**No. 20-36076**

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**UNITED STATE COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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Christopher Zielinski, *Plaintiff - Appellant*

v.

Service Employees International Union,
Local 503, *et al*., *Defendants-Appellees.*

On Appeal from the United States District Court
for the District of Oregon
No. 6:20-cv-00165-HZ
Honorable Marco A. Hernandez

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# APPELLANT'S REPLY BRIEF

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# I. INTRODUCTION

Appellant Christopher Zielinski's government employer deducted union dues from his wages without his consent. The Union claims Zielinski signed two separate membership cards, in each of which he agreed to automatic deduction of dues from his paychecks by his State employer. But Zielinski signed neither of these cards.[1] In seizing his money, Zielinski's employer acted, pursuant to State statute, at the direction of the union. ER-042—43.

The question on appeal is whether it violates the First and Fourteenth Amendments for a State to require government employers to take wages from their employees at the direction of a union engaged in political speech, without obtaining or verifying any evidence of employee consent. Defendants-Appellees, the State Department of Administrative Services ("DAS") and the union, Service Employees International Union Local 503 ("SEIU"), argue they are absolved of liability under

[1] SEIU claims Zielinski signed a membership card and authorization for deduction of dues on two occasions, once in 2013 and once in 2017. But Zielinski did not sign either membership card. ER-042—43. In fact, since he began his employment in 2009, he has intentionally chosen not to be a member of the union. ER-042. DAS deducted union dues from Zielinski's wages without authorization, based on the union's false representation that he authorized the deductions. *Id*. Zielinski believed paying union dues was a mandatory condition of his job at the Oregon Health Authority, so while he consistently chose not to join the union, he did not question the automatic deductions from his paychecks. ER-042. The deductions started when he began his employment in 2009, and continued unabated until Zielinski started asking questions in 2019. ER-042—043.

the First Amendment because the state law technically requires SEIU to acquire the employee's authorization before instructing DAS to seize the employee's money– whether or not the union *actually* obtains that permission. SEIU Answering Brief 29, 33 ("SEIU Br."); DAS Answering Brief 13 ("DAS Br.").

But, as demonstrated below, a union dues deduction procedural policy which results in compelled political speech is not shielded from constitutional scrutiny simply because government delegates a portion of the procedure to a private party or because a state statute includes a pretextual provision requiring authorization prior to the deductions.

## II. ARGUMENT

Oregon's system places a financially interested party (SEIU) in charge of the State's procedure for dues deduction. The State deducts union dues out of State employee wages when the union instructs it to do so. This policy violates both the First Amendment's prohibition on putting a financially interested party in charge of dues deductions from nonmembers (*Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-02, 303, 308 (1986), and the requirement that a nonmember affirmatively consent to pay before union dues are deducted from his wages (*Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2486 (2018).

### A. ACTIONS TAKEN PURSUANT TO A PROCEDURAL PROCESS ESTABLISHED BY STATE LAW ARE "UNDER COLOR OF LAW."

States are always responsible for the procedural processes they put into place. *Lugar v. Edmondson Oil Co., Inc*., 457 U.S. 922, 941 (1982) ("the procedural scheme created by the statute obviously is the product of state action"). Actions taken pursuant to a procedure the law creates are actions under color of state law, *Id*. A private party, such as a union engages in state action when the law puts the private party in control of a state property seizure procedure. *Id*. at 941. A "procedural scheme created by…statute" is "obviously is the product of state action and properly may be addressed in a section 1983 action." *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (taking up *Janus* on remand ("*Janus II*")) (citing *Lugar*, 457 U.S. at 941); *see also Roberts v. AT&T Mobility, LLC,* 877 F.3d 833, n. 7 (9th Cir. 2017).

SEIU argues the conduct Zielinski challenges was not "under the color of law" because Oregon state policy makes union membership voluntary. SEIU Br. 2, citing *Dale v. Kulongoski*, 894 P.2d 462, 464–65, n. 5 (Or. 1995). But while the State articulates a policy of voluntary membership, State law *requires* DAS to seize employees' wages at SEIU's direction. DAS continues dues deductions until it receives notice from the union that the employee no longer consents to dues deductions. ORS 243.806(7). The result is that, as here, even non-members of a union may be forced to pay money to a union. Zielinski challenges the Oregon Statutes *themselves* – statutes that have proven inadequate to protect his rights to due process and freedom from compelled speech. ER-044 – 46. He does not allege that

SEIU's departure from state law (forgery) caused his harm, rather SEIU's actions and the State's actions *following the law* caused Zielinski's harm. ER-044 – 48. *Lugar*, 457 U.S. 941.

Like any other private organization, SEIU becomes a state actor when two conditions are met: (1) when SEIU exercises a privilege created by the state, and (2) when it is fair to call SEIU a state actor, such as, where the State provides significant aid. *Lugar*, 457 U.S. at 937.

**1. SEIU Exercised a Privilege Created by State Law When It Directed the State to Seize Zielinski's Wages.**

SEIU argues that forgery is not condoned by state policy, and therefore that the forgery of Zielinski's signature is not conduct "under color of law" for purposes of a 42 U.S.C. §1983challenge, even though its ability to profit by the forgery was entirely created by the state law at issue. SEIU Br. 11-13. But the United States Supreme Court has rejected the fallacious reasoning underlying SEIU's assertions by holding that "[w]hile private misuse of a state statute does not describe conduct that can be attributed to the State, *the procedural scheme created by the statute* obviously is the product of state action." *Lugar*, 457 U.S. at 941 (emphasis added). SEIU focuses on the first part of the quotation: since SEIU misused Oregon law by directing the State to take money without employee authorization, SEIU's actions are not attributable to the state. SEIU Br. 14-17. But SEIU ignores the second part: the procedural scheme under which SEIU acted was *obviously* the product of state

action. *Lugar,* 457 U.S. at 941. The State deducts the dues via a State-created system. It is state action.

If it were not for SEIU's special status under ORS 243.806, SEIU would not have been able to seize Zielinski's money. If SEIU were in a similar position to most truly private entities, SEIU would be forced to seek payment for goods or services by first entering a contract and then by convincing the customer to pay. Even when a contract contains irrevocability provisions, a customer can typically refuse to send payment or notify his or her bank to stop payment. The customer retains the ability to at least dispute a charge. But under Oregon law, SEIU gets paid out of a State employee's paychecks automatically, before the employee even sees the money. Zielinski cannot get these payments stopped by appealing to his employer – he must convince SEIU to contact the employer before the employer will stop the payments. ORS 243.806. It is this special system established by Oregon law. This procedural scheme allowing for automatic deduction of dues has been "*created by the statute*" and it "obviously is the product of state action." *Lugar*, 457 U.S. at 941 (emphasis added).

It is this procedural scheme (ORS 243.806) that is the subject of Zielinski's First and Fourteenth Amendment claims under §1983. The fact that SEIU's actions were also allegedly criminal, fraudulent and a misuse of the authority granted to

SEIU under the law ought not deprive Zielinski of his ability to exercise his First Amendment rights.

SEIU argues based on *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), that the State's involvement here is merely ministerial: "State's "ministerial processing of payroll deductions" under law permitting only employee-authorized deductions "does not render [the State] and [the Union] joint actors." SEIU Br. 20-21, quoting *Belgau*, 975 F.3d at 947-48. In *Belgau*, however, this Court held that a membership agreement between the plaintiff-employees and the union justified post-membership nonmember deductions pursuant to a provision in that agreement. Consequently, this Court concluded the employees were not entitled to *Janus'* protections because they had joined the union. *Belgau*, 975 F.3d at 944. But here, there was *no* agreement to pay dues and Zielinski *never* became a union member. The State has not merely implemented a third-party agreement or administer funds: it has set up a system that allows SIEU to take what it wants. *See* ORS 243.806(2) ("A public employer shall deduct the dues, fees and any other deduction authorized by a public employee under this section and remit payment to the designated organization or entity."). The Statute does not provide a mechanism for certifying, verifying, or otherwise confirming employee authorization. Since Zielinski did not consent or authorize the seizure of his wages, the source of his constitutional deprivation could not have been an agreement distinguishing his case from *Belgau*. *Belgau*, 975 F.3d at 944.

Similarly, SEIU's arguments regarding *misuse* of state law are unpersuasive. Contrary to SEIU's argument and the District Court's conclusion, the harm is not the *forgery* of an authorization agreement. ER-010; SEIU Br. 14. The harm is the deduction of Zielinski's money without his consent. This deduction is the direct result of the Statute's delegation of control to the union, and the State's deduction from Zielinski's wages. The state action is not triggered by SEIU's forgery; it is triggered by SEIU making use of the privilege the State created by which the State deducts union dues from non-union employees' wages so long as SEIU instructs it to do so. Even now, with allegations of forgery outstanding, if SEIU placed Zielinski's name on the list of employees from whom DAS is instructed to deduct dues, there is nothing in the statute that would allow DAS to question the list, or to verify authorization. ORS 243.806. DAS Br. 2-3.

In arguing that misuse of a statute is not state action, SEIU relies primarily on three cases: (1) *Collins v. Womancare,* 878 F.2d 1145, 1152 (9th Cir. 1989); (2) *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 553-54 (9th Cir. 1974) (en banc); (3) *Hassett v. Lemay Bank and Trust Co*., 851 F.2d 1127 (8th Cir. 1988). SEIU Br. 16-18. But each of these cases is distinguishable from Zielinski's challenge because Zielinski challenges the statute itself, not merely SEIU's fraud.

In *Collins*, plaintiffs argued that defendants, a private organization, violated California's citizen's arrest statute, resulting in plaintiffs' wrongful arrest. The Court

determined that since the defendants' actions violated the statute, those actions could not reasonably be construed as state action. Unlike the plaintiffs in *Collins*, Zielinski challenges the state law itself. When DAS complies with SEIU's instructions, it follows the letter of the law. ORS 243.806. Zielinski challenges the lack of any procedure to confirm employee consent. ER-045. DAS agrees that they were *required* by law to follow SEIU's instructions. DAS Br. 2-3. The State cannot clothe SEIU with the power to direct *the State's* wage seizures, while simultaneously claiming that SEIU's directions are not state action – and *Collins* provides no support for such a notion.

In *Ouzts v. Maryland Nat. Ins. Co.*, a bail bondsman ignored state law requiring him to obtain a fugitive warrant from a magistrate before making an arrest. 505 F.2d 547 (9th Cir. 1944). Since the bondsman's actions unequivocally violated the procedural requirements of the law, they were not taken under "color of state law." Even if the bondsman represented himself as a police officer, he did so in violation of the law – thus there was no state action. *Id*. at 554-555.

SEIU claims that an *unauthorized* dues deduction is similarly a violation of the law, and thus not state action. SEIU Br. 16. But, practically speaking, Oregon's dues deduction process consists of two things: SEIU instructing and the State doing what the union instructs. ORS 243.806. All SEIU has to do to obtain Employee's money is to tell DAS that Zielinski has authorized deductions (provide a list). SEIU

Br. 23. Under the reasoning in *Ouzts*, from the state's perspective, all procedural requirements were fulfilled – thus the conduct of which Zielinski complains was under color of state law.

SEIU also relies on *Hassett v. Lemay Bank and Trust Co*., 851 F.2d 1127 (1988), an Eight Circuit case. Again, the plaintiff argued that the requirements of the replevin statute had not been fulfilled – thus the statute was misused. The challenge was no to the statute itself. *Hassett*, 851 F.2d at 1130. But here, Zielinski challenges the statutory procedure itself. ER-045.

Zielinski does not allege that the union's forgery is state action. Rather, the state action is the State's policy of deducting union dues from its employees' wages pursuant to a union's command. This procedural policy is what Zielinski challenges, and it is a policy that the State *followed* to the letter when it deducted dues from Zielinski's wages pursuant to SEIU's instructions.[2]

[2] Analogously, a policy that is facially neutral, but capable of application in a content-based manner, may be "under color of law." *E.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759-60 (a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech.) Similarly here, the fact that a law, on its face, requires "authorization" prior to dues deductions cannot save a State from liability when it *actually* deducts union dues from employees' wages without authorization – which is undisputedly what happened in this case.

The state is always responsible for the procedural processes the law puts into place. *Lugar*, 457 U.S. at 941. Where, as here, the process is entirely within the control of SEIU as a result of *state law*, there is obviously state action.

**2. It is Fair to Call SEIU A State Actor When It Controls and Compels Payments from Zielinski's Wages.**

Before a private party may be held liable for its use of a state-created procedure, it must be fair to call the private entity a state actor. This fairness can be demonstrated when, for instance, the private party has acted together with the state, or has obtained significant aid from the state, or because private party's conduct is otherwise chargeable to the state. *Lugar,* 457 U.S. at 937.

Contrary to SEIU's arguments, it is fair to call SEIU a state actor here.[3] SEIU claims that unions are "private actors," citing *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009). SEIU Br. 20. But SEIU does nothing to counter Zielinski's argument that SEIU becomes a state actor for purposes of §1983 when it takes advantage of the special status granted to it under state law. It is fair to categorize SEIU as a state actor for purposes of union dues deductions since SEIU in fact *directs* DAS, thus making full use of DAS' services in collecting money from employees.

[3] The District Court did not reach discussion of the second prong. ER-010 (Opin. & Ord. 8 at n.1).

This Court uses four tests to determine whether a private party can be treated as a "state actor" under *Lugar*: "(1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (internal quotations, citation omitted).[4]

**a.** SEIU argues that it cannot be a state actor under the public function test because it does not engage in a traditional, exclusive government function; it merely gives the government a list of employees who have authorized deductions. SEIU Br. at 22. In so arguing, SEIU suggests that its roll is merely clerical. *Id*. But the law also provides: "a public employer shall rely on list" provided by the union to make the deductions and "remit payment to the labor organization." ORS 243.806(7). DAS is required to rely on the list put together by SEIU – no provision of the statutory scheme allows DAS to verify, or even inquire into, whether an employee authorization is authentic. SEIU admits as much, pointing out that this is a feature of the collective bargaining scheme under Oregon law. *Id*.

But the government actually takes the money, and the money taken is for the specific purpose political speech. Under these circumstances, obtaining authorization becomes the government's responsibility. In other words, when it is

[4] The public function test and the joint action test "largely subsume" the other two, so they will be discussed in more detail. *Naoko Ohno v. Yuko Yasuma*, 723 F.3d at 995 & n.13.

*the state* that takes the money, it is the 'traditional and exclusive' function of government to get the authorization. *See also* Section B, *infra*.) The burden to show adequate consent is always on the government. *Janus*, 138 S.Ct. at 2486; *Moran v Burbine*, 475 U.S. 412, 450 (1986)

SEIU claims that no First Amendment waiver need be obtained from an employee before dues are deducted for union political speech because, in *Belgau*, this Court held that *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Belgau*, 975 F.3d at 952. SEIU Br. 24. But here, it is undisputed Mr. Zielinski was *never* a union member and *never* agreed to pay union dues or fees.

SEIU goes on to cite *Belgau* for the proposition that:

> where state law directs the State to process dues deductions based on certification from a union that an employee has validly authorized those deductions, "'without inquiry into the merits' of the [dues deduction] agreement," the State's "'mandatory indifference to the underlying merits' of the authorization 'refutes any characterization' of [the Union] as a joint actor with [the State]." *Belgau*, 975 F.3d at 948 (quoting *Ohno*, 723 F.3d at 997).

SEIU Br. 25-26. SEIU implies that a refusal to make "inquiry into the merits" of a dues authorization is somehow the same as a refusal to inquire *whether the agreement exists* in the first place. *Belgau* did not address whether a state can, should, or is required to verify *the existence* of an authorization. SEIU conveniently ignores the qualification "pursuant to a voluntary agreement." *See Belgau*, 975 F.3d

at 952. In *Belgau*, this Court found that the employees agreed to authorize dues deductions. Zielinski did not. He was a non-member, and as such, the State owes him every duty recognized by the Court in *Janus*. *Janus*, 138 S.Ct. at 2486.

**b.** SEIU argues that there is no joint action or "symbiotic relationship" here between SEIU and the State because "[the state] received no benefits as a passthrough for the dues collection. The state remitted the total amount to [the Union] and kept nothing for itself," and because "the parties opposed one another at the collective bargaining table." SEIU Br. at 28-29, citing *Belgau,* 975 F.3d at 948. But the State clearly receives benefit from the procedural system it has implemented: it relieves itself of any time or expense associated with obtaining verification of employee consent or authorization of dues deductions. DAS Br. 2-3. Under the CBA, the union indemnifies the State for liability for payroll deductions. ER-029-033. More importantly, SEIU benefits enormously because without the State making these deductions, SEIU would have "significant difficulties" collecting its own dues. *Ysursa v. Pocatello Educ. Ass'n*, 55 U.S. 353, 359 (2009). These "significant difficulties" are overcome by the State's "significant assistance", *Ohno*, 723 F.3d at 996 – exactly the kind of "assistance" required for state action. See *Lugar*, 457 U. S. at 933.

## B. SEIU AND THE STATE DEPRIVED ZIELINSKI OF HIS FIRST AND FOURTEENTH AMENDMENT RIGHTS.

While not every deduction from a public employees' paycheck raises a potential constitutional issue, a deduction that goes directly into the coffer of a political organization such as SEIU unquestionably does.[5] The First Amendment's protections against compelled speech requires that payments to a union may not be "deducted from a nonmember's wages…unless the employee affirmatively consents to pay." *Janus*, 138 S.Ct. at 2486. Further, this case raises questions of adequate procedural due process because a State cannot establish a procedure for deducting union dues from nonmembers that is "entirely controlled by [a] union, which is an interested party." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-02, 303, 308 (1986).

Zielinski was never a union member, thus he must affirmatively consent to pay dues to the union *before* such payment may be collected. The State's actions have deprived Mr. Zielinski of his right to *not support* political speech by a union. *Janus*, 138 S.Ct. at 2486. Defendants make much of the fact that the enabling statute contains the pro forma requirement of employee authorization, and that Oregon law

[5] The First Amendment also provides a logical limit on the type of actions that might be brought against a payroll deduction, since only those involving political speech are implicated. Not every payroll deduction raises such an issue, and this will, in and of itself, prevent any opening of the floodgate to challenges to all types of wage deductions as SEIU foretells. SEIU Br. 33.

presumes union membership to be voluntary. SEIU Br. 2; DAS Br. 2. But, in fact, the statute's nod to authorization is meaningless. ORS 243.806.

SEIU cannot distinguish Zielinski's claims from the claims made by the plaintiff-appellant in *Janus*. SEIU Br. 26. In both cases, the employee did not consent to pay money to the union, but was nonetheless forced to pay money to the union under the state's statutory dues deduction scheme. In both cases, employees brought their claims under 42 U.S.C. § 1983 seeking to vindicate their constitutional rights.

The fact that Zielinski may also have a cause of action for violation of state law prohibiting fraud and unlawful withholding of wages does not destroy his ability to bring constitutional claims, despite SEIU assertions that Zielinski has adequate post-deprivation relief and that therefore, there is no due process violation here. SEIU Br. 33.[6] But the post-deprivation relief available to Zielinski is not adequate because compelled political speech is irreparable harm. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012).

State-law claims do not provide the same relief as plaintiffs would receive under 42 U.S.C. §1983, which provides for attorney fees (42 U.S.C. § 1988), and

[6] SEIU argues that the state is not required to protect against random acts by private actors, citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 195 (1989). SEIU Br. 30. But, since SEIU is a state actor with regard to dues deductions, *DeShaney* is inapplicable.

provides a means to enforce civil rights. In fact, part of the statutory scheme challenged goes so far as to intentionally limit the available remedies: "A public employer that makes unauthorized deductions or a labor organization that receives payment in violation of the requirements of this section is liable to the public employee for actual damages in an amount *not to exceed* the amount of the unauthorized deductions." ORS 243.806(10)(b) (emphasis added). Under this scheme, no nominal damages are available to an employee whose rights are violated (to say nothing of punitive damages, injunctive relief, and attorney fees – all of which are important components of any civil rights litigation).[7]

Under SEIU's reasoning, individual state employees have less protection for their rights than they had before *Janus*. At least *pre-Janus* under *Abood* and its progeny, an employee could be forced to pay money only for so-called representational expenses. *Janus,* 138 S.Ct. at 2463, citing *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 233 (1977). But here, the government collects full dues—including those used for undisputedly political speech—from Zielinski without a shred of evidence, other than the word of a self-interested union, that he clearly and

[7] Even where available, state-law claims do not provide the same relief a plaintiff would receive under 42 U.S.C. §1983, which was created to provide a mechanism for vindicating important civil rights: "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe v. Pape*, 365 U.S. 167, 196 (1961).

affirmatively consented to pay. The government simply relies on unions' assertions that individuals are members. Nothing in the State's procedure requires that SEIU provide to DAS proof that an employee had "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" *Patterson v. Illinois*, 487 U.S. 285, 292 (1988), or whether the employee's ostensible consent was freely given. *Cf., e.g., D.H. Overmyer Co. v. Frick Co*., 405 U.S. 174, 185–86 (1972); *Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993). DAS is not required to verify an authorization, but if it *fails* to take a deduction for the benefit of SEIU, it may be liable to SEIU. ORS 243.806(9): "[i]f …the employer fails to make an authorized deduction and remit payment to the labor organization, the public employer is liable to the labor organization … for the full amount that the employer failed to deduct and remit to the labor organization." On the other hand, the statute makes no provision for DAS to take any action to verify an authorization, even if a mistake were discovered.[8]

[8] DAS argues cryptically "unless an employee complains, the validity of an employee's authorization is ordinarily a matter for the union and the employee…" DAS Br. 3. But DAS does not explain how an employees' complaint would lead to any action by the state employer – indeed the statute provides motivation for the state employer to take the employee's money if in doubt (since it will be liable to the union if it does not do so), ORS 243.806: If "the employer fails to make an authorized deduction and remit payment to the labor organization, the public employer is liable to the labor organization, without recourse against the employee who authorized the deduction, for the full amount that the employer failed to deduct and remit to the labor organization."

## C. ZIELINSKI HAS STANDING TO SEEK PROSPECTIVE RELIEF BECAUSE THE UNION RETAINS FULL AUTHORITY – AND ABILITY – TO REINSTATE DUES DEDUCTIONS.

### 1. Zielinski Has Standing to Seek Injunctive And Declaratory Relief.

A party has standing when he has "a personal interest" in an "actual controversy." *Davis v. Federal Election Com'n*, 554 U.S. 724, 732-33 (2008). He must demonstrate an "injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged behavior, and likely to be redressed by a favorable ruling." *Id*.

Appellees assert the injury Zielinski seeks to redress is not "actual or imminent" because the deductions have ended. SEIU Br. 6, 37; DAS Br. 5-13. SEIU also argues that it has taken steps to eliminate the unauthorized taking of Zielinski's money in the future. SEIU Br. 8-9; ER 19.

When Zielinski filed this case, he had suffered the unauthorized seizure of his wages for years. ER-042. The statutory system under which these seizures occurred remained, and remains, in place, and all relevant circumstances remain unchanged: Zielinski works the same job for the same employer, gets paid in the same manner, and remains in the same bargaining unit he was in when he brought this suit. SEIU

remains capable of instructing the State to deduct dues from Zielinski's wages at any time.[9]

SEIU continues to assert the validity of the authorization cards, and continues to assert the constitutionality of the wage-deduction process from start to finish. Under these circumstances, Zielinski remains under continuing threat that his wages will be taken again without his consent. Should this occur even one time, Zielinski will have been irreparably injured. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012). Further, the threat and constant fear that it might occur is itself a concrete injury, especially when it involves First Amendment rights. "We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise." *Walker v. City of Birmingham*, 388 U.S. 307, 344 (1967) (justice Brennan, dissenting). *See also Reed v. Town of Gilbert*, 707 F.3d 1057, 1066-67 (9th Cir. 2013) (amended ordinance continued to impede the plaintiff's ability to post a sign). Similarly here, Mr. Zielinski has every right to

[9] The continued threat to Zielinski is amply illustrated by the growing number of cases of forgery alleged against the same union since the beginning of 2020. *See e.g., Wright v. SEIU Local 503, et al,* No. 20-35878 (complaint filed March 30, 2020); *Schiewe v. SEIU Local 503*, *et al,* 20-35882 (complaint filed March 30, 2020); *Jarrett v. SEIU Local 503 et al*, 21-35133 (compliant filed June 30, 2020); *Trees v. SEIU Local 503, et al*, U.S. Dist. Or. No. 6:21-cv-00468-MK (complaint filed March 29, 2021).

remain employed by the State, and such employment may not be predicated on his political expression (or lack thereof). A provision that "threatens to chill the speech of third parties not before the court" may be challenged under the overbreadth doctrine. *Ancheta v. Watada*, 135 F.Supp.2d 1114, 1124 (D. Haw. 2001). The State cannot require employees to waive their First Amendment rights as a condition of employment (*Janus*, 138 S.Ct. at 2486). Being forced to participate in political speech with which one disagrees would deter any reasonable person from wishing to retain State employment.

SEIU claims to have "flagged" plaintiff's name (ER-019), and implies that this will prevent any future unauthorized deductions. But even if there were some way to verify the effectiveness of this new system, SEIU's assertions do not destroy Zielinski's standing. SEIU's claim that it has changed its policy to "flag" Zielinski's name is not in any way enforceable by Zielinski or the State. It is simply SEIU's unadorned statement. Second, even if it could be taken at face value, the "change in policy" SEIU claims to have instituted does nothing to protect Zielinski from what occurred previously. His money was taken without authorization while SEIU claimed that a false authorization was adequate to justify its actions. ER-043. Notably, the claim that "any future authorization in his name will be reviewed by legal counsel" is cold comfort since each of the *two* false authorizations were reviewed by legal counsel and SEIU still asserts their validity. *Id*. ER-026.

Appellees cite to *Slayman v. FedEx Ground Package System, Inc*., 765 F.3d 1033 (9th Cir. 2014). SEIU Br. 37. But in *Slayman*, the court found no standing because the named class representatives no longer worked for the relevant company and thus would be unaffected by prospective relief. *Id*. at 1048. Here, Zielinski continues to work for the government, and will be directly affected by prospective relief since as long as he retains his employment, and the dues deduction procedure remains unchanged, he may again have dues deducted at SEIU's whim.

SEIU cites to *Oregon State Police Officers Ass'n v. Peterson*, 979 F.2d 776 (9th Cir. 1992). SEIU Br. 38. But this case is also distinguishable. In *Peterson,* the Union argued it "expects to have occasion in the future" to sue on behalf of members. This Court rightly determined that a possible future lawsuit would be insufficient confer standing. *Id*. at 777-78. But far from a mere possible future injury, Zielinski has actually experienced the unauthorized deduction of union dues from his wages.

Were Zielinski to be forced to pay again, even if it were deductions from only one paycheck, he will have suffered irreparable harm. *See Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984). Zielinski has a "concrete interest … in the outcome of the litigation." *Ellis*, 446 U.S. at 442 (a "minute" financial interest sufficient to overcome mootness).

Additionally, this is not a situation where defendants have agreed to a meaningful policy change that renders injunctive relief unnecessary (such as a

verification procedure or mechanism by which DAS could stop dues that are disputed). *See e.g., Uzuegbunam v. Preczewski,* 141 S.Ct. 792, 797 (2021) (parties agreed that claims for injunctive relief were moot when defendant rolled-back challenged policy; nominal damages claims remained). Neither DAS nor SEIU have altered or abolished their dues deduction procedures. The procedure used to deduct union dues from Zielinski's wages unlawfully is still being applied to the bargaining unit to which Zielinski belongs, meaning he is still susceptible to its danger.

A declaratory judgment regarding the enforceability of Oregon's dues deduction system will redress the harm Zielinski continues to suffer. Injunctive relief to safeguard Zielinski's First Amendment rights will prevent the same harm from occurring in the future. This concrete and particularized impact is entirely sufficient to give Zielinski standing, both now, and as of when this lawsuit was filed. *Knox v.*, 567 U.S. at 307 (A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party").

**2. Zielinski's Claims for Prospective Relief Are Not Moot.**

DAS argues that the case is moot since they no longer deduct dues. DAS Br. 8. However, "The voluntary cessation of challenged conduct does not ordinarily render a case moot..." *Knox*, 567 U.S. at 307, (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). The Court reasoned, "[S]ince the union continues to defend the legality of the [] fee, it is not clear why the union would

necessarily refrain from collecting similar fees in the future." *Knox*, 567 U.S. at 307. The same could be said here: just because SEIU voluntarily directed DAS to stop enforcing their policy against Zielinski, there is no reason to think they would not resume the same policy against him in the future. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. at 289. *Knox*, 567 U.S. 308, "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." quoting *Ellis*, 466 U.S. at 442. *See also American Diabetes Association v. United States Department of the Army*, 938 F.3d 1147, 1152 (2019) ("when government asserts mootness based on [a] change [in policy], it still must bear heavy burden of showing that challenged conduct cannot reasonably be expected to start up again.")

As the Third Circuit put it, "Courts should be "skeptical of a claim of mootness when a defendant … assures us that the case is moot because the injury will not recur, yet maintains that its conduct was lawful all along." *Hartnett v. Pennsylvania State Education Association*, 963 F.3d 301, 306 (3rd Cir. 2020). Such an argument would enable a defendant to compel payments against an employees' wishes, and void court intervention by paying off only those who file lawsuits.[10]

Finally, Zielinski's claims are "capable of repetition, but evading review." *Los*

[10] *See Jody Lutter v. JNESO, et al*., 2020 WL 7022621 *3 (U.S. Dist. NJ 2020).

*Angeles v. Lyons*, 461 U.S. 95, 109 (1983), *Fed. Election Comm'n v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 463 (2007). First, "the duration of the challenged action is 'too short' to allow full litigation before it ceases," *Johnson v. Rancho Santiago Cmty Coll. Dist*., 623 F.3d 1011, 1019 (9th Cir. 2010). Litigating this case, as with most types of litigation, takes longer than the duration of deductions. *See Belgau*, 975 F.3d 940, 949. Second, there is a reasonable expectation that the plaintiff could himself "suffer repeated harm" or "'it is certain that other persons similarly situated' will have the same complaint," *Pitts v. Terrible Herbst, Inc*., 653 F.3d 1081, 1089–90 (9th Cir. 2011).

For all of these reasons, Zielinski has standing to make claims for prospective relief, and these claims are not moot or otherwise satisfied by SEIU's empty promises.

## III. CONCLUSION

This Court should reverse the District Court's decision because the State deducted union dues from Appellant Zielinski's wages without obtaining his consent, and because no change in policy has occurred that would better protect Mr. Zielinski going forward should SEIU decide to, once again, instruct the State to take his wages.

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## CERTIFICATE OF COMPLIANCE

I am one of the attorneys of record in this case. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1; it contains 6048 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

May 12, 2021.

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