Nathan R. Rietmann
nathan@rietmannlaw.com
Rietmann Law, P.C.
1270 Chemeketa St. NE
Salem, Oregon 97301
Phone: 503-551-2740
Fax: 1-888-700-0192

Brian K. Kelsey (Pro Hac Vice)
bkelsey@libertyjusticecenter.org
Daniel R. Suhr (Pro Hac Vice)
dsuhr@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

COLLEEN STROEDER,

Plaintiff,

v.

SEIU LOCAL 503; **KATE BROWN**, in her official capacity as governor of Oregon; **PAUL MATHER**, in his official capacity as acting director of the Oregon Department of Transportation; and **KATY COBA**, in her official capacity as director of the Oregon Department of Administrative Services,

Defendants.

Case No. 3:19-cv-01181-BR

PLAINTIFF'S RESPONSE TO STATE DEFENDANTS' MOTION TO DISMISS

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Plaintiff, Colleen Stroeder ("Stroeder"), files this Response in opposition to the Motion to Dismiss, Dkt. 24, filed by Kate Brown, in her official capacity as governor of Oregon; Paul Mather, in his official capacity as acting director of the Oregon Department of Transportation; and Katy Coba, in her official capacity as director of the Oregon Department of Administrative Services (collectively, the "State Defendants"). In response to the motion, Stroeder argues below that 1) the Eleventh Amendment does not bar recovery against the State Defendants sued for declaratory and injunctive relief in their official capacities and 2) the State Defendants cannot avoid review from this Court because their unconstitutional actions last shorter than a year and represent an entrenched policy.

1. **The Eleventh Amendment does not bar claims for declaratory and injunctive relief.**

Stroeder does not seek damages against the State Defendants. *See* Complaint, Dkt. 1, at 9-10 (Prayer for Relief seeks damages only against SEIU). Stroeder seeks only declaratory relief against the State Defendants (see *id*. at 9 (a) and (b)), which she may obtain under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). To avoid the Eleventh Amendment bar, a court conducts a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md*., 535 U.S. 635, 645 (2002). Plaintiffs' Complaint alleges just such ongoing violations and seeks just such relief.

The Ninth Circuit is in accord with this analysis. "Neither absolute nor qualified immunity bars Plaintiff's claims against" the governor, her cabinet secretary, and his subordinate when those claims are for declaratory and injunctive relief. *Thornton v. Brown*, 757 F.3d 834, 839 (9th Cir. 2014) (citing *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (holding

that "state officials sued in their official capacities" are "'persons' within the meaning of § 1983" when they are "sued for prospective injunctive relief"); *Buckwalter v. Nev. Bd. of Med. Exam'rs*, 678 F.3d 737, 747 (9th Cir. 2012) ("Absolute immunity is not a bar to injunctive or declaratory relief."); and *Vance v. Barrett*, 345 F.3d 1083, 1091 n.10 (9th Cir. 2003) ("[A] defense of qualified immunity is not available for prospective injunctive relief.").

Because Stroeder's claims against the State Defendants are for declaratory and injunctive relief only, they are not barred by Eleventh Amendment sovereign immunity under the long-standing doctrine of *Ex Parte Young*.

2. **Plaintiff's claims are not moot**.

Plaintiff's claims are not moot. Rather, they present exactly the sort of claim that is (1) evading review because of the entrapment time periods present in these union dues-deduction authorizations and (2) capable of repetition because of the government's entrenched policy required by Oregon statute. *See City of L.A. v. Barr*, 929 F.3d 1163, 1172-73 (9th Cir. 2019) (setting forth the standard). Under the State Defendants' theory, the only way for Stroeder and other government workers to maintain standing would be to skip their annual 15-day escape window to resign from the union and stop their dues deductions, even after they have sued to leave the union. The doctrine of mootness does not require such an obvious action against her own interest. Recently, the Ninth Circuit verified a similarly situated plaintiff's standing in another union challenge:

> Although no class has been certified and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case

> not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three years is "too short to allow for full judicial review." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

Fisk v. Inslee, 759 F. App'x 632, 633 (9th Cir. 2019). The *Fisk* Court, in other words, did not find such a claim mooted by the end of dues deduction. Nor did it demand that the plaintiffs show they would rejoin the union only to try to resign again to maintain standing. Instead, the court denied mootness because the claim was evading review and capable of repetition.[1]

It is also important to clarify that this is not a case "where, as here, the defendants voluntarily cease the conduct complained of." Motion to Dismiss at 4. The Union and State Defendants have only stopped deducting dues from Plaintiff's paychecks because she exercised her right to opt-out when she reached her 15-day annual escape window. If she had decided in the fall rather than the summer to leave her union, she would be stuck paying dues until August 2020. In fact, the State Defendants would be legally obligated to continue deducting those dues until August 2020 because of the statute Plaintiff now challenges: Oregon Chapter 429 (2019 Laws) (2019 H.B. 2016), Section 6(6) (providing that a dues-deduction authorization "shall remain in

[1] The Ninth Circuit ultimately dismissed the case because of defective pleading that had failed to make the arguments in the district court that Stroeder now presents to this Court. The Court found such arguments had been waived. 759 F.App'x at 634.

effect until the public employee revokes the authorization in the manner provided by the terms of the agreement."). In other words, it is the ongoing, permanent, entrenched policy of the State of Oregon to reject requests from employees such as the Plaintiff who wish to withdraw their affirmative consent outside the 15-day escape window otherwise afforded them. Yet under the State Defendants' theory of standing, no plaintiff could ever successfully challenge the law, because no litigation would be concluded on the merits by the time the employee reached his or her next opt-out window, and no plaintiff could show a reasonable likelihood of repetition as to herself specifically. Stroeder voluntarily dismissed her Motion for Preliminary Injunction on the issue, Dkt. 22, but Stroeder should be accorded a ruling by this Court on the merits.

As to the first prong of the mootness doctrine, evading review, an annual dues-deduction opt-out window is very similar to other situations where full federal judicial review simply lasts longer than the facts otherwise allow. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) ("a period of two years is too short to complete judicial review of the lawfulness of the procurement"). Such tactics are not new; they are a typical and longstanding strategy by unions to avoid judicial scrutiny. In *Knox v. SEIU Local 1000*, 567 U.S. 298 (2012), the Supreme Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted fees to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743,

> 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Knox, 567 U.S. at 307. As in *Knox,* here the State Defendants continue to assert the legality of their withdrawal window policy but wish to avoid this Court determining its legality. The Court should grant Stroeder her right to a legal determination because she still maintains her claims for declaratory relief, for attorneys' fees, and for past dues from SEIU Local 503.

These principles of law regarding a live case or controversy are not novel or unique to this case: it is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade,* 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire,* 416 U.S. at 125.

Specific to the second prong, "[t]he capable-of-repetition doctrine is applicable only when there is a reasonable expectation that the same complaining party would be subjected to the same

action again." *Cox v. McCarthy*, 829 F.2d 800, 803 (9th Cir. 1987). There can be no doubt that if Stroeder were to join a union again and then attempt to resign before her escape window, she would be "subjected to the same action again." The State Defendants have no other choice but to subject her to the same action; they are legally bound to do so by statute. *See Nat'l Audubon Soc'y v. Butler*, 160 F. Supp. 2d 1180, 1187 (W.D. Wash. 2001) (second prong met when government agency is continuing its behavior). If the State Defendants' position were correct, it would be impossible for the law to ever receive constitutional review: no worker could attempt to resign from the union before the escape window, resign during the time period, and then prove to a court that the worker genuinely wants back into the same union in the future. Stroeder must show only that the harm is capable of repetition. *Fed. Election Comm'n v. Wis. Right to Life, Inc*., 551 U.S. 449, 463 (2007) ("Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges.")

The Court should also bear in mind that it should permit a case to move forward when "the public interest in having this dispute resolved is strong." *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle,* 829 F.2d 933, 939 (9th Cir. 1987). In this case, the public interest in resolving the constitutionality of a recent state statute affecting all state employees is strong. *See Greenpeace Action v. Frasunklin*, 14 F.3d 1324, 1330 (9th Cir. 1992). "[T]he existence of a public interest in having the legality of the practices settled militates against a mootness conclusion." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985) (internal quotations omitted). This is not an appeal for an advisory opinion; the Plaintiff will vigorously prosecute her case because her rights were violated, and "[t]he judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Super Tire Eng'g Co.*, 416 U.S. at 127. "All that is

required is 'governmental action directly affecting, and continuing to affect, the behavior of citizens in our society,'" which is certainly the case here. *Hall v. Bennett*, 999 F. Supp. 2d 1266, 1270 (M.D. Ala. 2014) (quoting *Super Tire Eng'g Co*., 416 U.S. at 126).

CONCLUSION

In *Super Tire Eng'g Co.*, the Supreme Court warned that "the purposes of the Declaratory Judgment Act would be frustrated" if "a state policy affecting a collective-bargaining agreement . . . could be adjudicated only rarely" because of mootness concerns. Both the Supreme Court and the Ninth Circuit Court of Appeals have affirmed repeatedly that cases like this one are not moot and are allowed to proceed for declaratory relief against state officials. For the reasons stated above, the motion to dismiss should be denied.

Dated: October 30, 2019

Respectfully Submitted,

/s/ Brian K. Kelsey
Brian K. Kelsey
Daniel R. Suhr
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
bkelsey@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

-and-

/s/ Nathan R. Rietmann
Nathan R. Rietmann
nathan@rietmannlaw.com
Rietmann Law, P.C.
1270 Chemeketa St. NE
Salem, Oregon 97301
Phone: 503-551-2740
Fax: 1-888-700-0192

Attorneys for Colleen Stroeder