

No. 26-

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IN THE  
**Supreme Court of the United States**

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PENNY GARDNER,

*Petitioner,*

*v.*

STATE OF WASHINGTON, ACTING THROUGH  
AND DOING BUSINESS AS THE WASHINGTON  
HEALTH CARE AUTHORITY,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether a State can be a 42 U.S.C. §1983 “person” when its own law so provides, and whether a plaintiff may rely on that state law.

## **PARTIES TO THE PROCEEDING**

The Petitioner is Penny Gardner, who is the plaintiff in the underlying action in the United States District Court for the Eastern District of Washington. The Respondent is the third-party defendant “State Of Washington, d/b/a The Washington Health Care Authority (HCA), Washington State Department of Health (DOH), Washington State Department of Social and Health Services (DSHS), Department of Developmental Disabilities (DDD), Child Protective Services (CPS), Child Protective Services Licensing Division, Department of Children, Youth and Family Services (DCYF), DCYF Licensing Division, Children’s Administration and Division of Licensed Resources, and Attorney General’s Office. Appendix B, at 8a (United States District Court Order on Summary Judgment). Israel Rodriguez is an individual Defendant in the underlying action, but this Petition for Certiorari only concerns the underlying courts’ dismissal of Petitioner’s claims against the State of Washington.

*iii*

**RULE 29.6 CORPORATE  
DISCLOSURE STATEMENT**

Petitioner is a natural person and no disclosure is required.

## **RELATED PROCEEDINGS**

The following proceedings are related to this case:

- A. *Penny Gardner v. Israel Rodriguez; State Of Washington, Acting Through And Doing Business As The Washington Health Care Authority*, No. 24-2418 (9<sup>th</sup> Circuit) (opinion affirming dismissal entered April 24, 2026 (App. A at 1a-7a); petition for rehearing or rehearing en banc denied June 2, 2026 (App. D at 44a-45a); and
- B. *Penny Gardner v. Israel Rodriguez And State Of Washington, Acting Through And D/B/A The Washington Health Care Authority (HCA), Washington State Department Of Health (DOH), Washington State Department Of Social And Health Services (DSHS), Department Of Developmental Disabilities (DDD), Child Protective Services (CPS), Child Protective Services Licensing Division, Department Of Children, Youth And Family Services (DCYF), DCYF Licensing Division, Children's Administration And Division Of Licensed Resources, And Attorney General's Office*, NO. 2:22-CV-0144-TOR, (E.D. Wash.) (order dismissing claims on summary judgment entered March 28, 2024 (App. B at 8a-40a)).

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## **ORDERS BELOW**

The official opinion entered by the Ninth Circuit is *Gardner v. Rodriguez*, 24-2418, 2026 WL 1122109 (9th Cir. Apr. 24, 2026), and the memorandum opinion is attached at Appendix A, pages 1a-7a. Petitioner’s petition for en banc review was denied on June 2, 2026. Appendix D, at 44a.

## **BASIS FOR JURISDICTION IN THIS COURT**

This Court has jurisdiction to review this Petition for a Writ of Certiorari under 28 U.S.C. §1254 (1) because Petitioner is a party in a civil action seeking review of the decision of the Ninth Circuit Court of Appeals.

As background, on March 8, 2024, the United States District Court for the Eastern District of Washington granted summary judgment in favor of the Third-Party Defendant State of Washington dismissing Plaintiff Gardner’s 42 U.S.C. §1983 claim, and all of her other tort claims, against the State. Appendix B at 8a-40a. On April 24, 2026, the Ninth Circuit upheld that dismissal by memorandum opinion in *Gardner v. Rodriguez*. Appendix A at 1a-7a. On June 2, 2026, the Ninth Circuit denied Petitioner Gardner’s Petition for Rehearing En Banc. Appendix D at 44a-45a. This petition is timely.

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE**

42 U.S.C. §1983 states: “Every person who, under color of any statute... of any State... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights... secured by the Constitution

and laws, shall be liable to the party injured in an action at law.”

Washington’s Constitution, Article II, § 26, entitled “Suits Against the State,” states, “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.”

Revised Code of Washington (RCW) § 4.92.090, entitled “Tortious conduct of state—Liability for damages,” states: “The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”

RCW 1.16.080, entitled “‘Person’—Construction of ‘association,’ ‘unincorporated association,’ and ‘person, firm, or corporation’ to include a limited liability company,” states at section 1, “The term ‘person’ may be construed to include the United States, this state, or any state or territory, or any public or private corporation or limited liability company, as well as an individual.”

U.S. Const. amend. XIV, entitled “Citizenship; Privileges And Immunities; Due Process; Equal Protection; Appointment Of Representation; Disqualification Of Officers; Public Debt; Enforcement” at Section 1, states, in relevant part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”

## STATEMENT OF THE CASE

The facts material to consideration of the question presented are these:

Petitioner Penny Gardner filed tort claims, including a 42 U.S.C. §1983 claim against the State of Washington, in part for violation of her due process right. Appendix B, at 18a. She alleged that the State of Washington acted through eight Washington decision-making social and health service agencies and their personnel, and caused her to lose a (\$7.8 million dollar) medically fragile child care business. Appendix A, at 2a-3a; and Appendix B at 9a-10a. She alleged that the State violated due process and inflicted the damage by repeatedly failing to inform her of ongoing violations committed by her on-site business manager. *See generally*, Exhibit B, at 9a-16a (District Court). Specifically, over a period of two years, Petitioner Gardner was excluded from the management and the premises of her business by a temporary state dissolution court business administration order. Appendix B, at 12a. While she was excluded from the business, the State's intertwined state social service agencies did not notify Gardner that they were repeatedly identifying, making "founded" or "valid" findings of child neglect and abuse against her business's temporary administrator, but then accommodating those abuse and neglect determinations. Appendix B, at 14a (ref. "Numerous reports of neglect, abuse, and unlawful alterations of patient medical records were made against the facility," and see p. 16a ("The letter of revocation documented 55 founded or valid licensing violation allegations.")). The State suspended, then revoked, then permanently revoked, Gardner's business's license, all without the State giving Gardner notice of the suspension, the revocation, or the history that preceded it.

Appendix B at 15a (suspension) 16a (revocation), and 17a (permanent relinquishment).

Gardner sued the State of Washington as a third-party defendant under Section 1983 in Washington's Spokane County Superior Court. Appendix B at 23a. The State removed Petitioner's Section 1983 claim to the federal district court, and Gardner filed a Second Amended Complaint. *Id.*, and Appendix B at 18a. Over nearly three years of litigation in both state and the federal court (including 22 months in the federal court alone, Appendix A, at 6a), the State at no time claimed that it was not a Section 1983 person, nor did it cite to *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) for such a proposition. On January 19, 2024, however, the State moved for Rule 56 summary judgment, now asserting, for the first time, that the State was not a "person" under 42 U.S.C. §1983 and could not be sued under that statute. The district court granted the State of Washington its requested dismissal. Appendix A at 4a. It held that, while the State had waived immunity by removing the case to the federal district court, [Appendix A at 5a, Appendix B at 23a], this Court's ruling in *Will v. Michigan* prevented the State from being a Section 1983 "person." The District Court held that "Likewise, this Court and others have uniformly concluded that the Revised Code of Washington does not give plaintiffs a right to sue the State or its agencies under Section 1983." Appendix B at 24a.

On April 24, 2026, the Ninth Circuit affirmed the district court. Appendix A at 4a. The Ninth Circuit does not mention Washington's Chapter 4.92 statutory framework. It says only that "Second, even if Washington state law could modify Section 1983's personhood requirement, the

Washington Supreme Court has repeatedly confirmed that Washington state law does not do so.” Appendix A, at 4a-5a. It cites to a Ninth Circuit decision, *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1189 (9th Cir. 2002), for this proposition, [Appendix A at 4a] but *Cortez* does not mention Washington’s legislative framework, nor address the question presented. It cites to *Rains v. Washington*, 100 Wn. 2d 660 (Wash. 1983), a Washington State decision from the year 1983 that predated *Will v. Michigan* and Washington’s evolving statutory framework. [Appendix A at 5a]. It cites to *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 4 P.3d 808, 830 (Wash. 2000), which does not address the issue presented and defers an attorney fee decision to its reading of *Will v. Michigan*. [Appendix A at 5a]. On June 2, 2026, the Ninth Circuit denied Petitioner’s petition for en banc review. Appendix D at 44a.

Petitioner Gardner petitions for a writ of certiorari on the sole issue of whether a State *can be* a 42 U.S.C. §1983 “person” when its own law so provides, and/or whether a plaintiff may rely on that state law, because that is *exactly* what Washington’s legislature has done in RCW 4.92 et seq.

## REASONS FOR GRANTING THE WRIT.

Compelling reasons exist warranting certiorari.

### **A. The Ninth Circuit’s Decision Conflicts with This Court’s Precedent Allowing State Legislatures to Determine the Manner In Which That State Will Be Sued.**

The question presented is whether a State *can be* a 42 U.S.C. §1983 “person” when its own law so provides, and/or whether a plaintiff may rely on that state law. Under principles of federalism, and this Court’s precedent, the answer must be yes. Federalism requires that courts apply the plain text of complimentary federal and state statutes in complimentary fashion, and not create schisms. The Ninth Circuit’s opinion conflicts with this principle and creates a schism.

42 U.S.C. §1983 requires that “Every *person* who, under color of any statute, ordinance, regulation, ... of any State... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights... secured by the Constitution and laws, shall be liable to the party injured in an action at law.” (emphasis added). A state legislature has the right to prescribe the manner in which suits must be brought against government entities. *Beers v. State*, 61 U.S. 527, 529 (1857) (holding that a state “may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.”); *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) (“[I]t is an established principle of jurisprudence in all civilized nations that

the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state.”); *Alden v. Maine*, 527 U.S. 706, 752 (1999) (“A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts.”). This Court recently affirmed a state legislature’s right to *implement* federal rights by its legislation (such as electing a President). *Watson v. Republican Nat’l Comm.*, 146 S. Ct. 2165 (2026).

The State of Washington’s Constitution, Article II, § 26, states, “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” 42 U.S.C. §1983 claims are tort claims. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 179 (2023). The Revised Code of Washington (RCW) § 4.92.090, entitled “Tortious conduct of state—Liability for damages,” states: “The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct *to the same extent as if it were a private person or corporation.*” (emphasis added). RCW 1.16.080 states that “The term ‘person’ may be construed to include ... this state, ... as well as an individual.”

The Ninth Circuit affirmed the dismissal of Petitioner’s Section 1983 tort claim against the State of Washington because it holds this Court “has long held that states and state agencies are not ‘persons’ within the meaning of Section 1983.” Appendix A at 4a citing *Will v. Michigan*, 491 U.S. at 64. But if the State of Washington’s *legislature*

says that the state is liable for damages arising out of the state's tortious conduct "to the same extent as if it were a private person or corporation," RCW 4.92.090, and the legislature has indeed done this, then the State *can be* a Section 1983 "person" when its own law so provides, and/or whether a plaintiff relies on that state law.

Certainly states may not pass legislation doing harm to federal rights, or conflicting with federal law, nor may they "regulat(e) conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012). But Washington's legislative decision to define itself as a "person" for tort liability does no harm to the 42 U.S.C. §1983 federal right; to the contrary, it compliments that right by implementing it. The literal application of RCW 4.92.090's definition of the State as a person for tort liability purposes does not "produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). There is no conflict between Washington's RCW 4.92 et seq. statutory framework and Section 1983 that would require preemption. *Arizona v. United States*, 567 U.S. at 399. There is no indication that Congress enacted Section 1983 as "a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* "Compliance with both federal and state regulations" is not "a physical impossibility." *Id.* The state law does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

*Id.* There are no “potentially ambiguous statutory terms” that Congress failed to define effectively which required delegation “to federal judges the task of filling gaps in a statute.” *United States v. Santos*, 553 U.S. 507, 524 (2008).

*Will v. Michigan* does not reject the plain language of Washington’s statutory framework. *Will v. Michigan* only discusses Congressional intent, not state legislative intent. *Will v. Michigan* holds that Congress may not *make* a state a Section 1983 “person” against its consent. “The Eleventh Amendment bars such suits unless the State has waived its immunity.” 491 U.S. at 66. In “enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law.” *Id.*, at 67. It was *because* of Congressional intent, then, that *Will* holds “that neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Id.*, at 71. In this regard, *Will v. Michigan* only aligns with the same premise later articulated in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996), the premise being that a federal statute “cannot grant jurisdiction over a State that does not consent to be sued.” *Will v. Michigan* only aligns with *Alden v. Maine*, which holds that “The powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.” 527 U.S. at 712. *Will v. Michigan* does not prevent a state from deeming itself a Section 1983 “person” for purposes of tort liability, which is what the State of Washington has done. In fact, in *Will v. Michigan*, Justices Brennan, Marshall, Blackmun, and Stevens joined in a dissent noting that “Finally, even if both of these questions were resolved in favor of an immunity defense, there would remain the question whether it would

be reasonable to attribute to Congress an intent to allow States to decide for themselves whether to take cognizance of § 1983 suits brought against them.” *Will v Michigan*, 491 U.S. at 71 (citations omitted).

In disregarding Washington’s Constitution, Article II, § 26, and the Legislature’s RCW 4.92.090, the Ninth Circuit court of appeals has decided an important federal question of federalism in a way that conflicts with relevant decisions of this Court as to a state’s legislative sovereignty to “prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.” *Beers v. State*, 61 U.S. at 529.

Moreover, this Court has equally emphasized that the plain text of a statute controls over other considerations. “When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.” *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 653 (2020). “The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 242. The interpretative canon “is not a license for the judiciary to rewrite language enacted by the legislature.” *United States v. Albertini*, 472 U.S. 675, 680 (1985). “It is well established that ‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citations omitted). This is a guarantee of due process.

“[T]extualism serves as an essential guardian of the due process promise of fair notice.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 434 (2024) (Justice GORSUCH, concurring).

Petitioner Gardner relied on the plain text of her state’s RCW 4.92.090, a state law which compliments and implements her Section 1983 remedy against the State of Washington. She sued the State of Washington as the actor damaging her through eight known social service agencies. In disregarding Washington’s Constitution, Article II, § 26, and its RCW 4.92.090, the Ninth Circuit has decided important federal questions of state legislative sovereignty and due process in a way that conflicts with relevant decisions of this Court.

**B. The Ninth Circuit’s Decision Conflicts with This Court’s Precedent Defining the Constitutional Separation of Powers, Which Requires that the Plain Language of Statutes be Enforced.**

The Ninth Circuit’s rejection of the plain text of RCW 4.92.090 in favor of a different judicial view violates the separation of powers. “The separation of powers, among other things, prevents Congress from exercising the judicial power.” *Patchak v. Zinke*, 583 U.S. 244, 250 (2018). The converse is also true. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 223 (2020). The powers of a federal government are those of “three defined categories, Legislative, Executive, and Judicial.” *Id.* The federal court must respect the same structure applicable to the states through constitutional directives of full faith and credit, and the reserving of powers to the states. U.S. Const. art.

IV, § 1; U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). The court must start “with a presumption that the state statute is valid.” *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661 (2003). As discussed above, Washington’s RCW 4.92 framework does no harm to the federal statutory scheme; it compliments those rights. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 242; *Arizona v. United States*, 567 U.S. 387, 403 (2012) (preemption); *United States v. Santos*, 553 U.S. at 524 (gaps that must be remedied). *Will v. Michigan* does not reject the plain language of a Washington statutory framework.

Again, the Ninth Circuit’s rejection of the plain language of Washington’s statute rejects the legislative sovereignty of the State of Washington to make itself a Section 1983 person for the benefit of its citizens. The Ninth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court.

**C. The Ninth Circuit’s Decision Conflicts with This Court’s Precedent Holding that Textualism Serves as an Essential Guardian of the Due Process Promise of Fair Notice.**

The Ninth Circuit’s decision also implicates due process — under both the Fifth and Fourteenth Amendments — because a person is entitled to rely on the plain language of a statute as fair notice of conduct that is forbidden or required. “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden

or required. “*F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). But so too, a person bringing a civil claim against their State must also be entitled to rely on the plain language of existing law. *Loper Bright Enters. v. Raimondo*, 603 U.S. at 434. “Textualism serves as an essential guardian of the due process promise of fair notice.” *Id.*

Plaintiff Gardner adhered to her State’s statute. She named the State of Washington as a person for tort liability. RCW 4.92.090. Again, the Ninth Circuit has denied Gardner the due process of law in contravention of this Court’s holdings on fair notice and reliance on statutory text. In that regard, it has decided an important federal question of due process in a way that conflicts with relevant decisions of this Court.

**D. The Ninth Circuit Fails to Appreciate that Washington’s Highest Court Has Deferred to the Federal Court; Washington’s Highest Court Has Not Determined the Textualism or Legislative Sovereignty Issue as a Matter of Its Own Constitution. It Should be Free to Do So.**

The Ninth Circuit erroneously holds that Washington’s Supreme Court decided that statutory language does not mean what it says. That reasoning is why review should be accepted.

Washington’s highest court confirms that the State’s legislature will direct the manner in which the state may be sued. *Medina v. Pub. Util. Dist. No. 1 of Benton Cnty.*, 147 Wn. 2d 303, 312 (2002) *ref.* Article 2, § 26. Washington’s Constitution “specifically reserves the right

of the legislature to...direct by law, *in what manner*, and in what courts, suits may be brought against the state.” *Id.* at 312 (emphasis added) *ref.* Article 2, § 26; *also see Oda v. State*, 111 Wn. App. 79, 83–84, 44 P.3d 8, 10 (2002) (“The Washington Constitution authorizes the Legislature to “direct by law, in what manner, and in what courts, suits may be brought against the state.” Const. article II, § 26); *and see O’Donoghue v. State*, 66 Wn.2d 787, 789 (1965), *ref.* Article 2, § 26 (stating “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.”). Washington’s legislature has the right to condition the filing of lawsuits against its government entities. *Hanson v. Carmona*, 16 Wn. App. 2d 834, 844 (2021), *aff’d on other grounds*, 1 Wn.3d 362, (2023), *ref. Nelson v. Dunkin*, 69 Wn.2d 726, 729 (1966) ( reiterating in relevant part that “the right to sue the state, a county, or another state-created governmental agency must be derived from statutory enactment.” ).

The State of Washington’s legislature has long since waived its sovereign immunity from suit by statute. “In 1961, the Legislature waived the state’s sovereign immunity with respect to tort actions” by RCW 4.92.090. *Oda v. State*, 111 Wn. App. at 83–84. RCW 4.92.090 “is ‘one of the broadest waivers of sovereign immunity in the country.’” *Id.*, quoting *Savage v. State*, 127 Wn. 2d 434, 445 (1995). But the State of Washington’s legislature has *also* explicitly implemented “person” status for its own tort liability. RCW 4.92.090 “operates to make the State presumptively liable in all instances in which the Legislature has *not* indicated otherwise.” *Oda v. State*, 111 Wn. App. at 84, *ref. Savage v. State*, 127 Wn. 2d at 445. Washington’s legislature has not indicated otherwise: “The state of Washington...*shall* be liable for damages

arising out of its tortious conduct to the same extent *as if it were a private person or corporation.*” RCW 4.92.090 (emphasis added). RCW’s Chapter 4.92 is an act explicitly named “Actions and Claims Against State.” RCW 1.16.080 (1) also declares that, for all purposes under its statutory code, the “term ‘person’ may be construed to include...this state ...;” *see also State v. Jeffries*, 42 Wn. App. 142, 145 (1985) (holding that, in regard to RCW 1.16.080, “Clearly, the term person may include the State...”).

The Ninth Circuit cites to the 1983 decision in *Rains v. Washington*, 100 Wn. 2d 660, which predates *Will v. Michigan*. *Rains* holds, in direct contravention of the plain legislative language of today’s RCW 4.92.090, that “We can find nothing in the legislative history nor in the legislation to indicate the Legislature also intended the State could be sued.” 100 Wn. 2d at 668. *Rains* relied on the 1979 decision in *Edgar v. State*, 92 Wn.2d 217 (1979), which *allowed* the state to be sued where a tort is properly pled. Under the then-existing precedent regarding RCW 4.92.090, a claimant asserting a claim against the State must “show that the conduct complained of constitutes a tort which would be actionable if it were done by a private person in a private setting. This the plaintiff here has failed to do.” *Id.*, at 226. But RCW 4.92.090 has remained in force since 1979 with *no* modification to its plain language. The legislature has thus declined to import the court’s language into the statute by amendment.

The Ninth Circuit also cites to *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 4 P.3d 808, 830 (Wash. 2000) which does not assess RCW 4.92 either as a statute, as a chapter, or as a framework. It cites *Will* only in the context of an attorney fee section, not within

an analysis of federalism. It does not consider any of this Court's law identified here, nor does it consider Washington's Constitution, art. 2, sec. 26, and its holding is effectively overridden by the 2002 decisions in *Medina*, 147 Wn. 2d 303 and *Oda v. State*, 111 Wn. App. at 84. Until the federal court clarifies that *Will v. Michigan* addresses Congressional intent, not state legislative intent, then any court remains unable to properly apply the plain text of its own state statutes when it comes to 42 U.S.C. §1983.

**E. This Case is a Clean Vehicle for Deciding the Question Presented.**

This petition avoids any fact-intensive scenario; the question presented is a singular issue of law, decided at summary judgment, where this Court need only look at a caption heading, the parties sued, the orders entered, and its own precedent. This is an unpublished decision, but it is a decision promulgating the error of continued holdings by district and appellate courts that *Will v. Michigan* prevents states from legislatively consenting to being a Section 1983 person for tort liability.

**CONCLUSION**

The question presented is whether a State *can be* a 42 U.S.C. §1983 “person” when its own law so provides, and a plaintiff relies on that state law. Petitioner respectfully asks that her Petition for a Writ of Certiorari be granted, and that the answer to the question be “yes.”

Dated this 31<sup>st</sup> day of August, 2026.

Respectfully submitted,

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## APPENDIX

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**APPENDIX A — MEMORANDUM OF THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT, FILED APRIL 24, 2026**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 24-2418  
D.C.No. 2:22-cv-00144-TOR

PENNY GARDNER, FORMERLY KNOWN AS  
PENNY RODRIGUEZ,

*Plaintiff-Appellant,*

v.

ISRAEL RODRIGUEZ; STATE OF  
WASHINGTON, ACTING THROUGH AND  
DOING BUSINESS AS THE WASHINGTON  
HEALTH CARE AUTHORITY,

*Defendants-Appellees.*

No. 24-2760  
D.C.No. 2:22-cv-00144-TOR

PENNY GARDNER,

*Plaintiff-Appellee,*

v.

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ISRAEL RODRIGUEZ,

*Defendant-Appellant,*

and

STATE OF WASHINGTON,

*Defendant.*

Filed April 24, 2026

**MEMORANDUM\***

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

Submitted April 22, 2026\*\*  
Seattle, Washington

Before: MURGUIA, Chief Judge, and McKEOWN and  
KOH, Circuit Judges.

Plaintiff Penny Gardner brought this action for  
damages against the State of Washington and eight  
state agencies (collectively, “State Defendants”), as well

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

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

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as Israel Rodriguez. Gardner asserted against State Defendants federal and state constitutional due process and equal protection claims under 42 U.S.C. §§ 1983, 1985(3), and 1986, and various state law claims. Gardner also asserted state law claims against Rodriguez. Gardner appeals the district court’s grant of summary judgment in favor of State Defendants.<sup>1</sup> Rodriguez cross-appeals the district court’s decision to remand Gardner’s state law claims against him to state court. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

“We review the district court’s decision on cross-motions for summary judgment de novo. Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.” *U.S. Sec. & Exch. Comm’n v. Feng*, 935 F.3d 721, 728 (9th Cir. 2019) (citations omitted). We review the district court’s decision to retain or decline supplemental jurisdiction over state law claims for an abuse of discretion. *Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1090 (9th Cir. 2008).

---

1. On appeal, Gardner challenges only the viability of her Section 1983 claim, the merits of her federal due process and equal protection claims, and remand of her state law outrage claim against State Defendants. Gardner does not raise any arguments as to Sections 1985(3) or 1986, her state constitutional claims, or her other state law claims against State Defendants. Accordingly, Gardner has waived these issues. *See Arpin v. Santa Clara Valley Transport. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (“[I]ssues which are not specifically and distinctly argued and raised in a party’s opening brief are waived.”).

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1. The district court did not err in dismissing Gardner’s Section 1983 claim because State Defendants are not “persons” subject to suit under Section 1983. The plain text of 42 U.S.C. § 1983 creates a cause of action against “[e]very person” who violates a right secured by the U.S. Constitution or federal law while acting under color of state law. The U.S. Supreme Court has long held that states and state agencies are not “persons” within the meaning of Section 1983. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989). That alone forecloses Gardner’s Section 1983 claim against State Defendants. *See id.*

Gardner’s arguments to the contrary misread well-established precedent. First, State Defendants’ waiver of Eleventh Amendment sovereign immunity by removing the case from state court to federal court did not transform State Defendants into “person[s]” within the meaning of Section 1983. *See id.* at 66 (confirming that Eleventh Amendment immunity and Section 1983 personhood are “separate issues”); *Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1234 (9th Cir. 2015) (observing that Section 1983 personhood is “often conflated with Eleventh Amendment immunity” but “the concepts are distinct” (citation omitted)).

Second, even if Washington state law could modify Section 1983’s personhood requirement, the Washington Supreme Court has repeatedly confirmed that Washington state law does not do so. *See Cortez v. County of Los Angeles*, 294 F.3d 1186, 1189 (9th Cir. 2002) (“[T]he determination of § 1983 liability is governed by federal

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law.”); *see also Rains v. Washington*, 674 P.2d 165, 170 (Wash. 1983) (“[T]here is no express legislative indication that the State [] has consented to suit . . . for federal civil rights actions.”); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 4 P.3d 808, 830 (Wash. 2000) (“[S]uit may not be brought under § 1983 . . . against the state . . . because a state is not a ‘person’ subject to suit within the meaning of § 1983.”).

Third, Gardner separately contends that State Defendants “waived” their ability to argue a “lack of capacity to be sued” under Section 1983 when State Defendants waived their Eleventh Amendment sovereign immunity. As explained, Eleventh Amendment immunity and Section 1983 personhood are distinct concepts, and waiver of the former does not constitute a “waiver” of arguments as to the latter. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 617 (2002) (treating the issue of Section 1983’s personhood requirement as distinct from the issue of waiver of Eleventh Amendment immunity by removal). No case law supports Gardner’s suggestion that State Defendants’ removal of this case to federal court precludes State Defendants from asserting that they are not “persons” within the meaning of Section 1983. To the extent that Gardner believes that State Defendants “waived” the personhood argument because it was an affirmative defense that State Defendants failed to timely raise below, Gardner is incorrect. State Defendants repeatedly argued that they are not “persons” under Section 1983 in their summary judgment briefing. *See Garcia v. Salvation Army*, 918 F.3d 997, 1008-09 (9th Cir. 2019) (confirming that an affirmative defense can be

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raised for the first time at summary judgment absent a showing of prejudice that goes beyond mere delay).

2. The district court did not abuse its discretion by retaining supplemental jurisdiction over Gardner’s state law outrage claim against State Defendants after the district court dismissed Gardner’s federal claims. 28 U.S.C. § 1367(c) provides that a district court “may” decline to exercise supplemental jurisdiction if “the district court has dismissed all claims over which it had original jurisdiction.” *See Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) (“[A] federal district court with power to hear state law claims has discretion to keep, or decline to keep, them.”). A district court’s exercise of that discretion should “consider and weigh . . . the values of judicial economy, convenience, fairness, and comity.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988), *abrogated on other grounds by Royal Canin U. S. A., Inc. v. Wullschleger*, 604 U.S. 22, 39-41 (2025). “Supreme Court and Ninth Circuit precedent teaches us that the district court is in the best position to judge the extent of resources invested in a case and that, therefore, the district court’s discretion ought not be lightly disturbed.” *Schneider v. TRW, Inc.*, 938 F.2d 986, 993-94 (9th Cir. 1991).

Here, the district court properly determined that retaining supplemental jurisdiction over Gardner’s state law outrage claim would be in the interest of “judicial economy” because the case had been pending in federal court for nearly 22 months, the district court had resolved several issues involving the scope of discovery as to State

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Defendants, the state law claim against State Defendants had been briefed on the merits by both parties, and a resolution could definitively resolve the case as against State Defendants. *Cohill*, 484 U.S. at 350. The district court properly dismissed the state law outrage claim on the merits because Gardner failed to meet her burden of establishing a prima facie showing that State Defendants engaged in conduct that was “so extreme in degree[] as to go beyond all possible bounds of decency.” *Dicomes v. Washington*, 782 P.2d 1002, 1012 (Wash. 1989).

3. The district court did not abuse its discretion by declining to retain supplemental jurisdiction over Gardner’s state law claims against Rodriguez. The district court properly determined that the “judicial economy” concerns that applied to State Defendants did “not present” as to Rodriguez. *Cohill*, 484 U.S. at 350. Once State Defendants were dismissed from the action, Rodriguez was the “sole remaining defendant” and “a non-diverse party facing only state law claims.” Furthermore, Rodriguez’s motion for summary judgment did not address the merits of Gardner’s state law claims. Instead, the motion raised arguments that required resolution of issues unrelated to the issues raised by Gardner’s federal claims. Accordingly, the district court appropriately exercised its discretion by treating Gardner’s state law claims against Rodriguez like “the usual case” and remanding those claims to state court. *Id.* at 350 n.7.

**AFFIRMED.**

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**APPENDIX B — ORDER ON MOTIONS FOR  
SUMMARY JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN DISTRICT  
OF WASHINGTON, FILED MARCH 28, 2024**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

NO. 2:22-CV-0144-TOR

PENNY GARDNER (F/K/A PENNY RODRIGUEZ),

*Plaintiff,*

v.

ISRAEL RODRIGUEZ AND STATE OF  
WASHINGTON, ACTING THROUGH AND D/B/A  
THE WASHINGTON HEALTH CARE AUTHORITY  
(HCA), WASHINGTON STATE DEPARTMENT  
OF HEALTH (DOH), WASHINGTON STATE  
DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES (DSHS), DEPARTMENT OF  
DEVELOPMENTAL DISABILITIES (DDD),  
CHILD PROTECTIVE SERVICES (CPS), CHILD  
PROTECTIVE SERVICES LICENSING DIVISION,  
DEPARTMENT OF CHILDREN, YOUTH AND  
FAMILY SERVICES (DCYF), DCYF LICENSING  
DIVISION, CHILDREN'S ADMINISTRATION AND  
DIVISION OF LICENSED RESOURCES, AND  
ATTORNEY GENERAL'S OFFICE,

*Defendants.*

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Signed March 28, 2024

**ORDER ON MOTIONS FOR  
SUMMARY JUDGMENT**

BEFORE THE COURT are the State Defendants' Motion for Summary Judgment (ECF No. 84), Defendant Israel Rodriguez's Motion for Summary Judgment (ECF No. 92), and Plaintiff's Motion for Summary Judgment (ECF No. 96). These matters were submitted for consideration without oral argument. The Court has reviewed the records and files herein and is fully informed. For the reasons discussed below, the State Defendants' Motion for Summary Judgment (ECF No. 84) is **GRANTED** and Plaintiff's Motion for Summary Judgment (ECF No. 96) is **DENIED**. The Court declines to reach Defendant Rodriguez's Motion for Summary Judgment (ECF No. 92) and **DISMISSES** the claims against him.

**BACKGROUND**

The events giving rise to these motions are generally undisputed. Plaintiff Penny Gardner and Defendant Israel Rodriguez are divorcees who share four adult children together. ECF No. 94-20 at 2, 6. Plaintiff, a registered nurse (RN), and Defendant Rodriguez, a certified nursing assistant (CNA), were both unmarried and running their own adult care facilities when they met at a training seminar hosted by the State. ECF Nos. 98 at 3, ¶ 4; 104 at 2, ¶ 4. The pair realized that they shared a passion for

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bringing their services to medically fragile children<sup>1</sup> in eastern Washington and began working together towards opening a facility. ECF Nos. 98 at 3, ¶ 5; 104 at 2, ¶ 5. To that end, the couple acquired property in Spokane, Washington, and established Weeping Ridge Northwest, LLC (WRN). ECF Nos. 85 at 2, ¶ 1; 98 at 4, ¶¶ 7, 9; *see also* 98-1 at 2.

Washington State law requires entities running group care facilities to acquire and maintain a current license. *See* RCW 74.15.090; WAC 110-145-1310. Licenses are valid for a three-year period, are nontransferable, and apply exclusively to the licensee. RCW 74.15.100; WAC 110-145-1345(2); *see also* ECF No. 98-4 at 2 (“NOTE: This license is not transferable, and is valid only for use by the individual or agency to whom it is issued and at the location above described.”). In accordance with these requirements, Plaintiff and Defendant Rodriguez applied for a Children’s Agency License on behalf of WRN. ECF Nos. 85 at 3, ¶ 5; 98 at 4, ¶ 7. On June 26, 2014, the Washington State Department of Social and Health Services (DSHS)<sup>2</sup> issued

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1. As defined by WAC 110-148-1305, “‘medically fragile’ means the condition of a child who requires the availability of 24-hour skilled care from a health care professional or specially trained family or foster member. These conditions may be present all the time or frequently occurring. If the technology, support, and services being received by the medically fragile children are interrupted or denied, the child may, without immediate health care intervention, experience death.”

2. In July 2017, the Department of Children, Youth and Family Services (DCYF) assumed licensing and related responsibilities from DSHS. *See Matter of Dependency of H.A.B.*, 24 Wash. App.

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a license to WRN<sup>3</sup> at its address on 1026 North Seminole Drive. ECF No. 98-4 at 2. The license was valid through June 25, 2017. *Id.* Once licensed, WRN was entered into various contracts for the placement of medically fragile children with DSHS at its facility. ECF Nos. 91 at 2, ¶ 5; 98-8 at 2.

Plaintiff and Defendant Rodriguez assumed separate roles at WRN. Plaintiff was named “clinical director” of WRN and Defendant Rodriguez was designated as the “administrator” or “executive director” of the facility. ECF Nos. 98-33 at 3; 98-9 at 5. As the parties generally understood those positions, Plaintiff was responsible for oversight of all residents’ medical care, ECF No. 122 at 5, ¶ 12, while Defendant Rodriguez assumed responsibility for the more administrative and managerial aspects of running WRN, including completing paperwork, maintaining contact with state agencies regarding licensure and safety requirements, and serving as the registered agent of the company, *see* ECF Nos. 87 at 5, ¶ 25; 98-31 at 8 (state employees testifying that Defendant Rodriguez was their primary point of contact).

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2d 1041, 2022 WL 17420564, at 7, n.7 (Wash. Ct. App. Dec. 6, 2022) (citing Second Engrossed Second Substitute H.B. 1661, 65th Leg., 3rd Spec. Sess. (Wash. 2017)).

3. Plaintiff disputes this, arguing that the contracts and licenses were between her/Defendant Rodriguez and DSHS/DCYF rather than between WRN and DSHS/DCYF. *See* ECF No. 96 at 6. As discussed further at *infra* Part II. A, this has been disproven.

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In April 2017, approximately two months before their initial license was due to expire, the couple submitted a license renewal application for WRN. *See* ECF No. 98-9 at 3. However, the parties' relationship soured not long thereafter. On May 4, 2017, Defendant Rodriguez obtained an *ex parte* temporary domestic violence protection order against Plaintiff from the Stevens County Superior Court. ECF No. 94-20 at 7, ¶ 22.1.10. According to the petition, which Plaintiff disputes, Plaintiff slapped the parties' then 13-year-old daughter across the face and made subsequent threats of harm to the 13-year-old and her other daughter, then 12. *Id.*; ECF No. 98 at 10, ¶ 30. At a hearing held on May 18, 2017, the Stevens County Commissioner entered an order of protection, to be in effect for one year. ECF No. 94-20 at 8, ¶ 22.1.11. On May 25, 2017, Defendant Rodriguez filed for a dissolution of marriage. *Id.* at 8, ¶ 22.1.15.

Due to the entry of the protective order, various restrictions were placed on Plaintiff's access to minor children. As is relevant here, the order excluded Plaintiff from setting foot on WRN's premises, from continuing in her role as clinical director of the facility, and from having contact "directly or indirectly" with Defendant Rodriguez. ECF Nos. 85 at 3-4, ¶¶ 12, 15; 97 at 7, ¶¶ 32-33, 38. On May 6, 2017, Defendant Rodriguez e-mailed DSHS licensor Darwin Bleth to inform him that Plaintiff was restrained from entering WRN's premises, who in turn forwarded the e-mail to agency leadership. ECF No. 87-2 at 2; 97 at 8, ¶ 36. Consequently, DSHS, through Mr. Bleth, contacted Defendant Rodriguez regarding the status of WRN's license renewal application on May 24:

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[R]egarding the renewal application you submitted on 4/6/17 . . . [DSHS staff decided] that we could not accept the renewal application as it currently indicates Penny [is] an employee who would have access to children placed in your care. As a result of this shared decision, we are now asking that you submit a renewal application with Penny not listed in these positions for your program, as she is currently restrained from being at the facility.

ECF No. 87-4 at 2.

When Defendant Rodriguez did not reply to the initial e-mail, Mr. Bleth followed up on June 19, 2017, stressing the importance of receiving an updated application. ECF No. 87-5 at 2. Defendant Rodriguez replied that he had been advised to leave Plaintiff on the application at that time on the advice of counsel because no formal charges had been brought against her. ECF No 98-32 at 2. That same day, the parties entered into a stipulated temporary family law order as part of their divorce proceedings which put Defendant Rodriguez in charge of WRN as chief administrator. ECF Nos. 86-23 at 11-14; 98-16. Both parties were represented by counsel in that proceeding. ECF No. 98-16 at 2. In addition to continuing to prohibit the parties from contacting each other, the order also provided that Defendant would maintain the property, ensure that all revenue would go into a “neutral account” created by a third-party agent, and that a third-party certified public accountant would process all payments and provide reports on the financial status of the parties’ businesses. ECF No. 98-16 at 4.

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The following day, on June 20, WRN submitted a renewal application which did not list Plaintiff as clinical director. ECF No. 87 at 4, ¶¶ 21-22. The application was accepted. *Id.* Plaintiff maintains that she was not made aware that her name had been removed from the application. ECF No. 97 at 12, ¶ 64.

The domestic violence allegations against Plaintiff were later deemed unfounded by Child Protective Services (CPS), ECF No. 98-20 at 2, and the Stevens County Superior Court vacated the protective order in July, albeit with some reservations, ECF Nos. 94-20 at 9, ¶ 22.2.01 (characterizing Plaintiff's actions as not "domestic violence" yet "unnecessarily punitive and demonstrative of poor parenting practice"). Despite being cleared of these allegations, Plaintiff did not seek to reassume her position as clinical director or to otherwise modify the terms of the parties' temporary agreement putting Defendant Rodriguez in charge of the facility. ECF No. 98 at 16, ¶ 53.

During Defendant Rodriguez's tenure as chief administrator, conditions at WRN considerably deteriorated. ECF No. 84 at 6. Numerous reports of neglect, abuse, and unlawful alterations of patient medical records were made against the facility. ECF No. 98-26 at 2-5. On July 5, 2019, DCYF personally served Defendant Rodriguez at his home address with notice of a suspension of WRN's license, effective July 8, 2019. *Id.* at 2; ECF No. 86 at 6, ¶ 27. The suspension letter outlined various incidents of concern that had occurred over the three months preceding the letter and explained:

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[T]hese facts and incidents indicate a concerning lack of care and supervision of children and candor with the Department necessary to keep children healthy and safe. The Department also has serious concerns about the reliability of your medical records and documentation, which prevents DCYF or any other entity from doing reasonable oversight and prevents parents whose children are placed in your facility from making informed medical decisions. Most concerning is the fact that your facility is charged with caring for medically fragile and therefor[e] particularly vulnerable children who are extremely dependent on their caregivers. Accordingly, immediate action is imperative.

ECF No. 98-26 at 6.

Defendant Rodriguez informed Plaintiff of the license suspension through counsel. ECF No. 85 at 6. It was at this point that Plaintiff learned she had been excluded from the license application submitted in May 2017. ECF No. 98 at 30, ¶ 72. Plaintiff also later learned that WRN was placed on voluntary “no referral” status one year earlier, in June 2018, due to similar concerns. ECF No. 98 at 23, ¶¶ 81-82; 98-34 at 3. Plaintiff was not informed of this. ECF No. 98 at 23, ¶ 82.

The suspension letter provided that the parties could contest the decision by requesting an adjudicative proceeding with the Office of Administrative Hearings (OAH). ECF No. 98-26 at 11. Both parties took advantage

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of this process to present appeals on WRN's behalf. ECF Nos. 85 at 6-7, ¶¶ 31-34; 97 at 16, ¶ 90. Defendant Rodriguez engaged Attorney Susan Nelson to appear on behalf of WRN and argue that DCYF's decision was arbitrary and capricious. ECF No. 86-19 at 3. Plaintiff retained Attorney Mary Schultz—who also represents Plaintiff in this case—to argue that proper notice of the suspension had not been given to WRN through its co-owner, Plaintiff. *See* ECF No. 86-20 at 12, ¶¶ 2-16 (administrative law judge (ALJ) summarizing that “the issue Ms. Schultz is attempting to raise on behalf of [WRN] is limited solely to a procedural issue regarding notice” and “Ms. Nelson is essentially contesting the substantive issue”). The ALJ determined that a summary judgment hearing was appropriate and set a date. *Id.* at 13-14.

However, “[b]ecause of the substantial fees she was incurring across the spectrum,” Plaintiff could no longer pursue her appeal, and Ms. Schultz withdrew as an attorney from the matter. ECF Nos. 97 at 16, ¶ 91; 85 at 9, ¶ 47. Thus, when Plaintiff failed to appear at a later prehearing conference, the ALJ determined that she was in default. ECF No. 86-15 at 2. Plaintiff did not submit a request to reinstate the hearing. *Id.* at 3; ECF No. 86-18. The appeal continued through Ms. Nelson, and DCYF ultimately revoked WRN's license on June 25, 2020. ECF Nos. 85 at 8, ¶ 45; 98-33. The letter of revocation documented 55 founded or valid licensing violation allegations. ECF No. 98-33. The letter of revocation was sent via certified mail to Defendant Rodriguez at his home address. *Id.* at 2.

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WRN, through a receiver appointed by the Stevens County Superior Court, appealed the order of revocation and began negotiating a settlement with DCYF. ECF No. 85 at 9, ¶¶ 49-52. Plaintiff objected to the first proposed settlement, which provided that WRN, Defendant Rodriguez, and Plaintiff were “not to seek any licensing, including but not limited to foster care licensing, from the licensing division of DCYF.” ECF No. 88-6 at 2, 7. The receivership ended shortly thereafter, but the Stevens County Superior Court agreed that the current agreement was unacceptable as it “appear[ed] to implicate rights held by [Plaintiff],” who was not a party to the negotiations as she had abandoned her administrative appeal. ECF No. 86-22 at 2. Thus, WRN and DCYF continued negotiations to amend the terms of the settlement. ECF No. 85 at 10, ¶ 57. The final agreement excluded any mention of Plaintiff, except to mention her ownership interest and involvement in related proceedings in the background section. *See* ECF No. 88-8 at 4-6. The settlement provided that in exchange for DCYF refraining from using any findings made related to the suspension and revocation of WRN’s license against Defendant Rodriguez or his facilities providing adult care and withdrawing the suspension and revocation of WRN’s license, WRN would “no longer have a license through DCYF” and “Israel Rodriguez and/or [WRN] shall not submit any future license application to DCYF or any of its successor agencies, and agree that any such application will be denied without right of appeal and will result in the reinstatement of the revocation.” *Id.* at 6, ¶¶ 2-4. The settlement was approved by the OAH in January 2022. *Id.* at 2.

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By second amended complaint, Plaintiff brought claims against the State and its various agencies (hereinafter “State Defendants”) as well as Defendant Rodriguez. As to the State Defendants, Plaintiff alleged violations of due process and equal protection under 42 U.S.C. §§ 1983, 1985(3), and 1986. ECF No. 58 at 46-47. Plaintiff also alleged breach of contract, constructive fraud/fraudulent concealment, intentional infliction of emotional distress, and outrage. *Id.* at 47-50. As to Defendant Rodriguez, Plaintiff pled breach of fiduciary duty/unjust enrichment/constructive fraud, interference with a business expectancy, fraud/fraudulent concealment, intentional infliction of emotional distress, and outrage. *Id.* at 51-57.

**DISCUSSION**

Three motions for summary judgment are before the Court: the State Defendant’s Motion for Summary Judgment, Plaintiff’s Motion for Summary Judgment Against DSHS and DCYF, and Defendant Rodriguez’s Motion for Summary Judgment. The Court addresses Plaintiff’s and the State Defendant’s cross-motions for summary judgment together.

**I. Summary Judgment Standard**

The Court begins by reviewing the familiar standard for summary judgment. Summary judgment may be granted in favor of a moving party who demonstrates “that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a

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matter of law.” Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court must only consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is “genuine” only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* The Court views the facts, and all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

On cross-motions for summary judgment “both parties asserting that there are no uncontested issues of material fact[] does not vitiate the court’s responsibility

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to determine whether disputed issues of material fact are present.” *Fair Housing Council of Riverside Cnty, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978)). Moreover, the court must consider each motion on its own merits. *Id.* at 1134 (“[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them.”). However, where motions for summary judgment center around the same dispositive issue, a court need not organize its discussion of the cross-motions into separate sections. *Tulalip Tribes of Washington v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015); *see also, e.g., Acosta v. City Nat’l Corp.*, 922 F.3d 880, 890 (9th Cir. 2019) (determining that where two motions for summary judgment center around the same central legal issue and one party has the same burden of proof under substantive law in both motions, granting one party’s motion compels denial of the other party’s motion). With these principles in mind, the Court turns to the motions for summary judgment.

## **II. Motions for Summary Judgment: State Defendants & Plaintiff**

State Defendants move for summary judgment on all claims. *See* ECF No. 84. Plaintiff opposes the motion, ECF No. 106, and moves for summary judgment on her Fourteenth Amendment due process claims, ECF No. 96. The Court considers each contention in turn.

*Appendix B***A. Due Process Claims**

The Court begins by considering the cross-motions for summary judgment on Plaintiff’s claims for violations of her state and federal due process rights. ECF No. 58 at 46, ¶ 3.1. In her motion for summary judgment, Plaintiff asserts that she had a protected property interest in the children’s agency license issued to WRN, and that the license was improperly suspended and revoked without proper pre-or post-deprivation notice to her or hearings. ECF No. 96 at 6-20. The State Defendants, by contrast, assert that this claim necessarily fails because they are not a “person” capable of being sued under Sections 1983, 1985, and 1986, but that Plaintiff’s claims fail on the merits regardless. ECF No. 84 at 12-15. In this instance, the Court agrees with the State Defendants.

Section 1983 empowers plaintiffs to sue persons who, “acting under the color of state law, caused the deprivation of a federal right.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Although this statute authorizes suit against state officials in their individual capacities—and, in limited circumstances where prospective injunctive relief is sought, in their official capacities—it is well accepted that the State and its arms are not “persons” capable of being sued under Section 1983. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989); *see also Wright v. Airway Heights Corr. Ctr. MSU*, No. 2:20-cv-00436-MKD, 2022 WL 17543678, at \*3 (E.D. Wash. Dec. 8, 2022), *appeal docketed*, No. 22-36057 (9th Cir. 2022) (“State agencies . . . are categorically not subject to suit under 42 U.S.C. § 1983.”). This principle

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has been held to extend to Sections 1985 and 1986, which create causes of action against “persons” who conspire to cause deprivations of equal protection, 42 U.S.C. § 1985, and those who have knowledge of intended deprivations mentioned in Section 1985 yet neglect or refuse to prevent the intended deprivation, 42 U.S.C. § 1986. *See Sykes v. State of California (Dep’t of Motor Vehicles)*, 497 F.2d 197, 201 (9th Cir. 1974) (holding that the state Department of Motor Vehicles was not a “person” within the meaning of Civil Rights Statutes and that, “[s]ince *Monroe v. Pape*, 365 U.S. 167 (1961) . . . our court has not allowed governmental units to be sued under either Section 1983 or Section 1985”); *see also Jachetta v. United States*, 653 F.3d 898, 908 (9th Cir. 2011) (“§§ 1983 and 1985 impose liability upon a ‘person,’ and a federal agency is not a ‘person’ within the meaning of these provisions”); *see also Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 626 (9th Cir. 1988) (noting that a claim can only be stated under Section 1986 if a valid claim exists under Section 1985).

In her briefing on her own motion for summary judgment, Plaintiff argues that the State Defendants have waived their protections of sovereign immunity under the Eleventh Amendment by removing the action to this court, engaging in discovery, and answering her complaints. ECF No. 121 at 3-4 (pressing that “[w]hether a party is a ‘person’ under § 1983 is a statutory defense that can be waived”). In her response to the Defendants’ motion for summary judgment, Plaintiff also contends that the Washington State legislature has created a right of action for plaintiffs to bring “any” claim against the

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State in superior court through RCW 4.92.010 and thereby waived its sovereign immunity and consented to suit in state court. ECF No. 106 at 9-16.

These discussions by Plaintiff confuse the issues. First, Plaintiff is correct that a State may waive its sovereign immunity under the Eleventh Amendment by its litigation conduct, including by removing an action to federal court. *See Lapidus v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 623 (2002) (“[R]emoval is a form of voluntary invocation of a federal court’s jurisdiction sufficient to waive the State’s otherwise valid objection to litigation of a matter . . . in a federal forum.”). In this instance, Defendants removed the matter from Spokane County Superior Court to this Court on June 16, 2022, thereby waiving the defense of sovereign immunity that may have otherwise been available to them. *See* ECF No. 1. However, it does not follow that a waiver of sovereign immunity converts a State into a “person” under Sections 1983, 1985, or 1986 such that they are amenable to suit. *See Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1234 (9th Cir. 2015) (“While the statutory definition of ‘person’ [under Section 1983] is similar to and often conflated with Eleventh Amendment immunity, the concepts are distinct.”) (internal quotations and citation omitted) (cleaned up). The district courts in the Ninth Circuit which have had occasion to directly confront this question have concluded that a State’s waiver of sovereign immunity under the Eleventh Amendment does not affect its personhood under Section 1983. *See Johnson v. Hall*, No. 2:19-cv-1752 KJN P, 2019 WL 4392413, at \*3 (E.D. Cal. Sep. 13, 2019) (“Even if a state waives its Eleventh

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Amendment immunity in a § 1983 action, it is still not subject to suit because it is not a person under § 1983.”) (citing *Itagaki v. Frank*, No. 09-00110 SOM/LEK, 2010 WL 2640110, at \*4 (D. Haw. June 29, 2010)); *see also Davis v. Abercrombie*, No. 11-00144 LEK-BMK, 2013 WL 5204982 (D. Haw. Sep. 13, 2013) (same).

Likewise, this Court and others have uniformly concluded that the Revised Code of Washington does not give plaintiffs a right to sue the State or its agencies under Section 1983. *See Wright*, 2022 WL 17543678 at \*4 (“[A]s found by the Supreme Court of Washington, Wash. Rev. Code chapter 4.92 does not render Washington state entities subject to Section 1983 suits.”) (citing *Edgar v. State*, 92 Wash.2d 217, 222 (1979); *Rains v. State*, 100 Wash.2d 600, 666 (1983)).<sup>4</sup>As such, neither the State Defendants’ conduct in this matter nor state statutes compel the conclusion that Defendants are “persons” amenable to suit under Sections 1983, 1985, or 1986. The Court likewise rejects Plaintiff’s implication that either the federal due process clause or the state due process clause themselves create a private right of action. *See Azul-Pacifico v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (“[A] litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983.”); *Spurrell v. Bloch*, 40 Wash. App. 854, 862 (1985) (concluding that augmenting legislation was required to

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4. Plaintiff asks the Court to certify the question of whether a cause of action exists against the State under the RCW to the Washington State Supreme Court. ECF No. 106 at 18. Because authority directly to the contrary exists from Washington State courts, the Court declines to certify the issue.

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support an action for money damages against the State for violations of due process).

Finally, even if the State Defendants were entities capable of being sued, Plaintiff's due process clause claims would still fall short. The protections of the federal due process clause in the Fourteenth Amendment of the United States Constitution and the state due process clause under Article I, Section 3 of the Washington State Constitution are coextensive. *In re Estate of Hayes*, 185 Wash. App. 567, 603 (2015). Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "A section 1983 claim based upon procedural due process . . . has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

Plaintiff has not demonstrated to the Court's satisfaction that she had a property interest in WRN's children's agency license. Plaintiff's due process claim is grounded in the belief that the license at issue was "her" property. *See* ECF No. 96 at 6-9. Quite to the contrary, the implementing statutes, regulations, and text of the license itself make plain that the license belonged to WRN, not Plaintiff or Defendant Rodriguez. *See, e.g.*, WAC 110-145-1345(2) ("Your license is valid *only* for the person or organization *named* on the license and only for the specific address listed on the license.") (emphasis added); *see also, e.g.*, ECF No. 87-1 at 2 (stating that "a license is hereby

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granted to: Weeping Ridge Northwest, LLC” and “[t]his license is not transferrable, and is valid only for use by the individual or agency *to whom it is issued*”) (emphasis added). The license named WRN as the licensee and included WRN’s address—it did not mention Plaintiff or her home address. ECF Nos. 87-1 at 2; 98-4 at 2.

Turning from this authority, Plaintiff makes broad arguments about how agency officials sometimes referred to Plaintiff and Defendant Rodriguez as “license holders” as opposed to mere applicants seeking a license on WRN’s behalf and about how, as a business owner, she has a protected property interest in her business’s licenses. ECF Nos. 96 at 7-8; 121 at 7. Regarding Plaintiff’s concern that agency officials sometimes referred to her or Defendant Rodriguez as the license holders, it is clear that those statements were offered as a shorthand, not an official legal interpretation of the RCW. *See* ECF No. 105-3 (DCYF Supervisor Melissa Fielding testifying that she “wish[ed] [she] wouldn’t have worded it that way” and she mixed up “using application and license interchangeably when they shouldn’t be”). Therefore, Plaintiff’s reliance on the statements of DCYF employees in informal email exchanges is not indicative of WRN’s status as a licensee.

As to Plaintiff’s claims that she had a property interest in WRN’s business license as the owner of that business, those arguments are likewise unfounded. The cases she discusses in support of this proposition are irrelevant because they concern situations where the property owner held the business license in their own name as opposed to the facility’s name. *See* ECF No. 103

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at 15 (collecting cases). Therefore, there is not a genuine dispute as to an issue of material fact regarding whether Plaintiff held a property interest in the children's agency license. *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (“[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment.”). Accordingly, the Court dismisses Plaintiff's motion for summary judgment on her due process claims and grants Defendant's motion for summary judgment on the same.<sup>5</sup>

**B. Equal Protection Claims**

As with Plaintiff's due process claims, her state and federal equal protection claims also fail for the simple fact that the State and its agencies are not subject to suit under Sections 1983, 1985, or 1986 and that those provisions do not independently create a private right of action. However, even if the Court could find a way around these deficiencies, it still could not force the conclusion that WRN's notice process deprived Plaintiff of equal protection.

The parties agree that the equal protection issue presented by Plaintiff is a “class of one” equal protection claim. *See North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008) (“When an equal protection

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5. Because Plaintiff has not shown that she had a property interest at stake, the Court declines to consider her further arguments that she was deprived of meaningful notice regarding the potential loss of the license until after it was already suspended and revoked. ECF No. 96 at 21.

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claim is premised on unique treatment rather than on a classification, the Supreme Court has described it as a ‘class of one’ claim.”) (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curium)); *see also Andersen v. King Cnty.*, 158 Wash.2d 1, 31 (2006). The successful plaintiff asserting a class of one equal protection claim will establish that she was “intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 601 (2008) (quoting *Vill. of Willowbrook*, 528 U.S. at 564).

Plaintiff asserts that the disparate “treatment at issue includes the State’s insistence on giving notice to and only speaking to a male business owner [despite] knowing of a female owner, and continuing to do so even after the female owner has demanded that she be given notice.” ECF No. 106 at 22-23. The Court finds that Plaintiff cannot meet her burden to show that she and Defendant Rodriguez were “similarly situated.” As the undisputed facts show, Plaintiff allowed Defendant Rodriguez to assume full control over the management of WRN during their dissolution proceedings, and did not seek to re-establish any form of managerial control over the facility even after she had received notification of the license suspension. Even prior to their dissolution, however, Plaintiff and Defendant Rodriguez were not similarly situated: Plaintiff oversaw the clinical and medical aspects of running the facility, whereas Defendant Rodriguez managed the more ministerial aspects of running the business, including serving as the registered agent for purposes of receiving service. *See* RCW 4.28.080(9) (allowing service

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on a company's registered agent). Therefore, because of Defendant Rodriguez's status as the administrator of the facility, the State Defendants had a rational basis for affording notice to Defendant Rodriguez rather than Plaintiff, and summary judgment is granted in favor of the State Defendants on this issue.

**C. Propriety of Remand**

Plaintiff, anticipating her federal constitutional claims might be dismissed, asks the Court to remand the remaining claims against the State Defendants—which are all grounded in state law—to the Spokane County Superior Court.<sup>6</sup>ECF No. 106 at 18-19. The State Defendants oppose the motion, contending that significant resources and time have already been committed to the resolution of these claims. ECF No. 119 at 16-17. The Court agrees with Defendants.

Under 28 U.S.C. § 1367(c)(3), a district court may exercise its discretion to either retain or remand supplemental claims to a state court where “the district court has dismissed all claims over which it has original jurisdiction.” *Albingia Versicherungs A.G. v. Schenker Intern. Inc.*, 344 F.3d 931, 936-38 (9th Cir. 2003), *amended on other grounds* at 350 F.3d 916 (“Supplemental jurisdiction is not destroyed by elimination of the basis for original jurisdiction.”). When deciding whether to

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6. Plaintiff's original complaint was filed in Spokane County Superior Court. Defendants removed the action to this Court on the basis of federal question jurisdiction. *See* ECF No. 1 (notice of removal).

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exercise supplemental jurisdiction over pendent state law claims, a district court “should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Generally, “in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.” *Id.* at 350, n.7. However, the interests of judicial economy, convenience, fairness, and comity are sometimes best served by retention of jurisdiction in federal court, such as “where the trial date is imminent or the federal court has performed a substantial amount of legal analysis that would need to be repeated by a state court if the case were remanded.” *Miller v. Bay Area Rapid Transit Dist.*, 236 F. Supp. 2d 1110, 1116 (N.D. Cal. 2002). The court may also consider whether the plaintiff engaged in any “manipulative tactics” in deciding whether to remand is warranted. *See Baddie v. Berkeley Farms*, 64 F.3d 487, 490-91 (9th Cir. 1995) (differentiating between manipulation and a “straight-forward tactical decision”).

At this time, it does not seem to the Court that remand is the most expeditious or fair way to resolve Plaintiff’s remaining state law claims against the State Defendants. This action has been pending before this Court since June 16, 2022. *See* ECF No. 1. The Court has resolved multiple discovery issues regarding the scope of discovery against the State and its agencies. *See, e.g.*, ECF Nos. 36 (granting State Defendants’ motion for a protective order); 52 (limiting the scope of discovery regarding the

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deposition of DCYF's 30(b)(6) representative); 69 at 4 (reconsidering a prior discovery issue involving the State's 30(b)(6) deponent at a teleconference); 79 (teleconference discussion regarding 30(b)(6) witness deposition).

The state law claims against the State Defendants have been briefed on the merits, are ripe for decision, and a decision at this stage could definitively resolve the case as against the State Defendants. Remanding would put the superior court in the uncomfortable position of assuming a case that has already been extensively litigated as well as reviewing the extensive background giving rise to these claims, thereby causing undue delay and prejudice to the State Defendants. Further, as made clear below, the pendent state law claims do not present the kinds of "novel or complex issue(s) of state law" that might otherwise compel the Court to stay its hand in resolving a dispositive motion—instead, as detailed further below, they concern the application of basic, settled principles of contract and tort law. 28 U.S.C. 1367(c)(1). Because remand would only have the effect of delaying the inevitable at this stage, the Court declines to refrain from continuing to exercise supplemental jurisdiction over Plaintiff's state law claims against the State Defendants.

**D. Breach of Contract**

Plaintiff asserts by amended complaint that Defendants are in breach of contract. ECF No. 58 at 46, ¶¶ 3.5-3.6. Specifically, she claims that the license itself is a contract between herself and DCYF. ECF No. 106 at 24. According to Plaintiff, she and the State had an agreement where

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the State would provide a three-year license in exchange for Plaintiff creating a viable business and facility capable of housing clients. *Id.* at 24-25.

In response to the State's concerns that WRN, not Plaintiff, is the named party on the contract, Plaintiff argues that there was a "deal between she and the State" and that, even if she was not named, "she was the direct third party beneficiary of the [contract] benefits, and she can enforce that license 'contract' language to the same extent as the named parties can enforce it." *Id.* at 27.

To establish a breach of contract, plaintiff must show "(1) a duty imposed by the contract (2) was breached, with (3) damages proximately caused by the breach." *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wash. App. 707, 712 (1995). Even if the Court agreed with Plaintiff that the license was a contract, Plaintiff cannot show that she is the party to said contract because, as previously discussed, the license was held by WRN. Plaintiff's argument in the alternative—that she is a third-party beneficiary—is similarly tenuous. To create a third-party beneficiary, the contracting parties must intend that the promisor will assume a "direct obligation" to the claimed beneficiary at the time they enter the contract. *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wash.2d 96, 99 (1986). "The test of intent is an objective one: whether performance under the contract would necessarily and directly benefit the third party." *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wash. App. 192, 196 (2002) (citing *Postlewait*, 106 Wash.2d at 99). "Merely incidental, indirect or inconsequential

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benefits to a third party are insufficient to demonstrate an intent to create a third-party beneficiary contract.” *Id.* (citing *Del Guzzi Constr. Co., Inc. v. Global Nw. Ltd., Inc.*, 105 Wash.2d 878, 885 (1986)). Here, there is no objective evidence suggesting that DCYF and WRN intended to create a third-party beneficiary in Plaintiff. The license does not mention Plaintiff and in fact explicitly provides that its use is intended only for the “agency to whom it is issued.” ECF No. 89-1 at 2.

Finally, even if the license is a contract to which Plaintiff is a third-party beneficiary, Plaintiff is unable to establish breach. By Plaintiff’s own admission, DCYF was authorized to suspend or revoke the license for “due cause.” ECF No. 106 at 26 (citing ECF No. 98 at ¶ 20). In this instance, DCYF documented over 55 instances resulting in founded or valid findings of neglect and manipulation of medical records. ECF No. 108 at 4, ¶ 4. DCYF properly served and noticed the registered agent in suspending and revoking the license. Accordingly, Plaintiff has not stated a cognizable claim for breach of contract.

**E. Constructive Fraud / Fraudulent Concealment**

Plaintiff alleges that the State Defendants engaged in constructive fraud by concealing their collusion with Defendant Rodriguez to remove Plaintiff’s rights, removing Plaintiff from the license application, not responding to complaints against WRN, making a threat to suspend WRN’s license in 2018 without notice to Plaintiff, suspending and revoking the license itself, and negotiating an agreement with Defendant Rodriguez “to

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indefinitely terminate Gardner’s licensing right.” ECF No. 58 at 47, ¶ 3.8. Plaintiff further alleges that these acts were made with interested or sinister motive “because of gender discrimination.” *Id.* at 48, ¶ 3.12.

“Constructive fraud is conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud.” *Hunter v. Ferebauer*, 980 F. Supp. 2d 1251, 1265 (quoting *Green v. McAllister*, 103 Wash. App. 452, 468 (2000) (internal quotations and brackets omitted)). To state a claim for constructive fraud, a plaintiff must establish a “failure to perform an obligation” as well as “an interested or sinister motive and fiduciary or quasi-fiduciary relationship between the parties.” *Singleton v. Nationwide Ins. Co. of America*, C20-5688 BHS, 2020 WL 6287124, at \*2 (W.D. Wash. Oct. 27, 2020) (cleaned up).

The elements of constructive fraud are not satisfied in this case. At the outset, it is unclear what sort of obligation DCYF owed to Plaintiff. Plaintiff asserts that the agency was required to inform her of ongoing violations so she could obtain a change of the stipulated order designating Defendant Rodriguez as the chief administrator/executive of WRN and rectify matters before the license suspension. However, once Plaintiff agreed that she would allow Defendant Rodriguez to assume the full responsibilities of managing the business while also agreeing that she would not maintain contact with Defendant or set foot onto the property, she all but forfeited her right to know whether the facility’s license remained in good status or her name appeared on the application for license renewal: DCYF

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was only required to notify the registered agent of the suspension and ultimate revocation. *See* RCW 4.28.080(9). There is simply no authority supporting the proposition that DCYF is required to serve each member of an LLC regarding license suspension or revocation, much less inform members of the mere threat of license suspension. Further, Plaintiff has not shown that DCYF owed her a fiduciary duty. *See Annechino v. Worthy*, 162 Wash. App. 138, 143 (2011) (“As a general rule, participants in a business transaction deal at an arm’s length and do not enter into a fiduciary relationship.”). Finally, as to DCYF’s alleged sinister motive, Plaintiff’s allegations of gender discrimination are specious. DCYF revoked WRN’s license because of its extensive violations of licensing requirements, not because of Plaintiff’s gender. Nor is it apparent, once again, that DCYF’s failure to provide Plaintiff with notice of the suspension and revocation was motivated by anything other than compliance with the statutorily-prescribed method for service. Plaintiff has not alleged a single instance of DCYF—or any agency, for that matter—mentioning her gender.

Fraudulent concealment, relatedly, “is a species of fraud.” *Tucker v. BMW of N. America*, 2020 WL 5701844 at \*3 (W.D. Wash. Sept. 24, 2020) (quoting *Liebergessell v. Evans*, 93 Wash.2d 881, 893 (1980) (quotation marks omitted)). To establish fraudulent concealment, “the plaintiff may either affirmatively plead and prove the nine elements of fraud or simply show that the defendant breached an affirmative duty to disclose a material fact.” *Id.* (quoting *Schreiner Farms, Inc. v. Am. Tower*, 173 Wash. App 154, 163 (2013)). The nine elements of fraud are:

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(1) [R]epresentation of an existing fact, (2) materiality of the fact, (3) falsity of the fact, (4) the speaker's knowledge of the falsity of the fact, (5) the speaker's intent that the fact should be acted on by the person to whom the fact was represented, (6) ignorance of the fact's falsity on the part of the person to whom it is represented, (7) reliance on the truth of the factual representation, (8) the right of the person to rely on the factual representation, and (9) the person's consequent damage from the false factual representation.

*Angelo v. Angelo*, 142 Wash. App. 622, 643 (2008) (citing *Sigman v. Stevens-Norton, Inc.*, 70 Wash.2d 915, 920 (1967)).

Plaintiff focuses on these nine elements of fraud. See ECF No. 108 at 6, ¶ 9. As to the first element, she claims that WRN and Defendant Rodriguez “made representations of existing fact to me, which was that my work towards creating [WRN] would result in a license revocable only based upon due cause created by my actions as an applicant owner of that business.” *Id.* Plaintiff has not introduced an iota of evidence that WRN could only suspend the license based upon Plaintiff's specific actions or inactions. To the contrary, the statutory scheme gives DCYF authority to suspend or revoke a license where “necessary to protect the public health, safety, or welfare.” See ECF No. 89-2 at 5 (citing RCW 43 .20A.205(2)(b); 74.15.130(1); WAC 110-145-1390). The parties did not identify any authority supporting Plaintiff's general claim

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that the agency must identify “due cause” for each member of an LLC supporting a facility’s license revocation. Accordingly, Plaintiff’s claims for constructive fraud and fraudulent concealment fail.

**F. Intentional Infliction of Emotional Distress & Outrage**

Plaintiff also presents claims for intentional infliction of emotional distress and outrage. ECF No. 58 at 49-50, ¶¶ 3.14-3.16. The Court evaluates both claims together, as outrage is one element of an intentional infliction of emotional distress claim.

To state a claim for intentional infliction of emotional distress, a plaintiff must prove “(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.” *Trujillo v. Nw. Trustee Servs.*, 183 Wash.2d 820, 840 (2015) (quotations and citations omitted). The elements of a claim for intentional infliction of emotional distress are generally ones of fact reserved for a jury. *Id.*; *see also Repin v. State*, 198 Wash. App. 243, 266 (2017). However, courts “have considered themselves gatekeepers for purposes of allowing a jury to decide [such] claims” and “render[] an initial screening to determine whether the defendant’s conduct and mental state, together with the plaintiff’s mental distress, rise to the level necessary to make out a prima facie case.” *Repin*, 198 Wash. App. at 266; *see also Robel v. Roundup Corp.*, 148 Wash.2d 35, 51 (2002) (explaining that the three elements only go to the jury after the court

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“determines if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability”) (quotations and citations omitted). Notably, the standard of outrageousness is “extremely high.” *Repin*, 198 Wash. App. at 267. To constitute outrage, the conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Spicer v. Patnode*, 9 Wash. App. 2d 283, 292 (2019) (quoting *Reyes v. Yakima Health Dist.*, 191 Wash.2d 79, 91 (2018)). Further, “liability may not be imposed for mere insults, indignities, threats annoyances, petty oppressions, or other trivialities.” *Id.* at 296.

Plaintiff avers that reasonable minds could differ as to the outrageousness of the State’s actions. ECF No. 106 at 31. Specifically, she contends that “[t]he State intentionally ignored a female business owner, collaborated with, accommodated and joked with, [and] supported a male owner in his divorce against her, checked in with him on ‘how court went,’ gave him strategies to use against Gardner in her divorce, and destroyed her business.” *Id.* She further alleges that the State withheld from her the bad conduct of Defendant Rodriguez and allowed him to enter into a settlement to “relinquish her license and business entirely” in exchange for receiving permission to continue to run his facilities for vulnerable adults. *Id.* at 31-32.

Whether State employees were aware of or somehow interested in the details of the parties’ divorce is irrelevant. As to Plaintiff’s other allegations that the State

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“ignored her” and “destroyed her business” the Court has already found that those actions were lawful and within reason given the nature and number of the findings against the facility. As to Plaintiff’s complaint that the terms of the settlement were unfair, the Stevens County Superior Court specifically ruled that Plaintiff was not to be mentioned in that settlement, nor was Plaintiff a party to that settlement agreement. Indeed, the settlement has no effect on Plaintiff’s legal rights. Accordingly, reasonable minds would be required to conclude that the State Defendants’ actions were not sufficiently outrageous to merit a jury trial on those claims. Accordingly, the Court grants the State Defendants’ motion for summary judgment and dismisses all claims against the State and its agencies with prejudice.

### **III. Motion for Summary Judgment: Defendant Rodriguez**

The only remaining claims are those against Defendant Rodriguez. The State Defendants, whom Plaintiff lobbied various federal constitutional claims against, have all been dismissed from this action. Defendant Rodriguez, the sole remaining defendant, is a non-diverse party facing only state law claims. Accordingly, the Court declines to exercise supplemental jurisdiction to resolve Defendant Rodriguez’s motion for summary judgment. *See* 28 U.S.C. § 1367(c)(3). Further, the same concerns about convenience do not present with respect to Defendant Rodriguez as they did with the State Defendants’ claims because Defendant Rodriguez’s motion did not address Plaintiff’s state law claims on their substantive merits, but instead

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argued the Court was precluded from evaluating the claims because, for instance, of problems with standing or collateral estoppel. Defendant Rodriguez's motion for summary judgment is therefore denied and Defendant Rodriguez is dismissed from this action without prejudice.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

1. The State Defendants' Motion for Summary Judgment (ECF No. 84) is **GRANTED**, and Plaintiff's Motion for Summary Judgment (ECF No. 96) is **DENIED**. All claims against the State and its agencies are **DISMISSED with prejudice**.
2. The Court declines to reach Defendant Rodriguez's Motion for Summary Judgment (ECF No. 92) as it lacks supplemental jurisdiction over the remaining claims. This case is hereby **REMANDED** to Spokane County Superior Court for all further proceedings concerning the state law claims against Defendant Rodriguez (former Spokane County Superior Court No. 19-2-03497-32).

The District Court Executive is directed to enter this Order and Judgment for State Defendants, furnish copies to counsel, mail a certified copy of this Order to the Clerk of the Spokane County Superior Court, and **CLOSE** the file.

DATED March 28, 2024.

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

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**APPENDIX C — JUDGMENT OF THE UNITED  
STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF WASHINGTON, FILED MARCH 28, 2024**

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WASHINGTON

Civil Action No. 2:22-CV-0144-TOR

PENNY GARDNER,  
(F/K/A PENNY RODRIGUEZ),

*Plaintiff,*

v.

ISRAEL RODRIGUEZ AND  
STATE OF WASHINGTON, *et al.*,

*Defendants.*

Filed March 28, 2024

**JUDGMENT IN A CIVIL ACTION**

The court has ordered that (*check one*):

☐ the plaintiff (*name*) \_\_\_\_\_ recover  
from the defendant (*name*) \_\_\_\_\_ the  
amount of \_\_\_\_\_ dollars  
(\$ \_\_\_\_), which includes prejudgment interest at the rate  
of \_\_\_\_%, plus post judgment interest at the rate of \_\_\_\_%  
per annum, along with costs.

*Appendix C*

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (*name*) \_\_\_\_\_ recover costs from the plaintiff (*name*) \_\_\_\_\_.

☒ other: The State Defendants' Motion for Summary Judgment (ECF No. 84) is GRANTED, and Plaintiff's Motion for Summary Judgment (ECF No. 96) is DENIED. All claims against the State and its agencies are DISMISSED with prejudice. The Court declines to reach Defendant Rodriguez's Motion for Summary Judgment (ECF No. 92) as it lacks supplemental jurisdiction over the remaining claims. This matter is REMANDED to Spokane County Superior Court for all further proceedings on the state law claims against Defendant Rodriguez.

This action was (*check one*):

☐ tried by a jury with Judge \_\_\_\_\_ presiding, and the jury has rendered a verdict.

☐ tried by Judge \_\_\_\_\_ without a jury and the above decision was reached.

☒ decided by Judge THOMAS O. RICE on the parties' cross-motions for summary judgment (ECF Nos. 84, 96).

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Date: March 28, 2024

*CLERK OF COURT*

SEAN F. McAVOY

*s/ B. Fortenberry*  
*(By) Deputy Clerk*

B. Fortenberry

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**APPENDIX D — ORDER OF THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT,  
FILED JUNE 2, 2026**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 24-2418  
D.C.No. 2:22-cv-00144-TOR  
Eastern District of Washington, Spokane

PENNY GARDNER, FORMERLY KNOWN AS  
PENNY RODRIGUEZ,

*Plaintiff-Appellant,*

v.

ISRAEL RODRIGUEZ; STATE OF  
WASHINGTON, ACTING THROUGH AND  
DOING BUSINESS AS THE WASHINGTON  
HEALTH CARE AUTHORITY,

*Defendants-Appellees.*

No. 24-2760  
D.C.No. 2:22-cv-00144-TOR  
Eastern District of Washington, Spokane

PENNY GARDNER,

*Plaintiff-Appellee,*

v.

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*Appendix D*

ISRAEL RODRIGUEZ,

*Defendant-Appellant,*

and

STATE OF WASHINGTON,

*Defendant.*

Filed June 2, 2026

**ORDER**

Before: MURGUIA, Chief Judge, and McKEOWN and KOH, Circuit Judges.

Chief Judge Murguia and Judge Koh have voted to deny the petition for rehearing en banc, and Judge McKeown so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. The petition for rehearing en banc (Dkt. No. 71) is **DENIED**.

**APPENDIX E — MANDATE OF THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH  
CIRCUIT, FILED JUNE 10, 2026**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 24-2418  
D.C.No. 2:22-cv-00144-TOR  
Eastern District of Washington, Spokane

PENNY GARDNER, FORMERLY KNOWN AS  
PENNY RODRIGUEZ,

*Plaintiff-Appellant,*

v.

ISRAEL RODRIGUEZ; STATE OF  
WASHINGTON, ACTING THROUGH AND  
DOING BUSINESS AS THE WASHINGTON  
HEALTH CARE AUTHORITY,

*Defendants-Appellees.*

No. 24-2760  
D.C.No. 2:22-cv-00144-TOR  
Eastern District of Washington, Spokane

PENNY GARDNER,

*Plaintiff-Appellee,*

v.

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*Appendix E*

ISRAEL RODRIGUEZ,

*Defendant-Appellant,*

and

STATE OF WASHINGTON,

*Defendant.*

Filed June 10, 2026

**MANDATE**

The judgment of this Court, entered April 24, 2026, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT