No. 24-____

IN THE

Supreme Court of the United States

KIRSTI PARDE,
Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, A LABOR ORGANIZATION; DAVID SLAYTON, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER/CLERK OF THE COURT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY; ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; COUNTY OF LOS ANGELES,
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

Petitioner Kirsti Parde did not authorize her union or government employer to take her lawfully earned wages to fund expressive union speech after she resigned union membership and withdrew authorization to dues payments. Her employer nonetheless continued to extract union dues from her wages pursuant to a policy it implemented under California law which requires public employers to make unauthorized deductions without prior notice to employees or any evidence of their affirmative consent so long as the union demands such deductions.

The Ninth Circuit found that these deductions caused Parde "concrete" constitutional injury but held that 42 U.S.C. § 1983 neither protects her from, nor provides a remedy for, such injury. This is because, according to Ninth Circuit precedents, the union shielded itself and the government from constitutional scrutiny by manufacturing an unauthorized union membership card Parde never signed.

The questions presented are:

1) Whether, to properly plead a procedural due process claim under the Fourteenth Amendment, a plaintiff must allege a government actor had actual or constructive knowledge that he or she *unlawfully* deprived the plaintiff of life, liberty, or property.

2) Whether the government violates its employees' First Amendment rights by seizing union dues from their paychecks without affirmative consent shown by clear and compelling evidence.

3) Whether a union engages in "state action" when it uses a statutory privilege granted to it by a

state and a municipality to access employees' paychecks through a public employer's union dues payroll deduction system.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Kirsti Parde was the plaintiff-appellant in the court below.

Respondents Service Employees International Union, Local 721; David Slayton, in his official capacity as Executive Officer/Clerk of Court of the Superior Court of California; County of Los Angeles; Rob Bonta, in his official capacity as Attorney General of California were defendant-appellees in the court below.

Because the petitioner is 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. *Parde v. Service Employees International Union, Local 721*, No. 23-55021, United States Court of Appeals for the Ninth Circuit. Judgment entered May 10, 2024. Denial of re-hearing en banc entered June 18, 2024.

2. *Parde v. Service Employees International Union, Local 721*, No. 2:22-cv-03320, United States District Court for the Central District of California. Judgment entered December 12, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The district court dismissed the petitioner's claims, *Parde v. Serv. Emps. Int'l Union, Loc. 721,* No. 22-03320 (C.D. Cal. Dec. 12, 2022); the order is reproduced as Appendix C, Pet.App. 11a-28a. The Ninth Circuit affirmed the district court's dismissal of the petitioner's complaint in a memorandum opinion, reported as *Parde v. Serv. Emps. Int'l Union, Loc. 721,* No. 23-55021, 2024 WL 2106182 (9th Cir. May 10, 2022), reproduced as Appendix A, Pet.App. 1a-8a.

JURISDICTION

The Ninth Circuit issued its memorandum opinion on May 10, 2024. Pet.App, 1a-8a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The Ninth Circuit denied the petitioner's petition for rehearing en banc on June 18, 2024. Pet.App. 9a-10a.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

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…" The text of the First Amendment is reproduced as Appendix M, Pet.App. 119a.

Section 1 of the Fourteenth Amendment states, in pertinent part: "…nor shall any State deprive any person of life, liberty, or property, without due process of law…" The text of Section 1 of the Fourteenth Amendment is reproduced as Appendix N, Pet.App. 120a.

42 U.S.C. § 1983 is reproduced as Appendix O, Pet.App. 121a.

California Government Code § 1157.12 is reproduced as Appendix P, Pet.App. 122a.

INTRODUCTION

For over forty years this Court has jealously protected the rights of dissenting employees in bargaining units represented by a union, with particular concern for compelled financial support of objectionable union political speech. This concern culminated in *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, in which this Court held that *before* a government employer may make "any…attempt" to seize "any…payment to the union" from its employees' wages, an employee's affirmative consent "must be freely given and *shown by* clear and compelling evidence." 585 U.S. 878, 930 (2018) (emphasis added).

California's statutory system for the government's deduction of union dues from public employees' wages fails this standard, as petitioner Kirsti Parde experienced when Los Angeles County (the "County") deducted unauthorized union dues from her wages after she resigned union membership and withdrew authorization for dues deductions. The County made these unauthorized deductions without notice to Parde and without any evidence of her affirmative consent because the policy it adopted in California Government Code § 1157.12 required that it do so pursuant to Service Employees International Union, Local 721's ("SEIU") unilateral demand.

Parde objected immediately after her paystub showed that SEIU and the County were continuing to make the deductions. However, SEIU continued to instruct her employer to deduct union dues from her wages pursuant to its statutory authority to directly access Parde's paycheck through government wage seizures, apparently relying on a document Parde never signed. The Ninth Circuit found that the unauthorized dues deductions caused Parde concrete

constitutional injury, yet held based on its own precedents that California's statutory system fails even to *implicate* the First or Fourteenth Amendments.

The Ninth Circuit's holdings below merit review because they conflict with this Court's decisions on important federal questions regarding due process, the First Amendment, municipal liability, and state action. *See* Sup. Ct. R. 10(c). This Court's review is sorely needed because courts have prevented *Janus* from having the effect this Court intended when it held that a public employee's affirmative consent to dues payments must be "freely given and *shown by* clear and compelling evidence" *before* the government deducts any such payments from the employee's wages. *Janus*, 585 U.S. at 930 (emphasis added). The Ninth Circuit rulings at issue here deprive all public employees in the circuit of any constitutional protection once they join a union, even as long ago as 1998. This petition presents the Court with an opportunity to revive *Janus* from the obscurity to which courts have relegated it.

STATEMENT OF THE CASE

A. California's statutory system for deducting money from public employees' wages to fund a union's political speech grants unions the authority to control government wage deductions without prior notice or a showing that the employees affirmatively consented.

Cal. Gov't Code § 1157.12 requires municipal employers which choose to deduct union dues from its employees' paychecks to do so using a procedure which delegates complete control of the employer's payroll

deduction system to the union receiving the money.[1] Pet.App. 122a. In so doing, California law establishes a policy that government employers will deduct union dues from their employees' wages without employees' affirmative consent so long as a union instructs them to do so. This procedure is incompatible with due process and the First Amendment.

Under California law, unions hold the keys to the public employer's payroll kingdom, both before an employee could notice the deductions and after an employee objects to the deductions. First, the statute requires employers to "rely on a certification from an employee organization requesting a deduction or reduction…" from employees' paychecks. Cal. Gov't Code § 1157.12(a). The statute then prevents employers from entertaining employees' objections to the deductions. *Id*. at 1157.12(b) ("A public employer… shall direct employee requests to cancel or change deductions… to the employee organization" and "shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed…"). The statute also requires the union to indemnify the public employer for any unlawful deductions, which incentivizes employers to disregard employees' rights. *Id*.

The statute does not require the union provide *any* evidence of employee authorization before the

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[1] State law does *not* require municipal employers to deduct union dues from their employees' wages, but such employers that freely choose such a policy must use the procedure established in Cal. Gov't Code § 1157.12 to do so. *See* Cal. Gov't Code § 1157.12 ("Public employers other than the State *that* provide for the administration of payroll deductions… shall…". (emphasis added)); *see also infra* at 16-17.

government takes employees' money based on the union's demand. *Id*. at 1157.12(a). Nor must an employee be notified before the deductions. Additionally, the statute makes *the union* the judge and jury of the dispute after an employee notices the unauthorized deductions in a paystub, objects, and the union produces an allegedly valid authorization. *Id*. at 1157.12(b).

California law, therefore, establishes a policy that government employers will deduct union dues from their employees' wages without employees' affirmative consent so long as a union instructs them to do so. Together, the State and its public employers have created a system in which government "officials will attach property on the *ex parte* application of one party to a private dispute." *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 942 (1982).

B. Petitioner Parde suffered a concrete constitutional injury when her employer deducted union dues from her wages after she no longer wished to support the union's political speech.

Petitioner Kirsti Parde, a court reporter employed by the Superior Court of California, Los Angeles County, found herself at the mercy of this system when she tried to disassociate from SEIU by resigning union membership and objecting to any further dues deductions. Pet.App. 34a, 41a-42a (¶ 11, 58-63). As a result, even the Ninth Circuit could not deny that Parde "suffered a cognizable, particularized, and concrete First Amendment injury when dues were deducted from her wages and diverted to the union after Parde no longer wished to support the union's speech." Pet.App. 3a.

Parde began working for the Superior Court a quarter-century ago in March 1998, at which time she joined the union. Pet.App. 35a (¶¶ 16-17). Over time, Parde increasingly disagreed with SEIU's speech on political and social matters. Pet.App. 35a-36a (¶¶ 18-22). On January 10, 2022, Parde decided to disassociate from SEIU. Pursuant to Cal. Gov't Code § 1157.12(b), she sent a written letter to SEIU resigning her union membership and withdrawing any authorization for her employer's deduction of union dues from her wages. Pet.App. 36a (¶ 23).

However, Parde's employer, the Superior Court, had agreed to a policy in CBA Art. 14.2 that employees who had previously joined the union could only withdraw authorization for such deductions between August 1 and August 31 of each year. Pet.App. 115a. Rather than rely on this CBA policy, however, SEIU responded on January 12, 2022, via a letter stating that SEIU accepted her membership resignation, but that she must continue paying nonmember dues through October 2022 pursuant to the terms of a membership application she had never seen, much less signed. Pet.App. 36a (¶¶ 24-25).[2] Parde contacted SEIU on January 27, 2022, telling SEIU again to stop the deductions, that the computer-generated signature and date of October 23, 2020 was not her doing, and to send her a copy of any original 1998 authorization card with her handwritten signature. SEIU ignored this request. Pet.App. 40a (¶¶ 47-48). Parde followed up on February 16, 2022, by written letter in which she again disputed the new card's authenticity and demanded a

[2] Ninth Circuit precedent incentivized SEIU to cite the unauthorized membership application rather than the CBA to justify the disputed deductions. *See infra* at 19-20.

copy of the original 1998 authorization card. SEIU again ignored this request. Pet.App. 41a (¶¶ 55-56).

The respondents stopped deducting union dues from her wages pursuant to Cal. Gov't Code § 1157.12 only *after* Parde filed her lawsuit and the union instructed Parde's employer to stop the deductions in an attempt to moot her case.[3]

C. The Ninth Circuit holds that Parde suffered a concrete constitutional injury but that 42 U.S.C. § 1983 does not protect her from, or provide a remedy for, such injury.

Parde filed suit on May 16, 2022 under 42 U.S.C. § 1983 alleging that SEIU, the County, the Superior Court, and the California Attorney General violated her Fourteenth Amendment procedural due process rights and her First Amendment free speech rights. Pet.App. 47a-51a (¶¶ 96-125). She sought preliminary and permanent injunctive relief, declaratory judgment, damages of $868.80 deducted from her wages without consent, compensatory damages for the deprivation of her First and Fourteenth Amendment rights, and nominal damages. Pet.App. 51a-53a (¶¶ 126-137). Each respondent filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (b)(6). Pet.App. 12a-14a. The district court granted these motions under 12(b)(6) without leave to amend the complaint, thereby dismissing all of Parde's claims. Pet.App. 12a-13a.

The Ninth Circuit affirmed the district court's dismissals despite correctly holding, for the first time

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[3] Parde works for the Superior Court, which collectively bargains with SEIU. However, Los Angeles County has contracted with the Superior Court to process the Superior Court's payroll. *See* Pet.App. 117a-118a; 42a (¶¶ 64-67); 46a (¶¶ 93-94).

in any unauthorized dues deduction case, that Parde "suffered a cognizable, particularized, and concrete First Amendment injury when dues were deducted from her wages" after she objected to union membership and dues deductions. Pet.App. 3a. The Court also found that the injury was "fairly traceable to SEIU… the Superior Court and County." Unfortunately for Parde, however, the Court held that no one who actually caused this "concrete First Amendment injury" is constitutionally liable under § 1983.

Specifically, with reference to the matters presented in this petition, the Ninth Circuit held that the district court properly dismissed Parde's Fourteenth Amendment procedural due process claim against the Superior Court, the State, and the County because Parde did not allege that any government defendant "intended to withhold *unauthorized* dues while having actual or constructive knowledge that such dues were unauthorized," citing *Ochoa v. Pub. Consulting Grp., Inc.,* 48 F.4th 1102, 1110 (9th Cir. 2022), *cert. denied,* 143 S. Ct. 783 (2023) (which cites *Daniels v. Williams*, 474 U.S. 327, 329 (1986)). Pet.App. 7a (n. 6) (emphasis added).

The court dismissed Parde's First Amendment claim for damages against the County for payroll processing as lacking proximate cause because it supposedly "could not reasonably have foreseen Parde's asserted First Amendment injury" and, in the alternative, because Parde failed to allege "factual allegations sufficient to establish *Monell* [*v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978)] liability." Pet.App. 7a.

As to the union, the court dismissed all claims against SEIU for lack of state action since, according to the court, Parde's claim arises from "a private misuse of a state statute that is, by definition, contrary

to the relevant policy articulated by the State," citing *Wright v. Serv. Emps. Int'l Union Local 503*, 48 F.4th 1112, 1122 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023). Pet.App. 6a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition because the Ninth Circuit has "decided…important question[s] of federal law" in ways that violate the Constitution and "relevant decisions of this Court." Sup. Ct. R. 10(c). Circuit courts across the country are failing to protect public employees' constitutional rights by evading this Court's holding in *Janus* that *before* a government employer may make "any…attempt" to seize "any…payment to the union" from its employees' wages, an employee's affirmative consent "must be freely given and *shown by* clear and compelling evidence." 585 U.S. at 930 (emphasis added). Courts have thus permitted government employers and unions to compel dissenting public employees to fund expressive union speech.

This Court has not hesitated in the past to grant certiorari to protect these dissenting employees' substantive[4] and procedural constitutional rights.[5] The Court should do so again here for the purpose of reviving *Janus* and once and for all protecting public employees from "sinful and tyrannical" compelled union speech. 585 U.S. at 893.

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[4] *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Harris v. Quinn*, 573 U.S. 616 (2014).

[5] *See Knox v. Serv. Employees Int'l Union, Local 1000,* 567 U.S. 298 (2012); *Chicago Tchrs. Union, Loc. No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986).

I. THE NINTH CIRCUIT'S HOLDING THAT PROCEDURAL DUE PROCESS CLAIMS REQUIRE PROOF OF INTENT TO *UNLAWFULLY* DEPRIVE SOMEONE OF LIFE, LIBERTY, OR PROPERTY CONFLICTS WITH THIS COURT'S DECISIONS.

A procedural due process claim does not require a plaintiff to prove government officials subjectively knew they *unlawfully* deprived the plaintiff of life, liberty, or property. Yet the Ninth Circuit dismissed Parde's due process claim because she failed to allege that respondents "intended to withhold unauthorized dues *while having actual or constructive knowledge that such dues were unauthorized*." Pet.App. 7a (n. 6) (emphasis added). The court based this holding on a rule of law it established in *Ochoa* that a valid procedural due process claim requires an employee to plead that the government subjectively knew that it *unlawfully* deprived the employee of her liberty interest against compelled speech or property interest in her wages. 48 F.4th at 1110 (citing *Daniels*, 474 U.S. at 328). This rule conflicts with this Court's due process jurisprudence.

The Ninth Circuit misreads *Daniels*, in which the plaintiff's due process claim failed because he did not allege that the government act depriving him of a liberty interest was a "deliberate decision of government officials to deprive a person of life, liberty, or property." *Id*. at 331 (plaintiff inmate sought damages for injuries sustained when he slipped on a pillow negligently left on stairs by a deputy). This Court concluded that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels,* 474 U.S. at 328. However, this does *not* mean

that the government act in question must be a deliberate decision of government officials to *unlawfully* deprive a person of life, liberty, or property.

Rather, the due process clause requires only that the government deliberately act, not—as the Ninth Circuit believes—that the government deliberately act with the knowledge that its act violates the law. *See Ochoa*, 48 F.4th at 1110 (defendants "did not know or have any reason to know that" SEIU falsely represented the plaintiff employee's authorization for deductions); Pet.App. 7a (n. 6). The due process clause by itself does not contain a mens rea type of state-of-mind requirement in which government must know it acts unlawfully.[6] And since this Court made clear in *Daniels* that § 1983 contains no such "state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right", 474 U.S. at 330, the Ninth Circuit shouldn't import such a requirement here to evade *Janus*.[7]

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[6] *See*, *e.g.*, *N. Ga. Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 603-04 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604, 616-18 (1974); *D.H. Overmyer Co. Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 186-876 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 337-38 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 69-70 (1972). In none of these cases did the plaintiffs have to plead or prove that government officials subjectively knew that their actions were unlawful.

[7] Additionally, Parde need not prove a particular state of mind to show the government deprived her of her underlying liberty interest against compelled speech or property interest. *See*, *e.g.*, *Janus*, 585 U.S. at 929-30 (union obviously did not have actual or constructive knowledge that its deduction from Mark Janus' wages were unlawful, given agency fees were legal at the time); *Lugar*, 457 U.S. at 925 (only thirty-four days after the deprivation did it come to light that the creditor "had failed to establish the statutory grounds for attachment alleged in the petition.").

It is enough to trigger the protections of the due process clause when a government system or procedure makes the unlawful deprivation of a liberty or property interest *possible*; it does not require that the unlawful deprivation be *inevitable*—as the Ninth Circuit's standard would require. *See*, *e.g.*, *Fuentes*, 407 U.S. at 87 ("It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest *is at stake*, whatever the ultimate outcome of a hearing…") (emphasis added); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (a procedural due process claim "does not depend on the merits of a claimant's substantive assertions…"). This distinction is important because the Ninth Circuit has cabined *Janus* so thoroughly that it only prohibits compelled dues schemes overtly compulsive on their face like the agency fee statute at issue in *Janus*. *See supra* at 2-3 and *infra* at 21-25. This leaves intact a host of post-*Janus* compelled dues schemes, such as the one here, which run afoul of *Janus'* requirement that affirmative consent to "any… payment to the union" … "must be freely given and shown by clear and compelling evidence." 585 U.S. at 930.

To successfully plead a procedural due process claim, then, Parde need only allege that the government deliberately deducted union dues from her wages—*not* that the government subjectively knew it made those deductions *unlawfully*. Parde clearly satisfied this requirement. Pet.App. 41a-46a, 48a-49a (¶¶ 58-95, 106-113). The government did not negligently deduct union dues from her wages on accident like the sheriff's deputy in *Daniels* accidentally left the pillow on a staircase. Rather, the entire purpose of the statutory procedure is for government to deduct money from employees' wages to fund a union's political speech.

The Ninth Circuit's rule that a government employer must have actual or constructive knowledge that its deductions are unlawful cannot be reconciled to this Court's due process clause jurisprudence. This Court should grant the petition, reverse, and remand to the lower courts for them to determine whether California's procedure for taking money from public employees' wages through payroll deductions to fund a union's political speech contains the safeguards necessary to protect Parde's liberty interest in her First Amendment right against compelled speech and her property interest in her wages.

II. THE NINTH CIRCUIT'S DECISION TO AFFIRM THE DISMISSAL OF PARDE'S FIRST AMENDMENT CLAIMS CONFLICTS WITH THIS COURT'S DECISION IN *JANUS V. AM. FED'N OF STATE, CNTY., & MUN. EMPLOYEES, COUNCIL 31*.

Before a government employer may seize money from its employees' wages to fund a union's political speech, a "waiver must be freely given *and shown* by clear and compelling evidence." *Janus*, 585 U.S. at 930 (emphasis added). The government is not shielded from liability for failing to meet this standard because a union used its state-granted authority to instruct the government to make unauthorized dues deductions from its employee's wages. Nor can a municipality evade this requirement under *Monell* if it voluntarily chose to deduct union dues from public employees' wages.

A. The Ninth Circuit's holding that Los Angeles County is not liable under the First Amendment because it did not proximately cause unauthorized union dues deductions from Parde's wages conflicts with this Court's decisions.

Parde sued Los Angeles County after learning it was the payroll processer responsible for taking her wages and giving the money to the union. The Ninth Circuit dismissed Parde's First Amendment claim against the County for lack of proximate cause because the County allegedly could not have reasonably foreseen Parde's asserted First Amendment injury, presumably due to SEIU's failures. Pet.App. 7a. But self-serving unlawful conduct on the part of the union who has statutorily been given the right to deduct *its own dues* using the government's payroll system is precisely the kind of foreseeable conduct within "the scope of the risk created by the predicate conduct." *Caroline v. United States*, 574 U.S. 434, 445 (2014). The "predicate conduct" here is the statute that grants SEIU this self-serving authority (Cal. Gov't Code § 1157.12) and the County's decision to contract with the Superior Court to deduct employees' wages pursuant to that procedure. *See*, *e.g.*, *Hudson*, 475 U.S. at 308 ("the most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees.").

It is enough that the deprivation "be direct or indirect." *Arnold v. Int'l Business Machines Corp.*, 637 F.2d 1350, 1355 (1981). Section 1983 "creates liability for any person who subjects, or *causes to be subjected* particular persons to the deprivation of particular rights." *Id*. (emphasis added). The County (and the

Superior Court) caused Parde "to be subjected" to conduct which violated her First and Fourteenth Amendment rights by choosing to deduct money from employees' wages to fund a union's political speech using a union-controlled procedure that does not require an employee's consent to nonmember union payments to be a waiver that is "freely given and shown by clear and compelling evidence." *Janus*, 585 U.S. at 930.

Additionally, it is unclear why the Ninth Circuit found it relevant that Parde did not make the County aware that it should stop its unlawful deductions, Pet.App. 7a, given that (a) she could not have known the unauthorized deductions were going to occur before they actually occurred, (b) she didn't know until after filing the lawsuit that the County was the payroll processor, and (c) Cal. Gov't Code § 1157.12 renders such notice futile—both before and after the deductions began. *See supra* at 4-7. In any case, even if we assume the County (or Superior Court) could entertain objections from employees, notice from an employee soon after the deductions would still be too late to prevent the constitutional injury caused by the initial deduction. *See Knox*, 567 U.S. at 317 ("…the [F]irst [A]mendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.").

B. The Ninth Circuit's holding that Los Angeles County was not liable under 42 U.S.C. § 1983 conflicts with this Court's decision in *Monell v. Department of Social Services City of New York* because the County exercised its discretion in establishing its policy of dues deductions from employees' wages.

It is not unusual for a public entity in the Ninth Circuit to contract with another entity to process payroll. These entities which actually take money for union dues should be held liable for constitutional injuries to public employees.

The Ninth Circuit held in the alternative that Parde's First Amendment claim against the County fails for lack of liability under *Monell*. Pet.App. 7a (n. 7). However, the County is liable for damages under § 1983 because its unconstitutional conduct is based on its own officially adopted and promulgated policy. *See Monell,* 436 U.S. at 690. Nothing in Cal. Gov't Code § 1157.12 required the County to contract with the Superior Court to deduct union dues on behalf of the union directly via payroll deductions. *See* Cal. Gov't Code § 1157.12(a) ("Public employers… *that* provide for the administration of payroll deductions… shall…") (emphasis added). The County was not even Parde's actual employer. Even if it were, nothing in that statute required the County or the Superior Court to administer payroll deductions directly from Superior Court employees.[8]

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[8] The County thereby adopted the Superior Court's policy in the CBA to only process employees' withdrawal of authorization to dues payments during the month of August each year. Pet.App. 115a. *See Abood*, 431 U.S. at 253 (Powell, Rehnquist, and Blackmun, JJ. concurring) ("Where a teachers' union for example,

The *Monell* policy requirement is satisfied where municipalities make "a deliberate choice to follow a course of action … by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Here, the County clearly exercised its discretion to agree to process payroll for the Superior Court knowing it would deduct union dues on behalf of SEIU to fund its political speech directly from Superior Court employees' wages. Thus, the Ninth Circuit's holding that the County is not liable for lack of a discretionary policy conflicts with this Court's decisions in *Monell* and its progeny.

III. THE NINTH CIRCUIT'S HOLDING THAT PARDE'S CLAIMS AGAINST SEIU FAIL FOR LACK OF STATE ACTION CONFLICTS WITH THIS COURT'S DECISIONS REGARDING STATE ACTION.

It is well-established that First Amendment protections against compelled speech are triggered when the government grants its coercive powers to a union to control and receive payroll dues deductions from employees' wages, which the government has done here through CBA and statute (Cal. Gov't Code § 1157.12(a)), *see supra* at 4-6). *See Janus*, 585 U.S. at 929-30 (applying constitutional scrutiny to compelled dues scheme in Illinois law and CBA); *see also*, *Harris*, 573 U.S. 616; *Knox*, 567 U.S. at 314; *Hudson*, 475 U.S.

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acting pursuant to a state statute authorizing collective bargaining in the public sector, obtains the agreement of the school board that teachers residing outside the school district will not be hired, the provision in the bargaining agreement to that effect has the same force as if the school board had adopted it by promulgating a regulation.").

at 308; *Abood*, 431 U.S. at 234. The state action here is the same as in *Janus*: the union tells the government which employees are union members, and the two act jointly pursuant to CBA and/or state law to seize and collect dues payments from employees' wages. For employees who object, this system causes a constitutional injury *because the entities involved are state actors*. *Janus,* 585 U.S. at 929. The Ninth Circuit correctly found that Parde's "concrete" constitutional injury "is fairly traceable to SEIU" but its contradictory holding that SEIU is not a state actor conflicts with *Janus*.

Parde objected to full dues deductions. SEIU's act of demanding full dues even though having no consent does not change the analysis or allow SEIU to escape constitutional scrutiny, contrary to the Ninth Circuit's conclusion otherwise. *See* Pet.App. 6a (SEIU did not engage in state action because "… Parde's claim arises from a misuse of a state statute that is, by definition, contrary to the relevant policy articulated by a state," citing *Wright,* 48 F.4th at 1122 and *Lugar*, 457 U.S. at 940-41 (cleaned up.)). This Court recently made clear in *Lindke v. Freed* that "[m]isuse of power, possessed by virtue of state law, constitutes state action." 601 U.S. 187, 199 (2024). After all, "[t]o misuse power… one must possess it in the first place." *Id.* at 189.

State action encompasses conduct that violates state law when that conduct was made possible only because government granted an actor "the *type* of authority that he used to violate" that law. *Id.* at 200 (emphasis added). Here, SEIU was able to demand and collect Parde's wages *only* because the CBA and Cal. Gov't Code § 1157.12 granted SEIU the exclusive ability to control a government employer's payroll deduction system. This Court need look no further than *Lugar*

for an example. There a creditor used a statutory procedure to demand a government official attach an alleged debtor's property even though the creditor ultimately did not have authority under the law to do so. *Lugar*, 457 U.S. at 924-25.

In its decision, the Ninth Circuit ignored *Lindke*, which this Court issued after oral argument below but before the court's decision. Parde brought *Lindke* to the court's attention in her notice of supplemental authority filed March 19, 2024 (before the court issued its decision). Pet.App. 55a-57a. The court also denied Parde's request for rehearing en banc solely dedicated to this issue. Pet.App. 9a-10a. To date, the Ninth Circuit has issued several decisions since *Lindke* dealing with unions jointly acting with government employers to compel objectionable political speech. *See*, *e.g.*, *Bourque v. Engineers & Architects Assoc.*, 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), *cert. pending*, *Bourque v. Engineers & Architects Assoc.*, No. 24-2 (S. Ct.); *Craine v. AFSCME Council 36, Local 119*, No. 23-55206, 2024 WL 1405390 (9th Cir. Apr. 2, 2024), *cert. pending*, *Craine v. AFSCME Council 36, Local 119*, No. 24-122 (S. Ct.) The court ignored *Lindke* each time.

This case is a good opportunity for this Court to instruct the lower courts on when a party's "misuse of a statute" *does* constitute state action and when it *doesn't*. *Compare Lugar*, 457 U.S. at 941 ("While private misuse of a state statute does not describe conduct that can be attributed to the State…") to *Lindke*, 601 U.S. at 199 ("[m]isuse of power, possessed by virtue of state law, constitutes state action."). The Ninth Circuit has seized on the above-cited language

in *Lugar* to evade all prospective application of *Janus* so long as a statute ostensibly requires an employee's authorization to union payments, even when the dues deduction procedure is controlled by the union, lacks due process, requires government wage seizures without any evidence of affirmative consent, and ultimately compels employees to fund objectionable union speech—all of which occurred here. The Ninth Circuit's insistence on absolving unions of constitutional scrutiny in such circumstances conflicts with *Janus*, *Lindke*, and *Lugar*.

IV. THIS CASE CONCERNS MATTERS OF EXCEPTIONAL IMPORTANCE BECAUSE THE NINTH CIRCUIT CONTINUES TO ISSUE DECISIONS WHICH CONFLICT WITH THIS COURT'S PRECEDENTS TO EVADE *JANUS*.

The circumstances under which a nonconsenting public employee may be forced to subsidize a union's "private speech on matters of substantial public concern" is a question of exceptional importance, as this Court already determined in *Janus*. 585 U.S. at 886. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus*, 585 U.S. at 892.

Yet courts since *Janus* have *not* condemned schemes to "compel[] individuals to mouth support for views

they find objectionable." *Id*. Rather, they have indulged them, creating bad law in the process, as many courts did after *Abood*, when governments and unions repeatedly pushed the envelope to test how much infringement on employees' First Amendment rights the courts would tolerate. As a result, this Court created hedgerow after hedgerow around employees' precious First Amendment rights until it became necessary to scrap the whole paradigm in *Janus*. *See Harris*, 573 U.S. 616; *Knox*, 567 U.S. at 314; *Hudson*, 475 U.S. at 308; *Abood*, 431 U.S. at 234.

This case is yet another example of how a government and union are testing the courts to see how much they can infringe employees' constitutional rights. For the Ninth Circuit's part, it acquiesced here as it has done repeatedly in many cases in the six years since *Janus*, creating bad law to declaw *Janus*' requirement that a public employee's authorization to government dues deductions must constitute a waiver that is "freely given *and shown* by clear and compelling evidence." *Janus*, 585 U.S. at 930 (emphasis added).[9] The result has been that *Janus* has been

[9] Examples of such cases involving pending petitions include *Laird v. United Teachers Los Angeles*, No. 22-55780, 2023 WL 69701711 (9th Cir. Oct. 23, 2023), *cert. pending*, *Laird v. United Teachers Los Angeles,* No. 23-1111 (S. Ct.); *Cram v. Serv. Emps. Int'l Union, Loc. 503*, No. 22-35321, 2023 WL 6971455 (9th Cir. Oct. 23, 2023), *cert. pending*, *Cram v. Serv. Employees Int'l Union, Local 503,* No. 23-1112 (S. Ct.); *Kant v. Serv. Emps. Int'l Union, Loc. 721,* No. 22-55904, 2023 WL 6970156 (9th Cir. Oct. 23, 2023), *cert. pending*, *Kant v. Serv. Employees Int'l Union Local 721*, No. 23-1113 (S. Ct.); *Hubbard v. Serv. Emps. Int'l Union, Loc. 2015*, No. 21-16408, 2023 WL 6871463 (9th Cir. Oct. 23, 2023), *cert. pending*, *Hubbard v. Serv. Employees Int'l Union Local 2015,* No. 23-1214 (S. Ct.); *Bourque, sub nom. Craine,* 2024 WL 1405390, *cert. pending*, *Bourque,* No. 24-2 (S. Ct.); *Craine,* 2024 WL 1405390, at *2 (even when there was *no* forgery, a policy

cabined so thoroughly that it only applies to invalidate agency fee laws as explicitly compulsive as the agency

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established in a CBA by the government employer and union which compelled union membership and dues payments did not trigger constitutional scrutiny because the deductions resulted from a "private misuse of a state statute"), petition for certiorari pending, *Craine,* No. 24-122 (S. Ct.); *Deering v. Int'l Bhd. of Elec. Workers, Loc. 18*, No. 22-55458, 2023 WL 6970169, at *1 (9th Cir. Oct. 23, 2023) (a policy which prevented the appellant employee from canceling dues payments "did not violate [his] First Amendment rights since he voluntarily joined the union"), petition for certiorari pending, *Deering v. Int'l Bhd. of Elec. Workers, Loc. 18,* No. 23-1215 (S. Ct.).

Such examples involving previous petitions include *Kurk v. Los Rios Classified Emps. Ass'n*, No. 23-1215, 2022 WL 3645061, at *1 (9th Cir. Aug. 24, 2022), *cert. denied*, 143 S. Ct. 2431 (2023) (upholding a policy which compelled an objecting employee to continue union membership and dues payments even though the employee never agreed to do so); *Savas v. Cal. State L. Enf't Agency*, No. 20-56045, 2022 WL 1262014, at *1 (9th Cir. April 28, 2022), *cert. denied sub nom. Savas v. Cal. Statewide L. Enf't Ass'n*., 143 S. Ct. 2430 (2023) (allowing a policy which compelled continued union membership and dues payments because the constitutional right not to associate with a union "applie[s] to nonunion members only."); *Wright,* 48 F.4th at 1116-17, 1121-25, *cert. denied*, 143 S. Ct. 749 (2023) (compelled union membership and government dues deductions based on a union forgery do not trigger constitutional scrutiny since the unauthorized deductions resulted from a "private misuse of a state statute," and *Janus* does not impose an affirmative duty on government employers to ensure employees have affirmatively consented before deducting union dues from their wages, citing *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020)); *Ochoa*, 48 F.4th at 1110-11 (due process claim failed because the state actor deducting dues "did not know or have any reason to know that those [union] representations were false"); *Belgau*, 975 F.3d at 944, 946–49, 950-52 (compelling nonmember fees after resigning membership does not require that the employee waive her right against compelled speech because "the world did not change" after *Janus,* 585 U.S. 878, for those who "signed up to be union members.").

fee statute in *Janus*. This renders a dead letter all prospective application of this Court's holding that governments and unions cannot even "*attempt*…to collect" money from the wages of public employees for whom there is not "clear and compelling evidence" that they waived their First Amendment rights. *Janus*, 585 U.S. at 930 (emphasis added).

The Ninth Circuit is not alone in creating bad law to evade *Janus*. To date, six other circuits have done similarly, even citing Ninth Circuit cases when doing so. This includes the Second, Third, Sixth, Seventh, Eighth, and Tenth Circuits.[10] Additionally, as observed by the National Right to Work Legal Defense Foundation in its amicus brief supporting the petition for certiorari in *Bourque v. Engineers and Architects Association*, well over four million public employees in seventeen states cannot exercise their First Amendment rights under *Janus* except during a few days each year. Brief for Nat'l Right to Work Legal Defense Foundation, Inc. as Amici Curiae supporting Petitioner, at 18, *Bourque v. Engineers and Architects Association*, No. 24-2 (S. Ct.).

The practical effect of the Ninth Circuit's six-year evasion of *Janus* is that SEIU could literally do *nothing* to violate Parde's First Amendment rights

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[10] *See Wheatley v. New York State United Tchrs.*, 80 F.4th 386, 390-92 (2d Cir. 2023); *Barlow v. Serv. Emps. Int'l Union Loc. 668*, 90 F.4th 607, 615-17 (3d Cir. 2024); *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176, 1181-83 (6th Cir. 2023); *Ramon Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504, IFTAFT/AFL-CIO*, 57 F.4th 582, 585-87 (7th Cir. 2023); *Bennett v. AFSCME Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 991 F.3d 724, 729-31 (7th Cir. 2021); *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 860-61 (8th Cir. 2023); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961 (10th Cir. 2021).

against compelled association and speech after she joined the union in 1998 and sought to resign membership and stop government dues deductions in 2022. Consider the following examples:

- SEIU could have refused to allow Parde to ever resign union membership, since public employees who join unions have no constitutional right to disassociate from those unions. *Deering,* 2023 WL 6970169*, cert. pending*, No. 23-1215 (S. Ct.); *Kurk,* 2022 WL 3645061, *cert. denied*, 143 S. Ct. 2431 (2023).
- SEIU could have relied on Parde's 1998 membership application and argued *Belgau* controlled, so that any dispute over resignation and government dues deductions is a matter of contract law, and thus constitutionally unprotected. 975 F.3d at 950.
- SEIU could have used a computer to manufacture the 2020 membership [re-]application upon receiving Parde's resignation request, since "private misuse of a state statute" is an act contrary to state law that supposedly cannot be "under color of law" under § 1983. *Wright,* 48 F.4th at 1116-17, 1121-25.[11]
- Similarly, SEIU could have done nothing by refusing to tell the employer to stop the deductions, so that the employer continued to give Parde's money to support financially the objectionable SEIU speech—a constitutional injury. SEIU would argue this, too, violates state

[11] Parde does not know when the union manufactured its unauthorized membership card. The point here is that the union could have done so after her resignation to avoid constitutional scrutiny.

law and therefore it cannot be acting "under color of law."

- SEIU could have done nothing even if Parde objected to her employer since Parde did not allege that the County or Superior Court had actual or constructive knowledge that they were *unlawfully* withholding unauthorized dues from her wages. *Ochoa*, 48 F.4th at 1110. Even though such deductions caused her "concrete" constitutional injury, Pet.App. 3a, Parde is apparently not entitled even to post-deprivation due process, let alone pre-deprivation process. *Ochoa*, 48 F4th at 1110.
- SEIU could have argued *Janus* does not protect Parde, because she had once joined a union, unlike Mark Janus. *Belgau*, 975 F.3d at 944 ("…the world did not change" after *Janus* for employees who "signed up to the union members.").
- SEIU could have argued that CBA Art. 14.2 required her to continue paying union dues since the Ninth Circuit holds that a union negotiating such a policy with a government employer and using the government to make its deductions is not a state actor jointly with the government employer. *Deering,* 2023 WL 6970169, *cert. pending*, No. 23-1215 (S. Ct.) and *Kurk,* 2022 WL 3645061, *cert. denied*, 143 S. Ct. 2431 (2023).

That all this is true is a testament to the Ninth Circuit's committed mission to evade *Janus*, leaving public workers who have at one time joined a union with *no* First Amendment rights.

This Court has consistently protected the rights of minority public employees not to support financially

the speech of a union majority. Even *Abood* protected that right, as to overt political speech. *Janus* purported to extend that protection to all public sector union activities, intending that minority employees need pay nothing to further union speech. The Ninth Circuit, however, has utterly contravened that holding. The Court should accept this petition to establish firmly that the First Amendment protects all public employees against majority unions compelling them to support objectionable union speech.

V. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE IMPORTANT QUESTIONS PRESENTED.

This case is an ideal vehicle through which to address the questions presented because it presents this Court with a clean opportunity to end the string of bad law lower courts have created to evade *Janus*.

First, protecting Parde's First Amendment rights requires no expansion of law. This Court need only explicitly state what has clearly been the law for over four decades: the Constitution must be brought to bear when unions use state statutes, municipal policies, and/or government payroll systems to compel public employees to fund their political speech. Such a clear holding is an affirmation—not an expansion—of existing First Amendment principles.

Similarly, granting certiorari to vindicate public employees' procedural rights requires no expansion of law. This Court has protected non-union public employees' procedural rights in the context presented here going back decades. *See Knox*, 567 U.S. at 321-22; *Hudson*, 475 U.S. at 309. Moreover, California's procedure at issue here is no different than the procedures this Court has invalidated for decades in

non-labor contexts. *See supra* at 11 n.6. State legislatures violate the law when they put public employees' liberty and property interests exclusively in the hands of a private party which benefits from the violation of those interests. Such procedures must be scrutinized under the Fourteenth Amendment's procedural due process clause.

Second, this case in particular demonstrates how current Ninth Circuit precedent incentivizes unions to commit fraud to relieve themselves and municipal employers of constitutional liability. The unauthorized membership card SEIU relied on to justify the unauthorized deductions incorporates a window period set in whatever CBA is in effect at the time an employee resigns membership, but establishes a different window period if there is no CBA in effect. Pet.App. 101a-103a. The CBA expired January 15, 2022, five days *after* Parde resigned her membership. *See* Pet.App. 38a-39a (¶¶ 28-36). Thus, SEIU *should have* cited to the CBA policy to justify the continued deductions. However, SEIU relied on the unauthorized card rather than the CBA policy to justify the deductions, *see supra* at 6, since, according to Ninth Circuit precedent, fraud is an affirmative defense to state action for a union and a way for a municipality to avoid liability under *Monell*. *See supra* at 8-9. (Additionally, a CBA policy more obviously constitutes union state action under *Lugar* and a municipal policy under *Monell*.) Precedent which incentivizes this kind of gamesmanship should be reversed when fundamental constitutional rights are at stake, as they are here.

Third, this case is a good vehicle for resolving the Ninth Circuit's manipulation of this Court's "state action" precedents to evade *Janus*. *See supra* at 6, 19-20.

Finally, matters presented in this petition were raised at every stage in the case below, fully briefed by the parties, and decided by the lower courts using the Fed. R. Civ. P. 12(b)(6) standard that requires this Court to presume the truth of Parde's allegations. Parde only appeals the dismissal of her procedural due process claims against all parties, her First Amendment claim against the County and SEIU, and the court's holding on state action regarding SEIU. Thus, Parde presents this Court with facts and claims that fit squarely into this Court's established precedents.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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September 16, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS—Continued

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: May 10, 2024]

No. 23-55021

D.C. No. 2:22-cv-03320-GW-PLA

KIRSTI PARDE, AKA Kirsti Edmonds-West,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, a labor organization; DAVID SLAYTON, in his official capacity as Executive Officer/Clerk of Court of the Superior Court of California, Los Angeles County; ROB BONTA; COUNTY OF LOS ANGELES,

Defendants-Appellees,

and

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES; BETTY T. YEE, in her official capacity as California State Controller,

Defendants.

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

MEMORANDUM[*]

Submitted May 6, 2024[**]
Pasadena, California

Before: WARDLAW, CHRISTEN, and BENNETT, Circuit Judges.

Kirsti Parde, a court reporter employed by the Superior Court of California, Los Angeles ("Superior Court"), appeals the dismissal of her 42 U.S.C. § 1983 action, in which she alleges that the Superior Court and the County of Los Angeles ("County"), under state laws enforced by California's Attorney General, continued to deduct union dues from her wages and give those dues to Parde's former union, Service Employees International Union, Local 721 ("SEIU" or "union"), after Parde terminated her union membership and rescinded her dues-deduction authorization.[1] Parde alleges that SEIU misrepresented to the Superior Court and the County that dues deductions should continue, and that it forged Parde's electronic signature on a dues authorization form. Parde claims that the Superior Court, the County, the State, and SEIU violated her First and Fourteenth Amendment rights under *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585

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

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

[1] Parde sues Attorney General Rob Bonta and Clerk of Court David Slayton in their official capacities. We use "the State" and "the Superior Court" as shorthand when discussing Parde's claims against the Attorney General and the Clerk of Court, respectively.

U.S. 878 (2018). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court had "an independent obligation to assure that standing exists," *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009), and was not free to assume jurisdiction for the purpose of deciding the merits, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998). Nevertheless, we may affirm the district court's dismissal under Federal Rule of Civil Procedure 12(b)(1) and (6) on any basis supported in the record, *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1106 (9th Cir. 2022) (citation omitted), *cert. denied*, 143 S. Ct. 783 (2023). We therefore address Parde's standing for each claim she presses and for each form of relief she seeks. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

A. Parde has standing to seek damages from SEIU, the Superior Court, and the County on her First Amendment and substantive due process claims. Parde suffered a cognizable, particularized, and concrete First Amendment injury when dues were deducted from her wages and diverted to the union after Parde no longer wished to support the union's speech. *See Janus*, 585 U.S. at 890. That injury is fairly traceable to SEIU, which allegedly forged her authorization and pocketed her dues, as well as the Superior Court and County, the entities that deducted dues for Superior Court employees. Her injury is also capable of redress in compensatory and nominal damages. *See Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

Parde's injury is not fairly traceable to the State.[2] "[P]rivate misuse of a state statute does not describe

[2] Parde's motion to take judicial notice (Dkt. 52) is GRANTED.

conduct that can be attributed to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). The Second Amended Complaint ("SAC") alleges no actions or omissions of the State that are fairly traceable to the unauthorized deductions Parde suffered from January to June 2022.[3] *Cf. Lutter v. JNESO*, 86 F.4th 111, 127–28 (3d Cir. 2023).

Although Parde suffered an actual past injury, she does not face an imminent injury. For Parde to be reinjured, she would either (1) need to rejoin the union, subsequently withdraw her membership, and once again be faced with a union that refuses to direct the Superior Court to cease the unauthorized payroll deductions, or (2) without rejoining the union, once again have the union erroneously or fraudulently certify her authorization to the Superior Court. Parde contends that there's no guarantee either chain of events *won't* happen, but Parde's burden is to demonstrate that either hypothetical is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (citation omitted). Her allegations do not satisfy that showing.[4] *Cf. Wright v. Serv. Emps. Int'l Union Local 503*, 48 F.4th 1112, 1118–20 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023). Because Parde's asserted injury is unlikely to recur, there is no "discrete injury" which prospective relief would "likely" be capable of

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[3] Even if Parde had standing to assert a First Amendment and substantive due process claim against the State, we would find her claim for damages barred under the Eleventh Amendment. And we would conclude that her claim for prospective relief fails on the merits for the reasons explained below.

[4] Parde seeks additional discovery on this point, but she has not identified facts unknown to her that would allow her to meet her burden to show a "certainly impending" injury. *See Clapper*, 568 U.S. at 401.

redressing. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (citation omitted); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Accordingly, Parde lacks standing to seek prospective relief against any defendant on her First Amendment or substantive due process claims.

B. Parde has standing to seek retrospective and prospective relief against all defendants on her procedural due process claim. Under *Ochoa*, an employee who "has already had union dues erroneously withheld from her paycheck" and "remains employed with the State" faces a "sufficiently real" risk of future injury "to meet the low threshold required to establish procedural standing," even if her "claimed future harms are speculative." 48 F.4th at 1107 (citation omitted).

2. The State and Superior Court contend that Parde's claims for relief are moot. Neither argues that any "changes in the circumstances that prevailed at the beginning of the litigation have forestalled [Parde's] occasion for meaningful relief" for her asserted past injury, *see Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021) (citation omitted), and neither addresses the low threshold Parde faces to establish procedural standing, *see Ochoa*, 48 F.4th at 1107. Thus, neither meets its "burden of establishing that [the] case is moot." *Meland*, 2 F.4th at 849.

3. Parde's claims for damages against the Superior Court and the State are barred. We have repeatedly 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, 169 (1985)). Nothing in the SAC or

briefing demonstrates a waiver by the State or valid congressional override of the State's sovereign immunity.

4. The district court properly dismissed Parde's claims against the union for failure to allege state action for the purposes of § 1983. *Wright*, 48 F.4th at 1121– 25. California permits dues deductions only if the employee authorizes such deductions, and only if the union certifies compliance with *Janus*. *See* Cal. Gov't Code §§ 1157.12, 71638. Nothing in the law authorizes, permits, or compels the union to erroneously or fraudulently certify that it has and will maintain valid employee authorizations. In fact, the State fairly appears to criminalize such conduct and/or provide for civil liability. Parde concedes that California's statutory scheme "has no meaningful distinction from" the Oregon scheme we considered in *Wright*.[5] Accordingly, we conclude that Parde's "alleged constitutional deprivation did not result from 'the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.'" *Wright*, 48 F.4th at 1122 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013)). Rather, Parde's claim arises from "a 'private misuse of a state statute' that is, by definition, 'contrary to the relevant policy articulated by the State.'" *Id.* at 1123 (quoting *Lugar*, 457 U.S. at 940–41).

5. The district court properly dismissed Parde's Fourteenth Amendment procedural due process claims against the Superior Court, the State, and the County. Parde does not plausibly allege that any of these

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[5] Parde disagrees with how we decided *Wright*, but she does not argue that we should decline to follow *Wright* on grounds that "the theory or reasoning underlying" *Wright* has been "undercut" by any subsequent, controlling authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

defendants intentionally withheld unauthorized union dues or "ha[d] any reason to know that [the union's] representations were false." *Ochoa*, 48 F.4th 1110–11.[6] The government does not have an affirmative duty to ensure that the agreement between the union and employee is genuine, or to "ensure the accuracy of SEIU's certification of those employees who have authorized dues deductions." *Wright*, 48 F.4th at 1125.

6. The district court correctly dismissed Parde's First Amendment claim against the County for lack of proximate cause. *See Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). Without an affirmative duty to ensure that certifications are genuine, *Wright*, 48 F.4th at 1125, and with no notice that Parde contested or questioned her authorization or SEIU's certification, the County could not reasonably have foreseen Parde's asserted First Amendment injury.[7]

7. Parde's substantive due process claim is based on a purported deprivation of Parde's liberty interest in her First Amendment right against compelled speech.

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[6] Parde argues that *Ochoa* is distinguishable because the Superior Court "*intentionally* authorized [the] County to deduct money from Parde's paycheck" after receiving SEIU's false representation, and the "County *intentionally* deducted the money from Parde's paycheck." This was also true in *Ochoa*: the defendants' voluntary and intentional actions resulted in deductions from Ochoa's paycheck. *See* 48 F.4th at 1110. What mattered in *Ochoa*, and what Parde fails to distinguish, is that no government defendant in *Ochoa* was shown to have intended to withhold *unauthorized* dues while having actual or constructive knowledge that such dues were unauthorized. *See id.*

[7] Parde's First Amendment claim against the County alternatively fails because the SAC lacks factual allegations sufficient to establish *Monell* liability. *See Sandoval v. County of Sonoma*, 912 F.3d 509, 517–18 (9th Cir. 2018); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (plurality opinion).

For reasons already stated, Parde's allegations, taken as true, fail to meet her burden to establish "conscience shocking behavior by the government." *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992))).

In sum, we affirm the district court's dismissal of Parde's claims for prospective relief under the First Amendment against all defendants for lack of standing. We affirm the dismissal of Parde's claims for damages against the Superior Court and the State as barred under the Eleventh Amendment. We affirm the dismissal of Parde's claims against SEIU for failure to allege state action for purposes of § 1983, and Parde's remaining procedural due process claims for failure to allege an intentional deprivation of a protected interest. We affirm the dismissal of Parde's First Amendment claim against the County for damages for failure to allege proximate cause for the purposes of § 1983. Finally, we affirm the dismissal of Parde's substantive due process claim for failure to state a claim.[8]

AFFIRMED.

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[8] Parde does not challenge the district court's decision to dismiss the SAC with prejudice. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) ("Arguments not raised by a party in its opening brief are deemed waived.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: June 18, 2024]

No. 23-55021

D.C. No. 2:22-cv-03320-GW-PLA

KIRSTI PARDE, AKA Kirsti Edmonds-West,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, a labor organization; DAVID SLAYTON, in his official capacity as Executive Officer/Clerk of Court of the Superior Court of California, Los Angeles County; ROB BONTA; COUNTY OF LOS ANGELES,

Defendants-Appellees,

and

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES; BETTY T. YEE, in her official capacity as California State Controller,

Defendants.

Central District of California, Los Angeles

ORDER

Before: WARDLAW, CHRISTEN, and BENNETT, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing en banc (Dkt. 81). The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 22-3320-GW-PLAx

Date December 9, 2022

Title *Kristi Parde v. Service Employees International Union, Local 721, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez
Deputy Clerk

None Present
Court Reporter / Recorder

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Tape No.

Attorneys Present for Plaintiffs: None Present

Attorneys Present for Defendants: None Present

PROCEEDINGS: IN CHAMBERS - TENTATIVE RULING ON DEFENDANT COUNTY OF LOS ANGELES' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(B)(6) [58]; ATTORNEY GENERAL'S MOTION TO DISMISS [59]; SEIU LOCAL 721's MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [60]; and DEFENDANT SHERRI R. CARTER'S MOTION TO DISMISS PLAINTIFF'S SECOND

AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) OR FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) [61]

Attached hereto is the Court's Tentative Ruling on Defendants' Motions [58][59][60][61] set for hearing on December 12, 2022 at 8:30 a.m.

Parde v. Serv. Emps. Int'l Union, Local 721, et al., Case No. 2:22-cv-03320-GW-(PLAx) Tentative Rulings on: 1) Defendant SEIU Local 721's Motion to Dismiss Plaintiff's Second Amended Complaint; 2) Defendant County of Los Angeles' Motion to Dismiss Plaintiff's Second Amended Complaint; 3) Defendant Attorney General Rob Bonta's Motion to Dismiss; and 4) Defendant Sherri R. Carter's Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1) or Federal Rule of Civil Procedure 12(b)(6)

I. Introduction

Kirsti Parde, a/k/a Kirsti Edmonds-West ("Plaintiff") filed suit on May 16, 2022 against the Service Employees International Union, Local 721 ("SEIU"); the Superior Court of California, County of Los Angeles ("Superior Court"); Betty T. Yee ("Yee"), in her official capacity as California State Controller; and Rob Bonta, in his official capacity as Attorney General of California ("the Attorney General"). On June 2, 2022, she filed a "Verified Amended Complaint for Declaratory Judgment, Injunctive Relief, and Damages for Violation of Civil Rights. [42 U.S.C. § 1983]" ("AC"). *See* Docket No. 19. The AC dropped Yee as a defendant, added the County of Los Angeles ("LA County") as a defendant, and set forth three counts, for 1) violation

of the First Amendment (42 U.S.C. § 1983), 2) violation of due process under the Fourteenth Amendment (42 U.S.C. § 1983), and 3) substantive due process (42 U.S.C. § 1983). On July 22, 2022, Plaintiff filed another version of her Verified Amended Complaint for Declaratory Judgment, Injunctive Relief, and Damages for Violation of Civil Rights. [42 U.S.C. § 1983], which the Court will refer to herein as the "SAC." *See* Docket No. 53. The SAC again contains the same three causes of action as the AC, and it names SEIU, the County and the Attorney General as defendants. Instead of the Superior Court, however, the SAC names as a fourth defendant Sherri R. Carter, in her official capacity as Executive Officer/Clerk of Court of the Superior Court of California, Los Angeles County ("Carter"). As the Court noted previously in this litigation, *see* Docket No. 46, at pg. 2 of 4, in general, the SAC centers on the allegation that the SEIU forged Plaintiff's signature to ensure she stayed a union member despite her resignation from the union, and subsequently continued to deduct union dues from her paycheck following her resignation. *See, e.g.*, SAC ¶¶ 1, 4-7, 22-27, 38-46, 51, 57-63.

Now on-calendar are four motions to dismiss, one filed by each of the four defendants. Although those motions initially presented both Rule 12(b)(1)-based reasons for dismissal and Rule 12(b)(6)-based reasons for dismissal, because of potential factual issues that the Rule 12(b)(1) arguments might raise (which might require some discovery to properly assess), either – with one exception, discussed below – the Defendants have withdrawn those grounds for dismissal or the Court has indicated that it will first address only the Rule 12(b)(6) arguments. Plaintiff has filed only two Opposition briefs to the four motions – one addressing the "Union Defendants' Motion," which the Court

presumes refers only to SEIU's motion, and the other which appears (at least initially) to address only "the Superior Court of California, Los Angeles County" (which is no longer a defendant in the case, such that the Court presumes Plaintiff intends to refer to Carter) and the County, which Plaintiff collectively refers to as "the State Defendants," Docket No. 71, at Caption and 1:3-5.[1]

II. Applicable Procedural Standard

Under Rule 12(b)(6), the court must: (1) construe the SAC in the light most favorable to Plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007) (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief).

[1] As addressed further herein, this second Opposition at times refers to the Attorney General and arguments relevant to that defendant as well.

However, Plaintiff must also "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Johnson*, 534 F.3d at 1122 (quoting *Twombly*, 550 U.S. at 570); *see also William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 667 (9th Cir. 2009) (confirming that *Twombly* pleading requirements "apply in all civil cases"). The SAC does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In its consideration of the motions, the Court is generally limited to the allegations on the face of the SAC (including documents attached thereto), matters which are properly judicially noticeable and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruling on other grounds recognized in Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). However, "[a] court may [also] consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

III. Discussion

A. SEIU

The Rule 12(b)(6) portion of SEIU's motion first concerns the argument that SEIU is not a "state actor" and therefore cannot be liable under 42 U.S.C. § 1983, the source of each of Plaintiff's claims. This is in recognition of the principle that "'[m]ost rights secured by the Constitution are protected only against infringement by governments,' so that 'the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State.'" *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)); *see also Lugar*, 457 U.S. at 937 (identifying a "two-part approach," requiring that the deprivation be "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and that "the party charged with the deprivation . . . be a person who may fairly be said to be a state actor"); *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020) ("The Supreme Court has long held that 'merely private conduct, however discriminatory or wrongful,' falls outside the purview of the Fourteenth Amendment.") (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)).

More-specifically, SEIU first argues that the claimed Constitutional deprivation did not result from state policy, but from SEIU's breach of a private agreement, the dues authorization agreement between SEIU and Plaintiff. SEIU asserts that, indeed, according to Plaintiff's allegations, SEIU's conduct would have violated state law due to SEIU's failure to inform Plaintiff's employer that Plaintiff had revoked her dues deduction authorization. Second, SEIU's opening

brief argues that *Belgau* forecloses any attempt to argue that SEIU is in any sense a "state actor" here.[2]

Plaintiff contends that SEIU, though a private party, is a "state actor" because it acted under color of state law by virtue of California's statutory system reflected in Section 1157.12. Section 1157.12 is what made it possible for SEIU to "use the police powers of the state to access [Plaintiff's] wages *before* she can object." Docket No. 70, at 7:18-19. As she sees it, SEIU did not "misuse" the statute, but in fact "used it correctly." *Id.* at 8:3.

Plaintiff also believes that SEIU qualifies as a state actor because, like in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018), SEIU both used the authority of state law and worked in conjunction with state actors. SEIU's argument that it is not a state actor is thus "unavoidably at odds with the *Janus* decisions," in Plaintiff's view. Docket No. 70, at 9:15-16. The other case law Plaintiff relies upon predominantly (if not entirely) deals – in Plaintiff's own telling of those cases, *see* Docket No. 70, at 9:18-13:20 – with *non-consensual* use of employees' money for union purposes, a union-funding system not in-play here.

In its Reply brief, SEIU directs the Court's attention to two Ninth Circuit decisions issued *after* it filed its motion (but *before* Plaintiff filed her Opposition to SEIU's motion), which it believes completely forecloses Plaintiff's federal claims, including all claims against SEIU: *Wright v. Serv. Emps. Int'l Union Local 503*, 48

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[2] While SEIU makes a number of other arguments directed at why it believes Plaintiff's claims fail on their merits – even if it is determined to be a "state actor" – the Court need not reach those arguments on SEIU's motion, as the discussion *infra* demonstrates.

F.4th 1112 (9th Cir. 2022), and *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102 (9th Cir. 2022). According to SEIU, these cases specifically do away with Plaintiff's argument – on the merits – that public employers must independently verify the accuracy of a union's certification of employees who have authorized dues deductions before making those deductions. SEIU also argues that state action in cases involving mandatory agency fee payments are irrelevant to situations where the question is whether the state's ministerial role in facilitating the deduction of *voluntary* membership dues makes unions "state actors." *See 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.") (emphases added); *id.* at 948 n.3 (distinguishing *Janus* litigation).

The Court's examination of *Wright*, *Ochoa* and *Belgau* confirms the merit of SEIU's "state action" arguments. *Wright* likewise involved an alleged union-membership forgery allegation. *See Wright*, 48 F.4th at 1116. It followed *Belgau* (which did *not* involve a forgery allegation) on the "state action" question, because there were "no meaningful differences between the Washington and Oregon statutory schemes" involved in the two cases, where neither state required state employees to join a union, "both states rely on the union to provide a list of employees who have authorized union dues deductions," and with the states "then deduct[ing] the dues from the employees' salary and remit[ting] them to the union." *Id.* at 1121. Like in *Belgau*, where "the 'source of the alleged constitutional harm' [was] not a state statute or policy but the particular private agreement between the union and Employees," 975 F.3d at 947 (quoting *Ohno*, 723 F.3d at 994), the Ninth Circuit again decided in *Wright* that the union was

"not a state actor for purposes of § 1983." *Wright*, 48 F.4th at 1121.

Wright explained that the "fraudulent act" of the union's "forgery of her dues authorization agreement" demonstrated "a 'private misuse of a state statute' that is, by definition, 'contrary to the relevant policy articulated by the State,'" meaning that the plaintiff could not identify any "state policy" that would make the union a state actor under Section 1983. *Id.* at 1123 (quoting *Lugar*, 457 U.S. at 940-41); *cf. Ochoa*, 48 F.4th at 1108 (explaining that, *as to private company payroll administrator defendants*, "[t]he cause of [the plaintiff's] alleged constitutional deprivation was the *withholding*, not the union's forgery or its technical mistake, . . . [a]nd the private defendants, as operators of the payroll system, are the ones who carried out the challenged withholding"); *id.* at 1108 n.7. *Wright* also made clear that the state's mere processing of dues deductions was, like in *Belgau*, implementation of a private agreement through the performance of an administrative task, not enough to make the State and the union joint actors for "state actor"/"state action" purposes. *Id.* at 1123-24; *see also Belgau*, 975 F.3d at 948.

Plaintiff has not addressed *Wright*, despite its issuance before she filed her Opposition.[3] She has not

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[3] Plaintiff's counsel – "Freedom Foundation" – was also appellate counsel in both *Wright* and *Ochoa*. Indeed, Plaintiff directed the Court to certain aspects of *Ochoa*'s case *at the district court level* in her Opposition brief, while also citing a different Ninth Circuit ruling (an unpublished Memorandum Disposition) that issued the same day as the opinions in *Wright* and *Ochoa*. *See* Docket No. 70, at 19 n.2 (citing *Zielinski v. Serv. Emps. Int'l Union Local 503*, No. 20-36076, 2022 WL 4298160 (9th Cir. Sept. 19, 2022)). Clearly, that the Ninth Circuit issued its opinions in *Wright* and *Ochoa* should hardly have caught Plaintiff unawares. The Court would expect an explanation from Plaintiff, at oral

explained why, and it is not obvious to the Court why, the statutory scheme at issue here has any meaningful difference from the statutory schemes in Oregon and Washington in *Wright* and *Belgau*. Moreover, the situation here is akin to *Wright*, involving an alleged forgery to an otherwise-consensual union dues authorization agreement, not to *Janus* and cases involving compelled union funding by nonmembers.

Lacking any comment from Plaintiff, despite her opportunity to do so, on the impact of *Wright*, the Court must conclude that SEIU is correct – *Wright*, along with *Belgau*, demonstrate that SEIU is not a "state actor" here. As such, no claims under Section 1983 (such as *all* the claims in the SAC) can be pled against SEIU. Unless Plaintiff can come up with a viable theory for recovery against SEIU at the hearing, the Court likely will dismiss all claims against SEIU without leave to amend.

B. The County

The County presents three arguments for dismissal here. First, it contends that Plaintiff cannot plead proximate cause as required, because the alleged harm (a forgery) was not foreseeable. *See Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981) (noting that causation – proximate causation – is an "implicit requirement" in civil rights causes of action); *id.* ("The standard for causation . . . closely resembles the standard 'foreseeability' formulation of proximate cause."); *see also Paroline v. United States*, 572 U.S. 434, 445 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."); *Van Ort v. Estate*

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argument, as to why Plaintiff's counsel's failed to mention even the existence of *Wright* and *Ochoa* in its briefing.

of Stanewich, 92 F.3d 831, 837 (9th Cir. 1996) ("[T]he County could not reasonably have foreseen that Stanewich would become a free-lance criminal and attack the Van Orts as he did. His unforeseeable private acts broke the chain of proximate cause connecting the County's alleged negligence to the Van Orts' injuries."). Second, it argues that Plaintiff cannot plead *Monell* liability because she has not pled ratification by an official with final policy-making authority, nor can she show a County policy or custom serving as the moving force/direct causal link, because the County was acting pursuant to a state-law requirement. *See Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998) (noting that it is Seventh and Sixth Circuit's position that a county "cannot be held liable under section 1983 for acts that it did under the command of state or federal law," while also noting that the Ninth Circuit has held to the contrary in *Evers v. County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984); *see also Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 957 (9th Cir. 2008) ("Generally, a municipality is liable under *Monell* only if a municipal policy or custom was the 'moving force' behind the constitutional violation[, meaning that] there must be 'a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.'") (quoting *Galen v. Cty. of L.A.*, 477 F.3d 652, 667 (9th Cir. 2007) and *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)); *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992) (noting that two of the ways to demonstrate municipal liability under *Monell* are to "establish that the individual who committed the constitutional tort was an official with 'final policy-making authority'" or to "prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for

it"). Third, the County argues that the Eleventh Amendment bars a federal court's consideration of claims that impact how State law is enforced, principally citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), for that proposition. It is not clear that the Court needs to consider anything other than the County's first argument in order to resolve this motion.

As to foreseeability, the County observes that Plaintiff has not alleged that she notified either her employer or the County of any dispute. Plaintiff's response on the foreseeability point appears to be that all that matters is that the County took her money and diverted it to SEIU. Plaintiff asserts that the source of her harm is the terms of Section 1157.12, not a misuse of it, because the deductions could have resulted from an administrative error, not a forgery.

The County views Plaintiff's Opposition as not addressing its proximate cause or Eleventh Amendment arguments at all, but only the issue of *Monell* liability (and the moving force/causal link question underlying that theory generally). *See* Docket No. 73, at 5:5-9. In truth, this is not an unreasonable interpretation of Plaintiff's Opposition. The County argues that, to the extent one might discern *any* response to its proximate cause argument, none of what Plaintiff says in her Opposition responds to the point that if there were any constitutional harm to Plaintiff, it would have been unforeseeable to the County. Indeed, it does not appear that the words "foresee," "foreseeability," "unforeseeable," or "unforeseeability" appear anywhere in Plaintiff's Opposition. The County also emphasizes that Plaintiff has pled forgery, not just as "one theory," but as *the* theory underlying how her signature

appeared on the dues-authorization agreement. This, it emphasizes, constitutes an intervening act.

As a result, it appears that Plaintiff has no response to the County's contention that an unforeseeable act of forgery would break the chain of any theory of causation tied to any act by the County. The "administrative error" theory is not present in the SAC. It is unclear how Plaintiff could further amend to make that allegation now without contradicting her forgery contentions. *See* SAC ¶¶ 1, 6, 38-46, 52, 62-63, 78, 87-88, 98, 111. Without need of addressing or resolving the County's other arguments,[4] therefore, it appears that dismissal without leave to amend is warranted here.

C. Attorney General

The Attorney General presents two different types of arguments: ones aimed at convincing the Court that it may not consider Plaintiff's claims against him at all, and ones aimed at convincing the Court that even if it does consider Plaintiff's claims, they fail. In the first category, the Attorney General argues, by way of Rule 12(b)(1), that any claim for damages against him

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[4] The County correctly observes in its Reply that Plaintiff has not addressed the County's Eleventh Amendment argument. While this might ordinarily be a reason to simply consider Plaintiff to have conceded dismissal based at least on that point, the exact nature of the County's argument in this regard is somewhat unclear. The Supreme Court's *Pennhurst* decision states that "a claim that state officials violated *state law* in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." 465 U.S. at 121 (emphasis added). The portion of the decision in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986), that the County cites in its brief also relates to claims for violations of state law. *See* Docket No. 58, at 17:12-16 (citing *Actmedia*, 830 F.2d at 964). Here, however, the claims are based upon Federal law, not state law.

is barred by sovereign immunity. Beyond that point, he asserts, under Rule 12(b)(6) standards, that Plaintiff cannot plausibly allege state action because what she has alleged is the SEIU's forgery (at most "private misuse of a state statute"), with no allegation that either the Attorney General or any other governmental official had knowledge of the alleged wrongdoing. Further, he argues that the ministerial deduction of dues itself – just playing a role in the enforcement of a private agreement – is not state action either (though it is not clear what role the Attorney General has in the ministerial deduction of dues), relying upon *Belgau*.

With respect to the viability of the claims themselves, as to the First Amendment, the Attorney General argues that *Belgau* precludes such a claim, again supporting the view that what Plaintiff has alleged is not harm that flows from the challenged statute, but from an alleged forgery. In addition, as SEIU itself argued, Plaintiff has not "point[ed] to any action *on the part of a government actor* that required the deduction of dues against her will." Docket No. 59, at 12:6-7. With respect to Plaintiff's due process claims, the Attorney General notes that her substantive due process claim is predicated on a First Amendment violation (which fails for the reasons the Attorney General already argued) and, as to procedural due process, there is no deprivation of a liberty or property interest because the statute sets up a system "predicated on consent to withdraw dues," Docket No. 59, at 12:16, while adequate post-deprivation remedies exist (in the form of a lawsuit against SEIU under state law or via an administrative remedy for unlawful labor practices by way of the Public Employees Relations Board), sufficient to prevent such a claim in a situation involving a random, unauthorized act. *See Hudson v. Palmer*, 468 U.S. 517, 536 (1984) (holding that provision of

"adequate postdeprivation remedy" prevents violation of Fourteenth Amendment in situation involving intentional deprivation of property by state employee).

In her Opposition to the motion of the "State Defendants," *see* Footnote 1, *supra*, Plaintiff argues that *Belgau* does not apply to her situation because she never signed a membership and dues' authorization agreement, and because her rights were deprived by operation of the system under Section 1157.12, not any agreement or affirmative consent. Whether or not that might have potentially been considered a convincing argument a few months ago, after publication of *Wright* – which indicated that the principles *Belgau* recognized apply even in the context of an alleged forgery – it is not one now.

In response to the sovereign immunity argument, Plaintiff indicates that she may obtain injunctive relief, and that she also seeks nominal damages, which she believes "do not provide any actual monetary compensation barred under the Eleventh Amendment," Docket No. 71, at 24:11-12, and are themselves "a form of prospective relief " *id.* at 24:17-18. As to the nominal damages portion of this argument, she is wrong. *See Platt v. Moore*, 15 F.4th 895, 910 (9th Cir. 2021) ("We note 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.") (quoting *Kentucky v. Graham*, 473 U.S. 159, 166-69 (1985)); *Johnson v. Rancho Santiago Cmty. Coll Dist.*, 623 F.3d 1011, 1021 & n.4 (9th Cir. 2010) (indicating that, absent waiver, defendant would have been entitled to sovereign immunity from plaintiffs' claims seeking nominal damages). Although the Attorney General cited both *Platt* and *Johnson* in his motion,

Plaintiff ignored them in her Opposition to the "State Defendants" motions, suggesting – as the Attorney General asserts – she has no response to them.

With respect to any portion of her claims that is *not* barred by sovereign immunity, *Wright* instructs that even in the situation where a plaintiff "challenges whether she is a duly authorized union member," there is "no affirmative duty on government entities to ensure that membership agreements and dues deductions are genuine." 48 F.4th at 1125. Plaintiff's First Amendment claim therefore fails in light of *Belgau*'s prior recognition that there is no "First Amendment right to avoid paying union dues," 975 F.3d at 951, and that union-membership/payment setups such as the instant one are distinguishable from the compelled arrangements present in *Janus*.

Her due process claims also fail, under *Ochoa*, because she "has never alleged that [the Attorney General was] even aware that the deductions were unauthorized" and there is no duty "to verify the accuracy of the information provided by the union." 48 F.4th at 1110-11. As *Ochoa* explained, "'[t]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.'" *Id.* at 1110 (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). The Ninth Circuit instructed that the plaintiff had to be able to demonstrate that the defendants – or at least those who were "state actors" – had "engaged in an 'affirmative abuse of power.'" *Id.* (quoting *Daniels*, 474 U.S. at 330). But, it concluded:

> she has not shown that either the State or the private [state-actor] defendants intended to withhold unauthorized dues and thus deprive her of [her liberty interest in not being

> compelled to subsidize the union's speech, and] she has never alleged that the State or the private defendants were even aware that the deductions were unauthorized – as she notes, they withheld the dues "based on SEIU 775's representations alone," and they did not know or have any reason to know that those representations were false.

Id. Noting that the state statute involved "does not impose a duty on either the State or the private defendants to verify the accuracy of the information provided by the union," the Ninth Circuit concluded that "[t]he defendants' reliance on the union's representations in the mistaken belief that they were accurate does not rise to the level of a Due Process Clause violation." *Id.* 1110-11.

In light of the foregoing, the Court need not consider or resolve the Attorney General's "state action" arguments or the other arguments for why he believes Plaintiff's individual claims cannot succeed. The Court would dismiss the SAC's claims against the Attorney General, and Plaintiff has given the Court no reason to conclude that an opportunity for amendment is warranted.

D. Carter

In her motion, Carter raises the issue of sovereign immunity under both Rules 12(b)(1) and 12(b)(6), asserting that both damages, and declaratory relief as to past actions, are barred. Plaintiff's Opposition to the "State Defendants" is addressed *supra*. In her Reply, Carter first directs the Court's attention to the Ninth Circuit's recent decisions in *Wright* and *Ochoa*, which she asserts "unequivocally held that government employers are not precluded by the First Amendment or Due Process Clause from relying on information

provided by unions as a basis for deducting dues from their employees' pay," and as to which – as the Court has already observed – Plaintiff had no comment in her Oppositions. Docket No. 74, at 1:9-17, 9:12-13. Carter argues in Reply that these two decisions are "squarely on point[] and dispositive of all claims Plaintiff has made against Defendant Carter." *Id.* at 7:18-21. With respect to the issue of nominal damages, Carter argues that "Plaintiff has not cited – and to our knowledge cannot cite – to any case where any court has ever ruled that a state official is potentially liable for nominal damages under the *Ex Parte Young* exception to Eleventh Amendment immunity." Docket No. 74, at 7:3-5. This is an accurate observation, at least with respect to what Plaintiff has/has not cited. Neither sovereign immunity nor *Ex Parte Young* were at all at issue in any of the cases Plaintiff cites on the topic of nominal damages. *See* Docket No. 71, at 24:11-25:5. Merely informing the Court as to what nominal damages *are* is not a convincing point to be made on this topic.

There is no need to re-create the wheel here. For the same reasons addressed in connection with the Attorney General's motion, a combination of sovereign immunity and the impact of the decisions in *Belgau*, *Wright* and *Ochoa* protects Carter from liability. The Court would grant Carter's motion, likely without leave to amend.

IV. Conclusion

For the reasons stated above, each of the four pending motions would be granted, without leave to amend. If anything remains of this case following such a decision, the parties should advise the Court at the hearing.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 22-3320-GW-PLA

Date December 12, 2022

Title *Kristi Parde v. Service Employees International Union, Local 721, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez
Deputy Clerk

Terri A. Hourigan
Court Reporter / Recorder

_____
Tape No.

Attorneys Present for Plaintiffs:

Shella S. Alcabes
Timothy R. Snowball

Attorneys Present for Defendants:

Christine M. Salazar
David A. Urban
Justin O. Sceva
Kristin A. Liska, by telephone

PROCEEDINGS: DEFENDANT COUNTY OF LOS ANGELES' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(B)(6) [58]; ATTORNEY GENERAL'S MOTION TO DISMISS

[59]; SEIU LOCAL 721's MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [60]; and DEFENDANT SHERRI R. CARTER'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) OR FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) [61]

The Court's Tentative Ruling on Defendants' Motions [58][59][60][61] was issued on December 9, 2022 [88]. Oral argument is held. The Tentative Ruling is adopted as the Court's Final Ruling. The four pending Motions are GRANTED without leave to amend.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No.: 2:22-cv-03320

KIRSTI PARDE, a/k/a KIRSTI EDMONDS-WEST, an individual,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, a labor organization; SHERRI R. CARTER, in her official capacity as Executive Officer/Clerk of Court of the Superior Court of California, Los Angeles County; COUNTY OF LOS ANGELES; and ROB BONTA, in his official capacity as Attorney General of California,

Defendants.

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

DEMAND FOR JURY

I. INTRODUCTION

1. Service Employees International Union, Local 721 ("SEIU 721") forged Plaintiff Kirsti Parde's[1] ("Ms. Parde") signature to ensure she stayed a union member despite her objections to the union's continued use of her lawfully earned wages for political speech with which she does not agree.

2. Ms. Parde joined SEIU 721 twenty-four years ago, on March 9, 1998, when she began working as a court reporter for the Superior Court of California, Los Angeles County (the "Superior Court").

3. As time went by, Ms. Parde found the union's political and social positions anathema to her own and felt that SEIU 721 was doing very little, if anything, to represent her interests.

4. As such, she sent an opt-out letter to SEIU 721 so that she could resign her membership.

5. SEIU 721 informed her that she could resign but would have to continue paying dues for another eleven months based on a dues authorization card dated October 23, 2020, that she never signed.

6. The Superior Court and SEIU 721, through Defendant County of Los Angeles ("LA County"), all

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[1] Parde is Kirsti Parde's married name. The name on her Membership Card and used for purposes at her employment by the Superior Court of California, Los Angeles County, is Kirsti Edmonds-West, her maiden name.

defendants in the instant lawsuit,[2] continued dues deductions after Ms. Parde's resignation in January 2022 based on a forged "membership agreement" in violation of her First and Fourteenth Amendment rights.

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

II. JURISDICTION AND VENUE

8. 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), and 28 U.S.C. §§ 2201-2202 (action for declaratory relief), including relief pursuant to Federal Rule of Civil Procedure 65 (permanent injunctive relief).

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

10. 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 are residents of California, and a substantial part of the events giving rise to this action occurred in this judicial district.

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[2] Collectively, Sherri Carter, in her official capacity as Executive Officer/Clerk of Court of the Superior Court of California, Los Angeles County, SEIU 721, LA County and Rob Bonta are collectively referred to as "Defendants."

III. PARTIES

11. Plaintiff Kirsti Parde is a public employee who lives in Los Angeles County, California, and who works as a court reporter for the Superior Court of California, Los Angeles County. Ms. Parde is in a bargaining unit represented by SEIU 721.

12. Defendant Sherri Carter ("Carter") is the Executive Officer/Clerk of Court of the Superior Court. In her official capacity, she is responsible for executing the MOU and representing the Superior Court as an employer in negotiations with SEIU 721. For purposes of this document, Carter is heretofore referred to as the "Superior Court" because she is the named Defendant representing the Superior Court. The Superior Court is a "public agency," Cal. Gov't Code § 3501(c), organized and managed by the State of California. Under Cal. Gov't Code § 1157.12 and the terms of the applicable MOU, SEIU 721 is responsible for certifying to the Superior Court that Ms. Parde and other employees have affirmatively consented to deductions from their lawfully earned wages for union purposes. The Superior Court's business address is 111 N. Hill Street, Los Angeles, California 90012.

13. Defendant SEIU 721, is an "employee organization," Cal. Gov't Code § 71601, and the exclusive representative for Ms. Parde's bargaining unit. Under Cal. Gov't Code § 1157.12 and the terms of the memorandum of understanding ("MOU"), SEIU 721 is empowered to inform the Superior Court whether Ms. Parde has affirmatively consented to monetary deductions. SEIU 721's address is 1545 Wilshire Blvd., Ste. 100, Los Angeles, California 90017.

14. Defendant County of Los Angeles is a "public agency," Cal. Gov't Code § 3501(c), headquartered in

Los Angeles, California. LA County contracts with the Superior Court to process payroll for the Superior Court. As part of that processing, LA County deducts money from Ms. Parde's lawfully earned wages without contractual authorization or affirmative consent, which SEIU 721 then uses to fund its political speech. For the purpose of service of process, LA County may be served with process at 500 W. Temple St, Los Angeles, CA 90012.

15. 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 statute challenged in this case. The actions of the Superior Court, LA County and SEIU 721, occurring under the sole authority provided by state law, are defended as constitutional by the Attorney General. The Attorney General's address for service of process is 300 South Spring Street, Los Angeles, California, 90013, in Los Angeles County.

IV. FACTUAL ALLEGATIONS

A. Ms. Parde Begins Employment at the Superior Court.

16. Ms. Parde began her employment as a court reporter with the Superior Court on March 9, 1998.

17. On March 9, 1998, she signed a dues authorization card that indicated that she would be a dues-paying member of SEIU 721.

18. As time went on, Ms. Parde felt that SEIU 721's political and social positions were repugnant to her.

19. In particular, she took issue with the union using her money to produce propaganda for the Democratic Party and Democrat candidates.

20. Moreover, she felt that in her over 20 years as a union member, SEIU 721 had done nothing to benefit her.

21. Ms. Parde did not communicate with SEIU 721 and did not participate in elections or meetings since March 1998.

22. Because of SEIU 721's donation to the Democratic party and left-wing causes, Ms. Parde decided to resign her membership and end her dues' authorization with SEIU 721.

B. Ms. Parde Discovers Her Signature Was Forged.

23. To resign her membership, on January 10, 2022, Ms. Parde sent a letter via certified mail to SEIU 721 resigning all forms of membership with SEIU 721 and revoking any authorization for dues deductions. Ex. A.

24. On January 12, 2022, SEIU 721 sent Ms. Parde a letter stating they accepted her resignation from SEIU 721.

25. However, SEIU 721 also stated that when she joined the union, she "agreed that [she] would continue to provide financial support in an amount equal to dues until a certain window period." Ex. B.

26. As evidence of this purported commitment to continued dues payments, the response letter claimed Ms. Parde signed a membership card ("Membership Card") that required her to continue paying dues until the time period listed in the Membership Card.

27. SEIU 721 provided a copy of the Membership Card dated October 23, 2020. Ex. C.

28. The Membership Card states as follows:

> I hereby voluntarily request and accept membership in SEIU Local 721 and authorize the Union as my designated exclusive bargaining agent to represent me and to negotiate and conduct on my behalf any and all agreements as to wages, hours and other conditions at work. I agree to be bound by the Constitution and Bylaws of the Union and by any contracts *that may be in existence at the time of application or that may be negotiated by the Union*. (Emphasis added).
>
> I further voluntarily authorize SEIU 721 to instruct my employer to deduct and remit to the Union, any dues, fees and general assessments from my paycheck and to adjust the amount of this deduction as may be required to comply with changes in premiums under existing agreements with insurance plans, or to comply with dues schedules and general assessments determined by the union. Irrespective of my membership in the Union, deductions for this purpose shall remain in effect and be irrevocable unless revoked by me *in writing in accordance with applicable provisions in the memorandum of understanding or agreement between my employer and SEIU 721*. In the absence of such provision, the authorization shall remain in effect and *can only be revoked by me in writing during the period not less than thirty (30) days and not more than forty-five (45) days before the annual anniversary date of the authorization*. (Emphasis added).

29. The Membership Card refers to the MOU between SEIU 721 and the Superior Court.

30. The most recent MOU runs from January 16, 2019, through January 15, 2022. Ex. D.

31. Based on information and belief, no new MOU has been negotiated.

32. Article 14, Section 2 ("Security Clause") of the MOU states as follows:

> Any employee in this Unit who has authorized Union dues deductions on the effective date of this agreement or at any time subsequent to the effective date of this agreement will continue to have such dues deductions made by the Court during the term of this agreement, provided, however, that an employee in this Unit may terminate such Union dues *August 1 to August 31* by notifying the Union of their termination of Union dues deduction. Such notification will be provided by the employee by certified mail/return receipt requested, and should be in the form of a letter containing the following information: employee name, employee number, job classification, the employer business name, and name of Union from which dues deductions are to be canceled. The Union agrees to finalize all necessary processing of emp1oyee written requests for cancellation of dues within thirty (30) calendar days following receipt of such request.

33. Pursuant to the Membership Card, an employee would first look to the MOU to determine when he or she could resign.

34. Because there is no current MOU, and the expired MOU refers to August 1-August 31 of the year preceding the MOU's expiration (August 1-31 of 2021), the proper termination date reverts to what it states in the Membership Card: "not less than thirty (30) days and not more than forty-five (45) days before the annual anniversary date of this authorization." Ex. C.

35. The computer-generated date on the Membership Card stated that the anniversary date was October 23, 2020. Ex. C.

36. As such, pursuant to the Membership Card, Ms. Parde would have been required to resign in the 15-day window period between September 8 and September 23, 2022.

37. SEIU 721 would also continue to deduct dues from her paycheck until November 2022.

38. Ms. Parde reviewed the Membership Card provided by SEIU 721. Ex. C.

39. The purported Membership Card contained a signature on the form that was computer-generated.

40. The computer-generated signature also had a computer-generated date (October 23, 2020) that purported to be the date of the signature.

41. Ms. Parde was shocked to see her signature on the Membership Card.

42. She did not sign the membership form on October 23, 2020, or on any date.

43. In fact, she had not signed anything relating to membership in SEIU 721 since March 9, 1998, twenty-four years ago.

44. Ms. Parde reviewed her emails and communications and confirmed that she had never contacted SEIU 721 regarding membership.

45. Further, after reviewing her calendar, Ms. Parde determined that on October 23, 2020, the date she allegedly signed the Membership Card electronically, she had been working in a courtroom most of the day transcribing for a judge and would not have had the time to sign the Membership Card.

46. After seeing her signature forged on the Membership Card, on January 27, 2022, Ms. Parde contacted SEIU 721 and demanded that SEIU 721 immediately provide her with an explanation of why her signature appeared on a Membership Card she did not sign.

47. Ms. Parde also demanded a copy of the original 1998 dues card with her "handwritten signature." Ex. E.

48. To date, SEIU 721 has ignored this request entirely.

49. SEIU 721 has refused to produce a Membership Card for Ms. Parde from 1998.

50. Upon information and belief, the 1998 Membership Card does not have language limiting Ms. Parde's ability to resign.

51. Instead, SEIU 721 produced a Membership Card that she never signed.

52. SEIU's deliberate misrepresentation of the truth of Ms. Parde's membership is a betrayal of trust to Ms. Parde.

53. Ms. Parde was led to believe that the union represented her interests as a public employee.

54. Instead, Ms. Parde found the Union's political positions to be in direct opposition to her own views, and the antithesis of her best interests.

55. On February 16, 2022, Ms. Parde sent a second letter to SEIU 721 disputing the Membership Card's authenticity and asking for a copy of her 1998 dues authorization card.

56. To date, SEIU 721 has not responded to this letter.

57. Despite her resignation and withdrawal of consent to any further dues deductions, Defendants took money from her paycheck in January, February, March, April, May 2022, and continue to extract funds to this day.

C. A Statutory Scheme, Defended by Defendant Bonta, Enables SEIU 721, the Superior Court and LA County to Continue Taking Dues Without Consent.

58. Ms. Parde withdrew her consent to pay dues on January 10, 2022 and has never renewed her consent.

59. SEIU 721, the Superior Court and LA County are continuing to unconstitutionally deduct unauthorized funds from Ms. Parde's lawfully earned wages.

60. She has given no contractual consent to pay anything because she revoked her 1998 authorization, and that membership card has no limitation on when she can resign.

61. Mrs. Parde has not given any other form of consent for the Defendants' extraction of any funds from her wages.

62. The Membership Agreement dated October 23, 2020 is forged.

63. Despite this, pursuant to the forged 2020 Membership Agreement, the Superior Court, through LA County, continues to deduct dues from Ms. Parde's paycheck and continues to give these dues to SEIU 721.

64. The Superior Court contracts with LA County to process its payroll and deduct union dues from its employees' paychecks.

65. The Superior Court does so pursuant to California Government Code § 1157.12(b): The Superior Court "shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed." Here, the employee organization is SEIU 721.

66. LA County is the one that ultimately makes the paycheck deductions because of its agreement with the Superior Court, but directions on when the deduction or reduction begin and end is entirely in the hands of SEIU 721 and its government partner, the Superior Court.

67. Once LA County and the Superior Court extract Ms. Parde's wages, SEIU 721 then use these monies to further political causes that Ms. Parde abhors.

68. Worse still, every election, whether local or national, SEIU 721 bombards Ms. Parde with text messages and emails about which candidates to support. Ms. Parde does not agree with SEIU 721's political candidates of choice.

69. Nor does she agree with having her dues be donated to those political candidates.

70. Further, everything SEIU 721 does is "inherently political,"[3] and therefore Ms. Parde also objects to SEIU 721 taking her money without consent and spending it for collective bargaining purposes.

71. As an example, SEIU 721 proposed strikes for job classifications that put the public at risk. Ms. Parde does not support this kind of action on the part of SEIU 721, yet she is forced to fund it.

72. This violation of Ms. Parde's constitutional rights only occurs because of a statutory scheme.

73. Once an employee of the Superior Court signs a Membership Agreement to pay dues, SEIU 721 certifies to the Superior Court that this employee's dues are to be deducted directly from their paycheck and sent to SEIU 721. *See*, Cal. Gov't Code § 71638.

74. If that employee no longer wishes to pay dues, the Superior Court will only review requests from SEIU 721 and not the employee. *See*, Cal. Gov't Code § 1157.12(b).

75. In other words, an employee's request to stop deductions from their own paycheck will go unheeded unless SEIU 721 consents to stop deductions, pursuant to the statute.

76. Worse still, the Superior Court and LA County must rely on a certification from SEIU 721 regarding the existence of a Membership Agreement that would require dues deductions. *See*, Cal. Gov't Code § 1157.12(a).

77. SEIU 721 is "not be required to provide a copy of an individual authorization to the public employer

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[3] *See*, *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*,138 S. Ct. 2448, 2458 (2018).

unless a dispute arises about the existence or terms of the authorization." *See*, Cal. Gov't Code § 1157.12(a).

78. In other words, if SEIU 721 forges a Membership Agreement, the Superior Court will, in complete disregard for the constitutional rights of its own employees, continue to deduct dues from an employee's wages and will not stop doing so unless SEIU 721, the forger, states that dues should stop.

79. To complete the loop that ensures an employee has no say in their own paycheck's deductions, SEIU 721 agrees to indemnify the Superior Court if a conflict arises regarding consent to deduct dues from the employee's paycheck. *See*, Cal. Gov't Code § 1157.12(a).

80. This indemnification essentially takes away any incentive for the Superior Court, or any public employer, to investigate fraud, malfeasance or even mistakes when it comes to its own employees' paychecks.

81. This scheme has been defended repeatedly by Defendant Bonta (or his predecessor Attorneys General) as Constitutional in various lawsuits throughout California, including some where a union forged the dues authorization cards of employees.[4]

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[4] *Bourque, et al v. Engineers and Architects Association, et al.*, Case No. 21-4006 (C.D.Ca.2021); *Deering v. International Brotherhood of Electrical Workers Local 18, et al.*, Case No. 21-07447 (C.D.Ca.2021), No. 22-55458 (9th Cir. 2022); *Espinoza v. Union of American Physicians and Dentists, AFSCME Local 206, et al.*, Case No. 21-01898 (C.D.Ca.2021), No. 22-55331 (9th Cir. 2022); *Hubbard v. Service Employees International Union Local 2015, et al.*, Case No. 20-00319 (E.D.Ca. 2020), No. 21-16408 (9th Cir. 2021); *Kant et al., v. SEIU Local 721, et al.*, Case No. 21-01153 (C.D.Ca. 2021); *Klee v. International Union of Operating Engineers, Local 501, et al.*, Case No. 22-00148 (C.D.Ca. 2022); *Kurk, et al v. Los Rios Classified Employees Association, et al.*, Case No. 19-00548 (E.D.Ca. 2019), No. 21-16257 (9th Cir. 2021);

82. Defendant Bonta continues to claim that the statutory scheme is constitutional and has not invalidated any portion of it.

83. Were it not for this scheme, once Ms. Parde discovered that the Superior Court was taking money from her paycheck without consent, she would have contacted the Superior Court, her employer, and asked them to stop.

84. Were it not for this scheme, Ms. Parde could have directed the Superior Court to stop taking funds right out of her paycheck immediately.

85. Instead, the Superior Court is statutorily obligated to disregard SEIU 721's fraud and automatically take funds from Ms. Parde's paycheck despite no consent.

86. These funds are then taken by LA County and are remitted directly to SEIU 721 pursuant to an agreement between the Superior Court and LA County and Cal. Gov't Code § 1157.12.

87. But for this scheme, Ms. Parde's First Amendment rights would not have been violated:

Laird v. United Teachers Los Angeles, et al., Case No. 21-02313 (C.D.Ca. 2021); *Marsh, et al. v. AFSCME 3299, et al.*, Case No. 19-02382 (E.D. Ca. 2019), No. 21-15309 (9th Cir. 2021); *Mendez, et al v. California Teachers' Association*, Case No. 19-01290 (N.D.Ca. 2019), No. 20-15394 (9th Cir. 2020); *Quezambra v. United Domestic Workers of America, AFSCME Local 3920, et al.*, Case No. 19-00927, No. 20-55643 (9th Cir. 2020); *Savas, et al v. v. California State Law Enforcement Agency, et al.*, Case No. 20-00032 (S.D.Ca. 2020), No. 20-56045 (9th Cir. 2020); *Semerjyan v. Service Employees International Union, Local 2015, et al.*, Case No. 20-02956, (C.D. Ca. 2020) (forgery); *Smith et al., v. Teamsters 2010 et al.*, Case No. 19-00771 (C.D. Ca 2019), No. 19-56503 (9th Cir. 2019).

SEIU 721 would have to wait until the forgery is cleared up before obtaining funds from Ms. Parde.

88. Instead, SEIU 721 gets the funds on the front end and by the time the forgery is decided, Ms. Parde has had to support political positions she detests for months, if not years.

89. The State continues to force Ms. Parde to pay for political causes in which she does not believe in by deducting money from her paycheck every month and sending them to SEIU 721 to be used for political causes. A copy of Ms. Parde's most recent paycheck is attached here at Ex. F.

90. This is done without her consent and despite her objections.

91. Further, the MOU between the Superior Court and SEIU 721 contains policy choices that are not required by Cal. Gov't Code § 1157.12, and which amount to a deliberate indifference to Ms. Parde's constitutional rights.

92. These policy choices were a moving force behind the deprivations of her rights.

93. Similarly, the Superior Court contracted with LA County for LA County to process the Superior Court's payroll and deduct dues from Ms. Parde's paycheck.

94. This agreement between the Superior Court and LA County is not required by law and is a policy choice made by LA County. This policy choice is a source of the deprivations of Ms. Parde's rights.

95. Specifically, but not limited to, the MOU's provision that employees purportedly are only allowed to end their membership's during a specified window period between August 1 and August 31, 2021.

V. CAUSES OF ACTION

COUNT I

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

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

97. Defendants' extraction of money from Plaintiff's paycheck violates Plaintiff's First Amendment rights, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983: (a) not to support, financially or otherwise, petitioning and speech; and (b) against compelled speech, because Defendants' extraction of funds was made without Parde's consent.

98. In fact, the union forged her signature in an attempt to force her to subsidize its undesirable activities.

99. Plaintiff effectively ended her SEIU 721 membership and dues authorization on January 10, 2022.

100. Ms. Parde neither contractually authorized nor affirmatively consented to the continuing deduction of money from her lawfully earned wages to fund union speech.

101. As a government union, every time SEIU takes and spends Ms. Parde's money without her contractual authorization or affirmative consent, she sustains an injury to her First Amendment rights.

102. No compelling state interest justifies this infringement of Plaintiff's First Amendment Rights.

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

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

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

COUNT II

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

106. Plaintiff re-alleges and incorporates by reference the paragraphs set for above.

107. As a public employee, Plaintiff has a property interest in the wages she has earned.

108. She also has a liberty interest protected by the First Amendment to not have her wages diverted to union coffers absent her consent.

109. The Superior Court, LA County and Defendant Bonta have a duty to implement and abide by adequate procedural safeguards to protect employee's rights; and SEIU 721, the union directing the Superior Court to withdraw dues and political assessments from Plaintiff's wages, has a duty to implement and abide by adequate procedural safeguards to protect employee's rights.

110. Defendants engaged in a pattern and practice of indifference towards Plaintiff's property rights, and her right to be free from continued forced payment of union dues and political assessment: (a) the Superior Court and LA County failed to implement any process for verification or confirmation of union membership,

relying entirely on unsubstantiated claims by SEIU 721, a financially interested party; (b) SEIU 721 failed to adequately train, vet, monitor, or otherwise instruct union personnel in such a manner as to avoid violating Plaintiff's constitutional rights, and in fact created an environment likely to lead to violation of such rights.

111. Defendants' actions led to forgery of Plaintiff's signature, rewarded SEIU 721 for the forgery of Plaintiff's signature, and failed to protect Plaintiff from this forgery and subsequent violation of her rights by the wrongful withdrawal of dues and political assessments from Plaintiff's wages without her consent.

112. Defendants, acting under color of law, knowingly, recklessly, deprived Plaintiff of her First Amendment right to be free from supporting a union with which she has fundamental and profound disagreements.

113. Therefore, Plaintiff seeks compensatory and nominal damages for the violation of her Fourteenth Amendment rights, and injunctive and declaratory relief against all Defendants for the continuing deprivation of her liberty and property interests without procedural due process pursuant to 42 U.S.C. § 1983 and 28 U.S.C §§ 2201-2202.

COUNT III

Substantive Due Process (42 U.S.C. § 1983)
(By Plaintiff Against all Defendants)

114. The Plaintiff re-alleges and incorporates by reference each and every paragraph included above.

115. The substantive component of the Due Process Clause prohibits restraints on liberty interests, like

the free speech interests protected by the First Amendment, that are inherently arbitrary.

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

117. The Plaintiff has a liberty interest in her First Amendment right against compelled speech.

118. Under California Government Code § 1157.12 and the MOU, the Superior Court and LA County has no ability to independently verify whether the Plaintiff has contractually authorized or affirmatively consented to deductions from her lawfully earned wages.

119. Instead, the Plaintiff is required to direct her union-related payroll preferences to Defendant SEIU 721, rather than directly to her employer.

120. Defendant SEIU 721 is an inherently biased party with a direct pecuniary interest in continuing to authorize deductions from the Plaintiff's lawfully earned wages without contractual authorization or affirmative consent.

121. Thus, California Government Code § 1157.12 and the MOU create a burden on Ms. Parde's right to freedom of speech that is arbitrary and is not justified by any state interest.

122. Any legitimate interest the State has in administrative efficiency can be achieved by means significantly less-restrictive of Ms. Parde's First Amendment Rights.

123. Even a single deduction by the Superior Court, and single expenditure by Defendant SEIU 721, without contractual authorization or affirmative consent would both be violations of Parde's right to substantive due process.

124. The Plaintiff has suffered, and continues to suffer, these injuries.

125. Therefore, the Plaintiff seeks compensatory damages against Defendant SEIU 721 and LA County for injuries to substantive due process rights, and nominal damages and equitable relief against all the Defendants to end the continuing deprivations, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests that this Court:

Emergency injunctive relief:

126. Issue an immediate injunction directing LA County and the Superior Court to cease diverting Plaintiff's lawfully earned wages to SEIU 721 for use in political contributions and speech without her affirmative consent as required by the First Amendment.

Issue a declaratory judgment:

127. That LA County and the Superior Court's continuing withdrawal of money from Plaintiff's lawfully earned wages for use in political speech after she effectively withdrew consent pursuant to the terms of the union agreement, under Cal. Gov't Code §1157.12 and the applicable MOU, is a violation of Plaintiff's First Amendment right against compelled speech, as well as the First Amendment rights of all similarly situated employees.

128. That the Defendants' failure to provide Plaintiff, and similarly situated employees, with 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;

129. That the Defendants' (all of them) scheme requiring Plaintiff, and other similarly situated employees, to direct her membership and dues authorization termination requests to a third-party union with a direct financial incentive to continue authorizing dues deductions without the employees' affirmative consent, is inherently arbitrary and a violation of the Fourteenth Amendment's guarantee of substantive due process.

Issue a permanent injunction:

130. Enjoining LA County and the Superior Court from seizing the lawfully earned wages of Plaintiff and similarly situated public employees for the purposes of being spent on SEIU 721's political speech without their affirmative consent;

131. Enjoining the Defendants from agreeing to and enforcing a procedure for deducting money from the lawfully earned wages of Plaintiff and similarly situated public employees that violates the First and Fourteenth Amendments and ordering Defendants Bonta, LA County, and the Superior Court to implement a process providing adequate procedures for confirming public employees' affirmative consent prior to the deduction of any money from their pay for SEIU 721's purposes.

132. Enjoining the Defendants from agreeing to and enforcing an inherently arbitrary procedure that violates the First and Fourteenth Amendment rights of Plaintiff and similarly situated employees and ordering Defendant Bonta, LA County and the Superior Court to implement a process by which LA County and the Superior Court must directly confirm public employees' voluntary and informed affirmative consent prior to the deduction of any money from their pay for SEIU 721 purposes.

C. Enter a judgment:

133. Awarding Plaintiff damages in the amount of $868.80, plus interest at the maximum amount allowed by law, for the money unconstitutionally seized from her lawfully earned wages without her affirmative consent by the Defendants after January 10, 2022, together with additional amounts for the subsequent and continuing diversions;

134. Awarding Plaintiff compensatory damages for the deprivation of her First and Fourteenth Amendment rights, in an amount to be determined at trial;

135. Awarding Plaintiff an amount of no less than $1.00 in nominal damages for the deprivation of her First Amendment and Fourteenth Amendment rights;

136. Awarding Plaintiff her costs and attorneys' fees under 42 U.S.C. § 1983 and § 1988;

137. Awarding Plaintiff any further relief to which she may be entitled and any other relief this Court may deem just and proper. Respectfully submitted,

Date: July 12, 2022

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Verification

I, Kirsti Parde, declare as follows:

1. I am the Plaintiff in the present case, a citizen of the United States of America, and a resident of the State of California.

2. I have personal knowledge of myself, my activities, and my intentions, including those set out in the foregoing Verified Amended Complaint for Declaratory Judgement, Injunctive Relief, and Damages for Violation of Civil Rights, and if called I would competently testify as to the matters stated herein.

3. I verify under penalty of I declare under penalties of perjury, under the laws of the United States, that the above statements are true and correct.

Executed on: July 22, 2022

/s/Kirsti Parde
Kirstie Parde

APPENDIX F

FREEDOM FOUNDATION

Our mission is to advance individual liberty, free enterprise, and limited, accountable government.

March 19, 2024

Molly C. Dwyer, Clerk of Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
95 Seventh Street
San Francisco, CA 94119-3939

Re: Rule 28(j) Notice of Supplemental Authority *Kirsti Parde v. Service Employees International Union, Local 721, et al.*, No. 23-55021

Dear Ms. Dwyer:

Appellant Kirsti Parde respectfully gives notice of the following subsequent authority decided by the Supreme Court of the United States on March 15, 2024. A copy of the Opinion in *Lindke v. Freed*, No. 22–611, slip op. at 1 (U.S., Mar. 15, 2024), is attached as Exhibit A.

In *Lindke*, the Court clarifies the requirements necessary to satisfy the first prong of the so-called *Lugar* test for state action, viz., the state policy requirement. This clarification has direct bearing on the instant case.

First, the Court makes clear that it is the source of the power being exercised, not the identity of the actor, that controls the inquiry. *Id.* at 6. So long as the actor was possessed of state authority, and exercised that authority in such a way that a constitutional injury resulted, the state policy requirement is satisfied. *Id.* at 9 (citing *Griffin v. Maryland*, 378 U. S. 130, 135

(1964); *West v. Atkins*, 487 U. S. 42, 49 (1988); *United States v. Classic*, 313 U. S. 299, 326 (1941)).

In this case, to avoid a finding that it acted pursuant to a state policy, SEIU would have to show that its conduct entailed functions in no way dependent on state authority. *Id.* (citing *Polk County v. Dodson*, 454 U. S. 312, 318–319 (1981). It cannot do so. But for the State authority given the union to control the government payroll deduction system pursuant to California Government Code §§ 71638 and 1157.12, Parde's speech would not have been compelled. The State's empowerment of SEIU, and SEIU's use of that authority, satisfies the first prong of the *Lugar* test under *Lindke*.

Second, an alleged "misuse" of the authority the State gives SEIU is no excuse. As the Court makes clear in *Lindke*, the "[m]isuse of power, possessed by virtue of state law," constitutes state action. *Id.* at 10 (citing Classic, 313 U. S., at 326 (emphasis added); *Screws v. United States*, 325 U. S. 91, 110 (1945) (state action where "the power which [state officers] were authorized to exercise was misused"); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 287–288 (1913) (the Fourteenth Amendment encompasses "abuse by a state officer . . . of the powers possessed")). 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." *Id.* at 11.

Contrary to the arguments raised by SEIU, it is irrelevant that the allegedly injurious action taken pursuant to State authority may have violated some other state or federal law. *Id.* at 10 ("While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights...it encompasses cases where his "particular

action...violated state or federal law."). The only question is whether state law made the action possible.

A finding that the SEIU acted pursuant to state policy requires only that the union had the statutory power to divert Parde's lawfully earned wages without affirmative consent, and that it exercised this power. *Id.* at 9. It did.

Respectfully Submitted,

Timothy R. Snowball
Litigation Counsel | *Freedom Foundation*
(619) 368-8237
tsnowball@freedomfoundation.com

Exhibit A

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LINDKE *v*. FREED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 22–611.

Argued October 31, 2023—Decided March 15, 2024

James Freed, like countless other Americans, created a private Facebook profile sometime before 2008. He eventually converted his profile to a public "page," meaning that *anyone* could see and comment on his posts. In 2014, Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Freed continued to operate his Facebook page himself and continued to post prolifically (and primarily) about his personal life. Freed also posted information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of concern. Freed often responded to comments on his posts, including those left by city

residents with inquiries about community matters. He occasionally deleted comments that he considered "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about it. Some posts were personal, and some contained information related to his job. Facebook user Kevin Lindke commented on some of Freed's posts, unequivocally expressing his displeasure with the city's approach to the pandemic. Initially, Freed deleted Lindke's comments; ultimately, he blocked him from commenting at all. Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page because it was a public forum. The District Court determined that because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under §1983, Lindke's claim failed. The Sixth Circuit affirmed.

Held: A public official who prevents someone from commenting on the official's social-media page engages in state action under §1983 only if the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts. Pp. 5–15.

(a) Section 1983 provides a cause of action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. (Emphasis added.) Section 1983's "under color of" text makes clear that it is a provision designed as a protection against acts attributable to a State, not those of a private person. In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily

pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. Sometimes, however, the line between private conduct and state action is difficult to draw. In *Griffin* v. *Maryland*, 378 U. S. 130, for example, it was the source of the power, not the identity of the employer, which controlled in the case of a deputized sheriff who was held to have engaged in state action while employed by a privately owned amusement park. Since *Griffin*, most state-action precedents have grappled with whether a nominally private person engaged in state action, but this case requires analyzing whether a *state official* engaged in state action or functioned as a private citizen.

Freed's status as a state employee is not determinative. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights—including the First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms. Here, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own. Pp. 5–8.

(b) In the case of a public official using social media, a close look is definitely necessary to categorize conduct. In cases analogous to this one, precedent articulates principles to distinguish between personal and official communication in the social-media context. A public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social

media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. Pp. 8–15.

(1) The test's first prong is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (emphasis added). Lindke's focus on appearance skips over this critical step. Unless Freed was "possessed of state authority" to post city updates and register citizen concerns, *Griffin*, 378 U. S., at 135, his conduct is not attributable to the State. Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. There must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Blum* v. *Yaretsky*, 457 U. S. 991, 1003.

To misuse power, one must possess it in the first place, and §1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Determining the scope of an official's power requires careful attention to the relevant source of that power and what authority it reasonably encompasses. The threshold inquiry to establish state action is not whether making official announcements *could* fit within a job description but whether making such announcements is *actually* part of the job that the State entrusted the official to do. Pp. 9–12.

(2) For social-media activity to constitute state action, an official must not only have state authority, he must also purport to use it. If the official does not speak in furtherance of his official responsibilities, he

speaks with his own voice. Here, if Freed's account had carried a label—*e.g.,* "this is the personal page of James R. Freed"—he would be entitled to a heavy presumption that all of his posts were personal, but Freed's page was not designated either "personal" or "official." The ambiguity surrounding Freed's page requires a fact-specific undertaking in which posts' content and function are the most important considerations. A post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is more likely personal. Lest any official lose the right to speak about public affairs in his personal capacity, the plaintiff must show that the official purports to exercise state authority in specific posts. The nature of the social-media technology matters to this analysis. For example, because Facebook's blocking tool operates on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. Pp. 12–15.

37 F. 4th 1199, vacated and remanded.

BARRETT, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 22–611

KEVIN LINDKE, Petitioner *v.* JAMES R. FREED

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[March 15, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

Like millions of Americans, James Freed maintained a Facebook account on which he posted about a wide range of topics, including his family and his job. Like most of those Americans, Freed occasionally received unwelcome comments on his posts. In response, Freed took a step familiar to Facebook users: He deleted the comments and blocked those who made them.

For most people with a Facebook account, that would have been the end of it. But Kevin Lindke, one of the unwelcome commenters, sued Freed for violating his right to free speech. Because the First Amendment

binds only the government, this claim is a nonstarter if Freed posted as a private citizen. Freed, however, is not only a private citizen but also the city manager of Port Huron, Michigan—and while Freed insists that his Facebook account was strictly personal, Lindke argues that Freed acted in his official capacity when he silenced Lindke's speech.

When a government official posts about job-related topics on social media, it can be difficult to tell whether the speech is official or private. We hold that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.

I

A

Sometime before 2008, while he was a college student, James Freed created a private Facebook profile that he shared only with "friends." In Facebook lingo, "friends" are not necessarily confidants or even real-life acquaintances. Users become "friends" when one accepts a "friend request" from another; after that, the two can generally see and comment on one another's posts and photos. When Freed, an avid Facebook user, began nearing the platform's 5,000 friend limit, he converted his profile to a public "page." This meant that *anyone* could see and comment on his posts. Freed chose "public figure" for his page's category, "James Freed" for its title, and "JamesRFreed1" as his username. Facebook did not require Freed to satisfy any special criteria either to convert his Facebook profile to a public page or to describe himself as a public figure.

In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook page

to reflect the new job. For his profile picture, Freed chose a photo of himself in a suit with a city lapel pin. In the "About" section, Freed added his title, a link to the city's website, and the city's general email address. He described himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI."

As before his appointment, Freed operated his Facebook page himself. And, as before his appointment, Freed posted prolifically (and primarily) about his personal life. He uploaded hundreds of photos of his daughter. He shared about outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston.

Freed also posted information related to his job. He described mundane activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city's boat launch. He shared news about the city's efforts to streamline leaf pickup and stabilize water intake from a local river. He highlighted communications from other city officials, like a press release from the fire chief and an annual financial report from the finance department. On occasion, Freed solicited feedback from the public—for instance, he once posted a link to a city survey about housing and encouraged his audience to complete it.

Freed's readers frequently commented on his posts, sometimes with reactions (for example, "Good job it takes skills" on a picture of his sleeping daughter) and sometimes with questions (for example, "Can you allow city residents to have chickens?"). Freed often replied to the comments, including by answering inquiries from city residents. (City residents can have chickens and should "call the Planning Dept for

details.") He occasionally deleted comments that he thought were "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about that. Some posts were personal, like pictures of his family spending time at home and outdoors to "[s]tay safe" and "[s]ave lives." Some contained general information, like case counts and weekly hospitalization numbers. Others related to Freed's job, like a description of the city's hiring freeze and a screenshot of a press release about a relief package that he helped prepare.

Enter Kevin Lindke. Unhappy with the city's approach to the pandemic, Lindke visited Freed's page and said so. For example, in response to one of Freed's posts, Lindke commented that the city's pandemic response was "abysmal" and that "the city deserves better." When Freed posted a photo of himself and the mayor picking up takeout from a local restaurant, Lindke complained that while "residents [we]re suffering," the city's leaders were eating at an expensive restaurant "instead of out talking to the community." Initially, Freed deleted Lindke's comments; ultimately, he blocked him. Once blocked, Lindke could see Freed's posts but could no longer comment on them.

B

Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page, which he characterized as a public forum. Freed, Lindke claimed, had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them.

The District Court granted summary judgment to Freed. Because only state action can give rise to

liability under §1983, Lindke's claim depended on whether Freed acted in a "private" or "public" capacity. 563 F. Supp. 3d 704, 714 (ED Mich. 2021). The "prevailing personal quality of Freed's post[s]," the absence of "government involvement" with his account, and the lack of posts conducting official business led the court to conclude that Freed managed his Facebook page in his private capacity, so Lindke's claim failed. *Ibid*.

The Sixth Circuit affirmed. It noted that "the caselaw is murky as to when a state official acts personally and when he acts officially" for purposes of §1983. 37 F. 4th 1199, 1202 (2022). To sort the personal from the official, that court "asks whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" *Id*., at 1203 (quoting *Waters* v. *Morristown*, 242 F. 3d 353, 359 (CA6 2001)). Applying this precedent to the social-media context, the Sixth Circuit held that an official's activity is state action if the "text of state law requires an officeholder to maintain a social-media account," the official "use[s] . . . state resources" or "government staff " to run the account, or the "accoun[t] belong[s] to an office, rather than an individual officeholder." 37 F. 4th, at 1203–1204. These situations, the Sixth Circuit explained, make an official's social-media activity "'fairly attributable'" to the State. *Id*., at 1204 (quoting *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982)). And it concluded that Freed's activity was not.

The Sixth Circuit's approach to state action in the social-media context differs from that of the Second and Ninth Circuits, which focus less on the connection between the official's authority and the account and more on whether the account's appearance and content

look official. See, *e.g.*, *Garnier* v. *O'Connor-Ratcliff*, 41 F. 4th 1158, 1170–1171 (CA9 2022); *Knight First Amdt. Inst. at Columbia Univ.* v. *Trump*, 928 F. 3d 226, 236 (CA2 2019), vacated as moot *sub nom*. *Biden* v. *Knight First Amdt. Inst. at Columbia Univ.*, 593 U. S. ___ (2021). We granted certiorari. 598 U. S. ___ (2023).

II

Section 1983 provides a cause of action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. (Emphasis added.) As its text makes clear, this provision protects against acts attributable to a State, not those of a private person. This limit tracks that of the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that §1983 protects. §1 ("No *State* shall . . . nor shall any *State* deprive . . . " (emphasis added)); see also *Lugar*, 457 U. S., at 929 ("[T]he statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical"). The need for governmental action is also explicit in the Free Speech Clause, the guarantee that Lindke invokes in this case. Amdt. 1 ("*Congress* shall make no law . . . abridging the freedom of speech . . . " (emphasis added)); see also *Manhattan Community Access Corp.* v. *Halleck*, 587 U. S. 802, 808 (2019) ("[T]he Free Speech Clause prohibits only *governmental* abridgment of speech," not "*private* abridgment of speech"). In short, the state-action requirement is both well established and reinforced by multiple sources.[1]

[1] Because local governments are subdivisions of the State, actions taken under color of a local government's law, custom, or usage count as "state" action for purposes of §1983. See *Monell* v.

In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. See, *e.g.*, *Graham* v. *Connor*, 490 U. S. 386, 388 (1989) (police officers); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 504–505 (1969) (public schools); *Estelle* v. *Gamble*, 429 U. S. 97, 98 (1976) (prison officials). And, absent some very unusual facts, no one would credit a child's assertion of free speech rights against a parent, or a plaintiff's complaint that a nosy neighbor unlawfully searched his garage.

Sometimes, however, the line between private conduct and state action is difficult to draw. *Griffin* v. *Maryland* is a good example. 378 U. S. 130 (1964). There, we held that a security guard at a privately owned amusement park engaged in state action when he enforced the park's policy of segregation against black protesters. *Id.*, at 132–135. Though employed by the park, the guard had been "deputized as a sheriff of Montgomery County" and possessed "'the same power and authority'" as any other deputy sheriff. *Id.*, at 132, and n. 1. The State had therefore allowed its power to be exercised by someone in the private sector. And the source of the power, not the identity of the employer, controlled.

By and large, our state-action precedents have grappled with variations of the question posed in *Griffin*: whether a nominally private person has engaged in state action for purposes of §1983. See, *e.g.*, *Marsh* v. *Alabama*, 326 U. S. 501, 502–503 (1946) (company town); *Adickes* v.

New York City Dept. of Social Servs., 436 U. S. 658, 690–691 (1978). And when a state or municipal employee violates a federal right while acting "under color of law," he can be sued in an individual capacity, as Freed was here.

S. H. Kress & Co., 398 U. S. 144, 146–147 (1970) (restaurant); *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 151–152 (1978) (warehouse company). Today's case, by contrast, requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. This Court has had little occasion to consider how the state-action requirement applies in this circumstance.

The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability "acts of officers in the ambit of their personal pursuits," *Screws* v. *United States*, 325 U. S. 91, 111 (1945) (plurality opinion), the state-action requirement "protects a robust sphere of individual liberty" for those who serve as public officials or employees, *Halleck*, 587 U. S., at 808.

The dispute between Lindke and Freed illustrates this dynamic. Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U. S. 410, 417 (2006). This right includes the ability to speak about "information related to or learned through public employment," so long as the speech is not "itself ordinarily within the scope of [the] employee's duties." *Lane* v. *Franks*, 573 U. S. 228, 236, 240 (2014). Where the right exists,

"editorial control over speech and speakers on [the public employee's] properties or platforms" is part and parcel of it. *Halleck*, 587 U. S., at 816. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own.

So Lindke cannot hang his hat on Freed's status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look.

III

A close look is definitely necessary in the context of a public official using social media. There are approximately 20 million state and local government employees across the Nation, with an extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social media for personal communication, official communication, or both—and the line between the two is often blurred. Moreover, social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech. The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry. See, *e.g.*, *Reitman* v. *Mulkey*, 387 U. S. 369, 378 (1967); *Gilmore* v. *Montgomery*, 417 U. S. 556, 574 (1974). We repeat that caution here.

That said, our precedent articulates principles that govern cases analogous to this one. For the reasons we explain below, a public official's social-media activity

constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.

A

The first prong of this test is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar*, 457 U. S., at 937 (emphasis added). An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how "official" it looks—lacks the necessary lineage.

This rule runs through our cases. *Griffin* stresses that the security guard was "possessed of state authority" and "purport[ed] to act under that authority." 378 U. S., at 135. *West* v. *Atkins* states that the "traditional definition" of state action "requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" 487 U. S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)). *Lugar* emphasizes that state action exists only when "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." 457 U. S., at 939; see also, *e.g.*, *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 620 (1991) (describing state action as the "exercise of a right or privilege having its source in state authority"); *Screws*, 325 U. S., at 111 (plurality opinion) (police-officer defendants "were authorized to make an arrest and to take such steps as were necessary to make the

arrest effective"). By contrast, when the challenged conduct "entail[s] functions and obligations in no way dependent on state authority," state action does not exist. *Polk County* v. *Dodson*, 454 U. S. 312, 318–319 (1981) (no state action because criminal defense "is essentially a private function . . . for which state office and authority are not needed"); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 358–359 (1974).

Lindke's focus on appearance skips over this crucial step. He insists that Freed's social-media activity constitutes state action because Freed's Facebook page looks and functions like an outlet for city updates and citizen concerns. But Freed's conduct is not attributable to the State unless he was "possessed of state authority" to post city updates and register citizen concerns. *Griffin*, 378 U. S., at 135. If the State did not entrust Freed with these responsibilities, it cannot "fairly be blamed" for the way he discharged them. *Lugar*, 457 U. S., at 936. Lindke imagines that Freed can conjure the power of the State through his own efforts. Yet the presence of state authority must be real, not a mirage.

Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. For example, imagine that Freed posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to Freed's state authority—because he had none. For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains." *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982) (emphasis deleted). There must

be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Id*., at 1003.

To be clear, the "[*m*]*isuse* of power, possessed by virtue of state law," constitutes state action. *Classic*, 313 U. S., at 326 (emphasis added); see also, *e.g*., *Screws*, 325 U. S., at 110 (plurality opinion) (state action where "the power which [state officers] were authorized to exercise was misused"). While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—*e.g*., the power to arrest—it encompasses cases where his "particular action"—*e.g.*, an arrest made with excessive force—violated state or federal law. *Griffin*, 378 U. S., at 135; see also *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 287–288 (1913) (the Fourteenth Amendment encompasses "abuse by a state officer . . . of the powers possessed"). Every §1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place.

Where does the power come from? Section 1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Statutes, ordinances, and regulations refer to written law through which a State can authorize an official to speak on its behalf. "Custom" and "usage" encompass "persistent practices of state officials" that are "so permanent and well settled" that they carry "the force of law." *Adickes*, 398 U. S., at 167–168. So a city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been

recognized to have that authority for so long that the manager's power to do so has become "permanent and well settled." *Id.*, at 168. And if an official has authority to speak for the State, he may have the authority to do so on social media even if the law does not make that explicit.

Determining the scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage. In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially. For example, state law might grant a high-ranking official like the director of the state department of transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject. At the same time, courts must not rely on "'excessively broad job descriptions'" to conclude that a government employee is authorized to speak for the State. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. 507, 529 (2022) (quoting *Garcetti*, 547 U. S., at 424). The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do.

In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action.

B

For social-media activity to constitute state action, an official must not only have state authority—he

must also purport to use it. *Griffin*, 378 U. S., at 135. State officials have a choice about the capacity in which they choose to speak. "[G]enerally, a public employee" purports to speak on behalf of the State while speaking "in his official capacity or" when he uses his speech to fulfill "his responsibilities pursuant to state law." *West*, 487 U. S., at 50. If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president.

The context of Freed's speech is hazier than that of the hypothetical school board president. Had Freed's account carried a label (*e.g.*, "this is the personal page of James R. Freed") or a disclaimer (*e.g.*, "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a "personal" page is personal (absent significant

evidence indicating that a post is official).[2] Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (*e.g.*, a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (*e.g.*, an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations. In some circumstances, the post's content and function might make the plaintiff 's argument a slam dunk. Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty.

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[2] An official cannot insulate government business from scrutiny by conducting it on a personal page. The Solicitor General offers the particularly clear example of an official who designates space on his nominally personal page as the official channel for receiving comments on a proposed regulation. Because the power to conduct notice-and-comment rulemaking belongs exclusively to the State, its exercise is necessarily governmental. Similarly, a mayor would engage in state action if he hosted a city council meeting online by streaming it only on his personal Facebook page. By contrast, a post that is compatible with either a "personal capacity" or "official capacity" designation is "personal" if it appears on a personal page.

If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office. Instead, it is much more likely that he is engaging in private speech "relate[d] to his public employment" or "concern[ing] information learned during that employment." *Lane*, 573 U. S., at 238.

Hard-to-classify cases require awareness that an official does not necessarily purport to exercise his authority simply by posting about a matter within it. He might post job-related information for any number of personal reasons, from a desire to raise public awareness to promoting his prospects for reelection. Moreover, many public officials possess a broad portfolio of governmental authority that includes routine interaction with the public, and it may not be easy to discern a boundary between their public and private lives. Yet these officials too have the right to speak about public affairs in their personal capacities. See, *e.g.*, *id.*, at 235–236. Lest any official lose that right, it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts. And when there is doubt, additional factors might cast light—for example, an official who uses government staff to make a post will be hard pressed to deny that he was conducting government business.

One last point: The nature of the technology matters to the state-action analysis. Freed performed two actions to which Lindke objected: He deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking

operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.[3] A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

* * *

The state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts. To the extent that this test differs from the one applied by the Sixth Circuit, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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[3] On some platforms, a blocked user might be unable even to *see* the blocker's posts. See, *e.g.*, *Garnier* v. *O'Connor-Ratcliff*, 41 F. 4th, 1158, 1164 (CA9 2022) (noting that "on Twitter, once a user has been 'blocked,' the individual can neither interact with nor view the blocker's Twitter feed"); *Knight First Amdt. Inst. at Columbia Univ*. v. *Trump*, 928 F. 3d 226, 231 (CA2 2019) (noting that a blocked user is unable to see, reply to, retweet, or like the blocker's tweets).

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-55021

Kirsti Parde, individual,

Plaintiff - Appellant

v.

Service Employees International Union, Local 721, et al.,

Defendants - Respondents

On Appeal from the United States District Court

for the Central District of California

No. 2:22-cv-03320-GW-PLA

Honorable George H. Wu

APPELLANT'S PETITION FOR

REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

RULE 35 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35(a)(1) and (b)(1)(A), counsel for Plaintiff-Appellant, Kirsti Parde ("Parde"), respectfully requests *en banc* review for the following reasons:

The Panel's memorandum opinion ("Panel Opinion") conflicts with an existing opinion of the Supreme Court, *Lindke v. Freed*, 601 U.S. 187 (2024) and a rehearing *en banc* is necessary to maintain uniformity between this Court and the Supreme Court.

Specifically, the Panel held that Parde's claims arise from "a private misuse of a statute" and that such a misuse is, by definition, "contrary to the relevant policy articulated by the state." Panel Op., p. 7, citing to *Wright v. Serv. Employees Int'l Union Local 503*, 48 F. 4th 1112, 1123 (9th Cir. 2022), *cert denied*, 143 S. Ct. 749 (2023) (internal citations omitted).

In *Lindke*, the Supreme Court held that "misuse" that is nonetheless cloaked with the state authority, is the very essence of state action. 601 U.S. at 200 ("Every § 1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place."). Appellee-Defendant Service Employees International Union, Local 721's ("SEIU" or "union") misuse of California Government Code § 1157.12 ("Section 1157.12") not only does not preclude the finding that SEIU acted "under color of state law" pursuant to 42 U.S.C. § 1983, but instead supports such a finding. While *Lindke* was handed down after briefing on this case was closed, on March 19, 2024, Parde filed a Notice of Supplemental Authority. (Dkt. 71).

Despite Parde's Notice of Supplemental Authority, the Panel Opinion did not address *Lindke*, or explain how its reliance on *Wright* could be squared with it. In fact, the Panel concluded that "[Parde] does not argue that we should decline to follow *Wright* on grounds that 'the theory or reasoning underlying' *Wright* has been 'undercut' by any subsequent, controlling authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)." Panel Op., p. 7, fn.5. But the theory and reasoning underlying *Wright* has been undercut by *Lindke*, and *en banc* review is necessary to resolve the conflict. The Court should grant *en banc* review.

STATEMENT OF FACTS

When she began working as a court reporter at the Superior Court in 1998, Parde joined SEIU. ER-7. Her application for membership contained no restrictions on resigning membership but required written notice to SEIU to stop dues deductions. ER-11. After 1998, Parde did not sign anything relating to union membership or dues. ER-11.

As time went by, and especially during the last three years before she resigned her membership, Parde found SEIU's political and social positions in conflict with her own and felt that SEIU was doing very little, if anything, to represent her interests. ER-7. Knowing that she did not sign anything that restricted her ability to end her membership and deductions at any time, on January 10, 2022, Parde sent an opt-out letter to SEIU. ER-8, 28. On January 12, 2022, SEIU informed her that while she could resign her membership, she would have to "continue to provide financial support" to SEIU for another eleven months, until the anniversary of a dues' authorization card SEIU alleges she signed on October 23, 2020 (the "2020 Membership Application"). ER-8-9.

When Parde looked at the 2020 Membership Application, she saw that it was an entirely new document with an electronic signature she never authorized. ER-10-12. On the basis of this unauthorized 2020 Membership Application, and despite her objection and resignation, her employer continued to collect money from Parde's paycheck twice monthly, and remit that money to SEIU for SEIU to use on its political speech.

After repeated attempts to contact SEIU and her employer, and seeing that she could not obtain relief

without judicial intervention, Parde filed suit against the Appellees on May 16, 2022. Appellees stopped deducting money from Parde's paycheck only after she filed suit, four months after she demanded the deductions stop. ER-12.

On December 12, 2022, the district court granted Appellees' motions to dismiss Parde's First Amendment and due process claims. Parde appealed the decision of the district court on January 10, 2023. This Court issued the Panel Opinion on May 10, 2024.

REASONS FOR GRANTING THE PETITION

I. THE PANEL OPINION CONTRADICTS THE SUPREME COURT'S FINDING IN LINDKE THAT MISUSE OF A STATE STATUTE CONSTITUTES STATE ACTION.

In relying on *Wright* to summarily decide Parde's claims, the Ninth Circuit holds that because SEIU's actions were an unlawful forgery, it "misused" the state law that granted it authority over employees' consent to dues deductions. Panel Op. p. 7. In other words, as this court previously held in *Wright*, Parde's injuries arose from the misuse of state law (here Section 1157.12), and this misuse meant that by definition, SEIU could not have acted "under color of state law." Panel Op., p. 7, citing to *Wright*, 48 F4th at 1123. But the idea that a party's "misuse" of a state statute avoids liability as a state actor contradicts not only years of civil rights litigation (for example where private individuals are joint participants with police officers to misuse police's power to arrest and detain, *see, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 133 (1970)), but also contradicts the Supreme Court's recent decision in *Lindke*.

In *Lindke*, the Court engaged in an extensive analysis of state action. "In the run-of-the-mill case," such as the actions of state officials, "state action is easy to spot." *Lindke*, 601 U.S. at 195. In other cases, "the line between private conduct and state action is difficult to draw." *Id.* Nonetheless, a security guard at a privately owned amusement park nevertheless "engaged in state action when he enforced the park's policy of segregation against black protestors" because he had been "deputized" by the sheriff of the county and therefore possessed "power and authority" that he misused. *Id*. at 195-96 citing to *Griffin v. Maryland*, 378 U.S. 130 (1964). To be a state actor in those more difficult cases, the defendant must "have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Lindke*, 601 U.S. at 198 citing to *West v. Atkins*, 487 U.S. 42, 49 (1988) (internal citations omitted).

Neither this court's decision in *Wright*, nor the Panel Opinion itself, nor even SEIU, disputes that SEIU is possessed its power by virtue of state law to send a list of employees *who have consented* to the Superior Court so that the employer deducts dues from Parde's wages and remits them to SEIU. *See, e.g., Wright*, 48 F.4th at 1122–23 ("SEIU's role is to transmit the employee's authorization to the State...Or. Rev. Stat. § 243.806(7).").[1] In fact, under this Court's reading of the California (and Oregon) statutory scheme, the statute *requires* the union to possess an employee's consent to dues

[1] In SEIU's Answering Brief, the union explicitly admits that, pursuant to Section 1157.12, "Unions are responsible for keeping track of which employees have authorized deductions or have revoked deductions 'pursuant to the terms of the employee's written authorization.' *Id.* §1157.12." SEIU Answering Br., p. 4.

deductions before sending the list to the employer. *Id.* at 1123 citing to Or. Rev. Stat. § 243.806(7) ("Because SEIU only transmits a list of employees who have *authorized* dues deductions to the State...") (emphasis added).[2]

The question, then, is whether SEIU's misuse of Section 1157.12, by transmitting Parde's authorization to the Superior Court *without actually possessing consent*, constitutes state action.

In *Wright*, this Court held that SEIU's transmission is a "fraudulent act" that "is by its nature antithetical to any 'right or privilege created by the State' because it is an express violation of existing law." *Id.* citing *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 940-41 (1982). Similarly, here, the Panel Opinion states that Parde's injury arises from a "private misuse of a state statute." Panel Op., p. 7. In either case, no one disputes that SEIU is "possessed of the power" to transmit consenting employees' names to the state employer "so that [those funds] may be implemented as provided in the collective bargaining agreement and related statutes." *Wright*, 48 F.4th at 1123-24.

But the Panel Opinion, and its reliance on *Wright*, contradicts the Supreme Court's holding in *Lindke*. There, the Court held: "To be clear, the "[m]isuse of power, possessed by virtue of state law," constitutes state action." *Lindke*, 601 U.S. at 199 citing *U.S. v. Classic*, 313 U.S. 299, 326 (1941). "Every § 1983 suit alleges a misuse of power, because no state actor has

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[2] *See also*, SEIU Answering Brief, p. 15: "California allows unions to request that the State make deductions from a public employee's pay *only if the employee has affirmatively authorized those deductions* and has not cancelled deductions in accordance with the terms of that authorization." (emphasis added).

the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place." *Lindke*, 601 U.S. at 201. The "state action doctrine...encompasses cases where [the] particular action...violated state or federal law." *Id.* citing *Griffin*, 378 U.S. at 135 (emphasis added).

Contrary to *Lindke*, the Panel Opinion holds that SEIU's "misuse" (or violation) of Section 1157.12 does not constitute state action. But according to *Lindke*, SEIU was a state actor because it was "clothed with the authority of [Section 1157.12]" when it transmitted a list of employees to the Superior Court and misused that power by transmitting Parde's name without actually possessing her consent. According to *Lindke*, this constitutes state action rather than an act "contrary to the relevant policy articulated by the State," Panel Op., p. 7. *Id.* 201 citing to *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913) (the Fourteenth Amendment encompasses "abuse by a state officer ... of the powers possessed").

This Court should not be dissuaded by the fact that *Lindke* involves a question about a state official's, rather than a private party's, misuse of a state statute. There is no practicable difference when, as the Lindke Court says, "the wrongdoer is clothed with the authority of state law" (in this case Section 1157.12), and directly cites for this proposition to *West v. Atkins. Lindke*, 601 U.S. at 198 citing to *West v. Atkins*, 487 U.S. at 49. In *West v. Atkins*, the Court found a private physician to be a state actor when he acted under the authority granted to him by the state to provide medical services, and misused that authority by providing poor medical services. 487 U.S. at 49. In relying on *West*, *Lindke* does not differentiate between state officials and private

parties acting under color of state law so long as either was possessed with the power and authority of the state.

The Ninth Circuit's reliance on *Wright* in its Panel Opinion to hold that Parde's claims failed to allege state action contradicts *Lindke* and should be reheard *en banc*.

II. THIS COURT SHOULD REHEAR THIS CASE BECAUSE PARDE CHALLENGED THE BASIS FOR *WRIGHT* IN HER NOTICE OF SUPPLEMENTAL AUTHORITY.

The Panel noted that:

> Parde disagrees with how we decided *Wright*, but she does not argue that we should decline to follow *Wright* on grounds that "the theory or reasoning underlying" *Wright* has been "undercut" by any subsequent, controlling authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

Panel Op. 7, fn.5.

But this is inaccurate. Parde argues that the *Lindke* decision undercuts *Wright*. While *Lindke* was handed down after briefing closed, Parde filed a notice of supplemental authority on March 19, 2024, explaining that (1) so long as the actor possessed state authority and exercised it in a way that resulted in a constitutional injury, the state policy requirement is satisfied; and (2) that "misuse" of a state statute when cloaked with the state authority constitutes the very essence of state action. *Lindke*, 601 U.S. at 200, Dkt. No. 71. Contrary to the Panel Opinion's note, the Notice of Supplemental Authority for *Lindke* indicates that Parde does argue that this Court should decline to follow *Wright* on grounds that "the theory or

reasoning underlying" *Wright* has been "undercut" by *Lindke*. As this Court held in *Miller v. Gammie*, the very case the Panel Opinion cites, to the extent that *Lindke* cannot be reconciled with *Wright*, a "three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." 335 F.3d at 900. This Court should grant a rehearing *en banc* because *Lindke* contradicts the Panel Opinion.

CONCLUSION

Parde hereby requests that this Court review the conflict of authority between the Panel Opinion and the Supreme Court in *Lindke*. For these reasons, Parde respectfully request that this Court grant their petition for rehearing *en banc*.

Dated: May 24, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States of Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 24, 2024

s/Shella Alcabes
Shella Alcabes

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[FILED: MAY 10 2024]

No. 23-55021
D.C. No. 2:22-cv-03320-GW-PLA

KIRSTI PARDE, AKA Kirsti Edmonds-West,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, a labor organization; DAVID SLAYTON, in his official capacity as Executive Officer/Clerk of Court of the Superior Court of California, Los Angeles County; ROB BONTA; COUNTY OF LOS ANGELES,

Defendants-Appellees,

and

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES; BETTY T. YEE, in her official capacity as California State Controller,

Defendants.

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

MEMORANDUM[*]

Submitted May 6, 2024[**]
Pasadena, California

Before: WARDLAW, CHRISTEN, and BENNETT, Circuit Judges.

Kirsti Parde, a court reporter employed by the Superior Court of California, Los Angeles ("Superior Court"), appeals the dismissal of her 42 U.S.C. § 1983 action, in which she alleges that the Superior Court and the County of Los Angeles ("County"), under state laws enforced by California's Attorney General, continued to deduct union dues from her wages and give those dues to Parde's former union, Service Employees International Union, Local 721 ("SEIU" or "union"), after Parde terminated her union membership and rescinded her dues-deduction authorization.[1] Parde alleges that SEIU misrepresented to the Superior Court and the County that dues deductions should continue, and that it forged Parde's electronic signature on a dues authorization form. Parde claims that the Superior Court, the County, the State, and SEIU violated her First and Fourteenth Amendment rights under *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585

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

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

[1] Parde sues Attorney General Rob Bonta and Clerk of Court David Slayton in their official capacities. We use "the State" and "the Superior Court" as shorthand when discussing Parde's claims against the Attorney General and the Clerk of Court, respectively.

U.S. 878 (2018). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court had "an independent obligation to assure that standing exists," *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009), and was not free to assume jurisdiction for the purpose of deciding the merits, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998). Nevertheless, we may affirm the district court's dismissal under Federal Rule of Civil Procedure 12(b)(1) and (6) on any basis supported in the record, *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1106 (9th Cir. 2022) (citation omitted), *cert. denied*, 143 S. Ct. 783 (2023). We therefore address Parde's standing for each claim she presses and for each form of relief she seeks. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

A. Parde has standing to seek damages from SEIU, the Superior Court, and the County on her First Amendment and substantive due process claims. Parde suffered a cognizable, particularized, and concrete First Amendment injury when dues were deducted from her wages and diverted to the union after Parde no longer wished to support the union's speech. *See Janus*, 585 U.S. at 890. That injury is fairly traceable to SEIU, which allegedly forged her authorization and pocketed her dues, as well as the Superior Court and County, the entities that deducted dues for Superior Court employees. Her injury is also capable of redress in compensatory and nominal damages. *See Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

Parde's injury is not fairly traceable to the State.[2] "[P]rivate misuse of a state statute does not describe

[2] Parde's motion to take judicial notice (Dkt. 52) is GRANTED.

conduct that can be attributed to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). The Second Amended Complaint ("SAC") alleges no actions or omissions of the State that are fairly traceable to the unauthorized deductions Parde suffered from January to June 2022.[3] *Cf. Lutter v. JNESO*, 86 F.4th 111, 127–28 (3d Cir. 2023).

Although Parde suffered an actual past injury, she does not face an imminent injury. For Parde to be reinjured, she would either (1) need to rejoin the union, subsequently withdraw her membership, and once again be faced with a union that refuses to direct the Superior Court to cease the unauthorized payroll deductions, or (2) without rejoining the union, once again have the union erroneously or fraudulently certify her authorization to the Superior Court. Parde contends that there's no guarantee either chain of events *won't* happen, but Parde's burden is to demonstrate that either hypothetical is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (citation omitted). Her allegations do not satisfy that showing.[4] *Cf. Wright v. Serv. Emps. Int'l Union Local 503*, 48 F.4th 1112, 1118–20 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023). Because Parde's asserted injury is unlikely to recur, there is no "discrete injury" which prospective relief would "likely"

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[3] Even if Parde had standing to assert a First Amendment and substantive due process claim against the State, we would find her claim for damages barred under the Eleventh Amendment. And we would conclude that her claim for prospective relief fails on the merits for the reasons explained below.

[4] Parde seeks additional discovery on this point, but she has not identified facts unknown to her that would allow her to meet her burden to show a "certainly impending" injury. *See Clapper*, 568 U.S. at 401.

be capable of redressing. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (citation omitted); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Accordingly, Parde lacks standing to seek prospective relief against any defendant on her First Amendment or substantive due process claims.

B. Parde has standing to seek retrospective and prospective relief against all defendants on her procedural due process claim. Under *Ochoa*, an employee who "has already had union dues erroneously withheld from her paycheck" and "remains employed with the State" faces a "sufficiently real" risk of future injury "to meet the low threshold required to establish procedural standing," even if her "claimed future harms are speculative." 48 F.4th at 1107 (citation omitted).

2. The State and Superior Court contend that Parde's claims for relief are moot. Neither argues that any "changes in the circumstances that prevailed at the beginning of the litigation have forestalled [Parde's] occasion for meaningful relief" for her asserted past injury, *see Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021) (citation omitted), and neither addresses the low threshold Parde faces to establish procedural standing, *see Ochoa*, 48 F.4th at 1107. Thus, neither meets its "burden of establishing that [the] case is moot." *Meland*, 2 F.4th at 849.

3. Parde's claims for damages against the Superior Court and the State are barred. We have repeatedly 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, 169 (1985)). Nothing in the SAC or

briefing demonstrates a waiver by the State or valid congressional override of the State's sovereign immunity.

4. The district court properly dismissed Parde's claims against the union for failure to allege state action for the purposes of § 1983. *Wright*, 48 F.4th at 1121– 25. California permits dues deductions only if the employee authorizes such deductions, and only if the union certifies compliance with *Janus*. *See* Cal. Gov't Code §§ 1157.12, 71638. Nothing in the law authorizes, permits, or compels the union to erroneously or fraudulently certify that it has and will maintain valid employee authorizations. In fact, the State fairly appears to criminalize such conduct and/or provide for civil liability. Parde concedes that California's statutory scheme "has no meaningful distinction from" the Oregon scheme we considered in *Wright*.[5] Accordingly, we conclude that Parde's "alleged constitutional deprivation did not result from 'the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.'" *Wright*, 48 F.4th at 1122 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013)). Rather, Parde's claim arises from "a 'private misuse of a state statute' that is, by definition, 'contrary to the relevant policy articulated by the State.'" *Id.* at 1123 (quoting *Lugar*, 457 U.S. at 940–41).

5. The district court properly dismissed Parde's Fourteenth Amendment procedural due process claims against the Superior Court, the State, and the County. Parde does not plausibly allege that any of these

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[5] Parde disagrees with how we decided *Wright*, but she does not argue that we should decline to follow *Wright* on grounds that "the theory or reasoning underlying" *Wright* has been "undercut" by any subsequent, controlling authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

defendants intentionally withheld unauthorized union dues or "ha[d] any reason to know that [the union's] representations were false." *Ochoa*, 48 F.4th 1110–11.[6] The government does not have an affirmative duty to ensure that the agreement between the union and employee is genuine, or to "ensure the accuracy of SEIU's certification of those employees who have authorized dues deductions." *Wright*, 48 F.4th at 1125.

6. The district court correctly dismissed Parde's First Amendment claim against the County for lack of proximate cause. *See Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). Without an affirmative duty to ensure that certifications are genuine, *Wright*, 48 F.4th at 1125, and with no notice that Parde contested or questioned her authorization or SEIU's certification, the County could not reasonably have foreseen Parde's asserted First Amendment injury.[7]

7. Parde's substantive due process claim is based on a purported deprivation of Parde's liberty interest in

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[6] Parde argues that *Ochoa* is distinguishable because the Superior Court "*intentionally* authorized [the] County to deduct money from Parde's paycheck" after receiving SEIU's false representation, and the "County *intentionally* deducted the money from Parde's paycheck." This was also true in *Ochoa*: the defendants' voluntary and intentional actions resulted in deductions from Ochoa's paycheck. *See* 48 F.4th at 1110. What mattered in *Ochoa*, and what Parde fails to distinguish, is that no government defendant in *Ochoa* was shown to have intended to withhold *unauthorized* dues while having actual or constructive knowledge that such dues were unauthorized. *See id.*

[7] Parde's First Amendment claim against the County alternatively fails because the SAC lacks factual allegations sufficient to establish *Monell* liability. *See Sandoval v. County of Sonoma*, 912 F.3d 509, 517–18 (9th Cir. 2018); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (plurality opinion).

her First Amendment right against compelled speech. For reasons already stated, Parde's allegations, taken as true, fail to meet her burden to establish "conscience shocking behavior by the government." *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992))).

In sum, we affirm the district court's dismissal of Parde's claims for prospective relief under the First Amendment against all defendants for lack of standing. We affirm the dismissal of Parde's claims for damages against the Superior Court and the State as barred under the Eleventh Amendment. We affirm the dismissal of Parde's claims against SEIU for failure to allege state action for purposes of § 1983, and Parde's remaining procedural due process claims for failure to allege an intentional deprivation of a protected interest. We affirm the dismissal of Parde's First Amendment claim against the County for damages for failure to allege proximate cause for the purposes of § 1983. Finally, we affirm the dismissal of Parde's substantive due process claim for failure to state a claim.[8]

AFFIRMED.

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[8] Parde does not challenge the district court's decision to dismiss the SAC with prejudice. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) ("Arguments not raised by a party in its opening brief are deemed waived.").

APPENDIX H

SEIU Local 721, CTW, CLC
1545 Willshire Blvd. Ste 100
Los Angeles, CA 90017
(877-721-4963)

SEIU Local 721, CTW, CLC
Membership Application

NAME

Kirsti Edmonds-West

BIRTHDATE

[redacted]

EMPLOYEE ID NUMBER

[redacted]

EMAIL

[redacted]

ADDRESS

[redacted]

HOME PHONE

[redacted]

CELL PHONE

[redacted]

WORK PHONE

(818) 256-1853

By providing my phone number, I understand that SEIU and its locals and affiliates may use automized calling technologies and/or text message me on my

cellular phone on a periodic basis. SEIU will never charge for text message alerts. Carrier message and data rates may apply to such alerts. Text STOP to any text from us or 787753 to stop receiving messages. Text HELP to 787753 for more information.

Membership Agreement

I hereby voluntarily request and accept membership in SEIU Local 721 and authorize the Union as my designated exclusive bargaining agent to represent me and to negotiate and conduct on my behalf any and all agreements as to wages, hours and other conditions of work. I agree to be bound by the Constitution and Bylaws of the Union and by any contracts that may be in existence at the time of application or that may be negotiated by the Union

10/23/2020
Date

/s/ KIRSTI EDMONDS-WEST
Signature

Dues Agreement

I further voluntarily authorize SEIU Local 721 to instruct my my employer to deduct and rend to the union, any dues, fees and general assessments from my paycheck and to adjust the amount of this deduction as may be required to comply with changes in premiums under existing agreements with insurance plans, or to comply with dues schedules and general assessments determined by the Union. Irrespective of my membership in the union, deductions for this purpose shall remain in direct and be irrevocable unless revoked by me in writing in accordance with applicable provisions in the memorandum of understanding or agreement between my employer and SEIU Local 721.

In the absence of such provision this authorization shall remain in effect and can only be revoked by me in writing during the period not less than thirty (30) days and not more than forty-five (45) days before the annual anniversary date of the authorization. This authorization will remain effective if my employment with the Employer is terminated and I am later re-employed by the Employer. It is my responsibility as a member to notify the Union if I believe my deductions are incorrect or if I am no longer in a bargaining unit represented by SEIU Local 721. While dues, fees and assessments to SEIU Local 721 are not tax deductible as charitable contributions for federal income tax purposes, they may be deductible under other provisions subject to various restrictions imposed by the Internal Revenue Code.

10/23/2020
Date

/s/ KIRSTI EDMONDS-WEST
Signature

APPENDIX I

Service Employees International Local 721
1545 Wilshire Blvd., Ste. 100
Los Angeles, CA 90017

SEIU 721 President:

Effective immediately, I resign membership in all levels of Service Employees International Local 721.

I do not consent to any payment or withholding of dues, fees, or political contributions to the union or affiliates. If you believe I have given consent in the past, that consent is revoked, effective immediately

The right to be free from forced union payments is guaranteed under the First Amendment of the Federal Constitution as recognized by *Janus v. AFSCME*. I insist that you immediately cease deducting any and all union dues or fees from my paycheck or account, as is my constitutional right. This notification is permanent and continuing in nature, until I sign indicating otherwise.

Further exaction of union dues or fees against my will violates my constitutional rights. If you refuse to process such cessation of payment, I request that you:

- promptly provide me with a copy of any dues deduction authorization – written, electronic, or oral – the union has on file for me; and
- promptly inform me, in writing, of exactly what steps I must take to effectuate my constitutional rights and stop the deduction of dues/fees.

I understand that SEIU 721 has arranged to be the sole provider of workplace representation services for all employees in my bargaining unit. I understand further that, in exchange for the privilege of acting as the exclusive bargaining representative, SEIU 721 must

continue to represent me fairly and without discrimination in dealings with my employer and cannot, under any circumstances, deny me any wages benefits, or protections provided under the collective bargaining agreement with my employer.

Please reply promptly to my request.

Kirsti Edmonds-West

Los Angeles County Superior Court
Official Reporter

Signature and Date:

/s/ Kirsti Emonds-West
1-10-2022

☑ Do not contact me with any future membership solicitations or union materials.

APPENDIX J

LOCAL 721 SEIU

SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC

OFFICERS

David Green
PRESIDENT

Simboe Wright
VICE PRESIDENT

Lillian Cabral
SECRETARY

Adolfo Granados
TREASURER

DIRECTORS

LA. COUNTY

Arcadia Lopez
VICE PRESIDENT
Kelley Dixon
VICE PRESIDENT

Lydia Cabral
Patrick Del Conte
Valencia Garner
Steven Gimian
Alina Mendizabal
Omar Perez
Jose Sanchez
Grace Santillano
Veryeti Vassel
Sharanda Wade

LA/OC CITIES

Stacee Kamya
VICE PRESIDENT

Andy Morales
VICE PRESIDENT

Pedro Conde
Kesavan Korand
Guillermo Martinez
Victor M. Vasquez
Salvador Zambrano

TRI-COUNTIES

Grace Sepelveda
VICE PRESIDENT
Roberto Camacho
VICE PRESIDENT

Jesse Gomez
Charles Harrington
Liza Rocha

INLAND AREA

Cheylynda Barnard
VICE PRESIDENT
Tara Stoddart
VICE PRESIDENT

Mike Beato
Oracio Diaz
Barbara Hunter
Roger Nunez

RETIREE MEMBER
Charley Mims

EXECUTIVE DIRECTOR
Bob Schoonover

https://www.seiu721.org

January 12, 2022

Kirsti Edmonds-West

Dear Kirsti,

This letter is in response to your request to resign your membership from SEIU Local 721 and discontinue your dues.

We have accepted your resignation, and we have updated our records to reflect that you are no longer a member. You will no longer receive or be entitled to the rights and benefits only afforded to full dues paying members of SEIU Local 721.

Enclosed you will find a copy of the letter you submitted requesting to resign from union membership.

However, when you joined the union, you agreed that you would continue to provide financial support in an amount equal to dues until a certain window period. Doing so provides financial stability for the union and allows us to enter into long-term contracts and plan for the future, among other things. Please see the enclosed copy of your membership card, which shows your commitment to continue providing financial support until the window period. Your next window period is from 10/8/2022-11/7/2022.

Given your commitment to continue providing financial support at least until 10/8/2022, you cannot stop your payments now. But as a courtesy we will hold on to your letter and process your request automatically

when your window period opens. In other words, unless you let us know you have changed your mind, we will tell your employer to stop deducting any union payments as of 10/8/2022. You do not need to send another letter.

We are sorry to lose you as a member, and please know that it is never too late to reconsider union membership. Membership and membership dues are what keep the union strong when negotiating for better pay, benefits, and working conditions. We are always stronger when we stick together and bargaining as a union gives power at the bargaining table that no one person has when negotiating alone.

We hope you will re-join our labor family soon. If you have any questions or concerns, or would like to talk more about the union, please do not hesitate to call us at: 877-721-4968. We are always happy to talk about the benefits of a strong union, and we also always want to know if there are ways we can do better.

In Solidarity,

Department of Membership

SEIU Local 721

(877) 721-4YOU

1545 Wilshire Blvd Ste 100 - Los Angeles CA 96017-9864 - Tel (213)368-8660 - Fax (213) 380-8040
222 W Carmen Ln Ste 201 - Santa Maria CA 93458 - Tel (805) 623-5256 - Fax (805) 623-5257
8177 River Crest Dr Ste B - Riverside CA 92507 - Tel (951) 571-7700. Fax (951) 653-6310 Carmen
1851 E 4th St Ste 250 - Santa Ana CA 92701-5159 - Tel (714) 541-1059 - Fax (714) 541-1084
77933 Las Montanas Rd Ste 205/Area C - Palm Desert CA 92211-4131 - Tel (760) 565-1358 - Fax (760) 404-0712

44421 10th St Ste I - Lancaster CA 93534-3335 - Tel (877) 721-4968 - Fax (651) 205-7800
2472 Eastman Ave Ste 30 - Ventura CA 93003-5774 - Tel (805) 650-4420 - Fax (805) 650-1028

APPENDIX K

January 27, 2022

SEIU Local 721
Department of Membership
1545 Wilshire Blvd., Ste. 100
Los Angeles, CA 90017

Re: Kirsti Edmonds-West, E[redacted]

To Whom it May Concern:

I am in receipt of your correspondence dated 1/12/22 regarding my obligation to continue to pay dues until the window for withdrawal. Your letter states my window is from 10/8 to 11/7/22; however, my date of employment with LA Superior Court is 3/9/98 and that is the date that I joined SEIU.

Furthermore, the membership application enclosed in your letter reflects a date of 10/23/20 and shows an electronic signature that is not my own.

Please immediately provide me with an explanation as to how the October 23, 2020, date is attributed to my membership, as well as a copy of the application that contains my handwritten signature, not computer-generated.

Sincerely,

Kirsti Edmonds-West

[redacted]

Cc: Opt Out Today Copy – 2nd Request Sent 2/16/22

APPENDIX L

SEIU Local 721

Superior Court of California, County of Los Angeles

Los Angeles Superior Court Reporters Employee Representation Unit 861

Memorandum of Understanding

January 16, 2019,
through
January 15, 2022

LOCAL 721
SEIU

MEMORANDUM OF UNDERSTANDING BETWEEN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES AND THE JOINT COUNCIL OF THE LOS ANGELES COUNTY COURT REPORTERS ASSOCIATION AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, CTW, CLC REGARDING THE LOS ANGELES SUPERIOR COURT REPORTERS UNIT

THIS MEMORANDUM OF UNDERSTANDING MADE AND ENTERED ON JANUARY 16, 2019

BY AND BETWEEN:	Authorized Management Representatives (hereinafter referred to as "Management") of the Superior Court of California, County of Los Angeles (hereinafter referred to as "Court")
AND	Joint Council of Los Angeles County Court Reporters Association and SEIU, Local 721, CTW, CLC (hereinafter referred to as "Joint Council" or "Union")

* * *

4. The parties will select an arbitrator from the panel of arbitrators previously agreed to by the parties and established for the purpose of conducting expedited arbitration

A. The arbitrator will be compensated at the contracted for flat daily rate. The cost of the arbitrator will be borne equally by the parties. In addition, each party will pay for all fees and expenses incurred by

that party on its behalf, including but not limited to, witness fees.

B. The parties agree that 1) no stenographic or tape recorded record of the hearing will be made, 2) there will be no representation by counsel, and 3) there will be no post hearing briefs.

5. The arbitrator selected will hear the grievance(s) within ten (10) business days of his/her selection and may hear multiple cases during the course of the day.

6. Arbitration of a grievance hereunder will be limited to the unresolved issue(s) of the formal written grievance as originally filed by the employee to the extent that said grievance has not been satisfactorily resolved.

7. The arbitrator will issue a "bench" decision at the conclusion of the parties' testimony. Only by mutual agreement of the parties and the arbitrator will a written decision be issued.

8. The decision of an arbitrator resulting from the arbitration of a grievance hereunder will be binding upon the parties.

ARTICLE 14 PAYROLL DEDUCTIONS AND DUES

Section 1 Deductions and Dues

It is agreed that Union dues and such other deductions as may be properly requested and lawfully permitted will be deducted monthly from the salary of each employee covered hereby who files with the Court a written authorization requesting that such deduction be made in accordance with applicable provisions of State law.

Remittance of the aggregate amount of all dues and other proper deductions made from the salaries of

employees covered hereunder will be made to the Union within thirty (30) business days after the conclusion of the month in which said dues and deductions were deducted.

Section 2 Security Clause

Any employee in this Unit who has authorized Union dues deductions on the effective date of this agreement or at any time subsequent to the effective date of this agreement will continue to have such dues deductions made by the Court during the term of this agreement, provided, however, that an employee in this Unit may terminate such Union dues August 1 to August 31 by notifying the Union of their termination of Union dues deduction. Such notification will be provided by the employee by certified mail/return receipt requested, and should be in the form of a letter containing the following information: employee name, employee number, job classification, the employer business name, and name of Union from which dues deductions are to be canceled. The Union agrees to finalize all necessary processing of emp1oyee written requests for cancellation of dues within thirty (30) calendar days following receipt of such request.

Section 3 Indemnification Clause

The Union agrees to indemnify and hold the Court and the County of Los Angeles harmless from any liabilities of any nature which may arise as a result of the application of the provisions of this Article.

ARTICLE 15 MANAGEMENT RIGHTS

The employer retains, solely and exclusively, all rights, powers, and authority that it exercised or possessed prior to the execution of this Memorandum of Under-

standing (MOU) except as specifically limited by an express provision of this MOU or otherwise agreed to by the parties. Additionally, it is the exclusive right of Management to determine its mission, to set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the exclusive right of Management to direct its employees which will include but is not limited to appointments, assignments, performance evaluations, classifications and transfers, establishment of policies, procedures, rules and regulations not in conflict with the terms of this Memorandum of Understanding, take disciplinary action for cause, relieve its employees

* * *

SIDE LETTER AGREEMENT

Between SEIU, Local 721/LACCRA Joint Council
and Los Angeles Superior Court
Pertaining to Court Reporter
Performance Evaluations.

The undersigned agree as follows:

1. LACCRA and Court Reporter Services Management will meet and confer about the form that is to be used and the schedule for completing Court Reporter performance evaluations.

2. To facilitate the transition into the performance evaluation program, the Performance Evaluation Form will not be completed for any Court Reporter for twelve (12) months following completion of the meet and confer process.

/s/ Diana Van Dyke

Diana Van Dyke, President Joint Council of Los Angeles County Court Reporters Association and Service Employees International Union, Local 721, CTW, CLC

/s/ Sherri R. Carter
Sherri R. Carter, Executive Officer/Clerk of Court, Superior Court of California, County of Los Angeles

/s/ Reneé Anderson
Reneé Anderson, SEIU Local 721 Joint Council Spokesperson

/s/ Ivette Pena
Ivette Pena, Court Spokesperson

IN WITNESS WHEREOF, the parties hereto have caused their duly authorized representatives to execute the Memorandum of Understanding the day, month and year first above written.

JOINT COUNCIL OF LOS ANGELES COUNTY COURT REPORTERS ASSOCIATION AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, CTW, CLC

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

/s/ Diana Van Dyke
DIANA VAN DYKE, CSR, President

/s/ Sherri R. Carter
SHERRI R. CARTER, Executive Officer/Clerk of Court

Reneé Anderson
Reneé Anderson, Union Spokesperson

/s/ Ivette Peña
Ivette Peña, Court Spokesperson

/s/ Therese K. Claussen
Therese K. Claussen, CSR

/s/ Blanca Carvajal
Blanca Carvajal, Administrator II

/s/ Jodi Daniels
Jodi Daniels, CSR

/s/ Veronika Cohen
Veronika Cohen, Managing Court Reporter

/s/ Carolyn Dasher
Carolyn Dasher, CSR

/s/ Robbin Hill
Robbin Hill, Managing Court Reporter

/s/ Lauren Engel
Lauren Engel, CSR

/s/ Kathie O'Connell
Kathie O'Connell, Director

/s/ Carol Herrera
Carol Herrera, CSR

/s/ Ambreen Zaheen-Watson
Ambreen Zaheen-Watson, Human Resources Director

/s/ Cassandra Medina
Cassandra Medina, CSR

/s/ Michele Baumberger
Michele Baumberger, Principal HR Analyst Labor Equity & Performance Division

/s/ Rosalina Nava
Rosalina Nava, CSR

/s/ Earl Thompson
Earl Thompson, SEIU Worksite Organizer

APPENDIX M

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 N

United States Constitution Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX O

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX P

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.