NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIRSTI PARDE, AKA Kirsti Edmonds-West,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, a labor organization; DAVID SLAYTON, in his official capacity as Executive Officer/Clerk of Court of the Superior Court of California, Los Angeles County; ROB BONTA; COUNTY OF LOS ANGELES,

Defendants-Appellees,

and

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES; BETTY T. YEE, in her official capacity as California State Controller,

Defendants.

No. 23-55021

D.C. No. 2:22-cv-03320-GW-PLA

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

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

Submitted May 6, 2024[**]
Pasadena, California

Before: WARDLAW, CHRISTEN, and BENNETT, Circuit Judges.

Kirsti Parde, a court reporter employed by the Superior Court of California, Los Angeles ("Superior Court"), appeals the dismissal of her 42 U.S.C. § 1983 action, in which she alleges that the Superior Court and the County of Los Angeles ("County"), under state laws enforced by California's Attorney General, continued to deduct union dues from her wages and give those dues to Parde's former union, Service Employees International Union, Local 721 ("SEIU" or "union"), after Parde terminated her union membership and rescinded her dues-deduction authorization.[1] Parde alleges that SEIU misrepresented to the Superior Court and the County that dues deductions should continue, and that it forged Parde's electronic signature on a dues authorization form. Parde claims that the Superior Court, the County, the State, and SEIU violated her First and Fourteenth Amendment rights under *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. 878 (2018). We have jurisdiction

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

[1] Parde sues Attorney General Rob Bonta and Clerk of Court David Slayton in their official capacities. We use "the State" and "the Superior Court" as shorthand when discussing Parde's claims against the Attorney General and the Clerk of Court, respectively.

under 28 U.S.C. § 1291, and we affirm.

1. The district court had "an independent obligation to assure that standing exists," *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009), and was not free to assume jurisdiction for the purpose of deciding the merits, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998). Nevertheless, we may affirm the district court's dismissal under Federal Rule of Civil Procedure 12(b)(1) and (6) on any basis supported in the record, *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1106 (9th Cir. 2022) (citation omitted), *cert. denied*, 143 S. Ct. 783 (2023). We therefore address Parde's standing for each claim she presses and for each form of relief she seeks. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

A. Parde has standing to seek damages from SEIU, the Superior Court, and the County on her First Amendment and substantive due process claims. Parde suffered a cognizable, particularized, and concrete First Amendment injury when dues were deducted from her wages and diverted to the union after Parde no longer wished to support the union's speech. *See Janus*, 585 U.S. at 890. That injury is fairly traceable to SEIU, which allegedly forged her authorization and pocketed her dues, as well as the Superior Court and County, the entities that deducted dues for Superior Court employees. Her injury is also capable of redress in compensatory and nominal damages. *See Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988);

Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021).

Parde's injury is not fairly traceable to the State.[2] "[P]rivate misuse of a state statute does not describe conduct that can be attributed to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). The Second Amended Complaint ("SAC") alleges no actions or omissions of the State that are fairly traceable to the unauthorized deductions Parde suffered from January to June 2022.[3] *Cf. Lutter v. JNESO*, 86 F.4th 111, 127–28 (3d Cir. 2023).

Although Parde suffered an actual past injury, she does not face an imminent injury. For Parde to be reinjured, she would either (1) need to rejoin the union, subsequently withdraw her membership, and once again be faced with a union that refuses to direct the Superior Court to cease the unauthorized payroll deductions, or (2) without rejoining the union, once again have the union erroneously or fraudulently certify her authorization to the Superior Court. Parde contends that there's no guarantee either chain of events *won't* happen, but Parde's burden is to demonstrate that either hypothetical is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (citation omitted). Her allegations do not

[2] Parde's motion to take judicial notice (Dkt. 52) is **GRANTED**.

[3] Even if Parde had standing to assert a First Amendment and substantive due process claim against the State, we would find her claim for damages barred under the Eleventh Amendment. And we would conclude that her claim for prospective relief fails on the merits for the reasons explained below.

satisfy that showing.[4] *Cf. Wright v. Serv. Emps. Int'l Union Local 503*, 48 F.4th 1112, 1118–20 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023). Because Parde's asserted injury is unlikely to recur, there is no "discrete injury" which prospective relief would "likely" be capable of redressing. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (citation omitted); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Accordingly, Parde lacks standing to seek prospective relief against any defendant on her First Amendment or substantive due process claims.

B. Parde has standing to seek retrospective and prospective relief against all defendants on her procedural due process claim. Under *Ochoa*, an employee who "has already had union dues erroneously withheld from her paycheck" and "remains employed with the State" faces a "sufficiently real" risk of future injury "to meet the low threshold required to establish procedural standing," even if her "claimed future harms are speculative." 48 F.4th at 1107 (citation omitted).

2. The State and Superior Court contend that Parde's claims for relief are moot. Neither argues that any "changes in the circumstances that prevailed at the beginning of the litigation have forestalled [Parde's] occasion for meaningful relief" for her asserted past injury, *see Meland v. Weber*, 2 F.4th 838, 849 (9th Cir.

[4] Parde seeks additional discovery on this point, but she has not identified facts unknown to her that would allow her to meet her burden to show a "certainly impending" injury. *See Clapper*, 568 U.S. at 401.

2021) (citation omitted), and neither addresses the low threshold Parde faces to establish procedural standing, *see Ochoa*, 48 F.4th at 1107. Thus, neither meets its "burden of establishing that [the] case is moot." *Meland*, 2 F.4th at 849.

3. Parde's claims for damages against the Superior Court and the State are barred. We have repeatedly recognized that, "'absent waiver by the State or valid congressional override,' state sovereign immunity protects state officer defendants sued in federal court in their official capacities from liability in damages, including nominal damages." *Platt v. Moore*, 15 F.4th 895, 910 (9th Cir. 2021) (quoting *Kentucky v. Graham*, 473 U.S. 159, 169 (1985)). Nothing in the SAC or briefing demonstrates a waiver by the State or valid congressional override of the State's sovereign immunity.

4. The district court properly dismissed Parde's claims against the union for failure to allege state action for the purposes of § 1983. *Wright*, 48 F.4th at 1121–25. California permits dues deductions only if the employee authorizes such deductions, and only if the union certifies compliance with *Janus*. *See* Cal. Gov't Code §§ 1157.12, 71638. Nothing in the law authorizes, permits, or compels the union to erroneously or fraudulently certify that it has and will maintain valid employee authorizations. In fact, the State fairly appears to criminalize such conduct and/or provide for civil liability. Parde concedes that California's statutory scheme "has no meaningful distinction from" the Oregon scheme we

considered in *Wright*.[5] Accordingly, we conclude that Parde's "alleged constitutional deprivation did not result from 'the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.'" *Wright*, 48 F.4th at 1122 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013)). Rather, Parde's claim arises from "a 'private misuse of a state statute' that is, by definition, 'contrary to the relevant policy articulated by the State.'" *Id.* at 1123 (quoting *Lugar*, 457 U.S. at 940–41).

5. The district court properly dismissed Parde's Fourteenth Amendment procedural due process claims against the Superior Court, the State, and the County. Parde does not plausibly allege that any of these defendants intentionally withheld unauthorized union dues or "ha[d] any reason to know that [the union's] representations were false." *Ochoa*, 48 F.4th 1110–11.[6] The government does not

[5] Parde disagrees with how we decided *Wright*, but she does not argue that we should decline to follow *Wright* on grounds that "the theory or reasoning underlying" *Wright* has been "undercut" by any subsequent, controlling authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

[6] Parde argues that *Ochoa* is distinguishable because the Superior Court "*intentionally* authorized [the] County to deduct money from Parde's paycheck" after receiving SEIU's false representation, and the "County *intentionally* deducted the money from Parde's paycheck." This was also true in *Ochoa*: the defendants' voluntary and intentional actions resulted in deductions from Ochoa's paycheck. *See* 48 F.4th at 1110. What mattered in *Ochoa*, and what Parde fails to distinguish, is that no government defendant in *Ochoa* was shown to have intended to withhold *unauthorized* dues while having actual or constructive knowledge that such dues were unauthorized. *See id.*

have an affirmative duty to ensure that the agreement between the union and employee is genuine, or to "ensure the accuracy of SEIU's certification of those employees who have authorized dues deductions." *Wright*, 48 F.4th at 1125.

6. The district court correctly dismissed Parde's First Amendment claim against the County for lack of proximate cause. *See Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). Without an affirmative duty to ensure that certifications are genuine, *Wright*, 48 F.4th at 1125, and with no notice that Parde contested or questioned her authorization or SEIU's certification, the County could not reasonably have foreseen Parde's asserted First Amendment injury.[7]

7. Parde's substantive due process claim is based on a purported deprivation of Parde's liberty interest in her First Amendment right against compelled speech. For reasons already stated, Parde's allegations, taken as true, fail to meet her burden to establish "conscience shocking behavior by the government." *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992))).

[7] Parde's First Amendment claim against the County alternatively fails because the SAC lacks factual allegations sufficient to establish *Monell* liability. *See Sandoval v. County of Sonoma*, 912 F.3d 509, 517–18 (9th Cir. 2018); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (plurality opinion).

In sum, we affirm the district court's dismissal of Parde's claims for prospective relief under the First Amendment against all defendants for lack of standing. We affirm the dismissal of Parde's claims for damages against the Superior Court and the State as barred under the Eleventh Amendment. We affirm the dismissal of Parde's claims against SEIU for failure to allege state action for purposes of § 1983, and Parde's remaining procedural due process claims for failure to allege an intentional deprivation of a protected interest. We affirm the dismissal of Parde's First Amendment claim against the County for damages for failure to allege proximate cause for the purposes of § 1983. Finally, we affirm the dismissal of Parde's substantive due process claim for failure to state a claim.[8]

AFFIRMED.

[8] Parde does not challenge the district court's decision to dismiss the SAC with prejudice. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) ("Arguments not raised by a party in its opening brief are deemed waived.").