and union to seize union dues from public employees' wages. Pet. App. 19a-20a. Rather, the court implicitly applied contract law and held that evidence of union membership alone suffices even if states and unions fail to show that employees waived their right not to subsidize union speech. *Id*. at 16a-17a. But the two are not equivalent. *See D.H. Overmyer Co. Inc. v. Frick Co.*, 405 U.S. 174, 183 (1972) ("More than mere contract law. . .is involved" when analyzing contracts containing restrictions on constitutional rights). A constitutionally sufficient waiver requires that parties know of the right in question and voluntarily and intelligently waive that right. *See Johnson*, 304 U.S. at 464 (cited in *Janus*, 138 S. Ct. at 2486); *Curtis Publishing Co.*, 388 U.S. at 145 (cited in *Janus*, 138 S. Ct. at 2486).[8]

[8] *Cohen v. Cowles Media Co*., 501 U.S. 663 (9th Cir. 1971), cited by the court below, does not mean that any contract valid under state law is automatically constitutional, Pet. App. 16a. The

Union membership does not itself prove that an employee (1) knew of her First Amendment right under *Janus* not to subsidize union speech or (2) intelligently decided to waive that right. No language in the payroll deduction authorization cards notified Employees that they have a right not to subsidize WFSE to any degree as nonmembers, or that signing the agreement waives that right. Pet. App. 81a, 83-84a. Moreover, Employees signed the agreements before this Court even recognized that right in *Janus*. *Id*. at 6a-7a, 83a-84a, 87a. The cards also threatened Employees with state-compelled agency fees if they declined union membership. *Id*. at 81a, 83a-84a. The cards cannot possibly constitute knowing and intelligent waivers of Employees' right not to subsidize union speech; nor did the Ninth Circuit claim otherwise.

The court below reasoned that union membership by itself shows that Employees properly consented to government dues deductions, and declared that *Janus* "in no way created a First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id*. at 20a. But claiming that a waiver is not necessary because an employee voluntarily consented to union payments puts the proverbial cart before the horse because it inverts the standard this Court laid down in *Janus*. There can be no valid dues or fee deductions without

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majority in *Cohen* did not address the waiver question, likely because the defendant argued it was categorically exempt under the First Amendment from agreements to restrict First Amendment rights, *i.e*., that its right to free speech was *unwaivable*. *Id.* at 672 ("The Minnesota Supreme Court's incorrect conclusion that the First Amendment barred Cohen's claims may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established. . ."). Employees here do not make this argument.

first establishing an affirmative waiver of First Amendment rights. *See Janus*, 138 S. Ct. at 2486. A court cannot, consistent with *Janus*, determine if a public employee consented to a state's union dues or fee deductions without determining if that alleged consent was shown by clear and compelling evidence to be a knowing and intelligent waiver of the employee's right not to subsidize union speech.

Moreover, it is not necessarily true that union membership indicates voluntary consent to government dues and fee deductions. Employees and other coworkers who signed the payroll deduction authorization cards prior to June 27, 2018 were unconstitutionally required at the time to pay compulsory fees to WFSE if they declined union membership. Pet. App. 6a, 77a-78a, 84a, 88a. Employees' decisions to sign the cards under this unconstitutional duress cannot be considered "voluntary", let alone "knowing." In any event, given these compulsory fees at the time, the "voluntary" language in the cards cannot possibly be construed as voluntarily bypassing the right under *Janus* not to subsidize *any* union speech as nonmembers – a right which the State and WFSE undisputedly deprived Employees of at the time. *Id*. at 83a-84a.

The Ninth Circuit unduly cabined *Janus'* protections only to "nonmembers" who were "not asked" to pay union dues. Pet. App. 17a. But a *Janus* waiver protects employees' fundamental First Amendment right against compelled political speech, which is a right *all* public employees possess – union members and nonmembers alike. Assuming that employees who become union members understood and waived their

Janus rights is contrary to the presumption against the waiver of constitutional rights.[9]

The Ninth Circuit acted contrary to *Janus* by finding that mere union membership is a substitute for the constitutional waiver this Court required for the government and unions to take monies for union speech from employees' wages.

B. The Ninth Circuit's decision conflicts with *Janus* because a state cannot seize union fees from the wages of objecting, non-union employees after they resign union membership without proof that they waived their right not to subsidize a union and its speech.

Even if the court below were correct that *Janus* only requires prior First Amendment waivers from nonmembers, the court deviated from its own logic by finding that the State and WFSE could seize union fees from Employees' wages *as objecting non-union employees* without evidence they knowingly waived their right not to subsidize WFSE and its speech as

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[9] Moreover, attempts to unearth two standards of consent in *Janus'* holding – a heightened waiver standard for nonmembers and some other lower standard for members – are unpersuasive. It makes no sense to decide which level of standard applies based on an employee's *future* decision to either remain a nonmember or become a member (and then apply the relevant analysis retroactively), *e.g.*, a new nonmember employee who is presented a payroll deduction authorization card upon being hired. The only workable (and logical) practice must be to apply the *same* standard of consent to all employees when they are presented with cards that authorize state deduction of union payments from their wages. (That standard must be a waiver standard, since that was the only standard discussed by this Court in its *Janus* holding. *See* 138 S. Ct. at 2486.)

nonmembers. Employees successfully resigned their WFSE memberships and WFSE withdrew their membership benefits, but the State and WFSE compelled them to continue subsidizing WFSE and its speech until the ten-day escape period was satisfied. Pet. App. 7a-8a, 89a-90a. If *Janus*' waiver requirement applies to anyone, it applies to nonmember employees who are being compelled to pay for union speech over their objections.

The Ninth Circuit declined to grapple with this important issue, and *did not even apply* constitutional scrutiny to the ten-day escape period policy that compels the payment of union fees from nonmembers. Instead, the court focused almost exclusively on *Janus*' application to union members. It never explains how it is possible, under *Janus*, that payments for union speech can constitutionally be seized from nonmember employees over their objections without proof they waived their First Amendment rights. Further, the court's reasoning also suffers from a related chronological defect: Employees *were* nonmembers upon being hired, as are virtually all employees, and were at that time entitled to the presumption against the waiver of constitutional rights.[10] Pet. App. 6a.

Ignoring all this, the court instead declared, without analysis, that employees who resign their union memberships are still bound by their "limited payment commitment period." *Id*. at 20a. The Ninth Circuit's reasoning is dangerous because it means that a public employee's one-time decision to join a union deprives

[10] Moreover, the court's almost exclusive focus on union membership led it to address arguments Employees never made, *e.g*., that *Janus* did not "recognize a member's right to pay nothing to the union" and "*Janus* does not extend a First Amendment right [to members] to avoid paying union dues." Pet. App. 18a-19a.

her of all First Amendment protections. This stripping of constitutional guarantees is effective no matter how onerous the restrictions imposed by the agreement, or whether she ever knew of her First Amendment right not to subsidize the union's speech. *See infra* at 25-28.

The sole effect of escape period policies is to compel employees to contribute money to propagate union advocacy that employees do not wish to support. Yet, under our Constitution, it is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). At the very least, *Janus* requires employees to waive their First Amendment rights before states and unions seize nonmember fees over employees' objections during an escape period policy's "limited payment commitment period."

Janus forecloses the notion that states and unions can constitutionally seize union fees from objecting nonmembers, until an escape period is satisfied, without proof these employees knowingly, voluntarily, and intelligently waived their right not to subsidize union speech. The Court should review this case to make this clear and protect the constitutional rights of *all* public employees, not just nonmembers who are "not asked" to subsidize union speech. Pet. App. 17a.

II. This Court Should Grant Review to Hold That Unions Are Liable Under 42 U.S.C. § 1983 When They Work Jointly With States To Violate Public Employees' First Amendment Rights By Seizing Money From Their Wages Without The Affirmative Consent Required By The First Amendment.

In clear conflict with the precedents of this Court and the Seventh Circuit Court of Appeals, the Ninth Circuit concluded that WFSE was not a state actor and could not be liable under 42 U.S.C. § 1983. Pet. App. 14a. Conduct under "the color of law," *i.e.*, state action,[11] subjects both government and private actors to liability under 42 U.S.C. § 1983 when the alleged deprivation is "caused by the exercise of some right or privilege created by the State. . ." and the party charged with the deprivation is "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). The Ninth Circuit's decision to relieve WFSE of any possible liability under 42 U.S.C. § 1983 conflicts with this well-established standard, and review by this Court is warranted.

[11] "In cases under § 1983, 'under the color of law' has consistently been treated as the same thing as the 'state action' requirement under the Fourteenth Amendment." *Lugar*, 457 U.S. at 928.

A. The Ninth Circuit's conclusion that WFSE was not a state actor conflicts with this Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The Illinois statute this Court held unconstitutional in *Janus* required state seizure of union payments from employees' wages without the affirmative consent the First Amendment requires (a waiver). *See* 138 S. Ct. at 2486. Here, the underlying state action is the same as that in *Janus*: state seizure of money from employees' wages on behalf of a union.

The State seizes this money pursuant to the demand of a union which collectively bargained with the State to obtain from employees the "authorization" to union dues and fee deductions required by RCW 41.80.100. States and unions must both be held liable when they jointly participate in seizing employees' wages pursuant to such procedures without the authorization *required by the First Amendment* – as they have done here by deducting money from Employees' wages without proof they voluntarily and knowingly waived their right not to subsidize union speech.

Any argument that WFSE's conduct pursuant to this arrangement is not state action is impossible to reconcile with this Court's holding in *Janus* that both "States *and* public-sector unions" may not compel union payments "from nonconsenting employees" – with proper "consent" defined as a waiver of First Amendment rights. *See* 138 S. Ct. at 2486 (emphasis added). This holding presupposes that unions are state actors that can violate the First Amendment.[12]

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[12] At the very least, the nonmember fees assessed to Employees by the State and WFSE after Employees resigned membership

Janus makes clear that a state's deduction of union dues or fees from its employees' wages is much more than simply a "ministerial task" unworthy of First Amendment protection. Pet. App. 12a. When such deductions are made outside the boundaries of First Amendment protections, they result in a "windfall" of "billions" of illegally-seized dollars that are funneled to unions to fund their political speech. *See Janus*, 138 S. Ct. at 2486. Relieving unions of liability when they work jointly with states to receive this windfall only incentivizes further and harsher First Amendment violations.

B. The Ninth Circuit's conclusion that WFSE was not a state actor conflicts with the Seventh Circuit Court of Appeals' decision on the same question in *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*), on remand.

In *Janus II*, the Seventh Circuit Court of Appeals found that AFSCME, Council 31's conduct was state action because its receipt of money from employees' wages was "attributable to the state." *See* 942 F.3d at 361. The court found it "sufficient for the union's conduct to amount to state action" that a state "deducted fair-share fees from the employees' paychecks and transferred that money to the union, which then spent it on . . . activities pursuant to the collective bargain-

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constitute state action, as this Court required proof of a constitutional waiver prior to agency fees and "*any* other payment" to a union "deducted from a nonmember's wages." *Id*. at 2486 (emphasis added). This also broadly includes "*any* other attempt" to collect such payments. *Id*. (emphasis added). A prior constitutional waiver could not be required if these deductions were not state action.

ing agreement." *Id*. The court "conclude[d] that AFSCME is a proper defendant under section 1983" because "AFSCME was a joint participant with the state in the agency-fee arrangement." *Id*. (citing *Lugar*, 457 U.S. at 935 and *Tulsa Professional Collection Services, Inc. v. Pop*e, 485 U.S. 478, 108 S. Ct. 1340, 99 L.Ed 2d 565 (1988)).

Similarly here, WFSE's joint participation with the State in collectively bargaining for *the State* to deduct union dues and fees from employees' wages upon WFSE's demand is "sufficient for the union's conduct to amount to state action." *Id*. It makes no difference whether the deductions are "the collection of agency fees" or the "transfer of union dues." Pet. App. 13a. WFSE is using a state-prescribed procedure to seize another's wages with overt assistance from the State, just like in *Janus*, *Lugar*, and the cases cited *infra* at n. 14.

Through RCW 41.80.100 and the CBA, WFSE claims a special right it could not acquire in a simple private agreement with employees; specifically, the State's use of the State payroll system pursuant to statute to seize money from the state-issued paychecks of state employees upon WFSE's exclusive demand. WFSE's joint participation with the State in this procedure is quintessential state action.

C. The Ninth Circuit's conclusion that WFSE was not a state actor conflicts with this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The Ninth Circuit's conclusion that WFSE's conduct "do[es] not trigger state action and independent constitutional scrutiny" because "[a]t bottom Washington's

role was to enforce a private agreement", Pet. App. 14a, is contrary to this Court's finding of state action in challenges to systems authorizing state seizures of money or property. The state action here is identical to the state action in *Lugar*: government seizure of money or property pursuant to a state-created "system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." *Lugar*, 457 U.S. at 942. As in *Lugar*, the State here seized Employees' property (wages) based on WFSE's *ex parte* application.[13]

As to *Lugar's* first prong, the Ninth Circuit wrongly found that Employees' claimed constitutional deprivation did not result from "the exercise of some right or privilege created by the State. . ." *Id*. at 9a-10a. The "source of the alleged constitutional harm" here, Pet. App. 10a, is the State's seizure of its employees' wages and a union's statutory authority to restrict the authorization and revocation of those seizures together with its demand for those state seizures without the authorization required by the First Amendment – each of which is a "right or privilege created by the State" in RCW 41.80.100 and which the State and WFSE twice agreed to incorporate into Article 40 of the 2017-2019 CBA. Pet. App. 66a-75a. In any event,

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[13] *See* MOU dated July 6, 2018 at Art. 40.3 and 40.6, respectively ("[T]he Union will provide [the State] the percentage and maximum dues [to] be deducted from the employee's salary" and "[e]very effort will be made to end the deduction. . .after receipt by the Employer of confirmation from the Union that the terms of the employees signed membership card regarding dues deduction revocation have been met."). Pet. App. 67a, 73a. *See also* current RCW 41.80.100(2)(g) ("The employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions."). Pet. App. 55a.

ample Court precedent, including *Lugar*, demonstrate that an allegedly voluntary agreement authorizing the seizures does not obviate state action (*e.g.*, a promissory note, lease agreement, or, as is the case here, a payroll deduction authorization card).[14] Pieces of paper cannot not deprive Employees' of any rights.

As to *Lugar's* second prong, WFSE can fairly be described as a state actor. *Lugar*, 975 F.3d at 947. Pet. App. 10a. It is difficult to conceive of a scenario in which the State could do *more* to "authorize[]" or "facilitate[]" the alleged unconstitutional conduct in this case. *Id*. The State created its authority to deduct union dues and fees from its employees' wages pursuant to "authorization" which can be less than a First Amendment waiver (at least as applied to Employees and putative class members), outsourced to WFSE the authority to acquire this "authorization" and restrict its revocation without limitation, and agreed to make such deductions pursuant to WFSE's exclusive demand. WFSE became a "willful participant in joint action with the State. . ." when it (twice) agreed with the State in the CBA to implement this scheme. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

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[14] *See N. Georgia Finishing, Inc. v. Di-Chem, Inc*., 419 U.S. 601, 603-04 (1975) (garnishment of bank account based on debt alleged to be established in a private purchase agreement for goods); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604, 616-18 (1974) (sequestration of property based on private purchase agreement); *D.H. Overmyer Co. Inc. of Ohio v. Frick Co.,* 405 U.S. 174, 186-876 (1972) (judgment against debtor without notice pursuant to private cognovit note); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 337-38 (1969) (state garnishment of employee's wages to satisfy alleged debt established in a private promissory note); *Fuentes v. Shevin*, 407 U.S. 67, 69-70 (1962) (replevin using state agents pursuant to a private purchase agreement); *Jackson v. Galan*, 868 F.2d 165, 167-68 (5th Cir. 1989) (wage garnishment based on private promissory note).

The court below incorrectly assumed that the necessary joint action between WFSE and the State had to relate to drafting or executing the payroll deduction authorization cards themselves. Pet. App. 11a (". . .when Employees signed the membership cards that authorized the dues deductions, they did not do so because of any state action."). In *Lugar*, however, the question was whether "a private party's joint participation with state officials *in the seizure of disputed property* is sufficient to characterize that party as a state actor. . .", a question this Court answered in the affirmative. 457 U.S. at 941-42 (emphasis added). The question was *not* whether the government played a part in drafting or executing the lease agreement that allegedly created a financial obligation. *Id*.

Similarly here, the question is *not* whether the State and WFSE jointly acted to assist or compel execution of the payroll deduction authorization cards. Rather, the proper question is whether WFSE's "joint participation with state officials *in the seizure of disputed property* is sufficient to characterize [WFSE] as a state actor." *Lugar*, 457 U.S. at 941 (emphasis added). As in *Lugar*, the answer to this question is "yes." The Ninth Circuit, like the Fourth Circuit Court of Appeals in *Lugar*, erred in holding that "'joint participation' required something more than invoking the aid of state officials to take advantage of state-created attachment procedures." *Lugar*, 457 U.S. at 942. WFSE's implementation of state seizure procedures and demand to the State to seize money from Employees' wages – whether union dues or nonmember fees – is state action; nothing more is required.

III. The Questions Presented Are of Exceptional Federal Importance And Warrant Review Because the Decision below Sanctions Widespread Unconstitutional Restrictions On Public Employees' First Amendment Rights, Incentivizes Future Harsher Restrictions, And Leaves Large Numbers of Public Employees' Rights Susceptible to Abuse.

The Ninth Circuit's decision below has dangerous ramifications that the Court should address. As *Abood* did 43 years ago, it invites "practical problems" in application and the "abuse" of public employees' fundamental First Amendment rights. *Janus*, 138 S. Ct. at 2460.

First, the First Amendment rights at stake in this case are of the utmost importance. This Court in *Janus* observed that "[c]ompelling individuals to mouth support for views they find objectionable violates . . . [a] cardinal constitutional command." 138 S. Ct. at 2463. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" Yet, this was the sole purpose of the scheme implemented by the State and WFSE. *See supra* at 2-7.

Second, the Ninth Circuit gutted *Janus* of its protections against compelled funding of political speech because it effectively nullified *Janus'* entire holding regarding constitutional waivers and the presumption against the waiver of constitutional rights. *See Janus*, 138 S. Ct. at 2486. If a *Janus* waiver is unnecessary prior to any type of state-deducted union payment from an employee's wages so long as the employee became a union member at any point,

the heightened waiver standard meant to safeguard public employees' constitutional rights would *never apply to any public employee anywhere*. States and unions could sidestep the knowing waiver standard simply by inserting a membership provision into a payroll deduction authorization card (or CBA or statute). (It is telling that in over two years of litigation, neither the Respondents nor the lower courts ever posited a post-*Janus* fact scenario in which a *Janus* waiver *would* apply under their interpretation of *Janus'* holding.)

This leaves legislatures and unions free to severely restrict *Janus* rights simply because, at some point in the past, employees once decided to join a union – even employees who never knew of their rights in the first place (including employees who became union members under a compelled agency fee regime, as is true here). If union membership inoculates such restrictions from constitutional scrutiny – including, as is the case here, future seizure of union payments from *objecting non-union employees* – nothing prevents states and unions from binding employees to subsidize a union's political viewpoint for much longer than a year or imposing convoluted procedures employees must navigate to decline union membership and stop subsidizing union speech.

The Ninth Circuit's conclusion regarding WFSE's lack of state action similarly gives unions a free hand to frustrate employees' rights so long as state law does not stop them. Unions would be free to devise a panacea of restrictions on public employees' rights unbound by First Amendment strictures. For example, most states which authorize and enforce these restrictions do not limit the duration of escape period policies or the procedures employees must navigate to

resign union membership and not subsidize union speech; nor do *any* of them require states or unions to notify employees of their rights. *See supra* at 2-7.

Third, the decision below creates a perverse incentive for governments to outsource their obligation to acquire affirmative authorization to dues or fee deductions to unions, which are empowered to restrict employees' rights without limitation pursuant to their own interests, free of any liability under the First Amendment or 42 U.S.C. § 1983.[15] Authorization prior to state deduction of union dues and fees from public employees' wages is a requirement imposed *by the Constitution*. It defies reason to acknowledge that the Constitution requires such affirmative authorization but, at the same time, relieve of all possible constitutional liability the parties responsible for obtaining that authorization.

Finally, the practices in this case restricting employees' rights are widespread and affect millions of public employees.[16] Among WFSE-represented employees alone, the State and WFSE have gotten over 16,000 employees to sign payroll deduction authoriza-

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[15] This Court recognized the dangers posed by such schemes in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 308 (1986) ("[T]he most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the Union, which is an interested party. . .") (internal quotations omitted).

[16] The decision below affects over 2.6 million public employees within the Ninth Circuit alone. Source: U.S. Census Bureau; "State and Local Government: Employment and Payroll Data (June 2020)", *available at* https://www2.census.gov/programs-surveys/apes/datasets/2019/2019_state_local.xls (last visited February 10, 2021). Thousands, perhaps millions, of public employees in states across the country are also subjected to restrictions prohibiting them from exercising their First Amendment rights. *See supra* at 5.

tion cards identical to the cards here (as of 2018), which restrict employees' ability to exercise their right under *Janus* not to subsidize WFSE's speech and threaten employees with agency fees. Pet. App. 87a-88a. Cases across the country involving these policies demonstrate that many public employers and unions already use the policies challenged here to restrict employees' from exercising their *Janus* rights. Pet. App. 19a.[17] Additionally, at least one other Court of Appeals recently issued decisions undermining *Janus*' protections. *See LaSpina v. SEIU Pennsylvania State Council*, --- F.3d ---, No. 19-3484, 2021 WL 137742, at *7-9 (3d Cir. 2021); *Fischer v. Governor of New Jersey*, --- Fed.Appx. ---, No. 19-3914, 2021 WL 141609, at *8 (3d Cir. Jan. 15, 2021) (unpublished). Similarly, states throughout the country have passed statutes that authorize restrictions on when employees can choose to stop subsidizing union speech. *See supra* at 5.

This Court spent forty (40) years subsequent to *Abood* drawing and redrawing lines in the sand limiting how far governments and unions could go in restricting the limited constitutional rights protected in *Abood*, finally acknowledging in *Janus* the unavoidable conclusion that *Abood's* constantly-evolving regime caused countless "practical problems" and "abuse." *Janus*,

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[17] *See also Pellegrino v. New York State United Teachers*, No. 18CV3439NGGRML, 2020 WL 2079386 (E.D.N.Y. Apr. 30, 2020); *Adams v. Teamsters Union Local 429*, No. 1:19-CV-336, 2020 WL 1558210 (M.D. Pa. Mar. 31, 2020); *Lutter v. JNESO et al*, No. 1:19-cv-13478 (D. N.J. 2020); *Zeigler v. AFSCME Council 13, et al.,* No. 2:20-cv-00996 (W.D. Pa); *Baro v. AFT*, No. 1:20-cv-02126 (N.D. Ill.); *Mandel v. SEIU Local 73*, No. 1:18-cv-08385 (N.D. Ill.); *Nance v. SEIU*, No. 1:20-cv-03004 (N.D. Ill. 2020); *Troesch v. CTU*, No. 1:20-cv-02682 (N.D. Ill.); *Hoekman v. Ed. Minn*., No. 18-cv-1686 (D. Minn.); *Prokes v. AFSCME 5*, No. 0:18-cv-2384 (D. Minn).

138 S. Ct. at 2460. Left to stand, the decision below is a harbinger of a similarly evolving, problematic, and abusive regime, characterized by public employers and unions pushing the envelope of permissible restrictions on First Amendment rights and leaving to individual employees the burden of filing lawsuits to stop the practices.

The decision below tests whether this Court meant what it said in *Janus*: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment unless the employee affirmatively consents to pay" by "waiving their First Amendment rights. . ." *Janus*, 138 S. Ct. at 2486. "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id*. The Ninth Circuit did not take these pronouncements seriously, and its decision should be reversed.

IV. This Case Is An Excellent Vehicle to Address the Dangers Posed By The Decision Below.

This Court has before it a circuit court opinion that (a) sanctions draconian restrictions on when and how millions of public employees can exercise their First Amendment *Janus* rights, (b) incentivizes governments and unions to impose even more severe restrictions, and (c) creates an unworkable regime which leaves public employees' First Amendment rights susceptible to abuse. This case is an excellent vehicle to address these dangers and ensure *Janus* retains vitality.

First, the facts are undisputed and involve methods commonly used by public employers and unions to

restrict employees' First Amendment rights. State statutes and/or CBAs typically impose such restrictions themselves or authorize unions to impose them. They also cede exclusive control of regulating the authorization and revocation of state wage seizures to the unions who benefit from the seizures. Washington's practices did (and do) both. *See supra* at 2-7.

Second, the facts are illustrative of the conduct incentivized by the decision below and similar cases. Pet. App. 19a. Like other state statutes that require "authorization" to government union dues deductions, the State outsourced to WFSE the role of acquiring this required "authorization" and imposed no limitations on restricting its revocation. WFSE leveraged this authority, along with agency fees (at the time) and its exclusive representation, to (i) induce Employees into severely restricting rights they did not know they had and (ii) require them to subsidize WFSE's political speech against their will.

This case presents the Court with a clean and direct opportunity to (again) clearly establish that a knowing, voluntary, and intelligent waiver of the First Amendment right not to subsidize a union's political speech is the proper standard courts must apply to determine if public employees have affirmatively consented to government union dues or fee deductions from their wages. *See Janus*, 138 S. Ct. at 2486.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35137
D.C. No. 3:18-cv-05620-RJB

MELISSA BELGAU; DONNA BYBEE; MICHAEL STONE; RICHARD OSTRANDER; MIRIAM TORRESPL; KATHERINE NEWMAN; GARY HONC,

Plaintiffs-Appellants,

v.

JAY ROBERT INSLEE, in His Official Capacity as Governor of the State of Washington; DAVID SCHUMACHER, in His Official Capacity as Director of the Washington Office of Financial Management; JOHN WEISMAN, in His Official Capacity as Director of the Washington Department of Health; CHERYL STRANGE, in Her Official Capacity as Director of the Washington Department of Social Health and Services; ROGER MILLAR, in His Official Capacity as Director of the Washington Department of Transportation; JOEL SACKS, in His Official Capacity as Dir. of Washington Department of Labor and Industries; WASHINGTON FEDERATION OF STATE EMPLOYEES, (AFSCME, Council 28),

Defendants-Appellees,

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted December 10, 2019
Seattle, Washington

Filed September 16, 2020

Before: M. Margaret McKeown and
Morgan Christen, Circuit Judges, and
M. Douglas Harpool,* District Judge.

Opinion by Judge McKeown

OPINION

SUMMARY**

Civil Rights

The panel affirmed the district court's dismissal of a putative class action brought pursuant to 42 U.S.C. § 1983 alleging that deduction of union dues from plaintiffs' paychecks violated the First Amendment.

Plaintiffs are public employees who signed membership agreements authorizing Washington state to deduct union dues from their paychecks and transmit them to the Washington Federation of State Employees, AFSCME Council 28 ("WFSE"). They had the option of declining union membership and paying fair-share representation (or agency) fees. After the decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.

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* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Ct. 2448 (2018), which held that compelling nonmembers to subsidize union speech is offensive to the First Amendment, employees notified WFSE that they no longer wanted to be union members or pay dues. Per this request, WFSE terminated employees' union memberships. However, pursuant to the terms of revised membership agreements, Washington continued to deduct union dues from employees' wages until an irrevocable one-year term expired.

The panel held that plaintiffs' claims against WFSE failed under § 1983 for lack of state action. The panel held that neither Washington's role in the alleged unconstitutional conduct nor its relationship with WFSE justified characterizing WFSE as a state actor. At bottom, Washington's role was to enforce a private agreement. *See Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 844 (9th Cir. 2017) ("there is no state action simply because the state enforces [a] private agreement"). Because the private dues agreements did not trigger state action and independent constitutional scrutiny, the district court properly dismissed the claims against WFSE.

Addressing whether the claims for prospective relief against Washington were moot, the panel held that the claims fell within the "capable of repetition yet evading review" mootness exception. The panel held that the challenged action, continued payroll deduction of union dues after an employee objects to union membership, capped at a period of one year, was too short for judicial review to run its course.

The panel held that the First Amendment claim for prospective relief against Washington failed because employees affirmatively consented to the deduction of union dues. The panel rejected employees' argument that the Supreme Court's decision in *Janus* voided the

commitment they made and now required the state to insist on strict constitutional waivers with respect to deduction of union dues. The panel held that *Janus* did not extend a First Amendment right to avoid paying union dues, and in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement. The panel held that neither state law nor the collective bargaining agreement compelled involuntary dues deduction and neither violated the First Amendment. The panel concluded that in the face of plaintiffs' voluntary agreement to pay union dues and in the absence of any legitimate claim of compulsion, the district court appropriately dismissed the First Amendment claim against Washington.

COUNSEL

James G. Abernathy (argued), Olympia, Washington, for Plaintiffs-Appellants.

Matthew J. Murray (argued), Scott A. Kronland, and P. Casey Pitts, Altshuler Berzon LLP, San Francisco, California; Edward E. Younglove III, Younglove & Coker PLLC, Olympia, Washington; for Defendant-Appellee Washington Federation of State Employees, (AFSCME, Council 28).

Alicia Orlena Young (argued), Senior Counsel; Kelly M. Woodward, Attorney; Robert W. Ferguson, Attorney

General; Office of the Attorney General, Olympia, Washington; for Defendants-Appellees Jay Robert Inslee, David Schumacher, John Weisman, Cheryl Strange, Roger Millar, and Joel Sacks.

OPINION

McKEOWN, Circuit Judge:

The Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* was a gamechanger in the world of unions and public employment. 138 S. Ct. 2448 (2018). In *Janus* the Court concluded that compelling nonmembers to subsidize union speech is offensive to the First Amendment. Public employers stopped automatically deducting representation fees from nonmembers.

But the world did not change for Belgau and others who affirmatively signed up to be union members. *Janus* repudiated agency fees imposed on nonmembers, not union dues collected from members, and left intact "labor-relations systems exactly as they are." *Id.* at 2485 n.27. Belgau and fellow union-member employees claim that, despite their agreement to the contrary, deduction of union dues violated the First Amendment. Their claim against the union fails under 42 U.S.C. § 1983 for lack of state action, a threshold requirement. Their First Amendment claim for prospective relief against Washington state also fails because Employees affirmatively consented to deduction of union dues. Neither state law nor the collective bargaining agreement compels involuntary dues deduction and neither violates the First Amendment. We affirm the district court's dismissal of the case.

BACKGROUND

The putative class action plaintiffs Melissa Belgau, Michael Stone, Richard Ostrander, Miriam Torres, Katherine Newman, Donna Bybee, and Gary Honc (collectively, "Employees") work for Washington state and belong to a bargaining unit that is exclusively represented by the Washington Federation of State

Employees, AFSCME Council 28 ("WFSE"). *See* RCW 41.80.080(2)–(3). Washington employees are not required to join a union to get or keep their jobs, though around 35,000 of the 40,000 employees in the bargaining unit are WFSE members. *See* RCW 41.80.050.

Employees became union members within three months of starting work. They signed membership agreements authorizing their employer, Washington state, to deduct union dues from their bi-weekly paychecks and transmit them to WFSE.

At the time Employees signed the membership cards, union dues were between 1.37% and 1.5% of base wages. They had the option of declining union membership and paying fair-share representation (or agency) fees, which were approximately 65–79% of union dues. Agency fees covered the cost incurred by the union in representing the interests of all employees—members and nonmembers alike—in the bargaining unit over the terms of employment. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232, 235 (1977), *overruled by Janus*, 138 S. Ct. 2448. The monies could not be used for First Amendment activities that were "not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235.

Joining the union conferred rights and benefits. Employees could vote on the ratification of collective bargaining agreements, vote or run in WFSE officer elections, serve on bargaining committees, and otherwise participate in WFSE's internal affairs. Employees also enjoyed members-only benefits, including discounts on goods and services, access to scholarship programs, and the ability to apply for disaster/hardship relief grants.

Based on the authorization in the membership agreements, Washington deducted union dues from

Employees' paychecks. Article 40 of the 2017–2019 collective bargaining agreement ("CBA") between Washington and WFSE required Washington to deduct "the membership dues from the salary of employees who request such deduction . . . on a Union payroll deduction authorization card," and to "honor the terms and conditions" of these membership cards. Washington law also directed Washington to collect the dues on behalf of WFSE from union members who authorized the deduction. *See* RCW 41.80.100(3)(a).[1]

In 2017, WFSE circulated a revised membership agreement. The revised card, a single-page document, headlined: "Yes!" the signatory "want[s] to be a union member." A series of voluntary authorizations followed. The signatory "voluntarily authorize[ed]" and "direct[ed]" Washington to deduct union dues and remit them to WFSE. The signatory agreed that the "voluntary authorization" will be "irrevocable for a period of one year." The signatory reiterated and confirmed these voluntary authorizations above the signature line. Employees were not required to sign the revised cards to keep their jobs or remain as WFSE members. Employees signed the revised cards.

After the Supreme Court decided *Janus* in June 2018, Washington and WFSE promptly amended the operative 2017–2019 CBA. These July 2018 and August 2018 Memos of Understanding removed Washington's authority to deduct an "agency shop fee, non-association fee, or representation fee" from

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[1] Citations are to the section numbers in effect at the time of the deductions. The current version of RCW 41.80.100, which became effective on July 28, 2019, removes the authority for collecting representation fees but leaves intact the language about collecting membership dues. *See* Washington Laws of 2019, ch. 230 §§ 15, 18.

nonmember paychecks. However, the updated provision did not change Washington's obligation to collect "membership dues" from those who authorized the deduction and to "honor the terms and conditions of each employee's signed membership cards."

After the *Janus* decision, Employees notified WFSE that they no longer wanted to be union members or pay dues. Per this request, WFSE 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. The dues were last collected from Employees when the one-year terms expired in April 2019.

In August 2018, Employees filed a putative class action against the state defendants—Washington State Governor Jay Inslee, and state agency directors and secretaries David Schumacher, John Weisman, Cheryl Strange, Roger Millar, and Joel Sacks (collectively, "Washington")—and WFSE alleging that the dues deductions violated their First Amendment rights and unjustly enriched WFSE. Employees sought injunctive relief against Washington from continued payroll deduction of union dues, and compensatory damages and other relief against WFSE for union dues paid thus far. The district court granted summary judgment for Washington and WFSE and dismissed the case.

ANALYSIS

I. THE § 1983 CLAIM AGAINST THE UNION FAILS FOR LACK OF STATE ACTION

The gist of Employees' claim against the union is that it acted in concert with the state by authorizing deductions without proper consent in violation of the

First Amendment. The fallacy of this approach is that it assumes state action sufficient to invoke a constitutional analysis. To establish a claim under 42 U.S.C. § 1983, Employees must show that WFSE deprived them of a right secured by the Constitution and acted "under color of state law." *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir. 1989). The Supreme Court has long held that "merely private conduct, however discriminatory or wrongful," falls outside the purview of the Fourteenth Amendment. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (citation omitted).

The state action inquiry boils down to this: is the challenged conduct that caused the alleged constitutional deprivation "fairly attributable" to the state? *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013); *see Blum*, 457 U.S. at 1004 ("constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains"); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (the challenged unconstitutional conduct must be "properly attributable to the State"). The answer here is simple: no.

We employ a two-prong inquiry to analyze whether Washington's "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 plaintiff complains." *Ohno*, 723 F.3d at 994; *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (two-prong test). The first prong—"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'"—is not met here. *Ohno*, 723 F.33d at 994 (quoting *Lugar*, 457 U.S. at 937). It is important to unpack the essence of

Employees' constitutional challenge: they do not generally contest the state's authority to deduct dues according to a private agreement. Rather, the 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. *Id.*

Nor can Employees prevail at the second step—"whether the party charged with the deprivation could be described in all fairness as a state actor." *Id.* As a private party, the union is generally not bound by the First Amendment, *see United Steelworker of Am. v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982), unless it has acted "in concert" with the state "in effecting a particular deprivation of constitutional right," *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (citations omitted). 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." *Ohno*, 723 F.33d at 996. Neither exists here.[2]

No Coercion or Oversight. The state's role here was to permit the private choice of the parties, a role that is neither significant nor coercive. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) (requiring

[2] Nor does WFSE qualify as a state actor under other tests the Supreme Court has articulated—the public function, the state compulsion, and the governmental nexus tests. *See Desert Palace*, 398 F.3d at 1140.

"significant assistance"); *Lugar*, 457 U.S. at 937 (requiring "significant aid"). The private party cannot be treated like a state actor where the government's involvement was only to provide "mere approval or acquiescence," "subtle encouragement," or "permission of a private choice." *See Sullivan*, 526 U.S. at 52–54.

WFSE and Employees entered into bargained-for agreements without any direction, participation, or oversight by Washington. "The decision" to deduct dues from Employees' payrolls was "made by concededly private parties," and depended on "judgments made by private parties without standards established by the State." *Id.* at 52 (citation omitted); *see Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1034 (9th Cir. 1989) ("Only private actors were responsible for the [challenged] decision" where "the decision ultimately turned on the judgments made by private parties according to professional standards that are not established by the State." (quotation marks and citation omitted)). Therefore, when Employees "signed" the membership cards that authorized the dues deductions, they "did not do so because of any state action." *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1201 (9th Cir. 1998), *overruled on other grounds by E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003); *see Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 717 (9th Cir. 1981) ("purely private" decisions, "exclusively from within the organization itself," do not make WFSE a state actor).

Although Washington was required to enforce the membership agreement by state law, it had no say in shaping the terms of that agreement. The state "cannot be said to provide 'significant assistance' to the *underlying* acts that [Employees] contends consti-

tuted the core violation of its First Amendment rights" if the "law *requires*" Washington to enforce the decisions of others "without inquiry into the merits" of the agreement. *Ohno*, 723 F.3d at 996–97. Washington's "mandatory indifference to the underlying merits" of the authorization "refutes any characterization" of WFSE as a joint actor with Washington. *Id.* at 997.

Ministerial Processing. At best, Washington's role in the allegedly unconstitutional conduct was ministerial processing of payroll deductions pursuant to Employees' authorizations. But providing a "machinery" for implementing the private agreement by performing an administrative task does not render Washington and WFSE joint actors. *Sullivan*, 526 U.S. at 54. Much more is required; the state must have "so significantly encourage[d] the private activity as to make the State responsible for" the allegedly unconstitutional conduct. *Id.* at 53.

No Symbiotic Relationship. Nor did Washington "insinuate[] itself into a position of interdependence with" WFSE. *Ohno*, 723 F.3d at 996 (citation omitted). A merely contractual relationship between the government and the non-governmental party does not support joint action; there must be a "symbiotic relationship" of mutual benefit and "substantial degree of cooperative action." *Sawyer v. Johansen*, 103 F.3d 140, 140 (9th Cir. 1996); *Collins*, 878 F.2d at 1154. Thus, no significant interdependence exists unless the "government in any meaningful way accepts benefits derived from the allegedly unconstitutional actions." *See Ohno*, 723 F.3d at 997. Here Washington received no benefits as a passthrough for the dues collection. The state remitted the total amount to WFSE and kept nothing for itself. Far from acting in concert, the parties opposed one another at the collective bargain-

ing table. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 196 (1988) (where the private actor "acted much more like adversaries than like partners," the private actor is "properly viewed as . . . at odds with the State"). Because neither Washington's role in the alleged unconstitutional conduct nor its relationship with WFSE justify characterizing WFSE as a state actor, Employees cannot establish the threshold state action requirement.

We are not persuaded by Employees' attempt to avoid the state action analysis by framing their grievances as a direct challenge to government action. This approach does not square with their theory of allegedly insufficient consent for dues deduction, rather than a challenge to the law or the CBA. As we have observed, "[i]f every private right were transformed into a governmental action just by raising a direct constitutional challenge, the distinction between private and governmental action would be obliterated." *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 839 (9th Cir. 2017) (citation omitted).

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.[3] *See Blum*, 457 U.S. at 1004 (state action analysis is aimed at "the *specific conduct* of which the plaintiff complains" (emphasis added)).

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[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. *See Janus v. Am. Federation of State, Cty. and Municipal Employees, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus II*").

At bottom, Washington's role was to enforce a private agreement. *See Roberts*, 877 F.3d at 844 ("there is no state action simply because the state enforces [a] private agreement"). Because the private dues agreements do not trigger state action and independent constitutional scrutiny, the district court properly dismissed the claims against WFSE.[4]

II. EMPLOYEES HAVE NO FIRST AMENDMENT CLAIM AGAINST THE STATE

A. MOOTNESS

Employees' sole remaining claim against Washington is for an injunction prohibiting the continued deduction of dues despite signed deduction authorizations. When Employees filed the complaint, Washington was still deducting union dues from their payrolls; however, the deductions ceased when the one-year payment commitment periods expired. A live dispute "must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citations omitted). Thus, any prospective injunction would not provide relief for Employees' mooted claim. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) ("Claims for injunctive relief become moot when the challenged activity ceases" and "the alleged violations could not reasonably be expected to recur" (citation omitted)). But we are not deprived of jurisdiction because the claim falls within an exception to mootness.

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[4] The district court also properly dismissed the unjust enrichment claim against the union in light of the contractual agreement between the parties. *See Young v. Young*, 164 Wash. 2d 477, 484–85 (2008).

In the class action context, a "controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). The Court extended this principle to situations where, as here, the district court has not ruled on class certification. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). A claim qualifies for this "limited" exception if "the pace of litigation and the inherently transitory nature of the claims at issue conspire to make [mootness] requirement difficult to fulfill." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1539 (2018).

Such an inherently transitory, pre-certification class-action claim falls within the "capable of repetition yet evading review" mootness exception if (1) "the duration of the challenged action is 'too short' to allow full litigation before it ceases," *Johnson v. Rancho Santiago Cmty Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010), and (2) there is a reasonable expectation that the named plaintiffs could themselves "suffer repeated harm" or "'it is certain that other persons similarly situated' will have the same complaint," *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1089–90 (9th Cir. 2011) (quoting *Gerstein*, 420 U.S. at 110 n.11). Employees' claim satisfies both conditions.

The challenged action—continued payroll deduction of union dues after an employee objects to union membership—is capped at a period of one year, which is too short for the judicial review to "run its course." *See Johnson*, 623 F.3d at 1019 (three years is "too short"). Because Washington continued to deduct union dues until the one-year terms expired, other persons similarly situated could be subjected to the

same conduct. For these reasons, we exercise jurisdiction over Employees' claim against Washington.

B. THE FIRST AMENDMENT

Employees do not claim that joining a union was a condition of their job; they chose to join WFSE. Employees do not offer a serious argument that they were coerced to sign the membership cards; they voluntarily authorized union dues to be deducted from their payrolls. Employees do not argue they were later required to sign the revised union cards; they signed those documents and made the commitment to pay dues for one year. These facts speak to a contractual obligation, not a First Amendment violation. Employees instead argue that the Court's decision in *Janus* voided the commitment they made and now requires the state to insist on strict constitutional waivers with respect to deduction of union dues. This argument ignores the facts and misreads *Janus*.

The First Amendment does not support Employees' right to renege on their promise to join and support the union. This promise was made in the context of a contractual relationship between the union and its employees. When "legal obligations . . . are self-imposed," state law, not the First Amendment, normally governs. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991); *Erie Telecomms., Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1989–90 (3d Cir. 1988) (distinguishing a First Amendment challenge from a claim to enforce "contractual obligations under the franchise and access agreements"). Nor does the First Amendment provide a right to "disregard promises that would otherwise be enforced under state law." *Cohen*, 501 U.S. at 671; *cf. Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude

by electronic means into the precincts of another's home or office.").

Janus did not alter these basic tenets of the First Amendment. The dangers of compelled speech animate *Janus*. 138 S. Ct. at 2463–64. The Court underscored that the pernicious nature of compelled speech extends to "[c]ompelling individuals to mouth support for views they find objectionable" by forcing them to subsidize that speech. *Id.* at 2463. For that reason, the Court condemned the practice of "automatically deduct[ing]" agency fees from nonmembers who were "not asked" and "not required to consent before the fees are deducted." *Id.* at 2460–61.

Employees, who are union members, experienced no such compulsion. Under Washington law, Employees were free to "join" WFSE or "refrain" from participating in union activities. *See* RCW 41.80.050. Washington and WFSE did not force Employees to sign the membership cards or retain membership status to get or keep their public-sector jobs. Employees repeatedly stated that they "voluntarily authorize[d]" Washington to deduct union dues from their wages, and that the commitment would be "irrevocable for a period of one year." Washington honored the terms and conditions of a bargained-for contract by deducting union dues only from the payrolls of Employees who gave voluntary authorization to do so. *See* RCW 41.80.100(3)(a). No fact supports even a whiff of compulsion.

That Employees had the option of paying less as agency fees pre-*Janus*, or that *Janus* made that lesser amount zero by invalidating agency fees, does not establish coercion. Employees' choice was not between paying the higher union dues or the lesser agency fees. Choosing to pay union dues cannot be decoupled from

the decision to join a union. The membership card Employees signed, titled "Payroll Deduction Authorization," begins with the statement: "Yes! I want to be a union member." This choice to voluntarily join a union and the choice to resign from it are contrary to compelled speech. *See Gallo Cattle Co. v. Cal. Milk Advisory Bd.*, 185 F.3d 969, 975 & n.7 (9th Cir. 1999); *see also Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 557–58 (10th Cir. 1997) ("a choice whether or not to sing songs she believe infringed upon" her First Amendment right "negates" "coercion or compulsion"); *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 292–93 (4th Cir. 1991) ("Where the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced."). By joining the union and receiving the benefits of membership, Employees also agreed to bear the financial burden of membership.

Janus does not address this financial burden of union membership. The Court explicitly cabined the reach of *Janus* by explaining that the "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." 138 S. Ct. at 2485 n.27. Nor did *Janus* recognize members' right to pay nothing to the union. The Court "was not concerned in the abstract with the deduction of money from employees' paychecks pursuant to an employment contract" nor did it give "an unqualified constitutional right to accept the benefits of union representation without paying." *Janus II*, 942 F.3d at 357–58. We join the swelling chorus of courts recognizing that *Janus* does not

extend a First Amendment right to avoid paying union dues.[5]

In an effort to circumvent the lack of compulsion, Employees define the relevant First Amendment right as the freedom not to pay union dues without "consent that amount to the waiver of a First Amendment right." In arguing that *Janus* requires constitutional waivers before union dues are deducted, Employees

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[5] *See Mendez v. Cal. Teachers Ass'n, et al.*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020) ("As every court to consider the issue has concluded, *Janus* does not preclude enforcement of union membership and dues deduction authorization agreements . . . ."); *Allen v. Ohio Civil Serv. Emps. Ass'n AFSCME, Local 11*, 2020 WL 1322051, at *12 (S.D. Ohio Mar. 20, 2020) (noting "the unanimous post-*Janus* district court decisions holding that employees who voluntarily chose to join a union . . . cannot renege on their promises to pay union dues"). *See, e.g.*, *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019); *Creed v. Alaska State Emps. Ass'n/AFSCME Local 52*, 2020 WL 4004794, at *5–10 (D. Alaska July 15, 2020); *Molina v. Pa. Soc. Serv. Union*, 2020 WL 2306650, at *7–8 (M.D. Pa. May 8, 2020); *Durst v. Or. Educ. Ass'n*, 2020 WL 1545484, at *4 (D. Or. Mar. 31, 2020); *Bennett v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, AFL-CIO et al.*, 2020 WL 1549603, at *3–5 (C.D. Ill. Mar. 30, 2020); *Loescher v. Minn. Teamsters Pub. & Law Enf't Emps.' Union, Local No. 320 and Indep. Sch. Dist. No. 831*, 2020 WL 912785, at *7 (D. Minn. Feb. 26, 2020); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 2020 WL 619574, at *5–6 (S.D. Cal. Feb. 10, 2020); *Hendrickson v. AFSCME Council 18*, 2020 WL 365041, at *5–6 (D.N.M. Jan. 22, 2020); *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 923–24 (E.D. Cal. 2019); *Smith v. Super Ct., Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2019); *Oliver v. Serv. Emps. Int'l Union Local 668*, 2019 WL 5964778 (E.D. Pa. Nov. 12, 2019); *Anderson v. SEIU*, 2019 WL 4246688, at *2 (D. Or. Sept. 4, 2019); *Seager v. United Teachers L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 877 (C.D. Cal. 2019); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019).

seize on a passage requiring any waiver of the First Amendment right to be "freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486. This approach misconstrues *Janus*. The Court considered whether a waiver could be presumed for the deduction of agency fees only after concluding that the practice of automatically deducting agency fees from nonmembers violates the First Amendment. It was in this context that the Court mandated that nonmembers "freely," "clearly," and "affirmatively" waive their First Amendment rights before any payment can be taken from them. *Id.* The Court discussed constitutional waiver *because* it concluded that nonmembers' First Amendment right had been infringed, and in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement.

We note that there is an easy remedy for Washington public employees who do not want to be part of the union: they can decide not to join the union in the first place, or they can resign their union membership after joining. Employees demonstrated the freedom do so, subject to a limited payment commitment period. In the face of their voluntary agreement to pay union dues and in the absence of any legitimate claim of compulsion, the district court appropriately dismissed the First Amendment claim against Washington.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed February 15, 2019]

Case No. 18-5620 RJB

MELISSA BELGAU, DONNA BYBEE, RICHARD OSTRANDER, KATHRINE NEWMAN, MIRIAN TORRES, GARY HONC, and MICHAEL STONE,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as governor of the State of Washington, DAVID SCHUMACHER, in his official capacity as Director of the Washington Office of Financial Management, JOHN WEISMAN, in his official capacity as Director of the Washington Department of Health, CHERYL STRANGE, in her official capacity as Director of the Washington Department of Social and Health Services, ROGER MILLAR, in his official capacity as Director of the Washington Department of Transportation, JOEL SACKS, in his official capacity as Director of the Washington Department of Labor and Industries, and WASHINGTON FEDERATION OF STATE EMPLOYEES (AFSCME, COUNSEL 28) a labor corporation,

Defendants.

ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Defendants Governor Jay Inslee, Director David Schumacher. Secretary John Wiesman, Secretary Cheryl Strange, Secretary Roger Millar, and Director Joel Sacks' ("State Defendants") Motion for Summary Judgment (Dkt. 47), Defendant Washington Federation of State Employees, AFSCME Council 28's ("Union") Motion for Summary Judgment (Dkt. 46), and the Plaintiffs Melissa Belgau, Donna Bybee, Michael Stone, Righard Ostrander, Miriam Torres, Katherine Newman, and Gary Honc's Cross-Motion for Summary Judgment (Dkt. 48). The Court has considered the pleadings filed regarding the motions and the remaining file.

Plaintiffs, who are Washington State employees, filed this putative class action on August 2, 2018, asserting that the Defendants are violating their first amendment rights by deducting union dues/fees from their wages even "after the U.S. Supreme Court issued *Janus v. AFSCME, Council 31*, on June 27, 2018, despite the fact that Plaintiffs have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy." Dkt. 1 (*citing Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018)).

For the reasons provided below, the State and Union's motions for summary judgment (Dkts. 46 and 47) should be granted and the Plaintiffs' motion (Dkt. 48) should be denied.

I. FACTS AND PROCEDURAL HISTORY

A. BACKGROUND FACTS

The State and the Union entered an exclusive collective bargaining agreement for the years 2017-2019 ("CBA") which included the collection of agency

fees for non-union members. Dkts. 44, at 2 and 44-1, at 2. Upon the Union member's written authorization, the State is obligated by statute to "deducting from the payments to bargaining unit members the dues required for membership in the [Union]." RCW § 41.80.100 (3)(b)(i).

The Union represents more than 40,000 Washington State employees; over 35,000 are dues paying members. Dkt. 44, at 2. Each Plaintiff is a "Washington state employee working in a General Government bargaining unit of employees that is exclusively represented by the [Union] for purposes of collective bargaining." Dkt. 44, at 2. They became Union members before July 2017. Dkts. 44-4 to 44-10. State employees are not required to become Union members as a condition of employment. Dkt. 44, at 3. Union members may resign their membership at any time. Dkt. 44, at 3.

In July 2017, the Union decided to begin using a new membership agreement which included a one-year dues payment commitment ("2017 membership agreement" or "2017 agreement"). Dkt. 44, at 3. Members of the Union were asked, but not required, to sign the 2017 agreement. *Id.* The request was make "after a deliberative process by [the Union's] democratically elected Executive Board, which formally approved the new cards in a meeting open to [Union] members." *Id.* Union members did not have to sign the new cards to remain Union members; initial cards are considered effective. *Id.*

The 2017 membership agreement, entitled "Payroll Deduction Authorization & Maintenance of Membership Card," provided, in part:

> Yes! I stand united with my fellow State employees . . . 100% Union . . .

Yes! I want to be a union member. . .

> Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each period, the amount of dues as set in accordance with the [Union] Constitution and By-Laws and authorize my Employer to remit such amount semi-monthly to the Union (currently 1.5% of my salary per pay period not to exceed the maximum). This voluntary authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period, regardless of whether I am or remain a member of the Union, unless I am no longer in active pay status in a [Union] bargaining unit; provided however, if the applicable collective-bargaining agreement specifies a longer or different revocation period, then only that period shall apply. This card supersedes any prior check-off authorization card I signed. I recognize that my authorization of dues deductions, and the continuation of such authorization from one year to the next, is voluntary and not a condition of my employment.

Dkts. 44-11 to 44-17. Each of the Plaintiffs signed the 2017 membership agreement: Plaintiff Belgau on November 2, 2017; Plaintiff Ostrander on November 2,

2018; Plaintiff Bybee on November 7, 2017; Plaintiff Stone on March 6, 2018; Plaintiff Newman on March 21, 2018; Plaintiff Honc on April 14, 2018; and Plaintiff Torres on April 16, 2018. *Id.* Each were afforded the opportunity to opt-out of Union membership, but did not choose to do so. *Id.*

The Defendants did not prevent, or advise, the Plaintiffs to seek legal counsel before they signed the original or 2017 membership agreements. Dkt. 44, at 3. The Plaintiffs did not seek legal counsel before signing the agreements. *Id.*

At the time the Plaintiffs signed their original and 2017 agreements, "the representation fee applicable to non-members ranged from approximately 65.3% to 78.8% of Union dues paid by Union members." Dkt. 44, at 4. Union dues were calculated "between approximately 1.37% and 1.5% of union members' base wages." *Id.*

Members of the Union are accorded exclusive rights, including "the ability to vote on whether to ratify a collective bargaining agreement, vote in Union officer elections, run for Union office, have the opportunity to serve on bargaining committees, and participate in the Union's internal affairs." Dkt. 44, at 4. They are also given members-only benefits, including "discounts on goods and services, including home mortgages and wireless phone plans, access to scholarship programs, free legal advice, discounted dental benefits, annual family campouts, access to the Union Sportsman's Alliance, and access to the AFSCME Free College program." *Id.*, at 5. They are also eligible to apply for disaster/hardship relief grants through the Foundation for Working Families. *Id.*

On June 27, 2018, the United States Supreme Court decided *Janus v. AFSCME, Council 31*. 138 S. Ct. 2448, 2486 (2018). The State and the Union entered into a Memorandum of Understanding on July 6, 2018, and amended the CBA to stop collection of compulsory agency fees for non-union members. Dkt. 44, at 2. As amended in July of 2018, § 40.2 of the CBA provides:

> The Employer agrees to deduct an amount equal to the membership dues from the salary of employees who request such deduction in writing within thirty (30) days of receipt of a properly completed request submitted to the appropriate agency payroll office. Such requests will be made on a Union payroll deduction authorization card. The Employer will honor the terms and conditions of each employee's signed membership card.

Dkt. 44-3, at 2. Under amended § 40.3(A), the CBA states that "[u]pon receipt of the employee's written authorization, the Employer [the State of Washington here] will deduct from the employee's salary an amount equal to the dues required to be a member of the Union." *Id.*, at 3. In amended § 40.6, the CBA further provides that "[a]n employee may revoke his or her authorization for payroll deduction of payments to the Union by written notice to the Employer and the Union in accordance with the terms and conditions of their signed membership card." *Id.*, at 7. Article 40 of the amended 2017-2019 CBA applies to the Plaintiffs and around 26,800 other Washington state employees. Dkt. 44, at 2.

After the June 27, 2018 *Janus* decision, each of the Plaintiffs notified the Union and the State that they no longer wanted to be Union members. Dkt. 44, at 5. Plaintiffs are no longer Union members and do not

have membership rights or access to Union benefits. *Id.* The State continued/continues to deduct an amount equal to the dues from their pay checks pursuant to the terms in the Plaintiffs' 2017 membership agreements and remitted/remits them to the Union. *Id.* For Plaintiffs Belgau, Bybee, and Ostrander, the one-year term expired in November 2018, so the State stopped deducting an amount equal to Union dues from their wages at that time. *Id.* When the one year anniversary of the signing of their 2017 membership agreement lapses for the remaining Plaintiffs, the last will be in April of 2019, the State will end the deductions without further objection from the Plaintiffs. *Id.*

After the Plaintiffs filed this case, the Union agreed to deposit, into a separate interest-bearing escrow account, all dues that the Union received from each Plaintiff after the date of each Plaintiff's request to resign from Union membership. Dkt. 44, at 6. The Union will continue to do so until this case is resolved, and will not use the dues to pay for any Union activities or otherwise subsidize Union operations. *Id*.

B. PROCEDURAL HISTORY

On August 2, 2018, the Plaintiffs filed this putative class action (1) challenging the constitutionality of RCW 41.80.100 and the CBA provisions related to the deduction of membership fees, as a violation of their First Amendment rights, (2) asserting that the Defendants conspired to violate their constitutional rights, and (3) claiming that the Union was unjustly enriched. Dkt. 1. The Plaintiffs seek declaratory and injunctive relief as well as monetary damages, costs and attorneys' fees. *Id.*

The same day Plaintiffs filed their complaint, they filed a motion seeking a temporary restraining order

"enjoining Defendants from deducting union dues/fees from the wages of any Washington State employee in a bargaining unit listed in Appendix A to the 2017-2019 [Collective Bargaining Agreement ("CBA")] for whom Defendants cannot provide clear and compelling evidence that he or she clearly and affirmatively consented, on or after June 27, 2018, to the deduction of union dues by waiving his or her right to not fund union advocacy, and from preventing Plaintiffs and state employees from resigning union membership." Dkt. 2, at 2.

On August 8, 2018, Plaintiffs' motion for a temporary restraining order was denied without prejudice. Dkt. 11. The Plaintiffs renewed their motion to preliminarily enjoin the State from continuing to collect Union membership dues because they had resigned from the Union. Dkt. 33. That motion was denied on October 11, 2018. Dkt. 37. It relied, in part, on the reasoning in *Fisk v. Inslee,* 2017 WL 4619223 (W.D. Wash. Oct. 16, 2017). *Id.* After that Order from this Court was issued, *Fisk* was affirmed on appeal in an unpublished decision. *Fisk v. Inslee*, 17-35957, 2019 WL 141253 (9th Cir. Jan. 9, 2019). The Ninth Circuit held:

> Appellees' deduction of union dues in accordance with the membership cards' dues irrevocability provision does not violate Appellants' First Amendment rights. Although Appellants resigned their membership in the union and objected to providing continued financial support, the First Amendment does not preclude the enforcement of "legal obligations" that are bargained-for and "self-imposed" under state contract law. *Cohen v. Cowles Media Co*., 501 U.S. 663, 668-71, 111 S. Ct. 2513, 115 L.Ed.2d

> 586 (1991). The provisions authorizing the withholding of dues and making that authorization irrevocable for certain periods were in clear, readable type on a simple one-page form, well within the ken of unrepresented or lay parties. Moreover, temporarily irrevocable payment authorizations are common and enforceable in many consumer contracts—e.g., gym memberships or cell phone contracts—and we conclude that under state contract law those provisions should be similarly enforceable here.

Id., at 1. In *Fiske*, the Plaintiffs raised the issue of whether they had properly waived their First Amendment rights for the first time; the Ninth Circuit declined to reach the question. *Id.*

C. PENDING MOTIONS AND ORGANIZATION OF OPINION

The parties now file cross motions for summary judgment (Dkts. 46-48) and have filed a "Stipulation Regarding Facts for Cross Motions for Summary Judgment" (Dkt. 44), which they assert contain the facts necessary to decide the motions. Responses have been filed (Dkts. 52 54), as have replies (Dkts. 55 and 56).

This opinion will first consider the State Defendants' motion for summary judgment for dismissal of all Plaintiffs' claims against the State Defendants for retrospective relief, on claims asserted against them under state law, based on the Eleventh Amendment, and the State Defendants' motion to dismiss the claim for declaratory judgment as to the Washington Attorney General, who is not a party to this case. *Id.* This opinion will then turn to the parties' cross motions for summary judgment on the First Amend-

ment claims and the remaining state law claim – unjust enrichment.

II. DISCUSSION

A. STANDARD ON MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56 (d). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254,

T.W. Elect. Service Inc., 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non-specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. ELEVENTH AMENDMENT AND NON-PROSPECTIVE RELIEF SOUGHT AGAINST THE STATE DEFENDANTS

The Plaintiffs make claims against the State and against individual state officials, in their official capacities only, for retrospective and prospective relief for the alleged constitutional violations and under state law. Dkt. 1. Claims against state or county officials, in their official capacities, are considered claims against the state. *Will v. Michigan Dept. of State Police*, 491 U.S. 48 (1989).

1. Claims for Federal Constitutional Violations that Seek Non-Prospective Relief Against the State and the Individual State Officials

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v.*

Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). States (or state officers acting in their official capacity) are not "persons" for purposes of damages for § 1983 liability. *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 66 (1989); *Doe v. Lawrence Livermore Nat'l Lab.,* 131 F.3d 836, 839 (9th Cir. 1997). "However, there is one exception to this general rule: when sued for *prospective injunctive* relief, a state official in his official capacity is considered a 'person' for § 1983 purposes." *Doe*, at 839 (*emphasis in original*).

To the extent that the Plaintiffs' assert constitutional claims under 42 U.S.C. § 1983 against the State Defendants for which they seek damages, or any other relief aside from prospective relief, those claims should be dismissed. The only relief available to the Plaintiffs from the State Defendants is prospective relief for the alleged constitutional violations. The State Defendants' motion for summary judgment on all Plaintiffs' claims for which they seek non-prospective relief should be granted.

2. Claims Other than State Claims asserted Against the State and State Officers in their Official Capacities

The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." "The Eleventh Amendment has been authoritatively construed to deprive federal courts of jurisdiction over suits by private parties against unconsenting States" *Seven Up Pete Venture v. Schweitzer,* 523 F.3d 948, 953 (9th Cir. 2008), unless the private parties are seeking prospective relief for

constitutional violations, *Ex Parte Young,* 209 U.S. 123 (1908).

To the extent the Plaintiffs' make claims other than claims for prospective relief for constitutional violations against the State Defendants, those claims should be dismissed. The State Defendants have not waived their Eleventh Amendment immunity as to those claims. The State Defendants' motion to have those claims dismissed as barred by the Eleventh Amendment should be granted. The Plaintiffs' motion for summary judgment on claims asserted against the State Defendants, except for the First Amendment claim which seeks prospective relief, should be denied.

C. CLAIMS FOR DECLARATORY RELIEF AGAINST NON-PARTY WASHINGTON ATTORNEY GENERAL

The Plaintiffs seek "Declaratory Judgment that the Washington [Attorney General's] policy related to the application of *Janus* . . . to [Union] represented State employees . . . is unconstitutional and of no effect." Dkt. 21, at 18.

Under Article III, a federal court cannot consider the merits of a legal claim unless the person seeking to invoke the jurisdiction of the court establishes the requisite standing to sue. *Whitmore v. Arkansas*, 495 U.S. 149 (1990). A litigant demonstrates standing by showing that he or she has suffered an injury in fact that is fairly traceable to the challenged action and is redressable by a favorable judicial decision. *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1017 (1998).

The State Defendants' motion for summary judgment of this claim should be granted. The Plaintiffs have failed to name the Washington Attorney General

in this lawsuit. They failed to show that they suffered an injury in fact as a result of an advisory opinion given by the Washington Attorney General. They make no showing that an alleged injury would be addressed by the relief they seek. The claim should be dismissed.

D. CLAIMS FOR VIOLATION OF THE FIRST AMENDMENT

The Plaintiffs assert claims against the Union and the State Defendants for violation of their First Amendment rights pursuant to 42 U.S.C. § 1983.

1. *First Amendment Claims Against the Union – State Action?*

As stated above, in order to maintain a claim under § 1983, a Plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). "The state-action element in § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Caviness v. Horizon Cmty. Learning Ctr., Inc*., 590 F.3d 806, 812 (9th Cir. 2010)(*internal quotation marks and citations omitted*). "[C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013).

A two-prong framework is used "for analyzing when governmental involvement in private action is itself sufficient in character and impact that the govern-

ment fairly can be viewed as responsible for the harm of which the plaintiff complains." *Naoko,* at 994. The first prong considers "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." *Id.* "The second prong determines whether the party charged with the deprivation could be described in all fairness as a state actor." *Id*.

a. Whether the Claimed Deprivation Resulted from the Exercise of Some Right or Privilege or by a Rule of Conduct Imposed by the State

The claimed deprivation did not result in the exercise of some right or privilege or by a rule of conduct imposed by the State. Plaintiffs now acknowledge that the First Amendment does not bar the State's deduction of Union fees from a valid dues agreement. Dkt. 56. They dispute whether the agreements they signed are valid. Plaintiffs repeatedly assert that they are harmed because the agreements were insufficient-whether because they did not properly waived their constitutional rights, or the agreements were not supported by consideration, or were obtained by duress because they were given "alternative perils" (either sign the agreement or pay the now unconstitutional agency fee agreements or be fired), etc. The Plaintiffs fail to show that the contents of the agreements are in any way attributable to the State. The parties agree that the State Defendants did not play any role in drafting or in the formation of the agreements here. They agree that the Union, a private entity, drafted the agreements and asked the Plaintiffs to sign them. RCW 41.80.100 and the Article 40 of the amended CBA are silent on what terms and

conditions are in the agreements. Indeed, state law prohibits the State from interfering in the formation or administration of the Union. RCW 41.80.110(1)(b). While the Plaintiffs attempt to recast their claim and argue that it is the State deductions that are issue, at the same time, they acknowledge that the deductions are constitutional if the agreements are valid. At its core, then, the source of the alleged constitutional harm is the sufficiency of the agreements, not the procedure for their collection that the State agreed to follow. "The claimed constitutional deprivation cannot be traced to a right, privilege, or rule of conduct imposed by a governmental entity." *Naoko,* at 994. This prong is not met.

b. Whether the Party Charged with the Deprivation is a State Actor

Even if the first prong is met, the Plaintiffs have failed to show that the Union is a state actor. The "inquiry begins by identifying the specific conduct of which the plaintiff complains. . . because an entity may be a State actor for some purposes but not for others." *Caviness,* at 812- 813 (*internal citations omitted*).

The Plaintiffs assert that their First Amendment rights were violated when the Union offered, and the Plaintiffs accepted, the initial membership agreement and the 2017 dues authorization agreement (that contains the one year non-revocable dues paying provision), both of which failed to contain a valid waiver of their constitutional rights or were otherwise invalid, and the State Defendants still deducted the Union dues. To maintain a federal constitutional claim, the issue is whether the Union's actions amount to state action.

"The Supreme Court has articulated four tests for determining whether a non-governmental person'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." *Naoko,* at 995 (*internal quotation marks and citations omitted*). Each will be considered below.

(i) Public Function

"Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924 (9th Cir. 2011) (*internal quotation marks omitted*).

There is no showing that the Union was endowed by the State "with powers or functions governmental in nature." *Florer,* at 924. The evidence in the record is that the Union was functioning as a union. The statute challenged by the Plaintiffs, RCW 41.80.110, and Article 40 of the CBA do not vest the Union with authority reserved to the government. Because "[t]he public function test is satisfied only on a showing that the function at issue is 'both traditionally and exclusively governmental," and no such showing has been made here, the public function test is not met. *Id.*

(ii) Joint Action

"'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, or otherwise has so far insinuated itself into a position of interdependence with the non-governmental party that it must be recognized as a joint participant in the

challenged activity." *Naoko,* at 996 (*internal quotation marks and citations omitted*).

There is no showing that joint action exists here – that "state officials and private parties have acted in concert" to deprive the Plaintiffs of their constitutional rights. *Naoko,* at 996. There is no evidence that the State Defendants "affirm[], authorize[], encourage[], or facilitate[]" the contents of the agreements or have so "far insinuated [themselves] into a position of interdependence with the [Union] that it must be recognized as a joint participant in the challenged activity." *Naoko,* at 996. The State Defendants are prohibited from playing a role in the content of the agreements between the Plaintiffs and the Union. Even if the State Defendants approved of the contents of the agreements, of which there is no evidence, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Caviness*, at 817. The State Defendants' "mandatory indifference to the underlying merits," content, or validity of the agreements "refutes any characterization" by the Plaintiffs of a joint action between the State Defendants and the Union as to the "aspects of the [agreements] alleged to compromise" the Plaintiffs' First Amendment rights. *Naoko,* at 997. The Plaintiffs argue that they seek recovery, not only for the continued deduction of dues after *Janus* (and their notification that they no longer wished to be Union members), but also seek recovery for deductions of compelled agency fees before *Janus* was decided, which was authorized by a Washington statute at the time. The Plaintiffs make no showing that *Janus* should be given retroactive effect in a manner that would allow them to bootstrap such a claim. *Janus* specifically stated that its holding was limited, providing that, "States can keep their labor-relations

systems exactly as they are – only they cannot force nonmembers to subsidize public-sector unions." *Janus,* at 2485, n. 27 (*emphasis added*).

While the Plaintiffs assert that it is RCW 41.80.100 that is the source of the Union's authority to impose a fee on nonmembers (Dkt. 56, at 15), that argument is without merit. It is the agreements themselves that authorize the Union to collect dues in exchange for benefits. Even in the absence of RCW 41.80.100 or Article 40 of the CBA, the Union could attempt to enforce the agreements to pay dues independently, in a breach of contract action. RCW 41.80.100 and Article 40 of the CBA only require the State Defendants to perform an administrative task - after the Plaintiffs provided express written authorization for dues to be paid for a year, the State Defendants are to deduct those dues and send them to the Union. The State points out that it does this for other entities with periods of payment that are not revocable for a set period of time, like for the retirement plan and health plan. Dkt. 47, at 17. Moreover, there is no evidence that the State Defendants "in any meaningful way accept[] benefits derived from the allegedly unconstitutional actions." *Naoko,* at 997. There is no evidence in the record that the substance of the agreements are the product of joint action with Union and the State Defendants.

(iii) State Compulsion

Under the state compulsion test, "[a] state may be responsible for a private entity's actions if it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Caviness,* at 816.

There is no evidence in this case that the State Defendants have "exercised coercive power" over the Union in regard to the agreements at issue. *Caviness,* at 816. The agreements at issue were made by private parties without standards established by the state. Further, there is no evidence that the State has provided significant "overt or covert" encouragement that the actions alleged to be unconstitutional here must "be deemed to be that of the State." *Id.* The requirements for the state compulsion test are not met.

(vi) Government Nexus

"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." *Naoko,* at 996, n.13.

This test is not met. There is no evidence that there is a "sufficiently close nexus between the State" and the content and or validity of the agreements "so that the action of the latter may be fairly treated as that of the State itself." The agreements at issue are between private parties.

c. Conclusion on State Action

The Plaintiffs' motion for summary judgment as to their First Amendment claim against the Union should be denied and the Union's motion for summary judgment should be granted. There is no evidence that the claimed constitutional deprivation here 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." *Naoko,* at 996. There is no evidence that the Union

"could be described in all fairness as a state actor," *Id.,* under any of the four tests. The State Defendants' obligation to deduct fees in accordance with the authorization "agreements does not transform decisions about membership requirements [that they pay dues for a year] into state action." *See Bain v. California Teachers Ass'n,* 2016 WL 6804921, at *7 (C.D. Cal. May 2, 2016). The First Amendment claim against the Union should be dismissed. Because the Plaintiffs' constitutional claim fails at the state action stage, no decision is necessary on whether the initial or 2017 membership agreements violate the First Amendment. *Naoko,* at 1000.

2. *First Amendment Claim Asserted Against the State Defendants*

As above, all Plaintiffs' claims for relief against the State Defendants are dismissed because States are not "a person" under § 1983 and by operation of the Eleventh Amendment, except claims under § 1983 which seek prospective relief. The Plaintiffs First Amendment claims against the State Defendants, then relate only to RCW 41.80.100, as amended, and Article 40 of the amended CBA, which are currently in effect, and only for prospective relief.

The Plaintiffs assert that RCW 41.80.100 and the CBA compel the State to "deduct union dues/fees from the Plaintiffs' . . . wages even though they have not clearly and affirmatively consented to the deductions" and so violate the First Amendment.

The Plaintiffs' motion for summary judgment against the State Defendants for violation of their First Amendment rights should be denied and the State Defendants' motion for summary judgment should be granted. RCW 41.80.100 provides that upon

the Plaintiffs' written authorization, the State is obligated to "deduct[] from the payments to bargaining unit members the dues required for membership in the [Union]." RCW § 41.80.100 (3)(b)(i). Likewise, as amended in July of 2018, § 40.2 of the CBA provides:

> The Employer agrees to deduct an amount equal to the membership dues from the salary of employees who request such deduction in writing within thirty (30) days of receipt of a properly completed request submitted to the appropriate agency payroll office. Such requests will be made on a Union payroll deduction authorization card. The Employer will honor the terms and conditions of each employee's signed membership card.

Dkt. 44-3, at 2. Under amended § 40.3(A), the CBA states that "[u]pon receipt of the employee's written authorization, the Employer [the State of Washington here] will deduct from the employee's salary an amount equal to the dues required to be a member of the Union." *Id.,* at 3. In amended § 40.6, the CBA further provides that "[a]n employee may revoke his or her authorization for payroll deduction of payments to the Union by written notice to the Employer and the Union in accordance with the terms and conditions of their signed membership card." *Id.,* at 7. The 2017 membership agreement, entitled "Payroll Deduction Authorization & Maintenance of Membership Card," provided, in part:

> Yes! I stand united with my fellow State employees . . . 100% Union . . .
>
> Yes! I want to be a union member. . .
>
> Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct

> from my pay each period, the amount of dues as set in accordance with the [Union] Constitution and By-Laws and authorize my Employer to remit such amount semi-monthly to the Union (currently 1.5% of my salary per pay period not to exceed the maximum). This voluntary authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period, regardless of whether I am or remain a member of the Union, unless I am no longer in active pay status in a [Union] bargaining unit; provided however, if the applicable collective-bargaining agreement specifies a longer or different revocation period, then only that period shall apply. This card supersedes any prior check-off authorization card I signed. I recognize that my authorization of dues deductions, and the continuation of such authorization from one year to the next, is voluntary and not a condition of my employment.

Dkts. 44-11 to 44-17.

The plain language of RCW 41.80.100 and the CBA do not compel involuntary dues deductions and do not violate the First Amendment. The parties do not dispute that all the Plaintiffs here signed the membership agreements and that they did not need to do so as

a condition of their employment. The parties do not dispute that the State plays no role in deciding what terms and conditions are in the membership agreements; and under state law, cannot participate in any way in making those determinations. The State's deduction of dues from the Plaintiffs' pay is pursuant to the Plaintiffs' explicit written instructions in the 2017 agreements. The fact that the Plaintiffs are now challenging the constitutional validity of the underlying agreements does not lead to liability for the State, especially where the State is prohibited from interfering with Union activity. Further, Plaintiffs' assertions that the agreements are not valid because they had not waived their First Amendment rights under *Janus* in their authorization agreements because they did not know of those rights yet, is without merit. Plaintiffs seek a broad expansion of the holding in *Janus*. *Janus* does not apply here – Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here. *See Cooley v. California Statewide Law Enforcement Ass'n*, 2019 WL 331170, at 2 (E.D. Cal. Jan. 25, 2019). "The relationship between unions and their voluntary members was not at issue in *Janus*." *Id.* The notion that the Plaintiffs may have made a different choice if they knew "the Supreme Court would later invalidate public employee agency fee arrangements [in *Janus*] does not void" their previous knowing agreements. *Id.*

To the extent that the Plaintiffs now argue that the membership agreement was not supported by consideration, is invalid due to mistake, was made under duress, or make some other assertion of validity based on contract law, they make no showing that the State Defendants are now liable under the First Amendment for those alleged failings. To do so would require

the State Defendants to make a judgment about the validity of the contracts the Union and its members choose to enter, something the State is prohibited from doing. The State is not a party to the membership agreement. The Plaintiffs "cannot now invoke the First Amendment to wriggle out of [their] contractual duties." *See Smith v. Superior Court, County of Contra Costa,* 2018 WL 6072806 (N.D. Cal. Nov. 16, 2018). The Plaintiffs' First Amendment claims asserted against the State Defendants should be dismissed.

3. Conspiracy Claim for Violation of the First Amendment Asserted Against all Defendants

As stated above, Plaintiffs' First Amendment claims against the Union and State Defendants should be dismissed. Their conspiracy claim, which is predicated on the alleged First Amendment violations, also fails. *Woodrum v. Woodward County, Okla.,* 866 F.2d 1121, 1126 (9th Cir. 1996). Further, the Plaintiffs do not to point to any evidence in the record to support their claim. The Plaintiffs' conspiracy claim should be dismissed.

E. CLAIMS FOR UNJUST ENRICHMENT AGAINST THE UNION

The Plaintiffs make claims for unjust enrichment against the Union. (Due to the operation of the Eleventh Amendment, the unjust enrichment claims against the State Defendants should be dismissed, as explained above.) Both the Plaintiffs and the Union move for summary judgment on this claim.

The elements of unjust enrichment are: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit

without payment." *Young v. Young*, 164 Wn.2d 477, 484–85 (2008). "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Id.,* at 484.

The parties here have a contractual relationship. The Plaintiffs' unjust enrichment claims are related to the same matter upon which they seek recovery. The unjust enrichment claims should be dismissed.

Moreover, even if the parties did not have a written contractual relationship, the Plaintiffs have failed to show that there is sufficient evidence in the circumstances here that it would be unjust for the Union to retain the dues. The Plaintiffs acknowledge that as Union members they received benefits and rights not available to non-members. Further, even after they announced that they no longer wanted to be Union members, it is not unjust for them to have to continue to pay dues for a limited time because that is what they agree to. The Plaintiffs have failed to show that the Union was unjustly enriched.

F. CONCLUSION

By this Order, all claims should be dismissed. This case should be closed.

III. ORDER

It is ORDERED that:

- The State Defendants' Motion for Summary Judgment (Dkt. 47) IS GRANTED;
- The Union's Motion for Summary Judgment (Dkt. 46) IS GRANTED; and

- The Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 48) IS DENIED.
- This case IS DISMISSED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 15th day of February, 2019.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed February 19, 2019]

Case No. 3:18-cv-05620-RJB

MELISSA BELGAU, DONNA BYBEE, RICHARD OSTRANDER, KATHRINE NEWMAN, MIRIAN TORRES, GARY HONC, and MICHAEL STONE,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as governor of the State of Washington, DAVID SCHUMACHER, in his official capacity as Director of the Washington Office of Financial Management, JOHN WEISMAN, in his official capacity as Director of the Washington Department of Health, CHERYL STRANGE, in her official capacity as Director of the Washington Department of Social and Health Services, ROGER MILLAR, in his official capacity as Director of the Washington Department of Transportation, JOEL SACKS, in his official capacity as Director of the Washington Department of Labor and Industries, and WASHINGTON FEDERATION OF STATE EMPLOYEES (AFSCME, COUNSEL 28) a labor corporation,

Defendants.

CIVIL JUDGMENT

___ Jury Verdict. This action came to consideration before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

- The State Defendants' Motion for Summary Judgment (Dkt. 47) IS GRANTED;
- The Union's Motion for Summary Judgment (Dkt. 46) IS GRANTED; and
- The Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 48) IS DENIED;
- This case IS CLOSED.

Dated this 19th day of February, 2019.

William M. McCool
Clerk of Court

s/Tyler Campbell
Tyler Campbell, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 26, 2020]

No. 19-35137

MELISSA BELGAU; et al.,

Plaintiffs-Appellants,

v.

JAY ROBERT INSLEE, in His Official Capacity as Governor of the State of Washington; et al.,

Defendants-Appellees.

D.C. No. 3:18-cv-05620-RJB
Western District of Washington, Tacoma

ORDER

Before: McKEOWN and CHRISTEN, Circuit Judges, and HARPOOL,* District Judge.

Judges McKeown and Christen have voted to deny the petition for rehearing en banc, and Judge Harpool so recommends.

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.

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* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

APPENDIX E

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

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 peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

U.S.C.A. Const. Amend. XIV

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judi-

cial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * *

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally
42 U.S.C.A. § 1983

Effective: October 19, 1996
Currentness

§ 1983. Civil action for deprivation of rights [Statutory Text & Notes of Decisions subdivisions I to IX]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 41. Public Employment, Civil Service, and Pensions (Refs & Annos)
Chapter 41.80. State Collective Bargaining (Refs & Annos)
RCWA 41.80.100. Employee authorization of membership dues and other payments—Revocation

Effective: July 28, 2019

(1) Upon authorization of an employee within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the employer must deduct from the payments to the employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and must transmit the same to the treasurer of the exclusive bargaining representative.

(2)(a) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that includes requirements for deductions of other payments, the employer must make such deductions upon authorization of the employee.

(b) An employee's written, electronic, or recorded voice authorization to have the employer deduct membership dues from the employee's salary must be made by the employee to the exclusive bargaining representative. If the employer receives a request for authorization of deductions, the employer shall as soon as practicable forward the request to the exclusive bargaining representative.

(c) Upon receiving notice of the employee's authorization, the employer shall deduct from the employee's salary membership dues and remit the amounts to the exclusive bargaining representative.

(d) The employee's authorization remains in effect until expressly revoked by the employee in accordance with the terms and conditions of the authorization.

(e) An employee's request to revoke authorization for payroll deductions must be in writing and submitted by the employee to the exclusive bargaining representative in accordance with the terms and conditions of the authorization.

(f) After the employer receives confirmation from the exclusive bargaining representative that the employee has revoked authorization for deductions, the employer shall end the deduction no later than the second payroll after receipt of the confirmation.

(g) The employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions.

* * * *

65th Legislature, 2018 Regular Session
Chapter 247
H.B. No. 2751
Labor Organizations—Dues—Deductions

An Act Relating to the deduction of union dues and fees; and amending RCW 28B.52.045, 41.56.110, 41.59.060, 41.76.045, 41.80.100, and 49.39.080.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1.RCW 28B.52.045 and 1987 c 314 s 8 are each amended to read as follows:

WA ST 28B.52.045

(1) Upon filing with the employer the voluntary written authorization of a bargaining unit employee under this chapter, the employee organization which is the exclusive bargaining representative of the bargaining unit shall have the right to have deducted from the salary of the bargaining unit employee the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the exclusive bargaining representative. Such employee authorization shall not be irrevocable for a period of more than one year. Such dues and fees shall be deducted from the pay of all employees who have given authorization for such deduction, and shall be transmitted by the employer to the employee organization or to the depository designated by the employee organization.

(2)(a) A collective bargaining agreement may include union security provisions, but not a closed shop. If an agency shop or other union security provision is agreed to, the employer shall enforce any such provision by deductions from the salary of bargaining unit

employees affected thereby and shall transmit such funds to the employee organization or to the depository designated by the employee organization.

(3) (b) Upon written authorization of an employee within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the employer must deduct from the payments to the employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and must transmit the same to the treasurer of the exclusive bargaining representative.

(c) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that:

(i) Includes a union security provision authorized under (a) of this subsection, the employer must enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues; or

(ii) Includes requirements for deductions of payments other than the deduction under (c)(i) of this subsection, the employer must make such deductions upon written authorization of the employee.

(2) An employee who is covered by a union security provision and who asserts a right of nonassociation based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member shall pay to a nonreligious charity or other charitable organization an amount of money

equivalent to the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the exclusive bargaining representative. The charity shall be agreed upon by the employee and the employee organization to which such employee would otherwise pay the dues and fees. The employee shall furnish written proof that such payments have been made. If the employee and the employee organization do not reach agreement on such matter, the commission shall designate the charitable organization.

Sec. 2.RCW 41.56.110 and 1973 c 59 s 1 are each amended to read as follows:

WA ST 41.56.110

(1) Upon the written authorization of any public an employee within the bargaining unit and after the certification or recognition of such the bargaining unit's exclusive bargaining representative, the public employer shall deduct from the pay of such public payments to the employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and shall transmit the same to the treasurer of the exclusive bargaining representative.

(2) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that:

(a) Includes a union security provision authorized under RCW 41.56.122, the employer must enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues; or

(b) Includes requirements for deductions of payments other than the deduction under (a) of this subsection, the employer must make such deductions upon written authorization of the employee.

Sec. 3.RCW 41.59.060 and 1975 1st ex.s. c 288 s 7 are each amended to read as follows:

WA ST 41.59.060

(1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.

(2) The exclusive bargaining representative shall have the right to have deducted from the salary of employees, upon receipt of an appropriate authorization form which shall not be irrevocable for a period of more than one year, an amount equal to the fees and dues required for membership. Such fees and dues shall be deducted monthly from the pay of all appropriate employees by the employer and transmitted as provided for by agreement between the employer and the exclusive bargaining representative, unless an automatic payroll deduction service is established pursuant to law, at which time such fees and dues shall be transmitted as therein provided. If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit. (a) Upon

written authorization of an employee within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the employer must deduct from the payments to the employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and must transmit the same to the treasurer of the exclusive bargaining representative.

(b) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that:

(i) Includes a union security provision authorized under RCW 41.59.100, the employer must enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues; or

(ii) Includes requirements for deductions of payments other than the deduction under (b)(i) of this subsection, the employer must make such deductions upon written authorization of the employee.

Sec. 4. RCW 41.76.045 and 2002 c 356 s 12 are each amended to read as follows:

WA ST 41.76.045

(1) Upon filing with the employer the voluntary written authorization of a bargaining unit faculty member under this chapter, the employee organization which is the exclusive bargaining representative of the bargaining unit shall have the right to have deducted from the salary of the bargaining unit faculty member the periodic dues and initiation fees uni-

formly required as a condition of acquiring or retaining membership in the exclusive bargaining representative. Such employee authorization shall not be irrevocable for a period of more than one year. Such dues and fees shall be deducted from the pay of all faculty members who have given authorization for such deduction, and shall be transmitted by the employer to the employee organization or to the depository designated by the employee organization.

(2)(a) A collective bargaining agreement may include union security provisions, but not a closed shop. If an agency shop or other union security provision is agreed to, the employer shall enforce any such provision by deductions from the salary of bargaining unit faculty members affected thereby and shall transmit such funds to the employee organization or to the depository designated by the employee organization.

(b) Upon written authorization of an employee within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the employer must deduct from the payments to the employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and must transmit the same to the treasurer of the exclusive bargaining representative.

(c) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that:

(i) Includes a union security provision authorized under (a) of this subsection, the employer must enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclu-

sive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues; or

(ii) Includes requirements for deductions of payments other than the deduction under (c)(i) of this subsection, the employer must make such deductions upon written authorization of the employee.

(2) A faculty member who is covered by a union security provision and who asserts a right of nonassociation based on bona fide religious tenets or teachings of a church or religious body of which such faculty member is a member shall pay to a nonreligious charity or other charitable organization an amount of money equivalent to the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the exclusive bargaining representative. The charity shall be agreed upon by the faculty member and the employee organization to which such faculty member would otherwise pay the dues and fees. The faculty member shall furnish written proof that such payments have been made. If the faculty member and the employee organization do not reach agreement on such matter, the dispute shall be submitted to the commission for determination.

Sec. 5.RCW 41.80.100 and 2002 c 354 s 311 are each amended to read as follows:

WA ST 41.80.100

(1) A collective bargaining agreement may contain a union security provision requiring as a condition of employment the payment, no later than the thirtieth day following the beginning of employment or July 1, 2004, whichever is later, of an agency shop fee to the employee organization that is the exclusive bargaining

representative for the bargaining unit in which the employee is employed. The amount of the fee shall be equal to the amount required to become a member in good standing of the employee organization. Each employee organization shall establish a procedure by which any employee so requesting may pay a representation fee no greater than the part of the membership fee that represents a pro rata share of expenditures for purposes germane to the collective bargaining process, to contract administration, or to pursuing matters affecting wages, hours, and other conditions of employment.

(2) An employee who is covered by a union security provision and who asserts a right of nonassociation based on bona fide religious tenets, or teachings of a church or religious body of which the employee is a member, shall, as a condition of employment, make payments to the employee organization, for purposes within the program of the employee organization as designated by the employee that would be in harmony with his or her individual conscience. The amount of the payments shall be equal to the periodic dues and fees uniformly required as a condition of acquiring or retaining membership in the employee organization minus any included monthly premiums for insurance programs sponsored by the employee organization. The employee shall not be a member of the employee organization but is entitled to all the representation rights of a member of the employee organization.

(3) Upon filing with the employer the written authorization of a bargaining unit employee under this chapter, the employee organization that is the exclusive bargaining representative of the bargaining unit shall have the exclusive right to have deducted from the salary of the employee an amount equal to

the fees and dues uniformly required as a condition of acquiring or retaining membership in the employee organization. The fees and dues shall be deducted each pay period from the pay of all employees who have given authorization for the deduction and shall be transmitted by the employer as provided for by agreement between the employer and the employee organization. (a) Upon written authorization of an employee within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the employer must deduct from the payments to the employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and must transmit the same to the treasurer of the exclusive bargaining representative.

(b) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that:

(i) Includes a union security provision authorized under subsection (1) of this section, the employer must enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues; or

(ii) Includes requirements for deductions of payments other than the deduction under (b)(i) of this subsection, the employer must make such deductions upon written authorization of the employee.

(4) Employee organizations that before July 1, 2004, were entitled to the benefits of this section shall continue to be entitled to these benefits.

Sec. 6.RCW 49.39.080 and 2010 c 6 s 9 are each amended to read as follows:

WA ST 49.39.080

(1) Upon the written authorization of any symphony musician an employee within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the employer must deduct from the pay of the symphony musician payments to the employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and must transmit the dues same to the treasurer of the exclusive bargaining representative.

(2) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that:

(a) Includes a union security provision authorized under RCW 49.39.090, the employer must enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, a fee equivalent to the dues; or

(b) Includes requirements for deductions of payments other than the deduction under (a) of this subsection, the employer must make such deductions upon written authorization of the employee.

Approved March 23, 2018.

Effective June 7, 2018.

APPENDIX F

MEMORANDUM OF UNDERSTANDING BETWEEN THE STATE OF WASHINGTON AND WASHINGTON FEDERATION OF STATE EMPLOYEE

The parties agree to modify Article 40, Dues Deduction/Status Reports, of the 2017-2019 Collective Bargaining Agreement between the Slate of Washington and the Washington Federation of State Employees as follows:

ARTICLE 40

UNION DUES DEDUCTION~~/~~ AND STATUS REPORTS

40.~~2~~1 Notification to Employees

The Employer will inform new, transferred, promoted, or demoted employees in writing prior to appointment into positions included in the bargaining unit(s) of the Union's exclusive ~~recognition and the union security provision~~ representation status. Upon appointment to a bargaining unit position. ~~T~~the Employer will furnish the employees ~~appointed into bargaining unit positions~~ with ~~a payroll deduction authorization form~~membership materials provided by the Union. The Employer will inform employees in writing, with a copy to the Union, ~~when~~ if they are subsequently appointed to a position that is not in a bargaining unit.

40.~~4~~2 Deduction Authorization

The Employer agrees to deduct ~~the~~ an amount equal to the membership dues~~, agency shop fee, non-association fee, or representation fee~~ from

the salary of employees who request such deduction in writing within thirty (30) days of receipt of a properly completed request submitted to the appropriate agency payroll office. Such requests will be made on a Union payroll deduction authorization card. The Employer will honor the terms and conditions of each employee's signed membership card.

40.4~~3~~ Union Dues

A. ~~When an employee provides~~ Upon receipt of the employee's written authorization ~~to the Employer~~, the ~~Union has the right to have~~ Employer will deducted from the employee's salary an amount equal to the fees or dues required to be a member of the Union. The Employer will provide payments for ~~all said~~ the deductions to the Union at the Union's official headquarters each pay period.

B. Forty-five (45) calendar days prior to any change in dues ~~and/or fees,~~ the Union will provide the Office of Financial Management/State Human Resources, Labor Relations Section the percentage and maximum dues ~~and/or fees~~ be deducted from the employee's salary.

~~**40.3 Union Security**~~

~~All employees covered by this Agreement will, as a condition of employment, either become members of the Union and pay membership dues, or, as non-members, pay a fee as described in Subsections 40.3 A, B, and C below, no later that the 30th day following the effective date of~~

~~this Agreement or the beginning of their employment.~~

~~A. Employees who choose not to become union members must pay to the Union, no later that the 30th day following the beginning of employment, and agency shop fee equal to the amount required to be a member in good standing of the Union~~

~~B. An employee who does not join the Union based on bona fide religious tenants, or teachings of a church or religious body of which he or she is a member, will make payments to the Union that are equal to its membership dues, less monthly union insurance premiums, if any. These payments will be used for purposes withing the program of the Union that are in harmony with the employee's conscience. Such employees will not be members of the union, but are entitled to all of the representational rights of union members.~~

~~C. The Union will establish a procedure that any employee who makes a request much pay a representation fee equal to a pro rata share of the full membership fee that is related to collective bargaining, contract administration and the pursuit of matters affecting wages, hours and other terms and conditions of employment rather than the full membership fee.~~

~~D. If an employee fails to meet the union security provisions outlined above, the Union may notify the Employer. If the Union notifies the Employer, the Union will inform the~~

~~employee that his or her employment may be terminated~~

40.~~6~~4 Voluntary Deduction<u>s</u>

A. <u>PEOPLE</u>

1. The Employer agrees to deduct from the wages of any employee who is a member of the Union deduction for the PEOPLE program. Written authorizations must be requested in writing by the employee and may be revoked by the employee at any time by giving written notice to both the Employer and the Union. The Employer agrees to remit electronically, on each state payday, any deductions made to the Union together with an electronic report showing:

   a. Employee name;

   b. Personnel number;

   c. Amount deducted; and

   d. Deduction code.

2. The parties agree this section satisfies the Employer's obligations and provides for the deduction authorized under <u>RCW 41.04.230.</u>

B. <u>Public Safety Protection Program (PSPP)</u>

The Employer agrees to deduct from the wages of any employee who is a member of the Union deductions for the WFSE/AFSCME PSPP, Written authorizations must be on the WFSE/AFSCME Council 28 PSPP Voluntary Payroll Deduction Authorization form. Deductions will include a one-time

initial deduction amount and ongoing monthly deduction amount. Authorizations may be revoked by the employee at any time by giving written notice to both the Employer and the Union. The Employer agrees to remit electronically, on each state payday, any deductions made to the Union together with an electronic report showing:

1. Employee name;
2. Personnel number;
3. Amount deducted; and
4. Deduction code.

40.~~7~~5 Status Reports

A. No later than the twelfth (12th) of each month, the Employer will provide the Union with a report in an electronic format of | the following data, if maintained by the Employer, for employees in the bargaining unit:

1. Personnel number
2. Employee name
3. Mailing address
4. Personnel area code and title
5. Organization unit code, abbreviation and title
6. Work county code and title
7. Work location street (if available)
8. Work location city (if available)
9. Work phone number

10. Employee group
11. Job class code and title
12. Appointment date
13. Bargaining unit code and title
14. Position number
15. Pay scale group
16. Pay scale level
17. Employment percent
18. Seniority date
19. Separation date
20. Special pay code
21. Total salary from which union dues is calculated
22. Deduction wage type
23. Deduction amount
24. Overtime eligibility designation
25. Retirement benefit plan

B. No later than the twelfth (12th) of each month, the Employer will provide the Union with a report in an electronic format of the following data, if maintained by the Employer, for employees who enter or leave the bargaining unit or who stop or start deductions:

1. Personnel number
2. Employee name
3. Mailing address

4. Personnel area code and title
5. Organization unit code, abbreviation and title
6. Work county code and title
7. Work location street (if available)
8. Work location city (if available)
9. Work phone number
10. Employee group
11. Job class code and title
12. Appointment date
13. Bargaining unit code and title
14. Position number
15. Pay scale group
16. Pay scale level
17. Employment percent
18. Seniority date
19. Separation date
20. Special pay code
21. Total salary from which union dues is calculated
22. Action reason title and effective date

C. Information provided pursuant to this Section will be maintained by the Union in confidence according to the law.

D. The Union will indemnify the Employer for any violations of employee privacy committed by the Union pursuant to this Section.

40.~~5~~6 ~~Dues Cancellation~~ Revocation

An employee may ~~cancel~~ revoke his or her authorization for payroll deduction of ~~fees~~ payments to the Union by written notice to the Employer and the Union in accordance with the terms and conditions of their signed membership card. Every effort will be made to ~~make the cancellation~~end the deduction effective on the first payroll, and not later than the second payroll, after receipt by the Employer of ~~the notice~~confirmation from the Union that the terms of the employee's signed membership card regarding dues deduction revocation have been met. ~~However, the cancellation may cause the employee to be terminated. subject to Section 40.3. above.~~

40.~~8~~7 Indemnification

The ~~Employer shall be held harmless by the~~ Union ~~and employees~~ agrees to indemnify and hold the Employer harmless from all claims, demands, suits or other forms of liability that arise against the Employer for or on account of compliance with this Article and any and all issues related to the deduction of dues ~~and~~ or fees.

Dated July 6, 2018

For the Employer	For the Union
/s/ John Vencill	/s/ Amy Spiegel
John Vencill,	Amy Spiegel,
Labor Negotiator	Director of Negotiations

APPENDIX G

Memorandum of Understanding
Between
The State of Washington
And the
Washington Federation of State Employees

The State of Washington and the Washington Federation of State Employees, AFSCME Council 28, agree to modify Article 40, Sections 40.4 and 40.5 of the 2017-2019 Collective Bargaining Agreement as follows:

40.4 The Employer agrees to deduct the membership dues, agency shop fee, non-association fee, or representation fee from the salary of employees who request such deduction in writing within thirty (30) days of receipt of a properly completed request submitted to the appropriate agency payroll office. Such requests will be made on a Union payroll deduction authorization card. <u>The Employer will honor the terms and conditions of each employee's signed membership card.</u>

40.5 ~~Dues/Fees Cancellation~~

An employee may cancel his or her payroll deduction of ~~dues or fees~~ by written notice to the Employer and the Union. Every effort will be made to make the cancellation effective on the first payroll, and not later than the second payroll, after receipt of the notice. However, the cancellation may cause the employee to be terminated, subject to Section 40.3, above.

The effective date of this MOU is the date it is signed by both parties to this agreement, below.

/s/ [Illegible]	8/10/17	/s/ [Illegible]	8/10/17
For the Employer	Date	For the Union	Date

APPENDIX H

ARTICLE 40
DUES DEDUCTION/STATUS REPORTS

40.1 Union Dues

A. When an employee provides written authorization to the Employer, the Union has the right to have deducted from the employee's salary an amount equal to the fees or dues required to be a member of the Union. The Employer will provide payments for all said deductions to the Union at the Union's official headquarters each pay period.

B. Forty-five (45) calendar days prior to any change in dues and/or fees, the Union will provide the Office of Financial Management/State Human Resources, Labor Relations Section the percentage and maximum dues and/or fees to be deducted from the employee's salary.

40.2 Notification to Employees

The Employer will inform new, transferred, promoted, or demoted employees in writing prior to appointment into positions included in the bargaining unit(s) of the Union's exclusive recognition and the union security provision. The Employer will furnish the employees appointed into bargaining unit positions with a payroll deduction authorization form. The Employer will inform employees in writing when they are appointed to a position that is not in a bargaining unit.

40.3 Union Security

All employees covered by this Agreement will, as a condition of employment, either become members of the Union and pay membership dues or, as non-members, pay a fee as described in Subsections 40.3 A, B, and C below, no later than the 30th day following the effective date of this Agreement or the beginning of their employment.

A. Employees who choose not to become union members must pay to the Union, no later than the 30th day following the beginning of employment, an agency shop fee equal to the amount required to be a member in good standing of the Union.

B. An employee who does not join the Union based on bona fide religious tenets, or teachings of a church or religious body of which he or she is a member, will make payments to the Union that are equal to its membership dues, less monthly union insurance premiums, if any. These payments will be used for purposes within the program of the Union that are in harmony with the employee's conscience. Such employees will not be members of the Union, but are entitled to all of the representational rights of union members.

C. The Union will establish a procedure that any employee who makes a request may pay a representation fee equal to a pro rata share of the full membership fee that is related to collective bargaining, contract administration and the pursuit of matters affecting wages, hours and other terms and conditions of employment rather than the full membership fee.

D. If an employee fails to meet the union security provisions outlined above, the Union may notify the Employer. If the Union notifies the Employer, the Union will inform the employee that his or her employment may be terminated.

40.4 The Employer agrees to deduct the membership dues, agency shop fee, non- association fee, or representation fee from the salary of employees who request such deduction in writing within thirty (30) days of receipt of a properly completed request submitted to the appropriate agency payroll office. Such requests will be made on a Union payroll deduction authorization card.

40.5 Dues/Fees Cancellation

An employee may cancel his or her payroll deduction of dues or fees by written notice to the Employer and the Union. Every effort will be made to make the cancellation effective on the first payroll, and not later than the second payroll, after receipt of the notice. However, the cancellation may cause the employee to be terminated, subject to Section 40.3, above.

40.6 Voluntary Deduction

A. PEOPLE

1. The Employer agrees to deduct from the wages of any employee who is a member of the Union deduction for the PEOPLE program. Written authorizations must be requested in writing by the employee and may be revoked by the employee at any time by giving written notice to both the Employer and the Union. The Employer

agrees to remit electronically, on each state payday, any deductions made to the Union together with an electronic report showing:

a. Employee name;

b. Personnel number;

c. Amount deducted; and

d. Deduction code.

* * *

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WASHINGTON FEDERATION OF STATE EMPLOYEES / AFSCME, Council 28 / AFL-CIO

Public Service
Washington Federation of State Employees
AFSCME
Making a Better Washington

WFSE is the largest union for state, higher education and public service employees in the state of Washington! We are 40,000 members strong - a powerful voice to protect jobs, pay, benefits, worker rights, working conditions and public services.

RECEIVED
JAN 05 2017

By becoming a union member you create a stronger and united voice to take a stand for public service employees and the services we provide. By joining together, we have power in the halls of government and at the contract bargaining table. WFSE is Washington's most powerful advocate for public service employees, working families, and strong communities.

Payroll Deduction Authorization

Nickname (if any) _____

NAME: Last Ostrander **First:** Richard **MI** M

Home Address: [redacted]

City: [redacted] **State:** [redacted] **Zip:** [redacted]

Mailing Address (if different) _____

City: _____ **State:** _____ **Zip:** _____

PHONE: Cell: ☒ [redacted] **Home:** ☐ _____ **Work:** ☐ _____

Sex: ☒ Male ☐ Female **Birth date:** [redacted] **Home email:** [redacted]

Employer: WSDOT **Job Class/Title:** Maintenance Tech 2 IRT **Work City:** Seattle

Last 4 of SSN: [redacted] **Employee ID No.:** _____ **Date Hired into Position:** Jan 6, 17

Worksite: Corrigan Ave **Shift:** _____

All employees covered by a collective bargaining agreement with union security must, as a condition of employment pay either union dues or a union representation fee to the WFSE no later than 30 days following the effective date of the bargaining agreement or the beginning of their employment in a covered bargaining unit position. In accordance with the Washington Federation of State Employees, Council 28, AFSCME, AFL-CIO (WFSE) collective bargaining agreement with my employer, I hereby choose:

☒ **YES! I want to be a union member. I support advocating for quality services and good jobs. I understand that by becoming a WFSE union member I will make our union stronger to protect jobs, public service employees and the services we provide!**

I authorize and direct my employer to deduct from my pay each pay period, regardless of whether I am or remain a member of the Union, the amount of dues as set in accordance with the WFSE Constitution and By-Laws (currently 1.5% of my salary each pay period, not to exceed the set maximum). This authorization shall be irrevocable, regardless of whether I am or remain a member of the Union until terminated by me by written notification to my employer with a copy to the WFSE in accordance with the collective bargaining agreement.

☐ No I do not want to be a union member. I understand that I am giving up the right to participate in union activities, trainings, and events. I will be unable to vote to accept (or reject) my union contract or proposed changes in wages and benefits as a result of negotiations, and to vote in union elections or for union officers. I will not be eligible to participate in union-management meetings regarding my workplace concerns. I will not be eligible for member-only benefits.

I understand that by choosing NOT to become a WFSE union member I still must pay a union representation fee. As a non-member I authorize the deduction from my earnings each payroll period of the union representation fee in accordance with the collective bargaining agreement and as allowed in RCW 41.80.100.

[signature] 1/4/17
SIGNATURE DATE

Dues or fees paid to WFSE are not deductible as charitable contributions for federal income tax purposes. Dues or fees paid to the WFSE, however, may qualify as business expenses and may be deductible in limited circumstances subject to various restrictions imposed by the Internal Revenue Service.

191-498

ER 057

APPENDIX I

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M

WASHINGTON FEDERATION OF STATE EMPLOYEES | AFSCME, COUNCIL 28 | AFL-CIO

YES! I STAND UNITED WITH MY FELLOW STATE EMPLOYEES IN WASHINGTON TO WIN:

WASHINGTON FEDERATION 100% UNION PROUD OF STATE EMPLOYEES

- Good pay and affordable healthcare for all state employees
- Full funding for vital public services and schools
- Retirement security
- Family friendly workplaces
- A more just and humane Washington
- Fair revenue where the wealthy pay their fair share

Received
MAR 21 2018
WFSE/HQ

We can no longer expect the courts, politicians or laws to protect our interests in Washington.

THE TIME IS NOW. 100% UNION

PAYROLL DEDUCTION AUTHORIZATION & MAINTENANCE OF DUES CARD

Last Name: Stone First Name: Mike Middle Initial: R Nickname (if any):
Home Address: [redacted]
City: [redacted] State: [redacted] Zip: [redacted]
Mailing Address (if different):
City: State: Zip:

(Please check preferred phone)

Cell Phone*: ☐ [redacted] Home Phone: ☐ Work Phone: ☐
Gender: M Birth Date: [redacted] Home Email:
Employer: DCS DSHS Job Class/Title: SEO 2 Work City: Olympia
Last 4 of SSN: [redacted] Employee ID No.: [redacted] Date Hired into Position: 12/1/15
Worksite: TC 3 Shift: 2nd language used at home:

YES! I want to be a union member. I support advocating for quality services and good jobs. I understand that as a WFSE member I will make our union stronger to protect public services and work together to improve pay, benefits and working conditions for all public employees.

Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, the amount of dues as set in accordance with the WFSE Constitution and By-Laws and authorize my Employer to remit such amount semi-monthly to the Union (currently 1.5% of my salary per pay period not to exceed the maximum). This voluntary authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination date of the collective bargaining agreement (if there is one) between the Employer and the Union, whichever occurs sooner, and for year to year thereafter unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than twenty (20) days before the end of any yearly period, regardless of whether I am or remain a member of the Union, unless I am no longer in active pay status in a WFSE bargaining unit; provided however, if the applicable collective-bargaining agreement specifies a longer or different revocation period, then only that period shall apply. This card supersedes any prior check-off authorization card I signed. I recognize that my authorization of dues deductions, and the continuation of such authorization from one year to the next, is voluntary and not a condition of my employment.

SIGNATURE: [signature] **DATE:** 3/6/18

*By providing my cell phone number, I understand that the Union and its affiliates may use automated calling technologies and/or text message me on my cell phone on a periodic basis. The Union will never charge for text message alerts; carrier message and data rates may apply to such texts. Melissa Kovez

Payments to the Union are not deductible as charitable donations for federal income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses. Stacie J OFO

opeiu3/afl/cio

@wfsec28 www.wfse.org @wfsec28

182-996

ER 037

APPENDIX J

NON-PROFIT ORG
US POSTAGE
PAID
OLYMPIA WA
PERMIT NO. 238

BUSINESS REPLY MAIL
FIRST-CLASS MAIL PERMIT NO 200 OLYMPIA WA

POSTAGE WILL BE PAID BY ADDRESSEE

Washington Federation of State Employees, AFSCME Council 28
1212 JEFFERSON ST STE 300
OLYMPIA WA 98501-9965

@wfsec28 www.wfse.org @wfsec28

DO NOT SIGN THIS SIDE IF YOU HAVE SIGNED THE OTHER SIDE

Employees in positions covered by a Washington Federation of State Employees, AFSCME, Council 28, AFL-CIO (WFSE) collective bargaining agreement containing union security must pay either dues or fees to the union.

Last Name:_____ **First Name:**_____ **MI** ____ **Gender:** _____

Employer: _____ **Job Class/Title:**_____ **Work City:**_____

Last 4 of SSN:_____ **Employee ID No.:**_____ **Date Hired Into Position:**_____

Cell Phone: _____ **Work Phone:** _____ **Home Phone:** _____

No, I do not want to be a union member. I understand that I am giving up the right to participate in union activities, trainings, and events. I will be unable to vote to accept (or reject) my union contract or proposed changes in wages and benefits as a result of negotiations, and to vote in union elections or for union officers. I will not be eligible to participate in union-management meetings regarding my workplace concerns. I will not be eligible for member-only benefits.

I understand that by choosing NOT to become a WFSE union member I still must pay a union representation fee. As a non-member I authorize the deduction from my earnings each payroll period of the union representation fee in accordance with the collective bargaining agreement and as allowed by law.

_____

NON-MEMBER SIGNATURE **DATE**

A signature on the other side of this card authorizing membership dues will supersede the signature above.

November 1 2017

APPENDIX K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed November 30, 2018]

No. 3:18-cv-5620

MELISSA BELGAU, *et al.*,

Plaintiffs,

v.

JAY R. INSLEE, *et al.*,

Defendants.

The Honorable Robert J. Bryan

STIPULATION REGARDING FACTS FOR CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Melissa Belgau, Donna Bybee, Michael Stone, Richard Ostrander, Miriam Torres, Katherine Newman, and Gary Honc ("Plaintiffs"), and Defendants Governor Jay Inslee, David Schumacher, John Wiesman, Cheryl Strange, Roger Millar, Joel Sacks ("State Defendants"), and Washington Federation of State Employees, AFSCME Council 28 ("WFSE") (together, "Defendants"), by and through their undersigned counsel of record, stipulate that, solely for purposes of filing cross-motions for summary judgment or partial summary judgment in this case, the following facts are true:

1) Defendant Washington Federation of State Employees, AFSCME Council 28 ("WFSE") is a labor organization that serves as the exclusive collective bargaining representative for approximately 40,000 employees of the State of Washington in bargaining units in general government agencies, institutions in the state community college system, and state institutions of higher education. WFSE also represents a small bargaining unit of employees of the Renton Technical College.

2) WFSE has more than 35,000 dues paying members.

3) Each Plaintiff is a Washington state employee working in a General Government bargaining unit of employees that is exclusively represented by WFSE for purposes of collective bargaining with their employer pursuant to Washington law.

4) A true copy of Article 40 of the general government collective bargaining agreement that applied to employees in Plaintiffs' bargaining unit, including Plaintiffs, beginning July 1, 2017 ("Pre-Amended 2017-2019 CBA Art. 40") is attached as Exhibit 1.

5) A true copy of the Memorandum of Understanding dated August 10, 2017 amending Article 40 of the general government collective bargaining agreement is attached as Exhibit 2.

6) A true copy of the Memorandum of Understanding dated July 6, 2018 further amending Article 40 of the general government collective bargaining agreement ("Amended 2017 2019 CBA Art. 40") is attached as Exhibit 3.

7) Amended 2017-2019 CBA Art. 40 currently applies to the approximately 26,800 Washington State

employees in general government agencies in the General Government bargaining units, including Plaintiffs, who are represented by WFSE.

8) Employees represented by WFSE are not required to become WFSE members as a condition of employment. WFSE members are also not required to remain WFSE members, and they may resign from membership at any time.

9) Plaintiffs signed the cards attached as Exhibits 4 through 17 (the "cards"). Each of these cards was signed on the date indicated on the card by the Plaintiff whose name appears on the card. Exhibits 4 through 10 are referred to herein as Plaintiffs' "initial cards." Exhibits 11 through 17 are referred to herein as Plaintiffs' "current cards."

10) WFSE drafted the cards that are Exhibits 4 through 17. WFSE asked the Plaintiffs to sign the cards. Defendants did not advise Plaintiffs to seek legal counsel before signing the cards. Defendants did not prevent Plaintiffs from consulting with legal counsel before signing the cards. Plaintiffs did not seek legal counsel before signing the cards.

11) Plaintiffs became WFSE members when they signed their initial cards (Exhibits 4 through 10). Other workers became WFSE members when they signed cards similar to Plaintiffs' cards (Exhibits 4 through 17).

12) In approximately July 2017, WFSE began asking current members if they would sign new cards materially identical to Plaintiffs' current cards (Exhibits 11 through 17). WFSE began asking members if they would sign these new cards after a deliberative process by WFSE's democratically elected Executive Board, which formally approved the new cards in a

meeting open to WFSE's members. Approximately 16,570 employees have signed these cards to date. The other WFSE members are still covered by cards similar to Plaintiffs' initial cards (Exhibits 4 through 10). WFSE did not require members to sign new cards to remain WFSE members.

13) At the time Plaintiffs signed their current cards (Exhibits 11 through 17), they worked in bargaining units covered by Pre-Amended 2017-2019 CBA Art. 40, as amended by the August 10, 2017 Memorandum of Understanding. At the time the Plaintiffs signed their initial cards (Exhibits 4 through 10), they worked in bargaining units covered by Pre-Amended 2017-2019 CBA Art. 40, or similar provisions in previous collective bargaining agreements.

14) At the time Plaintiffs signed the cards (Exhibits 4 through 17), the State Defendants deducted union dues from the wages of union members, including Plaintiffs, and remitted those dues to WFSE, and the State Defendants deducted representation fees from nonmembers as a condition of employment and remitted those fees to WFSE, pursuant to the collective bargaining agreements and the version of RCW 41.80.100 then in effect. Defendants stopped enforcing the representation fee requirement after the Supreme Court issued *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) on June 27, 2018.

15) At the time Plaintiffs signed the cards that are Exhibits 4 through 17, the representation fee applicable to non-members ranged from approximately 65.3% to 78.8% of union dues paid by union members.

16) At the time Plaintiffs signed the cards that are Exhibits 4 through 17, union dues were between

approximately 1.37% and 1.5% of union members' base wages.

17) By signing cards like the cards the Plaintiffs signed (Exhibits 4 through 17), workers become union members and obtain membership rights. Membership rights include the ability to vote on whether to ratify a collective bargaining agreement, vote in union officer elections, run for union office, have the opportunity to serve on bargaining committees, and participate in the union's internal affairs.

18) WFSE members also receive access to members-only benefits, including discounts on goods and services, including home mortgages and wireless phone plans, access to scholarship programs, free legal advice, discounted dental benefits, annual family campouts, access to the Union Sportsman's Alliance, and access to the AFSCME Free College program. WFSE also uses membership dues to contribute to the Foundation for Working Families, which provides disaster/hardship relief grants to union members.

19) Only WFSE members receive membership rights and access to members-only benefits.

20) After June 27, 2018, Plaintiffs each communicated in writing to WFSE that they object to union membership and the payment of any union dues or fees. Plaintiffs Belgau, Stone, Newman, and Honc also communicated their objections to their agency employers.

21) WFSE has processed Plaintiffs' membership resignations. Plaintiffs are no longer union members and no longer have membership rights or access to members-only benefits.

22) The State Defendants continued to deduct an amount equal to union dues paid by members from Plaintiffs' wages and remitted them to WFSE, pursuant to the Plaintiffs' current cards (Exhibits 11 through 17), Amended 2017-2019 CBA Art. 40, and RCW 41.80.100.

23) The State Defendants will continue to deduct an amount equal to union dues from Plaintiffs' wages and remit those funds to WFSE until the expiration of the one-year terms described in the Plaintiffs' current cards (Exhibits 11 through 17), i.e., one year after each Plaintiff signed his or her current card, without requiring Plaintiffs to again object to the deductions. For Plaintiffs Belgau, Bybee, and Ostrander, those one-year terms expired in November 2018, and the State Defendants stopped deducting an amount equal to union dues from the wages of those Plaintiffs.

24) After Plaintiffs filed this lawsuit, WFSE agreed to deposit the amounts deducted from Plaintiffs' wages in a separate, interest-bearing account pending resolution of this action. WFSE has opened the separate account and will keep all amounts received from each Plaintiff after the date of each Plaintiff's resignation of union membership and objection to dues or fee payments in the account until this lawsuit is resolved, so the funds will not be used to pay for any union activities or otherwise subsidize union operations.

25) Apart from the facts set forth in this stipulation, the parties do not contend that additional facts exist now that make the Plaintiffs' current cards enforceable or unenforceable.

26) The parties agree that they will file cross-motions for summary judgment or partial summary

judgment based on the facts set forth in this stipulation and will not introduce additional evidence related to the merits of Plaintiffs' claims in support of or opposition to those cross-motions. The parties agree that this stipulation does not preclude the parties from presenting additional facts or evidence if the case is not fully resolved based on those cross-motions for summary judgment or partial summary judgment or from raising at any time any issues that go to the court's subject matter jurisdiction.

DATED this 30th day of November, 2018.

So stipulated,

/s/ *James G. Abernathy*
James G. Abernathy, WSBA #48801
c/o Freedom Foundation
P.O. Box 552
Olympia, WA 98507
Telephone: (360) 956-3482
JAbernathy@myfreedomfoundation.com
Attorney for Plaintiffs

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edy@ylclaw.com

/s/ Scott A. Kronland
Scott A. Kronland, *Pro Hac Vice*
P. Casey Pitts, *Pro Hac Vice*
Matthew J. Murray, *Pro Hac Vice*
Kristin M. García, *Pro Hac Vice*
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skronland@altshulerberzon.com
cpitts@altshulerberzon.com
mmurray@altshulerberzon.com
kgarcia@altshulerberzon.com

Attorneys for Defendant Washington Federation of State Employees, AFSCME Council 28

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2018, I electronically filed this STIPULATION REGARDING FACTS FOR CROSS-MOTIONS FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for all parties.

DATED this 30th day of November, 2018, at San Francisco, California.

By: /s/ Scott A. Kronland
Scott A. Kronland, *Pro Hac Vice*
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
skronland@altshulerberzon.com

APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

[Filed August 23, 2018]

Case No. 3:18-cv-5620

MELISSA BELGAU, DONNA BYBEE, MICHAEL STONE, RICHARD OSTRANDER, MIRIAM TORRES, KATHERINE NEWMAN, GARY HONC, individuals,

Plaintiffs,

v.

JAY INSLEE, in His Official Capacity as Governor of the State of Washington; DAVID SCHUMACHER, in His Official Capacity as Director of the Washington Office of Financial Management; JOHN WEISMAN, in His Official Capacity as Director of the Washington Department of Health; CHERYL STRANGE, in Her Official Capacity as Director of the Washington Department of Social and Health Services; ROGER MILLAR, in His Official Capacity as Director of the Washington Department of Transportation; JOEL SACKS, in His Official Capacity as Dir. of Washington Department of Labor and Industries; WASHINGTON FEDERATION OF STATE EMPLOYEES (AFSCME, COUNCIL 28), a labor corporation,

Defendants.

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND DAMAGES – CLASS ACTION

INTRODUCTION

1. This class action case concerns whether union dues/fees deductions from State employees' wages since *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) are legal if the State employees have not clearly and affirmatively consented to the deductions by waiving their constitutional right to not fund union political advocacy ("union advocacy").

2. Plaintiffs Melissa Belgau, Michael Stone, Richard Ostrander, Miriam Torres, Katherine Newman, Donna Bybee, Gary Honc, and class members are Washington State employees from whose wages the State continues to deduct union dues/fees after the U.S. Supreme Court issued *Janus v. AFSCME, Council 31*, on June 27, 2018, despite the fact that Plaintiffs have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy. The State remits those deductions to the Washington Federation of State Employees ("WFSE").

3. The State of Washington and WFSE ("Defendants") claim the continued deductions are proper. They do so based on Plaintiffs' and class members' signatures on dues deduction agreements which allegedly authorize and bind Plaintiffs to continued deductions for a set period of time despite the fact that Plaintiffs' and class members' signed those agreements at a time when the relevant collective bargaining agreement included a compulsory agency fee provision, and the right to not fund union advocacy was not recognized by the U.S. Supreme Court in *Janus v. AFSCME, Council 31*, on June 27, 2019.

4. RCW 41.80.100 and Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6[1] authorize and compel the State to deduct union dues/fees ("dues") from Plaintiffs' and class members' wages and forward them to WFSE despite the fact that Plaintiffs have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy. The statute and CBA provisions and Defendants' actions taken pursuant to them, therefore, impermissibly infringe on Plaintiffs' and class members' First Amendment rights of free speech and free association.

5. This is a civil rights class action pursuant to 42 U.S.C. § 1983, seeking declaratory judgment, injunctive relief, as well as nominal, compensatory, and punitive damages and restitution of union dues illegally seized from Plaintiffs and the class members they seek to represent. Defendants are state actors acting under the color of state law—specifically RCW 41.80.100 and the Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, because it arises under the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C § 1983. This Court has authority under 28 U.S.C. §§ 2201 and 2202 to grant declaratory relief and other relief, including preliminary and permanent injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Pocedure.

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[1] Available at https://ofm.wa.gov/sites/default/files/public/legacy/labor/agreements/17-19/wfse_gg.pdf (last visited August 23, 2018).

7. Under 28 U.S.C. § 1367 this Court has supplemental jurisdiction over claims stated in this Complaint that do not arise under federal law but are so related to the federal claims as to form part of the same case or controversy.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 and intra-district assignment to the Tacoma Division is proper because the claims arise in this judicial district and division and Defendants do business and operate in this judicial district and division.

III. PARTIES

9. Plaintiff Melissa Belgau works for the State of Washington in the Department of Health as a Washington Emergency Medical Services Information System Administrator. Michael Stone works for the State of Washington in the Department of Social and Health Services as a Support Enforcement Officer. Richard Ostrander works for the State of Washington in the Department of Transportation as a Maintenance Technician. Miriam Torres is a Workfirst Program Specialist at the Washington State Department of Social and Health Services. Katherine Newman works for the State of Washington at the Health Care Authority as an Information Technology Specialist. Donna Bybee works for the State of Washington in the Department of Health as a Trauma Registry Administrator. Gary Honc works for the Washington Department of Labor and Industries as an Insurance Underwriter. Plaintiffs Belgau, Stone, Ostrander, Torres, Newman, Bybee, and Honc signed dues deduction agreements before June 27, 2018. Named Plaintiffs and class members are Washington State employees whose exclusive representative is WFSE. The state of Washington has deducted union

dues from Plaintiffs and class members since *Janus v. AFSCME, Council 31* issued on June 27, 2018 despite the fact that Plaintiffs and class members have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy.

10. Defendant Jay Inslee is Governor of Washington and is sued in his official capacity. As Governor, Defendant Inslee is Washington's chief executive officer and represents the State in collective bargaining with WFSE. See RCW 41.80.101(1).

11. Defendant David Schumacher is Director of the Washington State Office of Financial Management ("OFM"), the agency designated by the governor to collectively bargain with WFSE, and is sued in his official capacity. Defendant David Schumacher by and through OFM is charged with the responsibility of overseeing OFM, which is responsible for administering Plaintiffs' and class members' wages, as well as deducting from those wages union dues/fees and remitting them to WFSE pursuant to RCW 41.80.100 and Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6.

12. Defendant John Weisman is the Director of the Washington State Department of Health and is sued in his official capacity.

13. Defendant Cheryl Strange is the Director of the Washington State Department of Social and Health Services and is sued in her official capacity.

14. Roger Millar is Director of the Washington State Department of Transportation and is sued in his official capacity. Joel Sacks is Director of the Washington State Department of Labor and Industries and is sued in his official capacity.

15. Defendant Washington Federation of State Employees, American Federation of State, County, Municipal, Employees, Council 28 ("WFSE") is a labor union that represents over 35,000 public employees in Washington, and is headquartered at 1212 Jefferson Street, Suite 300, Olympia, WA 98501. WFSE is the State-recognized exclusive representative of Plaintiffs and class members. WFSE represents Plaintiffs and other Washington State employees throughout 36 State agencies, and the CBA applicable to Plaintiffs also applies to those Washington State employees and agencies.

IV. STATEMENT OF FACTS

16. Plaintiffs and class members are Washington State employees exclusively represented by WFSE and are subject to a single collective bargaining agreement applicable to Washington State employees in bargaining units represented by WFSE. WFSE represents Washington State employees in bargaining units in 36 different Washington State agencies.

17. At all times during their employment prior to July 6, 2018, Defendants subjected Plaintiffs and class members to CBA provisions which required the deduction of union dues or dues equivalent fees from their wages as a condition of employment. *See* Pre-amended 2017-19 CBA art. 40.

18. Employees who objected to union membership and the payment of any union dues/fees were still required to pay a "representation fee equal to the pro rata share of the full membership fee that is related to collective bargaining...", i.e., an agency fee the amount of which WFSE determined. Pre-amended 2017-19 CBA art. 40.3(C).

19. RCW 41.80.100 required Plaintiffs and class members to pay at least an agency fee to WFSE as a condition of employment. Before June 27, 2018, absent at least this minimum payment, Plaintiffs' and class members' employment would be terminated. Pre-amended CBA art. 40.3(D), 40.5. According to WFSE's 2017 accounting, the agency fee assessed to objecting nonunion employees was 77.8% of full union dues.

20. On June 27, 2018, the U.S. Supreme Court in *Janus v. AFSCME, Council 31*, held that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2486. The Supreme Court also held that agreeing to make any payments to a union constitutes a waiver of a constitutional right and that "such a waiver cannot be presumed" and "must be freely given and shown by clear and convincing evidence." *Id*.

21. On July 6, 2018, the State and WFSE executed an Amended CBA with a Memorandum of Understanding ("MOU") which removed the CBA's compulsory agency fee provision but still required the continued deduction of full union dues from the wages of Plaintiffs and class members.

22. Since June 27, 2018, Plaintiffs have communicated in writing to the State and WFSE that they object to union membership and the payment of any union dues/fees.

23. Despite the Supreme Court's ruling in *Janus v. AFSCME, Council 31* and Plaintiffs' objections, the State continues to deduct union dues/fees from Plaintiffs' wages and remit them to WFSE pursuant to RCW 41.80.100 and the MOU.

24. WFSE has informed Plaintiffs that it has instructed the State to continue deducting union dues/fees from Plaintiffs' wages.

25. Plaintiffs' State employers have indicated to Plaintiffs that it will continue to deduct union dues/fees from Plaintiffs' wages pursuant to WFSE's wishes and, in fact, have continued to do so.

26. Moreover, it is the official opinion of the Washington Attorney General that Plaintiffs' dues deduction agreements are not impacted by *Janus v. AFSCME, Council 31*, because he alleges Plaintiffs dues deduction agreements, signed before *Janus*, are "agreements between a union and its members to pay union dues." The Washington Attorney General states,

> The *Janus* decision does not impact any agreements between a union and its members to pay union dues, and existing membership cards or other agreements by union members to pay dues should continue to be honored. The opinion only impacts the payment of an agency service fee by individuals who decline union membership.[2]

27. Plaintiffs' Washington State employers take the same position as the Washington Attorney General, as do all of Washington's State employers (Washington State agencies).

28. Defendants contend the continued dues/fee deductions are lawful because of dues deduction agreements signed by Plaintiffs before June 27, 2018 which purport to authorize union dues deductions

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[2] Available at https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-issues-advisory-affirming-labor-rights-and-obligations (last visited August 1, 2018).

from Plaintiffs' wages. The agreement stated, "Effective immediately, I hereby voluntarily authorize and direct my Employer to deduct from my pay each pay period, the amount of dues as set in accordance with the WFSE Constitution and By-Laws and authorize my Employer to remit such amounts semi-monthly to the Union (currently 1.5% of my salary per pay period not to exceed the maximum)."

29. The dues deduction cards purport to authorize the State to deduct union dues from Plaintiffs' wages and remit them to WFSE. The cards state that authorization for the deductions will automatically renew annually unless the employee revokes the authorization between 10 and 20 days prior to the anniversary of the day Plaintiffs' signed the authorization. WFSE claims each plaintiff signed an identical card.

30. WFSE will require Plaintiffs to continue paying union dues/fees until Plaintiffs object again within the aforementioned limited ten day period. In the meantime, WFSE is preventing Plaintiffs from cancelling union membership and the deduction of union dues/fees from Plaintiffs' wages.

31. Amended CBA art. 40.2 requires State Defendants to "honor the terms and conditions of each employee's sign membership card." Amended CBA art. 40.2.

32. Amended CBA art. 40.6 only allows employees to revoke the card's purported authorization for a payroll deduction "in accordance with the terms and conditions of their signed membership card."

33. Plaintiffs signed the dues deduction cards at a time when the CBA included a compulsory agency fee provision, and the right to not fund union advocacy

was not recognized by the U.S. Supreme Court in *Janus v. AFSCME, Council 31* on June 27, 2019.

34. At the time Plaintiffs signed the cards, they had not previously clearly and affirmatively consented to the payment of union dues/fees by waiving their constitutional right to not fund union advocacy.

35. The dues deduction cards contain no language indicating that a First Amendment right was being, or potentially being, waived.

36. The dues deduction cards contain no language indicating that they operated as a waiver, or potential waiver, of a First Amendment right.

37. Plaintiffs and class members are paid on the 10th and the 25th day of each month. Absent injunctive relief, the State will continue deducting union dues/fees from Plaintiffs' and class members' wages on this schedule.

38. WFSE drafted the dues deduction agreements, WFSE proposed the agreements as take-it-or-leave-it form contracts, Plaintiffs could not bargain over the terms of the dues deduction authorizations, and Plaintiffs did not seek counsel and were not advised to seek counsel. Plaintiffs were not made aware, either by the language of the agreements or by WFSE or State representatives, of their constitutional right to not fund union advocacy or the significance of the agreement as a waiver of this right.

39. Plaintiffs cannot post a substantial bond to cover the amount of union dues that would be deducted from employees' wages through the duration of preliminary injunctive relief.

40. RCW 41.80.100 and Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6 authorize and compel the

State to deduct union dues/fees from Plaintiffs' and class members' wages and forward them to WFSE despite the fact that Plaintiffs have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy. The statute and CBA provisions and Defendants' actions taken pursuant to them, therefore, impermissibly infringe Plaintiffs' and class members' First Amendment rights of free speech and free association, as secured against state infringement by the Fourteenth Amendment to the U.S. Constitution.

V. CLASS ALLEGATIONS

41. Plaintiffs bring this case as a class action pursuant to Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), and, alternatively, 23(b)(3), for themselves and for all others similarly situated, and any subclasses deemed appropriate by this Court. The class consists of all individuals: 1) who are Washington State employees exclusively represented by WFSE as described in paragraph 9 above; 2) who have objected to union membership and the payment of any union dues or fees; 3) from whom the State continues to deduct union dues/fees on behalf of WFSE based on agreements signed at the time class members were subjected to an agency fee provision, and before the U.S. Supreme Court issued *Janus v. AFSCME, Council 31* on June 27, 2018; and 4) who have not clearly and affirmatively consented to dues/fees deductions by waiving the constitutional right to not fund union political advocacy. The class includes everyone who comes within the class definition at any time from three years prior to the commencement of this action until the conclusion of this action.

42. Upon information and belief, there are hundreds, and likely thousands, of class members. Their

number is so numerous and in varying locations and jurisdictions across Washington that joinder is impractical.

43. There are questions of law and fact common to all class members, including Plaintiffs. Factually, the State of Washington has continued to deduct union dues/fees from all class members who have objected to union membership and the payment of any union dues or fees, and each Plaintiff and class member signed a dues deduction agreement at a time when the relevant collective bargaining agreement included a compulsory agency fee provision, and the right to not fund union advocacy was yet to be recognized by the U.S. Supreme Court in *Janus v. AFSCME, Council 31* on June 27, 2019. The State of Washington continues to deduct union dues/fees from Plaintiffs' and class members' wages. The question of law is the same for all class members: Do these deductions violate Plaintiffs' and class members' First Amendment rights?

44. Plaintiffs' claims and defenses are typical of other members of the class because the State is seizing union dues/fees from class members who have objected to union membership and the payment of union dues/fees, even though they have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy because they signed dues deduction agreements at a time when the relevant collective bargaining agreement included a compulsory agency fee provision, and the right to not fund union advocacy was yet to be recognized by the U.S. Supreme Court in *Janus v. AFSCME, Council 31* on June 27, 2018. The State and SEIU have an identical duty to Plaintiffs and all other class members regarding these claims.

45. Plaintiffs can fairly and adequately represent the interests of the class and have no conflict with other, similarly situated class members. Plaintiffs also have no interest antagonistic to others who have been subjected by the State and WFSE to the aforementioned union dues/fee deductions.

46. Defendants' duty to cease the aforementioned union dues/fee deductions and pay back all monies deducted since the objection to union membership and the payment of any union due/fees, applies equally to all in the respective class, and the prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Defendants.

47. Defendants have acted to deprive Plaintiffs and each member of the class of their constitutional rights on grounds generally applicable to all, thereby making appropriate declaratory, injunctive, and other equitable relief with regard to the class as a whole.

48. The Plaintiffs and class are represented by the undersigned counsel pro bono. Counsel is employed by a long-established charitable organization experienced in furnishing representation to unionized public and partial-public employees whose constitutional rights have been violated.

49. A class action can be maintained under Rule 23(b)(3) because questions of law or fact common to the members of the class predominate over any questions affecting only individual members, in that the important and controlling questions of law and fact are common to all members of the class, i.e., whether the aforementioned dues deductions violate their First Amendment rights and whether certain dues deduc-

tion agreements constitute a valid waiver of a constitutional right if they are signed when the relevant collective bargaining agreement included a compulsory agency fee provision and before the right to not fund union advocacy was recognized by the U.S. Supreme Court in *Janus v. AFSCME, Council 31* on June 27, 2019. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, in as much as the individual class members are deprived of the same rights by Defendants' actions, differing only in the amount of money deducted which is, for legal purposes, immaterial. This fact is known to the Defendants and easily calculated from Defendants' business records. The limited amount of money involved in the case of each individual's claim (union dues/fee deductions since each class member objected to union membership and the payment of any union dues/fees or, alternatively, union due/fee deductions since each class member began employment) would make it burdensome for the class members to maintain separate actions.

50. A class action can be maintained under Rule 23(b)(1)(A) because separate actions by class members could risk inconsistent adjudications on the underlying legal issues.

51. A class action can be maintained under Rule 23(b)(1)(B) because an adjudication determining the constitutionality of union dues/fees deductions in the aforementioned circumstances, as a practical matter, will be dispositive of the interests of all class members.

52. The illegal actions taken by Defendants were taken pursuant to the same statutes and collective bargaining agreements, and constitute a concerted scheme resulting in the violation of Plaintiffs' and class members' rights. Additionally, the affiliation

among the Defendants presents an organizational structure which makes it expedient for the named Plaintiffs and members of the of the class to proceed against all named Defendants.

VI. CLAIMS FOR RELIEF

CLAIM 1

First Amendment, through 42 U.S.C. § 1983

Deducting union dues/fees from Plaintiffs' wages pursuant to RCW 41.80.100 violates the First Amendment to the United States Constitution.

53. Plaintiffs incorporate by reference and re-allege herein all Paragraphs above.

54. RCW 41.80.100, on its face and as applied, violates the Plaintiffs' First Amendment rights, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, to not associate with a mandatory representative, and to not support, financially or otherwise, petitioning and speech, and against compelled speech, because it authorizes and compels the State to deduct union dues/fees from Plaintiffs' and class members' wages even though they have not clearly and affirmatively consented to the deductions by waiving their constitutional right to not fund union advocacy; and because it forces Plaintiffs and class members to maintain union membership over their objection.

55. Consent to fund union advocacy cannot be presumed and neither Plaintiffs nor class members waived their constitutional right to not fund union advocacy.

56. No compelling state interest justifies this infringement on Plaintiffs' First Amendment rights.

57. RCW 41.80.100 is significantly broader than necessary to serve any possible alleged government interest.

58. RCW 41.80.100 is not carefully or narrowly tailored to minimize the infringement of free speech rights.

CLAIM 2

First Amendment, through 42 U.S.C. § 1983

Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6 and other cited provisions of the CBA and the deductions of untion dues/fees from Plaintiffs' and class members' wages pursuant thereto violate the First Amendment to the United States Constitution.

59. Plaintiffs incorporate by reference and reallege herein all Paragraphs above.

60. Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6 and other cited provisions of the CBA and any action thereto, on their face and as applied, violate Plaintiffs' First Amendment rights, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, to not associate with a mandatory representative, and to not support, financially or otherwise, petitioning and speech, and against compelled speech, because they compel the State to deduct union dues/fees from Plaintiffs' and class members' wages and remit them to WFSE even though they have not clearly and affirmatively consented to the deductions by waiving their constitutional right to not fund union advocacy; and because they force Plaintiffs and class members to maintain union membership over their objection.

61. Consent to fund union advocacy cannot be presumed and neither Plaintiffs nor class members

waived their constitutional right to not fund union advocacy.

62. No compelling state interest justifies this infringement on Plaintiffs' First Amendment rights.

63. Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6 are significantly broader than necessary to serve any possible alleged government interest.

64. Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6 are not carefully or narrowly tailored to minimize the infringement of free speech rights.

CLAIM 3

First Amendment, through 42 U.S.C. § 1983

Deducting union dues / fees from Plaintiffs' and class members' wages violates Plaintiffs' freedom of association.

65. Plaintiffs incorporate by reference and re-allege herein all Paragraphs above.

66. RCW 41.80.100, Amended 2017-2019 CBA Art. 40.2, 40.3, and/or 40.6, other cited provisions of the CBA, and Defendants' actions pursuant thereto violate Plaintiffs' and class members' First Amendment right to the freedom of association, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983.

67. Consent to fund union advocacy cannot be presumed and neither Plaintiffs nor class members waived their constitutional right to not fund union advocacy.

68. No compelling state interest justifies this infringement on Plaintiffs' and class members' First Amendment right to freedom of association.

69. RCW 41.80.100, Amended 2017-2019 CBA Art. 40.2, 40.3, and/or 40.6 are significantly broader than necessary to serve any possible alleged government interest.

70. RCW 41.80.100, Amended 2017-2019 CBA Art. 40.2, 40.3, and/or 40.6 are not carefully or narrowly tailored to minimize the infringement of free speech rights

CLAIM 4

First Amendment, through 42 U.S.C. § 1983

Defendants have illegally conspired to knowingly deprive Plaintiffs and class members of their constitutional rights.

71. Plaintiffs incorporate by reference and re-allege herein all Paragraphs above.

72. Defendants conspired to deprive Plaintiffs and class members of their First Amendment rights by unlawfully deducting union dues/fees from Plaintiffs' and class members' wages. There was an agreement to do so and a meeting of the minds to pursue this objective and Defendants took several overt acts, described above, to accomplish this objective.

73. By deducting union/dues fees from Plaintiffs' and class members' wages in the manner described herein, Defendants acted with malice and showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the rights and welfare of others, including Plaintiffs.

CLAIM 5
Unjust Enrichment
Defendants' scheme unjustly enriched Defendant WFSE.

74. Plaintiffs incorporate by reference and re-allege herein all Paragraphs above.

75. WFSE received a benefit in the form of 1.5% of Plaintiffs' and class members' wages pursuant to the dues exaction scheme imposed by Defendants on Plaintiffs.

76. WFSE benefited at Plaintiffs' and class members' expense because State Defendants deducted 1.5% of their wages and remitted the money to WFSE, and WFSE knew it benefited from receiving Plaintiffs' and class members' money.

77. The circumstances of Defendants' scheme make it unjust for WFSE to retain the benefit.

CLAIM 6
First Amendment, through 42 U.S.C. § 1983
Deducting union dues/fees from Plaintiffs' pursuant to RCW 41.80.100 and the Pre-amended CBA art. 40 violated the First Amendment to the United States Constitution.

78. Plaintiffs incorporate by reference and re-allege herein Paragraphs above.

79. RCW 41.80.100 and Pre-amended 2017-2019 CBA Art. 40, as well as the 2015-2017 CBA Art. 40 and other cited provisions of the CBAs and any action thereto, on their face and as applied, violate Plaintiffs' First Amendment rights, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983, to not associate with a mandatory representative, and to not support, financially or other-

wise, petitioning and speech, and against compelled speech, because they compelled the State to deduct union dues/fees from Plaintiffs' and class members' wages and remit them to WFSE even though they had not clearly and affirmatively consented to the deductions by waiving their constitutional right to not fund union advocacy; and because they forced Plaintiffs and class members to maintain union membership over their objection.

80. Consent to fund union advocacy cannot be presumed and neither Plaintiffs nor class members waived their constitutional right to not fund union advocacy.

81. No compelling state interest justifies this infringement on Plaintiffs' First Amendment rights.

82. RCW 41.80.100 and Pre-amended 2017-2019 CBA Art. 40, as well as the 2015 2017 CBA Art. 40 are significantly broader than necessary to serve any possible alleged government interest.

83. RCW 41.80.100 and Pre-amended 2017-2019 CBA Art. 40, as well as the 2015 2017 CBA Art. 40 are not carefully or narrowly tailored to minimize the infringement of free speech rights.

VI. PRAYER FOR RELIEF

84. Plaintiffs incorporate by reference and reallege herein all Paragraphs above.

85. Plaintiffs and class members have been injured as a result of Defendants' conduct as described above by deducting union dues/fees even though Plaintiffs and class members have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy. Accordingly, Plaintiffs pray for the following relief:

86. Declaratory Judgment: enter a Declaratory Judgment that RCW 41.80.100, Amended 2017-2019 CBA Art. 40.2, 40.3, and 40.6, and other cited provisions of the CBA on their face and as applied violates the First Amendment to the United States Constitution, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, because they permit and compel the State to deduct union dues/fees from Plaintiffs' and class members' wages even though they have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy, and/or because it forces Plaintiffs and class members to maintain union membership over their objection, and are unconstitutional and of no effect;

87. Declaratory Judgment: enter a Declaratory Judgment that the Washington AG's policy related to the application of *Janus v. AFSCME, Council 31*, to WFSE-represented State employees, cited herein, is unconstitutional and of no effect;

88. Declaratory Judgment: enter a Declaratory Judgment that Defendants conspired to deprive Plaintiffs and class members of their First Amendment rights by deducting union dues/fees from their wages even though they have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy, and/or because by forcing Plaintiffs and class members to maintain union membership over their objection;

89. Declaratory Judgment: enter a Declaratory Judgment that Defendants' deduction of monies from Plaintiffs' and class members' wages even though they have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not

fund union advocacy has been illegal and unconstitutional;

90. Declaratory Judgment: enter a Declaratory Judgment that RCW 41.80.100, Pre-amended 2017-2019 CBA art. 40, and the 2015-2017 CBA art. 40, and other cited provisions of the CBAs, and actions pursuant thereto, on their face and as applied, violate the First Amendment to the United States Constitution, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, because they permit and compel the State to deduct union dues/fees from Plaintiffs' and class members' wages even though they have not clearly and affirmatively consented to the deductions by waiving the constitutional right to not fund union advocacy, and/or because they force Plaintiffs and class members to maintain union membership over their objection, and are unconstitutional and of no effect;

91. Preliminary injunction and/or Temporary Restraining Order: issue a preliminary injunction and/or temporary restraining order enjoining Defendants from engaging in any activity this Court declares is illegal or likely illegal. Plaintiffs and class members are likely to prevail on the merits, likely to suffer irreparable harm in the absence of preliminary injunctive relief, the balance of equities tips in Plaintiffs' and class members' favor, and an injunction is in the public interest.

92. Permanent injunction: issue a permanent injunction enjoining Defendants from engaging in any activity this Court declares illegal, including but not limited to, the deduction of union dues/fees from Plaintiffs' and class members' wages, and the continuation and enforcement of RCW 41.80.100, Amended 2017-

2019 CBA Art. 40.2, 40.3, and 40.6, and other cited provisions of the CBA, insofar as doing so is unconstitutional and of no effect.

93. Compensatory Damages: enter a judgment against Defendants awarding Plaintiffs and class members compensatory damages under Claims 1-6 in an amount equal to all union dues/fees deducted from Plaintiffs' and class members' wages going back to the extent of the relevant statute of limitations or the date each Plaintiff on class member began employment, whichever is more recent, as well as nominal damages, mental anguish damages, and restitution;

94. Compensatory Damages: alternatively, enter a judgment against Defendants awarding Plaintiffs and class members compensatory damages under Claims 1-5 in an amount equal to the union dues/fees deducted from Plaintiffs' and class members' wages since they objected to union membership and the payment of any union dues/fees, as well as nominal damages, mental anguish damages, and restitution;

95. Punitive Damages: enter a judgment awarding Plaintiffs and class members punitive damages against Defendants based on Claims 1-6 because their conduct, described above, was and is motivated by evil motive or intent, or involves reckless or callous indifference to the federal and state rights of Plaintiffs and class members.

96. Costs and attorneys' fees: award Plaintiffs their costs and reasonable attorneys' fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988; and

97. Other relief: grant Plaintiffs such other and additional relief as the Court may deem just and proper.

Dated: August 23, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel/parties of record. I hereby certify that no other parties are to receive notice.

Dated: August 23, 2018

By: s/James Abernathy
James Abernathy, WSBA #48801