No. 22-____

IN THE

Supreme Court of the United States

CINDY ELLEN OCHOA, *an individual*,

Petitioner,

v.

PUBLIC CONSULTING GROUP, INC., *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

SYDNEY PHILLIPS
Counsel of Record
FREEDOM FOUNDATION
P.O. Box 552
Olympia, WA 98506
(360) 956-3482
sphillips@freedomfoundation.com
Counsel for Petitioner

December 19, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Washington State designed and operates a statutory system whereby it gives public sector unions authority and power to compel financial support for objectionable speech, and facilitates union efforts to obtain union dues from public employees. This system is union-controlled. It offers no means for public employees to contest the union's representations to the state, or the state's deduction of dues, before the state diverts the employee's money to the union for its political speech. Compelled funding of objectionable speech causes an irreparable harm to the employee. Petitioner Cindy Ochoa's First Amendment rights were violated – twice – under this system by the state diverting Ochoa's lawfully earned wages even though Ochoa never joined the union or granted consent for dues deductions.

Washington State statute requires the government employer to accept, without question, a union claim for employee dues deduction, and prohibits the state from discussing directly with the employee anything related to the dues deduction from her wages. Without any processes or procedures in place to protect Ochoa's liberty and property interests as a nonmember of the union in avoiding being compelled to subsidize the union's speech through unauthorized dues, the state and its private payroll system violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The question presented is:

Does a challenge to a statutory system alleging failure to provide due process under the Fourteenth Amendment and 42 U.S.C. § 1983 require an injured public employee to prove the defendants specifically intended to deprive her of her constitutional rights?

PARTIES TO THE PROCEEDINGS AND RULE 29.6

Petitioner Cindy Ellen Ochoa was the plaintiff-appellant in the court below. Respondents Public Consulting Group, Inc. ("PCG"), and Public Partnerships LLC ("PPL") (collectively the "Private Defendants"); Cheryl Strange, in her official capacity as Secretary of the Department of Social and Health Services ("DSHS"), and Jay Robert Inslee, in his official capacity as Governor of the State of Washington ("Governor Inslee") (collectively the "State") were defendants-appellees below. Because Ochoa is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RULE 14.1(b)(iii) STATEMENT OF ALL RELATED CASES

This case arises from and is related to the following proceedings:

1. *Ochoa v. Service Employees International Union, Local 775, et al.*, No. 2:18-CV-0297-TOR, U.S. District Court for the Eastern District of Washington. Judgment entered October 4, 2019.

2. *Ochoa v. Public Consulting Group, Inc., et al.*, No. 19-35870, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 19, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner Cindy Ellen Ochoa respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the following case: *Ochoa v. Public Consulting Group, Inc., et al.*, No. 19-35870 (9th Cir. Sept. 19, 2022).

OPINIONS

The district court's order granting the Private Defendant's motion to dismiss is reported at 2019 WL 3068452 and reproduced at Pet. App. A. The district court's order granting the State Defendant's motion for summary judgment is reported at 2019 WL 4918748 and reproduced at Pet. App. B. The Ninth Circuit's published opinion is reported at 48 F.4th 1102 and reproduced at Pet. App. C.

JURISDICTION

The judgment of the Ninth Circuit in this case was entered on September 19, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution, Section 1 of the Fourteenth Amendment to the United States Constitution, and Revised Code of Washington § 41.56.113 are reproduced at Pet. App. E.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Absent this Court's intervention, statutes require public employers to rely upon the word of financially incentivized third parties (unions) when depriving

public employees of their First Amendment rights by taking a portion of their wages and giving that money to the union to fund its political speech. The statute and public employer provide no form of due process to protect the employees' liberty and property interests prior to the deprivation. Further still, the Ninth Circuit prevents these same employees from seeking relief against the state system in a federal forum for this deprivation unless they show "specific intent" to violate constitutional rights by those state employees carrying out duties the system requires.

For this reason, the petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Factual Background

1. Cindy Ochoa, Individual Provider.

Cindy Ochoa is an Individual Provider ("IP") providing in-home health care for her adult son. Washington State IPs are public employees for collective bargaining purposes, with Respondent Governor Jay Inslee ("Governor Inslee") designated the IPs employer, Respondent Department of Social and Health Services ("DSHS") (collectively "the State") administering the IP program, and Public Partnership LLC ("PPL") and Public Consulting Group ("PCG") (collectively "IPOne") administering human resources and payroll on behalf of the state. Washington IPs are also subject to exclusive bargaining representation by Service Employees International Union Local 775 ("SEIU 775").

Ochoa has never been a union member or signed a dues deduction authorization card with SEIU 775. Ochoa ceased paying dues following this Court's 2014 decision in *Harris v. Quinn*, 573 U.S. 616 (2014), and

has never communicated to the union or her employer that she would like to support SEIU 775 – financially or otherwise.

2. Washington's Statutory System.

All Respondents support SEIU 775's dues collections at IPs' expense by using a dues extraction system that exposes Ochoa and other IPs who object to supporting a union to the reality that the system will violate their constitutional rights and leave them irreparable First Amendment injury.

The state statute codified in Revised Code of Washington ("RCW") § 41.45.113 and the Collective Bargaining Agreement between the State and the Union establish this system.

The Union initiates the dues deduction system by telling the state employer which employees have authorized dues payments. The State then withholds dues from IPs' salaries, which implicates employees' First Amendment right not to fund objectionable speech. This system allows the Union, a self-interested party, to obtain and attest to the validity of any IPs waiver of their constitutional rights. Neither the State nor IPOne review the legitimacy of the Union's claim that the IP has waived her rights and agreed to pay union dues, with none of the Respondents notifying the IP prior to withdrawing dues and giving the money to the union to fund political speech.

The State has put the unions in even more control of the system, removing any possibility of employee challenges since the filing of Ochoa's complaint, by amending RCW § 41.56.113 to prohibit itself, and its payroll provider, from considering IP challenges to the legality of their deductions. The 2019 amendments declare that the State will not stop dues withdrawals

unless the "terms and conditions of the authorization" allow it. Wash. Rev. Code § 41.56.113(b)(iii). The State will not consider requests to revoke authorizations unless first submitted to the union. Wash. Rev. Code § 41.56.113(b)(iv). Lastly, the employer "*shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions.*" Wash. Rev. Code § 41.56.113(b)(vi) (emphasis added).

3. Washington's System Breaks Down and Violates Ochoa's Rights, Twice.

Ochoa exercised her right to be free from compelled political speech in July 2014. At that time PPL stopped withholding union dues from her. In 2016, an SEIU 775 representative arrived at Ochoa's home and asked to verify Ochoa's information with an iPad. Ochoa refused to sign any document.

Nevertheless, a few months later, and per the dues deduction system, the State (through IPOne) began withdrawing union dues from Ochoa's salary. They did so without notifying Ochoa. Ochoa did not notice the dues withdrawals reflected on her salary statements until about five months after the withholdings began, at the end of February 2017. Because PPL's name and phone number were prominently displayed on her salary statement and the IPOne website, Ochoa contacted it several times, and only on the third contact did PPL tell Ochoa that PPL could nothing for her, despite deducting her dues, that the information for the deduction comes from the union, and to contact them.

Ochoa contacted SEIU 775 who then informed her that they had a membership card on file for her. Ochoa protested that she had not signed any membership cards, demanding a copy. Reviewing the document

made evident that the signature on the card was not hers, and the union finally admitted that the signature did not match hers. The State ceased dues withdrawals in July 2017.

A year later the State through PPL once again began withdrawing union dues from Ochoa and remitting them to SEIU 775. None of the Respondents asked Ochoa if she agreed to the withdrawals. Ochoa contacted both PPL and SEIU 775 again to stop dues from being withdrawn. Neither were willing or able to help her. Only after counsel for Ochoa contacted SEIU 775's counsel did dues withdrawals stop. Ochoa filed the complaint shortly thereafter.

B. Proceedings Below

Ochoa filed a lawsuit on September 24, 2018, against SEIU 775, Governor Jay Inslee, the Secretary of the Washington State Department of Social and Health Services, Public Partnerships LLC, and Public Consulting Group, Inc.

On March 27, 2019, Ochoa settled her claims against SEIU 775, and it was not a party to the appeal.

Ochoa filed a First Amended Complaint against the remaining defendants. The private defendants, PPL and PCG, filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) claiming that they were not state actors, which the District Court granted.

The State and DSHS answered but, before discovery had been completed, filed a motion for summary judgment, primarily arguing that Ochoa lacked standing. The District Court dismissed Ochoa's claim on Article III standing grounds.

Ochoa timely filed her notice of appeal to the Ninth Circuit Court of Appeals. After full briefing and oral

argument, the Ninth Circuit concluded that Ochoa did have Article III standing, that PPL and PCG are state actors, but that Ochoa's procedural due process claim failed because she did not allege sufficient facts to demonstrate that the Defendants engaged in an "affirmative abuse of power." *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1110 (9th Cir. 2022). Pet. App. C. The Ninth Circuit required Ochoa to show that the Defendants "*intended* to withhold unauthorized dues and thus deprive her of . . . her liberty interest as a nonmember of the union in not being compelled to subsidize the union's speech through unauthorized dues." *Id.* (emphasis added). It concluded that the Defendants withholding of unauthorized dues did "not rise to the level of a Due Process Clause violation" because the Defendants were apparently unaware the deductions were unauthorized, withheld the dues based solely on union representations, and did not know or suspect that the union representations were false. *Id.*

Further, the Ninth Circuit required the Defendants to intend the illegitimacy of the action leading to the deprivation and not just the action leading to deprivation itself. The Ninth Circuit focused on the Defendants' withholding of *unauthorized* dues, despite defining the "specific conduct of which the plaintiff complains" as the "*withholding*" itself above. *Ochoa*, 48 F.4th at 1108. Essentially, the Ninth Circuit did not focus on the challenge to the state system itself, but on what individuals mentally thought as they acted when carrying out the duties the statute requires.

This Petition for Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. WHETHER A FOURTEENTH AMENDMENT DUE PROCESS CHALLENGE TO THE CONSTITUTIONALITY OF A STATUTE REQUIRES A SHOWING OF SPECIFIC INTENT TO VIOLATE THE CONSTITUTIONAL RIGHTS OF A PUBLIC EMPLOYEE, IS AN IMPORTANT FEDERAL QUESTION

Recognizing public employees' constitutional right to be free from compelled speech was only a part of the proverbial "step in the right direction." The Ninth Circuit has nullified *Harris* and *Janus* protections for objecting employees in those states with a statutory system for dues deductions which requires the public employer to accept a union representation that the state should take from the employees' lawfully earned wages and give the money to fund union political speech, violating the First Amendment prohibition against compelled speech. Forgeries, administrative errors, and simply allowing a one-sided system where the union, a financially interested third party, has exclusive control to say who has dues deducted from their paychecks while also controlling who can stop having dues deducted are evidence of the extreme lack of due process in state systems like Washington's.

Compelling speech is an irreparable First Amendment harm. There is no form of due process available to public employees as it currently stands in states like Washington. Employees are relegated to a system which forces them to communicate with a union of which they are not a member and wish not to pay dues to, and is anything but a neutral, disinterested party, without any system to check their public employer from deducting dues from their paychecks.

The Ninth Circuit's ruling in *Ochoa* prevents public employees from ever having access to due process when it comes to their First Amendment rights and money taken from their paycheck to be given to unions. However, public employees can have their constitutional rights protected, and this Court can answer an important federal question – does a public employee have to alleged specific intent to make a due process claim?

In 2014, this Court decided *Harris v. Quinn*, recognizing for the first time quasi-public employees' constitutional right to be free from the payment of "agency fees" to public sector unions. 573 U.S. 616 (2014). In 2018, this Court decided *Janus v. AFSCME, Council 31*, recognizing this same constitutional right for all public employees. 138 S. Ct. 2448 (2018). Yet, states like Washington and unions like SEIU 775 take and use public employees' money without any process or procedure to protect those rights.

Washington State's statutory system, RCW § 41.56.113 requires public employers to accept a union's claims for dues deductions and does not permit public employers to speak to their employees regarding the deduction of dues. Public employers are required to trust the word of a financially interested union and to ignore the pleas of its employees. Individuals like Ochoa are forced to remain in a frightful system in which their employer tells them to contact the union and the union doesn't answer the call. This cannot be the way this country protects public employees' First Amendment rights. Due Process is necessary for all dues deductions statutory systems.

A. Whether Challenging a Statutory System for Lack of Due Process Under Section 1983 Requires Specific Intent is an Important, and Yet Unanswered, Federal Question

The Fourteenth Amendment states that no State shall deprive any person of life, liberty, or property, without due process of law. The Ninth Circuit correctly recognized that Ochoa has a liberty interest as a nonmember of the union to not be compelled to subsidize the union's speech through unauthorized dues. Pet. App. at 30a. With a liberty interest, as well as her property interest in the money that she earns, Ochoa is also entitled to due process under the statutory system in which her employer, the State of Washington, deducts dues from her pay. The current system is without any form of process prior to the deduction, or sufficient to cure irreparable harm.

Ochoa challenges the state system. The Ninth Circuit responds by requiring a public employee not only show the system prevents anything resembling due process, but also that those employees implementing the system must themselves know they are violating employees' rights, and *intend* to violate those rights. *Ochoa* raises a question integral to the interplay of due process and the acts of state actors against a public employee to pursue a valid section 1983 claim under the Fourteenth Amendment, which has not yet been answered by this Court.

A challenge to an improper system cannot also require the challenger to show the employees implementing the system intended additional harm. It cannot be true that a public employee has a recognized First Amendment right, but simply has no way to access that right. It is necessary for this Court to

recognize the statutory systems which deny public employees due process, and address the Fourteenth Amendment violations which occur widely,[1] and which the Ninth Circuit rubber stamps in *Ochoa*.

B. "Specific Intent" Is Not the Appropriate Standard for Public Employees' Due Process Challenges to State Statutory Systems

If Ochoa does not allege facts sufficient to demonstrate that the Private Defendants and the State deprived her of her liberty interest, not only once but twice, then it would be nearly impossible for any public employee to do so. The Ninth Circuit determined that "[Ochoa] has not shown that either the State or the private defendants *intended* to withhold unauthorized

---

[1] *See, e.g.*, *Zielinski v. Serv. Emps. Int'l Union Loc. 503*, No. 20-36076, 2022 WL 4298160 (9th Cir. Sept. 19, 2022); *Schiewe v. Serv. Emps. Int'l Union Loc. 503*, No. 3:20-cv-00519-JR, 2020 WL 5790389 (D. Or. Sept. 28, 2020); *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112 (9th Cir. 2022); *Jarrett v. Marion Cnty.*, No. 6:20 cv 01049-MK, 2021 WL 233116 (D. Or. Jan. 22, 2021); *Trees v. Serv. Emps. Int'l Union Loc. 503*, 574 F. Supp. 3d 856 (D. Or. 2021); *Araujo v. Serv. Emps. Int'l Union Loc. 775, et al*., No. 4:20-CV-05012 (E.D. Wash. Jan. 1, 2020); *Gatdula v. Serv. Emps. Int'l Union Loc. 775*, No. 2:20-cv-00476-RAJ (W.D. Wash. Mar. 26, 2021); *Yates v. Washington Fed'n of State Emps.*, 466 F. Supp. 3d 1197 (W.D. Wash. 2020); *Jimenez v. Serv. Emps. Int'l Union Loc. 775*, No. 1:21-CV-3128-TOR, 2022 WL 671023 (E.D. Wash. Mar. 4, 2022); *Hubbard v. Serv. Emps. Int'l Union Loc. 2015*, No. 21-16408 (9th Cir. Dec. 8, 2021) (stayed); *Marsh v. AFSCME 3299*, No. 21-15309 (9th Cir. Feb. 10, 2022) (stayed); *Semerjyan v. Serv. Emps Int'l Union Loc. 2015*, No. CV 20-02956 AB (ASx), (C.D. Cal. Sept. 25, 2020); *Quezambra v. United Domestic Workers of Am., AFSCME Loc. 3930*, No. 20-55643 (9th Cir. Feb. 10, 2020) (held in abeyance); *Stoia v. Serv. Emps. Int'l Union Loc. 2015*, No. 2:20-cv-01760-KJM-DMC (E.D. Cal. Aug. 27, 2021), No. 21-16597 (9th Cir. 2021).

dues and thus deprive her of that interest," Pet. App. at 30a. Ochoa spent time during numerous conversations with IPOne employees, telling them she did not consent to her wages going to the union to subsidize objectionable speech. The state statutory system allowed them to hide behind the statutory requirement they accept only the union's representation. While the Ninth Circuit is correct that there may be an intent requirement when a party alleges a due process violation, it is inconceivable that the Court could require intent when a party challenges a ***statute*** rather than an ***action***.

It makes perfect sense that when a party challenges an action performed by a state official, such as a deputy sheriff's negligence in leaving a pillow on the jail stairs, there must be something more than mere accident that ties the wrongful conduct to the state itself. *Daniels v. Williams*, 474 U.S. 327, 334 (1986). "Actions" encompass anything and everything a human being could do, and the state cannot be responsible constitutionally for every act, however random and unintended, done by one of its employees or officers. This same logic cannot apply to statutory challenges because intent is already baked into the statute: it was intentionally passed by the legislature.

When a state has intentionally enacted a law that lacks the procedural safeguards required by the Fourteenth Amendment, it cannot then claim that the failure of that statute to protect an individual's due process was merely "negligent." In fact, no court requires intent when challenging a statute. That intent requirement is only reserved, in the Ninth Circuit, for situations where ***conduct*** violates due process, such as the ***conduct*** of the deputy sheriff in *Daniels*. Were there an intent requirement for challenging a statute,

then no statutory challenges could ever be brought because the state would simply claim that the due process violation that resulted from the statute was merely accidental and not a result of the fact that no procedural safeguards existed. By drafting a statute that has the potential to violate civil rights and contains within it no procedural safeguards, the state, and anyone acting in concert with the state, has demonstrated at least a reckless disregard of the complainant's constitutional rights. Here, of course, the State of Washington actively *prohibited* basic due process protections.

Applying *Daniels* to Ochoa's case here results in the same analytical error. The *Daniels* Court discussed the applicability of Due Process to "deliberate decisions of government officials to deprive a person of life, liberty, or property." 474 U.S. at 331. Therefore, the Ninth Circuit held that Ochoa must allege that the *unauthorized* withholding by the state employer (or the payroll processor) was conduct intended to deprive Ochoa of her rights. Because Ochoa did not allege that the Private Defendants and the State ***intended*** to withhold unauthorized dues, they did not violate her Fourteenth Amendment rights. As explained above, this was not the correct standard because Ochoa challenged a statute (RCW § 41.46.113) as lacking due process. She did not challenge the withholding on its own as lacking due process. This distinction takes Ochoa's case out of the realm of *Daniels*.

Moreover, this distinction is easily demonstrated in cases challenging wage garnishment. In such cases, Courts do not ask whether the judge issuing a writ of garnishment, or a sheriff enforcing the writ, *intended* to violate the debtor's property right. Rather, the question is whether the statute meets the Fourteenth

Amendment requirements of notice and an opportunity to be heard. If those are missing, such as when wages are garnished without notice, the intent of the judge issuing the writ and of the sheriff enforcing the writ is presumed.

Similarly, due process requires prior notice and the opportunity to be heard before a court issues a writ of restitution evicting a tenant and restoring the property owner to possession of the premises. Due process analysis does not ask whether the judge issuing the writ *intended* to deprive tenant of constitutional rights. If the statutory system did not provide for notice or, as here, prohibited notice, due process analysis is unaffected by the mental state of a state employee following the statute.

If a property owner fails to pay taxes, and a county tax collector sells the property at public auction, due process does not look at whether the Sheriff *intended* to violate the owner's property interests. The focus is whether the system, as followed by the Sheriff, permitted the sale without prior notice and opportunity to be heard.

C. The Ninth Circuit Disagrees with Other Circuits as to The Level of Required Intent

The Ninth Circuit disagrees with the First, Third, Fifth, and Eighth Circuits by requiring the Defendants to *intend* the action that led to the deprivation. In *Ochoa*, it ruled "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." Pet. App. at 30a. (*citing Daniels*, 474 U.S. at

328).[2] The *Daniels* Court partially overruled *Parrat v. Taylor*, but only "to the extent that [*Parrat*] states that *mere lack of due care* by a state official *may* 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Daniels*, 474 U.S. at 330–31 (emphasis added).

The *Daniels* Court's discussed its decision to overrule *Parrat* and affirmed the conclusion that § 1983 does not contain a "state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Id.* at 329–30. Rather, depending on the right that was violated, "*merely negligent* conduct *may* not be enough to state a claim." *Id.* at 330 (emphasis added). The *Daniels* court then agreed the word "deprive" in the Due Process Clause "connotes more than a negligent act" and that federal lawsuits should not be allowed where "there has been no affirmative abuse of power." *Id.* at 330.

The *Daniels* Court clearly stated that mere negligence *may* not be sufficient to sustain a § 1983 claim but declined to specify the exact standard necessary to sustain a claim. *Id.* at 330, 334-35. Many circuit courts of appeals have cited *Daniels* as requiring less than full intent, *Germany v. Vance*, 868 F.2d 9, 18, 18 n.11 (1st Cir. 1989) (applying a standard of "recklessness or 'gross negligence'" to an interference with liberty claim); *Fagan v. City of Vineland*, 22 F.3d 1296, 1310-11 (3d Cir. 1994) (stating "the status of the claims arising from conduct falling within the spectrum between mere negligence and intentional conduct" is unclear); *Salas v. Carpenter*, 980 F.2d 299 (5th Cir.

[2] Daniels was an inmate who alleged damages for back and ankle injuries due to slipping on a pillow that was negligently left on the stairs by a corrections officer. *Daniels*, 474 U.S. at 328.

1992) ("The Court has not decided 'whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.'"); *Deretich v. Office of Administrative Hearings*, 798 F.2d 1147, 1151 (8th Cir. 1986) (requiring plaintiff to show procedural "deficiency resulted from more than mere negligence" when alleging infringement on his constitutionally protected property interest in his job).

However, other circuit courts of appeals have required defendants intend the deprivation. *Shannon v. Jacobwitz*, 394 F.3d 90, 94 (2d Cir. 2005) (stating the Supreme Court "clearly articulated that a finding of intentional conduct was a prerequisite for a due process claim" in *Daniels*); *Lovelace v. Lee*, 472 F.3d 174, 201 (4th Cir. 2006) (requiring the plaintiff to "assert conscious or intentional interference with his free exercise rights to state a valid claim under § 1983"); *Stevenson v. Koskey*, 877 F.2d 1435, 1440-41 (9th Cir. 1989) ("In the context of constitutional torts, it is the deliberate, intentional abuse of governmental power for the purpose of depriving a person of life, liberty or property that the fourteenth amendment was designed to prevent."). The use of *Daniels* is without any consistency throughout the country and warrants clarity by this Court.

Assuming *arguendo* that the state actor must recklessly, with gross negligence, or intentionally deprive the plaintiff of her constitutional rights, the Ninth Circuit did not acknowledge the fact that the state employer and the private defendants acted pursuant to state statute, that the statute was intentionally crafted by the state legislature to act upon Ochoa's rights in the way that it did, and that the state statute failed to provide *any* pre-deprivation

procedure to protect Ochoa's liberty interest. "In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law*—without adequate procedures." *Daniels*, 474 U.S. at 339 (Stevens, J., concurring) (emphasis in original). The Ninth Circuit clearly stated: "For Ochoa to prevail on a Fourteenth Amendment claim, she must demonstrate that *either* the private defendants *or the State* engaged in an 'affirmative abuse of power.'" *Id.* at 1110 (emphasis added). However, the Ninth Circuit only considered the state employer's action and did not consider the state legislature's action in crafting the statute under which all other parties acted.

Ochoa also named Governor Inslee in his official capacity to represent the state as the enactor of RCW § 41.56.113, which the state either knew or should have known would allow state employers to withhold unauthorized dues from the paychecks of public employees like Ochoa by refusing to provide for pre-deprivation procedures. The ultimate effect is that no defendant will be able to challenge a legislative statute in the Ninth Circuit that effectively deprives them of procedural due process protection without proving that the legislature intended to deprive them of a liberty or property interest.

D. These Statutory Systems Exist Around the Country and Provide No Due Process to Public Employees as A Result

Several states have statutory systems like Washington's RCW § 41.56.113. Each of these states provide no form of due process to the public employee and simply rely upon the union's assertion to the public employer for whom it should deduct dues.

The Illinois Public Labor Relations Act states, "the public employer must commence dues deductions . . . after receiving [written] notice [of authorization] from the labor organization" and provides the default method to revoke or cancel such deductions "shall be directed to the labor organization rather than to the public employer." 5 Ill. Comp. Stat. 315/6(f-10)-(f-25); *see also* Illinois Educational Labor Relations Act, 115 Ill. Comp. Stat. 5/11.1 (containing similar language applicable to public school district employees).

The Colorado Partnership for Quality Jobs and Services Act directs the state "shall honor the terms of covered employees' authorizations for payroll deductions" but the "[c]overed employees' requests to cancel or change authorizations for payroll deductions shall be directed to the certified employee organization rather than to the state." Colo. Rev. Stat. Ann. § 24-50-1111(2).

California's statutory systems vary by public employer. For public sector employees in elementary, secondary, and postsecondary education, the California Education Code requires the employee to direct requests to cancel or change authorizations for payroll deductions for employee organizations to the employee organization itself. Cal. Educ. Code § 45060(e); Cal. Educ. Code § 87833(e). These statutes also require the public employer to "rely on" certification from any "employee organization" requesting a deduction." *Id*.

Similarly, the statutory system in California Government Code § 1157.12 requires public employers other than the state that authorize payroll union dues deductions to "[d]irect employee requests to cancel or change deductions for employee organizations to the [union] rather than to the public employer." This system also requires the public employer to "rely on" certification from any union requesting a deduction."

Cal. Gov. Code § 1157.12(a). Cal. Gov. Code § 1157.10 requires "public agencies [not] under the uniform payroll system" to only "cancel[ ] or change a deduction at the request of the . . . organization authorized to receive the deduction."

Connecticut requires public employers to "rely on a certification from any public employee organization requesting a deduction" which claims the employee organization has an employee authorization for the deduction and also requires the public employee to direct "requests to cancel or change deductions for public employee organizations to the employee organization, rather than to the public employer." Conn. Gen. Stat. § 31-40bb(j). Further, Connecticut states "a public employee organization . . . shall not be required to provide a copy of an individual authorization to the public employer unless a dispute arises about the existence or terms of the authorization." *Id.*

Oregon requires the public employer rely on a union-provided list of employees authorizing a dues deduction, Or. Rev. Stat. § 243.806(7), provides a default rule allowing the public employee to "revoke authorization for the deduction by delivering an original signed, written statement of revocation to the headquarters of the labor organization, *Id.* at (6), and requires a public employee to resolve any dispute "regarding the existence, validity or revocation of an authorization for the deductions and payment" by paying yet more money to file an administrative action. *Id.* at (10)(a). However, because the statute requires the public employer to continue deducting dues even after the employee disputes the alleged authorization, the statute places the burden on the public employee to prove there is no authorization for the deductions. *See* Or. Rev. Stat. § 243.806.

Delaware's Police Officers' and Firefighters' Employment Relations Act requires the public employer to commence deductions "upon the exclusive representative's written request to the employer." 19 Del. C. § 1604(c). Delaware's Public Employment Relations Act provides "[t]he public employer shall deduct . . . the monthly amount of dues . . . upon the exclusive representative's written request to the employer." 19 Del. C. § 1304(c).

Hawaii requires the employee to provide "written notification . . . to the employee's exclusive representative" to stop the dues deductions. Haw. Rev. Stat. § 89-4(c). The employer must continue dues deductions until it receives a copy of the employee's written notification from the exclusive representative. *Id.*

Conversely, some states require more than the union's representation of which employees have authorized deductions. New York requires the public employer to be presented with proof that each individual employee has signed a dues deduction authorization card. *See* N.Y. Civ. Serv. Law § 208(1)(b).

II. THIS PETITION PRESENTS AN IDEAL VEHICLE TO ADDRESS THE NARROW QUESTION PRESENTED

The instant petition is the cleanest presentation of the constitutional question presented.

A. This Petition Addresses Only a Narrow Question

This petition addresses the narrow question whether a challenge to a statutory system alleging failure to provide due process under the Fourteenth Amendment requires an injured public employee to prove the

defendants specifically intended to deprive her of her constitutional rights.

This challenge avoids multiple related issues. The Ninth Circuit held these remaining defendants are accountable under Section 1983. There is no issue whether Cindy Ochoa ever joined a union, or consented to pay dues by waiving constitutional rights, by contract, or otherwise. The union has settled, so there is no question whether it is a state actor. The challenge to the Washington state statutory system is readily ascertainable. The state system and remaining defendants demonstrate state action in refusing due process before taking Ochoa's wages. There is no question the state gave part of her wages as dues to one of the most political public sector unions in the country. Lastly, the Ninth Circuit held Ochoa demonstrated sufficient Article III controversy to bring this challenge, avoiding other cases where the state claims it has ended a practice which is unlikely to recur to this particular plaintiff.

Answering this question will not disrupt the labor system, it will still permit public employers to withdraw dues from public employees' paychecks, however it will require the employer provide due process notice and an opportunity to contest the employer's deductions of union dues. A simple system such as an email prior to deductions saying "Union dues will be withdrawn on your next paycheck. If this is correct, you need do nothing. If this is incorrect, please contact _____" could alleviate all due process concerns. Yet, until that time, the only avenue for public employees to protect their constitutional right to be free from compelled speech is filing a federal lawsuit against the State for violation of their Fourteenth Amendment rights.

B. Forgery, "Administrative Error," "Not My Fault," Oh My!

This case is ideal for review because it has all the hallmarks of an epic. Alleged union forgery, State "administrative error," missed calls, confused representatives, and a classic case of "not my fault." Unlike the cowardly lion in the Wizard of Oz, Ochoa's fears of having her First Amendment Rights violated actually are around every corner. Lions! Oh yes, that is union forgery. Tigers! Oh yay, that is an "administrative error." Bears! Oh look, it is another violation of a public employee's constitutional rights. Without this Court's input, lions, and tigers, and bears are in fact around every corner pulling dues from every public employee's paycheck. Although the cowardly lion had no basis for his fears, public employees like Ochoa know that at any moment their constitutional rights could be violated because it has already happened.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Ninth Circuit should be granted.

Respectfully submitted,

SYDNEY PHILLIPS
Counsel of Record
FREEDOM FOUNDATION
P.O. Box 552
Olympia, WA 98506
(360) 956-3482
sphillips@freedomfoundation.com

Counsel for Petitioner

December 19, 2022

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:18-CV-0297-TOR

CINDY ELLEN OCHOA, an individual,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 775, an unincorporated labor association, *et al.*,

Defendants.

ORDER GRANTING DEFENDANT PUBLIC CONSULTING GROUP, INC., AND PUBLIC PARTNERSHIPS LLC'S MOTION TO DISMISS

BEFORE THE COURT is Defendant Public Consulting Group, Inc., and Defendant Public Partnerships LLC's Joint Motion to Dismiss (ECF No. 43). The Motion was submitted for consideration without a request for oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, the Motion (ECF No. 43) is granted.

BACKGROUND[1]

This case arises out of the alleged wrongful withholding of union dues from Ms. Cindy Ochoa's paycheck. In short, Ochoa is an employee of the State of Washington.

---

[1] Given the underlying substance of the allegations is detailed in this Court's previous Order Granting Defendants' Motion to Dismiss (ECF No. 38), the Court need not recount them here.

Defendants Public Consulting Group, Inc., and Public Partnership, LLC, (collectively PCG/PPL[2]) provide payroll services on behalf of the State. As part of the service, PCG/PPL withhold union dues and remit them to the Service Employees International Union Local 775 (SEIU 775). Pursuant to the State's direction, PCG/PPL rely entirely on SEIU 775 in determining from whom dues should be withheld. *See* ECF No. 39 at 9, ¶¶ 50-52. In other words, as the Court previously observed, PCG/PPL, provide passive payroll services based on the information given to them.

The Court recently granted PCG/PPL's Motion to Dismiss for failure to state a claim. ECF No. 38. Plaintiff submitted an Amended Complaint (ECF No. 39) and Defendants now renew their request for dismissal (ECF No. 43).

DISCUSSION

PCG/PPL argue dismissal is proper because Plaintiff's Amended Complaint suffers from the same flaws identified in Defendants previous Motion to Dismiss and the Court's Order granting the Motion. ECF No. 43 at 2. The Court agrees.

Ultimately, as PCG/PPL recognize, Plaintiff's Amended Complaint "fares no better" than the previous Complaint. ECF No. 43 at 2. The Court notes that many of the arguments raised by the Parties have been sufficiently addressed in this Court's previous Order and the additional allegations do not impact the analysis. As such, the Court will only address the newly raised legal argument in Plaintiff's Response (ECF No. 46) and the additional, substantive factual allegations in the Amended Complaint (ECF No. 39).

---

[2] For the purposes of this Order, the distinction between PCG and PPL is not material.

Plaintiff's Amended Complaint does not allege any substantive facts that would change the analysis the Court put forth in its previous Order Granting Motion to Dismiss (ECF No. 38). Plaintiff simply adds meat to PCG/PPL's operations, *see* ECF No. 39 at 6-9, ¶¶ 25-47, and details more interactions between Plaintiff and employees of PCG/PPL in trying to stop the withholding of her funds, who ultimately pointed her to SEIU 775, *see* ECF No. 39 at 12, ¶¶ 66-73; 16-17, ¶¶ 93-96. The critical facts – that PCG/PPL provide passive payroll services (as a mere instrument) at the direction of the State based on information provided to them – remain the same. Notably, Plaintiff makes no effort to discuss how the new allegations save Plaintiff's claim.

Plaintiff raises the new argument that PCG/PPL are state actors because disbursing Medicaid funds – part of their payroll services – is "a roll that has traditionally been the exclusive prerogative of government." ECF No. 46 at 11-12. Plaintiff does not provide any case law supporting its position that a payroll service provider that disburses Medicaid funds is a government actor. Rather, Plaintiff simply argues that "[t]he spending of public monies, specifically Medicaid, has traditionally and exclusively been the prerogative of the federal and state governments, since Medicaid's inception in 1965." ECF No. 46 at 11. The Court declines to adopt such a novel argument, especially where it would turn every private entity that disburses funds on behalf of the government into a state actor. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) ("The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become

acts of the government by reason of their significant or even total engagement in performing public contracts.").

Given Plaintiff's failed attempt to allege a plausible claim against PCG/PPL in the Amended Complaint, the Court finds amendment as to these claims is futile.

ACCORDINGLY, IT IS HEREBY ORDERED:

Defendant Public Consulting Group, Inc., and Defendant Public Partnerships LLC's Joint Motion to Dismiss (ECF No. 43) is GRANTED.

The District Court Executive is directed to enter this Order, dismiss Defendant Public Consulting Group, Inc., and Defendant Public Partnerships LLC from the case, and furnish copies to the parties.

DATED July 12, 2019.

/s/ Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 2:18-CV-0297-TOR

CINDY ELLEN OCHOA, an individual,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 775, an unincorporated labor association; CHERYL STRANGE in her official capacity as Secretary of the Department of Social and Health Services; and JAY INSLEE, in his official capacity as Governor of the State of Washington,

Defendants.

ORDER GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendants Cheryl Strange and Jay Inslee's Motion for Summary Judgment (ECF No. 50). The motion was submitted for consideration without a request for oral argument. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, the motion (ECF No. 50) is granted.

BACKGROUND

This case concerns two sets of unauthorized withdrawals of union dues from Plaintiff Cindy Ellen Ochoa's pay—one set from 2016 to 2017 and another set of withdrawals in mid-2018.

Plaintiff works as an "individual provider" contracting with the State of Washington and the Department of Social and Health Services to provide care to Medicaid eligible clients. Defendants are state officials, sued in their official capacity, representing the State and the agency (hereinafter, collectively referred to as "Defendants"). The Defendants are a party to a collective bargaining agreement with the Service Employees International Union 775 ("SEIU 775")—the union which represents individual providers like Plaintiff. ECF No. 51 at 2, ¶ 4. According to the agreement with SEIU 775—both at the time of the complained-of withdrawals and currently—individual providers communicate directly with SEIU 775 about whether they wish to have dues deducted; SEIU 775 then passes the information to Defendants, who provide the information to a third-party contractor that processes the payments to individual providers, including the withholding of union dues and other withholdings. ECF No. 51 at 2-3, ¶¶ 5-6.

The legal framework for withdrawing union dues has shifted over the relevant time period. As of 2014, individual providers had the right to opt out of paying union dues—without affirmatively opting out, the union dues would be withdrawn. ECF No. 51 at 3, ¶ 7. On June 27, 2018, the Supreme Court determined that union dues could only be withdrawn if the individual provider opted in to paying union dues—without affirmatively opting in, the union dues would not be withdrawn. ECF No. 51 at 4-5, ¶ 13. To account for this, Defendants adjusted their procedures for withdrawing union dues soon after the decision—i.e., requiring an affirmative opt in for the withdrawal of union dues. ECF No. 51 at 5, ¶¶ 15-16.

Plaintiff exercised her right to opt out of paying union dues in 2014 and the union dues withdrawals stopped at that time. *See* ECF No. 38 at 13, ¶ 77. Because Plaintiff had opted out, Plaintiff would have had to affirmatively opt in for union dues to be legitimately withdrawn. However, union dues were withdrawn from her pay in 2016 to 2017 and again in 2018 without Plaintiff's authorization.

1. First series of withdrawals

The first series of unauthorized withdrawals began on October 17, 2016 after Defendants "received a dues interface file from SEIU 775 for [Plaintiff] indicating dues should be withdrawn." ECF No. 51 at 4, ¶ 11. The withdrawals stopped around May of 2017 after Defendants "received a dues interface file from SEIU 775 on June 4, 2017, indicating [Plaintiff's] dues withdrawal should cease." ECF No. 51 at 4, ¶ 12. According to Plaintiff, the dues where withdrawn based on a forged signature allegedly manufactured by an agent of SEIU 775. ECF Nos. 59 at 4; 59-2 at 2, ¶ 1.

Plaintiff noticed the dues were being withheld from her pay "soon before March 2017". ECF No. 39 at 11, ¶ 64. Plaintiff alleges that she called the Defendants' third-party contractor and requested they stop withholding the union dues on March 1, 2017 and thereafter until May 1, 2017, when the contractor informed Plaintiff that she would need to contact SEIU 775 for assistance, explaining: "the deduction order comes from the union [so] the release also must come from the union". ECF No. 39 at 12-14, ¶¶ 66-78.

"As soon as [Plaintiff] realized [the third-party contractor] could not help her, she contacted SEIU 775." SEIU 775 informed Plaintiff that "SEIU 775 was withdrawing union dues from [Plaintiff's] salary because

[Plaintiff] had signed a union membership card." ECF No. 39 at 14, ¶ 80. Plaintiff denied authorizing such and "demanded that she be shown the card". ECF No. 39 at 14, ¶ 80. SEIU 775 sent Plaintiff a copy of the electronic signature dated May 28, 2016. ECF No. 39 at 14, ¶ 81. Upon receipt of the copy, Plaintiff "immediately recognized that the signature was not her own" and "again contacted SEIU 775 and demanded that they stop withdrawing dues from her salary, and remit the amount taken from her." ECF No. 39 at 14, ¶ 82. "In June 2017, Adam Glickman, secretary treasurer of SEIU 775, sent [Plaintiff] a letter . . . admit[ing] . . . the electronic signature on the card [did not match Plaintiff's] other signatures on file[.]" ECF No. 39 at 14-15, ¶ 83. The letter included a check to Plaintiff returning $358.94. ECF No. 39 at 15, ¶ 83. "[I]n July 2017, SEIU 775 sent a second letter to [Plaintiff] returning an additional $51.12." ECF No. 39 at 15, ¶ 84.

2. Second series of withdrawals

The second unauthorized withdrawal began in July 2018 and ended in August 2018. ECF No. 39 at 16, ¶ 92. As with the first series of withdrawals, Plaintiff had previously opted out, so she had to affirmatively opt in for dues to be legitimately withdrawn. Plaintiff denies authorizing the withdrawals and, at the time of filing suit, she did not know why the 2018 withdrawals began.

Despite her previous experience with the third-party contractor not being able to help, Plaintiff again contacted them to stop the withdrawals to no avail. ECF Nos. 39 at 16-17, ¶¶ 93-95; 59-2 at 2, ¶ 4. According to Plaintiff, her "counsel informed SEIU 775 of the withholdings" and the "[d]ues withholdings ceased promptly thereafter." Notably, Plaintiff attests that

"[i]n both instances, in order to have the deductions stop, [she] had to contact [the third-party contractor] and SEIU 775 numerous times, but did not receive adequate assistance on any of these occasions." ECF No. 59-2 at 2, ¶ 4. She also avers that she did not receive assistance from Defendants in ceasing dues deduction, but she does not allege that she contacted Defendants. ECF No. 59-2 at 2, ¶ 6.

Although Plaintiff was not aware of why the second series of withdrawals began, Defendants have provided an explanation. According to Defendants, beginning on June 28, 2018 – the day after the Supreme Court determined members must affirmatively opt in for dues to be withdrawn – Defendants implemented a temporary procedure for determining whether individual providers had given affirmative consent for withdrawals and began processing withdrawals accordingly. *See* ECF No. 51 at 5-7, ¶¶ 18-30. The process was not without error, however, as Defendants determined that "there were approximately 87 individual providers who likely had dues deductions taken without affirmative consent" as a result of discrepancies in the lists received from SEIU 775; this included the deductions from Plaintiff's pay in July and August of 2018. ECF Nos. 50 at 5; 51 at 7, ¶¶ 22-30. Defendants completed their restructured process by the end of 2018. ECF No. 51 at 8, ¶ 34.

Plaintiff brought suit on September 24, 2018 against SEIU 775, Defendants, and Defendants' third-party contractor. ECF No. 1. During litigation, Ochoa settled with SEIU 775 for $28,000. ECF No. 35. The Court granted the third-party contractor's Motion to Dismiss, but allowed Plaintiff to file an amended complaint. ECF No. 38. Plaintiff filed the First Amended Complaint (ECF No. 39) and the third-party contractor submitted

another Motion to Dismiss. The Court granted the Motion without leave to amend and dismissed the third-party contractor.

Now, Defendants move for summary judgment on Plaintiff's only remaining claims. ECF No. 50. Plaintiff opposes the Motion. ECF No. 59.

DISCUSSION

Defendants Washington State Governor Jay Inslee and Secretary of DSHS Cheryl Strange move the court for entry of summary judgment in their favor. ECF No. 50 at 2. Defendants argue "[t]he Eleventh Amendment bars any claims against State Defendants, except for prospective relief" in federal courts, including claims for violations of state law, and that "Plaintiff lacks Article III standing to seek prospective relief." ECF No. 50 at 2, 8. Defendants otherwise assert that the request for prospective relief should be denied, arguing that "[t]here is no direct link between her alleged injury and the procedures of State Defendants for withdrawal of union dues" and "there is no actual controversy warranting the court's issuance of a declaratory order". ECF No. 50 at 2.

Defendants are correct that the Eleventh Amendment bars Plaintiff's suit for damages and violations of state law in federal court, and that Plaintiff can only proceed with her claim for prospective relief. ECF No. 50 at 7-8. Plaintiff does not challenge this. *See* ECF Nos. 50 at 8; 59. This leaves the issue of whether Plaintiff has Article III standing to pursue prospective relief.

Plaintiff asserts that she has Article III standing because she is suffering from a present and ongoing injury. Her argument is very limited—she argues that (1) she "is presently forced to employ heightened

vigilance in her interactions with the union and State Defendants" because of the Defendants' "failure to employ minimal safeguards" and (2) there is "a substantial likelihood of identical deprivations in the future." ECF No. 59 at 13.

As to Plaintiff's first point, she contends that she is "forced to exercise heightened vigilance" because "SEIU 775 has dealt with [her] deceptively in the past" and she "knows that the State Defendants will not, apparently, question any union representation from the union . . . ." ECF No. 59 at 13. She states: "What this means, practically, is that she must closely monitor her salary statements." ECF No. 59 at 13. This is not a sufficient ongoing injury to establish a case and controversy. Having to review one's salary statements is a *de minimis* burden. Irrespective, the merits of her concern ultimately hinge on whether she has demonstrated a substantial likelihood of a similar deprivation—without the latter showing, there is no reasonable basis for her "heightened vigilance".

Plaintiff has not demonstrated that there is a substantial likelihood of a similar, future deprivation. Plaintiff concedes that, to establish Article III standing for prospective relief, Plaintiff must demonstrate that there is a "sufficient likelihood that [she] will again be wronged in a similar way." ECF No. 59 at 12 (quoting *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). However, Plaintiff's entire argument that she will again be wronged is limited to her statement that "[t]he mere repetitive nature of the violations suggests that they (or similar violations) will occur again" and that "[t]echnological problems happen all the time." ECF No. 59 at 16. This does not come close to meeting her burden.

First, Plaintiff ignores the fact that the two series of withdrawals stemmed from completely different events—a forgery and a mistake made during a transition period. As such, her "repetitive nature" argument is misplaced.

Second, there is no evidence that a forged authorization will occur again – Plaintiff has only presented one alleged instance in over 6 years in her role as an individual provider. Moreover, as of 2018, SEIU 775 must "submit an attestation of authenticity that a voluntary, affirmative authorization was received from each individual provider listed for a dues deduction[.]" ECF No. 50 at 6. This adequately curbs Plaintiff's concerns about a nefarious actor because SEIU 775 now has a vested interest in the accuracy of the information they provide. It is true that Plaintiff is not completely immunized from bad actors, but the constitution does not assure such.

Third, her argument that mistakes may happen in the future is pure conjecture, as the process responsible for the second deprivation was a temporary work around that is no longer in effect. This argument falls woefully short of demonstrating a substantial likelihood of a future deprivation.

Plaintiff has thus failed to demonstrate she has Article III standing.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendants Cheryl Strange and Jay Inslee's Motion for Summary Judgment (ECF No. 50) is GRANTED. The Clerk of Court shall enter Judgment of dismissal in favor of Defendants Washington State Governor Jay Inslee and Secretary of DSHS Cheryl Strange.

2. Pursuant to Federal Rule of Civil Procedure 68(a) and ECF No. 35, the Clerk of Court shall enter Judgment against SEIU 775 and in favor of Plaintiff Cindy Ellen Ochoa in the sum of $28,000 (twenty-eight thousand dollars) inclusive of (1) costs accrued prior to the date of this offer, including reasonable attorneys' fees under 42 U.S.C. § 1988(b), and (2) attorneys' fees not recoverable as costs under 42 U.S.C. § 1988(b).

The District Court Executive is directed to enter this Order, enter judgment accordingly, furnish copies to the parties, and close the file.

DATED October 4, 2019.

/s/ Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

———

No. 19-35870
D.C. No. 2:18-cv-00297-TOR

———

CINDY ELLEN OCHOA, AS AN INDIVIDUAL,

Plaintiff-Appellant,

v.

PUBLIC CONSULTING GROUP, INC., A MASSACHUSETTS CORPORATION; PUBLIC PARTNERSHIPS LLC, INCORPORATED IN DELAWARE; CHERYL STRANGE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES; JAY ROBERT INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WASHINGTON,

Defendants-Appellees.

———

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Argued and Submitted February 8, 2022
Portland, Oregon

Filed September 19, 2022

———

OPINION

———

Before: Richard A. Paez and Jacqueline H. Nguyen, Circuit Judges, and John R. Tunheim,[*] District Judge.

Opinion by Judge Paez

SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal of all of plaintiff's claims against Public Partnerships LLC ("PPL") and Public Consulting Group, Inc. ("PCG") (collectively "private defendants"), and the district court's grant of summary judgment to Washington Governor Inslee and Secretary Strange of the Department of Social and Health Services (collectively "state defendants"), in plaintiff's action alleging that defendants violated her First and Fourteenth Amendment rights and engaged in the willful withholding of her wages in violation of state law.

Plaintiff is an individual provider ("IP") of in-home care for her disabled son. Under Washington law, IPs are considered public employees for the purpose of collective bargaining, and they are represented by Service Employees International Union 775 ("SEIU"). Plaintiff did not join the union, but on two occasions the State withheld dues from her paycheck.

---

[*] The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, 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.

The panel held that plaintiff did not have standing to bring any claims for prospective relief. The panel further held that, although the district court erred in holding that PPL and PCG were not state actors, plaintiff had not alleged facts sufficient to support a Fourteenth Amendment due process claim or a claim for violation of state law.

Plaintiff argued that the district court incorrectly concluded that she lacked standing to seek prospective relief. Because plaintiff's claim was procedural and need not meet "all the normal standards" for standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 5545, 572 n. 7 (1992), the panel held that she did have standing to seek declaratory and injunctive relief against both the State and private defendants. Procedural rights are special, and a plaintiff can assert a procedural right without establishing all the normal standards for redressability and immediacy. The panel held that under the Fourteenth Amendment plaintiff had a procedural right to due process. Given that plaintiff already had union dues erroneously withheld from her paycheck twice and remained employed with the State and therefore at risk of additional unauthorized withholdings, the risk of future injury was sufficiently real to meet the low threshold required to establish procedural standing.

Plaintiff alleged that PPL and PCG violated her Fourteenth Amendment rights because they deprived her of her liberty interest under the First Amendment without adequate procedural safeguards. Viewing the complaint favorably, as required at the motion to dismiss stage, the panel held that plaintiff alleged sufficient facts to establish that PPL and PCG can be considered state actors for the purpose of her 42 U.S.C. § 1983 action. Plaintiff met both parts of the two-prong

test for determining whether state action exists. First, plaintiff's deprivation was caused by the private defendants' actions under Wash. Rev. Stat. § 41.56.113. Second, the private defendants can be considered state actors under the nexus test. The withholding of union dues from an IP's paycheck was an affirmative obligation of the State. The State directed the private defendants to withhold dues and provided them with a list of individuals from whom dues should be withheld. As a result, the responsibility for withholding union dues was more properly ascribed to the government than to the private defendants, and the private defendants should be treated as state actors.

The panel held that because the plaintiff did not allege facts sufficient to demonstrate that she was deprived of a liberty interest, her Fourteenth Amendment claim against the private defendants and the State failed. Plaintiff did have a liberty interest as a nonmember of the union in not being compelled to subsidize the union's speech through unauthorized dues. But she has not shown that either the state or the private defendants intended to withhold unauthorized dues and thus deprive her of that interest. The defendants' reliance on the union's representations in the mistaken belief that they were accurate did not rise to the level of a due process violation. Any injury that plaintiff suffered because of the union's misrepresentations was properly addressed by pursuing a state law claim against the union, not a Fourteenth Amendment claim against the State or the private defendants.

The panel held that there was no basis for plaintiff's final claim that the 2018 dues deduction constituted a willful withholding of her wages by PPL in violation of Wah. Rev. Code § 49.52.050. PPL was not, and could

not be considered, plaintiff's employer or an agent of her employer under the statute. Nor could plaintiff demonstrate that PPL's withholding of her dues was willful. Therefore, the district court did not err in dismissing the claim.

COUNSEL

Sydney Phillips (argued) and Caleb Jon F. Vandenbos, Freedom Foundation, Olympia, Washington, for Plaintiff-Appellant.

Alicia Young (argued), Assistant Attorney General; Susan Sackett Danpullo, and Cheryl L. Wolfe, Senior Counsel, Labor and Personnel Division; Robert W. Ferguson, Attorney General; Office of the Attorney General, Olympia, Washington; for Defendants-Appellees Cheryl Strange and Jay Robert Inslee.

Scott A. Flage (argued) and Markus W. Louvier, Evans Craven & Lackie PS, Spokane, Washington, for Defendants-Appellees Public Consulting Group, Inc., and Public Partnerships LLC.

Scott A. Kronland, Altshuler Berzon LLP, San Francisco, California; Michael C. Subit, Frank Freed Subit & Thomas LLP, Seattle, Washington; for Amicus Curiae SEIU Local 775.

OPINION

PAEZ, Circuit Judge:

Cindy Ochoa is a resident of Washington who works as an individual provider ("IP") of in-home care for her disabled adult son. Under Washington law, IPs are considered public employees for the purpose of collective bargaining, and they are represented by Service

Employees International Union 775 ("SEIU"). Ochoa did not join the union, but on two separate occasions the State nonetheless withheld dues from her paycheck. Ochoa sued the union; Jay Inslee, Governor of Washington; Cheryl Strange, Secretary of the Washington Department of Social and Health Services ("DSHS"); Public Partnerships LLC ("PPL"), a private company that administers DSHS's payroll system; and Public Consulting Group, Inc. ("PCG"), the parent company of PPL. She alleged that the defendants violated her First and Fourteenth Amendment rights and engaged in the willful withholding of her wages in violation of state law.

The district court dismissed all of Ochoa's claims against PPL and PCG (collectively, "private defendants") and granted summary judgment to Governor Inslee and Secretary Strange (collectively, "State defendants"). We affirm. Ochoa has standing to bring her claims for prospective relief, and the district court erred in holding that PPL and PCG are not state actors. Ochoa, however, has not alleged facts sufficient to support a Fourteenth Amendment due process claim or a claim for violation of state law.

BACKGROUND

Washington contracts with IPs to provide in-home care services to clients who are eligible for Medicaid. DSHS is responsible for administering the IP program, which involves paying providers' wages and withholding deductions, including union dues. DSHS uses a payroll system called IPOne to pay IPs and to process any dues deductions. IPOne is maintained by a private contractor, PPL.[1] SEIU provides DSHS with an electronic

[1] Ochoa alleges that PPL works jointly with PCG to design and manage the payroll system.

dues interface file identifying IPs who should have union dues withheld from their paychecks. DSHS then sends that file to PPL so the company can make the deductions. PPL relies entirely on the information from the union in determining from whom it should withhold dues.

When Ochoa first began working as an IP, Washington automatically withheld dues from all IPs' paychecks. After the Supreme Court's decision in *Harris v. Quinn*, 573 U.S. 616 (2014), the State and SEIU amended their collective bargaining agreement to establish an opt-out process in which union dues would be deducted from all IPs except those who affirmatively objected.[2] In July 2014, Ochoa exercised her right to cease paying union dues. She alleges that since then, she "has never communicated to any of the Defendants that she would like to support SEIU 775—either financially or otherwise." In May 2016, a union representative visited Ochoa at home and asked her to sign a form to verify her contact information, which Ochoa refused to do. Four months later, DSHS received a dues interface file from SEIU indicating that dues should be withheld from Ochoa's paycheck. Beginning on October 17, 2016, dues were withheld. About five months later, Ochoa noticed the withholdings and contacted IPOne several times to demand that they stop withholding dues. She received no response until May 2017, when IPOne informed her that she would need to contact SEIU for assistance.

When Ochoa contacted the union, a representative told her that dues were being withheld because Ochoa

---

[2] *Harris* held that workers who were not "full-fledged state employees" could not be compelled to financially support their public-sector union if they chose not to join. 573 U.S. at 645–47.

had signed a union membership card. Ochoa informed the representative that she had not signed a membership card and asked to be shown the card. When SEIU sent her a copy of the card, she recognized that the signature was not hers and once again asked the union to stop withholding dues. In June 2017, the secretary-treasurer of the union sent Ochoa a letter acknowledging that the signature on the card did not match the one on file for her. The letter included a check for $358.94. A month later, the union sent a second letter, which included a check for $51.12. Ochoa, through her attorney, rejected the checks. The withholding of union dues then stopped.

In 2018, the Supreme Court held that an opt-out process for deducting union dues from public employees violates the First Amendment. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). Immediately following the decision, the State began working to create an opt-in process and to ensure that union dues would not be deducted from any IP who had not affirmatively authorized such deductions. While the State was developing a permanent change, it implemented a workaround plan. Under this plan, SEIU would provide the State with two electronic interface files: one identifying all IPs who had opted out of paying dues, and one identifying all IPs who had affirmatively opted in. Beginning on July 16, 2018, deductions were taken only from the paychecks of IPs on the opt-in list. Because of discrepancies between the lists, however, there were approximately eighty-seven IPs from whom the State believes it deducted dues without affirmative consent.

Ochoa was among these providers. Dues were withheld from her salary in July and August 2018. Upon noticing the withholdings, she again contacted

IPOne and spoke to a representative who said that she could not fix the problem. She also contacted SEIU. After her calls to the union failed to stop the withholdings, Ochoa had her counsel contact SEIU, and the withholdings then promptly ceased.

Following these unauthorized deductions, Ochoa filed this lawsuit. In the operative complaint, Ochoa brought a claim under 42 U.S.C. § 1983 alleging that the defendants violated her First and Fourteenth Amendment rights by failing to employ minimal procedural safeguards to avoid unconstitutional dues withholdings and a claim that the defendants violated Wash. Rev. Code § 49.52.050 by engaging in willful withholding of her wages in 2018. The district court dismissed all the claims against the private defendants, concluding that they were not the proximate cause of the erroneous deprivations, were not state actors for the purposes of § 1983, and did not willfully withhold wages under § 49.52.050. The district court subsequently granted summary judgment to the State defendants, concluding that the Eleventh Amendment barred all claims against them except those for prospective relief and that Ochoa lacked standing to seek such relief. Ochoa timely appealed the final judgment.[3]

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's grant of summary judgment, "including legal determinations regarding

---

[3] SEIU and Ochoa separately entered into an agreement for an offer of judgment under Federal Rule of Civil Procedure 68(a), and SEIU is not party to this appeal. Ochoa does not appeal the district court's determination that the State defendants are entitled to Eleventh Amendment immunity on her claims for damages.

standing." *Alaska Right to Life PAC v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007). We also review de novo a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). We may affirm the dismissal "on any basis fairly supported by the record." *Yestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001).

DISCUSSION

A. Standing

Ochoa argues that the district court incorrectly concluded that she lacked standing to seek prospective relief. Because Ochoa's claim is procedural and thus need not meet "all the normal standards" for standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992), we hold that she does have standing to seek declaratory and injunctive relief against both the State and the private defendants.[4]

To have standing to bring suit, a plaintiff must generally establish that she has suffered an injury in fact that is fairly traceable to the challenged conduct of the defendant and that will likely be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560. The Supreme Court has explained that "procedural rights are special," however, and a plaintiff can therefore assert a procedural right "without meeting all the normal standards for redressability and immediacy." *Id*. at 572 n.7. To establish procedural standing, a plaintiff must "show that it was accorded a procedural right to protect its interests and that it has concrete

[4] Though Ochoa does not raise the argument that she has standing based on the procedural nature of her claims, we have "an independent obligation to assure that standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

interests that are threatened." *City of Las Vegas v. F.A.A.*, 570 F.3d 1109, 1114 (9th Cir. 2009).

Ochoa meets this less demanding standard. Under the Fourteenth Amendment, she has a procedural right to due process. *See Marsh v. County of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012). This right protects her concrete liberty interest under the First Amendment in being free from compulsion to financially support union speech. *See Janus*, 138 S. Ct. at 2460. It is true that Ochoa's claimed future harms are speculative because it is not clear whether she will ever again suffer an unauthorized withholding. However, given that she has already had union dues erroneously withheld from her paycheck twice and remains employed with the State and therefore at risk of additional unauthorized withholdings, the risk of future injury is "sufficiently real" to meet the low threshold required to establish procedural standing. *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 446 (9th Cir. 1994); *see also O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (noting that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury").[5]

B. State Action

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and

---

[5] The State defendants also argue that Ochoa's prospective claims are moot because the collective bargaining agreement between SEIU and the State was modified after *Janus* to withdraw dues only from IPs who have provided affirmative consent. The modified agreement does not provide the type of procedural safeguards Ochoa seeks, however, nor is there any evidence that it would make future unauthorized withholdings an impossibility. Therefore, it does not moot Ochoa's claim. *See Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006).

laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Ochoa alleges that PPL and PCG violated her Fourteenth Amendment rights because they deprived her of her liberty interest under the First Amendment without adequate procedural safeguards. The district court concluded that PPL and PCG were not subject to liability under § 1983 because they are private companies acting as an instrument of the state, not state actors. Viewing the complaint through the favorable lens required at the motion to dismiss stage, however, Ochoa has alleged sufficient facts to establish that PPL and PCG can be considered state actors for the purpose of her § 1983 claims.[6]

State action analysis begins with "identifying the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (internal quotation marks and citation omitted). The private defendants argue that Ochoa's claim is "based upon SEIU's alleged forgery on a union membership card," but her actual claim is broader. Ochoa alleges that she was deprived of her liberty interest without due process because unauthorized union dues were withheld from her paycheck without certain procedural safeguards. The cause of her alleged constitutional

---

[6] While PCG is PPL's parent company, it asserts that it is not party to the contract between PPL and DSHS. Ochoa does not dispute this claim. However, she alleges that PPL and PCG "work[] jointly" to provide the State's payroll processing and execute the contract. That is, she argues that both entities carried out the challenged actions and are equally responsible. Taking these allegations as true, as we must at the motion to dismiss stage, we treat PPL and PCG as a single entity for the purposes of our state action analysis. *See Cholla Ready Mix*, 382 F.3d at 973.

deprivation was the *withholding*, not the union's forgery or its technical mistake.[7] *See Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 997 (9th Cir. 2013) (distinguishing between challenges to the underlying cause of the deprivation and the state procedures for enacting the deprivation). And the private defendants, as operators of the payroll system, are the ones who carried out the challenged withholding.[8]

Once the conduct at issue has been defined, there is a two-prong test for determining whether state action exists. First, the plaintiff must show that her deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Second, she must show that "the party charged with the deprivation [is] a person who may

---

[7] In a concurrently filed opinion, *Wright v. Serv. Emps. Int'l Union, Loc. 503*, No. 20-35878, __ F.4th __ (9th Cir. 2022), the plaintiff brought a similar Fourteenth Amendment due process claim alleging that a private defendant failed to implement sufficient procedural safeguards against unauthorized withholdings of union dues. The state action analyses in the two cases differ, however, because the plaintiffs challenge different conduct. Wright's claim is against the union, which acts only to compile and transmit the list of union members. Ochoa's claim, on the other hand, is against the private payment processors, who act to withhold dues. Therefore, while *Wright* analyzes whether the Union's inclusion of Wright's name on the union membership list is state action, we analyze whether the payment processors' withholding of dues is state action.

[8] In holding that the private defendants could not be considered the "proximate cause" of the deprivation, the district court similarly misunderstood Ochoa's complaint. She alleges that the private defendants were the ones who committed the challenged conduct, not that the State committed the challenged conduct at their behest.

fairly be said to be a state actor." *Id*. Ochoa's complaint meets both prongs of the test.

First, Ochoa's deprivation was caused by the private defendants' actions under Wash. Rev. Stat. § 41.56.113, the state law governing the deduction of union dues from IPs' paychecks. The private defendants criticize this framing, pointing to *Lugar*'s distinction between "private misuse of a state statute," which is conduct that cannot "be attributed to the State," and "the procedural scheme created by the statute," which "obviously is the product of state action." 457 U.S. at 941. If the private defendants withheld union dues from Ochoa's paycheck without proper authorization, they argue, they acted *in violation* of § 41.56.113 rather than under its authority.

It is true that § 41.56.113 allows the withholding of dues only "[u]pon the written authorization of an individual provider." Wash. Rev. Code § 41.56.113(1)(a) (2018).[9] However, it also requires that the employer "shall . . . deduct from the payments to an individual provider . . . the monthly amount of dues as certified by the secretary of the exclusive bargaining representative." *Id*. This responsibility is mandatory. Neither the State nor the private defendants to whom it delegated its duties had the authority to question whether the representations from SEIU were accurate; they were simply directed to make the withholdings based on the information the union provided. The clear

[9] The statute has been amended several times. The relevant version of the statute at the time of the first withholding was Wash. Rev. Code § 41.56.113 (2010), and the relevant version at the time of the second withholding was Wash. Rev. Code § 41.56.113 (2018). Because the two versions are virtually identical and all quoted language and section numbers are the same, we cite only to the 2018 version.

language of the statute requires the State and the private defendants to withhold union dues whenever they are informed by the union that an IP has authorized it, whether or not that authorization actually occurred. *See Belgau v. Inslee*, 975 F.3d 940, 948 (9th Cir. 2020). Therefore, the private defendants were in fact acting in accordance with the statute when they withheld dues from Ochoa's paycheck on the basis of information they received from the union, and the first prong is met. *See id.* at 946–47.

Ochoa also satisfies the second prong of the state action test. There are a variety of tests that courts use in determining whether this prong is met, including the public function test, the state compulsion test, the nexus test, and the joint action test.[10] *See George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (per curiam). These tests are interrelated, and they are designed to answer the same key question: whether the conduct of a private actor is fairly attributable to the State. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012). Satisfaction of a single test is sufficient to establish state action, so long as there is no countervailing factor. *See George*, 91 F.3d at 1230. Here, the private defendants can be considered state actors under the nexus test.

"The nexus test inquiry asks whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so the action of the latter may be fairly treated as that of the state itself." *Gorenc v. Salt River Project Agric. Improvement*

---

[10] "Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here." *Lugar*, 457 U.S. at 939.

& Power Dist., 869 F.2d 503, 506 (9th Cir. 1989) (internal quotation marks and citation omitted). Such a nexus exists when the State "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." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Id*. When the State bears an "affirmative obligation" and delegates that function to a private party, the private party "assume[s] that obligation" and can be considered a state actor. *West*, 487 U.S. at 56. The delegated function must be one that the State has some constitutional or statutory obligation to carry out; delegation of merely discretionary tasks is not enough. *See Sullivan*, 526 U.S. at 55.

The withholding of union dues from an IP's paycheck is an affirmative obligation of the State. The State is required by statute to provide IPs with a salary and to withhold union dues from that salary when appropriate. *See* Wash. Rev. Code § 41.56.113 (2022). The agency has delegated these responsibilities to the private defendants by contracting with them for payroll processing.

Moreover, the State has "significantly involve[d] itself" in the process of withholding union dues. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020). The State directs the private defendants to withhold dues and provides them with a list of individuals from whom dues should be withheld. The companies do not exercise independent judgment about when to withhold dues and are in fact required by state law to make those deductions. *See George*, 91 F.3d at 1232. Indeed, the private defendants describe themselves as "merely cut[ting] checks at the direction

of the State." As a result, the responsibility for withholding union dues is more properly ascribed to the government than to the private defendants, and the private defendants should be treated as state actors. *See Lugar*, 457 U.S. at 938.

C. Due Process Claim

"Even if there is state action, the ultimate inquiry in a Fourteenth Amendment case is, of course, whether that action constitutes a denial or deprivation by the State of rights that the Amendment protects." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 n.4 (1978) (internal quotation marks omitted). Because Ochoa does not allege facts sufficient to demonstrate that she was deprived of a liberty interest, her Fourteenth Amendment claim against the private defendants and the State must fail.

"[T]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). For Ochoa to prevail on a Fourteenth Amendment claim, she must demonstrate that either the private defendants or the State engaged in an "affirmative abuse of power." *Id.* at 330 (internal quotation marks and citation omitted). Ochoa does have a liberty interest as a nonmember of the union in not being compelled to subsidize the union's speech through unauthorized dues. *Janus*, 138 S. Ct. at 2460. But she has not shown that either the State or the private defendants *intended* to withhold unauthorized dues and thus deprive her of that interest. Indeed, she has never alleged that the State or the private defendants were even aware that the deductions were unauthorized—as she notes, they withheld the dues "based on SEIU 775's representations alone," and they did not know or have any reason

to know that those representations were false. The state statute does not impose a duty on either the State or the private defendants to verify the accuracy of the information provided by the union; in fact, it compels "mandatory indifference to the underlying merits of the authorization." *Belgau*, 975 F.3d at 948 (internal quotation marks and citation omitted). The defendants' reliance on the union's representations in the mistaken belief that they were accurate does not rise to the level of a Due Process Clause violation. *See Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *see also Stevenson v. Koskey*, 877 F.2d 1435, 1440– 41 (9th Cir. 1989) ("In the context of constitutional torts, it is the deliberate, intentional abuse of governmental power for the purpose of depriving a person of life, liberty or property that the fourteenth amendment was designed to prevent."). Any injury that Ochoa suffered because of the union's misrepresentations is properly addressed by pursuing a state law claim against the union, not a Fourteenth Amendment claim against the State or the private defendants. *See Daniels*, 474 U.S. at 333.

D. Section 49.52.050

Ochoa's final claim is that the 2018 dues deductions constitute a willful withholding of her wages by PPL in violation of § 49.52.050.[11] There is no basis for this claim. As PPL argues, it is not and cannot be considered Ochoa's employer or an agent of her employer under the statute. Nor can Ochoa demonstrate that

[11] In her opening brief, Ochoa only argues that PPL is liable under the statute. Therefore, any argument that PCG is also liable under the statute is forfeited. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003). In any event, a claim against PCG under § 49.52.050 would fail for the same reasons the claim against PPL does.

PPL's withholding of her dues was willful. Therefore, the district court did not err in dismissing the claim.

First, Ochoa has failed to show that PPL is her employer or an agent of her employer. Section 49.52.050(2) states:

> Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who . . . [w]illfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract . . . [s]hall be guilty of a misdemeanor.

For the purposes of the statute, an agent is someone who has "some power and authority to make decisions regarding wages or the payment of wages." *Ellerman v. Centerpoint Prepress, Inc.*, 22 P.3d 795, 799 (Wash. 2001) (en banc). Ochoa admits that as an IP, her employer is the governor of Washington. Nonetheless, she argues that PPL should be considered an agent of the government because it "handles all wages" and "therefore does have control over salary payouts." The mere fact that PPL mechanically handles the process of sending out paychecks does not mean that the company makes any decisions regarding wages, however. In fact, Ochoa admits that DSHS is the one "responsible for administering the IP program" and thus "responsible for distributing IPs' wages and/or withholding them." PPL does not have any authority to make decisions regarding IPs' wages—it merely makes payments at the direction of and based on the information provided by the State. Therefore, the

company did not act as an agent of Ochoa's employer under § 49.52.050.

Nor does Ochoa allege facts sufficient to show that PPL acted willfully in deducting union dues from her wages. "Under [§] 49.52.050(2), a nonpayment of wages is willful when it is not a matter of mere carelessness, but the result of knowing and intentional action." *Ebling v. Gove's Cove, Inc.*, 663 P.2d 132, 135 (Wash. Ct. App. 1983). Ochoa argues that this standard can be satisfied by any "volitional act," and that the volitional act here was the fact that PPL withheld the dues. This argument sweeps too broadly. As Washington courts have held, "[a]n employer's genuine belief that he is not obligated to pay certain wages precludes the withholding of wages from falling within the operation of [§] 49.52.050(2)." *Id*. PPL's decision to withhold dues from Ochoa's paycheck in 2018 was based on information provided by SEIU, as all its withholding decisions are. As discussed above, Ochoa does not allege that PPL knew or should have known that this particular information was incorrect. Instead, her own complaint alleges that PPL withheld dues from her paycheck on the basis of a good faith belief that it was obligated to do so pursuant to its contract with the State. PPL is not liable for the dues withholding under § 49.52.050, and the district court correctly dismissed the claim.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35870
D.C. No. 2:18-cv-00297-TOR

CINDY ELLEN OCHOA, as an individual,

Plaintiff-Appellant,

v.

PUBLIC CONSULTING GROUP, INC.,
a Massachusetts corporation; *et al.*,

Defendants-Appellees.

U.S. District Court for Eastern Washington, Spokane

MANDATE

The judgment of this Court, entered September 19, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Quy Le
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX E

First Amendment of the
United States Constitution

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.

Fourteenth Amendment of the United States Constitution

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.

RCW 41.56.113

Department-contracted individual providers—Family child care providers—Adult family home providers—Language access providers—Employee authorization of membership dues and other payments—Revocation—Third-party entity permitted to act as an individual provider's agent.

(1) This subsection (1) applies only if the state makes the payments directly to a provider.

(a) Upon the authorization of an individual provider who contracts with the department of social and health services, a family child care provider, an adult family home provider, or a language access provider within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the state as payor, but not as the employer, shall, subject to (c) of this subsection, deduct from the payments to an individual provider who contracts with the department of social and health services, a family child care provider, an adult family home provider, or a language access provider 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.

(b)(i) 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.

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

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

(iv) 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.

(v) 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.

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

(vii) If the governor and the exclusive bargaining representative of a bargaining unit of individual providers who contract with the department of social and health services, family child care providers, adult family home providers, or language access providers enter into a collective bargaining agreement that includes requirements for deductions of other payments, the state, as payor, but not as the employer, shall, subject to (c) of this subsection, make such deductions upon authorization of the individual provider, family child care provider, adult family home provider, or language access provider.

(c)(i) The initial additional costs to the state in making deductions from the payments to individual providers, family child care providers, adult family home providers, and language access providers under this section shall be negotiated, agreed upon in advance, and reimbursed to the state by the exclusive bargaining representative.

(ii) The allocation of ongoing additional costs to the state in making deductions from the payments to individual providers, family child care providers, adult family home providers, or language access providers under this section shall be an appropriate subject of collective bargaining between the exclusive bargaining representative and the governor unless prohibited by another statute. If no collective bargaining agreement containing a provision allocating the ongoing additional cost is entered into between the exclusive bargaining representative and the governor, or if the legislature does not approve funding for the collective bargaining agreement as provided in RCW 74.39A.300, 41.56.028, 41.56.029, or 41.56.510, as applicable, the ongoing additional costs to the state in making deductions from the payments to individual providers, family child care providers, adult family home providers, or language access providers under this section shall be negotiated, agreed upon in advance, and reimbursed to the state by the exclusive bargaining representative.

(2) This subsection (2) applies only if the state does not make the payments directly to a language access provider. Upon the authorization of a language access provider within the bargaining unit and after the certification or recognition of the bargaining unit's exclusive bargaining representative, the state shall require through its contracts with third parties that:

(a) The monthly amount of dues as certified by the secretary of the exclusive bargaining representative be deducted from the payments to the language access provider and transmitted to the treasurer of the exclusive bargaining representative; and

(b) A record showing that dues have been deducted as specified in (a) of this subsection be provided to the state.

(3) This subsection (3) applies only to individual providers who contract with the department of social and health services. The exclusive bargaining representative of individual providers may designate a third-party entity to act as the individual provider's agent in receiving payments from the state to the individual provider, so long as the individual provider has entered into an agency agreement with a third-party entity for the purposes of deducting and remitting voluntary payments to the exclusive bargaining representative. A third-party entity that receives such payments is responsible for making and remitting deductions authorized by the individual provider. The costs of such deductions must be paid by the exclusive bargaining representative.