No. _____

In the Supreme Court of the United States

TERRY KLEE,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 51, an employee organization; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, a public agency; BETTY T. YEE, in her official capacity as California State Controller; ROB BONTA, in his official capacity as Attorney General of California,

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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QUESTION PRESENTED

In *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018), this Court held that public-sector employees have a First Amendment right to choose not to pay dues to public-sector unions. Ever since, unions and recalcitrant states have searched for creative ways around that decision. This case involves the latest such effort. California law provides that the state must deduct union dues from an employee's wages upon certification from the union that the employee is a union member, and that the deductions cannot stop until the union informs the state that the employee opted out. But unions are not quick to share news of resignations with the state, as this case demonstrates. Petitioner told his union to cancel his membership in December 2019, but the union did not do so until nearly two years later, after extracting nearly $1,000 more in union dues. Petitioner therefore sued the union (and state officials) under 42 U.S.C. §1983 to vindicate his First Amendment right and recover damages. But in the decision below, the Ninth Circuit held that petitioner has no remedy, as the union purportedly did not act "under color of state law" when invoking the aid of state officials to seize his wages (and the state officials enjoy sovereign immunity). That decision renders *Janus* rights nugatory, conflicts with this Court's state-action precedent, and entrenches a circuit split.

The question presented is:

Whether a public-sector union that invokes the aid of state officials to deduct union dues from a nonconsenting public-sector employee acts "under color of law" for purposes of 42 U.S.C. §1983.

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 14.1(b)(i), petitioner states that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner (plaintiff-appellant below) is Terry Klee.

Respondents (defendants-appellees below) are International Union of Operating Engineers, Local 51, an employee organization; the California Department of Corrections and Rehabilitation, a public agency; Betty T. Yee, in her official capacity as California State Controller; and Rob Bonta, in his official capacity as Attorney General of California.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit:

Terry Klee v. Int'l Union of Operating Eng'rs, Local 501, No. 2:22-cv-00148-JAK-MRW (C.D. Cal.) (Oct. 2, 2023);

Terry Klee v. Int'l Union of Operating Eng'rs, Local 501, No. 23-3304 (9th Cir.) (Jan. 21, 2025).

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PETITION FOR WRIT OF CERTIORARI

This case concerns the latest effort to undermine this Court's decision in *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018). In *Janus*, this Court held that public-sector employees have a First Amendment right to decline to pay membership fees to public-sector unions that fund union speech with which the employee disagrees. In the years since, unions and certain recalcitrant states have searched for creative ways to countermand that decision. The Ninth Circuit embraced one such gambit in the decision below, which threatens to make the constitutional right enshrined in *Janus* illusory.

Petitioner is a California state employee who joined his public-sector union pre-*Janus*. Under California law, petitioner's union had the authority to require state officials to deduct membership dues from his paychecks and to remit them to the union to fund union activities. Post-*Janus*, however, petitioner decided that he no longer wished to subsidize the union's objectionable speech and therefore sought to exercise his First Amendment right to resign his union membership. By design, California law does not make that process easy. Even if an employee provides proof to the state that he has left the union, California law still requires the state to continue deducting dues payments. That is because California has delegated authority to the union itself to coordinate the opt-out process. Thus, employees are forced to provide any resignation decision to the union; the union is in turn supposed to inform the state of that decision; and only then may the state stop deducting dues payments from the employee's paychecks.

Unsurprisingly, unions are reluctant to release dues-paying members from their membership rolls and thus are not shy about giving members the runaround when they hear that they wish to leave. This case is a prime example. Although petitioner instructed his union in December 2019 to cancel his membership, the union stalled and did not follow through until November 2021—after petitioner had sent four official opt-out letters to the union and sent numerous other emails to union officials. During that nearly two-year stretch, the union enlisted state support to seize union dues from petitioner's paychecks and ultimately succeeded in pocketing close to $1,000—all during a time of rampant inflation wrought by the COVID-19 pandemic.

After finally breaking free from the union, petitioner filed suit under 42 U.S.C. §1983 against the union (as well as certain state officials) seeking damages and to vindicate the First Amendment right that this Court recognized in *Janus*. But the district court dismissed his complaint, and the Ninth Circuit affirmed in the decision below. According to the court of appeals, petitioner has no recourse against the union for the constitutional violation because the union purportedly did not engage in the state action that §1983 requires when the union took advantage of *state* procedures and *invoked the aid of state officials* to extract union dues from petitioner for 22 months. And because the state officials are separately shielded by sovereign immunity, the court concluded that petitioner is simply out of luck.

The Ninth Circuit's decision is as wrong as it is dangerous. This Court's precedent is clear that a

§1983 plaintiff may file suit against a private party that jointly participates with state officials in the seizure of disputed property. That perfectly describes what the union did here. It also perfectly describes the union behavior in the entire line of this Court's cases culminating with *Janus*, which explains why this Court never questioned whether unions qualified as §1983 state actors in any of them. The Ninth Circuit's contrary conclusion cannot be resolved with all manner of this Court's precedent.

That millions of public-sector employees in California and elsewhere in the Ninth Circuit are at risk of losing their *Janus* rights is reason enough to grant review, but there is more. In contrast to the court of appeals below, the Seventh Circuit has explicitly held that §1983's state-action requirement is readily satisfied in circumstances just like those here. And while the Sixth and the Eighth Circuits have adopted the Ninth Circuit's cramped understanding of state action, that multi-circuit split only heightens the need for this Court's intervention. Indeed, absent certiorari, *Janus* rights will, by state design, remain available to numerous public-sector employees only at the grace of unions, which have consistently demonstrated that they will exploit loopholes to squash them. This Court should stop these efforts to evade this Court's precedent in their tracks. The Court should grant certiorari and confirm that *Janus* did not safeguard an impotent constitutional right.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 2025 WL 252478 and reproduced at App.1-7. The district

court's decision granting respondents' motion to dismiss is unreported but reproduced at App.8-44.

JURISDICTION

The Ninth Circuit issued its opinion on January 21, 2025. Justice Kagan extended the deadline to file a petition for writ of certiorari to and including June 20, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution, *see* U.S. Const. amend. I, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech …

Section 1983 of Title 42, *see* 42 U.S.C. §1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

The relevant provision of the California Government Code, *see* Cal. Gov't Code §§1152, 1153, are reproduced at App.46-49.

STATEMENT OF THE CASE

A. Federal Legal Framework

"Section 1983 provides a cause of action against any person acting under color of state law who 'subjects' a person or 'causes [a person] to be subjected … to the deprivation of any rights, privileges, or immunities secured by the Constitution." *Vega v. Tekoh*, 597 U.S. 134, 141 (2022). The rights secured by the Constitution include the rights protected by the First Amendment, which provides that the government "shall make no law … abridging the freedom of speech." U.S. Const. amend. I. As this Court has explained, the "freedom of speech" protected by the First Amendment "necessarily compris[es] the decision of both what to say and *what not to say*." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis added). The latter constitutional protection featured prominently in the line of this Court's cases that ended with *Janus*.

Beginning in the 1970s, this Court sanctioned states' use of so-called agency-shop arrangements. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Under an agency-shop arrangement, the state designates a union as the exclusive bargaining representative for state employees. And until very recently, the state employer could arrange for *all employees* to pay agency fees to the union—regardless whether they had joined the union—to cover the costs of the union's representation and bargaining activities. *See id.* at 212.

From the start, the Court recognized that this compelled-payment structure squarely implicated

state employees' First Amendment rights, as the monies collected could subsidize union political activities with which the non-members disagreed. *See id.* at 234-35. *Abood* nonetheless held that the mandatory and nonconsensual payment of agency fees did not violate First Amendment, at least so long as the union used the monies collected from non-members solely to fund activities "germane to its duties as collective-bargaining representative." *Id.* at 235.

Over time, however, the Court began to question *Abood*'s underpinnings, and it expressed "misgivings" about that decision in a series of cases. *Janus*, 585 U.S. at 927; *see Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *cf. Friedrichs v. Cal. Tchrs. Ass'n*, 578 U.S. 1 (2016) (per curiam). Notably, in each of them, public-sector employees pursued relief against union defendants under §1983, and this Court never paused to question whether those unions qualified as proper state-actor parties under the statute. *See* Compl., *Knox v. Westly*, No. 05-cv-2198 (E.D. Cal. filed Nov. 1, 2005), Dkt.1; First Am. Compl., *Riffey v. Rauner*, No. 10-cv-2477 (N.D. Ill. filed May 20, 2015), Dkt.79; Compl., *Friedrichs v. Cal. Tchrs. Ass'n*, No. 13-cv-676 (C.D. Cal. filed Apr. 30, 2013), Dkt.1.

In 2018, this Court closed the books on *Abood* for good in *Janus*—another §1983 action involving a union defendant. *See* Second Am. Compl., *Janus v. AFSCME, Council 31*, No. 15-cv-1235 (N.D. Ill. filed July 21, 2016), Dkt.145. In *Janus*, the Court observed that *Abood* had created "practical problems" in distinguishing between a union's collective-bargaining

efforts and a union's ideological activities. 585 U.S. at 886. And the difficulty in identifying the dividing line between the two led to significant "abuse" of non-members' constitutional rights, *id.*, as the "compelled subsidization of private speech seriously impinges on First Amendment rights," *id.* at 894. Given the absence of a compelling justification for forcing non-members to effectively voice support for the unions' activities by subsidizing their objectionable speech, *Janus* overruled *Abood*. *See id.* at 895-901, 916. And the Court emphatically proclaimed the scope of the First Amendment's protections in this area: States and public-sector unions are prohibited from "extract[ing]" fees "from nonconsenting employees," and "[n]either an agency fee nor any other payment to [a] union may be deducted from a nonmember's wages … unless the employee affirmatively consents to pay." *Id.* at 929-30. The upshot of *Janus* is that "nonconsenting employees" are (at least in theory) now free to exercise their First Amendment "right to eschew association for expressive purposes" and to prevent the deduction of union fees from their wages. *Id.* at 892, 929-30.

B. State Legal Framework & Proceedings Below

1. Petitioner Terry Klee is an employee at the California Department of Correction and Rehabilitation (CDCR) whose job responsibilities include supervising inmates working in the California prison system. *See* App.11. Since petitioner began working for CDCR in 2010, California has recognized the International Union of Operating Engineers (IUOE) as the employee organization exclusively

authorized to represent CDCR employees when bargaining with the state, *see* App.11—no matter whether those employees joined the union as members or not, *see* Cal. Gov't Code §1150(c).

That state recognition gave IUOE a privileged position as a matter of California law. When a state employee is a member of an employee organization like IUOE, the union is empowered to require the state to make deductions from the employee's wages and remit those deductions to the union to cover membership dues. *See id.* §1152 ("Deductions may be requested by employee organizations … from the salaries and wages of their members, and public employers shall honor these requests[.]"). To accomplish that objective, the union simply needs to provide the State Controller with a "certification" that it has "authorization[] signed by the individual from whose salary or wages the deduction or reduction is to be made." *Id.* §1153(b).

The union is also the gatekeeper on the back end of the process—*i.e.*, when an employee wishes to leave the union and stop paying union dues. California law states that "[e]mployee requests to cancel or change deductions for employee organizations shall be directed to the employee organization, rather than to the Controller," and that "[t]he employee organization shall be responsible for processing these requests." *Id.* §1153(h). It also states that "[t]he Controller shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed." *Id.* In other words, California law gives IUOE and other similar employee organizations pride of place: By

statute, they have sole authority to decide whether an employee's paychecks are subject to dues deductions.

Petitioner joined IUOE soon after he began working at CDCR in 2010, but he ultimately decided to terminate his membership in 2019 after *Janus*. *See* App.11. That same year, however, petitioner found himself embroiled in a dispute with an inmate who had exhibited "bad behavior." App.11. The inmate filed an administrative complaint against petitioner, and IUOE officials represented that they could not help petitioner with that proceeding if he did not have a membership agreement with the union. *See* App.11. Petitioner thus reluctantly rejoined IUOE as a member, and IUOE invoked the state procedures to initiate dues payments from petitioner's paychecks. *See* App.11-12.

The rekindled relationship did not last long. "Although [petitioner] contacted IUOE and requested IUOE's assistance on an urgent matter, it 'never responded to any of those inquiries.'" App.13. "[F]rustrated" with IUOE's stonewalling, petitioner resolved to leave IUOE a second and final time. App.13. To that end, on December 30, 2019, he mailed a formal letter to IUOE announcing his resignation from the union, explaining that he "no longer wish[ed] to pay dues or fees to the union." App.13. Petitioner also stated that, if IUOE "refuse[d] to accept [his] resignation at this time and/or refuse[d] to cease charging [him] dues and/or fees," IUOE should "hold this letter until such time as [IUOE] believe[d] that [he] c[ould] resign effectively, and honor this letter and [his] resignation and revocation request at that time." App.13. The same day, petitioner emailed the

letter to four IUOE officials, and he sent another email to one of them the next day asking IUOE to process his resignation request "ASAP." App.14. After a week of radio silence, on January 7, 2020, petitioner followed up with two IUOE officials—and then again on January 10, 2020, when he emphasized his desire to "opt[] out asap." App.14. After that last request, an IUOE official finally informed petitioner that his "request ha[d] been received and w[ould] be processed accordingly." App.14.

But nothing actually happened, and "[u]nion dues were still deducted from [petitioner's] pay during the spring and summer of 2020." App.14. Accordingly, in August and September 2020, petitioner began the process of contacting IUOE officials all over again—and generally received no responses at those times either. *See* App.14-15. Petitioner thus submitted a second and "substantially identical" formal opt-out letter on November 10, 2020, and followed up with seven additional emails to IUOE officials later that month. App.15. In December 2020, an IUOE official finally responded to petitioner, but not with the news that he wanted to hear: The message stated that the union had deemed petitioner's opt-out request not "effective" because petitioner purportedly made his request "outside [his] agreed upon cancel[l]ation window." App.15.

The calendar flipped to 2021, and petitioner decided to send a third formal opt-out letter in January of that year, which made clear that his "objection" to IUOE membership "[wa]s permanent and continuing in nature and should be honored for as long as [he] remain[s] in the bargaining unit." App.15-

16. Petitioner received a prompt response stating that his "request cannot be processed as the request is outside of the appropriate time to submit such a request" and that, as a result, IUOE "consider[ed] th[e] matter closed." App.16.

Petitioner did not share that understanding and thus requested assistance from IUOE in February 2021 to effectuate his constitutional right not to subsidize the union. App.16. But IUOE did not respond to that entreaty, forcing petitioner to go it alone again. In October 2021, petitioner sent a fourth formal opt-out letter to IUOE, which again "request[ed] that the unauthorized deductions from his lawfully earned wages immediately cease." App.16. At long last, IUOE allowed petitioner to leave the union in November 2021—nearly two years after his initial opt-out request and only after the union had invoked state assistance to obtain $924.04 in additional dues payments from petitioner during the peak of the COVID-19 pandemic. *See* App.16-17.

2. Petitioner filed this §1983 action in January 2022 against IUOE and certain state officials, including the State Controller, alleging in pertinent part that California's scheme of permitting dues to continue to be deducted from his paycheck notwithstanding his request to resign from the union violated his First Amendment rights under *Janus* and entitled him to damages. *See* App.10, 16-17.

Petitioner's claims faced an uphill battle from the start due to a pair of adverse Ninth Circuit decisions: *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), and *Wright v. SEIU*, 48 F.4th 1112 (9th Cir. 2022). In *Belgau*, several public-sector employees challenged a

joint enterprise between the state and a union in collecting dues from the employees' wages for months after they had resigned from the union. 975 F.3d at 945-46. The Ninth Circuit concluded that the employees' §1983 claims against the union failed for want of state action, attributing the harm solely to the terms of the union membership agreement and downplaying the state's role as the mere "ministerial processing of payroll deductions." *Id.* at 947-48.

Wright reaffirmed *Belgau*. In *Wright*, a public-sector employee challenged the state's deduction of dues based on an authorization agreement that the union had allegedly forged. 48 F.4th at 1122. Like *Belgau*, *Wright* concluded that the alleged harm arose from private behavior (*i.e.*, the alleged forgery), not the state's withholding of union dues based on that forgery. *Id.* at 1123. Although the court of appeals recognized that the state needed to take the affirmative step of deducting dues to facilitate the union's collection of fraudulently requested monies, it determined that the state did so with "mandatory indifference," which purportedly absolved the state of responsibility as a joint actor. *Id.* at 1123-24.

In light of these cases, the district court dismissed petitioner's complaint across the board. After finding the state officials insulated by sovereign immunity, the court followed the Ninth Circuit's lead in *Belgau* and *Wright* and dismissed petitioner's claims against IUOE on the theory that the union did not engage in "state action"—and thus petitioner could not satisfy one of the prerequisites for a §1983 action—when the union instructed the state to deduct fees from petitioner's paychecks. App.34-37. Based on *Belgau*

and *Wright*, the court held that, "even when the union allegedly takes advantage of a state procedure to take amounts deducted from a worker's paychecks without his or her consent, that union is not acting 'under color of law.'" App.37 (citing *Belgau*); *see also* App.40 (citing *Wright*).

3. Relying on the same string of recent precedent, the Ninth Circuit affirmed. *See* App.2-3. In addition to agreeing with the district court that petitioner could not obtain relief from any state official due to sovereign immunity, the court agreed that petitioner's argument that IUOE acted "under color of state law" is foreclosed by *Belgau* and *Wright*. *See* App.2-6.

The Ninth Circuit explained that, "[t]o establish that a private actor acted under color of state law, we employ a two-prong inquiry comprised of 'the state policy requirement' and 'the state actor requirement.'" App.3. The court observed that the state policy requirement assesses whether "the 'source of the alleged constitutional harm' is … a state statute or policy." App.3. Although the court recognized that, "[u]nder California law," the state "must" get "certification" from the union before making dues deductions, it found that state statutory scheme insufficient to satisfy the state policy requirement, on the theory that the alleged constitutional harm here flowed from a "private" "dispute over the terms of Union membership." App.3. Turning to the state actor requirement, the court explained that this second prong examines "whether the party charged with the deprivation could be described in all fairness as a state actor." App.4. The court answered that question in the negative too, positing that there was

no "joint action" between IUOE and the state when they worked together to deduct money from petitioner's paychecks and send it to IUOE. App.4-5.

REASONS FOR GRANTING THE PETITION

Janus established that a public-sector employee has a First Amendment right to opt out of a union and made clear beyond peradventure that states may not extract dues payments over an employee's objection. But through a series of cases, the Ninth Circuit has repeatedly sanctioned state laws that give unions, not employees, control over whether a state will extract dues from a state employee's paycheck—and held that unions can simply ignore objecting employees' opt-out requests without so much as risking liability under §1983 (all while state officials avoid liability due to sovereign immunity). It is hard to imagine that this Court went to the trouble of overruling *Abood* in *Janus* just to produce a First Amendment right that unions and states can thwart so easily. Certiorari is amply warranted.

The Ninth Circuit's rule that unions are not state actors when they invoke state laws designed to benefit them—and them alone—to get the state to extract fees on their behalf is profoundly wrong. This Court's precedent is clear that private parties can be state actors for §1983 purposes, and it is equally clear that private parties surmount the state-actor bar if they invoke the aid of state officials to take advantage of state-created procedures to seize another person's property. That describes what the union here did here to a T. The court of appeals acknowledged as much, but it nevertheless found that the union did not engage in state action under Ninth Circuit precedent.

That may explain the court's error, but it does not excuse it. To the contrary, that the Ninth Circuit's precedent is so far out of step with this Court's teachings underscores the need for intervention.

That is particularly true given that other courts of appeals have followed the Ninth Circuit's lead and created a circuit split along the way. Both the Sixth and Eighth Circuits have held that unions that utilize state machinery to extract union dues from nonconsenting employees are not proper defendants under §1983 due to the purported absence of state action. By contrast, the Seventh Circuit—in the remand proceedings in *Janus* itself—has reached the opposite conclusion, holding that unions are obviously engaged in state action in those circumstances.

The Court should not allow that circuit split to fester. Indeed, if the approach embraced by the Ninth Circuit is permitted to remain standing, it will effectively render the First Amendment right vindicated by *Janus* a dead letter in states that let unions control the opt-out process. And as this case and others prove, unions do not hesitate to neuter *Janus* when given the chance. It is time for this Court to put an end to this mischief once and for all, and it should do so in this case, where the state-action question was thoroughly litigated and outcome-determinative in the proceedings below.

I. The Ninth Circuit's Precedent Is Plainly Wrong.

This Court has resolved a number of §1983 actions in which plaintiffs sued union defendants on the ground that state-facilitated union efforts to collect fees from objecting employees violated the First

Amendment. *See, e.g.*, *Janus*, 585 U.S. 878; *Friedrichs*, 578 U.S. 1 (per curiam); *Harris*, 573 U.S. 616; *Knox*, 567 U.S. 298. The Court has never paused to consider whether the unions qualified as state actors under §1983, for obvious reason: They plainly do. The same goes for IUOE in this case, and the Ninth Circuit's contrary conclusion is plainly wrong.

1. Section 1983 authorizes private parties to bring a cause of action against "[e]very person" who causes a deprivation of a right secured by the Constitution when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U.S.C. §1983. As that text demonstrates, §1983 "does not require that the defendant be an officer of the State." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). It requires only a defendant who is a "person," and it is firmly established that "[p]rivate persons" can "act[] 'under color' of law for purposes of the statute." *United States v. Price*, 383 U.S. 787, 794 (1966); *see Lindke v. Freed*, 601 U.S. 187, 197 (2024) ("Private parties can act with the authority of the State.").

The basic question when determining whether a private party's conduct amounts to state action is whether "the deprivation of a federal right [can] be fairly attributable to the State." *Lugar v. Edmondson Oil, Co.*, 457 U.S. 922, 937 (1982); *see Filarsky v. Delia*, 566 U.S. 377, 383 (2012) ("Anyone whose conduct is 'fairly attributable to the State' can be sued as a state actor under §1983."). That question includes two components: (1) the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or

by a person for whom the State is responsible," and (2) "the private party must have 'acted together with or … obtained significant aid from state officials' or engaged in conduct 'otherwise chargeable to the State.'" *Wyatt v. Cole*, 504 U.S. 158, 162 (1992).

This Court's decision in *Lugar v. Edmondson Oil, Co.* exemplifies how courts are supposed to apply this test. *Lugar* considered the state-action question in the context of a due-process challenge to a state's procedure allowing private parties to obtain prejudgment attachments. *See* 457 U.S. at 924-25. The petitioner (Lugar), which operated a Virginia truck stop, owed money to its supplier (Edmondson), and Edmondson sued and invoked a Virginia statute, *see* Va. Code Ann. §8.01-533, to seek prejudgment attachment of some of Lugar's property. *See Lugar*, 457 U.S. at 924. In response, a state-court clerk issued, and a county sheriff executed, a writ of attachment that "effectively sequestered [Lugar's] property." *Id.* at 924-25. A little over a month later, however, a judge "ordered the attachment dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition," which prompted Lugar to file a §1983 action against Edmondson contending that Edmondson "had acted jointly with the State to deprive him of his property without due process of law." *Id.* at 925.

This Court held that Lugar "was deprived of his property through state action." *Id.* at 942. The "procedural scheme created by the statute," the Court explained, is "obviously … the product of state action." *Id.* at 941. And Edmondson had "invok[ed] the aid of state officials to take advantage of state-created

attachment procedures." *Id.* at 942. "[T]his is sufficient" to satisfy §1983, the Court concluded, as "we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor.'" *Id.* at 941-42; *see also, e.g.*, *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486-87 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute.").

That should have made this a straightforward case. The mechanism by which the California State Controller deducted dues from petitioner's paychecks between December 2019 and November 2021—*viz.*, California Government Code §§1152-53—is indisputably a "procedural scheme created by … statute" that is "obviously … the product of state action." *Lugar*, 457 U.S. at 941. And while IUOE conceivably could have chosen private means to collect dues from petitioner (*e.g.*, by asking him to write a check after getting paid), IUOE instead chose to enlist state support to accomplish that objective—namely, by providing a "notification" to the state that it should proceed with dues deductions given petitioner's purported "authorization" that the state should do so. Cal. Gov't Code §1153(g).

That "invo[cation] [of] the aid of state officials" to effect the "seizure of [petitioner's] property"—*i.e.*, petitioner's money—is more than "sufficient" to

establish state action. *Lugar*, 457 U.S. at 942; *see also Tulsa Pro. Collection Servs.*, 485 U.S. at 486-87 (holding that "significant" assistance of state officials occurred because without the "involvement" of the probate court, the statutory regime that the private party invoked would "never [be] activated"); *Kolinske v. Lubbers*, 712 F.2d 471, 479 (D.C. Cir. 1983) ("The decisive factor in [*Lugar*] … was whether the state was directly involved in the procedure by which [the] private [party] protected its interest."). After all, the "claimed deprivation" of petitioner's constitutional rights "resulted from the exercise of a right or privilege having its source in state authority" petitioner challenges, and "the challenged conduct" cannot plausibly be said to be "in no way dependent on state authority." *Lindke*, 601 U.S. at 198-99.

2. The Ninth Circuit's contrary—and cursory—reasoning does not withstand scrutiny. The court of appeals stated that "the state statutory scheme 'does not create a "right or privilege" in [the union] to direct the State's deductions of union dues'" because, "[u]nder California law, the State Controller makes deductions at the request of the Union" and "must first get certification from the Union that those individuals whose paychecks are to be deducted authorized the deductions." App.3. That is nonsensical. If state officials are prohibited from making dues deductions under the statutory scheme unless and until an employee organization like IUOE tells them to do so, it strains credulity to describe the statutory scheme as anything other than one that creates a right or privilege in the union to direct the state's deductions of union dues. Indeed, the California scheme here is not materially different from the Virginia scheme in

Lugar. *Lugar* involved "a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." 457 U.S. at 942. This case involves a system where state officials will remit union dues on the *ex parte* notification of one party to a private union agreement. This Court concluded that the constitutional deprivation at issue in the former resulted from "the exercise of a right or privilege having its source in state authority." *Id.* at 939. There is no reason in law or logic for a different conclusion here.

The Ninth Circuit seemed to think otherwise because, "[a]t bottom, [petitioner] challenges the Union's refusal to let him leave," which it tried to reduce to a mere "dispute over the terms of Union membership." App.3. But petitioner's issue is not just with IUOE's refusal to let him leave; it is with California's legal regime, which, by giving *the union* control over who must pay dues, "authorized the confiscation of [his] lawfully earned wages without his affirmative consent." D.Ct.Dkt.1, at 15 ¶76; *see also* CA9.Dkt.8.1, at 41-43. And the court wholly ignored that IUOE's state-sanctioned "refusal to let him leave" resulted in the state-facilitated seizure of nearly $1,000 that rightfully belonged to petitioner and that the union in turn used for politically charged union activities over petitioner's objection. *That* deprivation of a constitutional right is what petitioner challenged (as the district court recognized), *see* App.18, and *that* is just the kind of suit that petitioner may bring under §1983.

Finally, the Ninth Circuit refused to find "joint action" between IUOE and the state on the theory that

"the State 'did not 'affirm, authorize, encourage, or facilitate unconstitutional conduct' by processing dues deductions." App.4. That assertion is likewise impossible to square with *Lugar*. The state officials in *Lugar* did nothing more than "process" Edmondson's attachment request, yet this Court concluded that "[t]he Court of Appeals erred in holding that in this context 'joint participation' required something more than invoking the aid of state officials to take advantage of state-created … procedures" to "seiz[e]" the "disputed property." 457 U.S. at 941-42. That same reasoning applies with full force here.

3. It is no mystery why the decision below veered so far off course, as the cases on which it principally relied—the Ninth Circuit's earlier decisions in *Belgau* and *Wright*—are fatally flawed. In both cases, the court of appeals concluded that the unions had not exercised a right or privilege that the state had conferred on them even though both state laws at issue enabled the unions to dictate when the states deducted dues from employee wages. *See Belgau*, 975 F.3d at 946-47; *Wright*, 48 F.4th at 1122-23. Indeed, both decisions focused exclusively on the union's activities without acknowledging the essential roles that the state statutory regimes played in allowing the unions to expropriate the employees' wages without their consent.

In *Belgau*, the Ninth Circuit claimed that, because "the claimed constitutional harm is that the agreements were signed without a constitutional waiver of rights," the alleged injury resulted solely from "the particular private agreement." 975 F.3d at 947. But like the decision below, that omits the most

important detail: The union's collection efforts relied entirely on applying to the state to seize those funds over the employee's objection. *See id.* at 945-46. Such a state-facilitated procedure to confiscate employee property solely on the union's say-so is the kind of state-created privilege that satisfies this Court's state-action inquiry. *See Lugar*, 457 U.S. at 941-42.

Wright similarly went astray by focusing on the union's alleged fraudulent act, which the Ninth Circuit deemed "antithetical to any 'right or privilege created by the state.'" 48 F.4th at 1123. But *Wright*'s belief that state action had not occurred because the union's conduct amounted to "private misuse of a state statute," *id.*, is mistaken. This Court has made clear that "[*m*]*isuse* of power, possessed by virtue of state law," constitutes state action. *Lindke*, 601 U.S. at 199. And in *Wright*, the union indisputably possessed the power to demand dues deductions of the state, solely by virtue of state law. *See* 48 F.4th at 1123. The union may have misused that power, but "[e]very §1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right." *Lindke*, 601 U.S. at 200.

Belgau and *Wright* fared no better in analyzing the joint-action question. In *Belgau*, the Ninth Circuit suggested that the employee needed to point to more than the state's "ministerial processing of payroll deductions" pursuant to the employee's authorization agreements for the state to qualify as a joint actor. 975 F.3d at 948. But this Court expressly rejected that reasoning in *Lugar* when it held that state action did not "require[] something more than invoking the aid

of state officials to take advantage of state-created … procedures" to take private property. 457 U.S. at 942.

While *Belgau* believed that this Court's decision in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), supported its theory, *see* 975 F.3d at 948, it does not. *Sullivan* involved a challenge to a statutory regime that gave insurers the option to refuse to pay for benefits while a third party reviewed whether workers compensation properly covered the treatment. 526 U.S. at 45-46, 54. In that context, *Sullivan* simply observed that "[t]he most that can be said of the statutory scheme … is that whereas it previously prohibited insurers from withholding payment for disputed medical services, it no longer does so," and "[s]uch permission of a private choice cannot support a finding of state action." *Id.* at 54. In *Belgau*, by contrast, the state's dues-deduction scheme did not simply allow a "private choice." The state actively facilitated the union's request for dues and *itself* seized part of the employee's pay to deliver to the union. 975 F.3d at 945. That active participation in appropriating employee wages far more closely resembles *Lugar* than *Sullivan*.

For its part, *Wright* did not advance a distinct argument to justify its (equally faulty) conclusion that the state did not engage in joint action with the union to expropriate the employees' wages. It instead relied solely on *Belgau*'s holding that the state's "mandatory indifference" meant that no joint action could have occurred. 48 F.4th at 1123-24. But that is just another way of saying that state action requires more than the "*ex parte* application of one party to a private dispute" for the state's assistance to take the property

of the other—which, again, is the very proposition that this Court rejected in *Lugar*. 457 U.S. at 942.

In short, the Ninth Circuit's decisions in *Belgau* and *Wright* are egregiously wrong, rendering the Ninth Circuit's reliance on them here equally flawed.

II. The Decision Below Deepens A Circuit Split.

The Ninth Circuit's decision is not merely wrong; it further solidifies a circuit split on whether §1983's state-action requirement is satisfied by unions in this context. One circuit has squarely rejected the Ninth Circuit's understanding of the state-action requirement, while at least two others have followed the Ninth Circuit down the same mistaken path. Only this Court can provide uniformity.

The Seventh Circuit is on the correct side of the divide. Following *Janus*—in which this Court reversed a Seventh Circuit decision—that court on remand addressed Janus' §1983 claim seeking damages from the union for all fair-share fees that he had previously paid. *See Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019). The court made quick work of the question whether the union had "acted under color of state law" for purposes of §1983. *Id.* at 361. As it explained, "[a] procedural scheme created by … statute obviously is the product of state action" and "properly may be addressed in a section 1983 action." *Id.* And "[w]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Id.* Applying those principles, the court concluded that "AFSCME was a joint participant with the state in the agency-fee arrangement" and "a proper defendant under section 1983." *Id.* As the court put it, an Illinois

state agency "deducted fair-share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement." *Id.* "This is sufficient for the union's conduct to amount to state action." *Id.*

That is the opposite of what the Ninth Circuit held here. Just like the plaintiff in *Janus*, petitioner sought to have the money previously diverted to IUOE returned. *See* App.18. And just like the Seventh Circuit in *Janus*, the Ninth Circuit acknowledged that a California state agency had "deduct[ed]" that money "at the request of the Union," pursuant to a state law, and transferred it to the union to fund union activities. App.3. Nonetheless, the court here held that petitioner "fails to meet the state actor requirement and dismissal of his §1983 claims against the Union was appropriate," App.5. The circuit split is undeniable.

Unfortunately, the Ninth Circuit is not the only court of appeals that has issued a ruling at odds with the Seventh Circuit. The Sixth and Eighth Circuits have done the same. The Sixth Circuit confronted the state-action question in a §1983 suit against a union in *Littler v. Ohio Association of Public School Employees*, 88 F.4th 1176 (6th Cir. 2023), which involved the allegedly "wrongful deduction and retention of union dues." *Id.* at 1178. The court acknowledged that "the school district itself withheld [the plaintiff's] wages, and it did so at [the union's] request." *Id.* at 1181. But after invoking the very same Ninth Circuit precedent that the panel below found binding, the Sixth Circuit nonetheless deemed

the union's action not "fairly attributable to the state." *Id.* (citing *Wright*, 48 F.4th 1112).

The Eighth Circuit is in the same camp. In *Hoekman v. Education Minnesota*, 41 F.4th 969 (8th Cir. 2022), public employees sued a union under §1983 after the union "continued to collect full membership dues"—which "the State[] … deduct[ed]" pursuant to state law—"for some time after they attempted to resign." *Id.* at 978. But like the Ninth Circuit here and the Sixth Circuit in *Littler*, the Eighth Circuit concluded that "[t]he harm allegedly suffered … is attributable to private decisions and policies, not to the exercise of any state-created right or privilege." *Id.*; *see also Todd v. AFSCME, Council 5*, 125 F.4th 1214, 1217 (8th Cir. 2025).

As all of this underscores, petitioner could have pursued his §1983 claim against a union if only he had worked for the Illinois Department of Corrections. But he has found himself kicked out of court because he works in California—a fate that he likewise would have suffered in Ohio or Minnesota. That untenable divide cannot continue, and there is no sign that it will heal on its own. Indeed, there is certainly no sign that the Ninth Circuit will change its (mis)understanding of state action, as that court has now confronted a series of cases just like this one and has rejected all of them on state-action grounds. *See, e.g.*, *Belgau*, 975 F.3d 940; *Wright*, 48 F.4th 1122; *Cox v. Ass'n of Or. Corr. Emps., Inc.*, 2025 WL 1077133 (9th Cir. Apr. 10, 2025); *Freedom Found. v. Int'l Bhd. of Teamsters Loc. 117*, 2024 WL 5252228 (9th Cir. Dec. 31, 2024); *Craine v. AFSCME, Council 36*, 2024 WL 1405390 (9th Cir. Apr. 2, 2024). It is time for this Court to weigh in.

III. The Question Presented Is Exceptionally Important.

The importance of this case is difficult to overstate. As this Court recognized in both granting review in *Janus* and taking the rare step of overruling a 40-year-old precedent, the right of individuals to refuse to have their money put toward ends and ideas to which they object is foundational and stands at the core of the First Amendment. As Thomas Jefferson observed, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *A Bill for Establishing Religious Freedom*, *reprinted in* 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis omitted). *Janus* recognized as much and therefore held that "[s]tates and public-sector unions may no longer extract agency fees" "or any other payment" "from nonconsenting employees" to subsidize union speech with which those employees disagree. 585 U.S. at 905 n.8, 929.

The Ninth Circuit has all but eviscerated that constitutional right for all public-sector employees in California. California law provides that the state "shall rely" on public-sector unions to discern which employees have exercised their First Amendment rights under *Janus* to resign from the unions and cease associated dues payments. Cal. Gov't Code §1153(h). According to the Ninth Circuit, however, the unions are free to ignore employees' resignation requests without fear of liability under §1983 because a union's disdain for *Janus* "fails to meet the state actor requirement." App.5. And employees have no ability to seek relief against state officials either,

because they enjoy sovereign immunity. *See* App.5-6. In other words, the lesson of the decision below is that public-sector employees have a constitutional right to withdraw from a union and avoid paying union dues, but they cannot enforce that constitutional right in any way. That is astonishing, particularly in a Nation that prides itself on protecting the "general and indisputable rule" that, "where there is a legal right, there is also a legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The threat to First Amendment rights in California is sufficient to warrant this Court's intervention given the hundreds of thousands of public-sector employees that work in just that one state. *See* U.S. Census Bureau, *State Government Employment and Payroll Data: U.S. and States: 2017-2024* (Mar. 27, 2025), https://tinyurl.com/mr32a2rd. But the stakes are much higher, as the Ninth Circuit's blueprint for evading *Janus* is hardly good-for-California-only. Multiple other states have enacted regimes that effectively outsource the "protection" of the First Amendment right enshrined in *Janus* to public-sector unions. *See, e.g.*, Colo. Rev. Stat. §24-50-1111(2); Conn. Gen. Stat. §31-40bb(j); 5 Ill. Comp. Stat. Ann. 315/6(f-20); Or. Rev. Stat. §243.806(6)-(7); Wash. Rev. Code §41.56.113(1)(b)(iv)-(vi); *cf.* Del. Code Ann. tit. 19 §1304(c). Much like IUOE here, those unions are likewise unsurprisingly abusing their state-granted authority to continue to extract union dues from nonconsenting employees (with an invaluable assist from the state). In Washington, for example, unions have even gone so far as to refuse to open mail containing opt-out requests while they continue to reap dues payments with state

assistance—behavior that the Ninth Circuit has also let fly. *See Freedom Found.*, 2024 WL 5252228. And as the circuit split underscores, unions in other states are engaging in similarly mischievous behavior.

All this, moreover, is part of a much larger effort to evade *Janus*. For instance, states have enacted—again, with the Ninth Circuit's blessing—laws that effectively prohibit any private party except a public-sector union from communicating with public-sector employees, which severely inhibits the ability of employees to learn about their *Janus* rights. *See Boardman v. Inslee*, 978 F.3d 1092, 1098 (9th Cir. 2020); *cf. Freedom Found. v. Turner*, 2025 WL 752484 (9th Cir. Mar. 10, 2025). States have likewise enacted laws that prohibit public employers from informing their employees about their *Janus* rights. *See* Cal. Gov't Code §§3550, 3553. And states have enacted laws that prohibit employees from immediately pursuing relief in federal court when there are disputes concerning dues deductions. *See* Or. Rev. Stat. §243.806(10).

In short, it is no exaggeration to say that *Janus* is facing an existential threat. This Court found it necessary to grant certiorari in *Janus* to confirm that the First Amendment prohibits states from forcing public-sector employees to pay union dues. It is equally necessary to grant certiorari to confirm that this First Amendment right is actually enforceable. This is an ideal case in which to make that pronouncement. The parties vigorously litigated the state-action issue in the proceedings below. Both courts squarely addressed it. And it proved outcome-determinative in the Ninth Circuit's decision. This

Court thus will be hard-pressed to find a better opportunity to make clear that it did not put all the hard work into *Janus* for nought.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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June 20, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3304

TERRY KLEE,

Plaintiff-Appellant,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 51, et al.,

Defendants-Appellees.

Submitted: January 15, 2025*
Filed: January 21, 2025

Before: H.A. Thomas, Mendoza, and De Alba, Circuit Judges.

MEMORANDUM OPINION**

Terry Klee appeals the dismissal of his claims against the International Union of Operating Engineers, Local 501 ("the Union"), California State Controller Betty Yee, and Attorney General Rob

* 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).

Bonta. He argues that the Defendants deprived him of his First and Fourteenth Amendment rights by diverting money out of his paycheck and to the Union. We affirm.

We have jurisdiction under 28 U.S.C. § 1291. We review a grant of a motion to dismiss de novo. *Doe v. Regents of the Univ. of Cal.*, 23 F.4th 930, 935 (9th Cir. 2022). We must "accept[] as true all well-pleaded allegations of material fact and construe[] those facts in the light most favorable to the non-moving party." *Ernst & Haas Mgmt. Co. v. Hiscox, Inc.*, 23 F.4th 1195, 1199 (9th Cir. 2022) (citation omitted). "[A] district court's determination that [a] plaintiff[] lack[s] constitutional standing" is also reviewed de novo. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). The parties are familiar with the facts, so we recite only what is necessary.[1]

1. Klee's claims against the Union are brought under 42 U.S.C. § 1983. Section 1983 provides a cause of action against those who deprive others of federal rights while acting "under color of state law." *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020) (quoting *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir.

[1] The district court dismissed Klee's entire case. We limit our review to the distinct dispositive issues argued in Klee's opening brief: (1) whether the Union acted under color of state law, (2) whether he may recover nominal damages from the state officials, and (3) whether he may recover prospective relief from the state officials for an ongoing constitutional violation. Although Klee makes further argument about the nature of his claims and injuries, we discern no argument sufficiently stated relating to the dismissal of his claims against the California Department of Corrections and Rehabilitation ("CDCR") or for compensatory relief against the state officials.

1989)). To establish that a private actor acted under color of state law, we employ a two-prong inquiry comprised of "the state policy requirement" and "the state actor requirement." *Wright v. SEIU*, 48 F.4th 1112, 1121 (9th Cir. 2022).

First, the state policy requirement asks "whether the claimed constitutional deprivation resulted from the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* at 1121-22 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013) (internal quotation marks and alterations omitted)). Klee's arguments at this step are foreclosed by recent precedent. As we explained in *Wright*, the state statutory scheme "does not create a 'right or privilege' in [the union] to direct the State's deductions of union dues." *Id.* at 1122 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Under California law, the State Controller makes deductions at the request of the Union, but must first get certification from the Union that those individuals whose paychecks are to be deducted authorized the deductions. Cal. Gov't Code § 1153(a), (b). If the State Controller determines that the Union has failed to comply with statutes or regulations for deductions, she must refuse to deduct. *Id.* § 1153(f).

At bottom, Klee challenges the Union's refusal to let him leave, which is a dispute over the terms of Union membership. "Thus, the 'source of the alleged constitutional harm' is not a state statute or policy but the particular private agreement between the union and Employees." *Belgau*, 975 F.3d at 947 (quoting *Ohno*, 723 F.3d at 994). Section 1983 provides no

remedy for such disputes. Klee cannot meet the state policy requirement.

Second, the state actor requirement determines "whether the party charged with the deprivation could be described in all fairness as a state actor." *Wright*, 48 F.4th at 1122. This requirement can be met by succeeding in at least one of four tests. *Id.* Klee argues that he meets two tests: joint action and governmental nexus. His arguments as to each are foreclosed by recent precedent. As we found in *Wright*, which analyzed an Oregon statutory scheme similar to California's, the State "did not 'affirm, authorize, encourage, or facilitate unconstitutional conduct' by processing dues deductions" and therefore could not be a joint actor. *Id.* at 1123 (quoting *Belgau*, 975 F.3d at 947 (alterations omitted)). Turning to the governmental nexus test, Klee must establish that the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1109 (9th Cir. 2022) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). In *Belgau*, we declined to find a governmental nexus in similar circumstances, 975 F.3d at 947 n.2, and in any event, we find no factual allegations arising to the requisite coercion or encouragement supporting a governmental nexus to the Union's alleged constitutional violations.[2] Klee

[2] Further, our case law casts doubt on whether the "governmental nexus" test is truly distinct from the "joint action test." *See Wright*, 48 F.4th at 1122 n.6 ("the public function and joint action tests 'largely subsume the state compulsion . . . and . . . governmental nexus test[s].'") (quoting *Ohno*, 723 F.3d at 996 n.13); *Rawson v. Recovery Innovations,*

thus fails to meet the state actor requirement and dismissal of his § 1983 claims against the Union was appropriate.

2. Klee seeks nominal damages from state officials Yee and Bonta as recognition of their failure to secure his liberty and property interests in violation of the Fourteenth Amendment. "'[A]bsent waiver by the State or valid congressional override,' state sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, including nominal damages." *Platt v. Moore*, 15 F.4th 895, 910 (9th Cir. 2021) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166-69 (1985)). Klee argues, with reference to wide-ranging authority concerning nominal damages, that his request for damages is "prospective" in nature and therefore circumvents the Eleventh Amendment under *Ex parte Young*, 209 U.S. 123 (1908). The case law cited is inapposite and does not endorse the novel theory he argues. Not only have we recently observed that state officers are shielded from nominal damages, *Platt*, 15 F.4th at 910, but the nature of Klee's requested nominal damages is not prospective. He seeks nominal damages "for the deprivation of his First Amendment and Fourteenth Amendment rights," rather than as a measure to prevent a future injury. And as we have recognized, "relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred[.]" *Lund v. Cowan*, 5 F.4th 964, 970 (9th Cir.

Inc., 975 F.3d 742, 748 (9th Cir. 2020) (describing the nexus and joint action tests as one and the same).

2021) (quoting *Papasan v. Allain*, 478 U.S. 265, 278 (1986)). Therefore, even if there is room under *Ex parte Young* for certain types of nominal damages, there is none for those that Klee seeks.

3. Lastly, Klee seeks injunctive and declaratory relief from Yee and Bonta for their failure to secure his liberty and property interests from interference by the Union, in violation of the Fourteenth Amendment.

Article III of the Constitution restricts the judiciary to deciding only "cases" and "controversies." *Davidson v. Kimberly-Clerk Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). The case or controversy requirement, which constitutes "the irreducible constitutional minimum of standing," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), requires that a plaintiff show "(1) an 'actual or imminent' injury as a result of the alleged illegal conduct; (2) there is a 'causal connection between the injury and the conduct complained of'; and (3) the injury will 'likely' be 'redressed by a favorable decision' of the court." *Wright*, 48 F.4th at 1118 (quoting *Lujan*, 504 U.S. at 560-61). For prospective relief to redress a Fourteenth Amendment procedural due process injury, Klee must demonstrate "that [he] was accorded a procedural right to protect [his] interests and that [he] has concrete interests that are threatened." *Id.* at 1120-21.

We find again that Klee's argument is foreclosed by *Wright*. In *Wright*, we found that the plaintiff lacked a concrete interest in future wages because she had retired and was no longer at risk of having her wages unfairly deducted. *Id.* at 1121. Similarly, here, Klee's Complaint explains that he is no longer a member of the Union and has no intention to become

one. His risk of future injury "rests on a highly attenuated chain of inferences," including that he will rejoin the Union, and the same sequence of events will play out again. *Id.* at 1120 (internal quotation marks omitted). Like the plaintiff in *Wright*, "the threat of future unauthorized dues deductions from [Klee's] wages is entirely imaginary," *id.* at 1121 (internal quotation marks omitted), and thus insufficient to satisfy Article III standing. Klee fails to establish standing for injunctive or declaratory relief for his Fourteenth Amendment procedural due process claims against the state officials.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 22-cv-00148

TERRY KLEE,

Plaintiff,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 51, et al.,

Defendants.

Filed: August 14, 2023

ORDER RE DEFENDANTS' MOTIONS TO DISMISS

I. Introduction

Terry Klee ("Klee" or "Plaintiff") brought this action against International Union of Operating Engineers, Local 501 ("IUOE" or the "Union Defendant"). Dkt. 1 (the "Complaint"). The Complaint also named the following defendants: the California Department of Corrections and Rehabilitation ("CDCR"), Betty Yee ("Yee") and Rob Bonta ("Bonta" or, together with CDCR and Yee, the "State Defendants"). Dkt. 1. The Complaint advances three causes of action—(i) a claim under 42 U.S.C. § 1983 for the right to freedom from compelled speech as to union

dues, (ii) a claim under 42 U.S.C. § 1983 for the right to procedural due process as to liberty and property interests and (iii) a claim under 42 U.S.C. § 1983 for the right to substantive due process as to First Amendment liberty interests. *Id.* ¶¶ 69-108.

On February 3, 2022, the parties filed a stipulation to extend the time to answer the Complaint. Dkt. 19 (the "Stipulation Extending Time to Answer"). On March 4, 2022, the Union Defendant filed a motion to dismiss the Complaint. Dkt. 20 (the "IUOE Motion" or the "Union Defendant's Motion"). On the same day, the State Defendants filed a separate motion to dismiss the Complaint. Dkt. 21 (the "State Defendants' Motion"). Two weeks later, the parties stipulated to adjust the schedule for the briefing on the Defendants' Motions. Dkt. 26 (the "Stipulation re: Briefing"). On May 6, 2022, the Plaintiff filed an Opposition to the Defendants' Motions. Dkt. 27. On June 6, 2022, the State Defendants filed a Reply in support of their Motion. Dkt. 28 (the "State Defendants' Reply"). The same day, the Union Defendant filed a Reply in support of its Motion. Dkt. 29 (the "Union Defendant's Reply").

A hearing on the Motions to Dismiss was held on August 29, 2022. For the reasons stated in this Order, the Motions are **GRANTED WITHOUT PREJUDICE**, i.e., with leave to amend.

II. Factual Background

The following discussion is based on the allegations in the Complaint, which are deemed true for purposed of considering a motion to dismiss.

A. Parties

Plaintiff has been employed by the CDCR since 2010. Dkt. 1 ¶ 4. He works as a Materials Stores Supervisor I. *Id.* IUOE is a "recognized employee organization" under Cal. Gov't Code § 3513(b) and, in that capacity, it represents Mr. Klee's bargaining unit at CDCR. *Id.* ¶ 5. CDCR employs Plaintiff and is a "public agency" under Cal. Gov't Code § 3501(c). *Id.* ¶ 6. Yee was California's Controller at the relevant times. *Id.* ¶ 7. She was sued in her official capacity. *Id.* Bonta is California's Attorney General, and he was also sued in his official capacity. *Id.* at 8.

The Complaint alleges that "IUOE is empowered to represent whether Mr. Klee and other employees have affirmatively consented to deductions from their lawfully earned wages for union purposes." *Id.* ¶ 5. The Complaint alleges that CDCR "is responsible for certifying to [Yee] that [Plaintiff] and other employees have affirmatively consented to deductions from their lawfully earned wages for union purposes." *Id.* ¶ 6. It alleges that Yee was "responsible for the administration of payroll deductions for union purposes under Cal. Gov't Code § 1153." *Id.* ¶ 7. As Controller, state law required Yee to "rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed . . . ." Cal. Gov't Code § 1153(h). And, "[e]mployee requests to cancel or change deductions for employee organizations shall be directed to the employee organization, rather than to the Controller." *Id.* Finally, the Complaint alleges that Bonta is "charged

with the enforcement of state laws, including the statutes challenged in this case." Dkt. 1 ¶ 8.

B. Plaintiff Joins (and Re-Joins) the IUOE

Plaintiff began employment with CDCR in September 2010 and joined IUOE shortly thereafter. *Id.* ¶ 9. As noted, at all relevant times, he was employed as a Material Stores Supervisor I. *Id.* His duties involve supervising inmate work crews for the California state prison system. *Id.* ¶ 10.

Plaintiff briefly left the IUOE in late 2019. *Id.* ¶ 11. In October of that year, he told IUOE that he wanted to "resign from the union and stop paying dues." *Id.* "IUOE immediately processed his resignation and ceased [deducting dues] from [Plaintiff's] earnings." *Id.* ¶ 12. Soon thereafter, Plaintiff "removed an inmate from a work crew due to alleged bad behavior on the part of the inmate," who spoke to one of Plaintiff's co-workers. *Id.* ¶¶ 13-14. Plaintiff says the inmate's statements were both false and inflammatory. *Id.* ¶ 14. The co-worker "filed a formal complaint" against Plaintiff. *Id.* ¶ 15. Union officials told Plaintiff "that the only way to receive IUOE assistance regarding workplace issues was to sign a new membership agreement with IUOE." *Id.* ¶ 17. Plaintiff believed he needed union assistance to resolve his workplace conflict, so he decided to rejoin the union. *Id.* ¶¶ 16, 18-19.

C. The IUOE's Membership Agreement Limited How Plaintiff Could Leave the Union

When Plaintiff applied to re-join IUOE, his application contained a signed statement authorizing IUOE to deduct dues from his paycheck. *See* Dkt. 1-2.

Under this agreement, Plaintiff could only end his dues payments by (1) notifying the proper person(s) (2) in writing (3) at the proper time:

> In exchange for obtaining the benefit of exclusive representation by either IUOE Stationary Engineers Local 3, 39, or 501 (the Union), I authorize the State Controller to deduct from my wages all union dues and other fees and assessments as shall be certified by the Union. This authorization is irrevocable for a period of one year and year-to-year thereafter regardless of my membership status, unless not less than thirty (30) days and not more than forty five (45) days prior to the anniversary date of this authorization or the termination of the contract between my employer and the Union, whichever comes first. I will notify the Union and my employer in writing, with my valid signature, of my desire to revoke this authorization. The Union is authorized to use this authorization with the State Controller.

Dkt. 1-2 at 2. That agreement was signed on November 22, 2019. Dkt. 1-2 at 2. The agreement between IUOE and CDCR was effective through July 1, 2020. Dkt. 1-3 at 2.

The Complaint alleges that "[u]nder those terms [Plaintiff's] dues may cease between either May 17, 2020, and June 1, 2020 (30-45 days before expiration of the then current contract between IUOE and CDCR) . . . or between October 8, 2020, and October 23, 2020 (30-45 days before the anniversary of his agreement)." Dkt. 1 ¶ 21. Plaintiff also contends that

"since there is no object for the conditional word 'unless,' the authorization does not specify any action which must occur within either of the two designated time frames in order for [Plaintiff] to revoke his authorization." *Id.* ¶ 22. The Complaint alleges that IUOE "must simply be in receipt of a writing with [Plaintiff's] valid signature notifying the union of his desire to revoke the authorization in order for the deductions to cease." *Id.* ¶ 23.

D. Plaintiff Tries to Opt Out of Union Membership

Shortly after re-joining IUOE, Plaintiff became frustrated with IUOE's response to his workplace issues. Dkt. 1 ¶ 24. Although Plaintiff contacted IUOE and requested IUOE's assistance on an urgent matter, it "never responded to any of those inquiries." *Id.* ¶¶ 24-25.

On December 30, 2019, Plaintiff "sent a letter via certified mail to IUOE," explaining that he is "resigning my membership in the union." *Id.* ¶ 26; Dkt. 1-4. He added that he "no longer wish[ed] to pay dues or fees to the union" and "revok[ed] any previous dues authorization, check off, or continuing membership form that [he] may have signed." Dkt. 1-4. He also told IUOE that, if IUOE "refuse[d] to accept [his] resignation at this time and/or refuse[d] to cease charging [him] dues and/or fees," IUOE should "hold this letter until such time as [IUOE] believe[d] that [he] c[ould] resign effectively, and honor this letter and [his] resignation and revocation request at that time." *Id.* If so, Plaintiff asked IUOE to "inform [him] of the reason or reasons why [he] cannot resign immediately, and the date(s) at which [IUOE]

believe[d] [he] c[ould] effectively resign, along with any further steps that are necessary." *Id.* "If there is a 'window' period during which [Plaintiff] c[ould] resign or revoke any withholding authorizations or checkoffs," IUOE was asked to send Plaintiff "a copy of all controlling documents which state what this window period is for me, such as any bylaws, checkoff cards and/or authorizations." *Id.*

Later that day, Plaintiff sent the letter by e-mail to four employees of IUOE: Curly, Akili, Barnes and Valenzuela. *See* Dkt. 1-5. The next day, Plaintiff e-mailed the letter to Valenzuela. *See* Dkt. 1-6; Dkt. 1 at ¶ 31. That e-mail asked IUOE to process his opt-out request "ASAP." Dkt. 1-6.

When Plaintiff received no response, he allegedly followed up with Akili and Valenzuela on January 7, 2020. Dkt. 1-7; Dkt. 1 at ¶ 31. Plaintiff followed up again with them on January 10, 2020. Dkt. 1-8. Plaintiff reiterated his request that he be "opted out asap." *Id.* Later that day, Akili told Plaintiff that his "request has been received and will be processed accordingly." Dkt. 1-9. Union dues were still deducted from Plaintiff's pay during the spring and summer of 2020. Dkt. 1 at ¶ 36.

On August 28, 2020, Plaintiff asked three IUOE employees, Barnes, Valenzuela and Ulloa, for "the contact information to the membership department" because he wanted "to know what time of year [he] last submitted [his] membership enrollment." Dkt. 1-10. He received no response and followed up on September 2, 2020. Dkt. 1-11; Dkt. 1 ¶ 39-40. Barnes responded, saying "[h]ere you go" and attaching a copy of Plaintiff's 2019 authorization. Dkt. 1-12; Dkt. 1 ¶ 42.

Plaintiff responded on September 3, 2020, and asked when he could opt out during 2020 and whom he should contact to do so. Dkt. 1-13; Dkt. 1 ¶ 43-44. Plaintiff did not receive a response, and he followed up on September 8, 2020. Dkt. 1-14; Dkt. 1 ¶ 45-46. He did not receive a response after that. Dkt. 1 ¶ 47.

IUOE deducted union dues into November 2020. Dkt. 1-15; Dkt. 1 ¶ 49. On November 10, Plaintiff sent IUOE a second letter by certified mail. The second letter was substantially identical to the first. Dkt. 1-15; Dkt. 1 ¶ 50. Plaintiff contacted Valenzuela and Barnes six additional times by e-mail between November 17, 2020 and November 20, 2020. Dkt. 1-16; Dkt. 1 ¶ 51. He also contacted Barnes again on November 30, 2020. Dkt. 1-16.

On December 10, 2020, Barnes responded to Plaintiff by e-mail, citing the COVID-19 pandemic to explain IUOE's failure to respond to Plaintiff's prior requests. Dkt. 1-17; Dkt. 1 ¶ 51-52. Barnes told Plaintiff that Plaintiff's "request to cease union dues [was] outside [his] agreed upon cancel[l]ation window." Dkt. 1-17. Barnes said that "the Union must be notified between October 8th and October 23rd" for the revocation to be effective. Dkt. 1-17. Barnes did not address Aliki's January 2020 e-mail, Plaintiff's e-mails leading up to October 2020, or why Plaintiff's first opt-out letter would not have been applicable in May 2020. Dkt. 1 at ¶¶ 55-57.

On January 19, 2021, Plaintiff send a third opt-out letter to IUOE. Dkt. 1 at ¶ 58; Dkt. 1-18. This letter was sent by certified mail. Dkt. 1 at ¶ 58; Dkt. 1-18. The third letter contained much of the same information as the prior one. *See* Dkt. 1-18. It added

that Plaintiff's "objection [wa]s permanent and continuing in nature and should be honored for as long as [Plaintiff] remain[s] in the bargaining unit." *Id.* Barnes responded by e-mail on January 21, 2021. Dkt. 1-19. It stated that Plaintiff's "request cannot be processed as the request is outside of the appropriate time to submit such a request." *Id.* Barnes pointed out that he had explained to Plaintiff "the appropriate dates which would render a granted request." *Id.* Barnes also told Plaintiff that "[d]ue to the untimely request the Union considers this matter closed." *Id.*

On February 3, 2021, Plaintiff sent an e-mail to Crouch, a director at IUOE, seeking assistance in leaving the Union. Dkt. 1 ¶ 62. When he received no response, he sent an identical e-mail on February 11. Dkt. 1 ¶ 63. Crouch did not respond. Dkt. 1 ¶ 64.

On October 20, 2021, Plaintiff "sent a fourth opt-out letter via certified mail to IUOE, requesting that the unauthorized deductions from his lawfully earned wages immediately cease." Dkt. 1 ¶ 65; Dkt. 1-21. The letter was substantially identical to the previous letters. Dkt. 1-21. The deductions from Plaintiff's pay ceased in November of 2021. Dkt. 1 ¶ 67.

E. Plaintiff's Causes of Action

The first cause of action arises under 42 U.S.C. § 1983. Dkt. 1 ¶ 79. The Complaint alleges that, "[u]nder the First Amendment, the Defendants cannot take money from a public employee's lawfully earned wages without their affirmative consent." *Id.* ¶ 70. The Complaint alleges that Plaintiff withdrew his authorization in December 2019 and, under the agreement, the deductions should have stopped in May 2020, which was the first window period. *Id.*

¶¶ 71-72. Instead, Defendants allegedly withheld $53.72 per month (and later $56.42 per month) from Plaintiff's wages without his consent. *Id.* ¶ 73-74. The Complaint alleges that a total of $924.04 has been withdrawn from Plaintiff's wages. *Id.* ¶ 75. It also alleges that the Defendants' actions were not justified by any "legitimate, let alone compelling, interest" and were not "narrowly tailored to support [any such] interest." *Id.* ¶ 78.

The second cause of action also arises under 42 U.S.C. § 1983. Dkt. 1 ¶ 90. This claim is for procedural due process. *Id.* ¶ 81. Plaintiff claims he was deprived, without adequate procedural protections, of: (1) his liberty interest in his First Amendment rights against compelled speech; and (2) his property interest in the membership dues. *Id.* ¶¶ 82-87.

The third cause of action also arises under 42 U.S.C. § 1983, and alleges violations of substantive due process. Dkt. 1 ¶¶ 92-93. It alleges that Plaintiff "has a cognizable liberty interest in his First Amendment right against compelled speech" and that Defendants imposed restraints on that liberty that are inherently arbitrary. Dkt. 1 ¶¶ 92-95. Plaintiff argues that "IUOE is an inherently biased and financially interested party with an incentive for dues deductions to continue," even where the employee has not consented. Dkt. 1 ¶¶ 97-100. Because CDCR and Yee cannot "independently verify whether [Plaintiff] affirmatively consented" to payroll deductions and cannot "request [that Plaintiff] submit a new verifiable authorization," it is alleged that Cal. Gov't. Code § 1153 arbitrarily burdens Plaintiff's First Amendment rights against compelled speech. Dkt. 1

¶¶ 101-02. Plaintiff also reiterates that the Defendants' actions were not justified by any "legitimate, let alone compelling, interest" and were not "narrowly tailored to support [any such] interest." *Id.* ¶¶ 106-07.

F. Relief Requested by the Plaintiff

Plaintiff seeks three types of relief. Dkt. 1 at 20-23. *First*, Plaintiff seeks a declaratory judgment that Defendants' withdrawal of money from amounts to be paid to him through paychecks violated his First Amendment right against compelled speech, his Fourteenth Amendment guarantee of procedural due process and his Fourteenth Amendment guarantee of substantive due process. Dkt. 1 at 20-21.

Second, Plaintiff seeks a permanent injunction, which would bar Defendants from "seizing the lawfully earned wages of Mr. Klee and similarly situated public employees" without their affirmative consent. Dkt. 1 at 21. It would also require that CDCR and Yee "directly confirm public employees' voluntary and informed affirmative consent prior to the deduction of any money from their pay for IUOE purposes." *Id.* at 22. Further, it would require that they use "adequate procedures" when confirming that public employees consent to paycheck deductions. *Id.*

Third, Plaintiff seeks damages. As to the Union Defendant only, he seeks the return of the $924.04 deducted from his paychecks, prejudgment interest at the legal rate and compensatory damages for the deprivation of his First and Fourteenth Amendment rights. *Id.* Against all Defendants, he seeks $1.00 in nominal damages and an award of costs and attorney's fees under 42 U.S.C. §§ 1983 and 1988. *Id.*

III. Analysis

A. Legal Standards

1. Motion to Dismiss

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and internal quotation marks omitted).

A party may move to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to

judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

If a motion to dismiss is granted, the court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Although this policy is to be applied "with extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (citation omitted), allowing leave to amend is inappropriate in circumstances where litigants have failed to cure previously identified deficiencies, or where an amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990).

2. Section 1983

42 U.S.C. § 1983 provides a cause of action that may be brought against those who, under color of law, violate the federal constitutional or statutory rights of any person. Section 1983 is not a "source of substantive rights, but instead provides "a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). A valid claim under § 1983 requires that each of the following be established: "(1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law." *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

"Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach '"merely private conduct, no matter how discriminatory or wrongful,"' *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)). Where, as here, deprivations of rights under the Fourteenth Amendment are alleged, the "under color of law" requirement converges into the "state action" requirement of the Fourteenth Amendment. *Id.* at 50 n.8.

3. Compelled Subsidies of Union Speech, Procedural Due Process and Substantive Due Process

"[P]ublic employees [may not be] forced to subsidize a union . . . if they choose not to join . . . ." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459-60 (2018). Many public employees "strongly object to the positions the union takes in collective bargaining and related activities." *Id.* at 2460. "[T]his arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* As a result, "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486. Indeed, "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.* That affirmative consent must be "freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publishing*

Co. v. Butts, 388 U.S. 130, 145 (1967) (plurality opinion)).

"To obtain relief on a procedural due process claim, the plaintiff must establish the existence of (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process." *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008). "Not every procedural requirement ordained by state law, however, creates a substantive property interest entitled to constitutional protection." *Id.* at 1091. "Only if the governing statute compels a result upon compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body, does it create a constitutionally protected property interest." *Id.*

Substantive due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . . ." *Sagana v. Tenorio*, 384 F.3d 731, 742 (9th Cir. 2004) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). "The Due Process Clause prohibits restraints on liberty that are arbitrary and purposeless, but a claim under this clause is 'cognizable only if there is a recognized liberty or property interest at stake.'" *Id.* (citations omitted).

The Supreme Court held that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (internal quotations omitted). Put another way, it "protects those fundamental rights

and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). To constitute such a violation, "the alleged deprivation must 'shock the conscience and offend the community's sense of fair play and decency.'" *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013). "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977).

B. Application

1. Justiciability

a) The Standing Requirement

A federal court lacks subject matter jurisdiction if a plaintiff fails to establish Article III standing. A "plaintiff bears the burden of proving" the existence of subject matter jurisdiction and "must allege facts, not mere legal conclusions" to invoke the court's jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Consequently, a plaintiff "bears the burden of establishing" standing, and he or she "must clearly . . . allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted, omission in original); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A plaintiff must also establish standing for each claim and each form of relief sought. *See, e.g.*,

Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) ("standing is not dispensed in gross" (internal quotation marks omitted)).

To establish the "irreducible constitutional minimum" of Article III standing, a plaintiff must have: (1) suffered "an injury in fact," (2) "that is fairly traceable to the challenged conduct" of the defendant, and he or she must seek (3) "a remedy that is likely to redress that injury" by a favorable court decision. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021) (citing *Spokeo, Inc.*, 578 U.S. at 338). The injury must be "concrete and particularized," as well as "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548; *see also Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020) (plaintiff must show "a causal connection between the injury and the conduct complained of"); *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013) (to satisfy the causality element for Article III standing, "[t]he line of causation between the defendant's action and the plaintiff's harm must be more than attenuated").

Standing and mootness are related, but distinct. "Standing is determined by the facts that exist at the time the complaint is filed," whereas "[m]ootness inquiries . . . require courts to look to changing circumstances that arise after the complaint is filed . . . ." *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2021), *as amended* (Aug. 15, 2001). "[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." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC),*

Inc., 528 U.S. 167, 191 (2000). For example, if "a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action, despite the fact that she would have lacked initial standing had she filed the complaint after the transfer." *Id.* at 190-91 (internal citation omitted). There is a reason for this distinction. Thus, the "[s]tanding doctrine functions to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake," but "[m]ootness issues arise later in the case, when the federal courts are already involved and resources have already been devoted to the dispute." *Id.* at 191; *Jackson v. California Dep't of Mental Health*, 399 F.3d 1069, 1073 (9th Cir. 2005)

a) Standing to Bring Claims for Damages

Plaintiff has standing to seek damages. Defendants have not contested this determination. Neither Motion challenged Plaintiff's standing to seek retrospective relief. *See* Dkt. 19; Dkt. 20. This is consistent with *Janus*, which explained that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." 138 S. Ct. at 2464. If the deductions from Plaintiff's pay were improper, the rules established by *Janus* were violated and Plaintiff can seek the return of the amounts withheld. The loss of money is concrete enough to be an injury in fact, it is fairly traceable to

the Defendants and it could be redressed by compensatory damages.

Plaintiff also has standing to seek nominal damages. "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . [the Supreme Court has held] that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 ("nominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury").

Plaintiff's claims for retrospective relief are not moot. He seeks compensation for prior injuries, and a "live claim for [even] nominal damages will prevent dismissal for mootness." *Jacobs v. Clark Cnty. School. Dist.*, 526 F.3d 419, 425 (9th Cir. 2008) (quoting *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)).

b) Standing to Bring Claims for Injunctive or Declaratory Relief

Plaintiff lacks standing to seek prospective relief because it is not alleged that the Union is taking deductions from his paychecks, and there is no evidence that the Union will begin doing so unless Plaintiff chooses to rejoin the Union. "For injunctive relief, which is a prospective remedy, the threat of injury must be 'actual and imminent, not conjectural

or hypothetical.'" *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). "In other words, the 'threatened injury must be *certainly impending* to constitute injury in fact' and 'allegations of *possible* future injury are not sufficient." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "[W]here, as here, the [plaintiffs] seek declaratory and injunctive relief, they must demonstrate that they are 'realistically threatened by a *repetition* of the violation.'" *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (quoting *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001)).

Plaintiff cannot allege that he is currently being injured by the claimed deductions. Plaintiff brought this action on January 7, 2022, and the deductions had stopped in November 2021. Dkt. 1 ¶ 67. Plaintiff asserts that his "injuries are redressable by . . . prospective relief to end the threat of future deprivations." Dkt. 27 at 22. He also contends that "given that [he] challenges the constitutionality of the *system* under which IUOE, and the State Defendants arbitrarily take non-authorizing and nonconsenting employees' lawfully earned wages, the future threat to his rights is real . . . ." Dkt. 27 at 23. Even if Plaintiff challenges the constitutionality of the system by which union dues are deducted, because he is no longer a member of the Union, he is no longer being harmed by that system. This allegation is insufficient to establish standing.

Plaintiff asserts that he was injured both when an unauthorized deduction occurred and when the amount deducted was spent. Dkt. 27, at 23-24. His

reliance on *Janus* to support this argument is unpersuasive. *Janus* held that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Janus*, 138 S. Ct. at 2464. The Court "recognized that a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union . . . ." *Id.* (internal quotations and citations omitted). *Janus* did not hold that each time that a union spent money comprised a new constitutional injury. Rather, the injury occurs when a "public-sector union[] . . . extract[s] agency fees from nonconsenting employees." *Id.* at 2486. Even if each expenditure were a separate injury-in-fact, there are no allegations distinguishing Plaintiff's dues from the dues of every other union member. He has not alleged facts showing that any of the Union Defendant's specific expenditures could be fairly traced to the allegedly improper deductions.

Nor can Plaintiff allege that he has been threatened with an impending injury. The Defendants' allegedly unconstitutional act is the failure to honor certain attempted revocations by a worker of a dues authorization. Dkt. 1 at ¶¶ 70-79. However, the Complaint does not allege that Plaintiff is likely to rejoin the Union, that he might authorize dues deductions, or that he might then seek to revoke his authorization. *See* Dkt. 1. Until each of those contingencies occurs, Plaintiff cannot be subject to the allegedly unconstitutional policy.

The analysis in *Walsh v. Nevada Department of Human Resources* is instructive. 471 F.3d 1033 (9th Cir. 2006). There, plaintiff alleged that her former

employer "discriminated against her due to her disability." *Id.* at 1037. However, because "[t]here is no indication in the complaint that [plaintiff] has any interest in returning to work for the State or the Department," "she would not stand to benefit from an injunction requiring the anti-discriminatory policies she requests at her former place of work." *Id. Walsh* distinguished other cases where "non-employees were in the process of seeking reinstatement to their former positions, or seeking work from that employer." *Id.* Because the plaintiff "would not likely benefit" from the injunction she sought, she did not have standing. *Id.*

Klee is in a parallel position. He alleges that the Union Defendant harmed him in his capacity as a dues-paying union member. However, the Complaint does not allege that he has any interest in rejoining IUOE. For the same reason, he would not stand to benefit from any new policy on revoking dues authorizations. Under *Walsh*, the outcome would be different if Plaintiff were seeking to rejoin IUOE. There is no allegation that Plaintiff has made efforts to do so, or that Plaintiff is likely to rejoin IUOE and re-revoke his dues authorization. Consequently, there is no allegation that any required claimed injury was "imminent" when this action was filed.

Plaintiff's reliance on *McMahon* and *Debont* is misplaced. In *McMahon v. Pennsylvania Turnpike Commission*, the plaintiff joined a union, but tried to withdraw. 491 F. Supp. 2d 522, 525. The union rejected this attempt, arguing that it was not submitted at the required time. *Id.* The union continued to collect dues from the plaintiff, who then

filed an action seeking an order that the union discontinue making the deductions. *Id.* The court enjoined a provision "lock[ing] plaintiffs into union membership for the duration of the [collective bargaining agreement]." *Id.* at 527. In *Debont v. City of Poway*, the plaintiff also joined a union where he was subject to a similar provision, i.e., it prevented him from leaving the union while the current collective bargaining agreement was in effect. No. 98CV0502-K (LAB), 1998 WL 415844, at *5 (S.D. Cal. Apr. 14, 1998). This led the plaintiff to commence an action seeking an order that would require the union to stop taking the dues deductions. *Id.* at *2-3. Thus, in each of those cases, unlike this one, the union was deducting dues from the plaintiff when the suit was filed. *See McCahon*, 491 F. Supp. 2d at 526; *Debont*, 1998 WL 415844 at *2.

This analysis is also consistent with *Ochoa v. Public Consulting Group, Inc.*, 48 F.4th 1102 (9th Cir. 2022) and *Wright v. Service Employees International Union Local 503*, 48 F.4th 1112 (9th Cir. 2022). In *Ochoa*, the state of Washington employed the plaintiff; the plaintiff was not a union member. *Ochoa*, 48 F.4th at 1104. Although she had been a union member years earlier, she never rejoined the union. *Id.* at 1105. The union began making deductions from her paycheck because it had a signed membership card with her name on it. *Id.* However, she had not signed that card. *Id.* at 1105-06. After she alerted the union, the deductions ceased; the union repaid her but she rejected the checks. *Id.* at 1106. After *Janus*, the union created two lists: one of those who had opted out of paying dues and one of those who had affirmatively opted in. *Id.* The plaintiff was erroneously placed on

the list of those who had opted in. *Id.* The plaintiff contacted the union, and eventually had her counsel contact the union; the withholdings ceased. *Id.* She then filed an action, alleging that she might be erroneously placed on the opt-in list again. It was determined that, although her "claimed future harms [we]re speculative because it is not clear whether she will ever again suffer an unauthorized withholding," "the risk of future injury [was] 'sufficiently real' to meet the low threshold required to establish procedural standing." *Id.* at 1107. After all, "she ha[d] already had union dues erroneously withheld from her paycheck twice and remain[ed] employed with the State and [was] therefore at risk of additional unauthorized withholdings." *Id.*

In *Wright*, the plaintiff was employed by the state of Oregon. 48 F.4th at 1117. The plaintiff attempted to withdraw from the union. *Id.* When the union showed her a copy of her membership agreement, she alleged that her signature had been forged. *Id.* The plaintiff later retired, and the state ceased deducting union dues from her paycheck. *Id.* at 1117-18. The plaintiff argued that she had standing to bring a First Amendment claim. However, it was determined that the plaintiff's "fear of future unauthorized dues deduction [was] too speculative to confer standing . . . ." *Id.* at 1119. The plaintiff did "not allege that she intends to return to work," but she argued that she would "return to work either in the same position or one where she would be represented by [the union], that [the union] will forge her signature on a new membership agreement and that the [s]tate will again improperly deduct and remit dues to [the union]." *Id.* at 1119-20. "These inferences rest[ed] on

nothing more than rank speculation." *Id.* at 1120. For similar reasons, the plaintiff lacked standing to bring a Fourteenth Amendment claim: "[T]he threat of future unauthorized dues deductions from her wages is entirely 'imaginary.'" *Id.* at 1120-21.

The allegations here align with those in *Wright*. The only wrongdoing alleged by Plaintiff is Defendants' alleged failure to honor his attempt to withdraw from the Union. The only way this injury can recur is if Plaintiff joins the Union, tries to withdraw and Defendants ignore his withdrawal. Plaintiff does not allege that he intends to rejoin the Union, but he expresses fear that he would be subject to unconstitutional deductions again. These inferences are purely speculative. Nor does Plaintiff identify any instance in which Defendants imposed those injuries on someone else in his position. Indeed, Plaintiff does not deny that he voluntarily joined the Union. Only the validity and timing of his attempts to withdraw from the Union is disputed. In *Ochoa* and *Wright*, the alleged unconstitutional conduct caused the respective plaintiffs to be erroneously added to a list of union members. That injury could recur so long as the plaintiffs remained employed in their respective positions. Here, the alleged injury cannot recur unless Plaintiff rejoins IUOE. Just as it would have been rank speculation to assume that the plaintiff in *Wright* would end her retirement, it is rank speculation to assume that Plaintiff will rejoin the Union.

Plaintiff argues that his claims are justiciable under the rule as to injuries that are capable of repetition yet evading review. There is an "established exception to mootness for disputes capable of

repetition, yet evading review." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). To satisfy the first prong, because the exception "is concerned . . . with classes of cases that . . . would *always* evade judicial review," the injury must be of "*inherently* limited duration." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014) (quoting *Doe No. 1 v. Reed*, 697 F.3d 1235, 1240 (2012)). In the class action context, the second prong can be satisfied if "there is a reasonable expectation that the named plaintiffs could themselves 'suffer repeated harm' or "it is certain that other persons similarly situated' will have the same complaint.'" *Belgau*, 975 F.3d at 949 (quoting *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1089-90 (9th Cir. 2011)).

Plaintiff's argument does not change the outcome. *First*, this rule is an exception to the mootness doctrine. It will not permit the Plaintiff's claims to move forward when the Plaintiff lacks standing. *Second*, although IUOE's actions could affect similarly situated employees, this is not a class action proceeding. *See* Dkt. 1-1. Thus, the proper question is whether there is a reasonable expectation that Plaintiff will be subject to the same action again. For the reasons already stated, there is not. This outcome is consistent with decisions in other cases within this District. *See Few v. United Teachers of Los Angeles*, No. 218CV09531JLSDFM, 2020 WL 633598, at *6

(C.D. Cal. Feb. 10, 2020); *Jackson v. Napolitano*, No. 19CV1427-LAB (AHG), 2020 WL 5709284, at *7 (S.D. Cal. Sept. 23, 2020).

2. Sovereign Immunity

a) CDCR

The claims against CDCR are barred by the Eleventh Amendment. "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *see also Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004) ("State agencies . . . are not 'persons' within the meaning of § 1983, and are therefore not amenable to suit under that statute"). "This jurisdictional bar applies regardless of the nature of the relief sought." *Id.* Even "a § 1983 action alleging a constitutional claim," if "brought directly against a State," will be barred by the Eleventh Amendment. *Id.* at 120. Because CDCR is a state agency, it must be dismissed from this suit.

b) Yee and Bonta

Plaintiff cannot seek damages from Bonta and Yee because they were sued in their official capacities. "As when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 101-02. To be precise, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office" and is therefore barred. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The Complaint provides

that Bonta and Yee were sued in their official capacity, Dkt. 1, so they cannot be sued for damages.

It is immaterial that the Complaint only seeks nominal damages from Bonta and Yee. As the Ninth Circuit has explained, "'absent waiver by the State or valid congressional override,' state sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, including nominal damages." *Platt v. Moore*, 15 F.4th 895 (9th Cir. 2021). And, the Ninth Circuit stated in dicta that, "[a]bsent a waiver," "plaintiffs' claims seeking nominal damages" would be covered by sovereign immunity. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1021 (9th Cir. 2010). *Platt* is binding. Plaintiff cannot assert the claims at issue only if he can show that California waived sovereign immunity or that Congress overrode that immunity.

California has not waived its sovereign immunity. Plaintiff argues that, under Cal. Gov't Code § 905, sovereign immunity only covers "actual 'money and damages.'" Dkt. 27 at 24. However, this language refers to "all claims for money or damages," not just compensatory damages or "actual" damages. Cal. Gov't Code § 905.

Nominal damages are more than "purely symbolic." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). They are no "mere judicial token that provides no actual benefit to the plaintiff." *Id.* "[A] person who is awarded nominal damages receives 'relief on the merits of his claim' and 'may demand payment for nominal damages no less than he may demand payment for millions of dollars in

compensatory damages." *Id.* (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)). "Because nominal damages are in fact damages paid to the plaintiff they 'affec[t] the behavior of the defendant towards the plaintiff' and thus independently provide redress." *Id.* (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)).

Plaintiff's reliance on other authorities is misplaced. Plaintiff cites two cases holding that "[n]ominal damages mean no damages at all" because "[t]hey exist only in name, and not in amount." *Stanton v. New York & Eastern R. Co.*, 59 Conn. 272, 282 (1890); *see Moore v. Liszewski*, 838 F.3d 877, 879 (7th Cir. 2016) ("A jury verdict awarding nominal damages is not a small rather than a large damages award; functionally it is no damages award at all."). Neither of these cases is controlling in this Circuit, and neither addressed sovereign immunity. Finally, the Supreme Court has rejected Plaintiff's theory. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (rejecting the conclusions of *Stanton* and *Moore* regarding the nature of nominal damages).

Congress has not abrogated California's sovereign immunity through § 1983. "[I]f a lawsuit against state officials under 42 U.S.C. § 1983 alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even though the claim arises under the Constitution." *Pennhurst*, 465 U.S. at 120.

3. Under Color of Law

The Union Defendant was not engaged in "state action" when it deducted dues from Plaintiff's paychecks. The Complaint alleges that Defendants "act[ed] jointly under the color of state law" when they

"jointly" took money from the Plaintiff. Dkt. 1 ¶¶ 73-76. This is a legal conclusion, not a statement of alleged facts.

Plaintiff also alleges that Defendants were acting "under," and as part of "the scheme created by," Cal. Gov't Code § 1153 and the applicable Memorandum of Understanding between IUOE and CDCR. *Id.* Specifically, IUOE provides a list of its dues-paying members to the State Controller, who deducts the dues from their paychecks and transmits the funds to IUOE. Dkt. 1 ¶¶ 5-8. When a member cancels the agreement to deductions, IUOE is directed to update the Controller. *Id.* The Controller is required to rely on information provided by IUOE. *Id.* Even if this is true, IUOE has not acted "under color of law" in performing these ministerial functions.

The caselaw provides the basis for this conclusion. *First*, when a state requires a worker to transfer part of his pay to a union, the union's conduct can be attributed to the state. *Second*, when a state permits a worker to transfer part of his pay to a union, that union cannot be a state actor. *Third*, even when the union allegedly takes advantage of a state procedure to take amounts deducted from a worker's paychecks without his or her consent, that union is not acting "under color of law." Here, Plaintiff concedes that he initially authorized pay deductions for union dues; the state did not compel him to do so. Although he alleges that he had effectively withdrawn his consent, the purported basis for the deductions was a private agreement and the Union Defendant is not a state actor.

Belgau v. Inslee, 975 F.3d 940 (9th Cir. 2020), is controlling. There, employees sued a union, alleging "that it acted in concert with the state by authorizing deduction without proper consent in violation of the First Amendment." 975 F.3d at 946. The Ninth Circuit rejected this argument, holding that "the challenged conduct that caused the alleged constitutional deprivation was not 'fairly attributable' to the state[.]" *Id.* It applied "a two-prong inquiry" to evaluate whether the state's "involvement in private action is itself sufficient in character and impact that the government fairly can be viewed as responsible for the harm of which plaintiff complains." *Id.* (quoting *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013)).

The first prong was 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.* (quoting 723 F.3d at 994). The answer was "no." Thus, plaintiffs did "not generally contest the state's authority to deduct dues according to a private agreement." *Id.* at 946-47. Instead, "the claimed constitutional harm is that the agreements were signed without a constitutional waiver of rights." *Id.* at 947. For this reason, "the 'source of the alleged constitutional harm' is not a state statute or policy but the particular private agreement between the union and Employees." *Id.* (quoting 723 F.3d at 994). This analysis turns on whether the state's authority to deduct dues comes from an agreement between the union and the worker. Even if that private agreement is defective or breached, the claimed constitutional deprivation arose from the private agreement, not state action.

The second prong was whether "the party charged with the deprivation could be described in all fairness as a state actor." *Id.* This test asks whether the defendant "acted 'in concert' with the state 'in effecting a particular deprivation of constitutional right[s]." *Id.* (quoting *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012)). Such "joint action" exists when "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 nongovernmental party,' that it is 'recognized as a joint participant in the challenged activity.'" *Id.* (quoting 723 F.3d at 996). The first sub-test was not satisfied because "[t]he state's role . . . was to permit the private choice of the parties, a role that is neither significant nor coercive" because the state "was required to enforce the membership agreement by state law" but "it had no say in shaping the terms of that agreement." *Id.* at 947-48. The second sub-test was not satisfied because this test requires that the government "in [some] meaningful way accept[] benefits derived from the allegedly unconstitutional actions . . . ." *Id.* at 948 (quoting 723 F.3d at 997). In *Belgau* the state "received no benefits as a passthrough for the dues collection" because "[t]he state remitted the total amount to [the union] and kept nothing for itself" and because "[f]ar from acting in concert, the parties opposed one another at the collective bargaining table." *Id.* In the context of public-sector union dues disputes, the second prong of the "joint action" test is never satisfied. The state

never receives the workers' union dues and is always adverse to the union during labor negotiations.

Wright adopted similar principles. There, the only action taken by the state was "processing authorizations for dues deductions and remitting the payments to the union." 48 F.4th at 1124. "The State received no direct benefits when it served as a passthrough for union dues deductions." *Id.* In addition, "the state's use of the union's certification to process authorized dues deductions was the type of day-to-day administrative task that does not fit into the very few functions recognized as traditionally and exclusively a governmental task." *Id.* (cleaned up) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982); and quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978)). The Ninth Circuit concluded that the union was not a state actor simply for accepting a union's representations and transmitting a portion of a state employee's pay to the union.[1]

Here, the "joint action" test turns on whether the government established the terms of the agreement or whether it permitted the private choice of the parties. If the former, the union is a state actor. If the latter, it is not. The test evaluates whether the government affirms, authorizes, encourages, or facilitates unconstitutional conduct, not whether the union engages in such alleged conduct.

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[1] The Ninth Circuit has held that certain private payment processors hired by a state to handle salary payments and dues withholding could be state actors. *See Ochoa*, 48 F.4th at 1102. However, *Wright* recognized that *Ochoa*'s holding was limited to the status of payment processors, not unions. *Wright*, 48 F. 4th at 1123 n.8.

Other district courts in this Circuit have decided these issues in accord with this principle. For example, in *Zielinski v. Serv. Emps. Int'l Union Loc. 503*, 499 F. Supp. 3d 804, 809 (D. Or. 2020), "Plaintiff [did] not contest the State's authority to deduct union dues pursuant to a membership agreement" but alleged that the union "forg[ed] Plaintiff's signature on the agreements and authoriz[ed] dues deductions without his consent." *Zielinski* dismissed the complaint, concluding that "[w]here . . . the dispute surrounds whether the agreement the plaintiff signed is valid, the allegedly wrongful conduct stems from the union's authorization of dues, an exclusively private act." *Id.* at 810 (quoting *Schiewe v. Serv. Emps. Int'l Union Loc. 503*, No. 3:20-CV-00519-JR, 2020 WL 4251801, at *5 (D. Or. July 23, 2020), *report and recommendations adopted*, 2020 WL 5790389, at *2 (D. Or. Sept. 28, 2020).

Other district courts within the Ninth Circuit have held that, even when a union makes misrepresentations regarding dues authorizations to obtain money from workers, the union is not acting "under color of state law." *See, e.g.*, *Schiewe v. Serv. Emps. Int'l Union Loc. 503*, No. 3:20-CV-00519-JR, 2020 WL 5790389, at *1 (D. Or. Sept. 28, 2020) (union deducted dues from plaintiff's pay for the rest of irrevocable union membership); *Jarrett v. Marion Cnty.*, No. 6:20-CV-01049-MK, 2021 WL 65493, at *1 (D. Or. Jan. 6, 2021), *report and recommendation adopted*, No. 6:20 CV 01049-MK, 2021 WL 233116 (D. Or. Jan. 22, 2021) (same); *Yates v. Washington Fed'n of State Emps.*, 466 F. Supp. 3d 1197, 1203 (W.D. Wash. 2020) (union forged a signature); *Quezambra v. United Domestic Workers of Am. AFSCME Loc. 3930*,

445 F. Supp. 3d 695, 700 (C.D. Cal. 2020) (union deducted dues from plaintiff's pay without authorization).

Plaintiff argues that "*Belgau* does not apply to Mr. Klee's claims, because he fulfilled the terms of his contract with IUOE, [and consequently] *Belgau*'s findings as to state action when a contract is present are, of course, also inapplicable." Dkt. 27 at 12 n.4. The dues authorization in *Belgau* was enforceable and irrevocable, and Plaintiff alleges that his authorization was revocable and revoked. However, those differences are not material. The state-actor analysis in *Belgau* did not depend on the validity of the union's authority to take deductions from the plaintiff's paychecks. Instead, the analysis turned on the source of the union's purported authority: authorization from the government or authorization from the worker. Plaintiff admits that he joined IUOE and authorized pay deductions in the first instance. Dkt. 1 ¶¶ 16-19. Those pay deductions cannot be fairly attributed to state action.

Other cases cited by Plaintiff do not change this outcome. *Janus* held that the public-sector union received "significant assistance" from state officials because the union and state jointly participated in an agency-fee agreement requiring workers to pay dues to the union. *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31; AFL-CIO*, 942 F.3d 352, 361 (7th Cir. 2019). In *Warren v. Fraternal Order of Police, Ohio Labor Council, Inc.*, No. 1:21-CV-01665-PAB, 2022 WL 861505, at *6-7 (N.D. Ohio Mar. 23, 2022), the county and the union were using a "pre-*Janus* agency shop arrangement" with automatic

withholding procedures long after that arrangement had been struck down by *Janus*. In *Hudson v. Chicago Tchrs. Union Loc. No. 1*, 743 F.2d 1187, 1190-91 (7th Cir. 1984), *aff'd sub nom. Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 308-09 (1986), the court held found a union to be a state actor because the "public employer assist[ed] a union in coercing public employees to finance political activities" using a pre-*Janus* arrangement.

Plaintiff also cites *Bain v. California Teachers Association*, No. 2:15-cv-02465-SVW-AJW, 2016 WL 6804921 (C.D. Cal. May 2, 2016). However, in *Bain* the plaintiff objected that "teachers who elect to join the union 'cannot opt out of paying the portion of union dues that is spent on political or ideological expenditures . . . ." *Id.* at *6. *Bain* held that "[t]he government's ministerial obligation to deduct dues for members and agency fees for nonmembers under a collective bargaining agreement does not transform decisions about membership requirements into state actions." *Id.*

Plaintiff also cites *Wenzig v. Service Employees International Union Local 668*, 426 F. Supp. 3d 88 (M.D. Pa. 2019), *aff'd sub nom. Diamond v. Pennsylvania State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020). Plaintiff refers to a footnote in *Wenzig*, which stated that, "[a]lthough [the union] does not argue in this case that it was not acting under 'color of state law,' since plaintiffs are proceeding under § 1983, [the union] must be considered a state actor." *Id.* at 94 n.5. "As such, the court finds that for purposes of the instant motion [the union] is a state actor." The court did not reach the merits of whether the union was a

state actor. Instead, the court noted that, for plaintiff to state a § 1983 claim, the union must be a state actor. There, the union did not contest plaintiff's argument that it was a state actor.

Finally, Plaintiff cites *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) for the proposition that "even a *private* labor union should be considered a state actor under Section 1983 where it relies exclusively on the authority granted under state law to deduct money from public employees' pay to fund the union's political speech." Dkt. 27 at 16. However, *Beck* expressly declined to "decide whether the exercise of rights permitted, though not compelled by [the statute at issue] involves state action." 487 U.S. at 761.

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED WITHOUT PREJUDICE**, i.e., with leave to amend. Any amended complaint shall be filed within 21 days after the issuance of this Order.

IT IS SO ORDERED.

Appendix C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 22-cv-00148

TERRY KLEE,

Plaintiff,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 51, et al.,

Defendants.

Filed: October 2, 2023

JUDGMENT

On August 29, 2022, Defendants' Motions to Dismiss the Complaint were heard. On August 16, 2023, an order granting Defendants' Motions was issued, but Plaintiff was permitted to amend the Complaint within 21 days. On September 12, 2023, Plaintiff filed a Notice of Intent Not to Amend the Complaint. Accordingly, judgment is entered and Plaintiff's Complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: October 2, 2023

[handwritten: signature]
John A. Kronstadt
United States District Judge

Appendix D

RELEVANT STATUTORY PROVISIONS

Cal. Gov't Code §1152. Employee organizations and associations; membership dues, initiation fees, assessments and benefit deductions

Deductions may be requested by employee organizations and bona fide associations from the salaries and wages of their members, and public employers shall honor these requests, as follows:

(a) Employee organizations may request membership dues, initiation fees, and general assessments, as well as payment of any other membership benefit program sponsored by the organization.

(b) Bona fide associations may request membership dues and initiation fees.

The Controller shall not be required to make any benefit deductions for an employee member whose membership dues are not deducted.

Cal. Gov't Code §1153. Administration procedures; deductions, reductions, cancellations or changes

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.