

No. 20-35882

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Margo Cash Schiewe, *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. 3:20-cv-00519-JR
Honorable Karin J. Immergut

APPELLANT'S REPLY BRIEF

Rebekah C. Millard
James G. Abernathy
Freedom Foundation
P.O. Box 552
Olympia, Washington 98507
Tel: (360) 956-3482
rmillard@freedomfoundation.com;
jabernathy@freedomfoundation.com

Counsel for Appellants

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I. INTRODUCTION

May a State, consistent with the First Amendment, seize its employee's wages, and, without permission, distribute that money to a labor union to fund its political speech? Defendants-Appellees, the State Department of Administrative Services (DAS) and the union, Service Employees International Union Local 503 (SEIU), answer this question in the affirmative, claiming that since the union is *supposed* to get employee permission before instructing DAS to take employees' money, constitutional scrutiny is precluded – whether or not the union *actually* obtains that permission. SEIU Answering Brief 15 (“SEIU Br.”).

In Oregon, the union tells the State from whom to deduct union dues. This arrangement is enshrined in State law, ORS 243.806. The union is supposed to limit deductions to employees who have “authorized” the deductions. ORS 243.806(2). But this does not always happen.

Plaintiff-Appellant Cash Schiewe (“Appellant”) did not authorize deductions. ER-0102 – 0103. There is, in fact, no signature on the form the union claims she signed. *Id.* Yet, the State deducted union dues from her wages anyway, based on the union's representation that she electronically authorized the deductions. SEIU now claims that the forgery of Appellant's signature precludes her constitutional claims. SEIU Br. 14-20.

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 Appellant 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.

Appellant challenges the Oregon Statutes themselves – statutes that have proven inadequate to protect her rights to due process and freedom from compelled speech. ER-0105 – 0106. She does not allege that SEIU’s departure from state law (forgery) caused her harm, rather SEIU’s actions and the State’s actions following the law caused her harm. ER-0105 – 0106. *Lugar*, 457 U.S. 941.

SEIU, like any other private organization, becomes a state actor when two conditions are met (1) when SEIU deprives a person of her rights by exercising 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 v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982).

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

SEIU asserts that the State does not provide “significant assistance” to SEIU – 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 argues, ironically, SEIU’s *misuse* of the law ironically protects them from liability under the First Amendment. SEIU Br. 15-16, 30-33. Since the State has not participated the forgery, and since state law in fact condemns forgery, SEIU’s actions are not state action (the fact that the State deducts the dues via a State-created system notwithstanding). *Id.*

But the United States Supreme Court has already rejected this reasoning, 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 – SEIU misused Oregon law by taking money without employee authorization, SEIU’s actions are not attributable to the state. SEIU Br. 15-20. But SEIU ignores the second part: the procedural scheme under which SEIU acted was *obviously* the product of state action. *Lugar id.* It is this procedural scheme (ORS 243.806) that is the subject of Appellant’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, does not destroy state action, nor should it deprive Appellant of her ability to exercise her First Amendment rights.

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 Appellant'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. Appellant cannot get these payments stopped by appealing to her employer – she 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.*” , 457 U.S. at 941 (emphasis added).

It is this procedural scheme (ORS 243.806) that is the subject of Appellant Cash Schiewe'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 Appellant of her ability to exercise her 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. 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 Appellant *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 Appellant did not consent or authorize the seizure of her wages, the source of his constitutional deprivation could not have been an agreement distinguishing her 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-0011; SEIU Br. 11. The harm is the deduction of Appellant'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 Appellant's wages. The state action does not come from SEIU's forgery; it comes from SEIU making use of the privilege the State created by which the State deducts union dues from non-union employees' wages when SEIU instructs it to do so. Even now, with allegations of forgery outstanding, if SEIU placed Appellant'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 request verification of authorization. ORS 243.806. DAS Br. 2-3.

In arguing that misuse of a statute is not state action, SEIU relies primarily the following 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. 15. But each of these cases is distinguishable from Appellant's challenge because she 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*, Appellant challenges the state law itself. When DAS complies with SEIU's instructions, it follows the letter of the law. ORS 243.806. Appellant challenges the lack of any procedure to confirm employee consent. ER-0105. 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. 19. 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 Appellant's money is to tell DAS that she 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 Appellant 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. SEIU Br. 15. 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, Appellant challenges the statutory procedure itself. ER-0105 – 6.

But again, Appellant 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 Appellant challenges, and it is a policy that the State *followed* to the letter when it deducted dues from her wages pursuant to SEIU’s instructions.¹

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 (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 Appellant’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. 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. 21. But even if this decision were controlling, it has nothing to do with the facts here: 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

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 22-24. In so arguing, SEIU suggests that its roll is merely clerical. *Id* at 23. 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 *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

² The public function test and the joint action test “largely subsume” the other two, so they will be discussed in more detail. *Ohno*, 723 F.3d at 995 & n.13.

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. 25. But here, Appellant did not agree to pay union dues or fees.

SEIU goes on to claim:

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. 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.

Appellant did not. She 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.

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. 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-0097. Indemnification is also provided for in the statute, ORS 243.806(8)(b) (requiring union to indemnify state). 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 APPELLANT 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 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).

Appellant never wanted to be a union member. She must affirmatively consent to pay dues to the union *before* such payment may be collected. The State's actions have deprived Appellant of her 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

³ 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. 33-34.

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 Appellant's claims from the claims made by the plaintiff-appellant in *Janus*. SEIU Br. 27-28. 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 Appellant may also have a cause of action for violation of state law prohibiting fraud and unlawful withholding of wages does not destroy her ability to bring constitutional claims. SEIU argues that Appellant has adequate post-deprivation relief and that therefore, there is no due process violation here. SEIU Br. 34.⁴ But the post-deprivation relief available to Appellant is inadequate because compelled political speech is irreparable harm (*Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012)).

Further, 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),

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

and 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).⁵

In fact, 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 non-union employees without a shred of evidence, other than the word of a self-interested union, that the

⁵ 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).

employee clearly and 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.⁶

⁶ 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."

DAS also has a direct contractual relationship with SEIU via Collective Bargaining Agreements (“CBA”). Under the terms of the CBA, SEIU is the exclusive representative for employees in Appellant’s bargaining unit. The CBA requires the State to deduct union dues from employee wages “upon [SEIU’s] request.” Collective Bargaining Agreement, Section 15(a), ER-0096 – 0098. SEIU controls the “request” or “application” process: “All applications or cancellations of membership shall be submitted by the employee to the Union. Any written applications for Union membership and/or authorizations for Union dues and/or other deductions or for dues cancellations which an Agency receives shall be promptly forwarded to the Union.” *Id.*

C. APPELLANT’S CLAIMS FOR PROSPECTIVE RELIEF REMAIN LIVE BECAUSE THE UNION RETAINS FULL AUTHORITY – AND ABILITY – TO REINSTATE DUES DEDUCTIONS.

1. Appellant 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). She 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.*

DAS and SEIU assert Appellant's injury is not "actual or imminent" because the wage seizures have ended. SEIU Br. 37-41; DAS Br. 8-14. SEIU also argues that it has taken steps to eliminate the unauthorized taking of Appellant's money in the future. SEIU Br. 39; ER-0082

But when Cash Schiewe filed this case, she had suffered the unauthorized seizure of her wages for months. ER-0103. The statutory system under which these seizures occurred remained, and remains, in place, and all relevant circumstances remain unchanged: Appellant works the same job for the same employer, gets paid in the same manner, and remains in the same bargaining unit she was in when she brought this suit. SEIU remains capable of instructing the State to deduct dues from Appellant's wages at any time.⁷

SEIU continues to assert the validity of the authorization cards, and continues to assert the constitutionality of the whole system. Under these circumstances, Appellant remains under continuing threat that her wages will be taken again without his consent. Should this occur even one time, she will have been irreparably injured. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012). Further, the threat and constant

⁷ The continued threat to Appellant 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*, No. 20-36076 (complaint filed January 29, 2020); *Wright v. SEIU Local 503, et al*, No. 20-35878 (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).

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, Appellant has every right to 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” Appellant’s name (ER-0082), 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

Appellant's standing. SEIU's claim is not in any way enforceable by Appellant (or even by the State, for that matter). 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 Appellant from what occurred previously. Her money was taken without authorization while SEIU claimed that a false authorization was adequate to justify its actions. ER-0103.

Appellees cite to *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033 (9th Cir. 2014). SEIU Br. 38. 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, Appellant continues to work for the government, and will be directly affected by prospective relief since as long as she retains his employment, and the dues deduction procedure remains unchanged, she 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. 39. 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, Appellant has actually experienced the unauthorized deduction of union dues from his wages.

Were Appellant 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). Appellant 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 Appellant’s wages unlawfully is still being applied to the bargaining unit to which Appellant belongs, meaning she is still susceptible to its danger.

A declaratory judgment regarding the enforceability of Oregon’s dues deduction system will redress the harm Appellant continues to suffer. Injunctive relief to safeguard Appellant’s First Amendment rights will prevent the same harm from occurring in the future. This concrete and particularized impact is entirely sufficient to give Appellant standing. *Knox*, 567 U.S. at 307.

2. Appellant’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*, 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 Appellant, there is no reason to think they would not resume the same policy against her 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.⁸

Finally, Appellant'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 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 each of the forgoing reasons, Appellant 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 DAS deducted union dues from Appellant Cash Schiewe's wages without obtaining her consent,

⁸ *See Jody Lutter v. JNESO, et al.*, 2020 WL 7022621 *3 (U.S. Dist. NJ 2020).

and because no change in policy has occurred that would better protect Appellant going forward should SEIU decide to, once again, instruct DAS to take Appellant's wages.

Dated: May 12, 2021

s/ Rebekah Millard
Rebekah Millard

James Abernathy
Freedom Foundation P.O. Box 552
Olympia, Washington 98507
Tel: (360) 956-3482
Fax: (360) 352-1874
Email: RMillard@freedomfoundation.com

Counsel for Appellant

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 5995 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

s/ Rebekah Millard
Rebekah Millard

Counsel for Appellants