No. ___

IN THE
Supreme Court of the United States

DELORES POLK, et al.,
Petitioners,

v.

BETTY YEE, IN HER OFFICIAL CAPACITY AS STATE CONTROLLER OF CALIFORNIA, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court in *Janus v. AFSCME, Council 31* held that it violates the First Amendment for a state and union to seize payments for union speech from nonmembers of that union, unless there is clear and compelling evidence the individuals waived their constitutional rights. 138 S. Ct. 2448, 2486 (2018). The United States Court of Appeals for the Ninth Circuit, however, has held that states and union do not need proof of a waiver to seize payments for union speech from individuals who become nonmembers and object to supporting the union financially. The court also held that unions that act jointly with states to deduct and collect union dues from these nonmembers' wages are not state actors.

The questions presented are:

1. Do states and unions need clear and compelling evidence that nonmembers of a union waived their First Amendment right to refrain from subsidizing union speech in order to constitutionally seize payments for union speech from those individuals?
2. When a union acts jointly with a state to seize union payments from nonmembers' wages, is that union a state actor participating in a state action under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Delores Polk, Jose Diaz, Heather Herrick, Anh Le, Viet Le, Lien Loi, Peter Loi, Nora Maya, Susan McKay, Jolene Montoya, and Scott Ungar were Plaintiff-Appellants in the court below. Alicia Quirarte was a Plaintiff in the district court below but is not a Petitioner.

Respondents Betty Yee, in her official capacity as State Controller of California, SEIU Local 2015, United Domestic Workers of America, AFSCME Local 3930, and Rob Bonta, in his official capacity as Attorney General of California, were Defendant-Appellees in the court below.

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

STATEMENT OF RELATED PROCEEDINGS

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

1. *Polk v. Yee,* Nos. 20-17095 & 20-55266, United States Court of Appeals for the Ninth Circuit. Judgment entered June 8, 2022.

2. *Polk v. Yee*, No. 2:18-cv-02900, United States District Court for the Eastern District of California. Judgment entered October 14, 2020.

3. *Quirarte v. United Domestic Workers, AFSCME Local 3930*, United States District Court for the Southern District of California. Judgment entered February 10, 2020.

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This petition arises from two cases that were consolidated on appeal: *Polk v. Yee* and *Quirarte v. United Domestic Workers, AFSCME Local 3930*. Pet.App. 5. The district court's order in *Polk* dismissing the complaint for failure to state a claim, with limited leave to amend, is reported at 481 F. Supp. 3d 1060 and reproduced at Pet.App. 20. The district court's subsequent order dismissing the complaint in *Polk* with prejudice is reproduced at Pet.App. 18. The district court's order in *Quirarte* granting the defendants' judgment on the pleadings is reported at 438 F. Supp. 3d. 1108 and reproduced at Pet.App. 49. The Ninth Circuit affirmed both orders in a single opinion that is reported at 36 F.4th 939 and reproduced at Pet.App. 1.

JURISDICTION

The Ninth Circuit issued its opinion on June 8, 2022. Pet.App. 1. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance."

California Welfare & Institution Code ("WIC") § 12301.6(i)(2) states:

> The Controller shall make any deductions from the wages of in-home supportive services personnel, who are employees of a public authority pursuant to paragraph (1) of subdivision (c), that are agreed to by that public authority in collective bargaining with the designated representative of the in-home supportive services personnel pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code and transfer the deducted funds as directed in that agreement.

STATEMENT OF THE CASE

A. Legal background

1. It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). In *Harris*, the Court held that states and unions violate that bedrock principle by seizing monies for union speech from nonconsenting individuals who are not full-fledged public employees. *Id*. Specifically, the Court held the seizures violated the First Amendment rights of homecare providers who receive state Medicaid payments for their services to persons with disabilities. *Id*. at 621–23.

The Court extended *Harris'* holding to public employees in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). The Court held that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any

other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.*

The Court further held that showing affirmative consent to pay requires proof the employee waived his or her rights. *Id.* The Court explained that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* "Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)).

2. Notwithstanding the Court's waiver holding in *Janus*, the Ninth Circuit subsequently held that states and unions do *not* need clear and compelling evidence of a waiver to deduct union dues from employees' wages. *Belgau v. Inslee*, 975 F.3d 940, 950–52 (9th Cir. 2020), *cert. denied* 141 S. Ct. 2795 (2021). The court held that states and unions need only evidence of a contract that authorizes the deductions. *Id.*

Belgau was a First Amendment challenge by Washington State employees to that state's and a union's practice of deducting union dues from employees' wages based on dues deduction forms signed by those employees. 975 F.3d. at 945–46. The employees alleged that deductions made both when they were union members and after they became nonmembers were unconstitutional because they did not waive their right to not subsidize the union's speech. *Id.*

The Ninth Circuit first held the employees' claim against the union failed because it was not a state actor participating in a state action. *Id.* at 945–49. The court reasoned that "the 'source of the alleged constitutional harm' [was] not a state statute or policy but

the particular agreement between the union and Employees." *Id.* at 947. The court concluded "private dues agreements do not trigger state action and independent constitutional scrutiny." *Id.* at 949.

The Ninth Circuit next held the employees' First Amendment claim against the State of Washington failed because they contractually consented to pay union dues. *Id.* at 950–52. The court focused almost entirely on dues deducted from the employees when they were *union members*. The court found that *Janus* "does not address this financial burden of union membership," did not "recognize members' right to pay nothing to the union," and "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id.* at 951–52. As for *Janus'* waiver holding, the Ninth Circuit said the "Court discussed constitutional waiver *because* it concluded that nonmembers' First Amendment right had been infringed, and in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id.* at 952 (emphasis in original).

The Ninth Circuit, however, failed to explain why evidence of a waiver was not required for the State of Washington to deduct union dues from the employees' wages after they became *nonmembers*. The court just summarily declared that employees who "resign their union membership after joining" can be "subject to a limited payment commitment period." *Id.* at 952.

3. The Seventh and Tenth Circuits later followed the Ninth Circuit's lead in *Belgau*. The courts similarly held that *Janus* does not require evidence of a waiver

for the government and unions to extract union dues from employees—including after those employees become nonmembers of the union—if there exists a contract that authorizes the deductions. *See Bennett v. AFSCME Council 31*, 991 F.3d 724, 732–33 (7th Cir. 2021), *cert. denied* 142 S. Ct. 424 (2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961–62 (10th Cir. 2021), *cert. denied* 142 S. Ct. 423 (2021).

The Seventh Circuit, however, did not adopt *Belgau's* holding that unions are not state actors under 42 U.S.C. § 1983 when they act jointly with a state to take union payments from employees' wages. The holding is contrary to Seventh Circuit case law. *See Hudson v. Chi. Teachers Union Local No.* 1, 743 F.2d 1187, 1191 (7th Cir. 1984), *aff'd* 475 U.S. 292 (1986). Indeed, on remand from this Court's *Janus* decision, the Seventh Circuit held that a union acts under color of state law when participating in an arrangement in which a state "deduct[s] fair-share fees from the employees' paychecks and transfer[s] that money to the union . . . ." *Janus v. AFCSME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus* II").

B. Factual Background

1. Petitioners are eleven men and women who provide in-home assistance to persons with disabilities enrolled in California's In-Home Supportive Services ("IHSS") program, which is a Medicaid program. Pet.App. 4. IHSS providers are like the homecare providers in *Harris*: they are not public employees—they merely receive Medicaid payments for their services—but they have been unionized as if they were public employees. *See id.* at 4; *Harris*, 573 U.S. at 621-625. Petitioners and other IHSS providers are subject to

the exclusive representation of either SEIU Local 2015 or the United Domestic Workers of America, AFSCME Local 3930 ("UDW"). Pet.App. 4.

California has established a system for deducting union dues from IHSS providers' Medicaid payments. Under California WIC § 12301.6(i)(2), the California State Controller must deduct union dues from Medicaid payments made to IHSS providers as directed by agreements between unions and county-level public authorities that administer parts of the IHSS program. Acting pursuant to agreements between public authorities and SEIU or UDW, and in coordination with those unions, the State Controller deducts union dues from payments made to IHSS providers who sign or verbally accede to a dues deduction authorizations. *Polk* C.A. E.R. 62; *Quirarte* C.A. E.R. 24-25.

Those dues deduction authorizations include terms that prohibit IHSS providers from stopping union dues deductions except during brief annual window periods that range from ten (10) to thirty (30) days. Pet.App. 4, 21, 51. The providers can, however, resign their union membership at any time. *Id.* at 51. But providers who resign outside of the window period are required to continue to pay union dues, as nonmembers, until the window period restriction is satisfied.

2. Petitioners signed or verbally acceded to dues deduction authorizations after SEIU or UDW solicited them to do so. *Polk* C.A. E.R. 63–70; *Maya* C.A. E.R. 25–30. Petitioners were not informed at those times that they had a First Amendment right not to join or subsidize the union. *Id.* The dues deduction forms did

not include that important information or state that the providers were agreeing to waive their rights. *Id.*

After learning that they had a right not to join or support SEIU or UDW, Petitioners provided written notice that they did not want to be union members or have union dues deducted from their Medicaid payments. *Polk* C.A. E.R. 63–70; *Maya* C.A. E.R. 25–30. While Petitioners resignations of membership were honored, their requests to stop dues deductions were not because the requests were made outside the narrow window periods. *Id.* The State Controller and unions thus continued to seize union payments from Petitioners after they became nonmembers and over their express objections. *Id.*

C. Proceedings below.

Petitioners filed similar class-action lawsuits against the State Controller and either SEIU or UDW for violating the First Amendment by seizing union payments from themselves and other IHSS providers who became nonmembers and objected to subsidizing the unions. *Polk* C.A. E.R. 74–76; *Maya* C.A. E.R. 33–35. Petitioners also alleged the State Controller's conduct violated Medicaid's anti-reassignment statute, 42 U.S.C. § 1396a(a)(32). Pet.App.5.

The district court in *Polk* dismissed the complaint for failure to state a claim, first with limited leave to amend and then with prejudice. Pet.App. 18-20. The district court in *Quirarte* granted the defendants judgment on the pleadings. *Id.* at 49. "Both district courts dismissed these cases for the same reasons. As to the First Amendment claim, the district courts concluded that the unions were not state actors and that appellants' consent to pay union dues precluded any First

Amendment liability." *Id*. at 5. "As to the Medicaid Act claim, both district courts held that the anti-reassignment provision does not confer a right on providers that is enforceable under [42 U.S.C. § 1983]." *Id*.

The Ninth Circuit affirmed after consolidating the appeals. Pet.App. 3–5. The court found Medicaid's anti-reassignment statute to be unenforceable under Section 1983. *Id*. at 3. Petitioners do not seek review of that decision. With respect to Petitioners' constitutional claim, the court found that *Belgau* "rejected a virtually identical First Amendment claim on the same rationale" and that "Appellants now concede that *Belgau* forecloses their First Amendment claim." Pet.App. 5. Petitioners, however, maintained that *Belgau* is wrongly decided and that their First Amendment claims are meritorious. *Polk* C.A. Appellants' Opening Br. 22; *Maya* C.A. Appellants' Reply Br. 3. Petitioners reserved their right to seek this Court's review, which they now seek.

REASONS FOR GRANTING THE PETITION

The Court in *Janus* unambiguously held that, for a state and union to constitutionally take union payments from nonmembers' wages, a "waiver must be freely given and shown by 'clear and compelling' evidence". 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). The Ninth Circuit defied that holding by ruling in *Belgau* held that proof of a mere contract, and not a waiver, suffices to allow a state to seize union dues from individuals who become nonmembers and object to those seizures. 975 F.3d at 952.

The Ninth Circuit also deviated from *Janus* by holding that unions are not state actors when they work jointly with states to deduct and collect union dues

from nonmembers' wages. *Id*. at 949. The Court in *Janus* and *Harris* found that unions violated the First Amendment by engaging in the same state action. *See Janus*, 138 S. Ct. at 2486; *Harris*, 573 U.S. at 624–26. The Ninth Circuit's holding also conflicts with the Seventh Circuit's decisions in *Janus* II, 942 F.3d at 361 and *Hudson*, 743 F.2d at 1191.

The Court should resolve these conflicts because the Ninth Circuit's holdings undermine the free speech rights *Janus* and *Harris* recognized. The lower court's state action holding allows unions to impede individuals' right to stop supporting unions financially without fear of Section 1983 liability. The Ninth Circuit's waiver holding allows both states and unions to severely restrict when individuals can exercise their rights under *Janus* and *Harris* without any proof the individuals knowingly agreed to waive their speech rights. *Janus*' waiver requirement is exceptionally important for ensuring that individuals who no longer want to support a union's speech can freely exercise their right to stop subsidizing that speech.

This is an excellent case for establishing that the Court meant what it said in *Janus* because this case concerns the seizure of union payments from individuals when they are *nonmembers* of that union. The Ninth Circuit in *Belgau* focused also entirely on whether a state needed proof of a waiver to take dues from employees when they were union members, and gave short shrift to takings that occurred after they became nonmembers. 975 F.3d at 950–52. If *Janus'* waiver requirement applies to anyone, it must apply when states seize union payments from nonmembers who object to those seizures. The Court should take this case to reestablish that principle.

I. The Ninth Circuit's Decision Conflicts with *Janus*.

A. Under *Janus*, states and unions need evidence of a waiver to seize union dues from nonmembers.

1. In *Harris*, the Court held that the First Amendment prohibits states and unions from seizing payments for union speech from homecare providers who do not want to be union members or supporters. 573 U.S. at 620, 656. The Court then extended that holding to public employees in *Janus*, holding:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see *also Knox* [v. *SEIU Local 1000*, 567 U.S. 298, 312–13 (2012)]. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S. Ct. at 2486.

This waiver requirement applies not just to nonmembers who never joined a union, but also to individuals who become nonmembers by resigning their

union membership. Individuals who joined a union in the past obviously do not forfeit their First Amendment right to stop subsidizing that union's speech in the future. Individuals who choose to exercise that right by resigning their membership are as much "nonmembers" under *Janus* as individuals who never joined in the first place. 138 S. Ct. at 2486. If anything, the affirmative act of resigning makes the individuals' opposition to supporting the union more apparent. Unless these nonmembers earlier waived their First Amendment right to stop paying for union speech, states and unions necessarily violate that right by compelling them to continue to subsidize the union over their express objections.

Here, the State Controller and unions seized union payments from Petitioners *after* they became nonmembers and affirmatively objected to supporting the unions financially. *Polk* C.A. E.R. 63–70; *Maya* C.A. E.R. 25–30. Given that these seizures violated Petitioners' First Amendment right under *Janus* and *Harris* to not subsidize the unions and their speech, the lower courts should have analyzed whether Petitioners waived that constitutional right.

2. If the lower courts had conducted the waiver analysis *Janus* requires, they would have found that the Petitioners did not waive their First Amendment rights. The standard to establish a waiver of constitutional rights is exacting. The Court explained in *Janus* that "a waiver cannot be presumed," but "must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). The Court then cited three precedents holding an effective waiver requires proof of an "'intentional relinquishment or abandonment of a known

right or privilege.'" *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Johnson*, 304 U.S. at 464); *see Curtis Publ'g*, 388 U.S. at 143–45 (applying this standard to an alleged waiver of First Amendment rights). The Court has sometimes formulated these criteria as requiring that a waiver must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *see Fuentes v. Shevin,* 407 U.S. 67, 94–95 (1972) (same). Along with these criteria, a purported waiver is unenforceable as against public policy "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

There is no clear and compelling evidence that Petitioners "knowingly" or "intelligently" waived their First Amendment right to not subsidize union speech because there is no evidence the providers knew of that right. These criteria for a waiver require that a party have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986). Petitioners were not aware they had a right to not join or subsidize SEIU or UDW when those unions solicited them to sign dues deduction forms. *Polk* C.A. E.R. 63–70; *Maya* C.A. E.R. 25–30. Nothing on those forms notified Petitioners of their First Amendment rights or stated that they were agreeing to waive their rights by signing the forms. *Polk* C.A. E.R. 62-63; *Maya* C.A. E.R. 24–25. On their face, the forms do not prove Petitioners knowingly or intelligently waived their rights under *Janus* and *Harris*.

The forms' revocation restrictions, which prohibit providers from stopping dues deductions except during ten to thirty-day annual periods, also are unenforceable as against public policy. The policy weighing against enforcing these restrictions is of the highest order: the "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 573 U.S. at 656; *see Janus*, 138 S. Ct. at 2464 (recognizing that "compelled subsidization of private speech seriously impinges on First Amendment rights"). In *Curtis Publishing*, the Court rejected an alleged waiver of First Amendment freedoms, finding that "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." 388 U.S. at 145.

There is no countervailing interest in prohibiting individuals from exercising their First Amendment right to stop paying for union speech for 335-55 days of each year. Unions have no constitutional entitlement to receive monies from dissenting nonmembers. *Knox*, 567 U.S. at 313. Nor do union financial self-interests in collecting monies from nonmembers outweigh the individuals' constitutional rights. *See id.* at 321. Indeed, there is not even a legitimate reason for requiring that providers only can give notice that they want to stop dues deductions during brief annual periods. These restrictions plainly exist for the illegitimate purpose of making it difficult for providers to exercise their right to stop subsidizing union speech, and are thus enforceable as against public policy.

As the foregoing demonstrates, a constitutional-waiver analysis would make all the difference in this case. The same is true in other cases that challenge restrictions on when nonmembers can stop government deductions of union dues. If enforced, *Janus*'s waiver requirement will prohibit governments and unions from seizing union dues from nonmembers unless there is clear and compelling evidence they knowingly and intelligently waived their First Amendment rights and enforcement of that waiver is not against public policy. This salutary result is why it is important that the Court require lower courts to enforce *Janus*'s waiver requirement. *See infra* 21–23.

B. The Ninth Circuit defied *Janus* by substituting a lesser contract standard for the waiver standard this Court required.

1. The Ninth Circuit, followed by the Seventh and Tenth Circuits, gutted *Janus*'s waiver requirement. The courts held that proof of a waiver is not required for governments and unions to seize union dues from employees, including after they become nonmembers, if they contractually agreed to restrictions on when they can stop payroll deductions. *Belgau*, 975 F.3d at 951–52; *Bennett*, 991 F.3d at 732–33; *Hendrickson*, 992 F.3d at 961–62, 964. The courts thus substituted their own, lesser contract standard for the constitutional waiver requirement this Court set forth in *Janus* to govern when states and unions can take payments for union speech from nonmembers.

The two standards are not equivalent. The criteria for proving a waiver of a constitutional right is more exacting than the criteria for proving formation of a

contract. Among other things, a key element to proving a waiver is that an individual must have known of the constitutional right that he or she allegedly waived—*i.e.*, had a "a full awareness of . . . the nature of the right being abandoned." *Moran,* 475 U.S. at 421. That is not an element of proving a contract. Here, even if the dues deduction forms at issue amount to contracts, they are not clear and compelling evidence of a waiver because nothing on the forms prove the signatories knew of their First Amendment right to not support the union financially or intelligently chose to waive that right.

2. The Ninth Circuit's rationale for not enforcing *Janus*' waiver requirement is untenable. The court reasoned that evidence of a constitutional waiver is unnecessary because, according to the court, a state does not compel individuals to subsidize union speech when it takes union dues from individuals who contractually consented to pay those dues. *Belgau*, 975 F.3d at 951–52; *see Bennett*, 991 F.3d at 732–33 (similar). Whatever the merits of this rationale when a state takes dues from union members—which the court focused on in *Belgau*—the rationale makes no sense when a state takes union dues from individuals after they become *nonmembers* and *affirmatively object* to paying those dues. The state clearly is compelling these individuals to pay union dues against their will and in violation of their First Amendment rights.

That is the situation here. The State Controller and unions continued to seize union dues from Petitioners after they gave written notice that they did not want to be union members or have union dues deducted from their Medicaid payments. *Polk* C.A. E.R. 63–70; *Maya* C.A. E.R. 25–30. To say that Petitioners were

not compelled to subsidize union speech would require ignoring their resignations and objections.

3. The Ninth Circuit's other justification for not requiring evidence of a waiver is the proposition that state enforcement of a private agreement under a law of general applicability does not violate the First Amendment under *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). *Belgau*, 975 F.3d at 950. The proposition is inapposite because this case does not involve a private agreement or a law of general applicability, but a state seizing union payments from nonmembers in violation of their First Amendment rights under *Janus* and *Harris*.

Cohen concerned a promissory estoppel action against a newspaper based on an alleged breach of a private contract. 501 U.S. at 666–67. The Court found that enforcing a promissory estoppel law against the newspaper for that breach did not violate the newspaper's First Amendment rights because it was "a law of general applicability." *Id.* at 669–70. The Court did not need to address whether the newspaper waived its First Amendment rights because it found those rights were not violated in the first place.

The situation here is nothing like that in *Cohen*. *First*, dues deduction forms purporting to authorize the *State Controller* to deduct union dues from state Medicaid payments are not "private" agreements, but agreements with that state agency. Most forms in *Polk* state the provider "authorize[s] the Office of the State Controller to deduct from my earnings and pay over to the [SEIU] those dues and fees that may now hereafter be established by the union." *Polk* C.A. E.R.

35, 45, 48, 50. The forms in *Maya* have similar language. *Maya* C.A. E.R. 47, 54, 57, 60. The State Controller also is the entity that makes those deductions and enforces restrictions on stopping them. *See* California WIC § 12301.6(i)(2). An agreement with the State Controller of California is the antithesis of a private agreement. *Cf. Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018) (recognizing that "[a] dues-checkoff authorization is a contract between an employer and employee for payroll deductions" and that "[t]he union itself is not a party to the authorization").

Second, the State Controller does not deduct union dues from providers' Medicaid payments pursuant to a "law of general applicability." *Cohen,* 501 U.S. at 670. The State Controller does so pursuant to a narrow law that requires it to make deductions "agreed to by [a] . . . public authority in collective bargaining with" a union representative. California WIC § 12301.6(i)(2). As *Janus* makes clear, a state can violate employees' First Amendment rights by enforcing a law that requires it to deduct union payments from individuals' wages. *See* 138 S. Ct. at 2486 (finding a statute that required Illinois to deduct agency fees from employees' wages to be unconstitutional).

Finally, unlike the conduct at issue in *Cohen*, it certainly violates the First Amendment for a state and unions to seize union dues from nonmembers. *See Janus*, 138 S. Ct. at 2486. And that is what the State Controller and SEIU or UDW did to Petitioners: the respondents seized union payments from the providers after they resigned their union membership and objected to supporting the union. Thus, unlike in *Co-*

hen, a waiver analysis must be conducted here because, absent proof Petitioners waived their First Amendment rights to stop subsidizing union speech, the State Controllers' seizures were unconstitutional.

C. The Ninth Circuit's state action holding conflicts with this Court's precedents and Seventh Circuit case law.

The Ninth Circuit in *Belgau* held the First Amendment does not apply to unions that use state payroll deduction systems to seize payments from employees because, according to the court, this is not a state action and unions are not state actors. 975 F.3d at 947. This holding resulted in the appellate court upholding the district courts' conclusions here that SEIU and UDW are not state actors subject to Section 1983 liability. Pet.App. 5, 31, 60. The Ninth Circuit's holdings conflict not only with *Janus* and *Harris*, but also with Seventh Circuit precedents and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

1. The state action here is the same state action that *Janus* and *Harris* held to be unconstitutional: a state and union, acting jointly pursuant to a state law and collective bargaining agreements, deducting and collecting union payments from nonmembers' wages. *Janus*, 138 S. Ct. at 2486; *Harris*, 573 U.S. at 624–26. *Janus* held that *unions* that engage in this action violate the First Amendment. 138 S. Ct. at 2486 (holding "States and public-sector unions may no longer extract agency fees from nonconsenting employees."). Indeed, the Court has long held that unions can violate individuals' constitutional rights when working with a state to seize payments from those individuals.

See, e.g., Chi. Teachers Union Loc. No. 1 v. Hudson, 475 U.S. 292, 310 (1986).

On remand in *Janus*, the Seventh Circuit explained that it is "sufficient for the union's conduct to amount to state action" if a state agency "deducted fair share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement." *Janus* II, 942 F.3d at 361. The Seventh Circuit reached a similar conclusion decades earlier, holding:

> when a public employer assists a union in coercing public employees to finance political activities, that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 along with the agency.

Hudson, 743 F.2d at 1191.

2. The Seventh Circuit's conclusions are consistent with this Court's precedents finding state action when a plaintiff challenged the constitutionality of a state procedure that permitted a private party to seize money or property possessed by the plaintiff. *See Lugar*, 457 U.S. at 941–42; *id.* at 932–34 (discussing *Fuentes,* 407 U.S. 67, and other cases). In *Lugar*, this Court explained that a party is liable for constitutional deprivations under Section 1983 if the deprivation was "caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed by the state" and "the party charged with the deprivation . . . [is] a person who may be fairly said to be a state actor." *Id.* at 937. The *Lugar* Court held a

statutory procedure permitting a private party to attach disputed property "obviously is the product of state action." *Id.* at 941. The Court further found "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor.'" *Id.*

Lugar is controlling here. The State Controller's procedure for taking union dues from Medicaid payments made to the IHSS providers obviously is the product of state action. *See* California WIC § 12301.6(i)(2). SEIU and UDW's "joint participation with state officials in the seizure of disputed property"—here, monies from Petitioners' wages after they became nonmembers—"is sufficient to characterize that party as a 'state actor'" under *Lugar*, 457 U.S. at 941. SEIU and UDW are state actors under *Lugar*, as well as under *Janus* and *Harris*.

3. Notwithstanding these precedents, the Ninth Circuit in *Belgau* found a lack of state action because "'the source of the alleged constitutional harm' [was] not a state statute or policy but the particular agreement between the union and Employees." *Belgau*, 975 F.3d at 947. According to the court, the state's "role was to enforce a private agreement" and "private dues agreements do not trigger state action and independent constitutional scrutiny." *Belgau*, 975 F.3d at 949. This reasoning is untenable here.

The constitutional harm Petitioners challenge *is* a state statute and policy, namely the State Controller and unions' systematic seizure of union dues from nonmember providers' Medicaid payments under California WIC § 12301.6(i)(2). *See Polk* C.A. E.R. 75-77;

Maya C.A. E.R. 34-35. This state policy, and the constitutional harm it inflicts, is indistinguishable from the Illinois policy held unconstitutional in *Harris*, 573 U.S. at 624–26.

Dues deduction agreements with the State Controller are not private agreements, but agreements with that state agency. *See supra* 16-17. The agreements did not cause Petitioners' injuries, but merely are evidence that they did not knowingly waive their right to stop subsidizing union speech. Consequently, the existence of these dues deduction agreements does not wash away the overwhelming degree of state action that exists when a union works jointly with a state to systemically take monies from state Medicaid payments made to tens of thousands of IHSS providers.

II. The Questions Presented Are Exceptionally Important.

Janus' waiver requirement is essential to ensuring that millions of public employees and independent Medicaid providers can freely exercise the speech rights the Court recognized in *Janus* and *Harris*. Under a waiver standard, states and unions cannot restrict when individuals can stop paying for union speech unless there is clear and compelling evidence the individuals voluntarily, knowingly, and intelligently waived their speech rights and enforcement of that waiver is not against public policy. *See supra* at 12. The "knowing" criteria is important, as it requires that individuals be notified of their constitutional rights, allowing them to make informed decisions about whether to subsidize union expressive activities. *See* La Fetra, Deborah J., *Miranda for Janus: The Government's Obligation to Ensure Informed*

Waiver of Constitutional Rights, 55 Loyola L.A. L. Rev. 405 (Spring 2022). That purported waivers are unenforceable if against public policy under *Rumery*, 480 U.S. at 392, also is important because it curtails the ability of states and unions to impose unduly onerous restrictions on individuals' speech rights.

In contrast, states and unions can easily suppress individuals' speech rights under the Ninth Circuit's holding in *Belgau*, 975 F.3d at 951–52. Under the standard adopted in that case, states and unions can restrict when individuals may exercise their First Amendment rights under *Janus* and *Harris* simply by writing restrictions into the fine print of dues deduction forms. There is no requirement that individuals presented with those forms be notified of their constitutional right not to financially support the union. There are few impediments to states and unions including oppressive restrictions in the forms, such as a requirement that individuals cannot stop state dues deductions except during annual ten-day periods. Individuals can unwittingly sign their First Amendment rights away for a year or more without having any idea they are doing so.

To make things even worse, the Ninth Circuit's holding that unions are not state actors exempts their conduct from all constitutional scrutiny. Unions in California, Oregon, and Washington can mislead or coerce individuals to authorize dues deductions, and impede their ability to stop paying for union speech, without fear of liability under Section 1983.

The Court should not allow the Ninth Circuit to undermine its holdings in *Janus* and *Harris* in this manner. To protect individuals' speech rights under those

decisions, the Court should grant review to reestablish what it earlier held in *Janus*: that states and unions cannot seize payments for union speech from nonmembers unless they waive their right not to subsidize that speech. 138 S. Ct. at 2486.

III. This Is An Excellent Vehicle for Repudiating the Ninth Circuit's Decision in *Belgau*.

This is a suitable case for reviewing and reversing *Belgau* because it demonstrates why *Belgau* conflicts with *Janus* and is wrongly decided. That *Belgau* required the Ninth Circuit to hold the State Controller and unions could constitutionally seize union payments from Petitioners after they became nonmembers and objected to those seizures, without any evidence they waived their First Amendment rights, makes clear that *Belgau* contravenes *Janus*. And that *Belgau* required the lower court to find those unions not to be state actors when they engaged in conduct indistinguishable from that at issue in *Janus* and *Harris* leads to the same conclusion.

The Court should choose to review *Belgau* notwithstanding its earlier decision to deny review in that case. This case and other decisions based on *Belgau* now make apparent that *Belgau* is undermining individuals' speech rights. For example, the Ninth Circuit recently held that *Belgau* required the court to uphold a "maintenance of membership" agreement that requires all employees who are union members to remain union members, and to pay full unions, for the four-year duration of the agreement. *Savas v. Cal. State L. Enf't Agency*, 2022 WL 1262014 (9th Cir. Apr. 28, 2022). The Ninth Circuit found "the only poten-

tially relevant difference [between that case and *Belgau*] is that the irrevocability period in *Belgau* was one year whereas here it is four." *Id.* at * 2. The court saw no "plausible reason why an irrevocability period of one year is constitutionally permissible, but four years would not be." *Id.*[1] If *Belgau* requires the Ninth Circuit to find it permissible for a state and union to prohibit employees from exercising their First Amendment rights under *Janus* for *four years*, it is high time for the Court to review *Belgau*.

This case is better vehicle than *Belgau* itself to reaffirm *Janus*' holding that seizing union payments from nonmembers requires that a "waiver must be freely given and shown by 'clear and compelling' evidence.'" 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). Petitioners challenge the seizure of union payments from themselves and others who become *nonmembers* of that union. In contrast, the plaintiff employees in *Belgau* primarily challenged state deductions made when they were union *members*. 975 F.3d 944. The Ninth Circuit focused its analysis almost entirely on that claim, and paid scant attention to the constitutionality of deductions made after the employees became nonmembers. *Id.* at 750-52; *see supra* at 4.

Whatever the merits of *Belgau's* holding as it applies to union members, it's holding as applied to nonmembers is indefensible. If *Janus'* waiver holding applies to anyone, it must apply to nonmembers who are compelled to pay for union speech over their objections.

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[1] A petition for certiorari will be filed in *Savas* on the same day as this petition. If the Court grants review in *Savas*, it should either grant review here or hold this petition pending *Savas*.

Under *Belgau*, the Court's waiver holding applies to no one. The Court should not allow the Ninth Circuit to make *Janus'* waiver holding a dead letter. The Court should take this case to overrule *Belgau*.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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SEPTEMBER 6, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20-17095 and 20-55266

DELORES POLK; SCOTT UNGAR; HEATHER HERRICK; LIEN LOI; JOLENE MONTOYA; PETER LOI; SUSAN MCKAY, as individuals and representatives of the requested class,

Plaintiffs-Appellants,

v.

BETTY YEE, in her official capacity as State Controller of California; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 201,

Defendants-Appellees.

ALICIA QUIRARTE, Plaintiff, and NORA MAYA, ANH LE, VIET LE, JOSE DIAZ,

Plaintiffs-Appellants,

v.

UNITED DOMESTIC WORKERS OF AMERICA, AFSCME LOCAL 3930; BETTY YEE, in her official capacity as State Controller of California; ROB BONTA, in his official capacity as Attorney General of California,

Defendants-Appellees.

OPINION

Argued and Submitted February 8, 2022
Filed June 8, 2022

Before: Richard A. Paez and Jacqueline H. Nguyen, Circuit Judges, and John R. Tunheim, District Judge. [**]

NGUYEN, Circuit Judge:

Appellants, Medicaid providers and former members of public-sector unions, challenge the district courts' dismissals of these two cases, which we consolidated on appeal. When appellants joined the unions, they authorized the California State Controller to deduct union dues from their Medicaid reimbursements. Appellants now contend that, when the Controller made these deductions, she violated the "anti-reassignment" provision of the Medicaid Act, which prohibits state Medicaid programs from paying anyone other than the providers or recipients of covered services. See 42 U.S.C. § 1396a(a)(32).

Appellants brought these putative class actions under 42 U.S.C. § 1983, which makes state actors liable for violating federal rights. But not every federal law gives rise to a federal right that private parties can enforce under § 1983. We must therefore decide a

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

threshold question — not whether the anti-reassignment provision has been violated, but whether that provision confers a federal right on Medicaid providers.

For a federal statute to confer a right, "Congress must have intended that the provision in question benefit the plaintiff." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L.Ed.2d 569 (1997). Here, the text and legislative history of the anti-reassignment provision make clear that Congress was focused on preventing fraud and abuse in state Medicaid programs rather than on serving the needs of Medicaid providers. Because Congress did not intend to benefit Medicaid providers, we hold that the anti-reassignment provision does not confer a right that they can enforce under § 1983. We therefore affirm.

I.

A.

Under Medicaid, the federal government provides funding to state programs that offer health care for people of limited means. The Medicaid Act imposes numerous conditions on states concerning the operation of their Medicaid programs, which the Secretary of Health and Human Services may enforce by withholding funds from non-compliant states. *See* 42 U.S.C. §§ 1396a, 1396c; *see also Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013). As one such condition on state Medicaid programs, the anti-reassignment provision prohibits states from making payments for services to anyone other than the provider or recipient. *See* 42 U.S.C. § 1396a(a)(32).

California uses some of its Medicaid funding to provide assistance with daily activities to elderly and disabled beneficiaries under a program called In-Home Support Services (IHSS). *See* Cal. Welf. & Inst. Code § 12300 et seq. The recipients of these services are responsible for employing and overseeing the work of their IHSS providers, who are often family members.

IHSS providers are paid by the State Controller because California law treats them as public employees. See id. § 12301.6(c)(1). The Controller makes a variety of standard payroll deductions, including for federal and state income tax, unemployment compensation, and retirement savings. *See id.* § 12302.2(a)(1). California law also authorizes the Controller to deduct union dues from the paychecks of IHSS providers. *See id.* § 12301.6(i)(2).

B.

Appellants provide services through California's IHSS program. They all became members of the public-sector union with exclusive bargaining rights in their counties — either the Service Employees International Union Local 2015 (SEIU) or the United Domestic Workers of America AFSCME Local 3930 (UDW). When they signed up, appellants authorized the State Controller to deduct union dues from their paychecks. That authorization included an agreement that they could only revoke their consent during brief annual windows.

Appellants resigned from their unions outside the annual revocation windows. But they wanted their dues deductions to stop immediately. When the dues

deductions continued, they brought these two putative class actions under 42 U.S.C. § 1983 against their former unions and State Controller Betty Yee.

Appellants alleged that the continuing dues deductions violated their rights under the First Amendment and the Medicaid Act's anti-reassignment provision. In *Polk v. Yee*, the district court granted a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and the Polk appellants elected not to amend their complaint. In *Quirarte v. UDW*, the district court granted a motion for judgment on the pleadings under Rule 12(c).

Both district courts dismissed these cases for the same reasons. As to the First Amendment claim, the district courts concluded that the unions were not state actors and that appellants' consent to pay union dues precluded any First Amendment liability. This court subsequently decided *Belgau v. Inslee*, which rejected a virtually identical First Amendment claim on the same rationale. 975 F.3d 940 (9th Cir. 2020), cert. denied, —— U.S. ——, 141 S. Ct. 2795, 210 L.Ed.2d 928 (2021). Appellants now concede that *Belgau* forecloses their First Amendment claim. As to the Medicaid Act claim, both district courts held that the anti-reassignment provision does not confer a right on providers that is enforceable under § 1983.

Appellants in both cases timely appealed. Shortly before oral argument, we consolidated these appeals for all purposes under Federal Rule of Appellate Procedure 3(b)(2).

II.

We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *see Daewoo Elecs. Am. Inc. v. Opta*

Corp., 875 F.3d 1241, 1246 (9th Cir. 2017) (judgment on the pleadings); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (dismissal under Rule 12(b)(6)), we affirm.

A.

In *Blessing v. Freestone*, the Supreme Court established a three-part test to determine whether a federal statute confers a right enforceable under § 1983: "(1) 'Congress must have intended that the provision in question benefit the plaintiff,' (2) 'the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence,' and (3) 'the statute must unambiguously impose a binding obligation on the States.' " *Anderson v. Ghaly*, 930 F.3d 1066, 1073 (9th Cir. 2019) (quoting Blessing, 520 U.S. at 340–41, 117 S. Ct. 1353). "If all three prongs are satisfied, 'the right is presumptively enforceable' through § 1983." *Planned Parenthood*, 727 F.3d at 966 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S. Ct. 2268, 153 L.Ed.2d 309 (2002)).

To demonstrate that the anti-reassignment provision confers a federal right, appellants must satisfy the first prong by showing that Congress intended to benefit Medicaid providers. *See Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (holding that no enforceable right existed because the first prong was not met). Under this prong, we must "determine whether Congress 'unambiguously conferred' a federal right," which above all "requires 'rights-creating language.' " *Henry A. v. Willden*, 678 F.3d 991, 1005 (9th Cir. 2012) (quoting *Gonzaga*, 536 U.S. at 283–84

& n.3, 122 S. Ct. 2268). "[I]t is Congress's use of explicit, individually focused, rights-creating language that reveals congressional intent to create an individually enforceable right in a spending statute." *Sanchez*, 416 F.3d at 1057. Because the Medicaid Act "does not describe every requirement in the same language," we carefully examine the language of the particular Medicaid provision at issue. *Id*. at 1062. And to confirm what that language reveals, we may look to other indicia of congressional intent, including structure, legislative history, and agency interpretations. *See Ball v. Rodgers*, 492 F.3d 1094, 1112–15 (9th Cir. 2007).

Crucially, whether Congress intended to confer a right is a distinct question from whether the correct interpretation of the statute would benefit the plaintiff. "'[F]alling within the general zone of interest that the statute is intended to protect' is not enough." *All. of Nonprofits for Ins., Risk Retention Grp. v. Kipper*, 712 F.3d 1316, 1326 (9th Cir. 2013) (quoting *Gonzaga*, 536 U.S. at 283, 122 S. Ct. 2268). "[I]t is rights, not the broader or vaguer 'benefits' or 'interests' that may be enforced under the authority of [§ 1983]." *Gonzaga*, 536 U.S. at 283, 122 S. Ct. 2268. Even if a statute "incidental[ly] benefit[s]" the plaintiff, *All. of Nonprofits*, 712 F.3d at 1327, that does not by itself show that Congress "intended that the provision in question benefit the plaintiff," *Blessing*, 520 U.S. at 340, 117 S. Ct. 1353 (emphasis added); *see also Sanchez*, 416 F.3d at 1059 (explaining that, while Medicaid providers "may certainly benefit from their relationship with the State, ... they are, at best, indirect beneficiaries" under 42 U.S.C. § 1396a(a)(30)(A), which thus confers no right).

Appellants devote a substantial portion of their briefs to arguing that the anti-reassignment provision prohibits all payments to third parties, including union dues deductions. But that is not the issue before us. Whether the anti-reassignment provision prohibits union dues deductions is a separate question about the scope of the statute. We need not decide that question and we instead ask whom Congress intended to benefit.

B.

With those principles in mind, we begin with the language of the anti-reassignment provision: "A State plan for medical assistance must ... provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise ...."[1] 42 U.S.C. § 1396a(a)(32).

Because "cooperative federalism programs like Medicaid ... are necessarily phrased as a set of directives to states that wish to receive federal funding," Anderson, 930 F.3d at 1074, we cannot infer a lack of congressional intent to create an enforceable right from the bare fact that a Medicaid provision is a state program requirement, *see* 42 U.S.C. § 1320a-2; *Ball*, 492 F.3d at 1111–12. We therefore give no weight to the initial portion of the anti-reassignment provision — "[a] State plan for medical assistance must ... provide"

[1] This provision is subject to narrow exceptions not relevant to this case. *See* 42 U.S.C. § 1396a(a)(32)(A)–(D).

— which only captures Medicaid's status as a federal spending program.

We instead examine whether the statute makes "recognizing and enforcing individual beneficiaries' rights ... a condition for federal funding of the state program." *Anderson*, 930 F.3d at 1074. The key question is whether the text of the statute is "phrased in terms of the persons benefited ... with an unmistakable focus on the benefited class." *Gonzaga*, 536 U.S. at 284, 122 S. Ct. 2268 (citation and internal quotation marks omitted). The dividing line is between statutes that are "concerned with whether the needs of any particular person have been satisfied" and those that are "concerned ... solely with an aggregate institutional policy and practice." *Ball*, 492 F.3d at 1107 (citation and internal quotation marks omitted). We ask on which side of the line the main portion of the text falls: "no payment ... for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service." 42 U.S.C. § 1396a(a)(32).

The focus of this statutory language is on state payment practices. "Payment" is the subject of the statute's main clause. And the statute is phrased in terms of what the state may not do — make "payment ... to anyone other than" service providers or recipients — rather than in terms of what providers are to receive. *Id*. The statute only references providers following "other than," which underscores this focus on state payments. Even when describing the payees, the statute emphasizes those who are not to be paid. The provision's language "is directly concerned with the State as administrator and only indirectly with recipients

and providers as beneficiaries of the administered services." *Sanchez*, 416 F.3d at 1062. *But see Anderson*, 930 F.3d at 1074 (noting that "[g]iven the conditional nature of [federal spending] programs, the statutes enacting them will nearly always be phrased with a partial focus on the state").

Nothing in the statutory language reflects that Congress was "concerned with 'whether the needs of [Medicaid providers] have been satisfied.' " *Ball*, 492 F.3d at 1107 (quoting *Gonzaga*, 536 U.S. at 288, 122 S. Ct. 2268). The statute does not say that "payment must only be made to providers or recipients," much less that "only providers or recipients are to receive payment," as other rights-conferring Medicaid provisions are phrased. *Cf. Planned Parenthood*, 727 F.3d at 966 ("Any individual eligible for medical assistance ... may obtain such assistance from any [provider] qualified to perform the service or services required." (quoting 42 U.S.C. § 1396a(a)(23)) (emphasis omitted)); *Watson v. Weeks*, 436 F.3d 1152, 1159–60 (9th Cir. 2006) ("[A] state plan for medical assistance must provide 'for making medical assistance available, including at least [designated care and services],' to 'all individuals' meeting specified financial eligibility standards." (quoting 42 U.S.C. § 1396a(a)(10))). Unlike these other formulations, which are phrased in terms of Medicaid providers, the anti-reassignment provision "refers to [Medicaid providers] only in the context of describing the necessity of developing state-wide policies and procedures," and as "a means to an administrative end

rather than as individual beneficiaries of the statute." *Sanchez*, 416 F.3d at 1059.[2]

Given this administrative focus, we cannot say that the anti-reassignment provision's language shows that Congress "unambiguously conferred" an enforceable right on Medicaid providers. *Gonzaga*, 536 U.S. at 283, 122 S. Ct. 2268.

C.

We need not, however, rely on the statutory language alone. Another signal of congressional intent — legislative history — confirms that the anti-reassignment provision does not confer a right on Medicaid providers. When legislative history suggests whom Congress intends to benefit, it can be highly probative under the first prong of the *Blessing* test. *See All. of Nonprofits*, 712 F.3d at 1326–27.

In *Alliance of Nonprofits*, we recognized that the Liability Risk Retention Act (LRRA), which preempts certain state laws applicable to insurers, contained some rights-creating language. *Id*. at 1326. But we explained that "even if such language is necessary to the conclusion that Congress intended to create an enforceable right, that does not mean it is sufficient to do so." *Id*. (citation omitted). We then looked to the legislative history, which indicated that "Congress

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[2] The anti-reassignment provision refers to Medicaid providers as "person[s]," 42 U.S.C. § 1396a(a)(32), and "usually such use is sufficient ... to finding a right for § 1983 purposes," *Planned Parenthood*, 727 F.3d at 966 (quoting *Ball*, 492 F.3d at 1108). But, as we explain, the statute's administrative focus and its clear legislative history show that this language does not signal Congress's intent to confer an enforceable right in this case.

primarily enacted the LRRA to benefit buyers of insurance, rather than the insurance companies themselves." *Id*. at 1326–27. Accordingly, we held that the legislative history demonstrated that the statute conferred at most an "incidental benefit" on insurers, which "does not rise to the level of the 'unambiguously conferred' right that *Gonzaga University* requires us to find." *Id*. at 1327 (quoting *Gonzaga*, 536 U.S. at 283, 122 S. Ct. 2268).

Here, as in *Alliance of Nonprofits*, the legislative history leaves no doubt that Congress did not intend to benefit Medicaid providers. The anti-reassignment provision was enacted in response to a practice by providers of assigning their receivables to third parties, also known as "factoring."[3] Providers would collect a percentage of the value of their claims, and the assign-

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[3] Many courts have so characterized the anti-reassignment provision. *See Matter of Missionary Baptist Found. of Am., Inc.*, 796 F.2d 752, 757 n.6 (5th Cir. 1986) ("An examination of the legislative history of this provision reveals that its purpose was to prevent 'factoring' agencies from purchasing medicare and medicaid accounts receivable at a discount and then serving as the collection agency for the accounts."); *Danvers Pathology Assocs., Inc. v. Atkins*, 757 F.2d 427, 430 (1st Cir. 1985) (Breyer, J.) ("The purpose of the statute was to stop this 'factoring' of Medicaid receivables—the selling of Medicaid obligations to collection agencies at a discount and the presentation of those obligations by the collection agencies to the state for payment."); *Michael Reese Physicians & Surgeons, S.C. v. Quern*, 606 F.2d 732, 734 (7th Cir. 1979) ("Congress wished to eliminate factors, thereby making each provider responsible for billing for services rendered and personally liable for payments received for those services."), *aff'd on reh'g en banc*, 625 F.2d 764 (7th Cir. 1980).

ees would "undertake the effort and expense of submitting those claims to the states and would keep the reimbursement payments for themselves." *California v. Azar*, 501 F. Supp. 3d 830, 834 (N.D. Cal. 2020).

The House and Senate reports show that Congress adopted the anti-reassignment provision out of concern that factoring had led to fraud and abuse in the Medicaid program. The anti-reassignment provision was added to the Medicaid Act as part of the Social Security Amendments of 1972. Pub. L. No. 92-603, § 236(b)(3), 86 Stat. 1329, 1415 (1972). The reports from both chambers explained why Congress viewed factoring as a problem and how the anti-reassignment provision would help.

> Experience with this practice under these programs shows that some physicians and other persons providing services reassign their rights to other organizations or groups under conditions whereby the organization or group submits claims and receives payment in its own name. Such reassignments have been a source of incorrect and inflated claims for services and have created administrative problems with respect to determinations of reasonable charges and recovery of overpayments. Fraudulent operations of collection agencies have been identified in medicaid. Substantial overpayments to many organizations have been identified in the medicare program, one involving over a million dollars.
>
> Your committee's bill seeks to overcome these difficulties by prohibiting payment under these pro-

> grams to anyone other than the patient, his physician, or other person who provided the service ....
>
> H.R. Rep. No. 92-231, at 104 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5090; *see also* S. Rep. No. 92-1230, at 205 (1972).

The anti-reassignment provision was amended as part of the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977 to eliminate a loophole that involved power of attorney agreements. Pub. L. No. 95-142, § 2(a)(3), 91 Stat. 1175, 1176 (1977). The reports from both chambers again underscored that the goal of the anti-reassignment provision was to prevent fraud and abuse in the Medicaid program and argued that the "power of attorney" loophole should be closed to better accomplish that purpose.

> By 1972, it had become apparent that such reassignments were a significant source of incorrect and inflated claims for services paid by medicare and medicaid. In addition, cases of fraudulent billings by collection agencies and substantial overpayments to these so-called "factoring" agencies were also found. Congress concluded that such arrangements were not in the best interest of the government or the beneficiaries served by the medicare and medicaid programs ....
>
> Despite these efforts to stop factoring of medicare and medicaid bills, some practitioners and other persons have circumvented the intent of the law by use of a power of attorney. The use of a power of attorney allows the factoring company to receive the medicare or medicaid payment in the

> name of the physician, thus allowing the continuation of program abuses which factoring activities were shown to produce in the past.
>
> The bill would modify existing law to preclude the use of a power of attorney as a device for reassignments of benefits under medicare and medicaid ....
>
> H.R. Rep. No. 95-393, at 44 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3039, 3051; *see also* S. Rep. No. 95-453, at 6–7 (1977).

These reports clearly show that Congress was concerned not with "whether the needs of [Medicaid providers] have been satisfied," but instead with "aggregate institutional policy and practice." *Ball*, 492 F.3d at 1107 (citations and internal quotation marks omitted). The anti-reassignment provision was Congress's effort to end a practice among Medicaid providers because it interfered with the sound fiscal administration of the Medicaid program. In the face of this legislative history, we cannot say that "Congress ... intended that the provision in question benefit [Medicaid providers]," as the first prong of the *Blessing* test requires. 520 U.S. at 340, 117 S. Ct. 1353; *see also All. of Nonprofits*, 712 F.3d at 1326–27.

This legislative history harmonizes with our reading of the text. The textual focus on payment practices reflects Congress's goal of ensuring that state Medicaid payments are not lost to fraud and abuse. Given that goal, the anti-reassignment provision's reference to Medicaid providers is only "as a means to an administrative end rather than as individual beneficiaries of the statute." *Sanchez*, 416 F.3d at 1059. Considering text and legislative history together eliminates any

doubt that Congress did not intend to confer a right on Medicaid providers enforceable under § 1983.

D.

Appellants emphasize that, even though Congress was motivated by concerns about factoring, it enacted a broader prohibition encompassing all forms of diversion of Medicaid funds to third parties. However, as discussed above, appellants' argument would at most show that Medicaid providers are indirectly benefited by Congress's decision to enact a broad prohibition — not that Congress's purpose was to benefit Medicaid providers. That does not suffice. *See All. of Nonprofits*, 712 F.3d at 1327 (explaining that an "incidental benefit does not rise to the level of [an] 'unambiguously conferred' right" (quoting *Gonzaga*, 536 U.S. at 283, 122 S. Ct. 2268)); *see also Sanchez*, 416 F.3d at 1059.

Appellants also point out that the Centers for Medicare and Medicaid Services (CMS) adopted their broad interpretation of the anti-reassignment provision in a 2019 regulation. *See* Reassignment of Medicaid Provider Claims, 84 Fed. Reg. 19718 (May 6, 2019), *vacated by Azar*, 501 F. Supp. 3d at 843. More recently, however, CMS issued a rule clarifying that employment-type payroll deductions do not violate the anti-reassignment provision. *See* Reassignment of Medicaid Provider Claims, 87 Fed. Reg. 29675 (May 16, 2022) (codified at 42 C.F.R. § 447.10(i)). But even if CMS maintained its old interpretation, appellants still cannot show that Congress intended to confer an enforceable right. As we have pointed out in response to similar arguments before, "an agency cannot create a right enforceable through § 1983 where Congress has not done so." *Dev. Servs. Network v. Douglas*, 666

F.3d 540, 548 (9th Cir. 2011); *see also AlohaCare v. Haw. Dep't of Human Servs.*, 572 F.3d 740, 747 (9th Cir. 2009) ("Although 'a regulation may be relevant in determining the scope of the right conferred by Congress,' ultimately 'the inquiry must focus squarely on Congress's intent.' " (citation omitted)).

We therefore hold that the Medicaid Act's anti-reassignment provision, 42 U.S.C. § 1396a(a)(32), does not confer a right on Medicaid providers enforceable under § 1983. We affirm the district courts' dismissals of these cases.

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:18-cv-2900-KJM-KJN

DELORES POLK, et al.,
Plaintiffs,
v.

BETTY YEE, ET AL.,,
Defendants.

Filed: October 14, 2020

ORDER

On April 19, 2019, the court heard two motions to dismiss in this putative class action based on 42 U.S.C. § 1983. See ECF Nos. 19 & 23. The motions were brought by defendants Betty Yee, State Controller of California, and SEIU Local 2015 ("SEIU" or "Union").

After hearing, the court submitted the motions. ECF No. 37. On August 24, 2020, the court granted defendants' motions to dismiss with leave to amend claims one and two, subject to the pleading requirements of Federal Rule of Procedure 11. See generally Order, ECF No. 60. One month later, plaintiffs have requested the court issue an appealable final judgment,

noting they do not intend to amend their First Amended Complaint, but rather intend to appeal its dismissal. ECF No. 62, at 2.

The court having considered plaintiffs' request, heard all persons properly appearing and requesting to be heard, read and considered the motions to dismiss and supporting papers, finds good cause appearing to issue a final judgment. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004) (holding district court should enter final judgment dismissing all claims with prejudice and allow case in similar posture to go up on appeal).

Accordingly, the court DISMISSES all of plaintiffs' claims with prejudice and ORDERS that the Clerk of Court ENTER FINAL JUDGMENT in this action.

This order resolves ECF No. 62.

IT IS SO ORDERED.

DATED: October 14, 2020

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:18-cv-2900-KJM-KJN

DELORES POLK, et al.,
Plaintiffs,
v.

BETTY YEE, ET AL.,,
Defendants.

Filed: August 24, 2020

ORDER

Kimberly J. Mueller, CHIEF UNITED STATES DISTRICT JUDGE

In this § 1983 putative class action, defendants Betty Yee, State Controller of California, and SEIU Local 2015 ("SEIU" or "Union") have both filed motions to dismiss. For the following reasons, the court GRANTS both motions, with the leave to amend to the extent allowed below.

I. BACKGROUND

Plaintiffs are personal care providers to persons with disabilities who are enrolled in a Medicaid program called California's In-Home Support Services ("IHSS"). First Am. Compl. ("FAC"), ECF No. 14, ¶¶

13–15, 27. Because plaintiffs are employed by IHSS recipients, they are paid by the State Controller and California law deems them public employees for unionization purposes. FAC ¶ 16. SEIU Local 2015 ("Union" or "SEIU") is the exclusive bargaining representative for IHSS providers in 47 California counties. *Id.* ¶ 17.

In joining the Union, plaintiffs consented to a dues deduction agreement that authorized the state to deduct union dues from plaintiffs' paychecks for a certain period. *Id.* ¶¶ 20–22, 29 (Polk), 37 (Herrick), 43 (Loi), 48 (Loi), 53 (McKay), 58 (Montoya), 64 (Ungar). The agreements make the deduction authorization irrevocable except during an annual period ranging from ten to thirty days in duration, during which a person can send a revocation notice to SEIU. *Id.* ¶ 24. Plaintiffs all notified SEIU they no longer consented to the dues deduction, but they did so outside of the revocation period. *See id.* ¶¶ 69, 90; *see, e.g.*, ¶ 66–68 (Ungar). Accordingly, the State Controller continued to deduct union dues from plaintiffs' paychecks, allegedly without their consent. *Id.* ¶¶ 26, 90.

Plaintiffs bring this suit under 42 U.S.C. § 1983 on behalf of themselves and two putative classes, alleging deprivation of their First Amendment right to refrain from subsidizing the union's speech through dues, as provided in *Harris v. Quinn*, 573 U.S. 616, 656, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014) and *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2486, 201 L.Ed.2d 924 (2018). *Id.* ¶¶ 1, 69. Plaintiffs allege defendants violate their First Amendment rights in two ways: (1) by deducting union dues from plaintiffs' paychecks without a valid First Amendment waiver

(claim one); and (2) by enforcing the Union's revocation policy with respect to the dues deductions (claim two). *Id.* at 17, 19. Plaintiffs also allege defendants violated the federal Medicaid statute, 42 U.S.C. § 1396a(a)(32), by diverting a portion of Medicaid payments to the union in the form of deducted dues (claim three). *Id.* at 20–21

Defendant Yee moved to dismiss under Rule 12(b)(1) and Rule 12(b)(6), Yee MTD, ECF No. 19, plaintiffs oppose, Yee Opp'n, ECF No. 31, and Yee replied, Yee Reply, ECF No. 35. Defendant SEIU filed a separate motion to dismiss, SEIU MTD ECF No. 24, plaintiffs oppose, SEIU Opp'n, ECF No. 32, and SEIU replied, SEIU Reply, ECF No. 34. Both motions overlap substantially, so the court addresses the motions together here.

On May 9, 2019, plaintiffs filed a notice of supplemental authority, notifying the court that the Centers for Medicare & Medicaid Services issued a Final Rule on May 6, 2019, regarding the reassignment of Medicaid provider claims, 8 Fed. Reg. 19718 (May 6, 2019). ECF No. 38. Plaintiffs filed an additional notice of supplemental authority on November 11, 2019. ECF No. 46, and SEIU responded, ECF No. 47. Defendant SEIU also filed seventeen notices of supplemental authority. ECF Nos. 36, 39, 41, 43, 45, 48, 50–59. Plaintiffs have responded to one of these notices. ECF No. 49. The court has considered the supplemental authority and, as necessary, addresses it below.

II. LEGAL STANDARDS

A party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted."

Fed. R. Civ. P. 12(b)(6). The court may grant the motion only if the complaint lacks a "cognizable legal theory" or if its factual allegations do not support a cognizable legal theory. *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), though it need not include "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). But "sufficient factual matter" must make the claim at least plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Conclusory or formulaic recitations of elements do not alone suffice. *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). In a Rule 12(b)(6) analysis, the court must accept well-pleaded factual allegations as true and construe the complaint in plaintiff's favor. *Id.*; *Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007).

Under Federal Rule of Civil Procedure 12(b)(1), a defending party may move for dismissal for lack of subject matter jurisdiction. "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). A facial attack claims the "allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction," whereas a factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* If there is ambiguity as to whether the attack is facial or factual, the court applies a facial analysis. *See Wichansky v. Zoel Holding Co., Inc.*, 702 F. App'x

559, 560–61 (9th Cir. 2017) (district court erred in construing defendants' 12(b)(1) motion as factual, rather than facial, when ambiguity existed). The court treats a jurisdictional "facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citation omitted).

If a motion to dismiss is granted, the question arises whether the court should grant leave to amend. Federal Rule of Civil Procedure 15(a)(2) states, "[t]he court should freely give leave [to amend pleadings] when justice so requires," and the Ninth Circuit has "stressed Rule 15's policy of favoring amendments," *Ascon Props. Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). "In exercising its discretion [to grant or deny leave to amend] 'a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities.' " *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). However, "the liberality in granting leave to amend is subject to several limitations." *Ascon Props.*, 866 F.2d at 1160 (citing *Leighton*, 833 F.2d at 186). "Leave need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." *Id.* In addition, a court should look to whether the plaintiff has previously amended the

complaint, as "the district court's discretion is especially broad 'where the court has already given a plaintiff one or more opportunities to amend [its] complaint.' " *Id.* at 1161 (alteration in original) (quoting *Leighton*, 833 F.2d at 186 n.3).

III. DISCUSSION

A. State Action

1. Legal Standard

To state a claim under § 1983, a plaintiff must first show "the conduct complained of was committed by a person acting under color of state law." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). "[C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).

A court decides whether defendant was acting under state law by using a two-part test established in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). First, the court asks "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.* Second, the court asks whether defendant "may be appropriately characterized as [a] 'state actor[ ].' " *Id.* State action can exist only when both questions are answered in the affirmative. *See Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989) (citing *Lugar*, 457 U.S. at 937–39, 102 S.Ct. 2744).

"The Supreme Court has articulated four tests for determining whether a non-governmental person's actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (citation omitted). Plaintiffs contend SEIU is a state actor only under the joint action test, SEIU Opp'n at 22–23, so the court limits its analysis accordingly. *See Bain v. California Teachers Ass'n*, 156 F. Supp. 3d 1142, 1153 n.12 (C.D. Cal. 2015) ("Because satisfaction of one state action test can be sufficient the Court only analyzes the complained of conduct under Plaintiffs' strongest theory, the joint action test.").

2. SEIU

SEIU argues plaintiffs fail to state a valid § 1983 claim against the Union, because "[t]he state's ministerial processing of voluntary dues deductions does not transform the Union's private dues authorization agreements into state action." SEIU MTD at 15.

" 'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, or otherwise has so far insinuated itself into a position of interdependence with the non-governmental party that it must be recognized as a joint participant in the challenged activity." *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013) (internal quotation marks, citations omitted). "A plaintiff may demonstrate joint action by proving that there was a conspiracy or by showing a private party was a willful participant in the joint action." *Bain*, 156 F. Supp. 3d at 1153 (citing *Franklin v. Fox*, 312 F.3d 423, 444 (9th

Cir. 2002)). A joint action theory requires "a substantial degree of cooperation," *Franklin*, 312 F.3d at 444, and is supported "when the state knowingly accepts the benefits derived from unconstitutional behavior," *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995).

Plaintiffs argue "California law requires the State Controller to deduct union dues at an exclusive representative's behest," and "requires that SEIU have agreements with public authorities governing dues deductions for the State Controller to make those deductions," Opp'n to SEIU MTD at 22–23 (citing Cal. Welf. & Inst. Code § 12301.6(h)(2)). In this way, plaintiff argues, SEIU "works 'hand in glove' with the State and local governments" to effectuate the dues deductions. *Id.* at 23.

The court in *Belgau v. Inslee*, 359 F. Supp. 3d 1000 (W.D. Wash. 2019) analyzed a similar issue and found the state's fee deduction on behalf of the union did not render the union a state actor. *Id.* at 1014. As here, the plaintiffs in *Belgau* consented to union dues but tried to opt out of their union agreement after *Janus* was decided. *Id.* When the state continued to deduct dues from plaintiffs' paychecks, plaintiffs sued the union and the state claiming a violation of their First Amendment rights. *Id.* at 1008. The court analyzed whether the union's actions amounted to state action under all four tests announced in *Naoko* and concluded they did not. *Id.* at 1013–14 (citing *Naoko Ohno*, 723 F.3d at 995–96). In rejecting plaintiffs' argument that there was "joint action" because state law required the state to follow the union agreements by deducting union dues, the court explained this was merely an "administrative task" performed only after

plaintiffs provided authorization, and the same task the state also performs for entities such as retirement and health plans. *Id.* at 1014; *see also Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) ("Private use of state-sanctioned private remedies or procedures does not rise to the level of state action."). The court in *Belgau* also found plaintiffs had not shown "the State Defendants in any meaningful way accept[ ] benefits derived from the allegedly unconstitutional actions," *Belgau*, 359 F. Supp. 3d at 1014 (alteration in original) (citing *Naoko Ohno*, 723 F.3d at 997) and, ultimately, they could not show "that the substance of the agreements are the product of joint action with the Union and the State Defendants." *Id.*

The same reasoning applies here; though there is a connection between the alleged constitutional violation and the state action, plaintiffs have not pled facts to show that the Union acted in concert with the state to cause the deduction of Union dues without a "valid waiver," especially given the state's lack of involvement in the drafting and executing of the Union agreements. *See* SEIU Not. of Suppl. Authority, ECF No. 50 (citing *Smith v. Teamsters Local 2010*, No. CV1900771PAFFMX, 2019 WL 6647935, at *7 (C.D. Cal. Dec. 3, 2019) (finding union not state actor under joint action tests where state was authorized to deduct union dues from employees' paychecks), *appeal filed*, No. 19-56504 (Dec. 26, 2019)); *see also Not. of Suppl. Auth., ECF No. 48* (citing *Oliver v. Serv. Employees Int'l Union Local 668*, 415 F. Supp. 3d 602, 611–12 (E.D. Pa. 2019) (finding state's deduction of union dues was "strictly ministerial, implementing the instructions of the employee," who voluntarily agreed to

become a dues-paying member)); SEIU Not. of Suppl. Authority, ECF No. 52 (citing *Mendez v. California Teachers Ass'n, et al.*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020) (finding no state action and relevant state law authorizing deduction of union dues "set forth an administrative, ministerial mechanism for carrying out a deduction from the wages of those individuals who voluntarily elected to become union members"), *appeal filed*, No. 20-15394 (March 6, 2020)).

By contrast, the Seventh Circuit Court of Appeals came to the opposite conclusion in *Janus v. Am. Fed'n of State, Cty. & Mun. Employees, Council 31; AFL-CIO*, 942 F.3d 352, 361 (7th Cir. 2019) (*Janus II), pet. for cert. docketed*, No. 19-1104 (March 10, 2020), finding that the union defendant was a "joint participant with the state in the agency-fee arrangement" whereby the state deducted fees from employees' paychecks and transferred those funds to the union. *See* Not. of Suppl. Auth., ECF No. 46, at 2. "This is sufficient for the union's conduct to amount to state action" because the union is making "use of state procedures with the overt, significant assistance of state officials." *Janus II* at 361 (quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)). Defendants distinguish the case by pointing out: "The 'state action' at issue in *Janus* was *the government's requirement*, pursuant to an agreement with the union, that non-consenting public employees must pay fair-share fees *as a condition of public employment*." SEIU Resp. to Pls.' Suppl. Auth., ECF No. 47, at 2 (emphasis in original) (citations omitted). Here, by contrast, the state does not require membership in a union or payment of union dues as a condition of public employment. *Id.* Nonetheless, the

Seventh Circuit did not cite this fact in its analysis of the union's relationship with the state, but only the fact the state was "deducting fair-share fees from the employees' paychecks and transferr[ing] that money to the union." *Janus II*, 942 F.3d at 361.

Having considered these persuasive authorities, which are not controlling, the court joins the reasoning articulated in *Belgau* and several other district courts. Here, plaintiffs have not alleged that the State Defendants "affirm[ ], authorize[ ], encourage[ ], or facilitate[ ]" the contents of the agreements here, or the process by which the Union obtained plaintiffs' consent to those agreements. *Naoko Ohno*, 723 F.3d at 996. As the Supreme Court recently explained, the fact that the government "licenses [or] contracts with" a private entity, "does not convert the entity into a state actor." *Manhattan Community Access Corp. v. Halleck*, —— U.S. ——, 139 S. Ct. 1921, 1931, 204 L.Ed.2d 405 (2019) (affirming dismissal of § 1983 claim against private operator of public access cable channels in part because "fact the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function"), (cited in SEIU Not. of Suppl. Authority, ECF No. 39); *see also Bain*, 156 F. Supp. 3d at 1153 (finding no state action where, under state law, state participated in defining what must be paid by nonmembers, but state did not require or prohibit terms of membership to which plaintiffs objected); SEIU Not. of Suppl. Authority, ECF No. 57 (citing *Quezambra v. United Domestic Workers of Am. AFSCME Local 3930*, 445 F.Supp.3d 695, 703–

04 (C.D. Cal. 2020) (finding union not state actor under joint action test), *appeal filed,* No. 20-55643 (June 23, 2020)); SEIU Not. of Suppl. Authority, ECF No. 58 (citing *Schiewe v. Serv. Employees Int'l Union Local 503*, No. 3:20-CV-00519-JR, 2020 WL 4251801, at *5 (D. Or. July 23, 2020) (citing "growing case law" finding no state action where state deducted union fees based on valid dues agreement)).

Accordingly, SEIU is not a state actor under § 1983, and all three of plaintiffs' § 1983 claims against it, claims one, two and three, must be DISMISSED.

B. Eleventh Amendment Immunity (Defendant Yee)

Defendant Yee, sued in her official capacity as the State Controller of California, argues plaintiffs' first two claims are barred by the Eleventh Amendment, because plaintiffs have not established the exception in *Ex parte Young* applies. Yee MTD at 10–12 (citing *Ex parte Young*, 209 U.S. 123, 155–56, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). Yee argues plaintiffs have failed to allege a sufficient nexus between the Controller and (1) the Union's alleged failure to obtain a valid First Amendment waiver from plaintiffs and (2) the Union's revocation policy. *Id.*

"Under the Eleventh Amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court." *Mitchell v. Los Angeles Cty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (Eleventh Amendment proscribes suit against state agencies "regardless of the nature of the relief sought")). Because plaintiffs sue defendant Yee in her official capacity as the State

Controller, their suit is not against her as an individual but against her office, which is no different from a suit against the state itself. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Thus, the Eleventh Amendment bars the suit unless the *Ex parte Young* exception applies. *See* 209 U.S. at 155–56, 28 S.Ct. 441.

The *Ex parte Young* doctrine provides a narrow exception to Eleventh Amendment immunity for "prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (citing *Ex parte Young*, 209 U.S. at 155–56, 28 S.Ct. 441; *Alden v. Maine*, 527 U.S. 706, 747, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999)). In applying this exception, "it [must be] plain that such officer must have some connection with the enforcement of the act, or else it is merely making [her] a party as a representative of the State, and thereby attempting to make the State a party." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (quoting *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441). Also, "[t]his connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *L.A. Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (citation omitted).

Plaintiffs request only prospective declaratory and injunctive relief against defendant Yee; their claim for damages is made only against SEIU, against which

they also seek injunctive relief.[1] FAC ¶¶ A–H. Therefore, the *Ex parte Young* exception applies to claims against Yee if plaintiffs sufficiently allege a connection with the alleged First Amendment violations.

Yee argues the alleged violations arise out of SEIU's failure to obtain a valid First Amendment waiver from plaintiffs as well as SEIU's revocation policy, both of which involve SEIU's actions only. *See* Yee MTD at 10–12. However, plaintiffs' First Amendment claims appear to also arise out of the state's act of deducting union dues from plaintiffs' paychecks pursuant to that agreement and enforcing the Union's revocation policy. *See* FAC ¶ 20 ("The State Controller, at the behest of SEIU Local 2015 and in coordination with it, has and will deduct union dues from IHSS payments made to providers ...."); *id.* ¶ 21 ("The State Controller ... ultimately makes those deductions and transfers the monies to SEIU Local 2015"); *id.* ¶ 26 ("[T]he State Controller [has] enforced, and will continue to enforce, their revocation policy against providers by deducting and collecting union dues from IHSS payments ....").

The deduction of dues from plaintiffs' paychecks is central to plaintiffs' First Amendment claims against the state, therefore plaintiffs have adequately pled a nexus between Yee as State Controller and the alleged

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[1] Plaintiffs also request attorneys' fees from defendants generally, but this request does not change the analysis. Attorneys' fees are generally not barred by the Eleventh Amendment, as they are "ancillary" to an award of prospective relief. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 279–80, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) ("[T]he Eleventh Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State.")

violations.[2] The complaint sufficiently describes the role of the Controller in deducting union dues and thereby enforcing the challenged agreements and the revocation policy, allegedly in violation of the First Amendment. FAC ¶¶ 35–36 ("Polk again notified SEIU Local 2015 that she did not want to be a member ... Notwithstanding Polk's lack of consent, the State Controller, at the behest of SEIU Local 2015, deducts union dues from IHSS payments made to Polk and remits those monies to SEIU Local 2015 ....").

Because plaintiffs have requested only prospective declaratory and injunctive relief against Yee and have adequately alleged a connection between Yee and the alleged violation, the Eleventh Amendment does not bar suit. *L.A. Cty. Bar Ass'n*, 979 F.2d at 704; *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441. However, the key allegations appear in the complaint's general factual allegations, and not the specific claims. Any amended complaint should clarify precisely which

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[2] The court clarifies that this conclusion and the court's conclusion regarding whether SEIU is a state actor for § 1983 purposes are not incongruent. The relevant inquiry for *Ex Parte Young* is whether plaintiffs allege that Yee was directly involved in the ministerial deduction of union dues, assuming *arguendo* that the deduction itself is unconstitutional. The question in the preceding section was whether the allegations show the Union and the state acted closely together to deduct plaintiffs' union dues such that the Union should be liable if the state's actions are found unconstitutional. In other words, the court finds the current allegations do not show joint action between the Union and the state, but they do show a sufficient connection between Yee and the alleged unconstitutional act of deducting union dues.

claims are based on which allegations against defendant Yee.

C. First Amendment Claims (Claims One & Two)

1. No Heightened Waiver Requirement

Plaintiffs claim defendants are violating plaintiffs' First Amendment right by deducting union dues from plaintiffs' wages without a "valid waiver" FAC ¶¶ 83–87 (claim one), and by continuing to do so after plaintiffs rescinded their consent, pursuant to the Union's revocation policy, *id.* ¶¶ 89–93 (claim two) (citing *Harris*, 134 S. Ct. at 2618; *Janus*, 138 S. Ct. at 2486).

In *Janus*, the Supreme Court held: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages ... unless the employee affirmatively consents to pay." 138 S. Ct. at 2486. Plaintiffs argue that in order for defendants to be able to deduct union dues, *Janus* requires defendants obtain not just "consent to pay," but an express waiver of a plaintiff's First Amendment rights. FAC ¶¶ 86 (claim one), 91 (claim two). Specifically, plaintiffs allege the agreement must have actually "inform[ed] providers they have a First Amendment right not to financially support an exclusive representative and its speech [and] expressly state[d] that the provider agrees to waive his or her First Amendment rights ...." *Id.* ¶ 86. Because the membership agreements to which plaintiffs assented did not contain this information or express First Amendment waivers, plaintiffs argue, the agreement does not effect a valid waiver of plaintiffs' First Amendment right not to support the union, and defendants are violating that right by continuing to deduct dues from

plaintiffs' paychecks after plaintiffs attempted to opt out. SEIU Opp'n at 9–11.

Plaintiffs misinterpret the holding in *Janus*, which analyzed whether "agency fees," or a percentage of union dues, could be deducted from the income of a plaintiff who had declined to join the union. *Id.* at 2460–61. The Supreme Court held:

By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Id. at 2486 (internal citations omitted). With this paragraph, the Court is simply restating the existing standard for a valid waiver of constitutional rights, not establishing a new, heightened requirement for a waiver of First Amendment rights in this particular context. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion) ("Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.") (cited in *Janus*, 138 S. Ct. at 2486); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681–82, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) ("[C]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.... The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known

right or privilege.") (internal quotation marks and citations omitted) (cited in *Janus*, 138 S. Ct. at 2486). In other words, plaintiffs must "clearly and affirmatively consent" to paying union dues, not necessarily to waiving their First Amendment right in order to decline to pay union dues.

Other district courts have reached the same conclusion after *Janus*. *See* SEIU Not. of Suppl. Authority, ECF No. 59 (citing *Creed v. Alaska State Employees Ass'n/AFSCME Local 52*, No. 3:20-CV-0065-HRH, 472 F.Supp.3d 518, 525–29 (D. Alaska July 15, 2020) (rejecting plaintiffs' argument that union membership agreement violated First Amendment because it lacked express First Amendment "waiver" after *Janus*)); Not. of Suppl. Authority, ECF No. 45 (citing *Anderson v. Serv. Employees Int'l Union Local 503*, 400 F. Supp. 3d 1113, 1116 (D. Or. 2019) (same)); SEIU Not. of Suppl. Authority, ECF No. 43 (citing *Seager v. United Teachers Los Angeles*, No. 219CV00469 JLS DFM, 2019 WL 3822001 (C.D. Cal. Aug. 14, 2019) (rejecting former union member's First Amendment "claim for dues already deducted pursuant to" plaintiff's union membership dues deduction agreement, because "the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law") (citation omitted)); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019) ("*Janus* says nothing about people who join a union, agree to pay dues, and then later change their mind about paying union dues.") (quoting *Belgau v. Inslee*, No. 18-5620 RJB, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018)), *appeal filed*, No. 19-35299 (April 12, 2019). And, in similar contexts, contracts that waive constitutional rights

have been held enforceable without language expressly notifying the waiver of the constitutional rights at issue. *See Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993), *as amended* (Mar. 8, 1994) (contract enforceable against union, even though contract did not expressly inform union of its First Amendment rights); *but see Gete v. I.N.S.*, 121 F.3d 1285, 1294 (9th Cir. 1997) (refusing to enforce waiver implied in plaintiff's agreement to pursue administrative remedies rather than invoking judicial forfeiture, where plaintiffs did not receive "any notice whatsoever that they were waiving their right to challenge the lawfulness of the process itself, let alone all of their rights under the first ten amendments to the Constitution").

None of the civil cases plaintiffs cite suggest the requirements for a valid waiver in this context are any different. *See* SEIU Opp'n at 9–12. For example, plaintiffs cite *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 187, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), for the proposition that "government enforcement of contracts [will] violate constitutional rights, unless there exists clear evidence of a waiver of those rights." SEIU Opp'n at 13. But in *D.H. Overmyer*, the court found the plaintiff had effectively waived his due process rights even though the court remained silent on whether the contract included a notice to defendant that he was waiving his due process rights, but ultimately found plaintiff "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed ... and that it did so with full awareness of the legal consequences." *D.H. Overmyer*, 405 U.S. at 187, 92 S.Ct. 775.

Further, plaintiffs' allegation in claim two, that the union dues agreements cannot be revoked except within a certain time frame, does not support a claim for a First Amendment violation. *See* FAC ¶¶ 89–93. The Ninth Circuit recently found, in an unpublished opinion:

> [D]eduction of union dues in accordance with the membership cards' dues irrevocability provision does not violate [plaintiffs'] First Amendment rights. Although [plaintiffs] resigned their membership in the union and objected to providing continued financial support, the First Amendment does not preclude the enforcement of "legal obligations" that are bargained-for and "self-imposed" under state contract law.

Fisk v. Inslee, 759 F. App'x 632, 633 (9th Cir. 2019) (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668–71, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991)). However, the *Fisk* court was not expressly presented with the question of whether the waiver at issue was knowing, voluntary and intelligent, though the court did include a description that suggests such an analysis would be appropriate. *Id.* at 633–34 ("The provisions authorizing the withholding of dues and making that authorization irrevocable for certain periods were in clear, readable type on a simple one-page form, well within the ken of unrepresented or lay parties."). The conclusion that revocation restrictions are enforceable does not necessarily preclude plaintiffs' claim that the agreements enforced here were not valid waivers of plaintiffs' First Amendment rights. However, because the court is dismissing the § 1983 claims against the Union for lack of state action, it need not analyze whether such a claim would survive here, as there are no allegations suggesting defendant Yee was involved

in obtaining the waivers from plaintiffs or would otherwise be implicated in any such a claim. *See Mendez*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020) ("To the extent plaintiffs allege that the Union defendants misinformed them about their legal obligations to join the union or pay membership dues, their claims would be against the Union defendants under state law.").

2. Application of *Janus* to Union Members and Non-Members

At hearing, plaintiffs emphasized their argument that *Janus* should not be construed to apply only to non-members of unions. In other words, plaintiffs argue, union membership itself is not sufficient to establish a First Amendment waiver. SEIU Opp'n at 11 n.1. The court here is not suggesting union membership alone establishes a basis for a First Amendment waiver. As explained above, in order to collect dues from a member or a nonmember, a union must be able to show the individual "clearly and affirmatively consent[ed] [to pay] before any money is taken from them[.]" *Janus*, 138 S. Ct. at 2486; *cf.* SEIU Not. Suppl. Authority, ECF No. 55 (citing *Durst v. Oregon Educ. Ass'n*, 450 F.Supp.3d 1085, 1090–91 (D. Or. 2020) (finding *Janus* concerns only "nonconsenting employees, i.e., nonmembers" not those who "voluntarily joined their unions when they signed the membership cards")).

D. Private Right of Action Created by Medicaid Statute (Claim Three)

Plaintiffs' third claim alleges both defendants violated 42 U.S.C. § 1396a(a)(32) ("subdivision 32"), a provision of the Medicaid Act that states:

> A State plan for medical assistance must ....
>
> > (32) provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise; except that—[listing exceptions] ....

42 U.S.C. § 1396a(a)(32). Both defendants argue plaintiffs fail to state a cognizable claim because § 1396a(a)(32) does not create a privately enforceable right. *See* Yee MTD at 13–15; SEIU MTD at 20, 24.

As the Ninth Circuit explained in *Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013),

> to determine whether a federal statutory provision creates a private right enforceable under § 1983, we consider three factors: First, "Congress must have intended that the provision in question benefit the plaintiff"; second, the plaintiff must have "demonstrate[d] that the right assertedly protected ... is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and third, "the provision giving rise to the asserted right" must be "couched in mandatory, rather than precatory, terms."

Id. at 966 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340–41, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997)). Above all, however, the primary inquiry is "whether Congress *intended to create a federal right*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (emphasis in original).

Applying this analysis, federal courts have found that certain sections of § 1396a ("the Medicaid statute"), other than subdivision 32, create federal rights that can be privately enforced through a § 1983 claim. *See, e.g.*, *Betlach*, 727 F.3d at 968 (§ 1396a(a)(23) confers a privately enforceable right); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 523, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (health care provider could bring § 1983 claim to enforce 42 U.S.C. § 1396a(a)(13)(A)); *Doe v. Kidd*, 501 F.3d. 348, 356 (4th Cir. 2007) (claimant could seek to enforce 42 U.S.C. § 1396a(a)(8) through § 1983).

However, when another district court addressed the question with respect to subdivision 32 in particular, in *Transitional Servs. of New York for Long Island, Inc. v. New York State Office of Mental Health*, 91 F. Supp. 3d 438 (E.D.N.Y. 2015), that court found subdivision 32 did not create a privately enforceable right. The court based its finding primarily on the lack of congressional intent to create such a right, as evidenced by: (1) the legislative history and (2) the conditional language of subdivision 32. *Id.* at 443–44. As noted in SEIU's notice of supplemental authority, ECF No. 51, a court in the Northern District of California has recently come to a similar conclusion about subdivision 32, explaining:

> Section 32 does not create an individually enforceable right. The provision is embedded in a list of requirements for what state plans must contain, and these requirements are enforceable by the Secretary. The provision, on its face, restricts the entities to whom a payment can be made under the plan; it does not create an entitlement to payment.

Aliser v. SEIU California, 419 F. Supp. 3d 1161, 1168 (N.D. Cal. 2019) (internal citations omitted). As explained below, this court also finds section 32 does not create a privately enforceable right.

1. Legislative History

When analyzing whether a statute confers a private right, the primary inquiry is "whether Congress *intended to create a federal right*." *Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268 (emphasis in original). The parties appear to agree that § 1396a(a)(32) was enacted to "prohibit financial middlemen who receive payment via the discounting of claims from receiving Medicaid funds," *Mack v. Secretary of the HHS*, No. 90-1427V, 1997 WL 74704, at *3 (Fed. Cl. Spec. Mstr. Feb. 3, 1997), also known as "factoring," in an effort to curb inflated or fraudulent charges. *See* SEIU MTD at 25 n.9; *see also* Yee MTD at 14; Opp'n to Yee MTD at 15 n.2. As the *Transitional Services* court explained:

> [T]he purpose of the statute was to prevent healthcare providers from assigning their entitlement to reimbursement (from the state) to a third party:
>
> Prior to 1972, it was possible for state departments of public aid to reimburse medical providers at any address designated by the provider on the bill for services rendered. Quite frequently, physicians had their payment vouchers sent directly to factoring companies which would pay the provider at a discounted amount of the face value of the bills in exchange for an assignment of the physician's interest in the bills. In this manner, the provider obtained immediate payment for services rendered, albeit at a discounted

> rate. However, this system of payment was believed to be responsible for inflated and sometimes fraudulent charges for services rendered. In response to this problem, Congress amended § 1396a(a) to stop the "factoring" of Medicaid receivables.

Transitional Services, 91 F. Supp. 3d at 443 (internal quotation marks omitted) (quoting *Michael Reese Physicians & Surgeons, S.C. v. Quern,* 606 F.2d 732, 734 (7th Cir. 1979), *adopted en banc*, 625 F.2d 764 (7th Cir. 1980)) (citing, *inter alia*, *Danvers Pathology Associates, Inc. v. Atkins,* 757 F.2d 427, 428–31 (1st Cir. 1985) (Breyer, J.) (discussing legislative history of § 1396a(a)(32))).

Thus, given that Congress's purpose in enacting subdivision 32 was to prevent providers from re-assigning their Medicaid receivables, there is no basis for concluding Congress intended to confer on providers a right to prevent third parties from taking a portion of their receivables. *See* SEIU MTD at 26.

2. Conditional Language

A close reading of the subdivision 32 text also supports the conclusion that Congress did not intend the provision to create a privately enforceable right. *See Transitional Services*, 91 F. Supp. 3d at 444. For a statute to confer individuals such a right, "its text must be 'phrased in terms of the person benefitted.' " *Id.* (quoting *Gonzaga*, 536 U.S. at 284, 122 S.Ct. 2268). Subdivision 32 is not so phrased; it requires that the state's Medicaid plan must provide that "no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such

care or service, under an assignment or ... otherwise ...." 28 U.S.C. § 1396a(a)(32). "In other words," the *Transitional Services* court explained, "the provision states that *if* a payment is made to the provider under the plan, then it must be made to the provider alone. Thus, the provision does not require the state to issue any payment at all; instead, the provision places restrictions on who can receive such a payment." *Transitional Services* 91 F. Supp. 3d at 444 (emphasis in original).

Plaintiffs rely on *Betlach,* which analyzed a separate provision that required a state Medicaid plan to provide that "any individual eligible for medical assistance ... may obtain such assistance from any institution ...." *Betlach*, 727 F.3d at 966 (citing 42 U.S.C. § 1396a(a)(23)). In contrast to subdivision 32, this provision contained rights-conferring language: "any individual ... may obtain." *See id.* at 966–67. In subdivision 32, neither "individual" nor "provider" is the subject of the provision, and the statute is not phrased to affirmatively guarantee anything to either. Such an absence of rights-creating language suggests Congress did not "intend[ ] that the provision in question benefit" providers, *see id.* at 966 (citation omitted), and Congress's purpose, to curb Medicaid costs and fraud by preventing "factoring" of Medicaid receivables, further supports that conclusion.

As plaintiffs point out, the only other federal court to consider this question found that providers could enforce subdivision 32 through § 1983, based on its finding that subdivision 32 "creates a binding obligation for states to pay 'the person or institution providing such care or service,' " and it would "make little sense to give providers a right to receive payment

without also providing a method to recover payment." *AHS Tulsa Reg'l Med. Ctr., LLC v. Fogarty*, No. 07-CV-338-CVE-SAJ, 2007 WL 3046441, at *2 (N.D. Okla. Oct. 16, 2007). The court is persuaded by the *Transitional Services* court explanation, however, which concluded the *AHS* court's "logic depended upon the erroneous premise that § 1396a(a)(32) confers 'a right to receive payment,' " *Transitional Services*, 91 F. Supp. 3d at 445, and declines to read language into the statute that Congress itself did not incorporate.

A recent decision from a court in the Southern District of California also supports the conclusion that subdivision 32 does not create a privately enforceable right. *See* SEIU Not. of Suppl. Authority, ECF No. 54 (citing *Quirarte v. United Domestic Workers AFSCME Local 393*0, 438 F. Supp. 3d 1108 (S.D. Cal. 2020), *appeal filed*, No. 20-55266 (March 11, 2020)). Just as here, in *Quirarte*, the court analyzed a claim by IHSS providers brought under § 1983 for a violation of subdivision 32 of the Medicaid Act. The court found the subdivision does not create a private right of action under § 1983, because "[o]n its face, Section 32 restricts the entities to whom a payment can be made under the plan; it does not create an entitlement to payment," and it lacks "rights-conferring language." *Quirarte*, 438 F. Supp. 3d at 1119–20.

3. Plaintiffs' Supplemental Authority

On May 6, 2019, after the court heard the instant motion, the Centers for Medicare & Medicaid Services issued a Final Rule entitled *Reassignment of Medicaid Provider Claims*, 84 Fed. Reg. 19718-01. Pls.' Not. of Suppl. Authority, ECF No. 38, at 2. The new rule,

which took effect on July 5, 2019, removed 42 C.F.R. § 447.10(g)(4), which previously allowed Medicare practitioners to divert part of their paycheck to a third party "for benefits such as health insurance, skills training and other benefits customary for employees." *See* 84 Fed. Reg. 19718-01; 42 C.F.R. § 447 (effective July 5, 2019). In their notice of supplemental authority, plaintiffs argue this rule is relevant to their opposition because the new rule "rescind[s] a prior regulation that may have permitted reassignment because it violated [subdivision 32] ... and 'eliminate[s] a providers' ability to reassign portions of their reimbursements to contribute to union dues.' " Pls.' Not. of Suppl. Auth. (quoting 84 Fed. Reg. at 19724).

This supplemental authority does not change the analysis above. First, the Centers' new rule eliminating a previous reassignment provision may provide some insight regarding the Centers' interpretation of subdivision 32 as it applies to the ability to promulgate regulations; it does not provide any new insight into the intent of Congress in enacting subdivision 32, which is the relevant inquiry under *Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268. Second, while the new rule removes a regulation that may have been relevant to whether defendants had violated subdivision 32, it is not relevant to whether Congress created an enforceable right in the first place.

Also, in its explanation of the new rule, the agency states, "In regard to existing state laws surrounding union membership, if state law(s) and/or regulation(s) conflict with § 447.10 after the removal of paragraph (g)(4), the state Medicaid agency will need to take corrective action to comply with current federal statute and regulations." 84 Fed. Reg. at 19723. In other

words, the rule directs state Medicaid agencies to come into compliance with this regulation and, by extension, with the Centers' interpretation of subdivision 32; it does not make any mention of private litigants' ability to enforce subdivision 32. This explanation further counsels against finding subdivision 32 created a privately enforceable right.

For all these reasons, the Centers' new rule, 84 Fed. Reg. 19718-01, does not affect the outcome of this motion. The court finds subdivision 32 does not confer a privately enforceable federal right upon medical providers. In light of this conclusion, the court declines to reach the question whether defendants' alleged actions can violate subdivision 32. Defendants' motions to dismiss plaintiffs' third claim is GRANTED.

IV. CONCLUSION

For the reasons set forth above, the court GRANTS both defendants' motions to dismiss all of plaintiffs' claims. Amendment of claim three would be futile given the court's finding 42 U.S.C. § 1396a(a)(32) does not create a privately enforceable right. Therefore, the court does not grant leave to amend claim three. Where amendment would not necessarily be futile, leave to amend should be freely granted. *See Ascon Props.*, 866 F.2d at 1160. Accordingly, the court GRANTS plaintiffs leave to amend claims one and two, subject to the pleading requirements of Federal Rule of Procedure 11.

IT IS SO ORDERED.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 19-cv-1286-CAB-KSC

ALICIA QUIRARTE, et al.,
Plaintiffs,
v.

UNITED DOMESTIC WORKERS AFSCME LOCAL 3930 et al,,
Defendants.

Filed: February 10, 2020

ORDER GRANTING MOTIONS FOR JUDGMENT ON THE PLEADINGS

Hon. Cathy Ann Bencivengo, United States District Judge

This matter comes before the Court on the Defendants' motions for judgment on the pleadings. [Doc. Nos. 30, 34.] The motions have been fully briefed and the Court finds them suitable for determination on the papers submitted and without oral argument. *See* S.D. Cal. CivLR 7.1(d)(1). For the reasons set forth below, the motions are granted.

I. Background[1]

Plaintiffs Alicia Quirarte, Nora Maya, Anh Le, Viet Le, and Jose Diaz are In-Home Supportive Service ("IHSS") providers that provide non-medical assistance services to disabled individuals who qualify for California Medicaid ("Medi-Cal"). [Doc. No. 1 at ¶¶ 1, 17.[2]] Plaintiffs filed this putative class action complaint against Defendants Unified Domestic Workers AFSCME Local 3930 (the "Union") and California State Controller Betty Yee (the "State Controller") on July 11, 2019, alleging: (1) a violation of their First Amendment rights pursuant to 42 U.S.C. § 1983 for deducting union dues from Plaintiffs' wages; and (2) a violation of 42 U.S.C. § 1396a(a)(32) ("Section 32") pursuant to 42 U.S.C. § 1983 for deducting union dues from Medicaid payments made to IHSS providers. [*Id.* at 15–19.] On October 10, 2019, pursuant to stipulation between the parties, the Court granted the request of Xavier Becerra, in his official capacity as Attorney General of California, to intervene in this matter as a defendant. [Doc. No. 21.]

Plaintiffs are IHSS providers in various California counties. [Doc. No. 1 at ¶¶ 10–14.] Pursuant to California Welfare and Institutions Code section 12301.6, the Union was designated as the exclusive bargaining representative of certain IHSS providers in twenty-one California counties, including the counties where

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[1] The Court is not making any findings of fact, but rather summarizing the relevant allegations of Plaintiff's complaint.

[2] Document numbers and page references are to those assigned by CM/ECF for the docket entry.

the named Plaintiffs are employed. [*Id.* at ¶ 22.] The State Controller deducts union dues from IHSS payments made to IHSS providers who agree to the terms of a dues deduction assignment with the Union. [*Id.* at ¶ 25.] Plaintiffs allege that the dues deduction assignments usually contain terms that make the deduction of union dues not contingent on maintaining union membership and make the deduction irrevocable except when notice of revocation is provided during a short, annual escape period. [*Id.* at ¶ 26.] Plaintiffs further allege that the dues deduction assignments do not contain language informing IHSS providers of their First Amendment right not to subsidize the Union and its speech or stating that the provider waives that right by executing the assignment. [*Id.* at ¶ 27.] While IHSS providers who are Union members can resign at any time, deduction of union dues will continue if notice is provided outside of the designated escape period. [*Id.* at ¶ 28.] Each of the Plaintiffs allege they were pressured or induced into signing the assignment. [*Id.* at ¶¶ 30, 35, 41, 45.]

On December 13, 2019, the Union moved for a judgment on the pleadings and on December 27, 2019, Defendants Xavier Becerra and Betty Yee (the "State Defendants") moved for the same. [Doc. Nos. 30, 34.]

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c), any party may move for judgment on the pleadings at any time after the pleadings are closed but within such time as not to delay the trial. FED. R. CIV. P. 12(c). A motion for judgment on the pleadings must be evaluated under the same standard applicable to motions to dismiss brought under Rule 12(b)(6). *See Enron Oil*

Trading & Trans. Co. v. Walbrook Ins. Co., Ltd., 132 F.3d 526, 529 (9th Cir. 1997). Thus, the standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) applies to a motion for judgment on the pleadings. *Lowden v. T–Mobile USA, Inc.*, 378 Fed. Appx. 693, 694 (9th Cir. 2010) ("To survive a Federal Rule of Civil Procedure 12(c) motion, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.' " (quoting *Twombly*, 550 U.S. at 544, 127 S.Ct. 1955)). When deciding a motion for judgment on the pleadings, the Court assumes the allegations in the complaint are true and construes them in the light most favorable to the plaintiff. *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994). A judgment on the pleadings is appropriate when, even if all the allegations in the complaint are true, the moving party is entitled to judgment as a matter of law. *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042 (9th Cir. 2005).

III. DISCUSSION

Plaintiffs allege two causes of action: (1) a § 1983 claim for violation of Plaintiffs' First Amendment rights for the deduction of union dues from Plaintiffs' wages and (2) a § 1983 claim for violation of 42 U.S.C. § 1396a(a)(32) for deducting union dues from Medicaid payments made to IHSS providers. The Union and State Defendants (collectively "Defendants") move for judgment on the pleadings on similar grounds.

A. Mootness of Prospective Relief Claims

The Defendants contend that Plaintiffs' claims for prospective relief do not present a live controversy and are therefore moot. [Doc. No. 30-1 at 15–17; Doc. No. 34-1 at 11.] According to the Defendants, Plaintiffs lack any cognizable interest in forward-looking relief because the deduction of union membership dues from each of the Plaintiffs' wages has been terminated and Plaintiffs cannot show that they are likely to suffer any similarly alleged injury in the future. Plaintiffs respond that the Ninth Circuit has already considered, and rejected, an identical mootness argument in *Fisk v. Inslee*, 759 F. App'x 632 (9th Cir. 2019). In *Fisk*, the Ninth Circuit held under similar facts that while "no class ha[d] been certified and [the union] and the State ha[d] stopped deducting dues," this did not result in the plaintiffs' non-damages claims becoming moot. 759 F. App'x at 633. Citing to *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Ninth Circuit held that the plaintiffs' "non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk*, 759 F. App'x at 633. Like *Fisk*, this case involves a putative class action where prospective class members presumably remain subject to the challenged conduct. Accordingly, Plaintiffs' claims for prospective relief are not moot.

B. State Action

To prove a § 1983 violation, Plaintiffs must demonstrate that the Defendants: "(1) deprived them of a right secured by the Constitution, and (2) acted under color of state law." *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir. 1989); 42 U.S.C. § 1983. "The

state-action element in § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (quotations and citation omitted). "[C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013) (emphasis in original). However, "[u]nder § 1983, a claim may lie against a private party who 'is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.' " *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980)). "[A] bare allegation of such joint action will not overcome a motion to dismiss; the plaintiff must allege 'facts tending to show that [the private party] acted 'under color of state law or authority.' " *Id.* (quoting *Sykes v. State of Cal.*, 497 F.2d 197, 202 (9th Cir. 1974)); *see also Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900 (9th Cir. 2008). Courts use a two-prong framework to analyze "when governmental involvement in private action is itself sufficient in character and impact that the government fairly can be viewed as responsible for the harm of which the plaintiff complains." *Ohno*, 723 F.3d at 994. First, the court considers "whether the claimed constitutional deprivation resulted from the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* Second, the court considers

"whether the party charged with the deprivation could be described in all fairness as a state actor." *Id.*

1. Whether Plaintiffs' Alleged Harm Results from the Exercise of a Right or Privilege Created by the State or a Rule Imposed by the State

Plaintiffs allege the constitutional deprivation in this case results from the State Controller's systematic extraction of monies for union speech from state payments made to individuals pursuant to the statutory scheme created by California Welfare & Institutions Code § 12301.6(i)(2). [Doc. No. 35 at 12; Doc. No. 36 at 12.] The Court is not persuaded by Plaintiffs' attempt to frame the alleged harm as resulting from state action. The crux of Plaintiffs' alleged harm in this case results from the dues deduction assignments that Plaintiffs voluntarily signed with the Union.

"The fact that the State performs a ministerial function of collecting Plaintiffs' dues deductions does not mean that Plaintiffs' alleged harm is the result of state action." *Smith v. Teamsters Local 2010*, 2019 WL 6647935, at *5 (C.D. Cal. Dec. 3, 2019). "Automatic payroll deductions are the sort of ministerial act that do not convert the Union Defendants' membership dues and expenditures decisions into state action." *Bain v. California Teachers Ass'n*, 2016 WL 6804921, at *8 (C.D. Cal. May 2, 2016); *see also Caviness*, 590 F.3d at 817 ("[A]ction taken by private entities with the mere approval or acquiescence of the State is not state action") (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999)); *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1015 (W.D. Wash. 2019), appeal docketed, No. 19-35137

(9th Cir. Feb. 20, 2019) ("The State Defendants' obligation to deduct fees in accordance with the authorization 'agreements does not transform decisions about membership requirements [that they pay dues for a year] into state action.' ") (quoting *Bain*, 2016 WL 6804921, at *7). Under California law, "[e]mployee requests to cancel or change deductions for employee organizations shall be directed to the employee organization, rather than to the Controller." Cal. Gov't Code § 1153(h). In addition, "[t]he Controller shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed." *Id.*

The deduction of membership dues is a ministerial act by the State Controller who relies upon the information provided by the Union and the employer. The State Controller has no further involvement beyond processing the deduction pursuant to the membership agreements the Plaintiffs voluntarily agreed to. The agreements themselves state that the authorizations "are voluntary and not a condition of [Plaintiffs'] employment" and that the Plaintiffs "hereby authorize the Office of the State Controller of California ... to deduct from [Plaintiffs'] payments and to remit to the Union those dues and fees that may now or hereafter be established by the Union." [Doc. No. 30-3 at 2.] Plaintiffs' attempt to frame this as state action would result in any voluntary agreed upon deduction of wages by the State as state action (i.e. insurance premiums or retirement plan contributions). The "statutory scheme" if anything, merely authorizes Controller Yee to legally perform this ministerial function. Plaintiffs' citation to wage garnishment cases is inap-

posite. Those cases involve court or statutory mandated procedures to garnish wages without any prior notice or approval whereas here the Plaintiffs voluntarily entered into membership agreements with the Union and authorized the dues deductions. Accordingly, the Court is not convinced that this case presents a state action. However, for purposes of this opinion, even if the Court were to assume that Plaintiffs can satisfy the first prong, the Court finds that Plaintiffs cannot satisfy the second prong that the Union is a state actor.

2. Whether the Union is a State Actor

"The state actor requirement ensures that not all private parties face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Collins*, 878 F.2d at 1151. "The Supreme Court has articulated four tests for determining whether a [non-governmental person's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Ohno*, 723 F.3d at 995 (quoting *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012)). The Court addresses each test below.

a. Public Function

"Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924 (9th Cir. 2011) (quotations and citation omitted). "To satisfy the public function test, the function at issue must

be both traditionally and exclusively governmental." *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982)). " '[V]ery few' functions fall into that category." *Manhattan Cmty. Access Corp. v. Halleck*, —— U.S. ——, 139 S. Ct. 1921, 1929, 204 L.Ed.2d 405 (2019) (citation omitted) (collecting cases rejecting "public function" challenges to private conduct).

Plaintiffs contend that the Union is performing a public function because the State has outsourced to the Union its constitutional responsibility under *Janus v. AFSCME, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018), to determine if providers consented to dues deductions. [Doc. No. 35 at 19.] The Court finds Plaintiffs' creative argument unavailing. Here, the Plaintiffs voluntarily signed off on the dues deductions in the membership agreements which verified their consent. There is no constitutional responsibility under *Janus* that needed to be "outsourced to the Union" in this situation. As will be discussed further below, the Court does not find that Janus applies when employees have voluntarily agreed to become union members and authorized the dues deductions. The Court finds that Plaintiffs have failed to demonstrate that the Union has been endowed with any governmental authority or that the Union is engaging in any function that is traditionally and exclusively governmental under the public function test.

b. Joint Action

" 'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party,

or otherwise has so far insinuated itself into a position of interdependence with the non-governmental party that it must be recognized as a joint participant in the challenged activity." *Ohno*, 723 F.3d at 996 (internal quotations and citations omitted).

Plaintiffs contend that the Union is a state actor under the joint action test because it acts jointly with the State to take dues from the Plaintiffs without their consent. [Doc. No. 35 at 17.] According to Plaintiffs, the State Controller coordinates with the Union to deduct union dues pursuant to a state-established system. Plaintiffs have failed to support these conclusory allegations with sufficient factual support. The State Controller plays a ministerial role in performing the deductions pursuant to the membership agreements. Beyond this role, the State Controller has no further involvement. Plaintiffs have failed to show that "state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights" or that the deduction of membership dues amounts to "significant assistance" that warrants a finding of joint action. *Ohno*, 723 F.3d at 996.

c. State Compulsion

Under the state compulsion test, "[a] state may be responsible for a private entity's actions if it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Caviness*, 590 F.3d at 816.

Plaintiffs contend that by allowing the Union to dictate the amount of the dues deductions, the State and Union are in a relationship of mutual overt encouragement. [Doc. No. 35 at 21.] Even if the Union can

dictate the amount, the Court is not convinced that the State Controller's deduction of membership dues, or allowing the Union to dictate the amount, on its own leads to a finding of significant encouragement, overt or covert, by the State. The state compulsion test has not been met.

d. Governmental Nexus

"Under the governmental nexus test, a private party acts under color of state law if there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Ohno*, 723 F.3d at 996, n.13.

Again, Plaintiffs allege that the State and Union closely coordinate with one another with respect to the dues deductions such that the Union's actions can be fairly attributed to that of the State itself. [Doc. No. 35 at 22.] As previously stated, the Court is not convinced that the deduction of dues pursuant to the membership agreements lends to a finding of a sufficiently close nexus between the Union and the State and therefore the governmental nexus test has also not been met.

In conclusion, Plaintiffs have failed to satisfy any of the tests to find that the Union is a state actor and have failed to allege facts tending to show that the Union acted under color of state law or authority. Defendants' motions for judgment on the pleadings as to the First Amendment violation on the ground that Plaintiffs' alleged harms do not arise from any state action are therefore **GRANTED**.

C. First Amendment Violation

Even if Plaintiffs had sufficiently alleged state action, Plaintiffs have ultimately failed to demonstrate that Defendants violated their First Amendment rights. Plaintiffs contend that *Janus* requires proof of a First Amendment waiver to establish consent to dues deductions. [Doc. No. 36 at 14.] Plaintiffs have not cited to, and the Court has been unable to find on its own, any case that has broadened the scope of *Janus* to apply Plaintiffs' waiver requirement argument when employees voluntarily agree to become members of the union and authorize the deduction of union dues. The Court agrees with the numerous courts in this circuit that have held the opposite. The waiver requirement does not apply to the circumstances in this case compared to the situation in *Janus* involving the deduction of agency fees from a nonmember.

In *Janus*, the Supreme Court discussed the First Amendment right to not be "compel[ed] to mouth support for views [one] find[s] objectionable." *Janus*, 138 S. Ct. at 2463. Any payment to a union, either in the form of dues or agency fees, "provide[s] financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.' " *See id.* at 2464 (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310-311, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012)). A union's extraction of fees from an employee who has *not agreed* to support such positions thus constitutes a "compelled subsidization of private speech." *Id.* (emphasis added). *Janus* therefore held that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages ... unless the employee affirma-

tively consents to pay." 138 S. Ct. at 2486. When nonmembers agree to pay, they are "waiving their First Amendment rights." *Id.* The waiver "must be freely given and shown by 'clear and compelling' evidence." *Id.*

The *Janus* waiver requirement does not apply under the circumstances of this case. In *Janus*, the plaintiff never signed a union membership agreement that authorized a dues deduction assignment. *Janus* specifically concerned the "deduct[ions] from a nonmember's wages" without "affirmative[ ] consent[ ]." *Id.* at 2486. Notably, "the relationship between unions and their voluntary members was not at issue in *Janus*." *Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019). When an employee agrees to union membership and authorizes a dues deduction assignment, an employee is consenting to financially support the union and its "many positions during collective bargaining," *see id.* at 2464, and therefore his speech is not compelled. Because dues deductions do not violate a voluntary member's First Amendment right not to be compelled to speak, the *Janus* waiver requirement does not apply to voluntary members. *See Belgau*, 359 F. Supp. 3d at 1016-17 (W.D. Wash. 2019) ("*Janus* does not apply here -- Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here.").

Plaintiffs in this case voluntarily agreed to union membership and deduction of union dues. "Where the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily." *Kidwell v. Transp. Commc'ns Int'l*

Union, 946 F.2d 283, 293 (4th Cir. 1991); *see also Anderson v. Serv. Emps. Int'l Union Local 503*, 400 F. Supp. 3d 1113, 1116-18 (D. Or. 2019) ("To the extent that Plaintiffs may argue they were 'coerced' into membership, the Court does not agree.").

Moreover, "[t]he fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time of their decision does not mean their decision was therefore coerced." *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019); *Smith v. Bieker*, No. 18-CV-05472-VC, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019) (finding a valid agreement, even if plaintiffs did not know they could choose not to pay dues at the time of signing, because "changes in intervening law – even constitutional law – do not invalidate a contract") (citing *Brady v. United States*, 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). As this case involves voluntary members, the Union has not violated Plaintiffs' First Amendment rights. Accordingly, Defendants do not need to show a *Janus* waiver to enforce the agreement.

Finally, "the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); *see also Fisk*, 759 F. App'x at 633 (holding that the First Amendment does not preclude the enforcement of plaintiffs' voluntary union membership contracts); *Belgau*, 359 F. Supp. 3d at 1009. Accordingly, the Plaintiffs have not shown a violation of their First Amendment rights and Defendants' motions for judgment on the pleadings on the First Amendment violation are **GRANTED**.

D. Medicaid Act Violation

In addition to the First Amendment violation, Plaintiffs also claim that the State Controller's deduction of union dues from Plaintiffs and other IHSS providers violates Section 32 of the Medicaid Act. [Doc. No. 36 at 26.] Plaintiffs contend Section 32 gives Medicaid providers a right to direct payment for their services and prohibits diversions of those payments to any other party, except as expressly permitted. *Id.* The Court does not find that Section 32 creates a private right of action under § 1983. *See Aliser v. SEIU Cal.*, 419 F.Supp.3d 1161, 1163–64 (N.D. Cal. Dec. 10, 2019) ("[Section 32] of the Medicaid Act doesn't give the plaintiffs a federal right to sue under section 1983.").

42 U.S.C. § 1396a(a) lists requirements that a state must follow under its state Medicaid plan. The Secretary of Health and Human Services is authorized to determine whether states are complying with the requirements of section 1396a, and to withhold Medicaid funding from noncompliant states. § 1396c. Under Section 32, a state plan must "provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise." § 1396a(a)(32). Section 32 does not create an individually enforceable right. *See Transitional Services of New York for Long Island, Inc. v. New York State Office of Mental Health*, 91 F. Supp. 3d 438, 445 (E.D.N.Y. 2015). On its face, Section 32 restricts the entities to whom a payment can be made under the plan; it does not create an entitlement to payment. *See Gonzaga v. Doe*, 536 U.S. 273, 290, 122

S.Ct. 2268, 153 L.Ed.2d 309 (2002) ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."). Unlike Section 23, the subject of *Planned Parenthood Arizona Inc. v. Betlach*, Section 32 does not contain language that "unambiguously confers ... a right." *See Betlach*, 727 F.3d 960, 966 (9th Cir. 2013) (" '[A]ny individual eligible for medical assistance... may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required.' " (quoting § 1396a(a)(23)); cf. *Ball v. Rodgers*, 492 F.3d 1094, 1107 (9th Cir. 2007) ("[N]either provision uses the word 'individuals' simply in passing. Instead, both are constructed in such a way as to stress that these 'individuals' have two explicitly identified rights.").

Courts have determined that the purpose of Section 32 was to prevent healthcare providers from assigning their entitlement to reimbursement to a third party:

> "Prior to 1972, it was possible for state departments of public aid to reimburse medical providers at any address designated by the provider on the bill for services rendered. Quite frequently, physicians had their payment vouchers sent directly to factoring companies which would pay the provider at a discounted amount of the face value of the bills in exchange for an assignment of the physician's interest in the bills. In this manner, the provider obtained immediate payment for services rendered, albeit at a discounted rate. However, this system of payment was believed to be responsible for inflated and sometimes fraudulent charges for services rendered."

Michael Reese Physicians & Surgeons, S.C. v. Quern, 606 F.2d 732, 734 (7th Cir. 1979), adopted en banc, 625 F.2d 764 (7th Cir. 1980), cert. denied, 449 U.S. 1079, 101 S.Ct. 860, 66 L.Ed.2d 802 (1981). In response to this problem, Congress amended § 1396a(a) to stop the "factoring" of Medicaid receivables. *See Danvers Pathology Associates, Inc. v. Atkins*, 757 F.2d 427, 428-31 (1st Cir. 1985) (Breyer, J.) (discussing the legislative history of § 1396a(a)(32)).

Section 32 does not compel payment to healthcare providers. Rather, it states that if a payment is made under the plan, then it must be made to the provider alone. Thus, Section 32 does not require the state to issue any payment at all; instead, it places restrictions on who can receive such a payment. In other words, there is no rights-conferring language in the provision. Absent such language, the Court concludes that Section 32 does not confer a federal right upon medical providers. Accordingly, Defendants' motions for judgment on the pleadings on the Medicaid Act violation are **GRANTED**.

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** the Defendants' motions for judgment on the pleadings. Because no First Amendment violation can be shown, and no private right of action exists under Section 32 of the Medicaid Act, no amendment will be able to cure the deficiencies of Plaintiffs' complaint. Accordingly, this case is **DISMISSED with prejudice** and the Clerk of Court shall **CLOSE** this matter.

It is **SO ORDERED**.