FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CINDY ELLEN OCHOA, as an individual, *Plaintiff-Appellant*, v. PUBLIC CONSULTING GROUP, INC., a Massachusetts corporation; PUBLIC PARTNERSHIPS LLC, incorporated in Delaware; CHERYL STRANGE, in her official capacity as Secretary of the Department of Social and Health Services; JAY ROBERT INSLEE, in his official capacity as Governor of the State of Washington, *Defendants-Appellees.*	No. 19-35870 D.C. No. 2:18-cv-00297-TOR OPINION

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

Argued and Submitted February 8, 2022
Portland, Oregon

Filed September 19, 2022

Before: Richard A. Paez and Jacqueline H. Nguyen, Circuit Judges, and John R. Tunheim,* District Judge.

Opinion by Judge Paez

SUMMARY**

Civil Rights

The panel affirmed the district court's dismissal of all of plaintiff's claims against Public Partnerships LLC ("PPL") and Public Consulting Group, Inc. ("PCG") (collectively "private defendants"), and the district court's grant of summary judgment to Washington Governor Inslee and Secretary Strange of the Department of Social and Health Services (collectively "state defendants"), in plaintiff's action alleging that defendants violated her First and Fourteenth Amendment rights and engaged in the willful withholding of her wages in violation of state law.

Plaintiff is an individual provider ("IP") of in-home care for her disabled son. Under Washington law, IPs are considered public employees for the purpose of collective bargaining, and they are represented by Service Employees International Union 775 ("SEIU"). Plaintiff did not join the union, but on two occasions the State withheld dues from her paycheck.

* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that plaintiff did not have standing to bring any claims for prospective relief. The panel further held that, although the district court erred in holding that PPL and PCG were not state actors, plaintiff had not alleged facts sufficient to support a Fourteenth Amendment due process claim or a claim for violation of state law.

Plaintiff argued that the district court incorrectly concluded that she lacked standing to seek prospective relief. Because plaintiff's claim was procedural and need not meet "all the normal standards" for standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 5545, 572 n. 7 (1992), the panel held that she did have standing to seek declaratory and injunctive relief against both the State and private defendants. Procedural rights are special, and a plaintiff can assert a procedural right without establishing all the normal standards for redressability and immediacy. The panel held that under the Fourteenth Amendment plaintiff had a procedural right to due process. Given that plaintiff already had union dues erroneously withheld from her paycheck twice and remained employed with the State and therefore at risk of additional unauthorized withholdings, the risk of future injury was sufficiently real to meet the low threshold required to establish procedural standing.

Plaintiff alleged that PPL and PCG violated her Fourteenth Amendment rights because they deprived her of her liberty interest under the First Amendment without adequate procedural safeguards. Viewing the complaint favorably, as required at the motion to dismiss stage, the panel held that plaintiff alleged sufficient facts to establish that PPL and PCG can be considered state actors for the purpose of her 42 U.S.C. § 1983 action. Plaintiff met both parts of the two-prong test for determining whether state action exists. First, plaintiff's deprivation was caused by the

private defendants' actions under Wash. Rev. Stat. § 41.56.113. Second, the private defendants can be considered state actors under the nexus test. The withholding of union dues from an IP's paycheck was an affirmative obligation of the State. The State directed the private defendants to withhold dues and provided them with a list of individuals from whom dues should be withheld. As a result, the responsibility for withholding union dues was more properly ascribed to the government than to the private defendants, and the private defendants should be treated as state actors.

The panel held that because the plaintiff did not allege facts sufficient to demonstrate that she was deprived of a liberty interest, her Fourteenth Amendment claim against the private defendants and the State failed. Plaintiff did have a liberty interest as a nonmember of the union in not being compelled to subsidize the union's speech through unauthorized dues. But she has not shown that either the state or the private defendants intended to withhold unauthorized dues and thus deprive her of that interest. The defendants' reliance on the union's representations in the mistaken belief that they were accurate did not rise to the level of a due process violation. Any injury that plaintiff suffered because of the union's misrepresentations was properly addressed by pursuing a state law claim against the union, not a Fourteenth Amendment claim against the State or the private defendants.

The panel held that there was no basis for plaintiff's final claim that the 2018 dues deduction constituted a willful withholding of her wages by PPL in violation of Wah. Rev. Code § 49.52.050. PPL was not, and could not be considered, plaintiff's employer or an agent of her employer under the statute. Nor could plaintiff demonstrate that PPL's

withholding of her dues was willful. Therefore, the district court did not err in dismissing the claim.

COUNSEL

Sydney Phillips (argued) and Caleb Jon F. Vandenbos, Freedom Foundation, Olympia, Washington, for Plaintiff-Appellant.

Alicia Young (argued), Assistant Attorney General; Susan Sackett Danpullo, and Cheryl L. Wolfe, Senior Counsel, Labor and Personnel Division; Robert W. Ferguson, Attorney General; Office of the Attorney General, Olympia, Washington; for Defendants-Appellees Cheryl Strange and Jay Robert Inslee.

Scott A. Flage (argued) and Markus W. Louvier, Evans Craven & Lackie PS, Spokane, Washington, for Defendants-Appellees Public Consulting Group, Inc., and Public Partnerships LLC.

Scott A. Kronland, Altshuler Berzon LLP, San Francisco, California; Michael C. Subit, Frank Freed Subit & Thomas LLP, Seattle, Washington; for Amicus Curiae SEIU Local 775.

OPINION

PAEZ, Circuit Judge:

Cindy Ochoa is a resident of Washington who works as an individual provider ("IP") of in-home care for her disabled adult son. Under Washington law, IPs are considered public employees for the purpose of collective bargaining, and they are represented by Service Employees International Union 775 ("SEIU"). Ochoa did not join the union, but on two separate occasions the State nonetheless withheld dues from her paycheck. Ochoa sued the union; Jay Inslee, Governor of Washington; Cheryl Strange, Secretary of the Washington Department of Social and Health Services ("DSHS"); Public Partnerships LLC ("PPL"), a private company that administers DSHS's payroll system; and Public Consulting Group, Inc. ("PCG"), the parent company of PPL. She alleged that the defendants violated her First and Fourteenth Amendment rights and engaged in the willful withholding of her wages in violation of state law.

The district court dismissed all of Ochoa's claims against PPL and PCG (collectively, "private defendants") and granted summary judgment to Governor Inslee and Secretary Strange (collectively, "State defendants"). We affirm. Ochoa has standing to bring her claims for prospective relief, and the district court erred in holding that PPL and PCG are not state actors. Ochoa, however, has not alleged facts sufficient to support a Fourteenth Amendment due process claim or a claim for violation of state law.

BACKGROUND

Washington contracts with IPs to provide in-home care services to clients who are eligible for Medicaid. DSHS is responsible for administering the IP program, which involves paying providers' wages and withholding deductions, including union dues. DSHS uses a payroll system called IPOne to pay IPs and to process any dues deductions. IPOne is maintained by a private contractor, PPL.[1] SEIU provides DSHS with an electronic dues interface file identifying IPs who should have union dues withheld from their paychecks. DSHS then sends that file to PPL so the company can make the deductions. PPL relies entirely on the information from the union in determining from whom it should withhold dues.

When Ochoa first began working as an IP, Washington automatically withheld dues from all IPs' paychecks. After the Supreme Court's decision in *Harris v. Quinn*, 573 U.S. 616 (2014), the State and SEIU amended their collective bargaining agreement to establish an opt-out process in which union dues would be deducted from all IPs except those who affirmatively objected.[2] In July 2014, Ochoa exercised her right to cease paying union dues. She alleges that since then, she "has never communicated to any of the Defendants that she would like to support SEIU 775—either financially or otherwise." In May 2016, a union representative visited Ochoa at home and asked her to sign a form to verify her contact information, which Ochoa refused

[1] Ochoa alleges that PPL works jointly with PCG to design and manage the payroll system.

[2] *Harris* held that workers who were not "full-fledged state employees" could not be compelled to financially support their public-sector union if they chose not to join. 573 U.S. at 645–47.

to do. Four months later, DSHS received a dues interface file from SEIU indicating that dues should be withheld from Ochoa's paycheck. Beginning on October 17, 2016, dues were withheld. About five months later, Ochoa noticed the withholdings and contacted IPOne several times to demand that they stop withholding dues. She received no response until May 2017, when IPOne informed her that she would need to contact SEIU for assistance.

When Ochoa contacted the union, a representative told her that dues were being withheld because Ochoa had signed a union membership card. Ochoa informed the representative that she had not signed a membership card and asked to be shown the card. When SEIU sent her a copy of the card, she recognized that the signature was not hers and once again asked the union to stop withholding dues. In June 2017, the secretary-treasurer of the union sent Ochoa a letter acknowledging that the signature on the card did not match the one on file for her. The letter included a check for $358.94. A month later, the union sent a second letter, which included a check for $51.12. Ochoa, through her attorney, rejected the checks. The withholding of union dues then stopped.

In 2018, the Supreme Court held that an opt-out process for deducting union dues from public employees violates the First Amendment. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). Immediately following the decision, the State began working to create an opt-in process and to ensure that union dues would not be deducted from any IP who had not affirmatively authorized such deductions. While the State was developing a permanent change, it implemented a work-around plan. Under this plan, SEIU would provide the State with two electronic interface files: one identifying all IPs

who had opted out of paying dues, and one identifying all IPs who had affirmatively opted in. Beginning on July 16, 2018, deductions were taken only from the paychecks of IPs on the opt-in list. Because of discrepancies between the lists, however, there were approximately eighty-seven IPs from whom the State believes it deducted dues without affirmative consent.

Ochoa was among these providers. Dues were withheld from her salary in July and August 2018. Upon noticing the withholdings, she again contacted IPOne and spoke to a representative who said that she could not fix the problem. She also contacted SEIU. After her calls to the union failed to stop the withholdings, Ochoa had her counsel contact SEIU, and the withholdings then promptly ceased.

Following these unauthorized deductions, Ochoa filed this lawsuit. In the operative complaint, Ochoa brought a claim under 42 U.S.C. § 1983 alleging that the defendants violated her First and Fourteenth Amendment rights by failing to employ minimal procedural safeguards to avoid unconstitutional dues withholdings and a claim that the defendants violated Wash. Rev. Code § 49.52.050 by engaging in willful withholding of her wages in 2018. The district court dismissed all the claims against the private defendants, concluding that they were not the proximate cause of the erroneous deprivations, were not state actors for the purposes of § 1983, and did not willfully withhold wages under § 49.52.050. The district court subsequently granted summary judgment to the State defendants, concluding that the Eleventh Amendment barred all claims against them except those for prospective relief and that Ochoa lacked

standing to seek such relief. Ochoa timely appealed the final judgment.[3]

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's grant of summary judgment, "including legal determinations regarding standing." *Alaska Right to Life PAC v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007). We also review de novo a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). We may affirm the dismissal "on any basis fairly supported by the record." *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001).

DISCUSSION

A. Standing

Ochoa argues that the district court incorrectly concluded that she lacked standing to seek prospective relief. Because Ochoa's claim is procedural and thus need not meet "all the normal standards" for standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992), we hold that she does

[3] SEIU and Ochoa separately entered into an agreement for an offer of judgment under Federal Rule of Civil Procedure 68(a), and SEIU is not party to this appeal. Ochoa does not appeal the district court's determination that the State defendants are entitled to Eleventh Amendment immunity on her claims for damages.

have standing to seek declaratory and injunctive relief against both the State and the private defendants. [4]

To have standing to bring suit, a plaintiff must generally establish that she has suffered an injury in fact that is fairly traceable to the challenged conduct of the defendant and that will likely be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560. The Supreme Court has explained that "procedural rights are special," however, and a plaintiff can therefore assert a procedural right "without meeting all the normal standards for redressability and immediacy." *Id*. at 572 n.7. To establish procedural standing, a plaintiff must "show that it was accorded a procedural right to protect its interests and that it has concrete interests that are threatened." *City of Las Vegas v. F.A.A.*, 570 F.3d 1109, 1114 (9th Cir. 2009).

Ochoa meets this less demanding standard. Under the Fourteenth Amendment, she has a procedural right to due process. *See Marsh v. County of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012). This right protects her concrete liberty interest under the First Amendment in being free from compulsion to financially support union speech. *See Janus*, 138 S. Ct. at 2460. It is true that Ochoa's claimed future harms are speculative because it is not clear whether she will ever again suffer an unauthorized withholding. However, given that she has already had union dues erroneously withheld from her paycheck twice and remains employed with the State and therefore at risk of additional unauthorized withholdings, the risk of future injury is

[4] Though Ochoa does not raise the argument that she has standing based on the procedural nature of her claims, we have "an independent obligation to assure that standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

"sufficiently real" to meet the low threshold required to establish procedural standing. *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 446 (9th Cir. 1994); *see also O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (noting that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury").[5]

B. State Action

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Ochoa alleges that PPL and PCG violated her Fourteenth Amendment rights because they deprived her of her liberty interest under the First Amendment without adequate procedural safeguards. The district court concluded that PPL and PCG were not subject to liability under § 1983 because they are private companies acting as an instrument of the state, not state actors. Viewing the complaint through the favorable lens required at the motion to dismiss stage, however, Ochoa has alleged sufficient facts to establish that

[5] The State defendants also argue that Ochoa's prospective claims are moot because the collective bargaining agreement between SEIU and the State was modified after *Janus* to withdraw dues only from IPs who have provided affirmative consent. The modified agreement does not provide the type of procedural safeguards Ochoa seeks, however, nor is there any evidence that it would make future unauthorized withholdings an impossibility. Therefore, it does not moot Ochoa's claim. *See Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006).

PPL and PCG can be considered state actors for the purpose of her § 1983 claims.[6]

State action analysis begins with "identifying the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (internal quotation marks and citation omitted). The private defendants argue that Ochoa's claim is "based upon SEIU's alleged forgery on a union membership card," but her actual claim is broader. Ochoa alleges that she was deprived of her liberty interest without due process because unauthorized union dues were withheld from her paycheck without certain procedural safeguards. The cause of her alleged constitutional deprivation was the *withholding*, not the union's forgery or its technical mistake.[7] *See Naoko Ohno*

[6] While PCG is PPL's parent company, it asserts that it is not party to the contract between PPL and DSHS. Ochoa does not dispute this claim. However, she alleges that PPL and PCG "work[] jointly" to provide the State's payroll processing and execute the contract. That is, she argues that both entities carried out the challenged actions and are equally responsible. Taking these allegations as true, as we must at the motion to dismiss stage, we treat PPL and PCG as a single entity for the purposes of our state action analysis. *See Cholla Ready Mix*, 382 F.3d at 973.

[7] In a concurrently filed opinion, *Wright v. Serv. Emps. Int'l Union, Loc. 503*, No. 20-35878, __ F.4th __ (9th Cir. 2022), the plaintiff brought a similar Fourteenth Amendment due process claim alleging that a private defendant failed to implement sufficient procedural safeguards against unauthorized withholdings of union dues. The state action analyses in the two cases differ, however, because the plaintiffs challenge different conduct. Wright's claim is against the union, which acts only to compile and transmit the list of union members. Ochoa's claim, on the other hand, is against the private payment processors, who act to withhold dues. Therefore, while *Wright* analyzes whether the Union's inclusion of Wright's name on the union membership list is state

v. Yuko Yasuma, 723 F.3d 984, 997 (9th Cir. 2013) (distinguishing between challenges to the underlying cause of the deprivation and the state procedures for enacting the deprivation). And the private defendants, as operators of the payroll system, are the ones who carried out the challenged withholding.[8]

Once the conduct at issue has been defined, there is a two-prong test for determining whether state action exists. First, the plaintiff must show that her deprivation was "caused by 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." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Second, she must show that "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Id*. Ochoa's complaint meets both prongs of the test.

First, Ochoa's deprivation was caused by the private defendants' actions under Wash. Rev. Stat. § 41.56.113, the state law governing the deduction of union dues from IPs' paychecks. The private defendants criticize this framing, pointing to *Lugar*'s distinction between "private misuse of a state statute," which is conduct that cannot "be attributed to the State," and "the procedural scheme created by the statute," which "obviously is the product of state action." 457 U.S. at 941. If the private defendants withheld union

action, we analyze whether the payment processors' withholding of dues is state action.

[8] In holding that the private defendants could not be considered the "proximate cause" of the deprivation, the district court similarly misunderstood Ochoa's complaint. She alleges that the private defendants were the ones who committed the challenged conduct, not that the State committed the challenged conduct at their behest.

dues from Ochoa's paycheck without proper authorization, they argue, they acted *in violation* of § 41.56.113 rather than under its authority.

It is true that § 41.56.113 allows the withholding of dues only "[u]pon the written authorization of an individual provider." Wash. Rev. Code § 41.56.113(1)(a) (2018).[9] However, it also requires that the employer "shall . . . deduct from the payments to an individual provider . . . the monthly amount of dues as certified by the secretary of the exclusive bargaining representative." *Id*. This responsibility is mandatory. Neither the State nor the private defendants to whom it delegated its duties had the authority to question whether the representations from SEIU were accurate; they were simply directed to make the withholdings based on the information the union provided. The clear language of the statute requires the State and the private defendants to withhold union dues whenever they are informed by the union that an IP has authorized it, whether or not that authorization actually occurred. *See Belgau v. Inslee*, 975 F.3d 940, 948 (9th Cir. 2020). Therefore, the private defendants were in fact acting in accordance with the statute when they withheld dues from Ochoa's paycheck on the basis of information they received from the union, and the first prong is met. *See id.* at 946–47.

Ochoa also satisfies the second prong of the state action test. There are a variety of tests that courts use in determining whether this prong is met, including the public

[9] The statute has been amended several times. The relevant version of the statute at the time of the first withholding was Wash. Rev. Code § 41.56.113 (2010), and the relevant version at the time of the second withholding was Wash. Rev. Code § 41.56.113 (2018). Because the two versions are virtually identical and all quoted language and section numbers are the same, we cite only to the 2018 version.

function test, the state compulsion test, the nexus test, and the joint action test.[10] *See George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (per curiam). These tests are interrelated, and they are designed to answer the same key question: whether the conduct of a private actor is fairly attributable to the State. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012). Satisfaction of a single test is sufficient to establish state action, so long as there is no countervailing factor. *See George*, 91 F.3d at 1230. Here, the private defendants can be considered state actors under the nexus test.

"The nexus test inquiry asks whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so the action of the latter may be fairly treated as that of the state itself." *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989) (internal quotation marks and citation omitted). Such a nexus exists when the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Id*. When the State bears an "affirmative obligation" and delegates that function to a private party, the private party "assume[s] that obligation" and can be considered a state actor. *West*, 487 U.S. at 56. The delegated function must be one that the State has some constitutional or statutory obligation to carry out; delegation of merely

[10] "Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here." *Lugar*, 457 U.S. at 939.

discretionary tasks is not enough. *See Sullivan*, 526 U.S. at 55.

The withholding of union dues from an IP's paycheck is an affirmative obligation of the State. The State is required by statute to provide IPs with a salary and to withhold union dues from that salary when appropriate. *See* Wash. Rev. Code § 41.56.113 (2022). The agency has delegated these responsibilities to the private defendants by contracting with them for payroll processing.

Moreover, the State has "significantly involve[d] itself" in the process of withholding union dues. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020). The State directs the private defendants to withhold dues and provides them with a list of individuals from whom dues should be withheld. The companies do not exercise independent judgment about when to withhold dues and are in fact required by state law to make those deductions. *See George*, 91 F.3d at 1232. Indeed, the private defendants describe themselves as "merely cut[ting] checks at the direction of the State." As a result, the responsibility for withholding union dues is more properly ascribed to the government than to the private defendants, and the private defendants should be treated as state actors. *See Lugar*, 457 U.S. at 938.

C. Due Process Claim

"Even if there is state action, the ultimate inquiry in a Fourteenth Amendment case is, of course, whether that action constitutes a denial or deprivation by the State of rights that the Amendment protects." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 n.4 (1978) (internal quotation marks omitted). Because Ochoa does not allege facts sufficient to demonstrate that she was deprived of a liberty

interest, her Fourteenth Amendment claim against the private defendants and the State must fail.

"[T]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). For Ochoa to prevail on a Fourteenth Amendment claim, she must demonstrate that either the private defendants or the State engaged in an "affirmative abuse of power." *Id*. at 330 (internal quotation marks and citation omitted). Ochoa does have a liberty interest as a nonmember of the union in not being compelled to subsidize the union's speech through unauthorized dues. *Janus*, 138 S. Ct. at 2460. But she has not shown that either the State or the private defendants *intended* to withhold unauthorized dues and thus deprive her of that interest. Indeed, she has never alleged that the State or the private defendants were even aware that the deductions were unauthorized—as she notes, they withheld the dues "based on SEIU 775's representations alone," and they did not know or have any reason to know that those representations were false. The state statute does not impose a duty on either the State or the private defendants to verify the accuracy of the information provided by the union; in fact, it compels "mandatory indifference to the underlying merits of the authorization." *Belgau*, 975 F.3d at 948 (internal quotation marks and citation omitted). The defendants' reliance on the union's representations in the mistaken belief that they were accurate does not rise to the level of a Due Process Clause violation. *See Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *see also Stevenson v. Koskey*, 877 F.2d 1435, 1440–41 (9th Cir. 1989) ("In the context of constitutional torts, it is the deliberate, intentional abuse of governmental power for the purpose of depriving a person of life, liberty or property that the fourteenth amendment was designed to

prevent."). Any injury that Ochoa suffered because of the union's misrepresentations is properly addressed by pursuing a state law claim against the union, not a Fourteenth Amendment claim against the State or the private defendants. *See Daniels*, 474 U.S. at 333.

D. Section 49.52.050

Ochoa's final claim is that the 2018 dues deductions constitute a willful withholding of her wages by PPL in violation of § 49.52.050.[11] There is no basis for this claim. As PPL argues, it is not and cannot be considered Ochoa's employer or an agent of her employer under the statute. Nor can Ochoa demonstrate that PPL's withholding of her dues was willful. Therefore, the district court did not err in dismissing the claim.

First, Ochoa has failed to show that PPL is her employer or an agent of her employer. Section 49.52.050(2) states:

> Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who . . . [w]illfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any

[11] In her opening brief, Ochoa only argues that PPL is liable under the statute. Therefore, any argument that PCG is also liable under the statute is forfeited. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003). In any event, a claim against PCG under § 49.52.050 would fail for the same reasons the claim against PPL does.

> statute, ordinance, or contract . . . [s]hall be guilty of a misdemeanor.

For the purposes of the statute, an agent is someone who has "some power and authority to make decisions regarding wages or the payment of wages." *Ellerman v. Centerpoint Prepress, Inc*., 22 P.3d 795, 799 (Wash. 2001) (en banc). Ochoa admits that as an IP, her employer is the governor of Washington. Nonetheless, she argues that PPL should be considered an agent of the government because it "handles all wages" and "therefore does have control over salary payouts." The mere fact that PPL mechanically handles the process of sending out paychecks does not mean that the company makes any decisions regarding wages, however. In fact, Ochoa admits that DSHS is the one "responsible for administering the IP program" and thus "responsible for distributing IPs' wages and/or withholding them." PPL does not have any authority to make decisions regarding IPs' wages—it merely makes payments at the direction of and based on the information provided by the State. Therefore, the company did not act as an agent of Ochoa's employer under § 49.52.050.

Nor does Ochoa allege facts sufficient to show that PPL acted willfully in deducting union dues from her wages. "Under [§] 49.52.050(2), a nonpayment of wages is willful when it is not a matter of mere carelessness, but the result of knowing and intentional action." *Ebling v. Gove's Cove, Inc.*, 663 P.2d 132, 135 (Wash. Ct. App. 1983). Ochoa argues that this standard can be satisfied by any "volitional act," and that the volitional act here was the fact that PPL withheld the dues. This argument sweeps too broadly. As Washington courts have held, "[a]n employer's genuine belief that he is not obligated to pay certain wages precludes the withholding of wages from falling within the operation

of [§] 49.52.050(2)." *Id.* PPL's decision to withhold dues from Ochoa's paycheck in 2018 was based on information provided by SEIU, as all its withholding decisions are. As discussed above, Ochoa does not allege that PPL knew or should have known that this particular information was incorrect. Instead, her own complaint alleges that PPL withheld dues from her paycheck on the basis of a good faith belief that it was obligated to do so pursuant to its contract with the State. PPL is not liable for the dues withholding under § 49.52.050, and the district court correctly dismissed the claim.

AFFIRMED.