No. ___

IN THE

Supreme Court of the United States

CAMILLE BOURQUE,

Petitioner,

v.

ENGINEERS AND ARCHITECTS ASSOCIATION, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition concerns conduct substantively identical to the conduct this Court considered in *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, 585 U.S. 878, 920-30 (2018). Petitioner Camille Bourque was a nonmember who did not affirmatively consent to union deductions from her wages. Nevertheless, a union, through a government employer, forced her to pay not only agency fees, but full union dues. However, instead of applying the *Janus* case and finding that Bourque's speech was unconstitutionally compelled, the Ninth Circuit declined to apply any constitutional scrutiny to the union or employer's actions. The court reasoned that the statutory system operating here, in which a union instructs a public employer to take deductions from an employee's wages and give it to the union, does not give rise to a claim pursuant to 42 U.S.C. § 1983.

The questions presented are:

1. Is the First Amendment violated when a union causes a government employer to seize full union dues from the wages of a nonconsenting employee?

2. May a union avoid Section 1983 liability when taking full union dues from nonconsenting public employees by claiming the union "misused" its statutory authority?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Camille Bourque with Peter Morejon were the Plaintiffs-Appellants in the court below. Only Bourque seeks review in this petition.

Respondents Engineers and Architects Association; the City of Los Angeles; and Rob Bonta, Attorney General of the State of California were Defendant-Appellees in the court below.

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

STATEMENT OF RELATED PROCEEDINGS

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

1. *Bourque, et al. v. Engineers and Architects, et al*., No. 23-55369 (9th Cir. Apr. 2, 2023), sub nom, *Craine v. Am. Fed'n of State, Cnty., & Mun. Employees Council 36, Local 119*, No. 23-55206, 2024 WL 1405390 (9th Cir. Apr. 2, 2024), U.S. Court of Appeals for the Ninth Circuit. Judgment entered on April 2, 2024.

2. *Bourque, et al. v. Engineers and Architects, et al*., No. 2:21-cv-4006. United States District Court for the Central District of California. Judgment entered March 23, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINION BELOW

The district court dismissed Petitioners' claims, *Bourque et al., v. Engineers and Architects Association, et al*., No. 21-04006 (C.D. Cal. March 23, 2023), reproduced as Appendix D, Pet.App. 39a.

The Ninth Circuit affirmed the district court's dismissal of Petitioner's complaint in a combined memorandum opinion, reported as *Bourque, et al., v. Engineers and Architects Association, et al.,* No. 23-55369 (9th Cir. Apr. 2, 2024), sub nom, *Craine v. Am. Fed'n of State, Cnty., & Mun. Employees Council 36, Local 119*, No. 23-55206, 2024 WL 1405390 (9th Cir. Apr. 2, 2024), reproduced as Appendix B, Pet.App. 18a.

JURISDICTION

The Ninth Circuit issued its memorandum opinion on April 2, 2024. Pet.App. 18a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution states, in pertinent part: "Congress shall make no law…abridging the freedom of speech…" It is reproduced below as Appendix E, Pet.App. 75a.

California Government Code § 3504 is reproduced below as Appendix F, Pet.App. 76a.

California Government Code § 1157.12 is reproduced below as Appendix G, Pet.App. 77a.

STATEMENT OF THE CASE

A. Factual Background

1. Camille Bourque never consented to, and opposed, the deduction of full union dues.

Petitioner Camille Bourque has been a Principal Fingerprint ID Expert II for the Los Angeles Police Department for over twenty-four years. Pet.App. 3a. She never joined the Engineers and Architects Association (EAA) union, and never authorized the City of Los Angeles (the City) to deduct money from her wages for EAA. *Id.* at 4a. However, as is common in many states, the City, upon EAA's instruction, deducted full union dues from Bourque's pay until this Court's ruling in *Janus v. AFSCME* that neither agency fees nor any other payment to the union can be deducted from an employee's wages absent affirmative consent. *Id.* at 5a; *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31,* 585 U.S. 878*,* 920-30 (2018).

Unlike most other unions, EAA continued to instruct the City to take full dues even after *Janus.* When EAA sent Bourque an offensive political solicitation in late 2019, prompting her to ask questions about EAA, Bourque discovered her employer, the City, had been extracting full EAA union dues from her wages for years even though she had never agreed to pay. Pet.App. 5a.

Reasoning that EAA was primarily responsible for the nonconsensual deductions, Bourque immediately sent EAA an opt-out letter stating in no uncertain terms that she never affirmatively consented to supporting the union and demanding that the union "immediately cease deducting all dues, fees, and political contributions." *Id*. EAA did not acknowledge Bourque's letter for four months and continued to compel her to subsidize its speech through involuntary

wage deductions. *Id.* When, after repeated attempts, she finally reached someone from the union on the telephone, the EAA representative stated that, even though she never joined the union or authorized deductions, EAA would continue to take her money. *Id.* at 6a. The union employee explained that EAA acted through the City's payroll deductions system because of a "maintenance of membership" provision in the collective bargaining agreement (CBA) between the union and the City. *Id.*

The CBA, which the City and EAA negotiated, contained a provision that restricts an employee's ability to end union deductions to a narrow annual opt-out window. *Id*. The "maintenance of membership" provision created an opt-out window based on the anniversary date of joining the union. *Id*. According to EAA, an employee's failure to request a cessation of deductions during this specific time period sentences the employee to continued subsidization of the union for an entire year. *Id*. This was true even for someone, like Bourque, who never signed up to be a union member to begin with. *Id.* Additionally, because Bourque never joined the union, there was no anniversary date to trigger her ability to end the deductions. *Id*. Instead, EAA did nothing, and the City continued deducting full union dues. EAA ended the deductions only once Bourque hired an attorney and filed a lawsuit.

2. California's statutory system enabled EAA to compel Bourque's speech.

Once a union is recognized as exclusive representative of a given bargaining unit of public employees, it can negotiate and agree to CBAs binding all employees in the unit, regardless of whether they are members of the union. Meyers-Milias Brown Act (MMBA) Cal. Gov't

Code §§ 3500, *et seq*. The scope of action for exclusive representatives is broadly defined to include "all matters relating to employment conditions and employer-employee relations." Pet.App. 76a; MMBA § 3504. Pursuant to this broad grant of power, unions and government employers regularly negotiate and enter agreements for CBAs. These CBAs include those, like the one EAA and the City agreed to here, containing so-called "opt out windows" restricting represented employees' ability to end dues deductions authorizations by creating narrow annual periods. Pet.App. 6a. Thus, the MMBA empowers unions like EAA to enter agreements with municipalities like the City, to restrict the exercise of employees' First Amendment rights, and to force employees like Bourque to subsidize the union's political speech. *Id.*

Buttressing the MMBA is California Government Code § 1157.12 (Section 1157.12). *Id.* at 77a. Signed into law as part of a package of statutes on the same day this Court handed down *Janus*, Section 1157.12 gives control of dues deductions to unions like EAA. *Id.* Several parts of the statute are noteworthy in this regard. Nothing in Section 1157.12 actually requires unions to possess employee authorization for dues' deductions. *Id.* Instead, it provides that municipalities like the City are forced to rely on union authorizations of employee dues deductions, rather than authorizations from the employees themselves. *Id*. The only time the City can request actual proof of affirmative consent is when a "dispute" arises over deductions. *Id*. However, because EAA is responsible for telling the City whether a given employee has affirmatively consented, it also controls whether a dispute exists. *Id*. For their part, employees like Bourque are barred from taking their questions or complaints over nonconsensual union dues deductions directly to the City. *Id*. Instead, the only recourse Section 1157.12

provides employees is to take their grievances to EAA, which may simply ignore the employee's requests or deny them under its own statutory authority. *Id.* at 5a.

B. Proceedings Below

Bourque filed suit pursuant to 42 U.S.C. § 1983 (Section 1983), seeking compensatory and nominal damages against both EAA and the City for the violation of her First Amendment right to freedom from compelled speech. *Id.* at 1a. The district court granted EAA's Fed. R. Civ. Proc. 12(b)(1) and (b)(6) motion to dismiss against both respondents. *Id.* at 39a. After the presentation of oral arguments, *id.* at 25a, in which counsel for EAA acknowledged Bourque never affirmatively consented to deductions, *id.* at 31a, the Ninth Circuit affirmed the district court's dismissal. 18a.[1]

Regarding EAA, the court relied upon *Belgau v. Inslee*, 975 F.3d 940, 946-49 (9th Cir. 2020) (public employees cannot override binding contractual obligations by bringing a constitutional challenge), *cert. denied*, 141 S. Ct. 2795 (2021), Pet.App. 22a, and *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1121-25 (9th Cir. 2022) (alleged fraud was a misuse of state authority and was not action under "color of law" for purposes of Section 1983), *cert. denied*, 143 S. Ct. 749 (2023), Pet.App. 22a-23a, and held that Bourque's allegations did not give rise to a Section 1983 claim against EAA. There were two bases for this finding.

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[1] The Ninth Circuit combined its decision on Bourque's case with a separate case on behalf of a public employee named Michael Craine. The affirmation of Craine's case's dismissal is not addressed in the instant petition.

First, the Ninth Circuit held that the union's failure to "timely process" the resignation of Bourque's non-existent union membership amounted to a "misuse" of California law, removing her claims from the purview of Section 1983. Pet.App. 22a. Second, the court held "the mere fact that a state transits dues payments to a union does not give rise to a Section 1983 claim against the union," and "a state employer's 'ministerial processing of payroll deductions' does not create a sufficient nexus between the state and the union." *Id.* at 22a-23a. As such, according to the panel, EAA did not act under "color of law" for purposes of Section 1983.

Regarding Bourque's allegations against the City under a theory of municipal liability, the Ninth Circuit asserted, despite Bourque's specific allegations, *id.* at 6a, that the City's discretionary policy choice to include a "maintenance of membership" provision in its CBA restricting Bourque's ability to end the nonconsensual deductions amounted to nothing more than compliance with California law. Pet.App. 23a-24a.

INTRODUCTION AND REASONS FOR GRANTING THE PETITION

It would be a strange result for public employees to be in a worse position, regarding union-compelled speech, after *Janus* than they were before. Yet, this is precisely the result of the Ninth Circuit's ruling in this case. Petitioner Camille Bourque alleges facts that are the closest possible to those alleged in the *Janus* case. If Bourque's allegations do not warrant constitutional scrutiny pursuant to the *Janus* case, then no set of facts meet that standard.

Like Mark Janus, Bourque did not authorize EAA to take her money for use in funding the union's political speech. She was and remains a non-consenting, non-

member. Yet, EAA nonetheless took full union dues from her wages to support the union's political activities. The basis for this action was a statutory system, like the system operating in *Janus*, that authorizes EAA to take Bourque's wages without her affirmative consent. Therefore, under this set of facts, application of the *Janus* case and a finding that EAA acted under color of law to deprive Bourque of her First Amendment right to freedom from compelled speech should have been a straightforward matter.

For over four decades this Court has held that compelling full union dues from nonconsenting public employees runs afoul of the First Amendment, *see, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (prohibiting a union from requiring nonmembers to pay a full dues-equivalent charge funding political expression). And in *Janus*, the Court laid down a detailed standard which, when satisfied, shows affirmative consent through clear and convincing evidence for an employee to authorize such deductions. 585 U.S. at 930 (effective waivers must be knowing, intelligent, and voluntary).

But the Ninth Circuit has departed from *Janus* and its predecessors in such an extreme way as to render those cases a dead letter. First, despite Bourque alleging substantively identical facts as those alleged in *Janus*, the Ninth Circuit refused to apply any constitutional scrutiny to her claims. Pet.App. 22a-23a. Second, the Ninth Circuit held that EAA did not act under color of law when it used state statutory authority to take Bourque's money because the union "misused" Section 1157.12. *Id.* According to this interpretation, unions using state statutes to collect money from employees' wages to fund political speech may be considered only under color of law in the context of

agency fee regimes that no longer exist. But not only does the Ninth Circuit "misuse" theory fly in the face of over forty years of the Court's jurisprudence, this Court has recently rejected this exact theory. *See Lindke v. Freed*, 601 U.S. 187, 198 (2024) (discussing the state action doctrine) (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)).

The Ninth Circuit's conclusions on the issues of compelled speech and state action stand not only in direct conflict with this Court's precedents, but also the holdings of the Seventh, Sixth, and Third Circuits. The petition should be granted to settle the conflict.

Additionally, this petition is one of seven before the Court raising issues concerning union uses of state authority to compel public employee speech through the deduction of full union dues.[2] While agency fee regimes may be a thing of the past, union abuse of state statutory authority to collect full union dues from nonconsenting public employees remains a common and widespread practice. In addition to being the cleanest and most straightforward set of facts alleging compelled union speech possible in a post-*Janus* world, a grant of Bourque's petition would also impact all the other pending petitions. Therefore, the Bourque's petition presents the ideal vehicle to address post-*Janus* efforts

[2] *See Laird v. United Teachers Los Angeles, et al.*, No. 23-1111 (S. Ct.); *Deering v. Int'l Brotherhood of Electrical Workers, Local 18, et al.*, No. 23-1215 (S. Ct.); *Hubbard v. Serv. Employees Int'l Union, Local 2015, et al.*, No. 23-1214 (S. Ct.); *Cram v. Serv. Employees Int'l, Union, Local 503, et al.*, No. 23-1112 (S. Ct.); *Kant v. Serv. Employees Int'l Union, Local 721, et al.*, No. 23-1113 (S. Ct.); *Craine v. Am. Fed'n of State, Cnty., & Mun. Employees Council 36, Local 119*, 23-55206, 2024 WL 1405390 (9th Cir. Apr. 2, 2024) (cert petition to be filed).

to undermine the First Amendment rights of public employees.

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

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH DECADES OF THIS COURT'S PRECEDENTS, AND THIRD CIRCUIT PRECEDENT, APPLYING FIRST AMENDMENT PROTECTION TO PUBLIC EMPLOYEES

For over forty years prior to the *Janus* decision, this Court held that the First Amendment prohibits unions from using state authority to deduct full union dues from nonconsenting public employees. *See, e.g.*, *Abood*, 431 U.S. at 209 (prohibiting a union from requiring nonmembers to pay a full dues-equivalent charge funding political expression); *Ellis v. Bhd. Of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps*., 466 U.S. 435 (1984) (prohibiting a union from exacting an involuntary loan from nonmembers and charging for nonchargeable expenses); *Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 309 (1986) (prohibiting a union from enforcing an inadequate procedure to handle nonmember objections to calculation of an agency fee); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007) (the First Amendment allows a state to require affirmative authorization before using employee wages for political purposes); *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 312 (2012) (prohibiting a union from charging a special political assessment to objecting nonmembers and requiring them to opt out of its payment); *Harris v. Quinn*, 573 U.S. 616, 645 (2014) (prohibiting a union from charging agency fees to partial-public employees).

The culmination of this long line of cases prohibiting the extraction of full union dues was *Janus*, which extended those First Amendment principles to so-called agency fees. In *Janus*, this Court applied constitutional scrutiny to a statutory system under which a public sector labor union instructed a public employer to deduct agency fees (rather than full union dues) from a nonmember public employee to support the collective bargaining activities of a public sector labor union, even though he strongly objected to the bargaining positions of the union. 585 U.S. at 882-86. The Court concluded that an agency fee arrangement "violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* In order to comply with the First Amendment, the Court held that no payment can be deducted from a nonmember's lawfully earned wages, nor even an attempt be made to collect such a payment, unless certain constitutional requirements are met. *Id.* at 930. These requirements include a waiver of the First Amendment effectuated through affirmative rather than passive consent. *Id.* This affirmative consent must be knowing, intelligent, voluntary, and demonstrated through clear and compelling evidence. *Id.*

The Ninth Circuit's decision below conflicts with this Court's *Janus* decision and forty years of precedent. Mark Janus and Camille Bourque are substantively identical. Neither agreed to become a union member or authorize payroll deductions of union dues. Both were compelled to subsidize union speech through nonconsensual seizures of union payments from their wages. If a union seizing agency fees from Janus violated his First Amendment rights, which it did, then EAA seizing full union dues from Bourque also violated her First Amendment rights. It stands to

reason that EAA's compelled deductions of full union dues from Bourque's wages resulted in an even more egregious violation of the First Amendment than the injuries suffered by Mark Janus. EAA's conduct would have been unconstitutional even under *Abood*. But according to the lower court, a statutory system under which a union has the statutory authority to instruct a government employer to deduct full union dues from a non-consenting employee does not give rise to any constitutional scrutiny. Pet.App. 22a-23a.

The Ninth Circuit's rationale leads to the disturbing conclusion that a nonconsenting, nonmember who never authorized deductions can be forced to pay full union dues. Yet, as this Court has noted, it is tyrannical to force an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves." *Hudson*, 475 U.S. at 305. But here, according to the Ninth Circuit below, Bourque's compelled speech claims do not warrant even minimal constitutional scrutiny. Such a conclusion stands not only in direct conflict with *Janus* and its predecessors, but also with the precedent of the Third Circuit.

In *Lutter v. JNESO*, a public employee who had previously agreed to be a union member attempted to avail herself of her constitutional right to end further deductions from her lawfully earned wages after the *Janus* decision. 86 F.4th 111, 120 (3d Cir. 2023). On appeal, the Third Circuit held that Lutter had alleged an actionable injury to her First Amendment right to freedom from compelled speech, even though she had previously signed a union card authorizing such deductions. *Id.* at 127 ("Lutter did not wish to financially support JNESO's speech, but as directed by [state statute], union dues were deducted from her paycheck for ten months after she requested that they cease.").

In other words, even though Lutter had previously agreed to union deductions, she was not barred from seeking relief for deductions after she opted out.[3] If a former union member can bring compelled speech claims after withdrawing affirmative consent, then Bourque, who never affirmatively consented, should also be able to bring such claims.

An employee's right not to subsidize union speech becomes illusory if a union can simply use state law to take an employee's wages without their affirmative consent and over their objections, and the employee has no recourse to defend their First Amendment rights. Because this result conflicts with *Janus* and forty years of this Court's precedent applying the First Amendment to public employees' compelled speech claims, and also the precedents of the Third Circuit, this petition should be granted to settle the conflict.

[3] Multiple district courts have also concluded, along with the Third Circuit that, pursuant to this Court's holding in *Janus*, former union members can properly bring claims alleging compelled speech stemming from non-consensual union dues deductions. *See Klee v. Int'l Union of Operating Eng'rs, Local 501*, et al., Or. Re Defs' Mots. to Dismiss (Doc. 45), 7-9, No. 22-00148 (Aug. 14, 2023); *Chandavong, et al., v. Fresno Deputy Sheriff's Ass'n*, 599 F. Supp. 3d 1017 (E.D. Cal. 2022); *Bright v. Leslie, et al.*, No. 23-00320 (D. Or. Filed Mar. 6, 2023).

II. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH DECADES OF THIS COURT'S PRECEDENTS, AND THE HOLDINGS OF THE SEVENTH, SIXTH, AND THIRD CIRCUITS, HOLDING THAT UNIONS ACT UNDER "COLOR OF LAW" WHEN COMPELLING EMPLOYEES' SPEECH

This Court has consistently held that public sector unions that use state authority to compel public employees' to financially support union political speech through wage deductions act under "color of law" for purposes of Section 1983. *See, e.g.*, *Harris*, 573 U.S. at 645; *Knox*, 567 U.S. at 312; *Hudson*, 475 U.S. at 309; *Ellis*, 466 U.S. at 435; *Abood*, 431 U.S. at 209. So obvious was the presence of state action in those cases that the Court takes it as a matter of course. This legal reality was foundational to this Court's decision in *Janus*. 585 U.S. at 899 (having [union] dues and fees deducted directly from employees' wages" is a "special privilege" unions enjoy by virtue of state law). The California statutory system at issue in this petition is just such a system.

California grants unions this authority through the MMBA (which allows for enforcement of terms in a CBA, including the window period applied to Bourque), and Section 1157.12 (requiring the City to make payroll deductions from an employee's wages based on the union's say so). Both of these statutes caused Bourque's compelled speech injuries. For forty years this exact kind of government enabling of union deductions and government-union cooperation served as the basis for this Court finding that a union acted under "color of law." *Abood*, 431 U.S. at 209. California grants EAA the statutory rights, through the MMBA and Section 1157.12, to instruct the City from whom

full union dues will be deducted. Without these statutes, and access to the City's payroll deduction system, EAA would have no ability to access even a single penny of Bourque's wages without her affirmative consent. Without Section 1157.12, a determination as to whether there had been affirmative consent would lie with the public employer. Once the union is empowered to determine who has affirmatively consented, the union obtains the statutory authority to determine from whom full dues will be deducted.

This Court has highlighted the necessity of conducting a robust factual review to identify state action when such action might not be obvious. *Lindke*, 601 U.S. at 197 ("The distinction between private conduct and state action turns on substance, not labels… Categorizing conduct, therefore, can require a close look."); *see also Columbia Broadcasting Sys., Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 115 (1973) (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."). Nevertheless, the Ninth Circuit held that EAA's deduction of full union dues from Bourque's wages without her affirmative consent was simply a "misuse" of Section 1157.12 with only the barest consideration of the facts. Pet.App. 22a. But as this Court recently recognized, even misuse of state authority can be considered action under "color of law." Conduct falling within the scope of Section 1983 is the "[m]isuse of power, possessed by virtue of state law." *Lindke*, 601 U.S. at 198 (citing *Classic*, 313 U. S. at 326; *Screws v. United States*, 325 U.S. 91, 110 (1945)). In other words, "[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. Therefore, so

long as a person within the meaning of Section 1983 had the state-imbued authority necessary to violate a constitutional right, and a violation resulted from an exercise of that authority, the person acted under "color of law." *Id.* This is true even where the "particular action" may have violated some other state or federal law. *Id.*

This understanding is also in accord with the Seventh, Sixth, and Third Circuits, all of which have found state action in cases where unions used state statutes to compel speech in the form of involuntary union deductions. In *Janus* on remand, the Seventh Circuit recognized that when unions "make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) (*Janus II*) (quoting *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)). In *Janus II*, like EAA in this case, AFSCME was a "joint participant with the state" by certifying to the employer which employees' wages should be seized (and how much) and receiving the money to spend on political speech. *Id.* This reasoning was largely affirmed by the Sixth Circuit in *Littler v. Ohio Assoc. of Pub. School Employees*, 88 F.4th 1176 (6th Cir. 2023), although the court found no state action under the specific circumstances the plaintiff alleged.[4] However, the Court clarified that "[h]ad Littler challenged the constitutionality of a statute pursuant to which the state withheld dues, the 'specific

[4] In *Littler*, a public employee's First Amendment challenge to a "maintenance of membership" provision failed for lack of state action because she challenged the union's improper instruction to continue to deduct dues, rather than challenging the validity of the collective bargaining agreement itself or the state statute allowing for the involuntary deductions. *Littler*, 88 F.4th at 1182.

conduct' challenged would be the state's withholdings, which would be state action taken pursuant to the challenged law." *Id.* (citing *Janus II*, 942 F.3d at 361). The Third Circuit has followed this same line of reasoning. In *Lutter*, an employee did not wish to fund a union's political speech, but as the union directed pursuant to a state statute, union dues were deducted from her paycheck for ten months after she requested they cease. 86 F.4th at 127. Under these circumstances, the court found state action. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 933 (1982) ("[P]rivate use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment.")).[5]

California law grants EAA the statutory right to access and control a government created and operated payroll deduction system, and the union used that authority to compel Bourque's speech. Without this statute, the union would have no ability to access even a single penny of her wages. The Ninth Circuit's rejection of this principle conflicts with forty years of precedent, this Court's holdings in *Janus* and *Lindke*, and the determinations of the Seventh, Sixth, and Third Circuits. The petition should be granted to settle the conflict.

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[5] Multiple district courts considering the same issue have found unions are state actors. *See Chandavong*, 599 F. Supp. 3d at 1022 (union reliance on the CBA and state statutes to compel speech was state action); *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 921 (E.D. Cal 2019) (garnishment of wages involved the application of a state-created rule of conduct and was state action); *Warren v. Fraternal Order of Police*, 593 F. Supp. 3d 666, 672 (N.D. Ohio 2022) ("It is not simply that the FOP and the County had a contract that renders the FOP a state actor here, but that the FOP repeatedly made use of the County's automatic withholding procedures to seize portions of Warren's wages...").

III. THIS PETITION IS THE IDEAL VEHICLE TO ADDRESS THE QUESTIONS PRESENTED AND CURB UNIONS' WIDESPREAD POST-*JANUS* ABUSE OF POWER

Camille Bourque's facts clearly and simply illustrate a fundamental constitutional issue.

In *Janus*, this Court laid down an affirmative consent standard requirement for the deduction of monies for union purposes from the wages of public employees. Unfortunately, through statutes like the MMBA and Section 1157.12, as well as inventing novel ways to circumvent the *Janus* holding, unions' ability to compel speech in the Ninth Circuit is arguably stronger now than before *Janus*.

The Petitioners in *Hubbard v. Serv. Employees Int'l Union, Local 2015*, *et al.*, No. 23-1214 (S. Ct.), never signed union membership and dues authorization cards. Instead, as alleged in their complaint, a union forged their signatures and then used those cards as the basis to compel their speech.

The Petitioners in *Cram v. Serv. Employees Int'l, Union, Local 503, et al*., No. 23-1112 (S. Ct.), were not only compelled to fund union speech through dues deductions outside the terms of the agreements they signed, but compelled to fund overt political speech for the purpose of electioneering across the State of Oregon. These nonconsensual deductions run afoul of even the pre-*Janus* standard under *Abood*.

Petitioner Glenn Laird's union agreement allowed him to end deductions at any time. *Laird v. United Teachers Los Angeles, et al*., No. 23-1111 (S. Ct.). Nevertheless, United Teachers of Los Angeles used a state statute to force him to fund a campaign to

"defund the police" for sixth months. This political speech offended his deepest held beliefs.

Petitioner Christopher Deering signed a union membership and dues authorization card twenty years ago. *Deering v. Int'l Brotherhood of Electrical Workers, Local 18, et al.*, No. 23-1215 (S. Ct.). This card made no mention of any restriction on his ability to end deductions at any time, or any reference to the union's CBA. Nonetheless, the union claimed the ability to compel his speech pursuant to that CBA, without Deering's knowledge or participation.

The Petitioners in *Kant v. Serv. Employees Int'l Union, Local 721, et al.*, No. 23-1113 (S. Ct.), agreed to pay union dues until the expiration of their collective bargaining agreement between their union and employer. But the union unilaterally extended the terms of the agreement, thereby claiming the ability to continue deducting full union dues from their wages without their affirmative consent.

Michael Craine signed union membership and dues authorization in 1998. *Craine v. Am. Fed'n of State, Cnty., & Mun. Employees Council 36, Local 119*, 23-55206, 2024 WL 1405390 (9th Cir. Apr. 2, 2024) (cert petition to be filed). Like Deering, Craine's card makes no mention of any restriction on his ability to end deductions at any time, or any reference to the union's CBA. Nonetheless, the union claimed the ability not only to compel his speech pursuant to that CBA, but to force him to remain a union member.

When the Ninth Circuit considered each of these cases, the court concluded either that the petitioners' First Amendment compelled speech claims did not warrant <u>any</u> constitutional scrutiny pursuant to *Janus*, or that the claims failed for lack of state action

(or both). The same was true of Bourque's claims. But while each of the above referenced petitioners presents important questions based on conflicts of authority that this Court should answer, they each lack the key component of Bourque's petition: factual clarity and simplicity. It is undisputed that Bourque was never a union member and never authorized deductions from her wages. EAA simply asserts the right, pursuant to state statutes, to seize her wages and compel her speech. As stated, Bourque's fact pattern is the closest possible to *Janus* in a world in which agency fees no longer exist. Therefore, a grant in Bourque's case,[6] would impact all the other pending petitions, and curb union abuses of power across a wide range of different circumstances.

The petition should be granted to address unions' post-*Janus* abuses of statutory power.

[6] Either singly or in combination with one or more of the other pending petitions.

CONCLUSION

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

Respectfully submitted,

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July 1, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: 2:21-cv-4006

CAMILLE BOURQUE and PETER MOREJON, individuals,

Plaintiffs,

v.

ENGINEERS AND ARCHITECTS ASSOCIATION, *a labor organization;* the CITY OF LOS ANGELES; and ROB BONTA in his official capacity as Attorney General of California,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND DAMAGES FOR VIOLATION OF CIVIL RIGHTS. [42 U.S.C. § 1983]

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INTRODUCTION

Instead of recognizing the First Amendment rights of Camille Bourque and Peter Morejon to refuse to fund union speech to which they do not agree, and allowing them to exercise those rights, Defendant Engineers and Architects Association (EAA) simply ignored them.

Plaintiff Camille Bourque never joined EAA. But despite Bourque's lack of affirmative consent and repeated objections, her employer, Defendant City of Los Angeles (the City), continues to this day to take her lawfully earned wages for use by EAA in political speech with which she disagrees. Rather than respond to her request, EAA simply ignored her. Plaintiff Peter Morejon last signed a membership authorization with EAA in approximately 2005. It is his belief that this authorization allowed him to end his membership and dues deductions at any time without condition. So, when he received an EAA newsletter in 2020 calling for members for vote for certain political candidates, he decided to exercise this ability. But like Camille Bourque, EAA never responded to his request. Instead, it continued to take his lawfully earned wages without his affirmative consent for another four months.

This state action violated Bourque and Morejon's First Amendment right to be free from compelled speech and their rights to procedural and substantive due process under the Fourteenth Amendment. Thus, Plaintiffs seek redress pursuant to the Civil Rights Act, 42. U.S.C. § 1983 for declaratory and injunctive relief, compensatory and nominal damages as against both the City and EAA, and any other remedy this Court deems proper.

JURISDICTION AND VENUE

1. This action arises under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 (action for deprivation of federal civil rights).

2. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1343 (jurisdiction for deprivation of federal civil rights).

3. This Court has authority to grant equitable relief under 28 U.S.C. §§ 2201 and 2202 (declaratory relief and other relief) including relief pursuant to Federal Rule of Civil Procedure 65 (permanent injunctive relief).

4. Venue is proper in the Central District of California pursuant to 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(b)(2), because all Defendants reside in Los Angeles County. Additionally, a substantial part of the events giving rise to this action occurred in this judicial district.

PARTIES

5. Plaintiff Camille Bourque is a Principal Fingerprint ID Expert II for the Los Angeles Police Department. She has been employed by the City in that capacity for over 22 years.

6. Plaintiff Peter Morejon is an Airport Superintendent of Operations III. He has been employed by the City in that capacity for over 29 years.

7. Defendant, EAA, is a "recognized employee organization," Cal. Gov't Code §3501(b), headquartered in the city and county of Los Angeles, in the state of California. Under California state law, Cal. Gov't Code § 1157.12, and the terms of the applicable memoranda of understanding (MOU), EAA is empowered to represent

whether employees have affirmatively consented to have deductions withdrawn from their lawfully earned wages. EAA's office is located at 2911 West Temple Street, Los Angeles, CA 90026.

8. Defendant City of Los Angeles is a "public agency," Cal. Gov't Code § 3501(c), headquartered in Los Angeles, California. The City engages in business in California, including Los Angeles County. Under California state law, Cal. Gov't Code § 1157.12 and the terms of the applicable MOUs, the City is responsible for deducting dues from public employee's wages and remitting the dues to EAA, based on EAA's representation of whether employees have affirmatively consented to have deductions withdrawn from their lawfully earned wages. The City's office is located at 200 N Spring St, Los Angeles, CA 90012.

9. Defendant Rob Bonta, California's Attorney General, is sued in his official capacity as the representative of the State of California charged with the enforcement of state laws, including the provisions challenged in this case. His address for service is 300 South Spring Street, Los Angeles, California, 90013.

FACTUAL ALLEGATIONS

A. Bourque never joined or authorized payments to EAA.

10. Since Bourque began working for the City in August 1999, she never joined EAA or signed a membership card or any other authorization allowing the City to deduct money from her lawfully earned wages for EAA purposes.

11. Nevertheless, in September 2003 the City began deducting monies from her lawfully earned wages each pay period, which was remitted to EAA.

12. Prior to 2018, Bourque knew that agency fees would be deducted from her wages regardless of her choice not to fund the union's speech.

13. Thus, from 2003 when the deductions began to June 2018 when the U.S. Supreme Court ruled in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018) that agency fees are unconstitutional, Bourque did not contest the unauthorized deductions.

14. However, in late 2019 EAA sent a solicitation to members regarding joining a political committee to advise EAA on donations for political candidates and causes.

15. Bourque did not agree with this activity and decided to make clear to EAA that she did not affirmatively consent to the continued withdrawal of her lawfully earned wages for political speech with which she does not agree.

16. On February 1, 2020, Bourque sent a letter to EAA stating that she does not affirmatively consent to the continued withdrawal of her lawfully earned wages and demanded that the union "immediately cease deducting all dues, fees, and political contributions." Ex. A.

B. EAA ignores Bourque's request to end the deductions.

17. EAA did not acknowledge Bourque's letter at the time it was received.

18. EEA has never acknowledged Bourque's letter since February 2021.

19. The deductions from Bourque's lawfully earned wages continue without her affirmative consent.

20. In June 2020, Bourque telephoned EAA regarding the ongoing deductions from her lawfully earned wages.

21. She spoke with an EAA representative with the Los Angeles Police Department, who referred her to a maintenance of membership provision clause contained in the MOU between Bourque's EAA bargaining unit and the City.

22. The clause provides, in relevant part, that (1) it is binding on employees who "have authorized Union dues deductions," and (2) those employees who wish to rescind that authorization are bound to continue paying the union until "the first full payroll period that begins the period commencing ninety (90) days before the employee's anniversary date in the final year of the MOU..."[1] Ex. B, Art. 2.9(A)(3).

23. Bourque never signed a membership agreement with EAA.

24. There is therefore no anniversary date to which the MOU's 90-day formula can apply regarding Bourque.

25. Bourque does not, and has never, affirmatively consented to the withdrawal of her lawfully earned wages to fund EAA speech.

26. To this day the City and EAA, empowered by the force of state law under Cal. Gov't Code § 1157.12, and the applicable MOU, Ex. B, Art. 2.9(B)(1) and 2.9(B)(1)(a), continue to appropriate $41.80 from Bourque's bi-weekly paychecks without her consent and against her express objection.

27. From June 2018 to April 2021, the City and EAA took approximately $2,842.40 of Bourque's lawfully earned wages without her affirmative consent and against her express objection.

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[1] In the time between Bourque's opt-out letter and the phone call, the MOU had been amended adding another purported year to the span before EAA asserted the deductions could stop.

28. This money was used by EAA to fund political speech with which Bourque does not agree.

C. Morejon effectively ended his EAA membership and dues authorization.

29. Since beginning employment with the City in 1992, Morejon paid agency fees to EAA as a non-member.

30. Then, in approximately 2005, he joined EAA by signing a membership card and dues authorization.

31. Upon information and belief, this membership card formed an "at-will" association between Morejon and EAA, and Morejon was free to end that association at any time without condition.

32. In fall of 2020, EAA emailed political literature to Morejon calling on him to vote for the Biden/Harris ticket in the upcoming presidential election.

33. Morejon did not agree with this political messaging and opposed his dues money being spent for this purpose.

34. On October 5, 2020, Morejon sent a letter resigning his union membership and revoking his authorization to deduct union dues from his lawfully earned wages. Ex. C.

35. This letter was sent via certified mail. Ex. D.

D. EAA ignores Morejon's request to end the deductions.

36. EAA did not acknowledge the letter at the time it was received.

37. Given this lack of communication or acknowledgement, Morejon began telephoning EAA to inquire as to the status of his membership and the continued withdrawal of his lawfully earned wages by the City for EAA purposes. Ex. E.

38. Morejon repeatedly called EAA's office and spoke with Brenna Green, administrative assistant to EAA director, Steven Belhumeur.

39. Morejon spoke to Ms. Green on November 16, 2020.

40. Morejon spoke to Ms. Green on November 20, 2020.

41. Morejon spoke to Ms. Green on December 11, 2020.

42. Morejon spoke to Ms. Green on December 18, 2020.

43. During these calls with Ms. Green, Morejon was only ever able to learn that his letter was on the desk of EAA director, Steven Belhumeur.

44. Morejon called and left voicemails at Mr. Belhumeur's direct office number on December 11 and December 18, 2020.

45. Those messages were never returned by Mr. Belhumeur.

46. Morejon also repeatedly attempted to confirm his letter had been received and his membership ended through email. Ex. F.

47. The City and EAA, empowered by the force of state law under Cal. Gov't Code § 1157.12, and the applicable MOU, Ex. G, Art. 2.9(B)(1) and 2.9(B)(1)(a), continued to appropriate $58.00 from Morejon's bi-weekly paychecks without his consent and against his express objection.

48. From October 2020, when he terminated his membership, to January 2021, when the deductions finally ceased, the City and EAA took approximately

$464.00 of Morejon's lawfully earned wages without his affirmative consent.

49. This money was used by EAA to fund political speech with which Bourque does not agree.

E. Allegations Applicable to Requests for Equitable Relief

50. The controversy between the Defendants and Plaintiffs is a definite and concrete dispute concerning the legal relations of parties with adverse legal interests.

51. The dispute is real and substantial, as EAA still either retains Bourque and Morejon's money for use in political advocacy to which Bourque and Morejon are opposed, as authorized by California law under Cal. Gov't Code § 1157.12, and the applicable MOUs, or has already spent it for that purpose.

52. In the case of Bourque, the city continues to take her lawfully earned wages and divert them to EAA without her affirmative consent.

53. The Defendants maintain the constitutionality of these actions.

54. Permanent injunctive relief is appropriate, as Plaintiffs are suffering a continuing irreparable harm and injury inherent in a violation of First and Fourteenth Amendment rights, for which there is no adequate remedy at law.

55. The declaratory relief sought is not based on a hypothetical state of facts, nor would it amount to a mere advisory opinion, as the parties dispute the legality of ongoing taking and retention of their money without their affirmative consent.

56. As a result of the foregoing, an actual and justiciable controversy exists between Ms. Bourque,

Mr. Laird, and the Defendants regarding their respective legal rights, and the matter is ripe for judicial review.

COUNT I

Violation of the Right to Freedom from Compelled Speech (42 U.S.C. § 1983)

57. Plaintiffs re-allege and incorporate by reference each and every paragraph set forth above.

58. Under the First Amendment, the government cannot take money from public employees' wages to pay union dues or fees without the employees' voluntary and informed affirmative waiver of their First Amendment right to be free of compelled funding of objectionable speech, demonstrated by clear and compelling evidence. *Janus v. AFSCME*, 138 S. Ct. 2448.

59. The Defendants acted under color of state law and pursuant to Cal. Gov't Code § 1157.12 and the applicable MOUs to seize Plaintiffs' wages without their affirmative consent and against their express objection for use in EAA's political speech.

60. Plaintiffs did not, and do not, support EAA's political speech.

61. Plaintiffs repeatedly informed EAA that they did not affirmatively consent to the deduction of their lawfully earned wages for EAA speech.

62. EAA either ignored these repeated requests or took no action to end the unauthorized deductions from Plaintiffs' lawfully earned wages once informed that they did not affirmatively consent.

63. Pursuant to state law, Cal. Gov't Code § 1157.12 and the applicable MOUs, EAA jointly acted with the

City to seize Plaintiffs' lawfully earned wages without their affirmative consent.

64. Because it authorizes the confiscation of Plaintiffs' lawfully earned wages without their affirmative consent, the scheme created by Cal. Gov't Code § 1157.12 and the applicable MOUs, on its face and as applied, violates Plaintiffs' First Amendment rights against compelled speech.

65. The Defendants had no legitimate, let alone compelling, interest in depriving Plaintiffs of their First Amendment rights.

66. Even if the Defendants' scheme did have a legitimate or compelling purpose, it is not narrowly tailored to support that interest.

67. Plaintiffs seek compensatory and nominal damages against the City and EAA for the violation of their First Amendment rights, and injunctive and declaratory relief against all Defendants.

COUNT II

Deprivation of Liberty and Property Interests
Without Procedural Due Process
(42 U.S.C. § 1983)

68. Plaintiffs re-allege and incorporate by reference each and every paragraph set forth above.

69. The Fourteenth Amendment requires the provision of adequate procedures before an individual is deprived of liberty or property.

70. Plaintiffs have a cognizable liberty interest in their First Amendment rights against compelled speech.

71. Plaintiffs have a cognizable property interest in their lawfully earned wages confiscated by the Defendants without their affirmative consent.

72. Defendants' scheme for the seizure of dues for use in EAA's political speech does not include any procedural protections sufficient to meet the requirements of the Due Process Clause.

73. Neither Cal. Gov't Code § 1157.12 nor the applicable MOUs establish any procedures to convey notice to Plaintiffs before the City seized their wages without their affirmative consent for use in EAA's political speech.

74. Neither Cal. Gov't Code § 1157.12 nor the applicable MOUs establish any procedures to provide Plaintiffs with any pre-deprivation or post-deprivation hearing or other opportunity to object to the City to the seizure of their wages for use in EAA's political speech.

75. Pursuant to state law, Cal. Gov't Code § 1157.12 and the applicable MOUs, the EAA jointly acted with the City to deny Plaintiffs their procedural due process rights.

76. Because it lacked the necessary procedural safeguards to protect Plaintiffs' First Amendment liberty interests, and their property interests in their lawfully earned wages, Defendants' dues deduction scheme, on its face and as applied, violates Plaintiffs' right to procedural due process.

77. Plaintiffs seek compensatory and nominal damages against the City and EAA for the violation of their procedural due process rights, and injunctive and declaratory relief against all Defendants.

COUNT III

Inherently Arbitrary Deprivation of
Free Speech Liberty Interests
(42 U.S.C. § 1983)

78. The Plaintiffs re-allege and incorporate by reference each and every paragraph set forth above.

79. The substantive component of the Due Process Clause prohibits restraints on liberty that are inherently arbitrary.

80. Hence, substantive due process bars certain government actions regardless of the fairness of the procedures used to implement them.

81. Infringements of substantive due process rights are subject to strict constitutional scrutiny and must be narrowly tailored to serve a compelling state interest.

82. Plaintiffs have a cognizable liberty interest in their First Amendment rights against compelled speech.

83. The sole means available to Plaintiffs and public employees to terminate their union memberships and end their dues deductions under Cal. Gov't Code § 1157.12 and the applicable MOUs, requires their termination requests be directed to EAA.

84. EAA is inherently biased and financially interested party with an incentive for dues deductions to continue, whether an employee has given their affirmative consent or not.

85. EAA has no incentive to release Plaintiffs, or other comparable situated public employees, from their memberships or supposed dues authorizations.

86. Rather, EAA has a direct financial and legal incentive to represent to the City that Plaintiffs have provided the affirmative consent required by the First

Amendment, even when Plaintiffs had either never signed membership agreements or terminated their agreement.

87. Under these provisions, the City is allowed neither to independently verify whether Plaintiffs affirmatively consented to the deduction of dues from their pay to be remitted to EAA, nor request he submit a new verifiable authorization.

88. As a result, Defendants' scheme under Cal. Gov't Code § 1157.12 and the applicable MOUs has the purpose and effect of arbitrarily burdening Plaintiffs' ability to exercise their First Amendment rights.

89. Plaintiffs have a substantive due process right to exercise their First Amendment rights without suffering the conflict of interest imposed by Defendants' scheme.

90. Pursuant to state law, Cal. Gov't Code § 1157.12 and the applicable MOUs, EAA jointly acted with the City to deny Plaintiffs their substantive due process rights.

91. Because it creates an inherent and arbitrary conflict of interest burdening Plaintiffs' ability to exercise their First Amendment rights, Defendants' dues deduction scheme, on its face and as applied, violates Plaintiffs' right to substantive due process.

92. The Defendants had no legitimate, let alone compelling, interest in depriving Plaintiffs of their substantive due process rights.

93. Even if the Defendants' scheme did have a legitimate or compelling purpose, it is not narrowly tailored to support that interest.

94. Plaintiffs seek compensatory and nominal damages against the City and EAA for the violation of their

substantive due process rights, and injunctive and declaratory relief against all Defendants.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request this Court:

A. Issue a declaratory judgment:

- That the Defendants' scheme to seize Plaintiffs' wages without their affirmative consent under Cal. Gov't Code § 1157.12 and the applicable MOUs, is a violation of the First Amendment;
- That the Defendants' failure to provide Plaintiffs prior notice and an opportunity to dispute the seizure of their wages without their affirmative consent, is a violation of the Fourteenth Amendment's guarantee of procedural due process;
- That the Defendants' scheme requiring Plaintiffs to direct their membership and dues authorization termination requests to a third-party union with a direct financial incentive to continue dues deductions without the employees' affirmative consent, is inherently arbitrary and a violation of the Fourteenth Amendment's guarantee of substantive due process.

B. Issue a permanent injunction:

- Enjoining the Defendants from seizing the wages of Plaintiffs and public employees without their voluntary and informed affirmative consent under Cal. Gov't Code § 1157.12 and the applicable MOUs;
- Enjoining the Defendants from agreeing to and enforcing their procedure for deducting money from the pay of Plaintiffs and public employees that violates the First and Fourteenth Amend-

ments, and ordering the Defendants to implement a process providing adequate procedures for confirming public employees' voluntary and informed affirmative consent prior to the deduction of any money from their pay;

- Enjoining the Defendants from agreeing to and enforcing an inherently arbitrary procedure that violates the First and Fourteenth Amendments of Plaintiffs and public employees; and ordering the Defendants to implement a process by which the City must directly confirm public employees' affirmative consent prior to the deduction of any money from their pay.

C. Enter a judgment as against Defendants City and EAA:

- Awarding Camille Bourque compensatory damages of approximately $2,842.40 for the monies deducted from her lawfully earned wages without her affirmative consent, with interest, including any monies take from her lawfully earned wages without her consent after the filing of this lawsuit;
- Awarding Peter Morejon compensatory damages of approximately $464.00 for the monies deducted from his lawfully earned wages without his affirmative consent, with interest;
- Award Plaintiffs compensatory damages for the violation of their First Amendment rights against compelled speech, and of Due Process rights, in an amount to be determined at trial;
- Awarding Plaintiffs nominal damages of $1.00 each for the deprivation of their First Amendment and Fourteenth Amendment Due Process rights.

D. Other applicable relief:

- Award Plaintiffs costs and attorneys' fees under 42 U.S.C. § 1988;
- Award Plaintiffs any further relief to which they may be entitled and such other relief as this Court may deem just and proper.

Date: May 13, 2021

Respectfully submitted,

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55206

D.C. No. 2:22-cv-03310-DSF-SK

MICHAEL CRAINE,

Plaintiff-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES COUNCIL 36, LOCAL 119, an employee organization; COUNTY OF LOS ANGELES, a public agency; ROB BONTA, in his official capacity as Attorney General of California,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

No. 23-55369

D.C. No. 2:21-cv-04006-JAK-PVC

CAMILLE BOURQUE, individual;
PETER MOREJON, individual,

Plaintiffs-Appellants,

v.

ENGINEERS AND ARCHITECTS ASSOCIATION, a labor organization; CITY OF LOS ANGELES; ROB BONTA, in his official capacity as Attorney General of California,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California John A. Kronstadt, District Judge, Presiding

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Argued and Submitted March 8, 2024
Pasadena, California

MEMORANDUM[*]

Before: CLIFTON, H.A. THOMAS, and DESAI, Circuit Judges.

Plaintiff Michael Craine is an employee of the County of Los Angeles. He alleges that he had dues deducted from his wages without his authorization and sent to the American Federation of State, County, and Municipal Employees Council 36, Local 119 ("AFSCME"), the exclusive bargaining representative for his unit. Plaintiffs Camille Bourque and Peter Morejon are employees of the City of Los Angeles. They allege that they had dues deducted from their wages without their authorization and sent to the Engineers and Architects Association ("EAA"), the exclusive bargaining representative for their units; indeed, Bourque alleges that she never joined EAA. Plaintiffs raise First and Fourteenth Amendment claims against the unions,

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

their respective municipal employers, and California Attorney General Rob Bonta. The district court granted Defendants' motions to dismiss. We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 878 (9th Cir. 2022). We affirm.

1. The district court properly dismissed Morejon's claims for prospective relief for a lack of standing. Morejon was removed from EAA's member list and all deductions from his wages ceased before he filed his complaint. Allegations of past injury alone, with only a highly speculative potential for future unauthorized dues deductions, are insufficient to establish standing. *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1118–21 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023).

2. The district court properly dismissed Plaintiffs' claims for prospective relief as moot. The unions have refunded the money at issue and added Plaintiffs' names to a list they sent to the municipalities containing the names of members who have cancelled their dues authorization. When a defendant voluntarily ceases allegedly unlawful conduct, that defendant "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Here, Defendants have carried their burden. Plaintiffs are unlikely to authorize such deductions, and the deductions are therefore unlikely ever to resume.

3. The district court properly dismissed Plaintiffs' claims against the Attorney General because they are

barred by Eleventh Amendment sovereign immunity.[1] We have recognized that, "'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, 910 (9th Cir. 2021) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166–69 (1985)). Plaintiffs have not shown waiver by the State or a valid congressional override.

Plaintiffs' argument that the *Ex parte Young* doctrine applies is unavailing. Plaintiffs' complaints include no allegations against the Attorney General beyond stating that he is "sued in his official capacity as the representative of the State of California charged with the enforcement of state laws . . . ." But this "generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision" is not enough to subject the Attorney General to suit. *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). And Plaintiffs identify no ongoing violation of federal law, as the unions have processed their membership resignations and refunded all money at issue. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (noting that courts determine whether *Ex parte Young* overcomes an Eleventh Amendment bar to suit by conducting a "straightforward inquiry into whether

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[1] Appellants filed motions for judicial notice of the Attorney General's motion for intervention in a pending case before the U.S. District Court for the Central District of California. The district court case is not relevant, however, as it involves a different state law. As such, the Motion for Judicial Notice, Dkt. No. 46, Case No. 23-55206, and the Motion for Judicial Notice, Dkt. No. 39, Case No. 23-55369, are DENIED.

[the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" (alteration in original) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring))).

4. The district court properly dismissed Plaintiffs' claims against the unions for lack of state action. Actions by a private actor may be subject to Section 1983 liability if the plaintiff can show that the conduct was "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). To establish fair attribution, two criteria must be met: (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 the [S]tate or by a person for whom the State is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

First, Plaintiffs' allegations that the unions failed to timely process their resignations and notify their municipal employers amount to a "private misuse of a state statute" that is "contrary to the relevant policy articulated by the State." *Wright*, 48 F.4th at 1123 (quoting *Lugar*, 457 U.S. at 940–41). As such, Plaintiffs cannot satisfy the first *Lugar* prong.

Second, we reject Plaintiffs' argument that the unions are state actors under the "joint action" or "governmental nexus" tests. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). We have held that the mere fact that a state transmits dues payments to a union does not give rise to a Section 1983 claim against a union under these tests. *Belgau v. Inslee*, 975 F.3d 940, 947–49 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021); *see also Wright*, 48 F.4th at 1122 n.6 (noting that the joint action test "largely subsume[s]"

the governmental nexus test (quoting *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 n.13 (9th Cir. 2013))). And a state employer's "ministerial processing of payroll deductions" does not create a sufficient nexus between the state and a union to subject the union to Section 1983 liability. *Belgau*, 975 F.3d at 948; *see also Wright*, 48 F.4th at 1123–24. Accordingly, Plaintiffs cannot satisfy the second *Lugar* prong.

5. The district court properly dismissed Plaintiffs' claims against the municipalities for failure to establish *Monell* liability. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Plaintiffs do not allege that the municipalities intended to withhold unauthorized dues. *See Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1110 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 783 (2023). Nor have Plaintiffs alleged that the municipalities were "even aware that the deductions were unauthorized." *Id.* We have noted that "*Janus* imposes no affirmative duty on government entities to ensure that membership agreements and dues deductions are genuine," and "does not require that [a state] ensure the accuracy of [a union's] certification of those employees who have authorized dues deductions." *Wright*, 48 F.4th at 1125 (citing *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 929–30 (2018)).

Plaintiffs also cannot point to any deliberate choice the municipalities made, as the municipalities had to comply with California state law requiring them to deduct dues in reliance on the unions' representations. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("[U]nder § 1983, local governments are responsible only for 'their *own* illegal acts.'" (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986))); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1075 (9th Cir. 2016)

(en banc) ("The custom or policy must be a 'deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" (quoting *Pembaur*, 475 U.S. at 483)).

AFFIRMED.

APPENDIX C

[1] UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55369
D.C. No.: 2:21-cv-04006-JAK-PVC

CAMILLE BOURQUE, an individual and
PETER MOREJON, an individual,

Plaintiffs-Appellants,

v.

ENGINEERS AND ARCHITECTS ASSOCIATION,
a labor organization; *et al*,

Defendants-Appellees.

TRANSCRIPT OF PROCEEDINGS

HELD ON
FRIDAY, MARCH 8, 2024

BEFORE THE HONORABLE RICHARD R. CLIFTON, U.S. CIRCUIT COURT JUDGE THE HONORABLE HOLLY A. THOMAS, U.S. CIRCUIT COURT JUDGE THE HONORABLE ROOPALI H. DESAI, U.S. CIRCUIT COURT JUDGE

NINTH CIRCUIT COURT OF APPEALS
PASADENA, CALIFORNIA

[2] APPEARANCES

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[4] TRANSCRIPT OF PROCEEDINGS HELD ON FRIDAY, MARCH 8, 2024

JUDGE THOMAS: Our next case is Bourque and Morejon versus Engineers and Architects Association.

MR. SNOWBALL: Well, good morning again, Your Honors and may it please the court –

JUDGE THOMAS: Just a moment. I'm not sure if somebody else is making their way. Yeah. Just a moment. I'll let you know when to start.

MR. SNOWBALL: Musical chairs.

JUDGE THOMAS: Okay. You can go ahead and proceed. Thank you.

MR. SNOWBALL: Thank you very much. I'll start again. Good morning again, Your Honors, and may it please the court, Timothy Snowball on behalf of the appellants, Camille Bourque and Peter Morejon. I would like to reserve two minutes for rebuttal.

JUDGE THOMAS: Thank you.

MR. SNOWBALL: Your Honors, for over 40 years, the Supreme Court has protected the First Amendment right of public employees not to have [5] their speech compelled by public sector labor unions.

JUDGE CLIFTON: We just heard the core of the argument, and we remember what you said a few minutes ago, and we can do that.

MR. SNOWBALL: Sure.

JUDGE CLIFTON: So let me ask you to focus on what's different, if anything, about this case.

MR. SNOWBALL: Well, certainly. Absolutely. Our contention in this case, Your Honor, would be that the facts are even more simple and more egregious than in

the case that was just presented on behalf of Michael Crane because, in particular, Camille Bourque never authorized anything. It's one thing to, perhaps, try to cite to the Belgau case for the proposition that the union can simply raise an argument over a conflict over a card as a way to get around compelled speech claims, or to try to fit it within the inapposite framework of the Wright case.

In this case, it is undisputed. No party disputes that Camille Bourque never affirmatively authorized anything. This is the closest fact pattern possible in a post-Janus world, the Janus case itself, and I'd like to go through – first [6] compare the facts of this case to the Janus case to make my point, and then the statutes that are at issue in this case versus the Janus case.

In terms of the facts, Mark Janus was a non-union member who never consented to deductions from his lawfully-earned wages but was compelled, nonetheless, to speak by a union using the force of state law. The Supreme Court concluded that this arrangement violated Janus's right to freedom from compelled speech.

Here, Camille Bourque was a non-union member who never consented to deductions from her lawfully-earned wages but again was, nonetheless, compelled to speak by the union using the force of state law. As the Supreme Court found a constitutional violation on behalf of Mark Janus, we would ask this court respectfully to find a constitutional violation on behalf of Camille Bourque. And in failing to recognize that Bourque suffered a constitutional injury at all, we would offer that the district court erred on this point.

In regard to the statutes that are at issue in this case versus the Janus case, under the Illinois Public

Labor Relations Act, public employees could be forced to subsidize the political [7] speech of a union, even if they chose not to join the union, and even if they strongly objected to the political positions taken by the union.

In that case, in the Janus case, the Supreme Court found that the union's use of this statutory authority to compel Janus's speech was sufficient to hold the union responsible for her compelled speech injuries. Again here, under both the Meyer Milias Brown Act and California Government Code Section 1157.12, public employees can be forced to subsidize the political speech of a union, even if they choose not to join the union, and they strongly object to the union's political positions taken in public.

For the same reasons that the union was held responsible by the Supreme Court for Mark Janus's injuries, we would respectfully request this court find that the union in this case is responsible for Camille Bourque's injuries. Again, in failing to recognize that –

JUDGE CLIFTON: How does the other plaintiff, Mr. Morejon –

MR. SNOWBALL: Mr. Morejon, correct.

JUDGE CLIFTON: How does he fit in this picture?

[8] MR. SNOWBALL: Correct. Mr. Morejon's factual scenario is extremely similar to the factual scenario of Michael Crane, except for absent the free association claim, so we'd like to focus our time today on Camille Bourque.

Again, in failing to recognize even that Camille Bourque, who authorized nothing – I mean Janus changed the systems, Your Honor, if you go back and look at the pre- Janus agency fee cases. In those cases,

if a union was taking money from an employee's lawfully-earned wages to subsidize political speech, it was on the – incumbent upon the employee to opt out from those payments. Janus changes that system to an opt-in system under which – I mean we can go back and forth upon what is required for an employee to do, and what the standard is for knowing voluntary and informed consent, but it's clear that the employee must do something. There's some action required on behalf of the employee.

In this case again, no parties dispute that Camille Bourque never took that affirmative action. The union has been entirely unable to produce even a single document showing any kind of consent on her behalf.

[9] Unless the court has any additional questions, I will reserve my time.

JUDGE THOMAS: Thank you very much.

MR. KORNETSKY: Good morning, Your Honors. Adam Kornetsky, appearing on behalf of the Engineers and Architects Association.

This case is very similar to Crane, which you just heard oral argument in. And just as in Crane, the three cases, Belgau, Wright, and Ochoa, are controlling here. I don't want to –

JUDGE CLIFTON: Can you focus on what has been identified as the factual distinction with regard to one of the plaintiffs, Bourque, who apparently did not give authorization in the first instance. Does that change anything?

MR. KORNETSKY: That does not change anything. So Bourque allegedly never consented to any dues deductions, but it's essentially the same as in Wright where the allegation was that the union forged the

membership card, and that there was never any consent to dues deductions. So under Wright, I don't think that is a meaningful distinction.

So as I mentioned, this case is very similar to Crane. The only significant difference that is even potentially significant is that Crane [10] was an expired collective bargaining agreement. And in this case, it was an active collective bargaining agreement, but one that required affirmative written consent before any dues authorizations.

I want to focus a little bit on this collective bargaining agreement. It's actually two, but they have the same language. These MOUs, just to be very clear, that they do require affirmative written consent. While there's a dues maintenance window in the MOUs, the MOUs have several provisions that require affirmative written consent for all dues deductions in compliance with state law. Which as you heard, like the state laws in Oregon and Washington that were looked at in the prior Ninth Circuit decisions, the California state laws require this kind of consent, and they require that revocations of dues deductions be in compliance with the terms of the dues deductions. So that requires –

JUDGE CLIFTON: What form of consent was there from Camille Bourque?

MR. KORNETSKY: As alleged, there was no consent from Ms. Bourque.

JUDGE CLIFTON: So telling me that state law and the memorandum of understanding requires [11] consent, when satisfying to hear in response and not a dispute to the proposition that there wasn't consent, isn't that a concern? I mean I understand you cited to Wright, and we're bound by Wright. But isn't that a concern?

MR. KORNETSKY: It's certainly a concern that if any union members having dues deducted without consent, and that's the concern that the state laws and the MOU deal with, and it's something that's dealt with under state law.

So the plaintiffs here, you know, could have gone to the employment relations board, and they could have had a remedy for these allegedly unlawful deductions under state law. That's where this case should have gone and not in federal court because there's no First Amendment problem here.

There's no due process problem here. There's a problem under state law of an authorized deduction that the – respects the contract, or lack thereof, between the union and the private party. Nothing to do with the city or the state.

JUDGE THOMAS: Okay. Thank you very much.

MS. JOHNSON-BROOKS: Good morning, Your Honors. May it please the court, Erika Johnson-Brooks, on behalf of the City of Los Angeles.

[12] Essentially, the city is being sued for following a state law that the appellants do not like. The court is correct in its prior – in the prior case. The state law is not discretionary, and the district court correctly held that the core of the alleged harm here is the union's failure to notify the city that the plaintiffs had withdrawn or challenged their authorization. Therefore, the city's role was merely ministerial processing of payroll deductions. The city has no control or input per the MOU, and per the clear and unambiguous language in the state law.

In addition, the appellants cannot establish that the city applied a policy other than what was required

under state law, and that the city's actions were the moving force in the alleged harms. There was no deliberate action to follow a course of action from various alternatives. There are no alternatives under case – under state law.

In addition, the allegations regarding deliberate indifference, this court and the United States Supreme Court has set a very stringent standard of fault. It's a high standard, and you must show that the municipality has to be the moving force behind the injury alleged. There has to be [13] deliberate conduct, and there is no deliberate conduct by the city following state law.

In addition, the district court properly ruled, based on case law from this circuit and district courts within the circuit, that Bourque lacked standing to seek prospective relief, and Morejon's claims for prospective relief are moot. And it's clearly on point with the case, Wright, where allegations of past injury alone are insufficient to establish standing.

The threat of these alleged future dues authorizations, as the court recognized in Wright and it is the same here, are imaginary. It's conjecture and speculative. He's been removed – Morejon has been removed from the list, and there's no plausible suggestion that he will be subjected to unlawful wage deductions in the future.

Likewise, Bourque, she's conceded that the case is moot, but she relies on the voluntary cessation exception to mootness, arguing that the conduct will be repeated. And as I just mentioned with Morejon, the court – district court properly found that the alleged wrongful behavior is not reasonably expected to recur. And that is the case, Few versus United Teachers of

Los Angeles. And my [14] time is up. We ask that the district – that this court affirm the district court.

JUDGE THOMAS: Thank you very much.

MS. JOHNSON-BROOKS: Thank you.

MS. LISKA: Good morning again, Your Honors, and may it please –

JUDGE CLIFTON: Welcome back.

MS. LISKA: Thank you. Kristin Liska, on behalf of the Attorney General again. I will keep it very brief out of respect for your time, and I won't repeat what I previously said in the Crane argument we all just heard.

I do just want to reiterate that this statute, like the ones in Belgau, Wright, and Ochoa, those require written authorization for dues to be deducted. That if a union attests that it has that written authorization but doesn't, that would be a violation of the statute. And as have been discussed today, there are many state law remedies for that. Suits and fraud or contract, bringing an unfair labor practice. But that the statute itself is constitutional since the statute requires a written authorization.

If you have any questions, I'm happy to answer.

[15] JUDGE THOMAS: Thank you very much.

MS. LISKA: I will yield my time. Thank you.

MR. SNOWBALL: Thank you again, Your Honors. It's clear that Camille Bourque never affirmatively consented or authorized anything. The Supreme Court has laid down a standard for what's required for a union to use state statutes in order to take money from a public employee and use it to – for political speech. The unions cannot meet the standard in this case.

JUDGE CLIFTON: But the facts report are different. How do the facts permit us to distinguish our court's decision in Wright?

MR. SNOWBALL: Certainly, Your Honor. I think that the Wright case – again, the key factual distinction for the Wright case is the fact that in Wright, there was an allegation of forgery, of fraud. The allegations in Wright in the complaint is replete with allegations that someone signed the card on behalf – we have a fraudulent card on behalf of the plaintiff in that case, and that was a misuse of state law.

Again, there is nothing in the California statutes at issue in this case that actually require [16] the union to have a card. The effect of the statutes in this case are the same as the statutes in Janus. The question before the court is, do the statutes allow the union to unilaterally control whether or not there are going to be deductions from an employee's lawfully-earned wages, and that's exactly what happened in this case.

JUDGE CLIFTON: Well, I'll say again, I understand the allegations with regard to Bourque. But what Wright appears to me to say, is that the reason our court in Wright reached the conclusion it did is expressly – we conclude the district court did not err in dismissing these claims because SEIU is not a state actor for Section 1983 purposes. We, therefore affirm. Well, so yeah, the complaint may have been replete with allegations of forgery, but that's not what our court said in reaching the conclusion that 1983 didn't provide a claim. How is this case any different?

MR. SNOWBALL: I would respectfully disagree, Your Honor. I think if you get into the Wright case, what the court does when looking at the Lugar test for state action is actually – bases that conclusion upon a

Lugar prong 1, which is the state policy requirement. And the court concludes [17] the state could not have had a policy to enable fraud. So if the plaintiffs in Wright are alleging a misuse of state law an illegal act, that could not have been a statute that the state had passed in order to enable that to happen; therefore, it's completely intuitive and logical that you couldn't – can't break law at the same time at which you're acting pursuant to state law.

Here, the allegations are that there's nothing in the state law requiring the union to actually have a card, and we would encourage the court again to look at our reply brief. We put the text of California Government Code 1157.12 right next to the statute in Wright to try to demonstrate to the court how different these statutes are, and the fact that the statute in Wright does require a card. It says right there in the text of the statute that the union must possess a card. There is no such limitation on the statute and the union in this case.

JUDGE CLIFTON: So how does the difference in the statute change the characterization of whether the union is a state actor? If the California code may be less demanding than – was it Washington? And now, I've forgotten the state.

[18] MR. SNOWBALL: Oregon.

JUDGE CLIFTON: Oregon. How is that going to convert the union into a state actor? They're simply operating under the law that California has established.

MR. SNOWBALL: Not – I would submit, not only somewhat different – or I forget how the court characterized it. Not somewhat different. Completely different on this point, and this is the key part of the statute. Does the statute, like the statute in Janus,

allow the union to unilaterally control? Can a union tell the city, take money from Camille Bourque and give it to us for use in political speech without possessing a card? And, in fact, they can. That's exactly what happened here. There's been no defense today from my friends on the other side for this behavior. They simply claim the statutory power to do this, both for the Meyer Milias Brown Act and 1157.12.

Again, this window restriction did not appear out of thin air. When the city sat down with the unions and negotiate this contract, it didn't just get put in and they said, oh, well this is -¬ you know, we read the whole contract, and we happen to miss this one portion that has an effect upon [19] someone's First Amendment rights. The city selected this policy, and this policy was used, in part, to compel Camille Bourque's speech.

Just with the time remaining I have left, Your Honors, I want to push back a little bit on the idea that state defendants, or those alleged to have acted in our color of state law, can simply come into court and try to control the claims pursuant to Section 1983 for plaintiffs allegedly injured their constitutional right, simply by saying that we should've sought some other type of remedy. We don't concede or make any point about whether or not Camille Bourque potentially could have sought claim through some other venue.

The fact of the matter is, the Supreme Court in Janus was very clear on this point. And, again, just to emphasize to the court, this fact pattern is as close, we think, as to Janus will be in the post-Janus world. And so if Camille Bourque did not suffer a compelled speech injury in this case, potentially the conclusion would be that no one can potentially suffer a compelled speech injury post-Janus. And we just don't think that this court's decisions in Belgau and Wright, which

dealt with very specific facts, should be interpreted as [20] an affirmative bar to every compelled speech claim by any public employee, under any possible circumstances. And for that reason, we would ask the district court be overturned.

JUDGE THOMAS: Thank you very much. MR. SNOWBALL: Thank you.

JUDGE THOMAS: We thank all counsel for their arguments this morning. This case is submitted.

(WHEREUPON, the proceedings were concluded.)

CERTIFICATE

I, Michele Rene Pollreisz, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 24th day of May, 2024.

/s/ Michele Rene Pollreisz
Michele Rene Pollreisz

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV21-04006 JAK (PVCx)
Date	March 23, 2023
Title	Camille Bourque, et al. v. Engineers and Architects Association, et al.
Present:	The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Patricia Kim
Deputy Clerk

Not Reported
Court Reporter / Recorder

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANT ROB BONTA'S MOTION TO DISMISS COMPLAINT (DKT. 24); ENGINEERS AND ARCHITECTS ASSOCIATION'S MOTION TO DISMISS (DKT. 28); AND MOTION OF DEFENDANT CITY OF LOS ANGELES TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM (DKT. 30)

I. Introduction

On May 12, 2021, Camille Bourque and Peter Morejon (collectively, "Plaintiffs") filed the present action asserting claims pursuant to 42 U.S.C. § 1983. Dkt. 1 ("Complaint"). The Complaint named as defendants the Engineers and Architects Association (the "EAA"), the City of Los Angeles (the "City"), and California Attorney General Rob Bonta (the "Attorney General") (collectively, "Defendants"). *Id.* at 1. The allegations in the Complaint arise from disputes concerning deductions from Plaintiffs' paychecks that were transferred to EAA. Plaintiffs allege that, because the deducted amounts became a part of funds used to make various political statements with which they disagreed, the deduction actions violated their First Amendment rights.

On August 2, 2021, the Attorney General filed a Motion to Dismiss Complaint. Dkt. 24. On August 3, 2021, EAA and the City, respectively, filed motions to dismiss. Dkts. 28, 30 (together, with Dkt. 24, the "Motions"). On August 23, 2021, Plaintiffs filed an Opposition to Defendants' Motions to Dismiss. Dkt. 33 (the "Opposition").

On September 3, 2021, the City filed a Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss. Dkt. 34. On September 7, 2021, EAA and the Attorney General, respectively, filed replies to the Plaintiffs' Opposition. Dkts. 35, 36 (together, with Dkt. 34, the "Replies").

A hearing on the Motions was held on March 28, 2022, and they were taken under submission. For the reasons stated in this Order, the Motions are GRANTED.

II. Background

A. Parties

It is alleged that Camille Bourque ("Bourque") is employed as a Principal Fingerprint ID Expert II for the Los Angeles Police Department. Complaint ¶ 5. It is alleged that she has been employed in that capacity for more than 22 years. *Id.* It is alleged that Peter Morejon ("Morejon") is employed as an Airport Superintendent of Operations III for the City. *Id.* ¶ 6. It is alleged that he has been employed in that capacity for more than 29 years. *Id.*

It is alleged that EAA is a "recognized employee organization" pursuant to Cal. Gov't Code § 3501(b) that is headquartered in Los Angeles. *Id.* ¶ 7. It is alleged that EAA "is empowered to represent whether employees have affirmatively consented to have deductions withdrawn from their lawfully earned wages." *Id.*

It is alleged that the City is a "public agency" pursuant to Cal. Gov't Code § 3501(c). *Id.* ¶ 8. It is alleged that the City "is responsible for deducting dues from public employee's wages and remitting the dues to EAA, based on EAA's representation of whether employees have affirmatively consented to have deductions withdrawn from their lawfully earned wages." *Id.*

It is alleged that the Attorney General is "sued in his official capacity as the representative of the State of California charged with the enforcement of state laws, including the provisions challenged in this case." *Id.* ¶ 9.

B. Substantive Allegations

1. Allegations Concerning Plaintiff Bourque

It is alleged that Bourque began working for Defendant City in 1999. *Id.* ¶ 10. It is alleged that Bourque never joined Defendant EAA, and neither signed a membership

card nor otherwise authorized the City to deduct money from her wages for use by the EAA. *Id.* It is alleged that, beginning in September 2003, the City began deducting amounts from Bourque's wages, which were remitted to EAA. *Id.* ¶ 11. It is alleged that Bourque "did not contest the unauthorized deductions" between 2003 and February 2020. *Id.* ¶¶ 13-16.

It is alleged that in late 2019, EAA "sent a solicitation to members regarding joining a political committee to advise EAA on donations for political candidates and causes." *Id.* ¶ 14. It is alleged that Bourque disagreed with this activity and, on February 1, 2020, sent a letter to EAA "stating that she does not affirmatively consent to the continued withdrawal of her . . . wages." *Id.* ¶ 16. It is alleged that the letter demanded that EAA "immediately cease deducting all dues, fees, and political contributions." *Id.* It is alleged that the EAA continued to deduct money from Bourque's wages after she sent the letter. *Id.* ¶ 20.

It is then alleged that, in June 2020, Bourque spoke to an EAA representative by telephone, "who referred her to a maintenance of membership provision clause contained in the MOU between Bourque's EAA bargaining unit and the City." *Id.* ¶ 21. It is alleged that the clause applies to employees who "have authorized Union dues deductions" and further provides that "employees who wish to rescind that authorization are bound to continue paying the union until 'the first full payroll period that begins the period commencing ninety (90) days before the employee's anniversary date in the final year of the MOU.'" *Id.* ¶ 22.

It is further alleged that the City and EAA continue to take $41.80 from Plaintiff Bourque's bi-weekly paychecks "without her consent and against her express objection." *Id.* ¶ 26. It is alleged that between

June 2018 and April 2021, the City and EAA deducted approximately $2842.40 from Bourque's wages "without her affirmative consent and against her express objection." *Id.* ¶ 27. It is also alleged that the money was used by EAA "to fund political speech with which Bourque does not agree." *Id.* ¶ 28.

The Complaint also alleges that, when it was filed, EAA had not acknowledged Bourque's letter. *Id.* ¶¶ 17-18. It is alleged that the deductions from her wages "continue without her affirmative consent." *Id.* ¶ 19.

2. Allegations Concerning Morejon

It is alleged that Morejon began his employment with the City in 1992. *Id.* ¶ 29. It is alleged that from 1992 to 2005, Morejon paid agency fees to EAA as a non-member. *Id.* ¶¶ 20-30. It is alleged that in 2005, Morejon joined EAA "by signing a membership card and dues authorization." *Id.* ¶ 30. It is alleged that the membership card "formed an 'at-will' association between Morejon and EAA, and Morejon was free to end that association at any time without condition." *Id.* ¶ 31.

It is alleged that in 2020, Morejon received political literature from EAA that included public statements with which he disagreed. *Id.* ¶¶ 32-33. It is alleged that, on October 5, 2020, Morejon "sent a letter resigning his union membership and revoking his authorization to deduct union dues from his lawfully earned wages." *Id.* ¶ 34.

It is alleged that EAA did not acknowledge its receipt of the letter, which led Morejon to call EAA to inquire about the status of his membership and the continued withdrawal of wages by Defendant City "for EAA purposes." *Id.* ¶¶ 36-37. It is alleged that Morejon spoke with someone at EAA several times, but learned

only "that his letter was on the desk of EAA director, Steven Belhumeur." *Id.* ¶¶ 38-43.

It is further alleged that despite these efforts, the City and EAA continued to deduct "$58.00 from Morejon's bi-weekly paychecks without his consent and against his express objection." *Id.* ¶ 47. It is alleged that, between October 2020 and January 2021, "when the deductions finally ceased," Defendants City and EAA deducted approximately $464 from Morejon's wages without his consent. *Id.* ¶ 48.

3. Causes of Action

The three causes of action all arise under 42 U.S.C. § 1983. The First Cause of Action alleges that Defendants acted under color of law to seize portions of Plaintiffs' wages for use in EAA's political speech, in violation of Plaintiffs' First Amendment rights against compelled speech. *Id.* ¶¶ 57-67.

The Second Cause of Action alleges that "Defendants' scheme for the seizure of dues for use in EAA's political speech does not include any procedural protections sufficient to meet the requirements of the Due Process Clause." *Id.* ¶ 72. It is alleged that Defendants' actions did not properly safeguard Plaintiffs' First Amendment and property interests in violation of Plaintiffs' procedural due process rights. *Id.* ¶¶ 72-77.

The Third Cause of Action alleges that "Defendants' scheme under Cal. Gov't Code § 1157.12 . . . has the purpose and effect of arbitrarily burdening Plaintiffs' ability to exercise their First Amendment rights," which denies "Plaintiffs their substantive due process rights." *Id.* ¶¶ 88-90. Section 1157.12 provides:

> Public employers other than the state that provide for the administration of payroll

deductions authorized by employees for employee organizations as set forth in Sections 1152 and 1157.3 or pursuant to other public employee labor relations statutes, shall:

(a) Rely on a certification from any employee organization 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 public employer unless a dispute arises about the existence or terms of the authorization. The employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that certification.

(b) Direct employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer 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 public employer for any claims made by the employee for deductions made in reliance on that information. Deductions may be revoked only pursuant to the terms of the employee's written authorization.

Cal. Gov't Code § 1157.12.

4. Relief Sought

Plaintiffs seek three forms of relief. *First*, they seek a declaratory judgment as to the following: (1) Defendants' actions in deducting Plaintiffs' wages without their affirmative consent violated the First Amendment; (2) Defendants' failure to provide Plaintiffs prior notice and an opportunity to dispute the wage deductions violated their rights to procedural due process under the Fourteenth Amendment; and (3) Defendants' scheme requiring Plaintiffs to "direct their membership and dues authorization termination requests to a third-party union with a direct financial incentive to continue dues deductions" violated their substantive due process rights under the Fourteenth Amendment. Complaint at 15-16.

Second, they seek the entry of an injunction that provides the following relief: (1) Defendants shall not seize wages from "Plaintiffs and public employees" without their affirmative consent; (2) Defendants shall adopt adequate procedures to confirm that public employees have affirmatively consented to deductions from their wages; and (3) the City shall adopt a process by which it must directly confirm the affirmative consent of a public employee prior to any deduction from wages. *Id.* at 16.

Third, Plaintiffs seek compensatory damages. Bourque seeks $2,842.40, plus accrued interest, for the amounts deducted from her wages without her affirmative consent. *Id.* at 16. Morejon seeks approximately $464, plus accrued interest, for the amounts deducted from his wages without his affirmative consent. *Id.* at 17. Further, Plaintiffs seek compensatory damages "for the violation of their First Amendment rights against compelled speech, and of Due Process rights." *Id.* Plaintiffs also seek nominal damages for the violation

of their rights under the First and Fourteenth Amendments, as well as an award of attorney's fees and costs. *Id.*

III. Analysis

A. Legal Standards

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) (internal citations and quotations 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) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

Additionally, Fed. R. Civ. P. 12(b)(1) provides that a party may assert as a defense the court's lack of subject-matter jurisdiction. The Ninth Circuit has determined that "[a]lthough sovereign immunity is only quasi-jurisdictional in nature, Rule 12(b)(1) is still a proper vehicle for invoking sovereign immunity from suit." *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015); *see Sato v. Orange Cnty. Dept. of Educ.*, 861 F.3d 923, 927 n.2. (9th Cir. 2017) ("A sovereign immunity defense is 'quasi-jurisdictional' in nature and may be raised in either a Rule 12(b)(1) or 12(b)(6) motion.").

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). While this policy is to be applied "with extreme liberality," courts have routinely found that amendment is inappropriate in circumstances where litigants have failed to cure previously identified deficiencies, or where amendment would be futile. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001); *see Foman v. Davis*, 371 U.S. 178, 182 (1962); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990).

B. Application

1. Plaintiff Morejon's Claims Against Defendant Attorney General and for Prospective Relief

a) Claims Against Defendant Attorney General

(1) Eleventh Amendment Immunity

"[T]he Constitution does not provide for federal jurisdiction over suits against nonconsenting states." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). The Eleventh Amendment precludes actions in which a party seeks either damages or injunctive relief "against a state, an 'arm of the state,' its instrumentalities, or its agencies." *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) (per curiam) (quoting *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1422-23 (9th Cir. 1991)). Congress may limit this immunity, but only through Section 5 of the Fourteenth Amendment and only where there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Kimel*, 528 U.S. at 81-82 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

Ex Parte Young, 209 U.S. 123 (1908), determined that there were certain limitations on these restrictions. Thus, "the Eleventh Amendment does not bar actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities." *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (citing *Ex Parte Young,* 209 U.S. at 155-56). Pursuant to *Ex Parte Young*, "the state officer sued 'must have some connection with the enforcement of the [allegedly unconstitutional] act.'" *Id.* (quoting *Ex Parte Young*, 209 U.S. at 157). "This connection must be fairly direct; a generalized duty to enforce state law

or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Id.* To determine whether *Ex Parte Young* applies, a court must conduct "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Semerjyan v. Service Emp.'s Int'l Union Loc. 2015*, 489 F. Supp. 3d 1048, 1055 (C.D. Cal. 2020) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

The Complaint alleges that the deductions from Morejon's wages ended in January 2021. Complaint ¶ 48. Thus, as in *Semerjyan*, "the Complaint's factual allegations establish that there is *no* ongoing violation" as to Morejon. 489 F. Supp. 3d at 1056. A straightforward review of the Complaint "shows that there is no ongoing violation, so the *Ex parte Young* exception does not apply, and Plaintiff's § 1983 claims against the [Attorney General] are barred by Eleventh Amendment immunity." *Id.*

The Attorney General's Motion to Dismiss Complaint is GRANTED as to Morejon's claims.

b) Standing for Prospective Relief

For substantially the same reasons, EAA and the City argue that Morejon lacks standing to seek prospective relief. Dkt. 30 at 13-15; Dkt. 28-1 at 29.

The Complaint alleges that that the deductions from Morejon's wages ended in January 2021. Complaint ¶ 48. EAA has also established that Morejon was removed from the union member list before the Complaint was filed. *See* Declaration of Marleen Fonseca, Dkt. 28-2 ¶ 13 ("Fonseca Decl."); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("In resolving a factual attack on jurisdiction, the district

court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment."); *see Stoia v. Yee*, No. 2:20-cv-01760-KJM-DMC, 2021 WL 3847725, at *2-3 (E.D. Cal. Aug. 27, 2021) (citing *Safe Air for Everyone* and concluding that a declaration from the union's "Member Services Director" was properly considered in determining whether plaintiffs had standing); *Hubbard v. SEIU Loc. 2015*, 552 F. Supp. 3d 955, 959 (E.D. Cal. 2021) (same).

Further, there is no plausible suggestion that Morejon would be subject to unlawful wage deductions in the future. *See* Dkt. 33 at 38 ("Plaintiffs' claims for prospective relief are likely moot due to the fact that they are no longer members of EAA, [and] are unlikely to rejoin in the near future . . . ."); *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1119–20 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023) (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013)) ("[T]he sole basis for [Wright's] impending injury is her fear that, should she return to work, SEIU will forge a new membership agreement. . . . Wright's fear . . . rests on a 'highly attenuated chain' of inferences in which independent actors must act in a certain manner to target her specifically."); *Semerjyan*, 489 F. Supp. 3d at 1059-60 ("Plaintiff argues that the Union 'could easily reinstate [her] dues deductions without authorization,' . . . but this is pure speculation."); *Yates v. Wash. Fed'n of State Emps.*, 466 F. Supp. 3d 1197, 1205 (W.D. Wash. 2020) ("Yates presents no evidence to contradict WFSE's showing that its procedures make unauthorized withdrawals very unlikely, especially in Yates's case. The fact that Yates encountered an isolated instance of misconduct or error in the past does not mean she is at heightened risk of another similar experience."); *Stoia v. Yee*, No. 2:20-cv-01760-

KJM-DMC, 2021 WL 3847725, at *2 (E.D. Cal. Aug. 27, 2021), *appeal dismissed*, No. 21-16597, 2022 WL 4564130 (9th Cir. Apr. 29, 2022) ("Here, the challenged deductions stopped before this lawsuit began, and plaintiffs have not alleged or shown any future violations are more than just a possibility.").

For these reasons, Morejon "has not alleged any facts [from] which a threat of future injury could be reasonably inferred." *Semerjyan*, 489 F. Supp. 3d at 1059; *see Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct."). Because the voluntary cessation and capable-of-repetition-yet-evading-review exceptions to mootness do not apply in the context of standing, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190-91 (2000), Morejon's claims for prospective relief must be dismissed. *See Davis*, 554 U.S. at 734 ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (citation and internal quotation marks omitted)).

For the foregoing reasons, EAA's Motion to Dismiss and the City's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim are GRANTED as to Morejon's claims for prospective relief.[1]

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[1] Declaratory relief is prospective. *See Mayfield v. U.S.*, 599 F.3d 964, 969 (9th Cir. 2010) ("Thus, a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment.").

2. Bourque's Claims Against Defendant Attorney General

As explained above, under *Ex Parte Young*, "the state officer sued 'must have some connection with the enforcement of the [allegedly unconstitutional] act.'" *L.A. Cnty. Bar Ass'n*, 979 F.2d at 704 (quoting *Ex Parte Young*, 209 U.S. at 157). "This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Id.*

The sole allegation in the Complaint concerning the Attorney General is that he "is sued in his official capacity as the representative of the State of California charged with the enforcement of state laws, including the provisions challenged in this case." Compl. ¶ 9. This is insufficient to establish a "fairly direct" connection between the Attorney General and the claims because a "generalized duty to enforce state law . . . will not subject an official to suit." *L.A. Cnty. Bar Ass'n*, 979 F.2d at 704.

Neither response by Bourque is persuasive. The first is that the "entire system by which the City and EAA jointly act to deprive employees like Bourque and Morejon of their First and Fourteenth Amendment rights occurs under the exclusive authority of state law and is defended and enabled by the Attorney General." Dkt. 33 at 30. This allegation does not appear in the Complaint. However, even if the Complaint were amended to include it, the outcome would not change; this assertion is not more than one as to a "generalized duty to enforce state law." *L.A. Cnty. Bar Ass'n*, 979 F.2d at 704.

The second response is a citation to Cal. Gov't Code § 12511, which provides: "The Attorney General has charge, as attorney, of all legal matters in which the State is interested . . . ." For the same reasons, this is insufficient to establish a direct connection between the Attorney General and the alleged violations of Cal. Gov't Code § 1157.12. *See* Cal. Gov't Code § 1157.12 ("Public employers other than the state that provide for the administration of payroll deductions authorized by employees for employee organizations . . . shall: . . . .").

Because Bourque has failed to show a "fairly direct" connection between the Attorney General and Cal. Gov't Code § 1157.12, these claims are precluded by the Eleventh Amendment. *Cf. Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) ("Governor Brown is entitled to Eleventh Amendment immunity because his only connection to § 25982 is his general duty to enforce California law."); *Bolbol v. Brown*, 120 F. Supp. 3d 1010, 1019 (N.D. Cal. 2015) ("Here, Section 527.8 does not empower district attorneys to enforce the law, and accordingly the Attorney General's enforcement power is limited to her general duty to enforce California law. Because such a general duty is insufficient under *Ex parte Young*, the Eleventh Amendment bars plaintiffs' claims against the Attorney General.")

For the foregoing reasons, Bourque's claims against the Attorney General fail. The Attorney General's Motion to Dismiss Complaint is GRANTED as to Bourque's claims.

3. Plaintiffs' Claims Against Defendants EAA and City

a) Mootness

(1) Prospective Relief

EAA and the City argue that Plaintiffs' claims for prospective relief are moot. As explained above, Morejon lacks standing to pursue prospective relief. For similar reasons, Bourque's claims for prospective relief are moot.

In support of its Motion to Dismiss, EAA submitted a declaration from Marleen Fonseca, who is the current Executive Director of EAA and has served in that role since March 15, 2021. Fonseca Decl. ¶ 2. Fonseca declares that EAA receives regular reports from the City that include the name of each employee who is a member of EAA, and the amount of dues that has been deducted from each employee's pay check and transferred to EAA during the time period stated in the report. *Id.* ¶ 8. Fonseca declares that she generated reports from this database for Plaintiffs. *Id.* ¶ 9. Fonseca declares that EAA notified the City on May 22, 2021, that Bourque was no longer a member of the union "by providing her name on the cancellation list." *Id.* ¶ 14. Fonseca further declares that the City stopped deducting dues from Bourque's paychecks "beginning with her paycheck for the May 9 – May 22 pay period." *Id.*

Fonseca next declares that the report concerning Bourque shows that the City withdrew a total of $2479.06 from her paychecks for the period between June 27, 2018, and August 2, 2021. *Id.* ¶ 10. Fonseca declares that on May 29, 2021, she sent a letter and a refund check in the amount of $2850 to Bourque by certified mail. *Id.* ¶ 15. The "check was equal to more than $2,479.06 plus simple interest at 10 percent per

annum (or constantly compounding interest at 9 percent per annum) plus $1.00 in nominal damages." *Id.* ¶ 15. The proffered payment was provided without any conditions. Fonseca also attached to the declaration a copy of the letter sent to Bourque. Dkt. 28-2 at 12.

Bourque concedes that "Plaintiffs' claims for prospective relief are likely moot due to the fact that they are no longer members of EAA, are unlikely to rejoin in the near future, and are no longer having dues deducted from their lawfully earned wages by the City for EAA's political speech." Dkt. 33 at 38. However, Bourque argues that "several exceptions to mootness are directly on point and authorize this Court to assert jurisdiction and allow [her] claims for prospective relief to proceed." *Id.*

First, Plaintiff Bourque contends that her claims for prospective relief may proceed pursuant to the capable of repetition yet evading review exception to mootness. *Id.* The exception is "limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Several other district courts in this Circuit have rejected the proposed application of this rule in the context of factual circumstances that parallel those presented here. *See, e.g.*, *Few v. United Tchr.'s L.A.*, No. 2:18-cv-09531-JLS-DFM, 2020 WL 633598, at *5 (C.D. Cal. Feb. 10, 2020) (determining the "capable of repetition, yet evading review" doctrine did not apply where Plaintiff was "no longer a UTLA member, all dues deductions have ended, and there is no plausible likelihood that dues deductions will recur"), *aff'd*, 2022 WL 260023 (9th Cir.

Jan. 27, 2022); *Durst v. Or. Educ. Ass'n*, 450 F. Supp. 3d 1085, 1088 (D. Or. 2020) (doctrine does not apply where "there is no reasonable expectation that Plaintiffs will be subject to any involuntary deductions going forward"). There is no such reasonable expectation here. *See, e.g.*, *Stroeder v. Serv. Empls. Int'l Union*, No. 3:19-cv-01181-HZ, 2019 WL 6719481, at *3 (D. Or. Dec. 6, 2019) ("The Court cannot find a reasonable expectation that Plaintiff will be subjected to the challenged action again. . . . Plaintiff is no longer a union member, her dues authorization is no longer in effect, and dues are no longer being deducted from her paychecks."); *Durst*, 450 F. Supp. 3d at 1088 ("In other words, there is no reasonable expectation that Plaintiffs will be subject to any involuntary deductions going forward.").

In response, Bourque relies on *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), which was a class action proceeding, and argues that the present action cannot be deemed moot because Plaintiffs have not had an opportunity to seek class certification. The standard for determining mootness differs in the class action context, because the claims of some putative class members may not be moot. In contrast, "[w]here no class action has been instituted, the capable of repetition doctrine is applied only in exceptional situations where the plaintiff can reasonably show that *he will again* be subject to the same injury." *Sample v. Johnson*, 771 F.2d 1335, 1339 (9th Cir. 1985) (emphasis added). Bourque has failed to show that she is likely to be subject to the same injury, and the Complaint does not refer to Fed. R. Civ. P. 23 or otherwise allege any class claims. Therefore, Bourque's reliance on *Pitts* and the rules of mootness in class action proceedings is not persuasive. *See Few*, 2020 WL 633598, at *5 ("Thus, because Few has not brought a putative class action, his claim is non-justiciable.");

Stroeder, 2019 WL 6719481, at *3 ("Here, there is no putative class action."); *Grossman v. Hawaii Gov't Empls. Ass'n*/AFSCME Loc. 152, 611 F. Supp. 3d 1033, 1050 (D. Haw. 2020) ("This case differs because Grossman did not file her complaint as a class action, and she never sought to certify this case as a class action at any point in this litigation.").[2]

Second, Bourque argues that the voluntary cessation exception to mootness applies to her claims for prospective relief. Again, other district courts in this Circuit have rejected similar arguments. *See, e.g.*, *Aliser v. SEIU Cal.*, 419 F. Supp. 3d 1161, 1166 (N.D. Cal. 2019) ("[F]or the allegedly wrongful conduct to recur with respect to the plaintiffs, they would need to become union members again, which is "a remote possibility." (citation omitted)); *Few*, 2020 WL 633598, at *5 ("[V]oluntary cessation of challenged activity still yields mootness where, as here, it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (citation omitted)); *Grossman*, 611 F. Supp. 3d at 1048 ("As with Grossman's voluntary cessation theory, the fatal defect here is the fact that there is no "reasonable expectation that [Grossman] [will] be subject to [the terms of Act 7] again." (alterations in original) (citation omitted)); *Durst*, 450 F. Supp. 3d at 1088-89 (similar). This analysis applies here. Through the Fonseca Declaration, Defendants have established "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S.

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[2] Plaintiffs also "seek leave to amend their complaint to seek class certification on behalf of other City employees whose lawfully earned wages are currently being taken and spent on political speech by EAA without their affirmative consent." Dkt. 33 at 42. Plaintiffs' request for leave to amend is addressed below.

at 190; *see also* Dkt. 33 at 38 ("Plaintiffs[] . . . are unlikely to rejoin [EAA] in the near future . . . .").

For the foregoing reasons, Bourque's claims for prospective relief, including declaratory relief, are MOOT. Because Morejon lacks standing to seek prospective relief, and Bourque's claims for prospective relief are moot, EAA's Motion to Dismiss and the City's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim are GRANTED as to those claims.

(2) Retrospective Relief

EAA and City also argue that Plaintiffs' claims for retrospective relief are moot. Dkt. 28 at 10, 29-30; Dkt. 30 at 8, 11-12. They contend that Plaintiffs have received refunds of the total amounts deducted from their wages as alleged in the Complaint, and corresponding interest. Thus, each negotiated the checks sent to him or her by EAA. Plaintiffs do not dispute that they received and negotiated the checks, but argue that the "checks did not furnish the full scope of relief sought." *See* Dkt. 33 at 13-14. Plaintiffs also contend that the exceptions to mootness apply.

Plaintiffs' claims for compensatory damages in the amount deducted from their wages are moot. The undisputed facts offered by Defendants establish that Plaintiffs were provided the compensatory damages they seek, including interest, without condition. *See, e.g.*, *Jackson v. Napolitano*, No. 19cv1427-LAB (AHG), 2020 WL 5709284, at *4-6 (S.D. Cal. Sept. 23, 2020) (because "the Union fully refunded all dues Plaintiffs paid to it[,] . . . with interest," the "claim for a refund of their withheld union dues is moot"); *Durst*, 450 F. Supp. 3d at 1088 ("Plaintiffs' claim for compensatory damages is also moot as Defendants provided Plaintiffs

with all of the compensatory damages sought in the form of checks sent to Plaintiffs' attorney."); *Molina v. Penn. Soc. Serv. Union*, 392 F. Supp. 3d 469, 482 (M.D. Pa. 2019) ("The Court also concludes that dismissal of Plaintiff's claims for retrospective monetary relief in the form of post-resignation due payments is proper because Plaintiff's claim has been rendered moot by the refund provided by Defendants."); *Mayer v. Wallingford-Swarthmore Sch. Dist.*, 405 F. Supp. 3d 637, 642 (E.D. Pa. 2019) ("In this case, however, there are no compensatory damages to be awarded: Plaintiff has received a refund for the dues that were paid after he resigned from the Union, and his actual injury therefore has been redressed."). Further, for the same reasons stated above, none of the exceptions to mootness applies.

For the foregoing reasons, Plaintiffs' claims for compensatory damages in the amount of the wages deducted from their paychecks is MOOT. Therefore, EAA's Motion to Dismiss and the City's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim are GRANTED as to those claims for relief.

b) Failure to State a Claim

Plaintiffs also seek an award of "compensatory damages for the violation of their First Amendment rights against compelled speech, and of Due Process rights, in an amount to be determined at trial." Dkt. 1 at 17. As explained below, the Complaint fails to state a claim for a violation of Plaintiffs' First Amendment or due process rights because Plaintiffs' alleged harm was not based on state action and the Complaint fails to allege a *Monell* claim.

(1) Claims Against Defendant EAA

The first issue is whether Plaintiffs' claims, which arise under § 1983, allege conduct that constitutes "state action." Dkt. 28 at 15. To assess when "governmental involvement in private action" rises to this level, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), adopted a two-prong framework. *See Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013). "The first prong 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.' []The second prong determines whether the party charged with the deprivation could be described in all fairness as a state actor." *Id.* (citing *Lugar*, 457 U.S. at 937). A state actor is an actor "for whom a domestic governmental entity is in some sense responsible." *Id.* at 995.

Plaintiffs allege that EAA "acted under color of state law and pursuant to Cal. Gov't Code § 1157.12 and the applicable MOUs to seize Plaintiffs' wages without their affirmative consent and against their express objection for use in EAA's political speech." Complaint ¶ 59; *see id.* ¶ 90 ("Pursuant to state law, Cal. Gov't Code § 1157.12 and the applicable MOUs, EAA jointly acted with the City to deny Plaintiffs' their substantive due process rights.").

EAA's alleged conduct does not satisfy the first *Lugar* prong. Plaintiffs' alleged harm arises from wage deductions that occurred "without the employees' voluntary and informed affirmative waiver" of their right to avoid union dues. Complaint ¶¶ 58, 73, 86-87. Under California law, "employee organizations," including unions, may request that public employers deduct dues from the salaries and wages of their members.

Cal. Gov't Code § 1152. The public employer is required to rely on a certification from the employee organization that each member-employee has authorized such deductions. Cal. Gov't Code § 1157.12 ("Public employers . . . shall: (a) Rely on a certification from any employee organization requesting a deduction or reduction that they have and will maintain an authorization . . . ."). An employee's request to "cancel or change deductions" must be submitted to the employee organization, not the public employer. *Id.* ("("Public employers . . . shall: . . . (b) Direct employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed . . . .").

The California statutes that apply to the deduction of union dues from the paychecks of public employees are substantially similar to those in Washington that were reviewed in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). In *Belgau*, the "gist of the [e]mployees' claim against the union [was] that it acted in concert with the state by authorizing deductions without proper consent in violation of the First Amendment." *Id.* at 946. The Ninth Circuit concluded that the plaintiffs failed to allege the first prong of the *Lugar* test because the "claimed constitutional harm is that the agreements were signed without a constitutional waiver of rights. Thus, the 'source of the alleged constitutional harm' is not a state statute or policy but the particular private agreement between the union and [e]mployees." *Id.* at 947 (quoting *Ohno*, 723 F.3d at 994). In an opinion that issued after the hearing on the Motions, the Ninth Circuit addressed a claim by a former Oregon state employee regarding the alleged

unauthorized deduction of union dues from her wages pursuant to Oregon statutes similar to those at issue here. *See Wright*, 48 F.4th at 1121-25. Citing *Belgau*, *Wright* rejected the plaintiff's claims. It held that the alleged forgery by a union of the plaintiff's dues authorization agreement could not support constitutional claims against the union because this conduct did not constitute state action. *Id.*

The same analysis applies here. Plaintiffs' alleged harm arises from EAA's alleged failure to notify the City that Plaintiffs had not affirmatively consented to any future wage deductions. Complaint ¶¶ 16-28, 34-49. Thus, because the cause of Plaintiffs' harm was the alleged misrepresentation or fraud by EAA, not a state statute or policy, Plaintiffs fail to satisfy the first *Lugar* prong. *See Belgau*, 975 F.3d at 946-47. Other district courts in California have reached the same conclusion. *See, e.g.*, *Espinoza v. Union of Am. Physicians & Dentists, AFSCME Loc. 206*, 562 F. Supp. 3d 904, 912, (C.D. Cal. 2022) ("To the extent that UAPD's deductions were unlawful, 'private misuse of a state statute does not describe conduct that can be attributed to the State.'" (quoting *Collins v. Womancare*, 878 F.2d 1145, 1152 (9th Cir. 1989)); *Quirarte v. United Domestic Workers AFSCME Loc. 3930*, 438 F. Supp. 3d 1108, 1115-16 (S.D. Cal. 2020) ("The fact that the State performs a ministerial function of collecting Plaintiffs' dues deductions does not mean that Plaintiffs' alleged harm is the result of state action." (citation omitted)).

Plaintiffs rely on *Yates*, but it does not support their position. *Yates* distinguished *Lugar* and determined that the union's alleged forgery of the plaintiff's authorization form could not "logically support" the plaintiff's due process claim under § 1983 because the alleged "intentional misuse of [the] procedure" provided

by statute did not constitute state action. 466 F. Supp. 3d at 1204. *Yates* also held that that there was no joint action between the union and the state because "Yates does not allege that the State knowingly participated in WFSE's misconduct." *Id.* For these reasons, *Yates* concluded that the plaintiff's "claims that the State passed a statute with insufficient safeguards against its own violation and unknowingly accepted an allegedly forged signature" did not render the union's behavior state action. *Id.*

Even if Plaintiffs could satisfy the first prong in *Lugar*, the allegations in the Complaint are insufficient to establish that EAA is fairly described as a state actor. "The Supreme Court has articulated four tests for determining whether a private [party's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (citation omitted) (alteration in original).

Plaintiffs rely on the joint action and governmental nexus tests. Dkt. 33 at 20. "'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, . . . or otherwise has 'so far insinuated itself into a position of interdependence with [the non-governmental party] that it must be recognized as a joint participant in the challenged activity.'" *Ohno,* 723 F.3d at 996 (citations omitted).

Belgau precludes the acceptance of Plaintiffs' arguments. *Belgau* explained that "'[t]he decision' to deduct dues from Employees' payrolls was 'made by concededly private parties,' and depended on 'judgments made by private parties without standards established by the State.'" 975 F.3d at 947 (quoting *Am. Mfrs. Mut.*

Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999)). The Ninth Circuit determined that "[t]he state 'cannot be said to provide "significant assistance" to the underlying acts that [Employees] contends constituted the core violation of its First Amendment rights' if the 'law requires' Washington to enforce the decisions of others 'without inquiry into the merits' of the agreement." *Id.* at 947-48 (quoting *Ohno*, 723 F.3d at 996-97) (alterations in original); *see also Wright*, 48 F.4th at 1123 (quoting *Belgau*, 975 F.3d at 948) ("The State's 'mandatory indifference' to whether Wright's authorization was authentic 'refutes any characterization' of SEIU as a joint actor with the State.").

The same analysis applies under California law because the City does "not have a role in the alleged scheme apart from the ministerial processing of requests." *Espinoza*, 562 F. Supp. 3d at 913; *Semerjyan*, 489 F. Supp. 3d at 1058 ("Plaintiff does not allege that the State participated in the forgery of her card or knew the Union fraudulently represented her membership status."). Further, as *Belgau* explained, "providing a 'machinery' for implementing the private agreement by performing an administrative task does not render" the City and EAA joint actors. 975 F.3d at 948; *see id.* ("At best, Washington's role in the allegedly unconstitutional conduct was ministerial processing of payroll deductions pursuant to Employees' authorizations."). Nor is there an alleged "'symbiotic relationship' of mutual benefit and 'substantial degree of cooperative action'" between the two defendants. *Id.* (quoting *Sawyer v. Johansen*, 103 F.3d 140, 140 (9th Cir. 1996)).

Under the governmental nexus test, "a private party acts under color of state law if 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the

latter may be fairly treated as that of the State itself.'" *Ohno*, 723 F.3d at 995 n.13 (quoting *Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991)). Although this is "[a]rguably the most vague of the four approaches," *Kirtley v. Rainey*, 326 F.3d 1088, 1094 (9th Cir. 2003), the analysis in *Belgau* still applies. *See also Wright*, 48 F.4th at 1121 n.6 (quoting *Ohno*, 723 F.3d at 996 n.13) (declining to address the governmental nexus test in part because the public function and joint action tests "largely subsume" the governmental nexus test).

For the foregoing reasons, there is not a sufficiently close nexus between the actions of EAA and the City. "A merely contractual relationship between the government and the non-governmental party does not support joint action . . . ." *Belgau*, 975 F.3d at 948. Moreover, the City "received no benefits as a passthrough for the dues collection," and EAA and the City "oppose[] one another at the collective bargaining table." *Id.* (citing *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988)). Other district courts in California have adopted this analysis. *See Quirarte*, 438 F. Supp. 3d at 1117 ("As previously stated, the Court is not convinced that the deduction of dues pursuant to the membership agreements lends to a finding of a sufficiently close nexus between the Union and the State and therefore the governmental nexus test has also not been met."); *Quezambra v. United Domestic Workers of Am. AFSCME Local 3930*, 445 F. Supp. 3d 695, 704-05 (C.D. Cal. 2020) ("there is no sufficiently close nexus" in similar circumstances); *Hubbard v. SEIU Local 2015*, 552 F. Supp. 3d 955, 960 (E.D. Cal. 2021) ("Under analogous circumstances, courts within the Ninth Circuit have repeatedly found a union's authorization of dues, even if fraudulently made, does not transform the union's exclusively

private act into state action under any of the four conceivable tests . . . ."); *Semerjyan*, 489 F. Supp. 3d at 1057-59 (concluding union was not state actor in similar circumstances); *Espinoza*, 562 F. Supp. 3d at 913, 2022 WL 819741, at *4-5 (same).

Plaintiffs next argue that the state action analysis is controlled not by *Belgau*, but by *Janus v. Am. Fed'n of State, Cnty, and Mun. Emp.'s, Council 31*, 138 S. Ct. 2448 (2018) ("*Janus I*"), and the subsequent decision by the Seventh Circuit following the remand of the action. *Janus v. Am. Fed'n of State, Cnty, and Mun. Emp.'s, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"). Dkt. 33 at 22-23. Plaintiffs argue that "the underlying state action is identical to that in *Janus* [*I*]" and that the Seventh Circuit's analysis in *Janus II* "is also directly on point." *Id.* at 22.

Plaintiffs' arguments are unpersuasive. As the Ninth Circuit explained in *Belgau*, *Janus I* held that "the practice of automatically deducting agency fees from nonmembers violates the First Amendment." *Belgau*, 975 F.3d at 952; *see also Janus II*, 942 F.3d at 354 ("In 2018, the Supreme Court reversed its prior position and held that compulsory fair-share or agency fee arrangements impermissibly infringe on employees' First Amendment rights."). *Janus I* invalidated state laws that required a public employee, who was not a member of a union, to subsidize unions through "agency fees." 138 S. Ct. at 2459-60. Agency fees are not at issue here. *See Janus I*, 138 S. Ct. at 2485 n.27 ("States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.").[3]

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[3] Agency fees are mandatory ones that a union collects from all employees it represents, including those who have declined to join

Further, the analysis in *Janus II* of what constitutes state action does not apply here. *Janus II* determined that the "agency-fee arrangement" under Illinois law caused the conduct of the union to be state action. 942 F.3d at 361. As *Belgau* explained, the Ninth Circuit's "conclusion that state action is absent in the deduction and the transfer of union dues does not implicate the Seventh Circuit's analysis on the collection of agency fees." 975 F.3d at 948 n.3 (citing *Janus II*, 942 F.3d at 361). This action, like *Belgau*, concerns the deduction and transfer of union dues, not agency fees.[4]

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the union. *Janus I*, 138 S. Ct. at 2460. Non-member employees generally "are not assessed full union dues" but are required to pay "a percentage of the union dues." *Id.* This is also called an "agency shop" arrangement, which is an "agreement[] under which employees could be required either to be union members or to contribute to the costs of representation" by the union. *Janus II*, 942 F.3d at 354. *Janus I* held that "public-sector agency-shop arrangements violate the First Amendment." 138 S. Ct. at 2478; *see Belgau*, 975 F.3d at 944 ("*Janus* repudiated agency fees imposed on nonmembers, not union dues collected from members, and left intact 'labor-relations systems exactly as they are.'" (quoting *Janus*, 138 S. Ct. at 2485 n.27)). Cal. Gov't Code § 1157.12 does not authorize either agency fees or an agency shop arrangement. Consequently, Plaintiffs claim that the union misrepresented to the City that Plaintiffs had authorized the deduction of dues from their wages. *Cf. Belgau*, 975 F.3d at 948 ("Neither are we swayed by Employees' attempt to fill the state-action gap by equating authorized dues deduction with compelled agency fees."). Thus, agency fees are not at issue.

[4] Following the Motions hearing, Plaintiffs filed a notice of supplemental authority in which they cited *Warren v. Fraternal Ord. of Police, Ohio Lab. Council, Inc.*, 593 F. Supp. 3d 666 (N.D. Ohio 2022). Dkt. 45. *Warren* is distinguishable for the same reasons that have been stated as to *Janus II*. It concerns agency fees, not member dues. *Warren*, 593 F. Supp. 3d at 675-76 (the union acted under color of state law when it deducted agency fees

Plaintiffs argue that *Belgau* is distinguishable because Bourque alleges that she neither expressly authorized the wage deductions, nor signed any agreement with EAA. *Wright* rejected this argument. There, the Ninth Circuit concluded that whether an employee has agreed to join a union is "inconsequential" because "[t]he joint action test examines the government's action, not the status of the underlying agreement." *Wright*, 48 F.4th at 1124 (citing *Ohno*, 723 F.3d at 996). Thus, "[w]hile the factual circumstances of . . . *Belgau* may be different, the actions that Washington and Oregon took are the same: processing authorizations for dues deductions and remitting the payments to the union." *Id.* (citing *Belgau*, 975 F.3d at 945).

In this action, as in *Belgau* and *Wright*, the state's "role in the allegedly unconstitutional conduct was ministerial processing of payroll deductions pursuant to" the union's representation that the employee had assented to them. *See Belgau*, 975 F.3d at 948. The employees in *Belgau* argued that their private agreement with the union was invalid after *Janus I* and sought to revoke their deduction authorization effective immediately. The employee in *Wright* never joined the union and alleged that the union forged her membership card. *Wright*, 48 F.4th at 1116. Here, Plaintiffs argue that, despite their express revocation, or rejection of any authorization for deductions from their wages, EAA continued to represent to the City that such deductions were authorized. There is not a material distinction between the conduct of the union at issue in each of these cases because the underlying rule is the same -- the state entity is to have "mandatory indifference to the underlying merits of the authoriza-

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from the plaintiff's wages pursuant to an unconstitutional agency-shop arrangement).

tion." *Belgau*, 975 F.3d at 948 (citation and internal quotation marks omitted). Thus, as in *Belgau* and *Wright*, EAA is not a joint actor with the state entity. *See id.*; *Wright*, 48 F.4th at 1124.

Because the Complaint fails to allege state action, Plaintiffs' § 1983 claims against EAA are not viable. EAA's Motion to Dismiss is GRANTED as to Plaintiffs' § 1983 claims.

(2) Claims Against the City

The City argues that Plaintiffs' claims are insufficiently alleged because the claimed injuries were caused by private action and the City does not have liability under § 1983 by complying with state law. Dkt. 30 at 16-17. Plaintiffs argue the City is liable under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Dkt. 33 at 23-28.

As explained above, the core of Plaintiffs' alleged harm is EAA's failure to notify the City that Plaintiffs had withdrawn or changed their authorization of wage deductions. *See Belgau*, 975 F.3d at 947. Thus, the City's role in the alleged harm was merely "ministerial processing of payroll deductions pursuant to" EAA's representation that Plaintiffs had authorized the deductions. *See id.* at 948. Other district courts have concluded that there is not a viable *Monell* claim under similar circumstances. Thus, "[w]hen a municipality exercises no discretion and merely complies with a mandatory state law, the constitutional violation was not caused by an official policy of the municipality." *Aliser*, 419 F. Supp. 3d at 1165 (addressing Cal. Gov't Code § 1157.12(b)); *see Quezambra*, 445 F. Supp. 3d at 706 (same); *cf. Espinoza*, 562 F. Supp. 3d at 913, 2022 WL 819741 at *5 ("State Defendants' actions constitute

the ministerial processing of authorized deductions . . . which does not amount to state action.").

This analysis is persuasive. Under California law, the City was required to process EAA's request for wage deductions, *see* Cal. Gov't Code §§ 1152, 1157.3, 1157.12, and "rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed," Cal. Gov't Code § 1157.12. Plaintiffs' alleged harms do not establish either that the City applied a policy other than what was required under state law, or that the City's actions were the moving force that caused the alleged harms. "Regardless of whether it violates the Constitution for public employers to rely on unions for information regarding dues deductions, the plaintiffs have not adequately alleged that the [City] [is] liable for this conduct under *Monell* . . . ." *Aliser*, 419 F. Supp. 3d at 1165; *see Quezambra*, 445 F. Supp. 3d at 706 ("As the court explained in *Aliser*, 'the general decision to contract with [the Union] ... did not "cause" the specific allegedly unconstitutional' compelled speech 'that forms the basis of the claim.'" (quoting *Aliser*, 419 F. Supp. 3d at 1165)).[5]

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[5] Following the Motions hearing, Plaintiffs also filed a notice of supplemental authority citing *Bright v. State of Oregon et al.*, No. 3:23-cv-00320-MO (D. Ore. Mar. 8, 2023) (unpublished). Dkt. 48. In *Bright*, the plaintiff's request for a temporary restraining order against the state was granted because the state continued to deduct union dues from her wages without her authorization. *Bright*, No. 3:23-cv-00320-MO at Dkt. 8. The decision concluded that the plaintiff was likely to succeed on the merits of her First Amendment claim for the purpose of injunctive relief, but did not address whether the state's mandatory processing of payroll deductions constituted an official policy under *Monell*. Therefore, the decision is not persuasive authority in this action.

For the foregoing reasons, the Complaint fails sufficiently to allege § 1983 claims against the City. The City's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim is therefore GRANTED as to Plaintiffs' § 1983 claims.

4. Leave to Amend

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*, 244 F.3d at 712, leave to amend is inappropriate in circumstances where an amendment would be futile. *See Foman*, 371 U.S. at 182; *Allen*, 911 F.2d at 374.

Any amendment to the Complaint would be futile. *Foman*, 371 U.S. at 182. For the reasons discussed in this Order, Plaintiffs' claims against the Attorney General are barred by the Eleventh Amendment. There is no reasonable basis offered by Plaintiffs as to how they could amend the Complaint to state a claim against the Attorney General that alleges a sufficiently direct connection between the Attorney General and Cal. Gov't Code § 1157.12. Similarly, Morejon lacks standing to seek prospective relief and Bourque's claims for prospective relief are moot. Plaintiffs' claims for compensatory damages for the wages allegedly deducted without their authorization are also moot. Nor can Plaintiffs allege either that EAA is a state actor, or a viable basis for a *Monell* claim against the City.

Plaintiffs have sought leave to amend the Complaint to convert this to a class action proceeding. They contend that this would resolve the issue of mootness in that at least some members of the putative class may not have been reimbursed and deductions from

pay checks may still be in place as to others Dkt. 33 at 42. Plaintiffs cite no authority to support allowing such an amendment in which class action allegations would be presented for the first time. Other cases cited by Plaintiffs, e.g., *Pitts*, involved putative class action complaints. *See Pitts*, 653 F.3d at 1084, 1090; *see id.* at 1091-92 ("[W]e hold that an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot *a class action*.") (emphasis added). Nor have Plaintiffs established why they would be adequate class representatives under Fed. R. Civ. P. 23 given that they have been reimbursed and are no longer subject to any further deductions of dues from their pay checks.

Further, even assuming these Plaintiffs or new ones were to present class action allegations, amendment would still be futile because the harm alleged in the Complaint "cannot be legally attributed to [Defendants]." *Espinoza*, 562 F. Supp. at 911, (denying leave to amend to add class allegations). The same issues concerning the Eleventh Amendment, state action, and *Monell* would apply to any new plaintiffs.

IV. Conclusion

For the reasons stated in this Order, the Motions are GRANTED. The Complaint is dismissed with prejudice, i.e. without leave to amend. Within 14 days from the issuance of this Order, after meeting and conferring with Plaintiffs' counsel to seek to reach agreement as to the form of a proposed judgment, Defendants shall lodge a proposed judgment. If Plaintiffs have agreed to its form, the proposed judgment shall include the corresponding statement and signature. If Plaintiffs object to the form of the proposed judgment, they shall

timely file such objection(s) consistent with the Local Rules.

IT IS SO ORDERED.

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APPENDIX E

United States Constitution Amendment I

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

APPENDIX F

Cal. Gov't Code § 3504

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

APPENDIX G

Cal. Gov't Code § 1157.12

Public employers other than the state that provide for the administration of payroll deductions authorized by employees for employee organizations as set forth in Sections 1152 and 1157.3 or pursuant to other public employee labor relations statutes, shall:

(a) Rely on a certification from any employee organization 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 public employer unless a dispute arises about the existence or terms of the authorization. The employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that certification.

(b) Direct employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer 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 public employer for any claims made by the employee for deductions made in reliance on that information. Deductions may be revoked only pursuant to the terms of the employee's written authorization.