No. 23-____

IN THE

Supreme Court of the United States

TANISHIA HUBBARD,
Petitioner,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015, *et al.*,
Respondents.

KRISTY JIMENEZ,
Petitioner,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 775, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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May 10, 2024

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

QUESTIONS PRESENTED

Petitioners, individual providers Tanishia Hubbard and Kristy Jimenez, never agreed to join a union or pay dues. Despite this, their public employers deducted full union dues from their wages. When Petitioners called the deductions into question, their unions produced electronic membership cards forged to include Petitioners' names. The resulting involuntary deductions violate Petitioners' rights to be free from compelled speech pursuant to *Harris v. Quinn,* 573 U.S. 616 (2014) and *Janus v. Am. Fed'n of State, Cnty., Mun. Emps. Council 31*, U.S. 878, 929-930 (2018). Despite these precedents, the Ninth Circuit affirmed the district courts' dismissals of Petitioners' actions, refusing to find that governments and public sector unions violate public employees' First Amendment rights when they take money from employees' paychecks without the employees' consent.

The questions presented are:

1. Does the First Amendment protect a nonmember public employee against government deduction of union dues when the employee's union forged her membership and dues authorization agreement?
2. Does a public sector labor union act under "color of law" when, pursuant to state statute, it directs a government employer to deduct union dues from employees who have never consented?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Tanishia Hubbard and Kristy Jimenez were the Plaintiffs-Appellants in the court below.

Respondents Service Employees International Union, Local 2015; Malia M. Cohen, State Controller of the State of California; Rob Bonta, Attorney General of the State of California; Service Employees International Union, Local 775; Don Clintsman, Acting Secretary of the Washington State Department of Social and Health Services; and Jay Inslee, Governor of the State of Washington were Defendant-Appellees in the court below.

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

STATEMENT OF RELATED PROCEEDINGS

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

1. *Hubbard v. Serv. Emps. Int'l Union, Loc. 2015, et al.,* No. 21-16408, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 23, 2023.

2. *Jimenez v. Serv. Emps. Int'l Union, Loc. 775, et al.,* No. 22-35238, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 23, 2023.

3. *Hubbard v. Serv. Emps. Int'l Union, Loc. 2015, et al.,* No. 2:20-cv-00670. United States District Court for the Eastern District of California. Judgment entered August 6, 2021.

4. *Jimenez v. Serv. Emps. Int'l Union, Loc. 775, et al.,* No. 1:21-cv-3128. United States District Court for the Eastern District of Washington. Judgment entered March 4, 2022.

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The district court's order granting the State of California's and union's motion to dismiss in *Hubbard v. Serv. Emps. Int'l Union, Loc. 2015,* is reported at 552 F.Supp.3d 955 (E.D. Cal. 2021), and reproduced at Appendix E, Pet.App. 8a. The Ninth Circuit's memorandum opinion affirming that order is unreported and is reproduced at Appendix A, Pet.App. 1a. The Ninth Circuit order denying rehearing en banc is reproduced at Appendix C, Pet.App. 6a.

The district court's order granting the State of Washington's motion to dismiss and the union's motion for judgment on the pleadings in *Jimenez v. Serv. Emps. Int'l Union, Loc. 775,* is reported at 590 F.Supp.3d 1349 (E.D. Wash 2022), and reproduced at Appendix F, Pet.App. 20a. The Ninth Circuit's memorandum opinion affirming that order is unreported and is reproduced at Appendix B, Pet.App. 3a. The Ninth Circuit order denying rehearing en banc is reproduced at Appendix D, Pet.App.7a.

JURISDICTION

The Ninth Circuit issued its memorandum decisions in both of the cases below on October 23, 2023. Pet.App. 1a, 3a. The Ninth Circuit denied petitions for rehearing en banc in each case on December 12, 2023. Pet.App. 6a, 7a.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution states, in pertinent part: "Congress shall make no law…abridging the

freedom of speech. . .” It is reproduced as Appendix G, Pet.App. 40a.

California Government Code § 1153 is reproduced as Appendix H, Pet.App. 41a.

The Revised Code of Washington 41.56.113 is reproduced as Appendix I, Pet.App. 44a.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are individual providers (“IPs”) under the State of California’s and the State of Washington’s programs for in-home health care for the disabled. Tanishia Hubbard provides care for her disabled son, and Kristy Jimenez provides care for several family members, including her son who is battling cancer. Pet.App. 8a, 21a. The states employ the Petitioners, who, by virtue of state law, are required to be represented by Service Employees International Union local affiliates, Hubbard with California’s Local 2015 (“SEIU 2015”), and Jimenez with Washington’s Local 775 (“SEIU 775”). Neither Petitioner ever signed a membership card or in any way authorized union dues deductions. *Id.* at 8-9a, 22a. After she began employment, however, the State of California deducted full union dues from Hubbard’s wages for SEIU 2015. Pet.App. 9a. Similarly, the State of Washington began deducting full union dues from Jimenez’s wages for SEIU 775 a few months after she began her employment. Pet.App. 22a. Each Petitioner discovered the deductions after the 2018 *Janus* decision. *Id.* at 9a, 22a.

In trying to understand why SEIU was deducting dues from their paychecks, each Petitioner requested a copy of any documents that could serve as the basis for these deductions. *Id*. at 10a, 22a. In December

2019, SEIU 2015 sent Hubbard a copy of an online membership application dated November 4, 2018, which it claimed she signed. *Id*. at 10a. Hubbard did not, in fact, sign this membership application. Similarly, on March 31, 2021, after many requests, SEIU 775 sent Jimenez a copy of an internet membership agreement that SEIU claimed she signed in August 2016. *Id*. at 22a. Jimenez never signed a membership agreement in 2016, or any other time. *Id*.

II. Proceedings Below

Petitioners filed suit pursuant to 42 U.S.C. § 1983, seeking, *inter alia*, compensatory and nominal damages against SEIU for the violation of their First Amendment right to freedom from compelled speech. Pet.App.10-11a, 29a. In *Hubbard*, the district court granted SEIU's Fed. R. Civ. P. 12(b)(1) and (b)(6) motion to dismiss. *Id.* at 11a, 18-19a. In *Jimenez*, the district court granted SEIU's motion for judgment on the pleadings and dismissed Petitioner's state law claims. *Id.* at 39a. Petitioners appealed.

On appeal, the Ninth Circuit issued summary, unpublished memorandum opinions in each case, affirming the district court, citing *Belgau v. Inslee*, 975 F.3d 940, 946-49 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 2795 (2021) and *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1121–25 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 749 (2023). Pet.App. 2a, 4a. In *Belgau*, the Ninth Circuit held that dues agreements are private contracts and therefore do not trigger First Amendment scrutiny. 975 F.3d at 950. As such, the union was not acting "under color of law." 975 F.3d at 946-48.

The Ninth Circuit's application of *Belgau* to the Petitioners' facts leads to the untenable outcome that the mere existence of a dues authorization card, even

when forged by a union, renders the First Amendment inapplicable to any deductions a union and the public employer take from an employee's paycheck, even though, in such a case, it is obvious that the employee gives no consent. 975 F.3d at 946-49; Pet.App. 2a, 4a.

The Ninth Circuit also relied on *Wright*, where it held that when the union placed Ms. Wright's name on the list of employees who had authorized deductions when the union, in fact, forged the authorization, the union "misused" the state statute and could not have been acting "under color of state law" as required for liability under 42 U.S.C. § 1983. Pet.App. 2a, 4a citing to *Wright,* 48 F.4th at 1121-25.

Neither memorandum opinion addressed the glaring First Amendment violation at issue: that SEIU and the Employers diverted Petitioners' lawfully earned wages for SEIU's political speech in direct contravention of this Court's decisions in *Harris* and *Janus*. Pet.App. 1-5a.

The Petitioners subsequently sought review through petitions for rehearing en banc before the full Ninth Circuit. *Id.* at 6-7a. The Ninth Circuit denied the petitions for en banc review. *Id.*

REASONS FOR GRANTING THE PETITION

The Ninth Circuit departed from the precedents of this Court in *Harris* and *Janus* by refusing to address the Petitioners' First Amendment injuries caused by SEIU and the States' deduction of money from Petitioners' lawfully earned wages without their consent. The Ninth Circuit has also departed from the holdings of this Court that have applied the First Amendment to unions when they utilize a procedure created by state law to deduct employees' wages. The Ninth Circuit's approach conflicts with decisions from the Third, Sixth

and Seventh Circuits that recognize unions as state actors when they take money from public employees without their consent. This Court's supervisory authority is needed to clarify the law and to harmonize the Circuits' rulings.

As far back as 1977, this Court recognized that public employees cannot be required to support a union's political speech. *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977), overruled by *Janus v. Am. Fed'n of State, Cnty., Mun. Emps. Council 31*, 585 U.S. 878 (2018). This Court limited "agency fees" to only those expenses that are "germane to [a union's] duties as collective-bargaining representative." *Abood*, 431 U.S. at 235, 255 (Powell, J., concurring) ("Under First Amendment principles that have become settled... it is now clear, first, that any withholding of financial support for a public-sector union is within the protection of the First Amendment...").

In 2014, in *Harris,* this Court expanded partial public employees' First Amendment rights by holding that IPs may not be required to pay "agency fees," even those portions of the fees that were germane to collective bargaining. *Harris v. Quinn*, 573 U.S. 616, 656 (2014) ("no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants. . . who do not want to join or support the union.").

Most recently, in *Janus*, this Court held that public sector labor unions cannot require *any* nonmember employees, not just IPs, to pay "agency fees." 585 U.S. at 929-30. Unless the employee has waived her First Amendment rights through knowing, voluntary, and informed consent, demonstrated by clear and compelling evidence, unions cannot divert money from public

employees' paychecks. *Id.* This Court explained that use of nonmember money on collective bargaining triggers First Amendment scrutiny because even collective bargaining is "inherently political." *Id.* at 881, 920.

The Ninth Circuit's memorandum opinions, however, result in the untenable conclusion that if a union forges a public employee's consent, the employee's First Amendment injuries simply vanish. In other words, had the unions forged the *Harris* Petitioners' and Mark Janus' signatures on union dues authorizations, they would have had no case.

This conclusion undercuts *Harris* and *Janus* and denies First Amendment protections to public employees.

Additionally, for nearly fifty years this Court has acted on the reality that public sector unions that use state authority to compel public employees' speech through wage deductions act "under color of law" for purposes of 42 U.S.C. § 1983. *See, e.g.*, *Abood,* 431 U.S. 209; *Knox v. Serv. Emps. Int'l Union, Loc. 1000,* 567 U.S. 298 (2012); *Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); *Harris*, 573 U.S. 616; *Janus*, 585 U.S. at 878. Subsequent to the *Harris* and *Janus* decisions, the Third Circuit, in *Lutter v. JNESO*, 86 F.4th 111, 127 (3d Cir. 2023), Sixth Circuit, in *Littler v. Ohio Assoc. of Pub. School Employees*, 88 F.4th 1176 (6th Cir. 2023), and the Seventh Circuit, in *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) (*Janus II*), have all recognized that union reliance on state authority to deduct money from public employees warrants a finding of state action. In affirming the dismissal of the Petitioners' claims because SEIU did not act "under color of law," the Ninth Circuit departed from these precedents. Had the Petitioners brought their claims in the Third, Sixth, or

Seventh Circuits, the results of their cases would have been different because these circuits have all held that unions act "under color of state law" in these circumstances. On the other hand, the Eighth Circuit adopted the Ninth Circuit's understanding. *See Hoekman v. Education Minnesota*, 41 F.4th 969 (8th Cir. 2022). This conflict of authority should be resolved.

The Petitioners' case presents an important federal question. The Ninth Circuit's refusal to apply *Harris* and *Janus* to the instant cases bars these precedents from having any prospective effect in the Ninth Circuit because there are no further factual circumstances to which their legal conclusions will apply. This Court should take this case to ensure that *Janus* remains relevant and applicable in a post-agency fee world when unions take money from public employees without their affirmative consent.

The petition for a writ of certiorari to the Ninth Circuit should be granted for each of the reasons that follow.

I. THE NINTH CIRCUIT'S MEMORANDUM OPINIONS CONTRADICT THIS COURT'S DECISIONS IN *HARRIS* AND *JANUS* REGARDING THE APPLICATION OF THE FIRST AMENDMENT TO NONMEMBER PUBLIC EMPLOYEES.

In *Harris*, a group of non-union IPs brought an action against the Governor, and three unions, challenging mandatory agency fees paid to the union. 573 U.S. 616. Like Hubbard and Jimenez, the *Harris* Petitioners were partial public employees, providing in-home care to disabled individuals through Medicaid-waiver programs run by the Illinois Department of Human Services. This Court limited application of *Abood* to full public employees, holding that a state

cannot compel non-member IPs to pay anything to a union, even an agency fee to support union spending which is related to collective bargaining. For IPs, the agency fee provision did not present a sufficiently compelling state interest to override the IPs associational freedoms and therefore violated their First Amendment rights. *Id*. at 649.

In *Janus* this Court finished what it started in *Harris*, by holding that *all* nonmember public employees, not just IPs, should be free from paying agency fees. 585 U.S. at 882-887. This Court found that taking agency fees "violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* Because everything a public sector union does, including collective bargaining itself, is "inherently political," the requirement that employees pay anything – even agency fees – necessarily triggered First Amendment scrutiny. *Id*. at 881, 920.

This Court held that no payment can be deducted from a nonmember's lawfully earned wages, nor even an attempt be made to collect such a payment, unless the employee provides affirmative consent – a waiver of First Amendment rights. *Id.* at 930. To effectively waive First Amendment rights, the employee's consent had to be knowing, voluntary, informed, and demonstrated by clear and compelling evidence. *Id.*

Here, however, the Ninth Circuit refused to recognize that nonmember IPs forced to pay full dues without their consent have a First Amendment injury. This runs afoul of both *Harris* and *Janus*. In explaining the Ninth Circuit's reasoning, the memorandum opinions cited to the Ninth Circuit's decision in *Belgau*, in which a group of public employees alleged that the union dues cards they signed did not satisfy the waiver

standard laid down in *Janus*. *Belgau*, 975 F.3d at 946-49. The Ninth Circuit held the dues cards were private contractual obligations and since the state had no part in drafting the contracts, there was no need to conduct a First Amendment analysis. *Id*. at 950 ("The First Amendment does not support Employees' right to renege on their promise to join and support the union.").

Here, however, the Petitioners never promised "to join and support the union" – they signed no cards. Pet.App. 9a, 22a. By applying *Belgau* to Petitioners, the Ninth Circuit reaches the absurd result that *forged* membership cards remove the need for a First Amendment analysis simply because *some* card – a forged card – exists.

The Ninth Circuit's holding creates dangerous precedent and potential incentive: unions can avoid First Amendment liability by simply forging membership cards where none exist. When called to task, unions *might* be subject to state law claims for taking public employees' money, but they may avoid constitutional scrutiny altogether, even though there is no consent by the employee.

For a union to take an employee's money for use in union political speech in this manner is unconstitutional under *Harris* and *Janus* (and even *Abood*).

The Ninth Circuit's opinion conflicts with this Court's ruling in *Harris* and *Janus*, and the petition should be granted to settle the conflict.

II. THE NINTH CIRCUIT'S CONCLUSION THAT THE UNIONS' ACTIONS WERE NOT "UNDER COLOR OF LAW" CONFLICT WITH THE HOLDINGS OF THIS COURT.

In both memorandum opinions below, the Ninth Circuit concluded the Petitioners' 42 U.S.C. § 1983 claims against the unions fail for lack of state action. Pet.App. 2a, 4a. The opinions cite to *Wright*, 48 F.4th at 1121–25, which held that a claim alleging forgery of a dues card, was "private misuse of state statute" that was "contrary to the relevant policy articulated by the State." Thus, the union's conduct could not be "attributed to the state." *Id*. This ruling conflicts with this Court's recent holding in *Lindke v. Freed*, 601 U.S. 187, 198 (2024), its holding in *Lugar v. Edmondson Oil Co., Inc.* 457 U.S. 922 (1982), and decades of case law from *Abood* to *Janus*.

A. The Ninth Circuit's Memorandum Opinions Conflict with this Court's Holding in *Lindke*.

In relying on *Wright* to summarily decide the Petitioners' claims, the Ninth Circuit holds that because SEIU's actions were an unlawful forgery, it "misused" the state law that granted it authority over employees' consent to dues deductions. As such, SEIU could not be acting "under color of law." *Wright*, 48 F.4th at 1121–25. Pet.App. 2a, 4a. This reasoning contradicts this Court's recent holding in *Lindke,* 601 U.S. at 198: "To be clear, the '[m]isuse of power, possessed by virtue of state law,' constitutes state action," citing *United States v. Classic,* 313 U.S. 299, 326 (1941).

Here, the state granted SEIU the power to direct dues deductions (a power given to it by virtue of state law). While it was a misuse of the union's power to

falsify Petitioners' electronic signatures on membership cards, this Court held in the *Lindke* decision that "misuse" that is nonetheless cloaked with the state authority, is the very essence of state action. 601 U.S. at 200 ("Every § 1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place."). Here, SEIU did possess power in the first place by virtue of state law. The Ninth Circuit's reliance on *Wright* in its memorandum opinions to hold that SEIU did not act "under color of law" because it "misused" a statute contradicts *Lindke*.

B. The Ninth Circuit's Memorandum Opinions Conflict with this Court's Holding in *Lugar* By Ignoring the Procedural Scheme.

In both memorandum opinions below, the Ninth Circuit relies on its decision in *Wright* for the proposition that SEIU's "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." *Wright,* 48 F.4th at 1123, citing *Lugar,* 457 U.S. at 937. The "existing law" in question in *Wright* was Oregon's Criminal Code, under which forgery is a crime. *Wright*, 48 F.4th at 1123, citing Or. Rev. Stat. §§ 165.007 (second degree forgery), 165.013 (first degree forgery). The Ninth Circuit then concluded its analysis, "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." *Wright*, 48 F.4th at 1123.

But the Ninth Circuit in *Wright* conveniently ignores the second half of the sentence in *Lugar* upon which its analysis relies. The full sentence reads, "While private misuse of a state statute does not describe conduct that can be attributed to the State, *the procedural scheme created by the statute obviously is the product of state action*." *Lugar*, 457 U.S. at 941 (emphasis supplied). It is this very type of "procedural scheme" under which SEIU acted when it deducted dues without authorization in *Wright*, as well as here for Petitioners. California Government Code § 1153 (Pet.App. 41a) and Wash. Rev. Code 41.56.113 (Pet.App. 44a) both authorize the union to determine whether an employee has consented to dues deductions and require the state to rely on the unions' representation. But for this authority, the unions' forgery of employees' consent would not lead to deductions and would thus not lead to First Amendment violations. "[This] procedural scheme created by the statute *obviously is the product of state action*." *Lugar*, 457 U.S. at 941 (emphasis added).

Rather than recognizing that SEIU's instructions to the Employers to deduct dues were actions it took pursuant to state law, and were therefore state action, the Ninth Circuit misquoted and misapplied *Lugar* to reach its desired result.

C. The Ninth Circuit's Memorandum Opinions Conflict with Five Decades of Union-Related Cases from *Abood* to *Janus* Holding Unions Directly Accountable Under the First Amendment.

The Ninth Circuit's finding that the unions did not act "under color of law" for purposes of 42 U.S.C. § 1983 conflicts with this Court's precedents over the last five decades. Pet.App. 2a, 4a. This Court has consistently applied the First Amendment to unions, which it could not do unless unions are state actors when they deduct money from employee wages. *Abood*, 431 U.S. 209; *Hudson,* 475 U.S. 292; *Knox*, 567 U.S. 298; *Harris,* 573 U.S. 616; *Janus*, 585 U.S. 878.

In each of these 42 U.S.C. § 1983 actions, this Court could not have reached a First Amendment analysis had the union not been acting "under color of law" in directing the state to deduct employee wages. Moreover, this Court treats unions as state actors even when the states had little involvement and this Court was reviewing the union's *internal* procedures. *See Hudson,* 475 U.S. at 295 (union officials' computation of amount of fair share fee); *Knox*, 567 U.S. at 304 (union political assessment).

In the Petitioners' cases, state law grants SEIU the privilege of designating from which employees to deduct union dues. Wash. Rev. Code 41.56.113(1)(b)(vi) ("The employer shall rely on information provided by the exclusive bargaining representative regarding the authorization and revocation of deductions), Pet.App. 45a. Cal. Gov't Code §1153(a) ("[the Controller shall] [m]ake, cancel, or change a deduction or reduction at the request of the person or organization authorized to receive the deduction or reduction.") Pet.App. 41a. The

Ninth Circuit refused to consider the fact that, were it not for these state laws, the state employers would not have deducted, and the unions would not have received, any of Petitioners' money.

Because the Ninth Circuit's decision conflicts with nearly five decades of this Court's precedent applying the First Amendment to union actions authorized by, and taken pursuant to state statute, review is warranted.

III. THE NINTH CIRCUIT'S APPROACH TO STATE ACTION DEEPENS THE SPLIT OF AUTHORITY AMONG THE CIRCUITS.

Circuit Courts of Appeals are inconsistent in their treatment of union activities that qualify as actions "under color of law" for purposes of 42 U.S.C. § 1983. The Seventh, Third and Sixth Circuits have indicated there would be state action in union activities in circumstances such as those presented here. *Janus II,* 942 F.3d at 361; *Lutter*, 86 F.4th 111; *Littler*, 88 F.4th at 1182. The Eighth and Ninth Circuits have refused to apply the First Amendment to unions, instead relying on the fact that there was a union membership card, or a forgery of such a card, as the source of the harm. *Belgau,* 975 F.3d at 946-49; *Wright*, 48 F.4th 1112; *Hoekman,* 41 F.4th 969. This Court's intervention is needed to resolve this split of authority.

The Seventh Circuit explicitly stated the rationale that underlies this Court's decision in *Janus* when, on remand, it applied the First Amendment to the deduction of fair-share fees. *Janus II*, 942 F.3d at 361. It held that the union's acts were "attributable to the state" when the state took agency fees from employees at the union's direction. *Id*. at 361, quoting *Tulsa Pro.*

Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988). AFSCME was a "joint participant with the state" when the state employer deducted the fees and AFSCME received them to spend on its political speech. *Janus II*, 942 F.3d at 361.

Similarly, the Sixth Circuit explained that while the challenge to a union membership card failed for lack of state action, had the plaintiff "challenged the constitutionality of a statute pursuant to which the state withheld dues, the 'specific conduct' challenged would be the state's withholdings, which would be state action taken pursuant to the challenged law." *Littler*, 88 F.4th at 1182. Thus, in the Sixth Circuit, a challenge to the union's exercise of statutory authority, and to the statutory scheme itself, such as was brought by Petitioners below, would not have failed for lack of state action.

The Third Circuit recognized that the use of state law to compel union dues payments from public employees states a First Amendment claim for relief against the union. *Lutter*, 86 F.4th at 126-27 ("Her operative complaint sufficiently alleges the invasion of her First Amendment right against the compelled subsidization of speech."). The union relied on New Jersey law to continue to deduct union dues after the employee resigned from the union, thus there was state action. *Id*. 127-28 (citing *Lugar*, 457 U.S. at 933).

The Eighth and Ninth Circuits have, however, departed from the Seventh, Sixth and Third Circuits. Here, the Ninth Circuit determined that no state action was present when SEIU took money from Petitioners without their consent for its political speech. Pet.App. 2a, 4a.

Similarly, in *Hoekman*, 41 F.4th 969, the Eighth Circuit ruled that claims brought by two of the plaintiffs lacked a showing of state action since the plaintiffs previously agreed to be union members.

This split in the Courts of Appeal means that had Petitioners filed their cases in the Third, Sixth or Seventh Circuits, they would have achieved a different result. This Court's intervention is necessary to resolve this discord among the Circuits.

IV. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION REGARDING WHETHER *JANUS* HAS ANY PROSPECTIVE APPLICATION OR ONGOING EFFECT.

Because it concerns partial public employees who have never consented to be union members, this case presents the most analogous set of facts to *Harris* and *Janus* that is likely to exist in a post-agency fee world. Like Mark Janus, the Petitioners were, *and always had been*, nonmembers, and did not consent to dues deductions. Pet.App. 9a, 22a.

The Ninth Circuit's approach effectively means that *Harris* and *Janus* have no applicability outside of agency fee regimes themselves. Since agency fees have been done away with, *Harris'* and *Janus'* applicability has ended. But this restrictive view of precedent ignores both the history leading up to the cases and the language this Court utilized in the *Janus* decision.

First, while *Janus* dealt with an agency fee regime, the principles upon which it relies are not so limited. The history of jurisprudence in this area demonstrates this. Prior to *Janus*, this Court made a series of decisions over a span of over forty years that unions could not compel public employees to subsidize the political speech of unions against their will. At best,

unions could collect "agency fees" to support collective bargaining activities, but not the union's political activities. *Abood*, 431 U.S. at 209 (agency fee collection permissible, but not funds for political speech).

After *Abood,* this Court added the requirement that whatever was categorized as an agency fee must "include an adequate explanation of the basis for the fee" and "an opportunity to challenge the fee amount." *Hudson*, 475 U.S. at 310. Later, in *Knox*, this Court required the *Hudson* notice which explains the basis for agency fees, to be "fresh." 567 U.S. at 315 ("a nonmember cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent.") More recently, in *Harris*, this Court held that even agency fees violated the First Amendment for IPs. 573 U.S. at 616 ("The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.").

Janus took the next step in ensuring public employees were not coerced to support speech that conflicted with their conscience. *Janus* ensured that employees would not have to pay for union speech even if it was related to collective bargaining because even collective bargaining was "inherently political." *Janus,* 585 U.S. at 881, 920. Moreover, to ensure that employees were protected from such union deductions, this Court required that the employee affirmatively consent to waive her First Amendment rights before she can be required to support union political activity. *Id*. at 930.

Requiring *affirmative* consent before taking *any* employee money for a union's political speech was the next logical step. Courts "do not presume acquiescence in the loss of fundamental rights." *Knox*, 567 U.S. at 312 (quoting *College Sav. Bank v. Fla. Prepaid*

Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999)), and unions like SEIU have no constitutional entitlement to the lawfully earned wages of non-consenting employees. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 184–185 (2007) ("[I]t is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees."). A government facilitated system to the contrary represents a "remarkable boon" for unions. *Knox*, 567 U.S. at 312.

After *Janus*, California and Washington, among other states, enacted legislation to blunt the effect of *Janus* on union pocketbooks. Cal. Gov't Code § 1153 and Wash. Rev. Code 41.56.113 are perfect examples. Pet.App. 41-43a; 44a-47a. Each enables the union to control the entire dues deduction process, including communicating to the Employer whether the employee actually consented to pay dues.[1] An employee will receive no assistance from her employer to stop dues deductions if the employee, like the Petitioners, discovers that even though she never consented, the union deducted dues from her. *See*, Section 1153, Wash Rev. Code 41.56.113. Pet.App. 42-43a; 45a. Rather, she must turn to the union, which has every financial incentive to take an employee's money –

[1] Each of these state statutes require employers to rely on the union, a self-interested, biased party, to inform them from which employees it should deduct dues. *See*, Cal. Gov't Code §1153(h) ("The Controller *shall rely on information provided by the employee organization* regarding whether deductions for an employee organization were properly canceled or changed. . .") (Pet.App. 42-43a) and Wash. Rev. Code 41.56.113(1)(a)(vi) ("*the employer shall rely on information provided by the exclusive bargaining representative* regarding the authorization and revocation of deductions.") (emphasis added) (Pet.App. 45a).

whether by stalling to delay resolution, or forging consent in the first place.

The decisions that led up to *Harris* and *Janus* beg the question, do the principles upon which these precedents stand also protect nonmember employees in a post-agency fee world? In other words, apart from agency fees, does *Janus* have any application to situations where unions take money in the form of full union dues without consent simply because the deductions are not called "agency fees"? The Ninth Circuit believes that unless a state has set up an agency fee scheme in direct defiance of *Janus*, it has no application.

When this Court stated that not only do agency fees trigger First Amendment scrutiny, but also *"any other payment to the union,"* it anticipated situations other than mere agency fees where unions deduct money from employees' paychecks. *Id*. (emphasis added). This Court's holding in *Janus* demonstrates clairvoyance as to the future application of *Janus*:

> For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated *when money* [not just agency fees] is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before *anything* is taken from them.

Id. at 878 (emphasis added).

The facts of Petitioners' cases are the perfect vehicle for this Court to decide *Janus'* prospective effect because Petitioners certainly *did not* "choose to support" the union. The Petition should be granted to breathe life into *Janus* where the unions and the Ninth Circuit would prefer it to be buried.

CONCLUSION

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

Respectfully submitted,

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May 10, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-16408

D.C. No. 2:20-cv-00670-KJM-JDP

TANISHIA HUBBARD,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015; *et al.*,

Defendants-Appellees.

MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

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

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

Appellant Tanishia Hubbard is an in-home supportive services provider in California. Until late 2019, she

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

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

paid union dues to Appellee SEIU Local 2015. Hubbard brings several federal claims under 42 U.S.C. § 1983 against SEIU Local 2015 and two California state officials, as well as six state-law claims against SEIU Local 2015. The district court granted Appellees' motions to dismiss Hubbard's federal claims and declined to exercise supplemental jurisdiction over her state law claims. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

1. The § 1983 claims against SEIU Local 2015 fail for lack of state action. *See Belgau v. Inslee*, 975 F.3d 940, 946–49 (9th Cir. 2020); *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1121–25 (9th Cir. 2022).

2. Hubbard lacks standing to seek prospective relief against the California officials. Her dues deductions stopped before she filed suit, and the district court did not err in finding that Hubbard has not shown that future injury is sufficiently likely to warrant prospective relief.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35238

D.C. No. 1:21-cv-03128-TOR

KRISTY L. JIMENEZ,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 775, a local chapter of an unincorporated labor organization; et al.,

Defendants-Appellees.

MEMORANDUM[*]

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

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

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

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

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

Appellant Kristy Jimenez lives in Washington State and provides in-home health services to several of her family members. Until May 2021, she paid union dues to Appellee SEIU Local 775. She brings claims under 42 U.S.C. § 1983 against all Appellees, a claim under the Racketeer Influenced and Corrupt Organizations ("RICO") Act against Appellees SEIU Local 775 and SEIU International, and two state law claims. The district court granted a motion to dismiss Jimenez's claims against Appellees the Governor of Washington and the Acting Secretary of the Washington Department of Social and Health Services (the "State Defendants"). The court also granted a motion for judgment on the pleadings regarding Jimenez's claims against SEIU Local 775 and SEIU International. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The § 1983 claims against SEIU Local 775 and SEIU International fail for lack of state action. *See Belgau v. Inslee*, 975 F.3d 940, 946–49 (9th Cir. 2020); *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1121–25 (9th Cir. 2022).

2. Jimenez lacks standing to seek prospective relief against the State Defendants. Her dues deductions stopped before she filed suit, and the district court did not err in finding that Jimenez has not shown that future injury is sufficiently likely to warrant prospective relief.

3. Jimenez's RICO allegations, accepted as true, do not show that either SEIU Local 775 or SEIU International acted with "the specific intent to defraud" required for the alleged predicate offense of wire fraud. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). The facts alleged do not "tend to exclude a plausible and

innocuous alternative explanation" for the unauthorized deductions she alleges. *Id.* at 998. The district court thus properly dismissed Jimenez's RICO claim.

4. The district court appropriately dismissed Jimenez's claims with prejudice. "Dismissal with prejudice . . . is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The allegations in Jimenez's complaint show that SEIU Local 775 and SEIU International are not state actors and that Jimenez lacks standing to pursue her claims against the State Defendants. With regard to her RICO claim, Jimenez has proposed to amend her complaint, but only to fix a typographical error. She has not argued to us that there is any additional information she would include in an amended complaint that would address that claim's deficiencies.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-16408

D.C. No. 2:20-cv-00670-KJM-JDP
Eastern District of California, Sacramento

TANISHIA HUBBARD,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015; et al.,

Defendants-Appellees.

ORDER

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

The panel has voted to deny the petition for rehearing en banc (Dkt. No. 53) and Judge W. Fletcher has so recommended.

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

The petition for rehearing en banc is denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35238

D.C. No. 1:21-cv-03128-TOR
Eastern District of Washington, Yakima

KRISTY L. JIMENEZ,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 775, a local chapter of an unincorporated labor organization; et al.,

Defendants-Appellees.

ORDER

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

The panel has voted to deny the petition for rehearing en banc (Dkt. No. 56) and Judge W. Fletcher has so recommended.

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

The petition for rehearing en banc is denied.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:20-CV-00670-KJM-EFB

TANISHIA HUBBARD, individual,

Plaintiff,

v.

SEIU LOCAL 2015, *et al.*,

Defendants,

ORDER

Plaintiff Tanishia Hubbard, an In-Home Supportive Services (IHSS) provider, brings this § 1983 action against SEIU Local 2015, California State Controller Betty T. Yee and Attorney General of California Rob Bonta,[1] alleging violations of her First and Fourteenth Amendment rights to free speech and freedom of association. Plaintiff alleges she never authorized union dues deductions and the State Controller deducted dues from her wages without her consent. The State defendants and SEIU Local 2015 filed motions to dismiss. The motions are granted.

I. BACKGROUND

Hubbard is an in-home care provider caring for her son; she is enrolled in California's Medicaid (Medi-Cal)

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[1] Rob Bonta has served the Attorney General of California since April 23, 2021 and is substituted in place of Xavier Becerra. *See* Fed. R. Civ. P. 25(d).

Program, In Home Supportive Services (IHSS), since approximately 2012. Compl. ¶ 19, ECF No. 1. She lives in a county in which IHSS providers are represented by SEIU Local 2015 under a collective bargaining agreement. *See id.* ¶ 14. California law authorizes its State Controller to "make any deductions from the wages of [IHSS] personnel . . . , who," like Hubbard, "are employees of a public authority," if the deductions are "agreed to by that public authority in collective bargaining with the designated representative of the [IHSS] personnel." Cal. Welf. & Inst. Code § 12301.6(i)(2); Compl. ¶ 17. In administering these IHSS supportive service programs, the State Controller must "[m]ake, cancel, or change a deduction or reduction at the request of the . . . organization authorized to receive the deduction or reduction." Cal. Gov't Code § 1153(a). The State Controller must also "[o]btain a certification from any . . . employee organization . . . requesting a deduction . . . that they have and will maintain an authorization, signed by the individual from whose salary or wages the deduction or reduction is to be made." *Id.* § 1153(b). "An employee organization that certifies that it has and will maintain individual employee authorizations shall not be required to provide a copy of an individual authorization to the Controller unless a dispute arises about the existence or terms of the authorization." *Id.*

Plaintiff alleges she never joined SEIU and never authorized dues deductions. *Id*. ¶ 20. Despite not authorizing SEIU Local 2015 to deduct dues from her wages, plaintiff alleges the union directed the State Controller to deduct money from her paycheck. *Id*. ¶¶ 2, 21–22. She sent a letter to SEIU in January 2019 attempting to stop the deductions. *Id*. ¶ 23. A month later SEIU responded to her letter noting the "next period" when she could cancel her dues authorization

was "10/20/2019-11/3/219." *See* SEIU Letter at 2, ECF No. 1-1. Hubbard alleges she "had no means to test the truthfulness of the letter" because SEIU did not include a copy of her purported membership card in its communications. Compl. ¶ 26. In June 2019, she sent SEIU another written request to revoke her dues deductions. *See id*. ¶ 28. SEIU responded confirming "effective 3/25/2019" her status with the union had been converted to "non-member" and her dues deductions "will stop within thirty (30) days" after her "anniversary date of 10/20/2019-11/3/2019" "on which [she] signed [her] membership card." *See* Second SEIU Letter at 4, ECF No. 1-1. SEIU still did not include a copy of her membership card. *See* Compl. ¶ 30. On December 2019, SEIU mailed Hubbard a copy of her online membership card. Membership Card at 6, ECF No. 1-1 (showing signature date of November 4, 2018). Based on a careful review of that membership card, Hubbard alleges she did not fill out the online membership application. Compl. ¶ 34.

SEIU eventually cancelled plaintiffs' membership and directed the State Controller to stop union dues deductions. *Id*. ¶ 32. On October 1, 2019, the State Controller ceased dues deductions from Hubbard's wages. *See* Csekey Decl. ¶ 8, ECF No. 13.

Soon after the State stopped deducting union dues and fees from her earnings, plaintiff brought this suit under 42 U.S.C. § 1983, alleging deprivation of her First Amendment right to refrain from subsidizing the union's speech through dues absent her written consent, as provided in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Compl. ¶ 38. Plaintiff asserts this § 1983 action against SEIU Local 2015, California State Controller Betty T. Yee and Attorney General of California Rob Bonta, alleging violations of her First

and Fourteenth Amendment rights to free speech and freedom of association, *see id*. ¶¶ 36–51, and six state law claims against SEIU: (1) Fraudulent concealment for allegedly concealing that plaintiff did not properly authorize dues deductions, *see id*. ¶¶ 52–59, (2) Fraud by representing to plaintiff that she filled out a membership card, *see id*. ¶¶ 62–68, (3) Negligent misrepresentation by negligently misrepresenting to plaintiff that she filled out a membership card, *id*. ¶¶ 69–75, (4) Unjust enrichment for withholding dues from plaintiff's wages and benefiting from those dues, *id*. ¶¶ 76–79, (5) Conversion by "ordering the State Controller to deduct dues" from plaintiff's wages "based upon an unauthorized membership card," *id*. ¶¶ 80–83, and (6) Intentional infliction of emotional distress by wrongfully withholding dues from plaintiff's wages, *id*. ¶¶ 84–86. Plaintiff seeks both prospective and retrospective relief. *Id*. at 12 (Prayer for Relief).

State defendants and SEIU Local 2015 have filed separate motions to dismiss under Rule 12(b)(1) and Rule 12(b)(6). State Defs.' Mot. to Dismiss (AG MTD), ECF No. 9; SEIU Mot. to Dismiss (SEIU MTD), ECF No. 11. Plaintiff opposes the motions, which are fully briefed. *See* Opp'n AG MTD, ECF No. 17; Opp'n SEIU MTD, ECF No. 18; AG Reply, ECF No. 26; SEIU Reply, ECF No. 23. On October 28, 2020, the court submitted the motions without a hearing. *See* Minutes, ECF No. 25. The motions overlap substantially, so the court addresses them together here.

II. STANDING

State defendants first argue plaintiff lacks standing for prospective relief because she has not suffered a concrete "injury in fact." *See* AG MTD at 15. First, they note plaintiff is no longer a union member and union

dues are not being deducted from her paycheck. *See id*. Second, plaintiff's injury from past dues deductions is traceable to her membership agreement with SEIU Local and not California Welfare & Institutions Code section 12301.6(i)(2). *Id*. Third, a favorable decision in this case will not provide plaintiff any relief because, defendants argue, she is no longer paying any union dues. *See id.* For these same reasons, SEIU Local 2015 argues plaintiff lacks standing to seek injunctive relief. *See* SEIU Mem. P & A at 23, ECF No. 12.

To establish standing, plaintiff bears the burden of establishing three elements: (1) she suffered an injury in fact, (2) the defendants caused that injury, and (3) it is likely the injury will be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). An injury in fact is the "invasion of a legally protected interest" that is "concrete and particularized" and "actual and imminent," not "conjectural or hypothetical." *Van Patten*, 847 F.3d at 1042 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). Given that defendants voluntarily ceased the challenged conduct before her lawsuit was filed, plaintiff must show "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

Here, the challenged dues deductions stopped before plaintiff filed this lawsuit, and she has not alleged or otherwise shown that any future violations are more than just a possibility. SEIU, by contrast, has presented the declaration of its Member Services Director, Tom Csekey, explaining the union membership department has been instructed to "flag [Hubbard's] name in its database" so that any future membership and dues

authorization in her name will be brought to Mr. Csekey's attention for "review and confirmation before any action is taken to process." Csekey Decl. ¶ 9.

Contrary to plaintiff's argument in opposition, *see* Opp'n SEIU MTD at 21, the court may consider Csekey's declaration as evidence in determining whether plaintiff has standing. Defendants' motions present a factual challenge; that is, they challenge the truth of the complaint's allegation that Hubbard has presented the court with an "actual" controversy. *See* Compl. ¶ 6; *see Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* And contrary to plaintiff's argument, no unresolved jurisdictional question is so intertwined with the merits such that the court must consider the standard described in *Bell v. Hood*, 327 U.S. 678 (1946) and *Sun Valley Gasoline, Inc. v. Ernst Enterprises*, 711 F.2d 138 (9th Cir. 1983). The factual question here, whether defendants were effecting dues deductions at the time plaintiff filed her case, is independent of plaintiff's claims that the statutory regime is unconstitutional.

Plaintiff also argues the case is not moot because the State and SEIU could make the same union-related deductions by virtue of the fact she might "*merely . . . continue living in California and working as an in-home supportive services worker*." Opp'n AG MTD at 11 (emphasis in original) (relying on *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983)). Plaintiff contends the absence in the statute of any independent verification requirement means the same circumstance she alleges in her complaint "could easily happen to her again, because it *did* easily happen to

her in the first place." *Id*. (emphasis in original). Plaintiff's argument confuses standing and mootness. Mootness is possible only if a plaintiff had standing "at the commencement of the litigation." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). "[I]f a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." *Id.* at 191; *see also Renne v. Geary,* 501 U.S. 312, 320 (1991) ("[T]he mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced."). This case is therefore different from others, such as *Belgau v. Inslee*, in which the plaintiffs had standing when the case began. *See* 975 F.3d 940, 949 (9th Cir. 2020).

In sum, plaintiff does not have standing to seek prospective relief against the State defendants or SEIU. The claims against the State defendants are dismissed in their entirety as barred by the Eleventh Amendment. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999). The court turns to SEIU's motion to dismiss the plaintiffs' retrospective claims under Rule 12(b)(6).

III. MOTION TO DISMISS

A. Legal Standard

A party may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The motion may be granted only if the complaint lacks a "cognizable legal theory" or if its factual allegations do not support a cognizable legal

theory. *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). The court assumes all factual allegations are true and construes "them in the light most favorable to the nonmoving party." *Steinle v. City & Cty. of San Francisco*, 919 F.3d 1154, 1160 (9th Cir. 2019). If the complaint's allegations do not "plausibly give rise to an entitlement to relief," the motion must be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

A complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than unadorned accusations; "sufficient factual matter" must make the claim at least plausible. *Iqbal*, 556 U.S. at 678. In the same vein, conclusory or formulaic recitations elements do not alone suffice. *Id.* (quoting *Twombly*, 550 U.S. at 555). This evaluation of plausibility is a context-specific task drawing on "judicial experience and common sense." *Id.* at 679.

B. State Action

To state a § 1983 claim, plaintiff must plausibly allege SEIU deprived her of a right secured by the Constitution "under color of state law." *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015) (citation omitted). The court asks whether the pleadings allege, first, "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," and second, whether defendant is "appropriately characterized as [a] 'state actor[].'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). A plaintiff has pled a claim only when the answers to both questions is "yes." *See Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989) (citing *Lugar*, 457 U.S. at 937–39). Here, the

answer to the second question is "no," so the court need not address the first.

Although there is a kind of connection between plaintiff's alleged constitutional violation and state action, SEIU's allegedly false representations to the State Controller do not show it acted in concert with the state. Under analogous circumstances, courts within the Ninth Circuit have repeatedly found a union's authorization of dues, even if fraudulently made, does not transform the union's exclusively private act into state action under any of the four conceivable tests: A (1) the public function test; (2) the joint action test; (3) the state compulsion test; or (4) the governmental nexus test. *See, e.g.*, *Semerjyan v. Serv. Emps. Int'l Union Loc. 2015*, 489 F. Supp. 3d 1048, 1058 (C.D. Cal. 2020) (rejecting nearly identical argument regarding delivery of in-home supportive services based on § 12301.6(i)(2)[2]; clarifying "Union is not a state actor under the public function test . . . or the joint action test"); *Quezambra v. United Domestic Workers of Am. AFSCME Loc. 3930*, 445 F. Supp. 3d 695, 704 (C.D. Cal. 2020) (same; union deduction of membership dues does not meet any of the four tests); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F.Supp.3d 1108, 1115-17 (S.D. Cal. 2020) (same). These decisions are well-reasoned, and the court agrees with them.

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[2] "The Controller shall make any deductions from the wages of in-home supportive services personnel or waiver personal care services personnel, who are employees of a public authority . . . , that are agreed to by that public authority in collective bargaining with the designated representative of the in-home supportive services personnel or waiver personal care services personnel . . . and transfer the deducted funds as directed in that agreement." Cal. Welf. & Inst. Code § 12301.6(i)(2).

Additionally, this court in two recent cases has found the State Controller's fee deduction on behalf of a union did not render the union a state actor under the joint action test even where there is no fraud. *See Polk v. Yee*, No. 18-2900, 2020 WL 4937347, at *4 (E.D. Cal. Aug. 24, 2020); *Kurk v. Los Rios Classified Emps. Ass'n*, No. 2:19-CV-00548, 2021 WL 2003134, at *5 (E.D. Cal. May 19, 2021).

In *Polk* and *Kurk*, this court relied on *Belgau v. Inslee*, *supra*. In *Belgau*, the Ninth Circuit dismissed plaintiff's § 1983 claims against the union, reasoning "constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." 975 F.3d at 946. *Id*. (emphasis in original). Here, plaintiff does not contest the State's authority to deduct union dues when an employee has agreed to pay union dues and she does not allege the State Controller knew plaintiff had not authorized dues deductions. Instead, plaintiff's claimed constitutional harm stems from the State Controller's reliance on the union for certification of an employees' authorization of dues deductions without separately being required "to obtain legally valid consent from the IHSS Providers before deducting dues." *See* Compl. ¶¶ 49–50. Given these allegations, the source of plaintiff's purported constitutional harm is not a state statute or policy providing for a state agency to have "so far insinuated itself into a position of interdependence" with the non-governmental party so as to be recognized as a "joint participant" in the challenged activity, *Belgau,* 975 F. 3d at 947; rather the alleged wrongful conduct stems from the union's authorization of dues, an exclusively private act for which the Controller is not responsible. Allegations such as plaintiff's, that the State Controller was "relying entirely on unsubstantiated claims by the

Union" to deduct union from plaintiff's wages, Compl. ¶ 48, describe the type of "passive acquiescence" that does not create state action. *Bain v. California Tchrs. Ass'n*, 156 F. Supp. 3d 1142, 1153 (C.D. Cal. 2015).

SEIU does not qualify as a state actor for purposes of plaintiffs' § 1983 claims against it. Claims one and two must be dismissed.

C. Leave to Amend

If a motion to dismiss is granted, "[the] district court should grant leave to amend even if no request to amend the pleading was made . . ." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016). However, leave to amend need not be granted if amendment would be futile. *See Garmon v. County of L.A.*, 828 F.3d 837, 842 (9th Cir. 2016). Here, no amendment can overcome plaintiff's lack of standing to seek prospective relief against the State defendants or SEIU or to pursue her § 1983 claims against SEIU for retrospective relief. The court dismisses all of plaintiff's federal claims without leave to amend.

D. State Law Claims

The court declines to exercise its discretion under 28 U.S.C. § 1367(c)(2) to retain supplemental jurisdiction over plaintiff's six state law claims against SEIU. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."). The court dismisses these claims without prejudice to plaintiff's refiling them in state court.

IV. CONCLUSION

The motions to dismiss are granted. This order resolves ECF Nos. 9 and 11. The status pretrial scheduling

conference set for August 19, 2021 is vacated. The case is CLOSED.

IT IS SO ORDERED.

DATED: August 5, 2021.

/s/ Kimberly J. Mueller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. 1:21-CV-3128-TOR

KRISTY JIMENEZ, an individual,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 775, a local chapter of an unincorporated labor organization; SERVICE EMPLOYEE INTERNATIONAL UNION, an unincorporated labor organization; DON CLINTSMAN, in his official capacity as ACTING SECRETARY of the WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES; JAY INSLEE, in his official capacity as GOVERNOR of the STATE OF WASHINGTON,

Defendants.

ORDER GRANTING STATE DEFENDANTS' MOTION TO DISMISS AND GRANTING UNION DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

BEFORE THE COURT are State Defendants' Motion to Dismiss (ECF No. 20) and Union Defendants' Motion for Judgment on the Pleadings (ECF No. 22). These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein and is fully informed. For the reasons

discussed below, State Defendants' Motion to Dismiss (ECF No. 20) and Union Defendants' Motion for Judgment on the Pleadings (ECF No. 22) are GRANTED.

BACKGROUND

This matter arises from the unauthorized deduction of union dues payments from Plaintiff Kristy Jimenez's paychecks. The following facts are drawn from Plaintiff's Complaint and construed in the light most favorable to Plaintiff. *Schwarz v. United States*, 234 F.3d 428, 436 (9th Cir. 2000).

Plaintiff works as an Individual Provider ("IP"), providing in-home healthcare services for three members of her family. ECF No. 1 at 1, ¶ 1. Plaintiff is employed by the Washington Department of Social and Health Services ("DSHS"). *Id*. Defendants Governor Inslee, as chief executive officer of the State of Washington, and Don Clintsman, as acting Secretary of DSHS (collectively "State Defendants"), receive federal funding that is used to pay for IPs' salaries, including Plaintiff's. *Id*. at 6, ¶¶ 30–31. The IPs are paid through a state payroll processing system. *Id*. at ¶ 32.

Defendant Service Employees International Union Local 775 ("SEIU 775") is the exclusive bargaining representative for all IPs in Washington State. *Id*. at 5, ¶ 19. Under the relevant collective bargaining agreement and RCW 41.80.100, State Defendants, as the IPs' employer, agreed to deduct union dues from the IPs' wages. *Id*. at 7, ¶ 36; at 17, ¶ 117. State Defendants rely exclusively on the representations from SEIU 775 when determining from whom to withhold dues payments; State Defendants do not confirm the withholding authorizations from IPs. *Id*. at 7, ¶¶ 41–42. The dues are used, in part, to pay for contributions to SEIU 775's Committee on Political

Education ("COPE"), a federal political action committee. *Id*. at 8, ¶¶ 47–48.

In 2019, Plaintiff became aware that union dues were being withheld from her wages. *Id*. at ¶¶ 52–53. The deductions had been occurring since 2016 and continued through May 2021. *Id*. at ¶¶ 52, 54. Plaintiff did not recall signing up for a union membership. *Id*. at 9, ¶ 55. In December 2019, Plaintiff filled out a form and mailed it to SEIU 775 to cancel her union membership. *Id*. at ¶ 58. After receiving no response from SEIU 775, Plaintiff mailed a second form in September 2020. *Id*. at ¶ 63. Plaintiff also emailed SEIU 775's Member Resource Center in September 2020, requesting a copy of her union membership or dues deduction authorizations. *Id*. at 10, ¶ 65. Plaintiff received an email response two days later requesting additional information from Plaintiff; on that same day, Plaintiff also received a letter from SEIU 775 acknowledging her membership resignation. *Id*. at ¶¶ 69–70.

In October 2020, Plaintiff again requested a copy of her union membership. *Id*. at 11, ¶ 74. Plaintiff received a copy of her membership agreement in March 2021. *Id*. at ¶ 78. The membership card reflected Plaintiff's name digitally filled in at the top and a digital signature in Plaintiff's name authorizing dues deductions and COPE contributions. *Id*. at ¶ 79. The IP address located next to the digital signature belonged to a server located in Seattle, Washington. *Id*. at 12, ¶ 81. The signature was dated August 19, 2016. *Id*. at ¶ 80. Plaintiff did not electronically sign the membership agreement nor was she in Seattle in August 2016. *Id*. at ¶ 84.

In the motions presently before the Court, State Defendants move for dismissal of all counts asserted against them. ECF No. 20. Union Defendants seek

judgment on the pleadings or, in the alternative, partial summary judgment. ECF No. 22.

DISCUSSION

I. State Defendants' Motion to Dismiss

A motion to dismiss for failure to state a claim "tests the legal sufficiency" of the plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This requires the plaintiff to provide "more than labels and conclusions, and a formulaic recitation of the elements." *Twombly*, 550 U.S. at 555. While a plaintiff need not establish a probability of success on the merits, he or she must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

When analyzing whether a claim has been stated, the Court may consider the "complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff's "allegations of material fact are taken as true and construed in the light most favorable to the plaintiff[,]" however "conclusory allegations of law and unwarranted inferences

are insufficient to defeat a motion to dismiss for failure to state a claim." *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996) (citation and brackets omitted).

In assessing whether Rule 8(a)(2) has been satisfied, a court must first identify the elements of the plaintiff's claim(s) and then determine whether those elements could be proven on the facts pled. The court may disregard allegations that are contradicted by matters properly subject to judicial notice or by exhibit. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court may also disregard conclusory allegations and arguments which are not supported by reasonable deductions and inferences. *Id*.

The Court "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 662. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. at 678 (citation omitted). A claim may be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Navarro*, 250 F.3d at 732.

A. Standing to Seek Prospective Relief

State Defendants move for dismissal of Plaintiff's claims for injunctive and declaratory relief on the grounds that Plaintiff lacks standing to seek prospective relief. ECF No. 20 at 6–9. Plaintiff's Complaint seeks declaratory relief as to her First Amendment rights and injunctive relief against State Defendants to prevent their reliance on the representations of SEIU 775 for dues withholding. ECF No. 1 at 25–26, ¶¶ 167–170.

Article III standing requires a plaintiff to demonstrate three elements: (1) plaintiff must have suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) there must be a causal connection between the injury and the challenged conduct that is fairly traceable to the defendant's actions; and (3) it must be "likely" as opposed to "speculative" that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Injunctive relief is premised on a showing of repeated injury or future harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Declaratory relief requires evidence that the declaration being sought will remedy the alleged harm. *Mayfield v. United States*, 599 F.3d 964, 971–72 (9th Cir. 2010). Neither injunctive nor declaratory relief may be premised on past harm. *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

Counts I and II of the Complaint allege State Defendants violated Plaintiff's First and Fourteenth Amendment rights by failing to exercise proper oversight of the dues collection system, which forced Plaintiff to participate in political speech. ECF No. 1 at 15–18, ¶¶ 103–123. Plaintiff concedes her dues deductions ceased in May 2021 and that she received confirmation from the union regarding her membership resignation. *Id*. at 8, ¶ 54; at 10, ¶ 70. Thus, at the time the Complaint was filed in September 2021, Plaintiff was no longer a member of SEIU 775 or subject to the dues deductions. Plaintiff's responsive pleading to the present motion does not allege the dues deductions have resumed. Rather, Plaintiff claims she is still under threat of harm because "it is only the State's discretion and the Union's obeyance of the law that prevent the recommencement of dues deductions." ECF No. 24 at 12. Plaintiff does not present any facts

from which the Court could infer State Defendants are likely to resume deducting dues from Plaintiff's wages. Plaintiff's claim is purely speculative and unsupported, and it is insufficient to establish a harm that is actual or imminent. *See Schumacher v. Inslee*, 474 F. Supp. 3d 1172, 1175 (W.D. Wash. 2020); *Semerjyan v. Serv. Emps. Int'l Union Loc. 2015*, 489 F. Supp. 3d 1048, 1060 (C.D. Cal. 2020). Plaintiff has failed to state a claim upon which injunctive relief may be granted.

Plaintiff also seeks a declaration that the alleged scheme between State and Union Defendants described in Counts I and II is unconstitutional. ECF No. 1 at 25, ¶¶ 167–169. The Declaratory Judgment Act permits courts to "declare the rights and other legal relations" of the parties involved in "a case of actual controversy." 28 U.S.C. § 2201. The requirement of a "case of actual controversy" under the Act is no more than what the Constitution otherwise requires. *United Food & Com. Workers Loc. Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, & 1442 v. Food Emps. Council, Inc.*, 827 F.2d 519, 523 n.3 (9th Cir. 1987). Thus, a plaintiff must allege facts that, "under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007).

As previously noted, Plaintiff successfully withdrew her union membership, and State Defendants' automatic withdraw of dues payments ceased in May 2021. ECF No. 1 at 8, ¶ 54; at 10, ¶ 70. Thus, any actual controversy between Plaintiff and State Defendants ended in May 2021. Plaintiff may not seek declaratory relief for an allegedly unconstitutional scheme to which she is no longer a party.

The Court finds Plaintiff has failed to allege any claims upon which injunctive or declaratory relief may be granted.

B. Section 1983 Liability; Eleventh Amendment Immunity

State Defendants seek dismissal of Plaintiff's claim for damages under Count I on the premises that State Defendants are not "persons" for the purposes of a § 1983 claim and the Eleventh Amendment shields State Defendants from suit. ECF No. 20 at 9–11. Although the Complaint specifically seeks nominal, general, and punitive damages for violations of Plaintiff's constitutional rights under § 1983 (ECF No. 1 at 26, ¶¶ 171, 175), Plaintiff now states she seeks only prospective relief against State Defendants acting in their official capacities for the § 1983 claim. ECF No. 24 at 15–19.

To assert a claim under § 1983, a complaint must allege (1) the conduct complained of was committed by a person acting under the color of state law, and that (2) the conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*; *Daniels v. Williams*, 474 U.S. 327 (1986). States and state officials acting in their official capacities are not "persons" for the purposes of damages under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). However, a plaintiff may seek prospective relief under § 1983 against state officials acting in their official capacity. *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997)

Here, Plaintiff seeks relief against Defendants Don Clintsman and Governor Jay Inslee acting in their

official capacities. ECF No. 1. These individuals are not "persons" for the purposes of a damages claim under § 1983. *Will*, 491 U.S. at 66. In any event, Plaintiff now appears to renounce any damage claims arising under § 1983. ECF No. 24 at 15–19. Having determined Plaintiff failed to state cognizable claims for declaratory or injunctive relief under Counts I and II, her claims for prospective relief pursuant to § 1983 also fail. The Court need not reach the issue of Eleventh Amendment immunity.

Based on the foregoing, the Court finds Plaintiff has failed to state claims against State Defendants upon which relief may be granted. Accordingly, the federal claims asserted against State Defendants in Counts I and II are dismissed. Because amendment would be futile, the claims are dismissed with prejudice.

II. Union Defendants' Motion for Judgment on the Pleadings

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). In reviewing a 12(c) motion, the court "must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). "Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (internal quotation marks and citation omitted). "A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Marshall*

Naify Revocable Trust v. United States, 672 F.3d 620, 623 (9th Cir. 2012) (quoting *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)).

"Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (citation omitted).

A. State Action Under § 1983

Union Defendants move for judgment on the pleadings as to Counts I and II on the grounds that SEIU 775 and SEIU International are not state actors and their actions do not constitute state action. ECF No. 22 at 12–17. Count I of the Complaint alleges Union Defendants, acting under the color of state law, violated Plaintiff's First and Fourteenth Amendment rights under 42 U.S.C. § 1983 by forging her signature on union membership cards. ECF No. 1 at 15–17, ¶¶ 103–115. Count II of the Complaint alleges Union Defendants participated in a dues extraction scheme with State Defendants to violate Plaintiff's First and Fourteenth Amendment rights. *Id.* at 17–18, ¶¶ 116–123.

To state a claim under § 1983, Plaintiff must allege the Union Defendants "acted under color of state law" to deprive Plaintiff of a right secured by the Constitution. *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020). Because Union Defendants are private actors, the Court must determine whether "the challenged conduct that caused the alleged constitutional deprivation [is] fairly attributable to the state." *Id.* at 946. The Ninth Circuit employs a two-prong analysis to determine whether the conduct is state action. *Id*. Under the

"state policy" prong, the court will 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 state or by a person for whom the State is responsible." *Id*. (citing *Naoko Ohno v. Uko Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013)) (internal quotations omitted); *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989). Under the "state actor" prong, the court will consider "whether the party charged with the deprivation could be described in all fairness as a state actor." *Belgau,* 975 F.3d at 946 (quoting *United Steelworkers of Am. V. Sadlowski*, 457 U.S. 102, 121 n.16 (1982)); *Collins*, 878 F.2d at 1151.

As to the first prong, where a purported state actor acts contrary to, or misuses, a state law, the conduct cannot be attributed to any governmental decision. *Lugar v. Edmondson Oil Co., Inc*., 457 U.S. 922, 941 (1982). Here, Plaintiff claims that by following the state law that permits the withdrawal of dues from union members' paychecks, Union Defendants exploited Plaintiff's First and Fourteenth Amendment rights. ECF No. 25 at 14. Plaintiff's argument is unpersuasive. The crux of Plaintiff's litigation is the use of her forged signature to withdraw union dues. State law permits the withdrawal of union membership dues upon authorization from union members; it does not permit unions to forge signatures. RCW 41.56.113; 41.80.100. Thus, it cannot be fairly said that Union Defendants were acting pursuant to a state policy when they forged Plaintiff's signature and impermissibly deducted dues payments from Plaintiff's paychecks. Plaintiff has failed to allege any additional facts that would permit the Court to infer Union Defendants were acting pursuant to some other state policy when

they authorized dues withdrawals based on a forged signature.

Plaintiff's claims also fail to satisfy the state actor prong of the analysis. Plaintiff alleges Union Defendants acted jointly with State Defendants to violate her constitutional rights. ECF No. 25 at 15. In evaluating this prong, the Ninth Circuit considers whether "the government either (1) affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, or (2) otherwise has so far insinuated itself into a position of interdependence with the non-governmental party, that it is recognized as a joint participant in the challenged activity." *Belgau*, 975 F.3d at 947 (internal quotations omitted). Neither situation is present here.

First, Washington State does not participate in the parties' bargaining process. "Although Washington was required to enforce the membership agreement by state law, it had no say in shaping the terms of that agreement." *Id*. Thus, Washington's role in the dues deduction process is purely ministerial. Merely carrying out the administrative tasks of the agreement does not render Washington State and Union Defendants joint actors. *Id*. at 948. Moreover, Washington State has not insinuated itself into a position of interdependence with Union Defendants. "A merely contractual relationship between the government and the non-governmental party does not support joint action; there must be a symbiotic relationship of mutual benefit and substantial degree of cooperative action." *Id*. (internal quotations omitted). Washington receives no benefit from its administrative role; all dues collected from union members' pay checks are passed to Union Defendants and the State keeps nothing for itself. Finally, Washington State and Union Defendants

sit on opposite sides of the bargaining table; such an adversarial relationship can hardly be categorized as having a substantial degree of cooperation. *See Belgau,* 975 F.3d at 948. Plaintiff has not alleged facts from which the Court can infer that Union Defendants were state actors in the dues deduction process.

Plaintiff has failed to establish Union Defendants' actions are attributable to a state policy or that Unions Defendants acted as state actors. Accordingly, Union Defendants are entitled to judgment on the pleadings as to Counts I and II.

B. RICO

Union Defendants move for judgment on the pleadings as to Count IV on the grounds that Plaintiff has failed to sufficiently allege either wire fraud as a predicate act or the existence of an enterprise to maintain a RICO claim. ECF No. 22 at 18. Count IV of the Complaint alleges Union Defendants violated 18 U.S.C. § 1964 by sending forged signatures through email and then deducted dues payments based on the fraudulent signatures. ECF No. 1 at 21, ¶¶ 139–160.

"The elements of a civil Racketeer Influenced and Corrupt Organization Act ("RICO") claim are as follows: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO*, 770 F.3d 834, 837 (9th Cir. 2014). The predicate act must be both the actual and proximate cause of the alleged injury. *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010). "Rule 9(b)'s requirement that '[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity'

applies to civil RICO fraud claims." *Pacific Recovery Solutions v. United Behavioral Health*, 481 F. Supp. 3d 1011, 1026 (N.D. Cal. 2020). Union Defendants argue Plaintiff has not sufficiently pleaded the predicate offense of wire fraud and the existence of an enterprise to sustain a RICO claim.

1. Wire Fraud

Wire fraud in violation of 18 U.S.C. § 1343 can serve as a predicate offense for a RICO claim. *Id.* at 1028. Wire fraud requires a showing that the defendant (1) formed a scheme to defraud, (2) used the United States wires in furtherance of the scheme, and (3) did so with a specific intent to deceive or defraud. *Id*. "Alleged violations of RICO predicated on fraudulent communications . . . are subject to Rule 9(b), which requires that the plaintiff state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Id*. (internal quotation marks omitted). Additionally, the "specific intent to deceive or defraud" requires a showing of a scheme that is "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Sanville v. Bank of American Nat. Trust & Savings Ass'n*, 18 Fed. Appx. 500, 501 (9th Cir. 2001). Intent is shown by examination of the scheme itself. *Id*.

Here, there are sufficient facts from which the Court can infer the time and place of the alleged wire fraud. *See* ECF No. 1 at 8, ¶ 53; at 11–12, ¶¶ 78–80. However, there are no facts from which the Court can infer the existence of a scheme with an intent to deceive. Plaintiff does not identify any facts indicating Union Defendants directed its employees to forge Plaintiff's signature, or that Union Defendants even knew of the alleged forgery when the membership card was transmitted. Plaintiff's argument that she cannot know this

information is irrelevant; the Rule 9(b) heightened pleading requirements apply to allegations of wire fraud. *Pacific Recovery Solutions*, 481 F. Supp. 3d at 1028. Thus, where a plaintiff fails to plead the detailed factual allegations required for a RICO claim predicated on wire fraud, as is the case here, courts will find the claim untenable.

Plaintiff's inclusion of three other instances of alleged forgery cannot save the deficiencies in the pleadings. *See* ECF No. 1 at 12–14, ¶¶ 85–102. At best,

Plaintiff describes three additional circumstances in which union employees, acting on their own accord, filled in individuals' names or signatures while conducting routine union membership solicitations. Plaintiff has not alleged any facts indicating Union Defendants directed or even knew of those alleged forgeries. Without allegations that Union Defendants participated in or directed the forgeries, the Court cannot infer the existence of a scheme with the intent to defraud. Accordingly, Plaintiff has not sufficiently pleaded the requisite facts to sustain a RICO claim predicated on wire fraud.

2. Enterprise

There are two types of associations that meet the definition of "enterprise" for the purposes of a RICO claim. *Shaw v. Nissan North America, Inc.*, 220 F. Supp. 3d 1046, 1053 (C.D. Cal. 2016). The first is comprised of legal entities, such as corporations and partnerships. *Id*. The second is an "associated-in-fact enterprise," which is defined as "any union or group of individuals associated in fact although not a legal entity." *Id*. (quoting *United States v. Turkette*, 452 U.S. 576, 581–82 (1981)). The existence of such an enterprise is established with "evidence of an ongoing organization,

formal or informal, and by evidence that the various associates function as a continuing unit." *Id*. (quoting *Boyle v. United States*, 556 U.S. 938, 946 (2009)). "An association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated within the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id*. at 1053–54. The parties here address only the purpose and relationship elements.

Courts have routinely declined to find the existence of a RICO enterprise between entities carrying out ordinary commercial activities. *See, e.g*., *Shaw*, 220 F. Supp. 3d at 1053–58; *Robins v. Global Fitness Holdings*, LLC, 838 F. Supp. 2d 631, 651–53 (N.D. Ohio 2012); *Juberlirer v. MasterCard Intern., Inc.,* 68 F. Supp. 2d 1049, 1053 (W.D. Wis. 1999); *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 400 (7th Cir. 2009). There is no consensus among courts as to which structural element of the enterprise definition must fail in order to find routine commercial activities outside the scope of RICO liability. The Ninth Circuit's analysis of the common purpose element in *Odam v. Microsoft Corporation*, 486 F.3d 541, 549 (9th Cir. 2007) is instructive. There, the common purpose of the enterprise was to increase the number of people using Microsoft's internet service by offering Best Buy customers a free MSN internet trial subscription. *Id*. at 543. When Best Buy swiped a customer's credit card during the sale of merchandise, it sent the credit card and customer information to Microsoft. *Id*. Microsoft would then create an unauthorized customer account and, if the customer did not cancel the account before the end of the trial period, Microsoft would begin billing the account without permission. *Id*. Even though the common purpose was legitimate, the means by which the purpose was

achieved were fraudulent, which supported a RICO claim. *Id*. at 543.

It appears Plaintiff attempts to describe a similar scenario. Plaintiff argues Union Defendants share a common legal purpose in withdrawing dues payments, but that fraudulent means are used to achieve that purpose. ECF No. 25 at 22. However, unlike *Odam*, where the plaintiff established a systematic scheme of creating unauthorized accounts and billings, Plaintiff here has described only four incidents of alleged fraudulent activity. Plaintiff does not assert what knowledge Union Defendants possessed of the forged signatures or that they directed employees to forge signatures to achieve a certain purpose. Setting aside Plaintiff's legal conclusions regarding the existence of an enterprise, what remains are merely allegations that Union Defendants are associated in a manner that is directly related to their business activities: collecting dues and making political contributions. *See Shaw*, 220 F. Supp. 3d at 1056. Four seemingly unrelated incidents of forged signatures are insufficient to establish the existence of a common purpose under the definition of a RICO enterprise.

The relationship element of a RICO enterprise fails for similar reasons. The Complaint alleges the fraudulent activity was carried out by SEIU 775's employees; SEIU International is mentioned only in a cursory manner. See ECF Nos. 1 at 22, ¶¶ 143–44; 25 at 22–23 n.1. Plaintiff does not explain what role SEIU International played in the enterprise, nor does she allege there was an explicit agreement between Union Defendants to use forged signatures to obtain dues deductions. "[A]llegations that several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates are not

enough to show membership in an enterprise." *In re WellPoint, Inc. Out-ofNetwork UCR Rates Litig.*, 865 F. Supp. 2d 1002, 1033 (C.D. Cal. 2011) (quoting *Boyle*, 556 U.S. at 947 n.4) (internal quotations marks omitted)). The independent actions of a few employees are insufficient to support the existence of a relationship between Union Defendants for the purposes of a RICO enterprise.

The Court finds Plaintiff has failed to sufficiently plead the predicate offense of wire fraud and the existence of an enterprise to sustain a RICO claim. Consequently, Union Defendants are entitled to judgment on the pleadings as to Count IV. The claims are dismissed with prejudice, as amendment would be futile.

C. Supplemental Jurisdiction

A federal court has supplemental jurisdiction over pendent state law claims to the extent they are "so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy . . . ." 28 U.S.C. § 1367(a). "A state law claim is part of the same case or controversy when it shares a 'common nucleus of operative fact' with the federal claims and the state and federal claims would normally be tried together." *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004) (citation omitted). Once the court acquires supplemental jurisdiction over state law claims, § 1367(c) provides that the court may decline to exercise jurisdiction if

> (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction,

> or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Indeed, "[i]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988), *superseded on other grounds by statute as stated in Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010); *see also Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc).

Having dismissed all federal law claims in this matter, the Court declines to exercise jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3); *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) (finding that a district court did not abuse its discretion by declining to exercise supplemental jurisdiction over the remaining state law claims when federal claims were dismissed). The parties will not be prejudiced by the Court's decision to decline jurisdiction. Formal discovery in this federal case has not begun, so if Plaintiff chooses to refile her state law claims in state court, she will not be prejudiced. Further, the period of limitation for Plaintiff's remaining state law claims is tolled for thirty days after the claims are dismissed unless Washington law provides for a longer tolling period. *See* 28 U.S.C. § 1367(d).

ACCORDINGLY, IT IS HEREBY ORDERED:

1. State Defendants' Motion to Dismiss (ECF No. 20) is **GRANTED**. The claims asserted against Defendants Don Clintsman and Governor Jay Inslee in Plaintiff's Complaint (ECF No. 1) are **DISMISSED with prejudice**.

2. Union Defendants' Motion for Judgment on the Pleadings (ECF No. 22) is **GRANTED**. The claims asserted against Service Employees International Union Local 775 and Service Employees International Union are **DISMISSED with prejudice**.

3. Any remaining state law claims are **DISMISSED without prejudice**. The District Court Executive is directed to enter this Order, enter judgment accordingly, furnish copies to counsel, and **CLOSE** the file.

DATED March 4, 2022.

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

APPENDIX G

United States Constitution Amendment I

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

APPENDIX H

Cal. Gov't Code § 1153

The Controller shall provide for the administration of payroll deductions as set forth in Sections 1151, 1151.5, and 1152, salary reductions pursuant to Section 12420.2, and may establish, by rule or regulation, procedures for that purpose.

In administering these programs the Controller shall:

(a) Make, cancel, or change a deduction or reduction at the request of the person or organization authorized to receive the deduction or reduction. All requests shall be made on forms approved by the Controller.

(b) Obtain a certification from any state agency, employee organization, or business entity requesting a deduction or reduction that they have and will maintain an authorization, signed by the individual from whose salary or wages the deduction or reduction is to be made. An employee organization that certifies that it has and will maintain individual employee authorizations shall not be required to provide a copy of an individual authorization to the Controller unless a dispute arises about the existence or terms of the authorization.

(c) Provide for an agreement from individuals, organizations, and business entities receiving services to relieve the state, its officers and employees, of any liability that may result from making, canceling, or changing requested deductions or reductions. However, no financial institution receiving a payroll service pursuant to this section shall be required to reimburse the state for any error in the payroll service received by that financial institution after 90 days from the

month in which the payroll service was deducted from an individual's paycheck.

(d) Determine the cost of performing the requested service and collect that cost from the organization, entity, or individual requesting or authorizing the service. Services requested which are incidental, but not necessary, to making the deduction may be performed at the Controller's discretion with any additional cost to be paid by the requester. At least 30 days prior to implementation of any adjustment of employee costs pursuant to Section 12420.2, the Controller shall notify in writing any affected employee organization.

(e) Prior to making a deduction for an employee organization or a bona fide association, determine that the organization or association has been recognized, certified, or registered by the appropriate authority.

(f) Decline to make a deduction for any individual, organization, or entity if the Controller determines that it is not administratively feasible or practical to make the deduction or if the Controller determines that the individual, organization, or entity requesting or receiving the deduction has failed to comply with any statute, rule, regulation, or procedure for the administration of deductions.

(g) After receiving notification from an employee organization that it possesses a written authorization for deduction, commence the first deduction in the next pay period after the Controller receives the notification. The employee organization shall indemnify the Controller for any claims made by the employee for deductions made in reliance on that notification.

(h) Make, cancel, or change a deduction or reduction not later than the month subsequent to the month in which the request is received, except that a deduction

for an employee organization may be revoked only pursuant to the terms of the employee's written authorization. Employee requests to cancel or change deductions for employee organizations shall be directed to the employee organization, rather than to the Controller. The employee organization shall be responsible for processing these requests. The Controller shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed, and the employee organization shall indemnify the Controller for any claims made by the employee for deductions made in reliance on that information. Except as provided in subdivision (c), all cancellations or changes shall be effective when made by the Controller.

(i) At the request of a state agency, transfer employee deduction authorization for a state-sponsored benefit program from one provider to another if the benefit and the employee contribution remain substantially the same. Notice of the transfer shall be given by the Controller to all affected employees.

APPENDIX I

Wash. Rev. Code 41.56.113

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

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

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

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

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

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

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

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

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

(c)(i) The initial additional costs to the state in making deductions from the payments to individual

providers, family child care providers, adult family home providers, and language access providers under this section shall be negotiated, agreed upon in advance, and reimbursed to the state by the exclusive bargaining representative.

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

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

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

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

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