No. 20-35878

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jodee Wright, *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-00520-MC
Honorable Michael McShane

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Is a First Amendment issue raised when a State agency takes wages from its employees at the direction of a private organization for use in political speech? The union, Service Employees International Union Local 503 ("SEIU"), and the State Department of Administrative Services ("DAS") assert there is no constitutional issue since the union is *supposed* to get the employee's permission before DAS to takes the employee's money – whether or not the union *actually* obtains that permission. SEIU Answering Brief ("SEIU Br.") 16-18; DAS Answering Brief ("DAS Br.") 14.

SEIU alleges Plaintiff-Appellant Jodee Wright ("Appellant" or "Ms. Wright") signed a membership card and authorization for deduction of dues on October 5, 2017. But Ms. Wright did not sign the membership card. ER-0098 – 99. In fact, since she began her employment in 2005, she has intentionally chosen not to be a member of the union. ER-0098. Nonetheless, her employer seized money from her wages at the direction of SEIU, under a statutory system put in place by Oregon law. ER-0100. It is this system that is the subject of this appeal.

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).

SEIU argues, Ms. Wright alleged only misuse or abuse of Oregon law by SEIU, and has not stated a cause of action under 42 U.S.C. § 1983. They claim she merely challenges private action. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 942 (1982). *See* SEIU Br. 14-18. But Wright also challenges the State statute itself as being *procedurally defective*. ER-0101 – 102. Under *Lugar*, the statutory scheme *obviously* is the product of state action. *Lugar,* 457 U.S. at 942. Further, SEIU's actions – its joint participation with the State – in the seizure of Appellants' property are sufficient to characterize SEIU as a "state actor" for purposes of the Fourteenth Amendment. *Id.* ER-0101 – 102.

Under the challenged statute, SEIU tells DAS from whom to deduct union dues. ORS 243.806. The union is supposed to obtain "authorization" from the employee for the deductions. ORS 243.806(2). But SEIU does not always get this authorization, as Ms. Wright's experience shows. The State relies entirely on the Union's claims about authorization in making dues deductions. ORS 243.806(7).

This system is patently flawed since it puts a financially interested party (SEIU) into the position of guardian of employee consent. *Hudson*, 475 U.S. at 308.

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

A government is always responsible for the procedural processes it enacts. *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*. 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 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. SEIU satisfies both conditions because it used Oregon's state-created system for automatic deduction of member dues, and because it is entirely fair to call SEIU a state actor when it directs the State's deductions.

1. SEIU Exercised a Privilege Created by State Law When It Directed the State to Seize Dues from Wright's Wages.

SEIU argues the forgery of Wright's membership card was not an action "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 purports to articulate a policy of voluntary membership, State law *requires* DAS to seize employees' wages at SEIU's direction. DAS continues dues deductions until told to stop by SEIU. 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.

Despite the fact that the State collects dues at SEIU's direction, and despite the fact that SEIU can extract wages from the Plaintiff only by virtue of the State's intervention, SEIU asserts that the State does not provide "significant assistance" to SEIU. Under this rationale, ironically, SEIU's *misuse* of the law protects them from liability under the First Amendment. SEIU Br. 15-16. Since the State has not participated the forgery (and state law in fact condemns forgery), SEIU's forgery is not state action. *Id.* 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).

DAS deducts dues at SEIU's direction as it is required to do under state law. As DAS confirms in its answering brief, DAS continues dues deductions until it

receives notice from the union that the employee no longer consents to dues deductions. DAS Br. 2; ORS 243.806(7). This is a "procedural scheme created by…statute" and it is "obviously is the product of state action and properly may be addressed in a section 1983 action." *Janus II*, 942 F.3d at 358 (citing *Lugar*, 457 U.S. at 941); *see also Roberts,* 877 F.3d 833, n. 7 (9th Cir. 2017) (finding the first *Lugar* state action prong satisfied because the right of a private party to compel arbitration was created pursuant to statute and that "undoubtedly the State was responsible for the statute").

If it were not for SEIU's special status under ORS 243.806, SEIU would never have gotten Wright's money. Any ordinary business seeking payment for goods or services has to convince a consumer to pay – but SEIU gets paid automatically. For example, a magazine might require a monthly or yearly subscription. If a consumer decides to no longer pay for the magazine, he or she can cancel the subscription. Even if there is a contract in place, or automatic payments set up, the consumer can stop payment at the source by notifying her bank to stop payment. But SEIU is not like the magazine – SEIU was paid out of Wright's paychecks, before Wright even saw the money. 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).

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 dues deductions because of a provision in that agreement, concluding 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 Wright *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 Wright did not consent or authorize the seizure of her wages, the source of her constitutional deprivation could not have been an agreement, and her case is not comparable to *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-0010; SEIU Br. 14. The harm is the deduction of Wright's money without her consent. This deduction is the direct result of the Statute's delegation of control to the union, and the State's deduction from Wright'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 Wright'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 Wright's challenge because Wright 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*, Wright

challenges the state law itself. When DAS complies with SEIU's instructions, it follows the letter of the law. ORS 243.806. Wright challenges the lack of any procedure to confirm employee consent. ER-0101. 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 Wright has authorized deductions (provide a list). SEIU Br. 23. All procedural requirements were fulfilled – and the State took Wright's wages – thus the conduct of which Wright 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, Wright challenges the statutory procedure itself. ER-0101.

Again, Wright 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 Wright challenges, and it is a policy that the State *followed* to the letter when it deducted dues from Wright's wages pursuant to SEIU's instructions.[1]

The state is always responsible for the procedural processes the State puts into place by law. *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 Wright's Wages.

[1] 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 (1988) (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.

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. 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 Wright'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.

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).[2]

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

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. SEIU Br. 22-23.

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 *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, Ms. Wright 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. Wright did not. She was a non-member, and as such, the State owes her every duty recognized by the Court in *Janus*. *Janus*, 138 S.Ct. at 2486. Thus, by exercising a public function (to obtain valid authorization from non-members), SEIU is a state actor.

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-0092. 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. The State took Wright's wages at the direction of SEIU. In deliberately using the State in this manner, SEIU becomes a joint actor.

B. SEIU AND THE STATE DEPRIVED WRIGHT OF HER 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.[3] The First Amendment's

[3] The First Amendment also provides a logical limit on the type of actions that might be brought to challenge a payroll deduction: only those involving political

protections against compelled speech require 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, a State cannot establish a procedure for deducting union dues from nonmembers that is "entirely controlled by [a] union, which is an interested party." *Hudson*, 475 U.S. at 308.

Wright was never a union member, thus she must affirmatively consent to pay dues to the union *before* such payment may be collected. The State's actions have deprived Ms. Wright of her right to *not support* political speech by a union. *Janus*, 138 S.Ct. at 2486. SEIU makes much of the fact that the enabling statute contains the *pro forma* requirement of employee authorization, and that Oregon law 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 Ms. Wright's claims from the claims made by the plaintiff-appellant in *Janus*. SEIU Br. 25. 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.

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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.

The fact that Ms. Wright 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 Wright has adequate post-deprivation relief and that therefore, there is no due process violation here. SEIU Br. 32-35. But the post-deprivation relief available to Wright 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 provides an essential means to enforce civil rights. [4] 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

[4] "[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).

(to say nothing of punitive damages, injunctive relief, and attorney fees – all of which are important components of any civil rights litigation).

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 collected full dues—including those used for undisputedly political speech—from Wright at the direction of a self-interested union. 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).

On the other hand, if DAS 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." The statute makes no provision

for DAS to take any action to verify an authorization, even if a mistake were discovered.[5] Thus, the statutes incentivize DAS to make deductions whether or not authorized.[6]

C. WRIGHT HAS STANDING TO SEEK PROSPECTIVE RELIEF BECAUSE THE PROCESS REMAINS UNCHANGED.

"[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 567 U.S. 308, 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.")

Appellant has a "concrete interest … in the outcome of the litigation," *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984), because while she is currently retired

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[5] 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 employee 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."

[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. 29. But since SEIU is a state actor with regard to dues deductions, *DeShaney* is inapplicable.

from employment with the State, there are no facts to indicate she is ineligible for rehire. Appellant, should she again work for the State in a capacity similar to her previous employment, will again be subject to the exclusive representation and related rules that have resulted in her harm here.

1. Wright 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). The party 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 Wright seeks to redress is not "actual or imminent" because the deductions have ended, and she has retired from her employment. SEIU Br. 37-38; DAS Br. 10-11. But, when Wright filed this case, she had suffered the unauthorized seizure of her wages for years. ER-0098. The statutory system under which these seizures occurred remains, in place.[7]

[7] The continued threat to Wright, or anyone who might wish to seek state employment, is amply illustrated by the growing number of cases of forgery alleged against the same union since the beginning of 2020. *See e.g., Zielinski v. SEIU Local 503, et al,* 20-36076 (complaint filed January 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).

SEIU continues to assert the validity of the authorization card Wright signed, and continues to assert the constitutionality of the wage-deduction process from start to finish. SEIU Br. 2-6. Under these circumstances, Wright remains under continuing threat that, if she again begins to work for the State, her wages will be taken again without her consent. This is a threat of irreparable injury because it directly involves First Amendment rights. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012). "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, Ms. Wright has every right to again seek employment by the State, and such employment may not be predicated on her political expression (or lack thereof). Neither SEIU nor the State has put forward any evidence indicating Ms. Wright is in any way disqualified from seeking such employment. 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-0078), 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 Wright's standing. SEIU's claim that it has changed its policy to "flag" her name is not in any way enforceable by Ms. Wright or even by 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 Wright from what occurred previously. Her money was taken without authorization while SEIU claimed that a false authorization was adequate to justify its actions. ER-0098-99. Notably, the claim that any future membership card "will be brought to the attention of SEIU 503's legal department" for review is cold comfort since the previous forged authorization was reviewed by legal counsel and SEIU still asserts its validity. *Id*. ER-0099.

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 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, Ms. Wright has actually experienced the unauthorized deduction of union dues from her wages. [8] Were Wright to be forced to pay again, even if it were deductions from only one paycheck, she will have suffered irreparable harm. *See Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984). Wright 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 Wright's wages unlawfully is still being applied to the bargaining unit to which Wright would belong should she seek employment similar to her previous employment.

[8] Appellees also cite to *Slayman v. FedEx Ground Package System, Inc*., 765 F.3d 1033 (9th Cir. 2014). SEIU Br. 36. But *Slayman* did not involve the potential to chill the exercise of fundamental rights, and is therefore distinguishable.

A declaratory judgment regarding the enforceability of Oregon's dues deduction system will redress the harm by which Wright remains threatened. Injunctive relief to safeguard Wright's First Amendment rights will prevent the same harm from occurring in the future. This concrete and particularized impact is entirely sufficient to give Wright standing, both now, and as of when this lawsuit was filed. *Knox*, 567 U.S. at 307.

2. Wright's Claims for Prospective Relief Are Not Moot.

DAS argues that the case is moot since they no longer deduct dues. DAS Br. 9-13. 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)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *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.[9]

Finally, Wright's claims are "capable of repetition, but evading review." *Los 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 herself "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, Wright has standing to make claims for prospective relief, and these claims are not moot or otherwise satisfied by SEIU's empty promises.

III. CONCLUSION

Appellant asks this Court to scrutinize the statutory scheme that has produced her loss, not merely loss of money, but loss of her ability to choose to support, or not

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

to support, the union's political speech. She challenges the Oregon Statutes *themselves* since they have proven wholly inadequate to protect her rights. This Court should reverse the District Court's decision because DAS deducted union dues from Ms. Wright's wages without obtaining her consent, and because no change in policy has occurred that would better protect her going forward.

Dated: May 12, 2021

s/ Rebekah Millard
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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 6224 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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