No. 22-____

IN THE

Supreme Court of the United States

JODEE WRIGHT,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, *et al.*,

Respondents.

CHRISTOPHER ZIELINSKI,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, *et al.*,

Respondents.

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

JOINT PETITION FOR WRIT OF CERTIORARI

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December 19, 2022

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QUESTION PRESENTED

Oregon's collective bargaining system puts unions in exclusive control of deducting union dues from public employees' wages. State employers must presume the accuracy of a union's representation that employees have consented to dues payments, even if employees in fact have not consented to such deductions. Or. Rev. Stat. § 243.806.

Neither Petitioner Wright nor Petitioner Zielinski ever consented to union membership or dues payments. Yet under Oregon's system, their State employers deducted union dues from their wages relying on the list provided by Service Employees International Union, Local 503 ("SEIU" or "union").

Petitioners brought suit under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to challenge Oregon's dues deduction procedure and seek repayment of unlawfully deducted dues. The Ninth Circuit declined to apply constitutional scrutiny to Oregon's union dues deduction procedure, holding that the Constitution imposes no duty on government entities to ensure employees affirmatively consent to the government's deduction of union dues from their wages. Petitioners challenge this holding.

The question presented is:

Do the constitutional guarantees of Freedom of Speech and Due Process of law create an affirmative duty for government employers to ensure employees' consent before deducting union dues from employees' wages?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Jodee Wright and Christopher Zielinski were each Plaintiff-Appellants in the court below.

Respondents SEIU, the Oregon Department of Administrative Services, and Katy Coba in her official capacity as the Director of Oregon Administrative Services, were Defendant-Appellees in the court below.

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

STATEMENT OF RELATED PROCEEDINGS

This petition arises from and is directly related to the following proceedings:[1]

1. *Wright v. Service Employees International Union Local 503, et al.,* 48 F.4th 1112, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 19, 2022.

2. *Zielinski v. Service Employees International Union Local 503, et al,* 2022 WL 4298160 (unpublished), U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 19, 2022.

3. *Ochoa v. Public Consulting Group, Inc*., 48 F.4th 1102, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 19, 2022.

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[1] The judgments to be reviewed are combined in a single petition for a writ of certiorari pursuant to Supreme Court Rule 12.4 because they are from the same court and involve closely related questions.

4. *Wright v. SEIU 503*, No. 6:20-cv-00520-MC, 491 F. Supp. 3d 872, United States District Court for the District of Oregon, judgment entered September 28, 2020.

5. *Zielinski v. SEIU 503*, No. 3:20-cv-00165-HZ, 499 F. Supp. 3d 804, United States District Court for the District of Oregon, judgment entered December 4, 2020.

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This petition arises from two cases consolidated for purposes of argument on appeal. Pet.App. 24a fn. 2. In both cases, the Ninth Circuit affirmed the district court's dismissals of Petitioners' complaints, issuing an opinion in *Wright v. SEIU 503* that is reported at 48 F.4th 1112 and reproduced at Pet.App. 1a; and a memorandum in *Zielinski v. SEIU 503* that is not published, but which may be accessed at 2022 WL 4298160, and which is reproduced at Pet.App. 23a.

JURISDICTION

The Ninth Circuit issued its decisions and opinion on September 19, 2022. Pet.App. 1a, 23a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I, reproduced at Appendix C, Pet.App. 27a.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states in pertinent part: "nor shall any State deprive any person of life, liberty or property, without due process of law..." U.S. Const. Amend. XIV, reproduced at Appendix D, Pet.App. 28a.

Oregon Revised Statute § 243.806 is reproduced below at Appendix E, Pet.App. 29a.

STATEMENT OF THE CASE

A. Background

Under Oregon's dues deduction system, when a public-sector union includes an employee's name on a dues deduction list, the employer *must* presume the employee has consented to dues deductions and *must* deduct dues from the employee's wages – even if the employee objects to the deductions and, in fact, never consented to them. Or. Rev. Stat. § 243.806(7) ("A public employer *shall* rely on the list to make the authorized deductions and to remit payment to the labor organization.") (emphasis added). The State does not verify employee consent. Rather, the union alone decides whether an employee has consented to dues deductions. *Id*.

Petitioner Christopher Zielinski works for the Oregon Health Authority ("the State"), as did Petitioner Jodee Wright until she retired in 2020. Pet.App. 5a. Neither ever became an SEIU member or authorized the State to deduct union payments from their wages. Pet.App. 5a, 24a. Nonetheless, the State deducted union dues from Mr. Zielinski's paychecks since he began employment in 2009, and from Ms. Wright's paychecks since 2017, based on SEIU's inclusion of their names on its list of public employees who authorized dues deductions. *Id*.

In 2019, Mr. Zielinski objected to the deductions, but SEIU's representative informed him that he must continue to pay union dues until a future date based on the anniversary of a membership card he purportedly signed in 2017. Pet.App. 46a-49a. However, Mr. Zielinski never signed this, or any, membership card. When he requested a copy, the card SEIU produced to Zielinski contained a clearly falsified signature. When

Zielinski objected, SEIU produced a *second* membership card purportedly signed by Zielinski in 2013, and alleged that *this* was the card Mr. Zielinski actually signed. But the signature on this card was also false – Mr. Zielinski did not sign it. *Id*. SEIU could not explain either of the falsified signatures, but finally agreed to instruct the State to stop deducting dues from Mr. Zielinski's wages. Neither the State nor SEIU has offered to refund the compelled dues the State wrongfully withdrew from Mr. Zielinski's wages. *Id*.

The State and SEIU treated Ms. Wright nearly identically when she objected to the State's dues deductions, with the exception that the State stopped exacting union payments from her wages only after she retired in 2020. Pet.App. 35a-37a.

B. Proceedings below

Petitioners filed suit under 42 U.S.C. § 1983 alleging that Oregon's dues deduction system established in Or. Rev. Stat. § 243.806 violates the First Amendment and Fourteenth Amendment because it requires State employers to presume consent based upon the certification of an interested third party, SEIU.

The district court below dismissed Petitioners' cases by determining Petitioners failed to allege facts showing a "plausible basis that SEIU was a State actor for purposes of § 1983." Pet.App. 6a, 24-25a. On appeal, the Ninth Circuit affirmed both district court decisions – issuing a published decision in Wright's case (Pet.App. 1a), and an unpublished memorandum in Zielinski's case (Pet.App. 23a).

The Ninth Circuit affirmed the district courts' dismissals positing that SEIU is not a state actor despite its control of the state's system for deducting union dues from state employees' wages since "*Janus* imposes

no affirmative duty on government entities to ensure that membership agreements and dues deductions are genuine." Pet.App. 21a. Petitioners challenge this erroneous interpretation of the First and Fourteenth Amendments.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit determined that a state does not owe its employees the duty to ensure their affirmative consent before deducting money from their wages and remitting it to a union to be spent on political speech. Pet.App. 21a. The Ninth Circuit's holding conflicts with this Court's interpretation of the First Amendment as articulated in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2468 (2018). If states can empower a union to control state systems for deducting union dues from public employees' wages without any form of constitutional scrutiny, employee rights as articulated in this Court's precedents become illusory. In upholding Oregon's system, the lower court's opinions also conflict with this Court's decisions regarding an important federal question under the Fourteenth Amendment's Due Process Clause because the system lacks any safeguards that could prevent the unlawful deprivation of employees' property (see *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982); Pet.App. 14a, 26a), and because it places the union in exclusive control of the State's deduction of union dues from employees' wages. *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 302 (1986).

The holding below entrenches a conflict in the decisions of the Appellate Courts, namely the Seventh Circuit and the Ninth Circuit, on the important matter of what state action is adequate to establish liability for private parties under 42 U.S.C. § 1983. *See Janus*

v. AFCSME, Council 31, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus* II"); *Wright v. SEIU*, Pet.App. 14a.

I. Whether the First and Fourteenth Amendments impose a duty on states to ensure employees affirmatively consent before states deduct dues from their wages is an important federal question.

The Ninth Circuit's holding that "*Janus* imposes no affirmative duty on government entities to ensure that membership agreements and dues deductions are genuine" (Pet.App. 21a) conflicts with this Court's holding in *Janus* that "[n]either an agency fee nor *any other payment* to the union may be deducted from a nonmember's wages, nor may *any other attempt* be made to collect such a payment, unless the employee *affirmatively consents* to pay" and that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver *cannot be presumed*." 138 S.Ct. at 2486 (emphasis added). This Court drove home the burden this places on those seeking to justify state deduction of union dues from public employees' wages: "to be effective, the waiver must be freely given and *shown by clear and compelling evidence*" and "[u]nless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id*. (emphasis added).

Yet, the Ninth Circuit held that this language failed to create any affirmative duty on the part of states to ensure this standard is met, despite the result that a state's deduction of union dues from two non-union employees for years based on nothing other than the

unsubstantiated word of the union who benefited from the deductions.[1]

If a state owes a duty to its employees to obtain consent before deducting money from their wages for a union, then a private party is acting "under color of" law for purposes of 42 U.S.C. § 1983 to the extent it assumes and performs (or fails to perform) this duty. *See West v. Atkins*, 487 U.S. 42, 54-57 (1988) (prison doctor was a state actor because the state delegated its affirmative obligation to provide adequate medical care to a prisoner). If the First Amendment places no affirmative duty on states to obtain employees' consent to government-exacted union dues payments, then the role Oregon gives to the union is unexceptional. If, however, the First and Fourteenth Amendment place the duty to obtain consent on states, then states that delegate the task of obtaining consent to the unions also delegate the *corresponding constitutional responsibility*. Pet.App. 21a.

State systems for dues deductions, such as Oregon's system, are a workaround of *Janus* because the Oregon law at issue here, requires the State to presume consent when certified by SEIU: "A public employer *shall* rely on the [union-provided] list to make the authorized deductions and to remit payment to the labor organization." Or. Rev. Stat. § 243.806(7) (emphasis added). This statutory presumption controls

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[1] Since the lower courts decided these cases on motions to dismiss, this Court must presume that Petitioners have never been union members, never authorized the State to deduct union dues from their wages, and SEIU can produce no valid evidence of employee consent since the signatures on the membership cards are forged. Pet.App. 7a (footnote 2); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164 (1993); Pet.App. 36a, 48a.

even when an employee objects to the deductions and the union concocts a forged signature to defend itself after the fact. In fact, notwithstanding the statute's pretextual "requirement" for employee authorization in the statute, when Or. Rev. Stat. § 243.806 (7) is read in combination with Or. Rev. Stat. § 243.806(9), the State is *incentivized* to deduct dues with or without authorization because the State becomes liable to the union if the State fails to deduct dues from the wages of an employee whose name appears on the union-generated list. Moreover, reading the statute further, the only recourse provided to employees by Oregon's system is an administrative action challenging the "existence, validity or revocation of an authorization for the deductions" at Oregon's State Employment Relations Board. Or. Rev. Stat. § 243.806(10). However, since the State's deductions will continue at the union's discretion, even after an employee disputes the alleged authorization, the statute places a burden on employees to prove there is no authorization. The system is unconstitutional because the violation of First Amendment free speech rights, even if for brief periods of time, constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Gateway Pundit v. Sellers et al*, 2022 WL 17484331 *6 (9th Cir. 2022).

Under the Ninth Circuit's reasoning, states can establish procedures for deduction of union dues from public employees' wages to be spent on union political speech that (1) require states to presume employees' consent to dues payments based solely on a union's representation, and (2) are entirely controlled by the unions receiving the money, *without any constitutional scrutiny whatsoever*. The former conflicts with this Court's holding in *Janus* that such consent cannot be presumed under the First Amendment. *See* 138 S.Ct.

at 2486. The latter conflicts with this Court's holding in *Hudson* that the First Amendment prohibits state union dues deduction procedures entirely controlled by unions. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 308 (1986).[2] Moreover, if, as the lower court concluded, government-mandated union dues systems involve no state action, states can avoid constitutional scrutiny by delegating to the union (a private party). The result for employees is that there are no procedural safeguards in place to minimize the risk of an erroneous deprivation of the employees' property in violation of the Fourteenth Amendment. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982); *Hudson*, 475 U.S. at 308.

States such as Oregon are returning to such procedures post-*Janus* to protect union revenue streams in the wake of this Court's *Janus* decision. This Court acknowledged in *Janus* that prohibiting compelled union dues "may require unions to make adjustments in order to attract and retain members." 138 S. Ct. at 2485. But unions working hand-in-glove with state legislatures to preserve exclusive union control over a government's entire dues deduction operation is an "adjustment" that goes to far.

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[2] Over thirty-five years ago this Court made the common-sense observation that putting unions in charge of a State's dues deduction procedure endangers employees' First Amendment rights. *See Hudson*, 475 U.S. at 308 ("the most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees."). In *Hudson*, this Court clarified the need for procedural safeguards to prevent the possibility that non-union employees' money "might be used for impermissible purposes," as they were in the instant case. *Id*. at 309.

In fact, the Ninth Circuit's reasoning leads to the absurd result that *Janus* would have resulted in a win for the union had the union simply forged Mark Janus' signature on a union membership card. According to the Ninth Circuit, Mr. Janus would have been challenging the union's forged signature (not the statute), which would not have been conduct "under the color of law" since the Illinois statute did not authorize unions to forge signatures on membership cards. These state systems lead to precisely the kind of "practical problems and abuse" this Court tried to eradicate in *Janus*, and that states and unions are attempting to resurrect today. 138 S.Ct. at 2460.

At least 7 states currently have statutory systems that place the unions in the driver's seat when it comes to dues: California (Cal. Gov't Code § 1157.12); Colorado (Colo. Rev. Stat § 24-50-1111 (2)); Connecticut (Conn. Gen. Stat. § 31-40bb (h)—(j)); Delaware (Del. Code Ann. 19, § 1304 (c)(3)); Illinois (5 Ill. Comp. Stat. Ann. 315/6); Oregon (Or. Rev. Stat. § 243.806); and Washington (Wash. Rev. Code § 41.56.113). The statutory systems in place in Oregon, Washington, and California have been challenged in at least eight cases currently pending in the Ninth Circuit Court of Appeals, including the following: *Quezambra v. UDW AFCSME Local 3930, et al.*, Ninth Circuit 20-55643 (held in abeyance pending *Zielinski*); *Hubbard v. SEIU 2015, et al.*, Ninth Circuit 21-16408 (stayed pending *Wright* and *Zielinski*); *Marsh v AFSCME 3299, et al.*, Ninth Circuit 20-15309 (held in abeyance pending *Zielinski*); *Jarrett v. SEIU 503, et al.*, Ninth Circuit 21-35133 (held in abeyance pending *Zielinski*); *Schiewe v. SEIU 503, et al.,* Ninth Circuit 20-35882 (held in abeyance pending *Zielinski*); *Yates v. WFSE, et al*., Ninth Circuit, 20-35879 held in abeyance pending *Zielinski*); *Jimenez v. SEIU 775, et al.*, Ninth Circuit, 22-35238 (stayed until January 3, 2023 pursu-

ant to joint motion to stay pending *Zielinski* and *Wright*). Further, similar issues are also raised by at least one case pending in the Eighth Circuit Court of Appeals, *Todd v. AFSCME*, Eighth Circuit, 21-3749; and several cases pending in the United States District Courts, *Parde v SEIU 721, et al.*, U.S. District Court Cent. Dist. Cal., 2:22-cv-03320-GHW; *Trees v. SEIU 503, et al.*, U.S. District Court Oregon, 6:21–cv–00468–SI.

If states are free to establish systems for non-consensual dues deductions such as Oregon's without constitutional scrutiny, as they are under current Ninth Circuit precedent, unions can run roughshod over public employees' constitutional rights, whether it be the First Amendment right to be free of state-compelled speech or the Fourteenth Amendment right to be free of state-deprivation of property without due process of law.

II. This petition presents an excellent vehicle to resolve the circuit split on when a labor union is liable for constitutional deprivations under 42 U.S.C. § 1983.

If a state owes its employees a duty to obtain consent prior to deducting union dues from their wages, any attempt by a state to delegate that duty to a private party (such as a union) would result in the private party performing an action "under color" of law for purposes of §1983. *Atkins*, 487 U.S. at 48-50, 55 (1988); Pet.App. 18a.

A ruling from this court that this principle applies to a state's delegated union dues deduction procedure provides a resolution to the circuit split on union liability under § 1983 the Ninth Circuit has created between itself and the Seventh Circuit in *Janus v. AFCSME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus* II").

In *Janus II*, the Seventh Circuit observed that a "procedural scheme created by. . . statute obviously is the product of State action" and "properly may be addressed in a section 1983 action." *Id.* (quoting *Lugar*, 457 U.S. at 941–42 (1982)); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."). In so holding, the Seventh Circuit followed this Court's precedent in applying constitutional scrutiny to state systems for union dues deductions from public employees. *See e.g., Janus*, 138 S. Ct. 2448, *Hudson*, 75 U.S. 292. Hence, a union using state power to take and spend Mark Janus's lawfully earned wages on political speech pursuant to a state statute and a CBA qualified the union as state actor under § 1983. ("AFSCME was a joint participant with the State." *Janus II,* 942 F.3d at 361).

The Ninth Circuit below took a different route, holding that the union did not act under color of law when, pursuant to Oregon's system, it directed Petitioners' employer to continue their dues deductions over their objections – even though the union could do so pursuant only to the Oregon statute. Or. Rev. Stat. § 243.806. Pet.App. 15a-22a.

A holding from this Court that the First Amendment imposes a duty on states to obtain an employee's affirmative consent to the union dues the state deducts from their wages – the standard clearly articulated in *Janus* – resolves this conflict: a union is a state actor to the limited extent it performs (or fails to perform) the duty to acquire a public employee's affirmative consent to deductions of union payments from their wages. Without such a ruling, states will continue to delegate important constitutional

responsibilities to private parties, who will by virtue of their status as merely private actors avoid constitutional scrutiny.

III. This petition presents a clean opening to address the narrow question presented without the need to address jurisdictional issues.

This petition is an ideal vehicle for reviewing the question presented because Petitioners challenge a holding that is clear and narrow: "*Janus* imposes no affirmative duty on government entities to ensure that . . . dues deductions are genuine." Pet.App. 21a. The result of reversing this holding is also clear and narrow: states, or the private entities to whom they delegate control of union dues deduction procedures, are responsible for acquiring the affirmative consent constitutionally required from public employees before states deduct union dues payments from their wages, and are liable to the extent they failed to perform this duty.

To rule on this issue, the Court need not confront any standing or mootness issues that might complicate review. Petitioners do not appeal the lower court's dismissal of Ms. Wright's or Mr. Zielinski's claim for prospective relief against Oregon's procedure for lack of standing. Pet.App. 6a, and Pet.App. 25a. The Ninth Circuit concluded Ms. Wright's retirement deprived her of standing to seek prospective relief. Pet.App. 11a. The court determined that Mr. Zielinski, although not retired, also lacked standing to seek prospective relief on his First Amendment claims. The court also determined Mr. Zielinski had standing to assert prospective relief against the State on his Due Process claims. Pet.App. 25a. Petitioners request review only of the lower courts' dismissals of their claims against SEIU for damages caused by unconstitutional dues deductions,

Pet.App. 22a, 26a, and Mr. Zielinski's procedural due process claim against Oregon's dues deduction procedure, Pet.App. 25a fn. 3. There are no jurisdictional barriers to reviewing these claims.

Thus, the issue raised in this petition is a state's duty to acquire its employees' consent before deducting union payments from their wages, and a union's liability as the state's designee when it assumes, and fails to perform, this duty. Answering the question presented in the affirmative would result in an award of appropriate relief to Petitioners.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Zielinski and Ms. Wright's petition for certiorari review.

Respectfully submitted,

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December 19, 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35878

D.C. No. 6:20-cv-00520-MC

JODEE WRIGHT, an individual,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, a labor organization; KATY COBA, in her official capacity as Director of the Oregon Department of Administrative Services; Department of Administrative Services,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, 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 plaintiff's claims for prospective relief against all defendants for lack of jurisdiction and her claims for retrospective relief against Service Employees International Union Local 503 ("SEIU") for failure to allege state action under 42 U.S.C. § 1983.

Before her retirement, plaintiff was employed by the Oregon Health Authority, and SEIU was the exclusive representative for her bargaining unit. Plaintiff never joined SEIU, but the State deducted union dues from her salary and remitted the dues to SEIU. Plaintiff alleged that SEIU forged her signature on a union membership agreement. Plaintiff demanded that the State and SEIU stop the dues deductions and return the withheld payments. After she retired, plaintiff filed this action against State defendants and SEIU, alleging several constitutional claims under 42 U.S.C. § 1983. She also alleged several Oregon state law claims against SEIU.

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[*] 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 lacked standing to pursue her claims for prospective relief, and plaintiff's § 1983 claims failed for lack of state action.

Because jurisdiction is a threshold issue, the panel first considered whether it could entertain plaintiff's claims for prospective declaratory and injunctive relief against all defendants. As to plaintiff's claims for prospective relief for violation of her First Amendment rights, the panel concluded that her fear of future harm was based on a series of interferences that were too speculative to establish a "case or controversy" for the prospective relief she sought. Because she retired before filing this lawsuit, plaintiff's sole basis for her impending injury was her fear that, should she return to work, SEIU would forge a new membership agreement. Plaintiff's theory of future injury was unavailing. Plaintiff's allegations of past injury were also insufficient to establish standing. Plaintiff's theory that potential future unauthorized dues deductions chilled her exercise of her First Amendment rights was also too speculative to establish standing. Similarly, as to plaintiff's claims for prospective relief for violation of her Fourteenth Amendment procedural due process rights, the panel concluded that she lacked any concrete interest in her future wages or her right to be free from compelled union speech that were threatened by the alleged lack of procedural safeguards. The panel therefore affirmed the dismissal of these claims for lack of jurisdiction.

The panel next considered whether plaintiff's remaining claims against SEIU for retrospective relief—damages—were cognizable under 42 U.S.C. § 1983. The panel held that the district court did not err in dismissing these claims because SEIU was not a state actor for § 1983 purposes. *Belgau v. Inslee*, 975 F.3d

940 (9th Cir. 2020), dealt with an analogous statutory scheme in Washington authorizing union dues deductions. Given the similarities in the two statutory schemes of Oregon and Washington, the panel agreed with SEIU that, as in *Belgau*, it was not a state actor for purposes of § 1983. Plaintiff's claims failed to identify any "state policy" that would make SEIU a state actor under § 1983. SEIU further cannot fairly be described as a state actor under the joint action or public function tests. The panel therefore affirmed the district court's dismissal of plaintiff's claims for retrospective relief against SEIU.

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Christopher A. Perdue (argued), Assistant Attorney General; Benjamin Gutman, Solicitor General; Ellen F. Rosenblum, Attorney General; Office of the Attorney General, Salem, Oregon; for Defendants-Appellees Katy Coba and Department of Administrative Services.

OPINION

PAEZ, Circuit Judge:

Before her retirement in February 2020, Jodee Wright ("Wright") was employed by the Oregon Health Authority. The Service Employees International Union, Local 503 ("SEIU" or "Union") was the exclusive representative for her designated bargaining unit. Although Wright never joined the Union, the State began deducting union dues from her salary and remitting the dues to SEIU. In this lawsuit, Wright alleges that the Union forged her signature on a union membership agreement that included a dues deduction authorization, and then requested that the State deduct dues from her salary and remit them to SEIU. Months later, and while still employed, Wright demanded that the State and Union stop the dues deductions and return the withheld payments.

After Wright retired, she filed this lawsuit against the Department of Administrative Services, Katy Coba, the Director of the Department of Administrative Services (collectively, "state Defendants"), and SEIU alleging several constitutional claims under 42 U.S.C. § 1983 against Defendants. First, she alleged that by deducting dues without her consent, Defendants violated her First Amendment right to be free from compelled speech, as recognized by *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Second, she alleged that Defendants violated her right to procedural due process under the Fourteenth Amendment by deducting dues and remitting them to the Union without affording her certain procedural safeguards. Wright also alleged several state law claims against SEIU. She sought declaratory and injunctive relief and reimbursement of all the dues payments wrongfully withheld. The

district court concluded that Wright's claims for prospective relief were moot because she was no longer employed by the State. The court dismissed these claims for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The court dismissed the damages claims against SEIU under Rule 12(b)(6) because Wright failed to allege facts showing a plausible basis that SEIU was a state actor for purposes of § 1983.

We affirm, but we conclude that Wright lacked standing to pursue her claims for prospective relief.[1] *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (holding that this court may affirm on the basis of any ground fairly supported by the record). We also agree, for reasons similarly laid out in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), that Wright's § 1983 claims fail for lack of state action.

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[1] Wright's complaint does not allege when she retired, but the record shows that she did so at the end of February 2020. Wright does not dispute that she retired in February 2020. She then filed her lawsuit at the end of March 2020. We can properly consider this information because it was provided by the Defendants in declarations they filed in support of their motions to dismiss under Rule 12(b)(1). *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (holding that when a defendant makes a factual attack on the court's jurisdiction under Rule 12(b)(1), a court may consider evidence outside the complaint to resolve the jurisdictional challenge). Because Wright retired before she filed suit, this is a case in which she lacked "[t]he requisite personal interest that must exist at the commencement of the litigation" rather than one in which she lost that interest during the pendency of the suit. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). We therefore believe it is more straightforward to hold that her claims fail on standing grounds rather than to assume that standing exists in order to analyze mootness. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66–67 (1997).

I.

Wright worked for the Oregon Health Authority, a state agency, whose employees were represented exclusively by SEIU. According to SEIU, Wright joined SEIU on October 5, 2017, by electronically signing an SEIU membership and dues authorization agreement ("membership agreement"). From October 2017 until her retirement in February 2020, at SEIU's request, the State deducted union dues from Wright's salary and remitted them to SEIU. On October 15, 2019, Wright sent a letter to SEIU resigning her union membership and terminating her dues deduction authorization. On November 5, 2019, SEIU responded and included a copy of Wright's purported membership agreement. Wright had "no memory of signing" the membership agreement and determined that her signature had been forged.[2] When Wright retired in February 2020, the State ceased deducting and remitting union dues to SEIU.

After retiring, Wright filed this lawsuit under § 1983 against all Defendants, alleging the claims noted above. The district court dismissed Wright's claim for prospective relief against all Defendants as moot under Rule 12(b)(1). The court dismissed Wright's remaining damages claims against SEIU under Rule 12(b)(6) because she failed to allege a plausible basis for state action under § 1983. Wright timely appealed.[3] Fed. R. App. P. 4(a)(1)(A).

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[2] While the parties dispute whether Wright's membership agreement was forged, we assume that it was. *See Fowler Packing Co. v. Lanier*, 844 F.3d 809, 814 (9th Cir. 2016).

[3] We have jurisdiction under 28 U.S.C. § 1291. We review de novo an order dismissing a complaint for failure to state a claim, *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir.

II.

Because jurisdiction is a threshold issue, we first consider whether we may entertain Wright's claims for prospective declaratory and injunctive relief against all Defendants. As to Wright's claims for prospective relief for violation of her First Amendment rights, we conclude that her fear of future harm is based on a series of inferences that are too speculative to establish a "case or controversy" for the prospective relief she seeks. Similarly, as to Wright's claims for prospective relief for violation of her Fourteenth Amendment procedural due process rights, we conclude that she lacks any concrete interest in future wages or her right to be free from compelled union speech that are threatened by the alleged lack of procedural safeguards. We therefore affirm the district court's dismissal of these claims for lack of jurisdiction.

A. First Amendment Claim

To establish Article III standing, a plaintiff must demonstrate that: (1) she suffered an "actual or imminent" injury as a result of the alleged illegal conduct; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) the injury will "likely" be "redressed by a favorable decision" of the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The plaintiff has the burden of establishing standing "for each claim [s]he seeks to press and for

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2010), and for lack of subject-matter jurisdiction, *Sec. & Exch. Comm'n v. World Cap. Mkt., Inc.*, 864 F.3d 996, 1003 (9th Cir. 2017), and we review jurisdictional factual findings for clear error, *id.* The district court declined to exercise supplemental jurisdiction over Wright's state law claims for common law fraud and wage theft in violation of Or. Rev. Stat. §§ 652.610 and 652.615. We do not discuss these claims further.

each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted).

Because Wright's First Amendment claim for declaratory and injunctive relief was based on the threat of future injury, she has standing to sue only "if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Wright cannot rely "on mere conjecture" about Defendants' possible actions; she must present "concrete evidence to substantiate [her] fears." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 825 (9th Cir. 2020) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013)). Past wrongs are "insufficient by themselves to grant standing," but are "evidence bearing on whether there is a real and immediate threat of repeated injury." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). When a plaintiff's standing is grounded entirely on the threat of repeated injury, a plaintiff must show "a sufficient likelihood that [s]he will again be wronged in a similar way." *Id.* (quoting *Lyons*, 461 U.S. at 111).

In *Clapper*, the plaintiffs argued that they had standing based on their fear that in the future, government officials would seek to surveil their communications with foreign individuals, the Foreign Intelligence Surveillance Court ("FISC") would grant such a request, and the government would then carry out the surveillance. 568 U.S. at 410–11. The Supreme Court rejected that argument, holding that the threatened future injury was too speculative to constitute injury for standing purposes. *Id.* at 410–14. The Court noted

that the plaintiffs' claimed injury rested on a "highly attenuated chain of possibilities" and held that such possibilities were not enough to establish a "certainly impending" injury. *Id.* The Court further rejected the plaintiffs' alternative theory that they suffered ongoing injuries by resorting to preventative measures to protect their communications from surveillance. *Id.* at 415. The Court held that the plaintiffs could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416.

Similarly, we held in *Munns v. Kerry*, 782 F.3d 402 (9th Cir. 2015), that a former security services contractor lacked standing to seek prospective relief based on his fear of future injury if he were to obtain future private security work in Iraq. *Id.* at 409–11. The contractor alleged that during the military occupation of Iraq, the U.S. government had a policy of granting blanket immunity from prosecution to security contractors, who, as a result of the policy, engaged in "lawless behavior" which invited retribution from Iraqi terrorist groups. *Id.* at 407. The contractor feared that if he were to return to Iraq to provide security services, the government would reinstate the blanket immunity policy or a similar one and he would be injured or kidnapped by Iraqi terrorists who sought retribution. *Id.* We rejected the contractor's theory, noting that for him to sustain future injury, he would need to be hired for private security work in Iraq, the government would need to reinstate the former immunity policy or a similar one, and the reinstated policy would cause him to suffer harm as he alleged. *Id.* at 409–10. This attenuated chain of events was not "certainly impending," nor did it "present a substantial risk of its occurrence" sufficient for standing. *Id.* at 410.

We further rejected the contractor's alternative theory of injury that he was deterred from seeking future employment because of the uncertainty of the government's policy. *Id.* at 410. Comparing his deterrence theory to an analogous theory rejected in *Clapper*, we noted that the contractor's "chilling effect" argument was based on the same series of events as his initial theory and therefore was "too speculative to confer standing." *Id.*; *cf. Index Newspapers LLC*, 977 F.3d at 826–27 (holding that repeated police assaults sufficiently chilled investigative reporters' exercise of their First Amendment rights to constitute injury for standing purposes).

As in *Clapper* and *Munns*, Wright's fear of future unauthorized dues deduction is too speculative to confer standing for her First Amendment claim. Because she retired before filing this lawsuit, the sole basis for her impending injury is her fear that, should she return to work, SEIU will forge a new membership agreement. Wright's theory of future injury is unavailing. Although Wright does not allege that she intends to return to work, she argues, nonetheless, that we should infer that she will return to work either in the same position or one where she would be represented by SEIU, that SEIU will forge her signature on a new membership agreement, and that the State will again improperly deduct and remit dues to SEIU. Wright's fear, like the plaintiffs' fear of government surveillance in *Clapper* and the contractor's fear in *Munns*, rests on a "highly attenuated chain" of inferences in which independent actors must act in a certain manner to target her specifically. *Clapper*, 568 U.S. at 410; *Munns*, 782 F.3d at 410. These inferences rest on nothing more than rank speculation. While the scenario she posits may be theoretically possible, it is not "certainly impending," *In re Zappos.com, Inc.*, 888

F.3d at 1024, and she cannot show a sufficient likelihood that she will be wronged again in such a way, *Davidson*, 889 F.3d at 967.

Wright's allegations of past injury alone are also insufficient to establish standing. We have held that past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. *Index Newspapers, LLC*, 977 F.3d at 825 (citing *Lyons*, 461 U.S. at 102). Wright does not allege any continuing "adverse effects" from the past unauthorized dues deductions, so they cannot provide her with standing to seek prospective relief.[4] *Id.*; *see also Lyons*, 491 U.S. at 108–09.

Wright's theory that potential future unauthorized dues deductions chill her exercise of her First Amendment rights is also too speculative to establish standing. Wright argues that because SEIU insists that her membership agreement was not forged and that Oregon's statutory dues deduction scheme complies with due process, she remains under continued threat that if she were to return to public employment, SEIU would again forge a membership agreement with her name. Wright's fear of the potential chilling effect of her First Amendment rights fails for the same reason as her fear of future unauthorized dues deduction does

[4] While Wright points to other cases where SEIU is alleged to have forged a union membership agreement to show the "growing number of cases of forgery alleged against the same union," her argument is not persuasive. Wright cites to cases where the plaintiffs allege that SEIU forged their membership agreements. These cases, which allege similar acts of forgery, do not make it more likely that Wright would suffer another forgery if she returned to work, particularly with the "flagging" safeguards SEIU has put in place.

not support standing: her reliance on a series of inferences unsupported by the record. While a plaintiff's alleged chilling of her First Amendment rights "can constitute a cognizable injury," such an effect cannot be "based on a fear of future injury that itself [is] too speculative to confer standing." *Index Newspapers LLC*, 977 F.3d at 826 (alteration in original). Like the analogous deterrence theories in *Clapper* and *Munn*s, Wright's fear of potential chilling relies on the same series of inferences as her theory of injury, and it is therefore too speculative to constitute injury-in-fact. *Clapper*, 568 U.S. at 415–16; *Munns*, 782 F.3d at 410.

B. Fourteenth Amendment Procedural Due Process Claim

Wright similarly lacks standing to assert her Fourteenth Amendment procedural due process claim seeking prospective relief. When a plaintiff alleges a procedural violation of her rights, she is excused from the "normal standards for redressability and immediacy." *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (quoting *Lujan*, 504 U.S. at 572 n.7). In this situation, she need only show "that [she] was accorded a procedural right to protect [her] interests and that [she] has concrete interests that are threatened." *City of Las Vegas v. FAA*, 570 F.3d 1109, 1114 (9th Cir. 2009). We have recognized that employees have a concrete interest in receiving their salaries without unauthorized deductions. *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th Cir. 2017). Wright is retired and thus no longer receives wages from the State, however. Accordingly, she no longer has a concrete interest in her future wages or in freedom from compelled speech that would be threatened by the alleged lack of procedural safeguards. *See Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346,

1355 (9th Cir. 1994). Indeed, the threat of future unauthorized dues deductions from her wages is entirely "imaginary." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 446 (9th Cir. 1994). Wright therefore lacks standing to assert her procedural due process claim.

III.

We next consider whether Wright's remaining claims against SEIU for retrospective relief, i.e., damages, are cognizable under 42 U.S.C. § 1983. We conclude that the district court did not err in dismissing these claims because SEIU is not a state actor for § 1983 purposes. We therefore affirm the district court's dismissal of Wright's claims for retrospective relief against SEIU.

Our resolution of this issue is guided by our recent decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), which dealt with an analogous Washington state statutory scheme authorizing union dues deductions. We briefly describe the two statutory schemes to give context to our discussion. Washington and Oregon do not require state employees to join a union. *Compare* Wash. Rev. Code § 41.80.050 *with* Or. Rev. Stat. § 243.672(1)(c). For those employees who join a union, both states rely on the union to provide a list of employees who have authorized union dues deductions. *Compare* Wash. Rev. Code § 41.80.100(2)(g) *with* Or. Rev. Stat. § 243.806(7). The states then deduct the dues from the employees' salary and remit them to the union. *Belgau*, 975 F.3d at 945; *compare* Wash. Rev. Code § 41.80.100(2)(c) *with* Or. Rev. Stat. § 243.806(2). Indeed, there are no meaningful differences between the Washington and Oregon statutory schemes. In *Belgau*, we held that the union was not a state actor for § 1983 purposes, in part, because of the state's

ministerial role in processing dues deductions. *Belgau*, 975 F.3d at 948. Given the similarities in the two statutory schemes, we agree with SEIU that, as in *Belgau*, it is not a state actor for purposes of § 1983.

To maintain a claim under § 1983, Wright must prove that SEIU "deprived [her] of a right secured by the Constitution," and "acted under color of state law." *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir. 1989 (citation omitted). We use a two-prong inquiry to determine whether SEIU, as a private actor, engaged in state action to qualify as a state actor under § 1983. *Belgau*, 975 F.3d at 946; *see also Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (citation omitted) (holding that state action generally excludes "merely private conduct, no matter how discriminatory or wrongful"). The private actor must meet (1) the state policy requirement, and (2) the state actor requirement. *Collins*, 878 F.2d at 1151.

Under the state policy requirement, we consider "whether the claimed constitutional deprivation resulted from 'the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible.'" *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013) (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)). "The state policy requirement ensures that the alleged deprivation is fairly attributable to a state policy." *Collins*, 878 F.2d at 1151 (citations omitted).

Next, under the state actor requirement, we generally utilize one of four tests outlined by the Supreme Court to examine "whether the party charged with the deprivation could be described in all fairness as a state actor." *Ohno*, 723 F.3d at 994 (citing *Lugar*, 457 U.S. at 937); *see Tsao v. Desert Palace, Inc.*, 698 F.3d 1128,

1140 (9th Cir. 2012) (outlining the four tests).[5] Those tests include the public function test, the joint action test, the state compulsion test, and the governmental nexus test. *Tsao*, 698 F.3d at 1140. Any of the four tests are sufficient to satisfy the state actor requirement. *Id.* at 1139–40. We discuss only whether SEIU meets the requirements of the joint action and public function tests, as Wright and Defendants focus their arguments on those two tests.[6] SEIU satisfies neither prong of the state action inquiry.

Wright's alleged constitutional deprivation did not result from "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Ohno*, 723 F.3d at 994 (quoting *Lugar*, 457 U.S. at 937). To explain, we begin our state action analysis by identifying "the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (citation omitted). Although Wright makes repeated references to the "*forgery* of [her] authorization agreement," she frames her threatened injury as "the deduction of [her] money without her consent" pursuant to state law. As Wright acknowledges, it is the State, not SEIU, which deducts union

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[5] We note that courts use a variety of tests to determine whether the state actor requirement is met, including the four outlined above. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (per curiam). Because any one of the four tests outlined in *Tsao* is sufficient to demonstrate that a private party can be fairly considered a state actor, we utilize those tests here.

[6] We have said, however, that the public function and joint action tests "largely subsume the state compulsion . . . and . . . governmental nexus test[s]." *Ohno*, 723 F.3d at 996 n.13. Given the parties' arguments, there is no need for us to weigh in on that observation.

dues from employees' wages. Nonetheless, Wright argues that the Oregon statutory scheme grants to SEIU a "special privilege created by law," which allows it to dictate from which employees the State should deduct union dues.[7] Wright ignores that Oregon law requires employees to authorize union dues deductions. Or. Rev. Stat. §§ 165.007, 165.013, 243.806. Contrary to Wright's argument, Oregon law does not create a "right or privilege" in SEIU to direct the State's deductions of union dues. *Lugar*, 457 U.S. at 937. At its core, the right to authorize dues deductions is vested in the state employee, not SEIU. SEIU's role is to transmit the employee's authorization to the State so that it may be implemented as provided in the collective bargaining agreement and related statutes. Or. Rev. Stat. § 243.806(7).

In her claims against SEIU, Wright challenges SEIU's transmission of her forged dues authorization, not the State's withholding of union dues.[8] Because

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[7] Wright also argues that state action exists here because the circumstances of her case are indistinguishable from holdings in *Janus* and *Lugar*. Wright's comparison is inapposite because these cases do not concern a private actor's alleged violation of state law. *See Janus*, 138 S. Ct. at 2460–61 (concerning compulsory agency fees); *see also Lugar*, 457 U.S. at 924 (concerning ex parte prejudgment attachment with government aid).

[8] In the present case, as in *Ochoa v. Pub. Consulting Grp., Inc.*, No. 19-35870, __ F.4th __ (9th Cir. 2022), Wright pleads a Fourteenth Amendment due process claim, alleging that SEIU implemented insufficient procedural safeguards against unauthorized withholding of union dues. However, our state action analysis differs in this case because Wright challenges different conduct. Ochoa's claim was against private payment processors hired by the State to handle salary payments and dues withholdings. By contrast, Wright's claim is against SEIU, which transmits a list of employees who agreed to join the union and authorized dues deductions. Therefore, while *Ochoa* analyzes

SEIU only transmits a list of employees who have authorized dues deductions to the State, Wright can only challenge SEIU's forgery of her dues authorization agreement. Or. Rev. Stat. § 243.806(7). But this fraudulent act is by its nature antithetical to any "right or privilege created by the State" because it is an express violation of existing state law. *Lugar*, 457 U.S. at 937; Or. Rev. Stat. §§ 165.007, 165.013. As in *Lugar*, Wright's constitutional claims against SEIU rest on a "private misuse of a state statute" that is, by definition, "contrary to the relevant policy articulated by the State." *Lugar*, 457 U.S. at 940–41. Wright's claims thus fail to identify any "state policy" that would make SEIU a state actor under § 1983.

SEIU further cannot fairly be "described . . . as a state actor" under the joint action or public function tests. *Ohno*, 723 F.3d at 994 (citing *Lugar*, 457 U.S. at 937); *Tsao*, 698 F.3d at 1140.

> "A joint action between a state and a private party may be found in two scenarios: the government either (1) 'affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party,' or (2) 'otherwise has so far insinuated itself into a position of interdependence with the non-governmental party,' that it is 'recognized as a joint participant in the challenged activity.'"

Belgau, 975 F.3d at 947 (quoting *Ohno*, 723 F.3d at 996). The joint action test is not satisfied here because Oregon did not "affirm[], authorize[], encourage[], or

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whether the payment processors' withholding of dues is state action, we analyze whether the Union's transmission of Wright's name as a member of the union is state action.

facilitate[] unconstitutional conduct" by processing dues deductions. *Id.* (quoting *Ohno*, 723 F.3d at 996). In *Belgau*, we described the state's role in processing dues deductions as the "ministerial processing of payroll deductions pursuant to Employees' authorizations." *Id.* at 948. That characterization of Washington's actions in *Belgau* applies with equal force to Oregon's actions in this case. As we explained in *Belgau*, "providing a 'machinery' for implementing the private agreement by performing an administrative task does not render [the State] and [SEIU] joint actors." *Id.* (citation omitted). Indeed, Oregon law, like Washington law, mandates that the State accept SEIU's dues deductions certifications and remit the payments to the union. *Compare* Or. Rev. Stat. § 243.806(2), (7) *with* Wash. Rev. Code § 41.80.100. The State's "mandatory indifference" to whether Wright's authorization was authentic "refutes any characterization" of SEIU as a joint actor with the State. *Belgau*, 975 F.3d at 948 (quoting *Ohno*, 723 F.3d at 997).

Wright argues that *Belgau* is factually distinguishable because the plaintiffs in *Belgau* voluntarily agreed to join the union, whereas Wright did not. This argument is unavailing because the factual distinctions between this case and *Belgau* are inconsequential. The joint action test examines the government's action, not the status of the underlying agreement. *Ohno*, 723 F.3d at 996. While the factual circumstances of the present case and *Belgau* may be different, the actions that Washington and Oregon took are the same: processing authorizations for dues deductions and remitting the payments to the union. *See Belgau*, 975 F.3d at 945.

The joint action test is further not satisfied because the State did not "so far insinuate[] itself into a

position of interdependence with" SEIU such that SEIU can be "recognized as a joint participant" in dues deductions. *Ohno*, 723 F.3d at 996 (citation omitted). The state Defendants and SEIU did not have a "symbiotic relationship" of mutual benefit with one another or a "substantial degree of cooperative action"; rather, they had a contractual relationship. *Belgau*, 975 F.3d at 948 (citation omitted). The State received no direct benefits when it served as a passthrough for union dues deductions.[9] *See id.*; Or. Rev. Stat. § 243.806(2). Therefore, we conclude that the district court did not err in determining that Wright's constitutional claims against SEIU do not satisfy the joint action test.

Under the public function test, Wright's claims similarly fail. "Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Kirtley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir. 2003) (citation omitted). Wright argues that the State delegated to SEIU the authority under Or. Rev. Stat. § 243.806 to obtain an employee's authorization for union membership and dues deduction. Wright's argument founders

[9] Wright argues that "the State clearly receive[d] benefit from the procedural system it has implemented" because "it relieve[d] itself of any time or expense associated with obtaining verification of employee consent or authorization of dues deductions." In exchange, the Union "indemnifie[d] the State for liability for payroll deductions." Wright is incorrect. The State only took on the task of facilitating union dues deductions because it is required to do so by the collective bargaining agreement between the Union and the State and by Oregon state law. *See* Or. Rev. Stat. § 243.806(2). The State receives no direct benefit from its involvement in the dues deduction process.

given the nature of the State's role in the process and the task itself. As in *Belgau*, Oregon's obligation under Or. Rev. Stat. § 243.806(7) to accept SEIU's certification of those employees who have authorized dues deductions is not a "traditional[] and exclusive[] government[]" task. *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924 (9th Cir. 2011) (citation omitted); *see Belgau*, 975 F.3d at 947 n.2. Although employees' wages are involved, the State has no "affirmative obligation" under Or. Rev. Stat. § 243.806(7) to ensure that SEIU's certifications are accurate. *See* Or. Rev. Stat. § 243.806(7); *West v. Atkins*, 487 U.S. 42, 56 (1988). Rather, the State's use of SEIU's certification to process authorized dues deductions is the type of "day-to-day administrati[ve]" task, *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982), that does not fit into the "very few" functions the Court has recognized as traditionally and exclusively a governmental task, *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978).

Wright argues that *Janus* created a constitutional "duty" for the State to ensure that the employees listed in SEIU's certification had duly authorized dues deducted from their salaries. 138 S. Ct. at 2486. As we recognized in *Belgau*, *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Belgau*, 975 F.3d at 952. While Wright challenges whether she is a duly authorized union member, *Janus* imposes no affirmative duty on government entities to ensure that membership agreements and dues deductions are genuine. As discussed above, Oregon state law only authorizes the State to deduct and remit union dues from authorized union members. Or. Rev. Stat. §§ 165.007, 165.013, 243.806. Contrary to Wright's argument, *Janus* does not require

that Oregon ensure the accuracy of SEIU's certification of those employees who have authorized dues deductions. The district court did not err in rejecting Wright's public function argument.

At bottom, in light of *Belgau* and the state action analysis, SEIU does not qualify as a state actor. Therefore, Wright's claim for retrospective relief against SEIU fails for lack of state action.

IV.

We affirm the district court's dismissal of Wright's claims for prospective relief against all Defendants for lack of jurisdiction and her claims for retrospective relief against SEIU for failure to allege state action under § 1983.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-36076

D.C. No. 3:20-cv-00165-HZ

CHRISTOPHER ZIELINSKI, an individual,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, a labor organization; KATY COBA, in her official capacity as Director of the Oregon Department of Administrative Services,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, Chief District Judge, Presiding

Argued and Submitted February 8, 2022
Portland, Oregon

MEMORANDUM[*]

Before: PAEZ and NGUYEN, Circuit Judges, and TUNHEIM,[***] District Judge.

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

Christopher Zielinski is employed by the Oregon Health Authority ("OHA") and Service Employees International Union, Local 503 ("SEIU") is the exclusive representative for his designated bargaining unit as an employee. Zielinski appeals the district court's dismissal of his lawsuit against SEIU and Katy Coba in her official capacity as the director of the Department of Administrative Services (collectively, "Defendants"). Zielinski alleged that he had never signed a union membership agreement, but SEIU forged his signature on a membership agreement and directed the State to deduct dues from his salary between 2009 and 2019. He alleges First Amendment and procedural due process claims for the forgery and dues deductions, pursuant to 42 U.S.C. § 1983, against Defendants. He sought prospective injunctive and declaratory relief as well as damages. The district court granted Defendants' motion to dismiss his claims for prospective relief as moot under Federal Rule of Civil Procedure 12(b)(1), as well as his damages claims for failure to state a plausible claim under Rule 12(b)(6).[1] In a case consolidated for argument with Zielinski's appeal, *Wright v. SEIU, Local 503*, No. 20-35878, __ F.4th __ (9th Cir. 2022), we affirmed the district court's dismissal of nearly identical claims.[2] We have jurisdiction under 28 U.S.C. § 1291, and for the same reasons set out in *Wright*, we affirm.

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

[1] The district court also declined to exercise supplemental jurisdiction over a common law fraud claim against SEIU, and Zielinski does not appeal that dismissal.

[2] The parties agreed to consolidate the two cases for argument because they "involve[d] the same legal issues."

1. Prospective declaratory and injunctive relief. We conclude, as in *Wright*, that Zielinski's alleged fear of future harm is too speculative to establish standing for the prospective relief he seeks on his First Amendment claim.[3] *See Wright*, slip op. at 5. Zielinski's alleged past forgery is relevant evidence but remains "insufficient to establish standing." *Id.* at 10; *see also id.* at 10 n.4 (finding reliance on similar allegations by other plaintiffs as insufficient). The only difference between Zielinski and the plaintiff in *Wright*, for purposes of standing, is that Zielinski has not retired from his position at the OFIA and for which SEIU is the exclusive representative of his designated bargaining unit. *See id.* at 9. Although his continued employment removes one link in the "'highly attenuated chain' of inferences," *id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)), Zielinski still falls short of showing a "certainly impending" or "substantial risk" of future harm, *id.* at 10 (quoting *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018)). Zielinski's alleged scenario requires us to infer that SEIU will forge his signature on a new membership agreement, the safeguards SEIU put in place will not prompt a response by its legal counsel, and the State will unlawfully deduct dues from Zielinski's salary. Such a speculative chain of events is insufficient to establish standing. *See id.* at 9-12.

The same is true for Zielinski's theory that the potential of future unauthorized dues deductions has a "chilling effect" on his First Amendment rights

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[3] To the extent Zielinski seeks prospective relief on his procedural due process claim, he has standing but his claim fails for the reasons discussed in in *Ochoa v. Public Consulting Group, Inc.*, No. 19-35870, __ F.4th __ (9th Cir. 2022).

because, as we stated in *Wright*, such claims "cannot be 'based on a fear of future injury that *itself* is too speculative to confer standing.'" *Id.* at 11 (alteration omitted; emphasis added) (quoting *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020)). Accordingly, we affirm the district court's dismissal of Zielinski's claims for prospective relief. *See id.* at 3 (affirming for lack of standing where the district court dismissed on mootness grounds).

2. Retrospective damages relief. Zielinski also asserted damages claims under § 1983 against SEIU. His claims and arguments are identical to those made by the plaintiff in *Wright*. Just as in *Wright*, we conclude that he has failed to allege state action attributable to SEIU. *See id.* at 15-21; *see also Belgau v. Inslee*, 975 F.3d 940, 946-49 (9th Cir. 2020).

In sum, we affirm the district court's dismissal of Zielinski's claims for prospective relief on his First Amendment claim against all Defendants for lack of standing, and we affirm the dismissal of his retrospective relief claims against SEIU for failure to allege state action for purposes of § 1983.

AFFIRMED.

APPENDIX C

United States Constitution, Amendment I

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

APPENDIX D

United States Constitution, Amendment XIV §1

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.

APPENDIX E

Oregon Revised Statute § 243.806

(1) A public employee may enter into an agreement with a labor organization that is the exclusive representative to provide authorization for a public employer to make a deduction from the salary or wages of the public employee, in the manner described in subsection (4) of this section, to pay dues, fees and any other assessments or authorized deductions to the labor organization or its affiliated organizations or entities.

(2) A public employer shall deduct the dues, fees and any other deduction authorized by a public employee under this section and remit payment to the designated organization or entity.

(3)(a) In addition to making the deductions and payments to a labor organization or entity described in subsection (1) of this section, a public employer shall make deductions for and payments to a noncertified, yet bona fide, labor organization, if so requested and authorized by a public employee, in the manner described in subsection (4) of this section.

(b) The deductions and payments made in accordance with this subsection shall not be deemed an unfair labor practice under ORS 243.672.

(4)(a) A public employee may provide authorization for the deductions described in this section by telephonic communication or in writing, including by an electronic record or electronic signature, as those terms are defined in ORS 84.004.

(b) A public employee's authorization is independent of the employee's membership status in the labor organization to which payment is remitted and irre-

spective of whether a collective bargaining agreement authorizes the deduction.

(5) Notwithstanding subsections (1) to (4) of this section, a collective bargaining agreement between a labor organization and a public employer may authorize a public employer to make a deduction from the salary or wages of a public employee who is a member of the labor organization to pay dues, fees or other assessments to the labor organization or its affiliated organizations or entities.

(6) A public employee's authorization for a public employer to make a deduction under subsections (1) to (4) of this section shall remain in effect until the public employee revokes the authorization in the manner provided by the terms of the agreement. If the terms of the agreement do not specify the manner in which a public employee may revoke the authorized deduction, a public employee may revoke authorization for the deduction by delivering an original signed, written statement of revocation to the headquarters of the labor organization.

(7) A labor organization shall provide to each public employer a list identifying the public employees who have provided authorization for a public employer to make deductions from the public employee's salary or wages to pay dues, fees and any other assessments or authorized deductions to the labor organization. A public employer shall rely on the list to make the authorized deductions and to remit payment to the labor organization.

(8)(a) Notwithstanding subsection (10) of this section, a public employer that makes deductions and payments in reliance on the list described in subsection (7) of this section is not liable to a public employee for

actual damages resulting from an unauthorized deduction.

(b) A labor organization that receives payment from a public employer shall defend and indemnify the public employer for the amount of any unauthorized deduction resulting from the public employer's reliance on the list.

(9) If a labor organization provides a public employer with the list described in subsection (7) of this section and the employer fails to make an authorized deduction and remit payment to the labor organization, the public employer is liable to the labor organization, without recourse against the employee who authorized the deduction, for the full amount that the employer failed to deduct and remit to the labor organization.

(10)(a) If a dispute arises between the public employee and the labor organization regarding the existence, validity or revocation of an authorization for the deductions and payment described under subsections (1) and (2) of this section, the dispute shall be resolved through an unfair labor practice proceeding under ORS 243.672.

(b) A public employer that makes unauthorized deductions or a labor organization that receives payment in violation of the requirements of this section is liable to the public employee for actual damages in an amount not to exceed the amount of the unauthorized deductions.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

Case No. 6:20-cv-520

JODEE WRIGHT, an individual,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, a labor organization; Oregon Department of Administrative Services, and KATY COBA, in her official capacity as Director of the Oregon Department of Administrative Services,

Defendants.

COMPLAINT

Violation of Civil Rights under 42 U.S.C. § 1983,
Common Law Fraud; Wage Claim
Demand for Jury Trial

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INTRODUCTION

1. Plaintiff Jodee Wright's ("Ms. Wright") labor union collected union dues out of her wages without her authorization for years. Ms. Wright specifically objected to union membership in October 2019, at which point the union Service Employees International Union, Local 503 ("SEIU 503") claimed she signed a membership form under the terms of which she would be forced to continue to pay union dues until August 2020.

2. Ms. Wright did not sign this agreement, and informed SEIU 503 of this fact. Nonetheless, at SEIU 503's direction, the Oregon Department of Administrative Services (the "Department") continued to withhold union dues from Ms. Wright's wages and forwarded this money to SEIU 503.

3. Ms. Wright brings this civil rights action pursuant to 42 U.S.C. § 1983 to enforce her First Amendment right to be free of compelled speech and association, and her right to due process of law, and seeks declaratory and injunctive relief prohibiting Defendants' illegal and unconstitutional conduct in taking money out of her wages for union dues without her consent or authorization.

4. Additionally, Ms. Wright brings an action for common law fraud against SEIU 503. Ms. Wright also brings an action under ORS 652.615 for wages wrongfully deducted. She seeks compensatory damages, refund or restitution of all unlawfully seized money, nominal damages for the violation of her First Amendment rights, punitive damages for the intentional fraud, reasonable attorneys' fees, and any other relief the Court deems just and proper.

JURISDICTION AND VENUE

5. This action arises under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the deprivation, under color of state law, of rights, privileges, and immunities secured to Plaintiff by the Constitution of the United States, particularly the First Amendment as incorporated against the States by the Fourteenth Amendment.

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. This Court has supplemental jurisdiction over state law claims presented in this matter pursuant to 28 U.S.C. § 1367, because the claims are related to the federal constitutional claims in this action such that they do not raise novel or complex issues of state law and do not substantially predominate over the federal claims. There are, further, no exceptional circumstances compelling this Court to decline to hear the state law claims.

7. This action is an actual controversy in which Plaintiff seeks a declaration of her rights under the Constitution of the United States. Pursuant to 28 U.S.C. §§ 2201-2202, this Court may declare the rights of Plaintiff and grant further necessary and proper relief based thereon.

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

9. Because a substantial part of the events giving rise to these claims occurred in counties covered by the Eugene Division, assignment to that Division is proper under L.R. 3-2.

PARTIES

10. Plaintiff Jodee Wright is a public employee who lives in Marion County, Oregon, and who works for the Oregon Health Authority. Ms. Wright is in a bargaining unit represented by SEIU 503. The Oregon Department of Administrative Services pays her wages.

11. Defendant SEIU 503, whose headquarters is located at 1730 Commercial St. SE, Salem, OR 97302 is a statewide labor union and the exclusive representative of Plaintiff's designated bargaining unit. SEIU 503 and the Department are parties to a Collective Bargaining Agreement ("CBA") containing a negotiated for and agreed to provision requiring the State to deduct dues from Plaintiff's wages.

12. Defendant Oregon Department of Administrative Services whose address is at 155 Cottage St NE # U90, Salem, OR 97301, is the state agency charged with payment of state employees' wages, including Ms. Wright's wages. Defendant Katy Coba ("Ms. Coba") is director of the Oregon Department of Administrative Services and is sued in her official capacity.

FACTUAL ALLEGATIONS

13. Ms. Wright began her employment with the Oregon Department of Human Services in 2005, but did not become a member of SEIU 503.

14. According to information and belief, a membership application was executed in Ms. Wrights name on or near October 5, 2017. The Department of Administrative Services began withdrawing union dues from Ms. Wrights paychecks at or near this time.

15. On October 15, 2019, Ms. Wright sent a letter via certified mail to SEIU 503 resigning all forms of membership with SEIU 503 and revoking any

authorization for dues deductions. In addition, she asked for a copy of any membership form that SEIU 503 had on file for her.

16. On November 5, 2019, SEIU 503 sent Ms. Wright a letter claiming that she signed a membership form that included an authorization for dues deductions on October 5, 2017. Ms. Wright has no memory of signing any such authorization. SEIU 503 further claimed that, under the terms of the authorization, Ms. Wright would be required to continue paying dues until August 21, 2020, or until she retired.

17. SEIU 503 provided a copy of the membership form, which Ms. Wright reviewed.

18. Concerned that her signature had been forged on the form, Ms. Wright sought legal advice. On January 23, 2020 her counsel sent SEIU 503 a letter requesting an explanation as to the forged card and asking for refund of the money wrongfully taken from Ms. Wright.

19. On February 18, 2020 SEIU 503 responded through their counsel claiming that Ms. Wright had signed the membership form on an iPad and providing a screenshot of the metadata allegedly from the electronic signature.

20. The metadata provided did not authenticate the signature on the membership form.

21. Ms. Wright has not given affirmative consent to pay union dues, much less consent that is constitutionally adequate to waive Ms. Wright's First Amendment rights.

22. According to information and belief, SEIU 503 has sole control over union membership information, and the Department depends entirely on representa-

tions made by SEIU 503 with regard to union membership and dues authorization, as per the applicable Collective Bargaining Agreement between the parties.

23. In addition to union dues, Defendants have deducted the sum of $2.75 each month from Ms. Wright's paychecks designated "SEIU ISSUES."

24. According to information and belief, "SEIU ISSUES" is a political assessment that is designated expressly for the political purpose of promoting and defending public issue campaigns and ballot measures.

25. Ms. Wright never gave her permission for SEIU 503 to take this money or to use it for political purposes, and SEIU 503 never provided Ms. Wright with an explanation or accounting for its use of her money for political purposes.

CAUSES OF ACTION

26. Defendants' actions violate Plaintiff's First Amendment rights, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

27. Defendants' actions in deducting and collecting union dues and assessments have caused Wright to suffer the irreparable harm and injury inherent in a violation of First Amendment rights, for which there is no adequate remedy at law.

28. Defendant SEIU 503's action in taking Ms. Wright's money without her consent and pursuant to a forged membership agreement have caused Ms. Wright to suffer loss of income, emotional distress, and other damages.

COUNT I
Violation of the First Amendment (42 U.S.C. § 1983)
(By Plaintiff Against all Defendants)

29. Plaintiff re-alleges and incorporates by reference the paragraphs set forth above.

30. Defendants acted under color of state law, ORS 243.776 and ORS 292.055(3), and the Collective Bargaining Agreement between SEIU 503 and the Department in the deducting union dues and assessments from Plaintiff's paychecks and in remitting that money to SEIU 503 without her knowing, voluntary and intelligent consent.

31. Defendants' dues and assessments violate Ms. Wright's First Amendment rights, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983: (a) not to associate with a mandatory representative; (b) not to support, financially or otherwise, petitioning and speech; and (c) against compelled speech, because Defendants' dues and assessment extraction was made without Ms. Wright's consent.

32. No compelling state interest justifies this infringement of Plaintiff's First Amendment rights.

33. The dues and assessment extraction scheme is significantly broader than necessary to serve any possible alleged government interest.

34. The dues and assessment extraction scheme is not carefully or narrowly tailored to minimize the infringement of free speech rights.

35. Plaintiff suffers the irreparable injury and harm inherent in a violation of First Amendment rights, for which there is no adequate remedy at law, as a result of being subjected to Defendants' dues and assessment deduction scheme.

COUNT II
Violation of Due Process under the Fourteenth Amendment (42 U.S.C. § 1983)
(By Plaintiff Against all Defendants)

36. Ms. Wright re-alleges and incorporates by reference the paragraphs set forth above.

37. As a public employee, Ms. Wright, has a property interest in the wages she has earned. She also has a liberty interest protected by the First Amendment to not have her wages diverted to union coffers absent her consent.

38. The Department, as Ms. Wright's employer and as an arm of the State, has a duty to implement and abide by adequate procedural safeguards to protect employees' rights; and SEIU 503, the union directing the Department to withdraw dues and political assessments from Plaintiff's wages, has a duty to implement and abide by adequate procedural safeguards to protect employees' rights.

39. Defendants engaged in a pattern and practice of indifference towards Ms. Wright's First Amendment right to be free from forced payment of union dues and political assessments: (a) the Department failed to implement any process for verification or confirmation of union membership, relying entirely on unsubstantiated claims by SEIU 503, a financially interested party; (b) SEIU 503 failed to adequately train, vet, monitor, or otherwise instruct union personnel in such a manner as to avoid violating First Amendment rights, and in fact created an environment likely to lead to violation of such rights.

40. Defendants' actions led to the forgery of Ms. Wright's signature and subsequent violation of her rights by the wrongful withdrawal of dues and political assessments from Ms. Wright's wages without her consent.

41. Defendants caused further harm to Ms. Wright by failing to promptly and timely remedy the violation by stopping all dues and assessment withdrawals and restoring Ms. Wright's lawfully earned wages.

42. Defendants, acting under color of law, knowingly, recklessly, or because of callous indifference, deprived Ms. Wright of her First Amendment right to be free from supporting a union with which she has fundamental and profound disagreements.

COUNT III
Common Law Fraud
(By Plaintiff Against Defendant SEIU 503)

43. SEIU 503, by and through its agents or representatives, made a false and material misrepresentation of fact to Ms. Wright.

44. Because Ms. Wright never signed a union membership card, she is not and has never been a member of SEIU 503.

45. This misrepresentation was of a material fact (union membership) and resulted directly in the Department collecting money from Ms. Wright's paychecks and transferring it to SEIU 503 to the loss and detriment of Ms. Wright.

46. Ms. Wright had no knowledge of her rights with regard to union membership or non-membership at the time these deductions began, and actually and reasonably relied on the Defendants' actions in treating her as a union member and deducting dues from her paychecks.

47. According to information and belief, the Department put SEIU 503 in complete control over the process of union membership. The Union had access to information regarding union membership, and

knowledge of who had, and who had not, signed union membership cards.

48. Intentionally, or with reckless disregard for its truth or falsity, SEIU 503 propounded a union membership card with a false signature, claiming it was signed by Ms. Wright.

49. SEIU 503 continued to propound the false claim that Ms. Wright had signed a membership card, even when presented with evidence of its falsity.

50. In falsely claiming that Ms. Wright was a union member and had signed a membership card, SEIU 503 intended that the State take Ms. Wright's money and transfer it to SEIU 503, which in fact occurred.

51. SEIU 503's actions actually and proximately caused Ms. Wright to suffer both significant financial loss and significant emotional distress.

COUNT IV
Violation of Or. Rev. Stat. § 652.615
(By Plaintiff Against the Department and Coba)

50. Katy Coba in her official capacity, by and through her agents, deducted a portion of Wright's wages in violation of ORS § 652.610.

51. As an employee of the Oregon Health Authority, Wright was entitled to wages for her labor that are paid by the Oregon Department of Administrative Services ("DAS").

52. Ever since her employment started with Oregon Health Authority, dues have been deducted from each of Wright's paychecks. These deductions have been itemized on each pay stub as "SEIU" and were collected for the purpose of membership dues to be paid to SEIU 503.

53. Because Wright has never signed a union membership card, she is not and has never been a member of SEIU 503. Because of this, the deduction was not authorized by the collective bargaining agreement between SEIU 503 and DAS pursuant to ORS § 652.610 (3)(b) or (c).

54. These deductions were never authorized by Wright through any means and resulted directly in the Department of Administrative Services collecting money from Wright's paychecks and transferring it to SEIU 503 to the loss and detriment of Wright.

55. Even upon request that dues deductions cease, Coba continued to deduct union membership dues from Wright's wages.

56. Coba's actions actually and proximately caused Wright to suffer both significant financial loss and significant emotional distress.

PRAYER FOR RELIEF

Wherefore, Plaintiff requests that this Court:

A. Issue a declaratory judgment that Defendants' actions in taking Plaintiff's money without her valid authorization violate the First Amendment, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983.

B. Issue a declaratory judgment that the Department's deduction of monies from Plaintiff's wages without clear and compelling evidence that she waived her First Amendment rights is illegal and unconstitutional.

C. Permanently enjoin Defendants along with their officers, agents, servants, employees, attorneys, and any other person or entity in active concert or participation with them, from maintaining and enforcing

any of the policies, provisions, or actions declared unconstitutional or illegal including the deduction of union dues or fees from Plaintiff's wages without her consent;

D. Enter a judgment requiring Defendant Katy Coba to implement a process that will adequately ensure and confirm employees' consent prior to the deduction of dues from paychecks;

E. Enter a judgment against SEIU 503 awarding Plaintiff nominal and compensatory damages for violation of her constitutional rights, including but not limited to all dues, fees or other assessments taken from Plaintiff's wages, to the extent permitted by the relevant statute of limitations, together with any interest accumulated on such sum;

F. Award Plaintiff punitive damages against SEIU 503 for the fraudulent acts of SEIU 503;

G. Award Plaintiff actual damages or $200, whichever is greater, against the Department due for wrongfully deducted wages pursuant to ORS § 652.615.

H. Award Plaintiff her costs and reasonable attorneys' fees pursuant to the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988 and ORS § 652.615; and

I. Grant other and additional relief as the Court may deem just and proper.

Date: March 30, 2020

By: *s/Rebekah Millard*

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APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

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Case No.

———

CHRISTOPHER ZIELINSKI, an individual,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, a labor organization; and KATY COBA, in her official capacity as Director of the Oregon Department of Administrative Services,

Defendants.

———

COMPLAINT

Violation of Civil Rights under
42 U.S.C. § 1983, and Common Law Fraud
Demand for Jury Trial

———

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INTRODUCTION

1. Plaintiff Christopher Zielinski is a public-sector employee whose labor union collected a percentage of his wages for years without his consent or authorization. From the beginning of his employment, Zielinski chose not to become a member of his union, Service Employees International Union, Local 503 ("SEIU 503"). The union nonetheless treated him as a member, and at SEIU 503's direction, Zielinski's employer withheld union dues from his wages and forwarded this money to SEIU 503. Upon Zielinski's inquiry into this matter, SEIU 503 produced falsified membership cards that contain patent forgeries of Zielinski's signature.

2. Zielinski brings this civil rights action pursuant to 42 U.S.C. § 1983 to enforce his First Amendment right to be free of compelled speech and association, and his right to due process of law, and seeks declaratory and injunctive relief prohibiting Defendants' illegal and unconstitutional conduct in taking money out of his wages for union dues without his consent or authorization. Zielinski also brings an action for common law fraud against SEIU 503. He seeks compensatory damages, refund or restitution of all unlawfully seized money, nominal damages for the violation of his First Amendment rights, punitive damages for the intentional fraud, reasonable attorneys' fees, and any other relief the Court deems just and proper.

JURISDICTION AND VENUE

3. This action arises under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the deprivation, under color of state law, of rights, privileges, and immunities secured to Plaintiff by the Constitution of the United States, particularly the First Amendment

as incorporated against the States by the Fourteenth Amendment.

4. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. This Court has supplemental jurisdiction over state law claims presented in this matter pursuant to 28 U.S.C. § 1367, because the claims are related to the federal constitutional claims in this action such that they do not raise novel or complex issues of state law and do not substantially predominate over the federal claims. There are, further, no exceptional circumstances compelling declining state law claims.

5. This action is an actual controversy in which Plaintiff seeks a declaration of his rights under the Constitution of the United States. Pursuant to 28 U.S.C. §§ 2201-2202, this Court may declare the rights of Plaintiff and grant further necessary and proper relief based thereon, including injunctive relief pursuant to Federal Rule of Civil Procedure 65.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the claims arise in this judicial district and Defendants operate and do business in this judicial district.

7. Because a substantial part of the events giving rise to these claims occurred in counties covered by the Portland Division, assignment to that Division is proper. L.R. 3-2.

PARTIES

8. Plaintiff Christopher Zielinski is a public employee who lives in Columbia County, Oregon, and who works for Oregon Health Authority. Zielinski is in a bargaining unit represented by Defendant Union,

SEIU 503. His wages are paid by the Oregon Department of Administrative Services.

9. Defendant SEIU 503, whose headquarters is located at 1730 Commercial St. SE, Salem, OR 97302 is a statewide union which is the exclusive representative of Plaintiff's designated bargaining unit, and which as a party to the Collective Bargaining Agreement ("CBA") between SEIU 503 and the Department of Administrative Services negotiated for and agreed to a CBA provision that requires the State to deduct dues from Plaintiff's wages.

10. Defendant Katy Coba is director of the Oregon Department of Administrative Services, whose address is at 155 Cottage St NE # U90, Salem, OR 97301. Coba is sued in her official capacity.

FACTUAL ALLEGATIONS

11. On more than one occasion, Zielinski has been presented with union membership agreements at his place of work, but he has consistently refused to sign them because he does not want to be held to the terms and conditions of union membership.

12. Despite the fact that he never joined SEIU 503, he has been charged dues since he first started working at his current job in 2009.

13. On September 15, 2019 Zielinski called SEIU 503 to ask for clarification on a contract matter. The representative he spoke to on the phone was hostile, and refused to answer his question. Zielinski asked how he could leave the union. The SEIU 503 representative stated that Zielinski could leave union membership if he sent in an opt-out letter, but that he would be required to continue to pay dues until July of

2020 because of a membership agreement he signed in September of 2017.

14. Zielinski has never signed any membership agreement, and told the representative so. Nonetheless, the SEIU 503 representative insisted that the membership card was on file. Zielinski asked for a copy.

15. When he received the copy, Zielinski confirmed that the signature on the membership card was not his. Additionally, while the form was printed with his name, some of the personal information contained in the card was inaccurate.

16. Concerned that his signature had been forged on the form, Zielinski sought legal advice. His counsel sent a letter to SEIU 503 requesting an explanation of the existence of the fraudulent form, and asking for immediate cessation of dues deductions, as well as refund of the wrongfully taken money.

17. SEIU 503 responded through their counsel, but provided no explanation for the forged 2017 card. Instead, SEIU 503 claimed that there was another membership card on file for Zielinski, this one purportedly signed in 2013.

18. Zielinski carefully reviewed the 2013 document SEIU 503 provided, but the signature on the 2013 card was not Zielinski's signature. Zielinski did not sign the card in 2013 or at any other time, nor did he provide any other authorization to his employer or the union to deduct dues from his paycheck.

19. Plaintiff has not given any form of affirmative consent to pay dues, much less consent that is constitutionally adequate to waive plaintiff's First Amendment rights.

20. According to information and belief, SEIU 503 has sole control over union membership information, and the Department of Administrative Services depends entirely on representations made by SEIU 503 with regard to union membership and dues authorization.

CAUSES OF ACTION

21. Defendants' actions violate Plaintiff's First Amendment rights, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

22. Defendants' actions in deducting and collecting union dues have caused Plaintiffs to suffer the irreparable harm and injury inherent in a violation of First Amendment rights, for which there is no adequate remedy at law.

23. Defendant SEIU 503's action in taking Zielinski's money without his consent and pursuant to a forged membership agreement have caused Zielinski to suffer loss of income, emotional distress, and other damages.

COUNT I
Violation of the First Amendment (42 U.S.C. § 1983)
(By Plaintiff Against all Defendants)

24. Plaintiff re-alleges and incorporates by reference the paragraphs set forth above.

25. Defendants act under color of state law, ORS 243.776 and ORS 292.055(3), and the Collective Bargaining Agreement between SEIU 503 and the Department of Administrative Services in the deduction of money from Plaintiffs' paychecks and remittance of that money to SEIU 503. Defendants are violating Zielinski's First Amendment rights by deducting dues from his wages without his knowing, voluntary and intelligent consent.

26. Defendants' dues extraction scheme, on its face and as applied, violates Zielinski's First Amendment rights, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983: (a) not to associate with a mandatory representative; (b) not to support, financially or otherwise, petitioning and speech; and (c) against compelled speech, because Defendants' dues extraction scheme entirely lacks procedural safeguards to protect Zielinski's constitutional rights.

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

28. The dues extraction scheme is significantly broader than necessary to serve any possible alleged government interest.

29. The dues extraction scheme is not carefully or narrowly tailored to minimize the infringement of free speech rights.

30. Plaintiff suffers the irreparable injury and harm inherent in a violation of First Amendment rights, for which there is no adequate remedy at law, as a result of being subjected to Defendants' dues deduction scheme.

COUNT II
Violation of Due Process under the Fourteenth Amendment (42 U.S.C. § 1983)
(By Plaintiff Against all Defendants)

31. Zielinski re-alleges and incorporates by reference the paragraphs set forth above.

32. As a public employee, Zielinski, has a property interest in the wages he has earned. He also has a liberty interest protected by the First Amendment to not have his wages diverted to union coffers.

33. As such, unions that withdraw dues from public employees' wages, and the government employers that withdraw such dues on unions' behalf, have a duty to implement and abide by adequate procedural due process safeguards to protect employees' rights.

34. Defendants engaged in a pattern and practice of indifference towards Zielinski's First Amendment right to be free from forced payment of union dues: (a) the Department of Administrative Services failed to implement any process for verification or confirmation of union membership, relying entirely on unsubstantiated claims by SEIU 503; (b) SEIU 503 failed to adequately train, vet, monitor, or otherwise instruct union personnel in such a manner as to avoid violating First Amendment rights, and in fact created an environment likely to violate such rights.

35. Defendants' actions led to the forgery of Zielinski's signature and subsequent violation of his rights by the wrongful withdrawal of dues from Zielinski's wages without his consent.

36. Defendants caused further harm to Zielinski by failing to promptly and timely remedy the violation by stopping all dues withdrawals and restoring Zielinski's monies to him.

37. Defendants, acting under color of law, knowingly, recklessly, or because of callous indifference, deprived him of his First Amendment right to be free from supporting a union with which he has fundamental and profound disagreements.

COUNT III
Common Law Fraud
(By Plaintiff Against Defendant SEIU 503)

38. SEIU 503 by and through its agents or representatives made a false and material misrepresentation of fact to the Department of Administrative Services and to Zielinski.

39. Because Zielinski has never signed a union membership card, he is not and has never been a member of SEIU 503.

40. This misrepresentation was of a material fact (union membership and authorization for dues deductions) and resulted directly in the Department of Administrative Services collecting money from Zielinski's paychecks and transferring it to SEIU 503 to the loss and detriment of Zielinski.

41. Zielinski had no knowledge his rights with regard to union membership or non- membership at the time these deductions began, and actually and reasonably relied on the Union's actions in treating him as a union member and deducting dues from his paychecks.

42. According to information and belief, SEIU 503 was in complete control over the process of union membership, had access to information regarding union membership, and knowledge of who had, and who had not, signed union membership cards.

43. Intentionally, or with reckless disregard for its truth or falsity, SEIU 503 propounded a union membership card with a false signature, claiming it was signed by Zielinski on two occasions: in September 2019 (claiming he signed a membership agreement in

2017), and in December 2019 (claiming he signed a membership agreement in 2013).

44. SEIU 503 continued to so propound the false claim that Zielinski had signed a membership card, even when presented with evidence of its falsity.

45. In falsely claiming that Zielinski was a union member and had signed a membership card, SEIU 503 intended that Zielinski's money be taken from him and transferred to SEIU 503, which in fact occurred.

46. SEIU 503's actions actually and proximately caused Zielinski to suffer both significant financial loss and significant emotional distress.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that this Court:

A. Issue a declaratory judgment that Defendants' actions in taking Plaintiff's money without his valid authorization violate the First Amendment, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983.

B. Issue a declaratory judgment that the Department of Administrative Services deduction of monies from Plaintiff's wages without clear and compelling evidence that he waived their First Amendment rights is illegal and unconstitutional.

C. Permanently enjoin Defendants along with their officers, agents, servants, employees, attorneys, and any other person or entity in active concert or participation with them, from maintaining and enforcing any of the policies, provisions, or actions declared unconstitutional or illegal including the deduction of union dues or fees from Plaintiff's wages without his consent;

D. Enter a judgment against SEIU 503 awarding Plaintiff nominal and compensatory damages for violation of his constitutional rights, including but not limited to all dues, fees or other assessments taken from Plaintiff's wages, to the extent permitted by the relevant statute of limitations, together with any interest accumulated on such sum;

E. Award Plaintiffs punitive damages against SEIU 503 due to the intentional fraudulent acts of SEIU 503;

F. Award Plaintiffs their costs and reasonable attorneys' fees pursuant to the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988; and

G. Grant other and additional relief as the Court may deem just and proper.

Date: January 30, 2020

By: *s/ Rebekah Millard*

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APPENDIX H

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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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.

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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

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OPINION

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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.

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[*] 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 elec-

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

tronic 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

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[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 work-around 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

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[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

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[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).

and 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 deprivation was the *withholding*, not the union's

[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.

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

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[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*

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[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.