No. 19-56271

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cara O'Callaghan and Jeneé Misraje,

Plaintiffs-Appellants,

v.

Janet Napolitano, in her official capacity as President of the University of California; Teamsters Local 2010; and Xavier Becerra, in his official capacity as Attorney General of California,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-02289
Hon. James V. Selna

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court held that unions cannot collect money from government workers' paychecks without their affirmative consent. Appellants repeatedly told their union and their employer that they do not have consent to deduct union dues, yet Appellant Cara O'Callaghan remains trapped paying dues for almost four years.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331 because this claim arises under the First Amendment to the Constitution and, therefore, presents a federal question and had jurisdiction under 28 U.S.C. § 1343 because relief is sought under 42 U.S.C. § 1983.

On November 1, 2019, both Appellants filed a timely Notice of Appeal (ER 03) from the District Court's October 4, 2019 Judgment (ER 06) disposing of all parties' claims and issued in accordance with the that court's September 30, 2019 Order Regarding Motions to Dismiss (ER 08). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See also* Fed. R. App. P. 4(a)(4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1. Can a union trap public workers into paying dues for almost four years without the "affirmative consent" required by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)?
2. Are public sector unions entitled to a "good faith" defense against liability for monies exacted in violation of the Supreme Court's holding in *Janus*?
3. Does the state violate the free speech and free association rights of public employees by granting a labor union the right to exclusively represent employees who are not members of the union?

ADDENDUM

The relevant California statutes, which are either cited in this Brief or portions of which are being challenged by this lawsuit, are attached in an Addendum at the end of this brief.

STATEMENT OF THE CASE

Appellant Cara O'Callaghan ("O'Callaghan") is being trapped in the union for almost four years. She and Appellant Jenee Misraje ("Misraje") repeatedly

advised Appellee Teamsters Local 2010 (the "Union") that it does not have their affirmative consent to withdraw its dues from their paychecks or to represent them as members of the Union, but those requests were denied.

O'Callaghan is the finance manager of the Sport Club program, employed by the University of California, Santa Barbara ("UCSB"). Order Regarding Motions to Dismiss ("MTD Order") at *1 (ER 08). O'Callaghan was employed by UCSB from 2000 to 2004 and has been continuously employed by UCSB since August 2009. *Id.* at *2 (ER 09). For almost nine years since returning to UCSB, O'Callaghan did not join the Union but, instead, was forced by California law to pay agency fees, also known as "fair share" fees, to the Union. *Id.* (ER 09). On May 31, 2018, a Union representative came to O'Callaghan's workplace and solicited her to join the union. *Id.* (ER 09). The Union representative did not inform her of the impending Supreme Court decision in *Janus*; did not inform her that she had a right to pay nothing to the Union; and did not inform her that she was waiving that right. *Id.* (ER 09). Relying on this lack of information, O'Callaghan signed the membership application. *Id.* (ER 09).

On June 27, 2018, the Supreme Court decided *Janus* and held that the deduction of union fees from government employees without their "affirmative consent" violates the First Amendment. 138 S. Ct. at 2486. The Court further held that "affirmative consent" requires a "waiver" of First Amendment rights that is

"freely given" and must be shown by "clear and compelling" evidence. *Id*.

On July 25, 2018, after learning of the *Janus* decision, O'Callaghan sent one letter to the Union resigning from the Union and another letter to UCSB requesting that it stop deducting union dues from her paycheck. MTD Order at *2 (ER 09). In a letter dated July 24, 2018, the Union responded that she was free to resign her membership at any time; however, her payroll deductions would continue until she gave notice pursuant to the terms of the collective bargaining agreement between the Union and UCSB. *Id.* (ER 09). The Union letter did not explain what those terms were. Jason Rabinowitz Declaration, May 16, 2019, Exhibit 1 (ER 52). The terms required notice to be written and sent via U.S. mail to both the Union and UCSB during the thirty days prior to the expiration of the agreement, which would not occur until March 31, 2022—almost four years from the time of her request. MTD Order at *2 (ER 09).

On October 16, 2018, Liberty Justice Center sent a letter to UCSB demanding that it immediately stop deducting union dues from O'Callaghan's paycheck. *Id.* (ER 09). On October 24, 2018, UCSB referred the Liberty Justice Center letter to the Union via e-mail. *Id.* (ER 09). On November 9, 2018, the Union confirmed to UCSB via e-mail that it should continue to deduct union dues from O'Callaghan's paycheck. *Id.* (ER 09). On November 29, 2018, UCSB sent a letter to Liberty Justice Center stating that it would continue to deduct union dues

from O'Callaghan's paycheck. *Id.* (ER 09). Today, Appellee Janet Napolitano, in her official capacity as President of the University of California ("Napolitano") and the Union continue to deduct approximately $41.00 per month from O'Callaghan's paycheck. (ER 09).

Misraje is an administrative assistant in the Geography Department at the University of California, Los Angeles ("UCLA"), where she has been employed since May 2015. *Id.* (ER 09). On July 27, 2015, Misraje signed an application joining the Union. *Id.* at *9-10 (ER 09-10). On August 8, 2018, Misraje sent a letter to the Union requesting to withdraw her union membership. *Id.* at *10 (ER 10). On August 9, 2018, the Union responded to Misraje via e-mail that she would be dropped as a full member of the Union but that she could only end the deduction of union dues from her paycheck during a particular time window. *Id.* (ER 10).

On August 27, 2018, Misraje sent an e-mail to the Union, requesting that it immediately terminate her union membership and stop deducting dues from her paycheck, and she sent an email to UCLA requesting that it stop deducting union dues from her paycheck. *Id.* (ER 10). The same day, UCLA responded that it could not grant her request because all such requests must come through the Union under California law, and the Union repeated its response that Misraje was no longer a Union member but could not end deduction of her union dues until an unspecified

future time period. *Id.* (ER 10). Misraje made similar requests to both the Union and UCLA and received similar responses between October 11, 2018 and December 7, 2018. *Id.* (ER 10). The terms of Misraje's union membership application dictate that notice to end dues deductions must be written and sent to both the Union and UCLA "at least sixty (60) days, but not more than seventy-five (75) days" before the anniversary date of when she signed the agreement. *Id.* (ER 10). Napolitano deducted approximately $53.00 per month from Misraje's paychecks for union dues and remitted them to the Union. *Id.* (ER 10).

On March 27, 2019, O'Callaghan and Misraje (collectively, "Appellants") filed this lawsuit against Regents of the University of California; the Union; and Xavier Becerra, in his official capacity as Attorney General of California (the "Attorney General"). *See* Civil Docket for Case # 2:19-cv-02289-JVS-DFM ("Docket Sheet") at *4 (ER 64). The Complaint asserted seven counts, addressing two issues: 1) the deduction of Union dues from Appellants without their affirmative consent and 2) the Union's status as Appellants' exclusive representative in violation of their rights to free speech and association.

On April 23, 2019, Appellants filed a motion for preliminary injunction. *Id.* at *6 (ER 66). On June 10, 2019, the District Court denied the motion for preliminary injunction, representing the first of two rulings present for review. Order Regarding Motion for Preliminary Injunction at *1 ("PI Order") (ER 35).

On June 14, 2019, Appellants filed a First Amended Complaint, substituting Napolitano for the Regents of the University of California. MTD Order at *1 n.1 (ER 08); Docket Sheet at *8 (ER 68). On June 26, 2019, the Union filed a motion to dismiss the First Amended Complaint. Docket Sheet at *8 (ER 68). Two days later, the Attorney General did the same. *Id.* (ER 68). On August 12, 2019, Napolitano filed a motion to dismiss the First Amended Complaint. *Id.* at *8-9 (ER 68-69). On September 30, 2019, the District Court granted Appellees' motions to dismiss, representing the second of two rulings present for review. MTD Order at *1 (ER 08). On October 4, 2019, the District Court entered judgment disposing of the case in its entirety. (ER 06). On November 1, 2019, Appellants filed their Notice of Appeal. (ER 03).

SUMMARY OF ARGUMENT

Government employees have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). Government employees O'Callaghan and Misraje repeatedly told the Union it does not have their affirmative consent to withdraw its dues from their paychecks or to represent them as a member of the Union. These requests were ignored or denied. The Union has insisted, instead, that Appellants must wait until an opt-out period the Union

prefers in order to exercise their First Amendment right not to pay union dues. Napolitano has followed the Union's direction and continued to deduct dues from Appellants and remit them to the Union. The Attorney General has enforced California statutes upholding this unconstitutional scheme and also requiring the Union to be recognized as the exclusive representative of Appellants for bargaining purposes.

Trapping Appellants into paying union dues for years until the Union's preferred opt-out period is unconstitutional under *Janus*, which requires a "waiver" of First Amendment rights that is "freely given" and must be shown by "clear and compelling" evidence. *Id*. Appellants could not have waived their right to pay nothing to the Union when they joined because the *Janus* decision had not yet recognized that right. Appellants and Appellees were both operating under a mutual mistake of law when they gave Appellants the unconstitutional choice between paying union dues as members of the union or paying union agency fees as non-members of the union.

The longest entrapment period that the Union could possibly claim for government workers would be one year. The Union, however, is violating *Janus* by claiming that Appellants are no longer members of the Union, but it can still take money from their paychecks at all, and especially for four years.

The Union cannot rely on a "good faith" defense for violating Appellants'

Free Speech and Freedom of Association rights because there is no element of bad intent in a First Amendment violation. Such a requirement would be antithetical to a § 1983 claim, which was designed to challenge duly enacted laws like the ones Appellees rely on.

Finally, it is a violation of the First Amendment to force citizens to associate with organizations or causes with which they do not wish to associate. Yet California law grants public sector unions the power to speak on behalf of employees as their exclusive representative. Pursuant to this law, the Union purports to act as the exclusive representative of Appellants. This compelled arrangement abridges their rights of speech and association. The cases of *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) and *Mentele v. Inslee*, 916 F.3d 783, 784 (9th Cir. 2019) are inapposite to this lawsuit or, in the alternative, should be overruled.

STANDARD OF REVIEW

The Ninth Circuit reviews a district court's ruling on a motion to dismiss *de novo*, considering "only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Autotel v. Nev. Bell Tel. Co.,* 697 F.3d 846, 850 (9th Cir. 2012). The Court will "accept as true all well-pleaded factual allegations and construe them in the light most favorable to the plaintiff." *Id.*

ARGUMENT

I. Trapping workers in the Union for almost four years is incompatible with the "affirmative consent" required by *Janus* to deduct union dues.

Government employees have a First Amendment right not to join or make "any other payment to the union . . . unless the employee affirmatively consents to pay." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). Appellants have repeatedly told the Union it does not have their consent to deduct dues from them, but the Union insists that it can trap O'Callaghan into paying dues for almost four years.

A. To prove "affirmative consent," *Janus* requires clear and convincing evidence of a voluntary, knowing, and intelligent waiver.

Supreme Court precedent provides that certain standards be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Finally, the Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

In Appellants' case, they could not have waived their First Amendment right not to join or pay a union. First, at the time Appellants signed their union membership applications, they did not know about their right to pay nothing to the Union because the Supreme Court had not yet issued its decision in *Janus.* Second, Appellants could not have voluntarily, knowingly, or intelligently waived their rights not to join or pay a union because neither the Union nor Napolitano informed them they had a right not to join the union at all. Therefore, Appellants had no choice but to pay the Union, and they did not voluntarily waive their First Amendment rights.

Because the Court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.,* 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus,* 138 S. Ct. at 2484. In addition, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666 (1999) *(citing Aetna Ins. Co. v. Kennedy ex rel. Bogash,* 301 U.S. 389,393 (1937)).

The union applications Appellants signed did not provide a clear and compelling waiver of Appellants' First Amendment right not to join or pay a union because they did not expressly state that Appellants have a constitutional right not

to pay a union and because they did not expressly state that Appellants were waiving that right.

After the decision in *Janus,* the Union maintains that Appellants may only withdraw their dues deduction during arbitrary windows of time of the Union's choice, despite Appellants' repeated requests to be removed from the union rolls and to stop the deduction of dues from their paychecks. Being forced to pay union dues for up to one year, in Misraje's case, and for almost four years, in O'Callaghan's case, after they have stated plainly that they do not consent is unconstitutional.

The invalid union dues authorization applications signed by Appellants before the Supreme Court's decision in *Janus* cannot meet the standards set forth for waiving a constitutional right, as required by the Supreme Court in *Janus;* therefore, the Union cannot hold Appellants to the unreasonably long time window to withdraw their union membership set forth in the union applications.

Since they were apprised of their constitutional rights by the *Janus* decision, Appellants have not signed any additional union authorization applications. Therefore, Appellants have never been given their constitutional right to pay nothing to the union, and they have, therefore, never given the Union the "affirmative consent" required by the *Janus* decision.

Appellants have a clearly established right not to support the Union, and

they have not waived that right. This Court should prohibit the Union, Napolitano, and the Attorney General from treating Appellants as if they have waived their First Amendment rights.

B. The Union cannot trap workers into paying dues for almost four years.

Appellants contend that the one-year union dues entrapment period for Misraje is unconstitutional, but surely the almost four years that O'Callaghan is being held hostage by the Union is a violation of her First Amendment rights.

In *Knox*, the Supreme Court allowed that "[g]iving employees only one opportunity per year to make this choice [whether to join the union or be an agency fee payer] is tolerable if employees are able at the time in question to make an informed choice." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315, 132 S. Ct. 2277, 2291 (2012). But requiring employees to remain members for almost four years strains the boundaries of such toleration.

Under the prior *Abood* regime, the Supreme Court required annual notices be sent to employees with an accounting of chargeable and non-chargeable expenses to give an employee "a fair opportunity to identify the impact of the governmental action on his interests." *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303, 106 S. Ct. 1066, 1074 (1986). Under the overruled

scheme, the Court recognized that "a union's allocation of funds for chargeable and nonchargeable purposes is not likely to vary greatly from one year to the next." *Knox*, 567 U.S. at 318. Therefore, while ultimately rejecting the argument, the *Knox* Court at least expressed some openness to the idea that a union had an interest in a stable budget from one year to the next. Indeed, that is the interest put forward by the Union in this case as to why it needs to trap members into paying unconstitutional dues for a set period of time: "[It] is important for Local 2010 because it allows the Union to budget and plan effectively." Jason Rabinowitz Declaration, May 16, 2019, at 2. (ER 48). However, the Union has produced no evidence in the record to justify possibly needing union dues deductions for almost four years.

Not having signed a knowing waiver, Appellants are entitled to exercise their First Amendment rights under *Janus* 365 days a year, not just during a 15 or 30 day period each year. But at the very least, Appellants submit that under *Janus* employees should be provided a fair opportunity to decide whether to waive their fundamental rights at least once a year.

In a similar case decided last month in the District of New Jersey, the court also expressed skepticism at trapping government workers into paying union dues for periods longer than a year (or in that case, longer than six months). *See Smith v. N.J. Educ. Ass'n*, No. 18-10381 (RMB/KMW), 2019 U.S. Dist. LEXIS 205960, at

*19 (D.N.J. Nov. 27, 2019). The *Smith* decision addressed the constitutionality of a New Jersey statute requiring dues deductions to continue for up to one year after union resignation. In that case, the union agreements allowed members to cease dues deductions two times a year: once in January and once in July. *Id*. at *6. While it did not, ultimately, reach the issue of the constitutionality of what it deemed the "draconian" statute, it nonetheless, offered its opinion of such an annual entrapment period:

> If it were enforced as written, the Member Plaintiffs are correct that the [law]'s revocation procedure would, in the absence of a contract providing additional opt-out dates and a more reasonable notice requirement (as is present here), unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union.

Id. at *19-*20. Appellants submit that if a one-year opt-out period is too long, certainly the four-year period in this case is too long to survive review.

C. *Janus* applies to non-union members like Appellants.

The District Court held that *Janus* applies only to non-union members, but the Court erred in not recognizing that Appellants are nonmembers. *See* MTD Order (ER 13). The Union continues to assert a position that is contrary to the direct holding of *Janus*: that unions can continue to extract dues from non-union members. On one hand, the Union admits that the collection of fees from nonmembers is foreclosed by *Janus*. Teamsters Opp. to P.I. at 7 (ER 46). On the

other hand, however, the Union's own description of its treatment of Appellants explains that they are no longer union members but have "resigned from union membership." *Id.* Therefore, the Union is attempting to deduct dues from nonmembers. While Appellants accept this factual description of how the Union has treated them, they vigorously object to any conclusion of law that this action is still allowed under *Janus*. The *Janus* Court clearly ended the idea that unions can bifurcate the obligation to pay the union from membership in the union. *Janus,* 138 S.Ct. at 2460. If the *Janus* decision stands for anything at all, surely it stands for the proposition that nonmembers of the union cannot be forced to make payments to the union. *Id*.

D. The Union contracts were formed on the basis of a mutual mistake.

When Appellants exercised their First Amendment right to withdraw their affirmative consent to pay union dues, the Union could not rely on a contract that was based on a mutual mistake of what those rights were. The Union argues that Appellants "voluntarily" entered into an agreement to pay union dues. Teamsters Opp. to P.I. at 6 (ER 45). Quite the contrary, Appellants were mandated by a state law that has now been ruled unconstitutional to either pay union dues or pay their virtual equivalent in agency fees. This mandatory agreement, based on an unconstitutional choice, is not enforceable when Appellants assert their First

Amendment right to withdraw their affirmative consent to pay union dues.

For over 100 years, the Supreme Court has recognized that a contract based upon a mutual mistake is voidable by one of the parties upon discovery of the mistake: "It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties." *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389 (1918). Here, Appellants discovered the mistake that agency fees were constitutional when the Supreme Court ruled otherwise in *Janus*. They then requested out of the contract, but the assertion of their First Amendment rights was denied.

California expressly recognizes the doctrine of mutual, or "bilateral," mistake by statute. Cal. Civ. Code § 1578. "A mistake of law arises from '[a] misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law.'" *Harris v. Rudin*, 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552, 557 (2002) (quoting § 1578); *see also Kurwa v. Kislinger,* 4 Cal. 5th 109, 117, 226 Cal. Rptr. 3d 328, 334, 407 P.3d 12, 17 (2017) (citing *Harris* for the proposition that "the parties' lack of knowledge that a crucial statute had been amended could constitute a mistake of law that would justify rescinding a settlement agreement"). "As a general rule, a mistake of this sort constitutes grounds for unwinding the

transaction and giving the parties the chance to make a new run at the problem." *Kurwa,* 4 Cal. 5th at 117.

The Ninth Circuit likewise explains that "[t]he law has long recognized that it is unjust to permit either party to a transaction, in which both are laboring under the same mistake, to take advantage of the other when the truth is known. To the extent feasible, the law seeks to return the parties to their original positions." *Gayle Mfg. Co. v. Fed. Sav. & Loan Ins. Corp.*, 910 F.2d 574, 582 (9th Cir. 1990) (citing *Hannah v. Steinman*, 159 Cal. 142, 146-47, 112 P. 1094, 1096 (1911) (en banc); *Benson v. Bunting*, 127 Cal. 532, 537, 59 P. 991, 992 (1900); *Guthrie v. Times-Mirror*, Co., 51 Cal. App. 3d 879, 884, 124 Cal. Rptr. 577, 580 (Ct. App. 1975). Restatement (Second) of Contracts § 152 (1979); 3 Corbin on Contracts § 616 (1960); 13 Williston on Contracts § 1549 at 135 (3d ed. 1970)). It is for this reason that Cal. Civ. Code § 1578 "allows for rescission of a contract where consent to the contract was obtained through mutual mistake of law." *Gayle Mfg. Co.*, 910 F.2d at 582 n.5.

The "mutual mistake of law" doctrine applies to the circumstances of this case. Both Appellants and the Union were laboring under the same mistake at the time the contracts were ostensibly formed—that Teamsters was permitted to take money from them whether they signed or not. This misapprehension of law by all parties was something all the parties thought they knew, and they assumed that it

would continue to govern their actions. Yet the Supreme Court's clarification now frustrates the purposes toward which the parties all made the same mistake. This Court should find, therefore, that the mutual mistake that agency fees were permissible renders the alleged contract unenforceable, such that the Union is not permitted to take advantage of Appellants now that the truth is known.

II. The Union does not have a "good faith" defense for taking dues from Appellants against their wills.

A. The circuit courts that have recognized a "good faith" defense to § 1983 have done so only for certain constitutional deprivations.

1. *Wyatt* and several circuit courts found malice and lack of probable cause to be elements of certain § 1983 claims not at issue here.

The Supreme Court has never upheld dismissing a private defendant from a § 1983 claim based on a "good faith" defense. Despite this fact, the District Court, performing little of its own analysis, adopted the reasoning of other cases in different contexts that do not apply to Appellants. MTD Order at 12-13 (ER 18-21).

The cases upon which the District Court relied all stem from a misreading of three opinions in *Wyatt v. Cole,* 504 U.S. 158, 168-69 (1992). But this reading ignores the clear pronouncement of the *Wyatt* majority: private litigants in § 1983 cases are *not* afforded qualified immunity, and the Court did *not* decide whether

"good faith" could be used as an affirmative defense:

> The precise issue encompassed in this question, and the only issue decided by the lower courts, is whether qualified immunity, as enunciated in *Harlow*, is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute. That answer is no. In so holding, however, we do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.*, 457 U. S. 922 (1982), could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require Appellants to carry additional burdens.

Wyatt, 504 U.S. at 168-169.

The concurring and dissenting opinions in *Wyatt* also did not suggest that "good faith" reliance on a statute is a defense to *all* § 1983 damages claims. Rather, the opinions suggested that "good faith" reliance on a statute is available only to defeat the malice and probable cause elements of abuses of judicial process claims. *See id.* at 167 n.2 (majority opinion); *id*. at 172 (Kennedy, J., concurring); *id*. at 176 (Rehnquist, C.J., dissenting). As Chief Justice Rehnquist observed: "[r]eferring to the defendant as having a good-faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." 504 U.S. at 176 n.1 (Rehnquist, C.J., dissenting).

The District Court erred by not analyzing the *Wyatt* decision or the distinctions among § 1983 claims that might lead to the allowance of a "good

faith" defense. Instead, the court recited a passage from *Hernandez v. AFSCME California*, 386 F. Supp. 3d 1300, 1304 (E.D. Cal. 2019) that also did not differentiate among different §1983 claims and the elements required to prove them. MTD Order at 11 (ER 18).

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The elements and defenses material to different constitutional and statutory deprivations vary considerably. For example, the elements of a Fourteenth Amendment due-process deprivation are different from those of a Fourth Amendment search and seizure violation. Most importantly here, state of mind is material to some constitutional deprivations but not others. For instance, a specific intent is required in "due process claims for injuries caused by a high-speed chase," "Eighth Amendment claims for injuries suffered during the response to a prison disturbance," and invidious discrimination claims under the Equal Protection clauses. *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). In contrast, as this circuit has held, "free speech violations [like the one in this case] do not require specific intent." *Id.*

The Sixth Circuit was the first appellate court to find that private parties can raise a "common law good faith defense to malicious prosecution and wrongful attachment cases" brought under § 1983. *Duncan v. Peck*, 844 F.2d 1261, 1267

(6th Cir. 1988). "While probable cause and malice often have complicated meanings," *id*., these elements are generally not present if a defendant instituted a judicial process in good faith reliance on existing law. *See id.*; *Wyatt*, 504 U.S. at 172-74 (Kennedy. J., concurring); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997).

At the time, *Duncan's* holding conflicted with other appellate decisions holding that private parties enjoy "good faith" immunity to §1983 liability. *See id*. at 1265.[1] The Sixth Circuit in *Duncan* believed that "courts who endorsed the concept of good faith immunity for private individuals improperly confused good faith immunity with a good faith defense." 844 F.2d at 1266.

In 1992, the Supreme Court in *Wyatt* found that private parties seldom enjoy "good faith" immunity to § 1983 liability. 504 U.S. at 161, 168. *Wyatt* involved constitutional claims analogous to "malicious prosecution and abuse of process." *Id.* at 164. The Court recognized that, at common law, "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id*. at 164–65; *see also id*. at 172–73 (Kennedy. J., concurring). Justice Kennedy further explained that "if the plaintiff could prove

[1] A "defense" and an "immunity" differ in that a defense rebuts the alleged deprivation of rights, while an immunity is an exemption from § 1983 liability, even if there is a deprivation. *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 171-72 (Kennedy, J., concurring)).

subjective bad faith on the part of the defendant, he had gone far towards proving both malice and lack of probable cause." *Id*. at 173 (Kennedy. J., concurring). Indeed, often "lack of probable cause can *only* be shown through proof of subjective bad faith." *Id*. at 174 (emphasis in original) (citing *Birdsall v. Smith*, 122 N.W. 626 (Mich. 1909) (holding that a plaintiff alleging malicious prosecution failed to prove the prosecution lacked probable cause)).

The *Wyatt* Court determined that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id*. at 165. The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167.

Wyatt left open the question of whether the defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id*. at 168–69. As the Supreme Court later explained in *Richardson*, "*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense." 521 U.S. at 413. The Court in *Richardson*, "[l]ike the Court in *Wyatt*," also "[did] not express a view on this last-mentioned question." *Id*. at 414. The Supreme Court has yet to resolve the question.

On remand in *Wyatt*, the Fifth Circuit held the defendants could raise the defense because malice and lack of probable cause were elements of the common-law abuse of process claim. *Wyatt v. Cole*, 994 F.2d 1113, 1119-21 (5th Cir. 1993). The Fifth Circuit recognized that the Supreme Court "focused its inquiry on the *elements* of these torts," and found "that Appellants seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause." *Id*. at 1119 (first emphasis added).

The Fifth Circuit's observation is correct. In *Wyatt*, Justice Kennedy agreed with then Chief Justice Rehnquist that "it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." 504 U.S. at 172; *see also id*. at 176 n.1 (Rehnquist, C.J., dissenting).

The Third and Second Circuits later followed the Sixth and Fifth Circuits' lead and recognized that "good faith" is a defense to an abuse of process or malicious prosecution claim arising from abuse of judicial process. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996). The Second Circuit in *Pinsky* required proof of "malice" and "want of probable cause" because "malicious prosecution is the most closely analogous tort and look[ed] to . . . for the elements that must be established in order for [the plaintiff] to prevail on his §

1983 damages claim." 79 F.3d at 312–13. The Third Circuit in *Jordan* required proof of "malice" for the same reason, recognizing that while "section 1983 does not include any *mens rea* requirement in its text, . . . the Supreme Court has plainly read into it a state of mind requirement *specific to the particular federal right* underlying a § 1983 claim." 20 F.3d at 1277 (emphasis added).[2]

More recently, the Ninth Circuit in *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008), held "the facts of this case justify allowing" a towing company that towed a vehicle pursuant to police instructions to assert a "good faith" defense. *Id*. at 1097. This circuit did not identify its legal basis for recognizing the defense or its scope. The District Court in this case quoted another district court opinion relying on *Clement,* MTD Order at 11 (ER 18), but *Clement* does not support a "good faith" defense based in statutory reliance because *Clement* did not involve reliance on a statute, but rather reliance on police instructions to tow a car. 518 F.3d at 1097. The *Clement* decision is altogether too ambiguous to support the sweeping proposition that reliance on a statute is a defense to all § 1983 claims. To the extent it supports anything, it is that the towing

[2] The Sixth Circuit also reiterated its *Duncan* holding in another abuse of process case, *Vector Research, Inc. v. Howard & Howard Attorneys P.C*., 76 F.3d 692, 699 (6th Cir. 1996). *Vector Research* involved, in relevant part, a *Bivens* claim against attorneys for searching and seizing property pursuant to an *ex parte* court order. *Id*. at 695-97. The Court held the defendants could escape liability if they acted in good faith. *Id*. at 699.

company in that case did not itself commit the constitutional tort because "the constitutional violation arose from the inactions of the police rather than from any act or omission by the towing company." *Id.* Since "there would be no easy way for a private towing company to know" whether the officer had violated the owner's rights, it was not liable for the actions taken by the police officer. *Id.* *Clement*, therefore, at most stands for the proposition that private parties are not liable for torts *committed by government officials*. And nothing in *Clement* suggests that the towing company would be entitled to *keep the car* that had been impounded by police, which is what the Union is asking to do in this case.

As the foregoing review makes clear, these cases held that "good faith" reliance on existing law can defeat the malice and probable cause elements of a constitutional claim arising from an abuse of judicial process. That was the claim at issue in those cases (with the exception of *Clement,* which does not explain its basis). *See Wyatt*, 504 U.S. at 160 (state court complaint in replevin); *Duncan*, 844 F.2d at 1267 (state court prejudgment attachment order); *Jordan*, 20 F.3d at 1276–77 (state court judgment and garnishment process); *Pinsky*, 79 F.3d at 312–13 (state court prejudgment attachment procedure); *Vector Research*, 76 F.3d at 695-96 (federal court ex parte search order).

These cases did not recognize an across-the-board "good faith" defense—i.e., that any defendant that relies on a statute is exempt from paying damages

under § 1983. In fact, these cases did not recognize a true "defense" of any sort. *See Wyatt*, 504 U.S. at 172 (Kennedy J., concurring); *id*. at 176 n.1 (Rehnquist, C.J., dissenting). The Justices in *Wyatt* and the Second, Third, Fifth, and Sixth circuits found malice and lack of probable cause to be *elements* of abuse of process claims that *Appellants* bear the burden of proving. *See Wyatt*, 994 F.2d at 1119–20; *Jordan*, 20 F.3d at 1277; *Pinsky*, 79 F.3d at 312; *Duncan*, 844 F.2d at 1267. While "good faith" reliance on existing law may defeat those elements, such reliance is not a defense to § 1983 writ large.

Although it is not binding on this Court and involves a different issue, Appellants acknowledge that since the court below filed the opinion that is being appealed, the Seventh Circuit issued the first appellate opinion recognizing a similar type of reliance defense to the one the Union requests here. *Janus v. AFSCME Council 31*, No. 19-1553, 2019 U.S. App. LEXIS 33071, at *27 (7th Cir. Nov. 5, 2019). This decision, part of the ongoing post-Supreme Court litigation in the *Janus* case itself, sides with the Union. Appellants submit this decision is in error for all the reasons described in this brief. Judge Manion's separate opinion, while concurring "with the court's ultimate conclusion," comes closer to the mark, explaining that "[t]he unions received a huge windfall for 41 years," and that "a better way of looking at it would be to say rather than good faith, [the unions] had very 'good luck' in receiving this windfall for so many years." *Id*. at 35-37.

Appellants submit that this Court should not allow the Union to enjoy good luck that came out of Appellants' paychecks.

Furthermore, in the 7th Circuit *Janus* opinion, defendants relied on "good faith" in following state agency fee deduction statutes *until* the Supreme Court *Janus* decision was handed down. At that point, they stopped deducting agency fees. That is different from this case, in which Appellees continue to take dues from O'Callaghan. The District Court failed to discern this difference when it quoted extensively from *Hernandez*. MTD Order at 11-13 (ER 18-20). The portion of *Hernandez* from which it quoted was one involving the retrospective return of unconstitutionally taken agency fees. *See Hernandez v. AFSCME Cal.*, 386 F. Supp. 3d 1300, 1304 (E.D. Cal. 2019). The District Court erred in applying this analysis from Section II A of *Hernandez* to Appellants. Rather, the party analogous to Appellants in *Hernandez* is Plaintiff Timothy Porter, whose situation is discussed in Section II B of the opinion. Like Appellants, Porter signed a union membership application prior to the Supreme Court *Janus* decision and wished to end his dues deductions immediately but feared the union would force him to wait. *See Id.* at 1306-1307. Section II B of the *Hernandez* decision makes no mention of a "good faith" defense.[3] The District Court erred in failing to realize that Appellees

[3] Porter's claim was dismissed for lack of standing because, unlike Appellants in this case, he never actually resigned the union and requested that it stop taking his dues. 386 F. Supp. at 1308.

cannot rely on "good faith" to continue to violate the constitution for the next three years.

2. Malice and lack of probable cause are not elements of or defenses to a First Amendment compelled speech violation.

Unlike in claims arising from abuses of judicial processes, malice and lack of probable cause are not elements of, or a defense to, a First Amendment deprivation. As this circuit has held, "free speech violations do not require specific intent." *OSU Student Alliance*, 699 F.3d at 1074. In particular, a compelled speech violation does not require any specific intent. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial.

Thus, whether the Union relied in "good faith" on the California dues deduction statute when it seized money from Appellants without their consent is irrelevant. Either way, the action deprived them of their First Amendment rights. "Good faith" is simply not a defense to a union fee seizure under the Supreme Court's ruling in *Janus*.

3. A First Amendment compelled speech claim is not analogous to malicious prosecution or abuse of process.

Given that malice and lack of probable cause are not elements of First

Amendment compelled-speech claims, it is irrelevant which common law tort may be most analogous to such claims. Some district courts, however, have nevertheless evaluated which common law tort a compelled speech violation most resembles. *See, Carey v. Inslee,* 364 F. Supp. 3d 1220, 1229-30 (W.D. Wash. 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1005 (D. Alaska 2019). Those district courts have lost sight of the relevance of common law analogies, which are to determine the elements necessary to prove a particular constitutional deprivation.

Some constitutional claims actionable under § 1983 have no common law analogue. Section 1983 is not "simply a federalized amalgamation of pre-existing common-law claims," but "is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Rehberg*, 566 U.S. at 366. Appellants' First Amendment compelled-speech claim has no common law analogue. The Supreme Court explained that "[c]ompelling a person to subsidize the speech of other private speakers" violates the First Amendment because it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common law torts. It is peculiar to the First Amendment.

There is no basis for importing the elements or defenses to any common law tort into Appellants' First Amendment claim. There is especially no basis for

importing a "good faith," state of mind element because, as discussed above, "free speech violations do not require specific intent," *OSU Student Alliance*, 699 F.3d at 1074. Moreover, the *Janus* Supreme Court decision held that a claim for compelled subsidization for union speech requires only that a state and union seize union fees from employees without their prior consent, *Janus*, 138 S. Ct. at 2486.[4]

The bottom line is that "good faith" is not a defense to a deprivation of First Amendment rights under *Janus*. The Union, thus, lacks a cognizable basis for asserting a "good faith" defense.

B. A "good faith" defense conflicts with the text, purpose, and equitable principles of § 1983.

1. A "good faith" defense is incompatible with the text of § 1983.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

[4] Alternatively, if it is relevant, Appellants' claim is most like the tort of conversion because the union wrongfully took their property without authorization. "Good faith" is not a defense to conversion, a strict liability tort. *See Morisette v. United States*, 342 U.S. 246, 253-54 (1952); Richard A. Epstein, *Torts*, § 1.12.1 at 32 (1999).

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. The statute means what it says: "[u]nder the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg,* 566 U.S. at 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

A "good faith" defense to § 1983 cannot be reconciled with the statute's mandate that "every person"—not some persons, but "every person"—who deprives a party of constitutional rights under color of law "shall be liable to the party injured in an action at law . . ." The term "shall" is not a permissive term, but a mandatory one. The statute's plain language requires that the Union be held liable to Appellants for damages.

The proposition that a defendant's good faith reliance on a state statute exempts it from § 1983 damages liability has no basis whatsoever in § 1983's text. In fact, the proposition conflicts with the statute in at least two ways.

First, § 1983 "contains no independent state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). A "good faith" defense would require penciling into § 1983 a state-of-mind requirement absent from its text, in defiance of *Daniels*.

Second, an element of § 1983 is that a defendant must act "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. Consequently, a defendant acting under a state statute cannot also be a defense to § 1983. That would render the statute self-defeating: any defendant that acted "under color of any statute," as § 1983 requires, would be shielded from liability because it acted under color of a state statute.

In other words, a "good faith" defense based on statutory reliance renders a statutory *element* of § 1983 to be a *defense* to § 1983. There is little to no difference between a defendant acting "under color of any statute," 42 U.S.C. § 1983, and a defendant relying on a presumptively valid state law. That the Union acted "under color" of the California dues deduction law when it deprived Appellants of their constitutional rights is not exculpatory but the very reason why the Union is liable under § 1983.

2. A "good faith" defense is incompatible with the statutory basis for qualified immunity, and the Union lacks that immunity.

Section 1983 "on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Thus, courts can "not simply make [their] own judgment about the need for immunity" and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363.

Rather, courts only can "accord[] immunity where a 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine'" when it enacted § 1983. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992)). These policy reasons are "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 566 U.S. 377, 389–90 (2012) (citing *Richardson*, 521 U.S. at 409–11). The Union is not entitled to qualified immunity to § 1983 damages claims unless these exacting strictures are satisfied. *See, e.g., Owen v. Independence*, 445 U.S. 662, 657 (1980) (holding municipalities lack qualified immunity).

Qualified immunity law demonstrates that exemptions to § 1983 liability are not created out of whole cloth. Immunities are based on the statutory interpretation that § 1983 did not abrogate entrenched, pre-existing immunities. *See Filarsky*, 566 U.S. at 389–90. In contrast, no interpretation of § 1983's statutory language, or its legislative history,[5] supports a "good faith" defense.

[5] Unlike with recognized immunities, there is no common law history prior to 1871 of private parties enjoying a "good faith" defense to constitutional claims. As one scholar recently noted: "[t]here was no well-established, good-faith defense in suits

The Union's defense is premised on nothing more than misguided notions of equity and fairness. Given that courts "do not have a license to create immunities based on [their] view[s] of sound policy," *Rehberg*, 566 U.S. at 363, it follows that courts do not have license to create equivalent defenses to § 1983 liability on mere policy grounds.

It is also anomalous to grant defendants that lack qualified immunity the functional equivalent of immunity under the guise of a "defense," as it renders the qualified immunity analysis superfluous. Yet that is what the Union seeks here. Qualified immunity bars a damages claim against an individual if, as an objective matter, his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That accurately describes the defense the Union seeks here.

While there are procedural differences between an immunity and a defense, *see* n. 1, *infra*, both absolve defendants from having to compensate the victims of their constitutional deprivations. It makes no sense to grant defendants who are not

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about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment." William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 49 (2018); *see Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (Justice Marshall rejecting a "good faith" defense: "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."); *Anderson v. Myers*, 238 U.S. 368, 378 (1915) (rejecting "good faith" defense).

entitled to qualified immunity to § 1983 damages liability an equivalent defense to the same damages liability.

3. A "good faith" defense is inconsistent with equitable principles.

"As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

Here, Congress mandated in § 1983 that "every person who, under color of any statute" deprives others of their constitutional rights "shall be liable to the party injured in an action at law. . . " Courts cannot refuse to enforce this statutory command against defendants who acted pursuant to supposedly valid statutes because it would supposedly be unfair to those defendants. "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

In any case, fairness favors enforcing § 1983 as written. It is not fair to deny

victims of constitutional deprivations relief for their injuries. Nor is it fair to let wrongdoers keep ill-gotten gains. Appellants should not have to pay for the Union's unconstitutional conduct. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen*, 445 U.S. at 654.

The Supreme Court in *Owen* wrote those words when holding municipalities are not entitled to a "good-faith" immunity to § 1983 claims. The Court's two equitable justifications for so holding are equally applicable here.

First, the *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id*. at 651. That injustice also should not be tolerated here.

Countless victims of constitutional deprivations will be left remediless if defendants to § 1983 suits can escape liability by showing they had a "good faith," but mistaken, belief their conduct was lawful. Those victims include not just Appellants and other employees who had dues seized from them. Under the Union's argument, every defendant to every § 1983 damages claim can assert a "good faith" defense. For example, the municipalities that the Supreme Court in *Owen* held not to be entitled to a "good faith" immunity could raise an equivalent "good faith" defense, leading to the very injustice the Court sought to avoid.

Second, the *Owen* Court further recognized that § "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, *whether committed in good faith or not*, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id*. at 651–52 (emphasis added). The same rationale weighs against a "good faith" defense to § 1983.

Finally, the *Owen* Court held that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm rather "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 654. So too here, when Appellants' and the Union's interests are weighed together, the balance of equities overwhelmingly favors requiring the Union to return to Appellants the monies it unconstitutionally seized from them.

The District Court's opinion perhaps relies on the notion that that it would be unequal and unfair to hold private actors liable for damages that state actors avoid because of qualified immunity. *See* MTD Order at 11 (ER 18). It is not unfair, however, because public servants enjoy qualified immunity for reasons not

applicable to the Union and most other private entities: to ensure that the threat of personal liability does not dissuade individuals from acting as public servants. *See Wyatt*, 504 U.S. at 168. If those interests apply to private persons, they are entitled to immunity. *See Filarsky*, 566 U.S. at 389–90. Thus, "[f]airness alone is not . . . a sufficient reason for the immunity defense, and thus does not justify its extension to private parties." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998).

Moreover, a large organization like the Union is nothing like individual persons who enjoy qualified immunity. The Union is most akin to governmental bodies that lack qualified immunity, such as municipalities. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby." *Owen*, 445 U.S. at 654. Nor is it unjust to require other organizations to compensate citizens for violating their constitutional rights.

4. A "good faith" defense would undermine the remedial purposes of § 1983.

The Court should pause to consider the implications of recognizing the Union's sweeping defense. Under the District Court rationale, any defendant that deprives any person of any constitutional right can escape damages liability if it relied on existing law.

This ostensible defense would be available not just to unions but to all

defendants sued for damages under § 1983. Of course, individuals with qualified immunity would have little reason to raise the defense, since their immunity is similar. But defendants who lack immunity, such as private parties and municipal governments, would gain the functional equivalent of a qualified immunity.

These defendants could raise a statutory reliance defense not just to First Amendment compelled-speech claims but against any constitutional or statutory claim brought under § 1983 for damages. This includes claims alleging discrimination based on race, sex, or political affiliation. *See, e.g., United States v. Windsor,* 570 U.S. 744, 753 (2013) (suit for return of money taken in reliance on the federal Defense of Marriage Act). Allowing such a broad defense would render § 1983 self-defeating.

III. Recognizing the Union as Appellants' exclusive representative for bargaining purposes violates their First Amendment rights of speech and association. Appellants cannot be forced to associate with a group that they disagree with.

A. Forcing Appellants to have the Union serve as their exclusive representative is unconstitutional.

Under Cal. Gov't Code §§ 3570, 3571.1(e), 3574, 3578, as a condition of their employment, Appellants must allow the Union to speak on their behalf on wages and hours, matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. California law grants the union prerogatives to speak on

Appellants' behalf on not only wages but also "terms and conditions of employment." Cal. Gov't Code § 3562(q)(1). These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467. When the state certifies the Union to represent the bargaining unit, it forces all employees in that unit to associate with the Union. This coerced association authorizes the Union to speak on behalf of the employees even if the employees are not members, even if the employees do not contribute fees, and even if the employees disagree with the Union's positions and speech.

This arrangement has two constitutional problems: it is compelled speech because the Union speaks on behalf of the employees as though its speech is the employees' own speech and compelled association because the Union represents everyone in the bargaining unit without any choice or alternative for dissenting employees not to associate.

Legally compelling Appellants to associate with the Union demeans their First Amendment rights. Although the issue has not been raised directly before the Supreme Court, that Court has questioned whether exclusive representation in the public sector context imposes a "significant impingement" on public employees' First Amendment rights. *Janus*, 138 S. Ct. at 2483; *see Harris v. Quinn*, 134 S. Ct.

2618, 2640 (2014); *Knox v. Service Employees*, 567 U. S. 298, 310–11 (2012).[6] Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). Exclusive Representation forces employees "to voice ideas with which they disagree, [which] undermines" First Amendment values. *Janus*, 138 S. Ct. at 2464. California laws command Appellants' involuntary affirmation of beliefs they object to. The fact that Appellants retain the right to speak for themselves in certain circumstances does not resolve the problem that the Union organizes and negotiates as their representative in their employment relations.

Exclusive Representation is also forced association: Appellants are forced to associate with the Union as their exclusive representative simply because of their employment in this particular bargaining unit. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Yet Appellants have no such freedom, no choice about their

[6] The District Court opinion incorrectly concluded that the Supreme Court in *Janus* reached the question and endorsed exclusive representation. In fact, the Supreme Court did not decide the issue, but it strongly questioned the practice. MTD Order at 9-10 (ER 16-17).

association with the Union; it is imposed and coerced by state laws.

Exclusive Representation is, therefore, subject to at least exacting scrutiny, if not strict scrutiny. It must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 567 U.S. at 310. This the Appellees cannot show. *Janus* has already dispatched "labor peace" and the so-called "free-rider problem" as sufficiently compelling interests to justify this sort of mandate. 138 S. Ct. at 2465-69. Appellants are not seeking the right to form a rival union or to force the government to listen to their individual speech. They only wish to disclaim the Union's speech on their behalf. They are guaranteed that right not to be forced to associate with the Union and not to let the Union speak on their behalf by the First Amendment.

B. The District Court's reliance on *Knight* and *Mentele* is misplaced.

In upholding the California exclusive representation statutory scheme, the District Court relied on *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). MTD Order at 10 (ER 17). *Knight* held that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court

framed the issue, "The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273.

The plaintiffs in *Knight* were community college faculty who dissented from the certified union. *Id.* at 278. The Minnesota statute at issue required that their employer "meet and confer" with the union alone regarding "non-mandatory subjects" of bargaining. The statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276. The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations.

The Court explained the issue it was addressing well: "[A]ppellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. Confronted with this claim, the Court held that "[a]ppellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny the government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Appellants here do not claim that their employer—or anyone else—should be compelled to listen to their views. Instead, they assert a right

against the compelled association forced on them by exclusive representation. The District Court's misreading of *Knight* severely elevates and misinterprets dicta in the decision. The central issue of the *Knight* decision is whether Appellants could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Appellants' claim that the government cannot compel them to associate with the Union by making the Union bargain on their behalf. In arguing that these two distinct claims are the same, the District Court pointed only to dicta towards the end of the *Knight* opinion that suggests the challenged policy "in no way restrained [Appellants'] freedom to speak on any education related issue or their freedom to associate or not associate with whom they please." *Knight*, 465 U.S. at 288. *See* MTD Order at 10 (ER 17). But in that quote the *Knight* Court was still addressing the question of being heard. The *Knight* Court explained that the government's right to "choose its advisers" was upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288. The *Knight* Court raised the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id.* This, again, is another

path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

Knight is, therefore, not responsive to the question Appellants now raise: whether someone else can speak in their name, with their imprimatur granted to it by the government. Appellants do not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify the Union's voice. They do not demand that the government schedule meetings with them, engage in negotiation, or any of the other demands made in *Knight*. They demand only that the Union not do so in their name, and they respectfully request that this Court issue a declaration to that effect.

The District Court also relies on *Mentele v. Inslee*, 916 F.3d 783, 784 (9th Cir. 2019). *Mentele* recognizes that the question presented in *Knight* can be distinguished from the current question of whether a union can act as exclusive representative of non-members. *Id.* at 788 (the two questions are "arguably distinct"). Nonetheless, *Mentele* goes on to state that *Knight* continues to apply to "partial" state employees with limited representation by the union.

Mentele should be distinguished on this point. The Appellants in *Mentele* were not government workers but private employees. Under the childcare system of the State of Washington, "families choose independent childcare providers and pay them on a scale commensurate with the families' income levels. The State

covers the remaining cost." *Id.* at 785. Washington only considers the Appellants in *Mentele* to be "'public employees' for purposes of the State's collective bargaining legislation." *Id.* As such, the exclusive representation provided these employees by their union is limited: "[T]hey are considered 'partial' state employees, rather than full-fledged state employees, and Washington law limits the scope of their collective bargaining agent's representation." *Id.* The exclusive representative cannot organize a strike, negotiate over retirement benefits, or even govern the hiring or firing of employees because they are private employees hired by the families in need of their services. *Id.* The harm of being forced to associate with such an exclusive representative is, thus, minimal.

By contrast, Appellants are public employees in every aspect of the phrase. They are public university employees, hired and fired by the government, and are forced to associate with a government union that has different views from their own on important policy issues.

The *Janus* case clearly recognized the difference between government employees like Appellants and privately hired employees like those in *Mentele* when it ended the collection of agency fees from non-members of the union for government workers only and not for private employees. 138 S. Ct. at 2486.

Likewise, in *Harris v. Quinn*, the Supreme Court distinguished between "full-fledged public employees" like Appellants and partial state employees. 573

U.S. 616, 639 (2014). In fact, the plaintiffs in *Harris* were almost identical in nature to the plaintiffs in *Mentele*, and the Supreme Court in *Harris* limited its holding to partial state employees because of the differences between such employees and full-fledged public employees. *Id.* at 647. The plaintiffs in *Harris* were personal assistants hired solely by families to provide homecare services for Medicaid recipients. *Id.* at 621. Like the plaintiffs in *Mentele*, they were considered partial state employees because they were paid by the state and subject to limited collective bargaining and exclusive representation by state statute. *Id.* at 621-623. Just as the Court in *Harris* limited its holding to employees who were public only for collective bargaining purposes, so should the *Mentele* holding be limited to partial state employees and not extended to full-fledged public employees like Appellants.

C. In the alternative, *Knight* and *Mentele* should be overruled to the extent they hold that exclusive representation does not violate Appellees' right of association.

In the alternative, Appellants argue that, to the extent they justify exclusive representation, both *Knight* and *Mentele* should be overruled. *Knight* asserted that exclusive representation "in no way restrained [plaintiff's]…freedom to associate," *Knight*, 465 U.S. at 288; *Mentele* asserted that "it is difficult to imagine an alternative that is '*significantly* less restrictive' than" exclusive representation, *Mentele*, 2019

U.S. App. LEXIS 5613, at *19 (quoting *Janus*); however, *Janus* stated that exclusive representation "substantially restricts the rights of individual employees," *Janus*, 138 S. Ct. at 2460. *Knight* and *Mentele* were, therefore, in error on this point and should be overruled to bring greater clarity to the doctrine. This Court should overrule *Mentele* for failing to properly distinguish and interpret *Knight*.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court enjoin the Union and Napolitano from deducting union dues from O'Callaghan's paycheck, vacate the District Court's orders denying preliminary injunction and dismissing the case, and remand the case to the District Court for further proceedings consistent with the following holdings: 1) Appellants did not give "affirmative consent" for Napolitano or the Union to deduct union dues from their paychecks; 2) the Union may not rely on a "good faith" defense for deducting union dues from Appellants against their wills; and 3) Napolitano cannot recognize the Union as the exclusive representative of Appellants for bargaining purposes.

Dated: December 27, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(g)

9th Cir. Case Number: 19-56271

I am the attorney.

This brief contains 11,678 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).

I certify that this brief complies with the word limit of Cir. R. 32-1.

/s/ Reilly Stephens
December 27, 2019

STATEMENT OF RELATED CASES

Appellants are aware of the following related cases currently pending before the Ninth Circuit, none of which involve Appellants but may involve related questions of law.

Danielson v. Inslee, No. 18-36087

Belgau v. Inslee, No. 19-35137

Cook v. Brown, No. 19-35191

Carey v. Inslee, No. 19-35290

McCollum v. NEA-Alaska, No. 19-35299

Hough v. SEIU Local 521, No. 19-15792

Babb v. California Teachers Ass'n, Case No. 19-55692

Wilford v. NEA, AFT, and CTA, CFT, et al., Case No. 19-55712

Smith v. Superior Court, County of Contra Costa, Case No. 19-16381

Martin v. California Teachers Association, Case No. 19-55761

Imhoff v. California Teachers Association, Case No. 19-55868

Cooley v. California Statewide Law Enforcement Ass'n, Case No. 19-16498

Allen v. Santa Clara County Correctional, No. 19-17217

Hamidi v. SEIU, No. 19-17442

Anderson v. SEIU Local 503, No. 19-35871

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2019, I electronically filed the forgoing Opening Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Reilly Stephens
Reilly Stephens
Counsel for Appellants

Statutory Addendum

O'Callaghan v. Napolitano, 19-56271

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Cal Civ Code § 1578

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > CIVIL CODE (§§ 1 — 7021) > Division 3 Obligations (Pts. 1 — 4) > Part 2 Contracts (Titles 1 — 5) > Title 1 Nature of a Contract (Chs. 1 — 5) > Chapter 3 Consent (§§ 1565 — 1590)

§ 1578. Mistake of law

Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from:

1.A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2.A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

History

Enacted Stats 1872.

End of Document

Cal Gov Code § 1157.12

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 1 General (Arts. 1 — 8) > Article 6 Salary and Wage Deductions (§§ 1150 — 1159)

§ 1157.12. Certain public employers administering employee-authorized deductions for employee organizations; Reliance on certification provided by employee organization; Employee requests to cancel or change deductions for employee organizations

Public employers other than the state that provide for the administration of payroll deductions authorized by employees for employee organizations as set forth in Sections 1152 and 1157.3 or pursuant to other public employee labor relations statutes, shall:

(a) Rely on a certification from any employee organization requesting a deduction or reduction that they have and will maintain an authorization, signed by the individual from whose salary or wages the deduction or reduction is to be made. An employee organization that certifies that it has and will maintain individual employee authorizations shall not be required to provide a copy of an individual authorization to the public employer unless a dispute arises about the existence or terms of the authorization. The employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that certification.

(b) Direct employee requests to cancel or change deductions for employee organizations to the employee organization, rather than to the public employer. The public employer shall rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed, and the employee organization shall indemnify the public employer for any claims made by the employee for deductions made in reliance on that information. Deductions may be revoked only pursuant to the terms of the employee's written authorization.

History

Added Stats 2018 ch 53 § 10 (SB 866), effective June 27, 2018.

End of Document

Cal Gov Code § 3513

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 10.3 State Employer-Employee Relations (§§ 3512 — 3524)

§ 3513. Definitions

As used in this chapter:

(a)"Employee organization" means any organization that includes employees of the state and that has as one of its primary purposes representing these employees in their relations with the state.

(b)"Recognized employee organization" means an employee organization that has been recognized by the state as the exclusive representative of the employees in an appropriate unit.

(c)"State employee" means any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the State Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, supervisory employees, employees of the Department of Human Resources, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff, employees of the Legislative Counsel Bureau, employees of the Bureau of State Audits, employees of the office of the Inspector General, employees of the board, conciliators employed by the California State Mediation and Conciliation Service, employees of the Office of the State Chief Information Officer except as otherwise provided in Section 11546.5, and intermittent athletic inspectors who are employees of the State Athletic Commission.

(d)"Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours, and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion, and advice.

(e)"Managerial employee" means any employee having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department.

(f)"Confidential employee" means any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management positions.

(g)"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

(h)"Board" means the Public Employment Relations Board. The Educational Employment Relations Board shall be renamed the Public Employment Relations Board as provided in Section 3540. The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter.

(i)"Maintenance of membership" means that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization shall remain members of that employee organization in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding, commencing with the effective date of the memorandum of understanding. A maintenance of membership provision shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the employee organization by sending a signed withdrawal letter to the employee organization and a copy to the Controller's office.

(j)"State employer," or "employer," for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives.

(k)"Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

History

Added Stats 1977 ch 1159 § 4, operative July 1, 1978. Amended Stats 1978 ch 371 § 1, effective July 10, 1978, ch 776 § 1; Stats 1979 ch 1008 § 2; Stats 1982 ch 1081 § 2, ch 1572 § 2.3; Stats 1984 ch 733 § 1; Stats 1985 ch 236 § 2, effective July 25, 1985; Stats 1987 ch 766 § 1; Stats 1990 ch 1522 § 1 (SB 511); Stats 1993 ch 12 § 1 (SB 37), effective May 7, 1993; Stats 1999 ch 918 § 1 (SB 868); Stats 2007 ch 183 § 3 (SB 90), effective January 1, 2008. See this section as modified in Governor's Reorganization Plan No. 1 § 37 of 2011; Amended Stats 2012 ch 46 § 7 (SB 1038), effective June 27, 2012; Stats 2013 ch 76 § 71 (AB 383), effective January 1, 2014.

Cal Gov Code § 3515

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 10.3 State Employer-Employee Relations (§§ 3512 — 3524)

§ 3515. Right to participate in employee organizations; Self-representation

Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

History

Added Stats 1977 ch 1159 § 4, operative July 1, 1978. Amended Stats 1978 ch 776 § 4.3; Stats 1982 ch 1572 § 3; Stats 1990 ch 1522 § 2 (SB 511).

End of Document

Cal Gov Code § 3515.5

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 10.3 State Employer-Employee Relations (§§ 3512 — 3524)

§ 3515.5. Representation of members in employment relations; Exclusive representation

Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

History

Added Stats 1977 ch 1159 § 4, operative July 1, 1978.

End of Document

Cal Gov Code § 3562

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 12 Higher Education Employer-Employee Relations (Arts. 1 — 11) > Article 1 General Provisions (§§ 3560 — 3562.2)

§ 3562. Definitions

As used in this chapter:

(a)"Arbitration" means a method of resolving a rights dispute under which the parties to a controversy must accept the award of a third party.

(b)"Board" means the Public Employment Relations Board established pursuant to Section 3513.

(c)"Certified organization" means an employee organization that has been certified by the board as the exclusive representative of the employees in an appropriate unit after a proceeding under Article 5 (commencing with Section 3573).

(d)"Confidential employee" means any employee who is required to develop or present management positions with respect to meeting and conferring or whose duties normally require access to confidential information which contributes significantly to the development of those management positions.

(e)"Employee" or "higher education employee" means any employee, including student employees whose employment is contingent on their status as students, of the Regents of the University of California, the Directors of the Hastings College of the Law, or the Trustees of the California State University. However, managerial and confidential employees and employees whose principal place of employment is outside the State of California at a worksite with 100 or fewer employees shall be excluded from coverage under this chapter.

(f)

(1)"Employee organization" means any organization of any kind in which higher education employees participate and that exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees. An organization that represents one or more employees whose principal worksite is located outside the State of California is an employee organization only if it has filed with the board and with the employer a statement agreeing, in consideration of obtaining the benefits of status as an employee organization pursuant to this chapter, to submit to the jurisdiction of the board. The board shall promulgate the form of the statement.

(2)"Employee organization" shall also include any person that an employee organization authorizes to act on its behalf. An academic senate, or other similar academic bodies, or

divisions thereof, shall not be considered employee organizations for the purposes of this chapter.

(g)"Employer" or "higher education employer" means the regents in the case of the University of California, the directors in the case of the Hastings College of the Law, and the trustees in the case of the California State University, including any person acting as an agent of an employer.

(h)"Employer representative" means any person or persons authorized to act on behalf of the employer.

(i)"Exclusive representative" means any recognized or certified employee organization or person it authorizes to act on its behalf.

(j)"Impasse" means that the parties have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile.

(k)"Managerial employee" means any employee having significant responsibilities for formulating or administering policies and programs. No employee or group of employees shall be deemed to be managerial employees solely because the employee or group of employees participates in decisions with respect to courses, curriculum, personnel, and other matters of educational policy. A department chair or head of a similar academic unit or program who performs the foregoing duties primarily on behalf of the members of the academic unit or program shall not be deemed a managerial employee solely because of those duties.

(l)"Mediation" means the efforts of a third person, or persons, functioning as intermediaries, to assist the parties in reaching a voluntary resolution to an impasse.

(m)"Meet and confer" means the performance of the mutual obligation of the higher education employer and the exclusive representative of its employees to meet at reasonable times and to confer in good faith with respect to matters within the scope of representation and to endeavor to reach agreement on matters within the scope of representation. The process shall include adequate time for the resolution of impasses. If agreement is reached between representatives of the higher education employer and the exclusive representative, they shall jointly prepare a written memorandum of the understanding, which shall be presented to the higher education employer for concurrence. However, these obligations shall not compel either party to agree to any proposal or require the making of a concession.

(n)"Person" means one or more individuals, organizations, associations, corporations, boards, committees, commissions, agencies, or their representatives.

(o)"Professional employee" means:

(1) Any employee engaged in work: (A) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (B) involving the consistent exercise of discretion and judgment in its performance; (C) of a character so that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (D) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from

a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

(2) Any employee who: (A) has completed the courses of specialized intellectual instruction and study described in subparagraph (D) of paragraph (1), and (B) is performing related work under the supervision of a professional person to qualify himself or herself to become a professional employee as defined in paragraph (1).

(p)"Recognized organization" means an employee organization that has been recognized by an employer as the exclusive representative of the employees in an appropriate unit pursuant to Article 5 (commencing with Section 3573).

(q)

(1) For purposes of the University of California only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include any of the following:

(A) Consideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby.

(B) The amount of any fees that are not a term or condition of employment.

(C) Admission requirements for students, conditions for the award of certificates and degrees to students, which include what is required for students to achieve satisfactory progress toward their degrees, and the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing orders of the regents or the directors.

(D) Procedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate, the procedures to be used for the evaluation of the members of the academic senate, and the procedures for processing grievances of members of the academic senate. The exclusive representative of members of the academic senate shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this subparagraph. If the academic senate determines that any matter in this subparagraph should be within the scope of representation, or if any matter in this subparagraph is withdrawn from the responsibility of the academic senate, the matter shall be within the scope of representation.

(2) All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

(r)

(1) For purposes of the California State University only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include:

(A) Consideration of the merits, necessity, or organization of any service, activity, or program established by statute or regulations adopted by the trustees, except for the terms and conditions of employment of employees who may be affected thereby.

(B) The amount of any student fees that are not a term or condition of employment.

(C) Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and conduct of courses, curricula, and research programs.

(D) Criteria and standards to be used for the appointment, promotion, evaluation, and tenure of academic employees, which shall be the joint responsibility of the academic senate and the trustees. The exclusive representative shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this subparagraph. If the trustees withdraw any matter in this subparagraph from the responsibility of the academic senate, the matter shall be within the scope of representation.

(E) The amount of rental rates for housing charged to California State University employees.

(2) All matters not within the scope of representation are reserved to the employer, and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

History

Added Stats 1978 ch 744 § 3, operative July 1, 1979. Amended Stats 1983 ch 143 § 178, ch 323 § 35.6, effective July 21, 1983; Stats 1999 ch 971 § 2 (SB 1279); Stats 2002 ch 1046 § 1 (AB 2883); Stats 2003 ch 62 § 105 (SB 600); Stats 2017 ch 854 § 2 (SB 201), effective January 1, 2018.

End of Document

Cal Gov Code § 3570

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 12 Higher Education Employer-Employee Relations (Arts. 1 — 11) > Article 4 Rights, Obligations, Prohibitions, and Unfair Labor Practices (§§ 3565 — 3572.5)

§ 3570. Duty of employer to meet and confer

Higher education employers, or such representatives as they may designate, shall engage in meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation.

History

Added Stats 1978 ch 744 § 3, operative July 1, 1979.

End of Document

Cal Gov Code § 3571.1

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 12 Higher Education Employer-Employee Relations (Arts. 1 — 11) > Article 4 Rights, Obligations, Prohibitions, and Unfair Labor Practices (§§ 3565 — 3572.5)

§ 3571.1. Unlawful practices; Employee organization

It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause the higher education employer to violate Section 3571.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(c) Refuse or fail to engage in meeting and conferring with the higher education employer.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).

(e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

(f) Require of employees covered by a memorandum of understanding to which it is a party the payment of a fee, as a condition precedent to becoming a member of such organization, in an amount which the board finds excessive or discriminatory under all the circumstances. In making such a finding, the board shall consider, among other relevant factors, the practices and customs of employee organizations in higher education, and the wages currently paid to the employees affected.

(g) Cause, or attempt to cause, an employer to pay or deliver, or agree to pay or deliver, any money or other thing of value, in the nature of an exaction, for services which are not performed or are not to be performed.

History

Added Stats 1978 ch 744 § 3, operative July 1, 1979.

Cal Gov Code § 3574

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 12 Higher Education Employer-Employee Relations (Arts. 1 — 11) > Article 5 Employee Organizations: Representation, Recognition, Certification and Decertification (§§ 3573 — 3578)

§ 3574. Grounds for denying request

The higher education employer shall grant a request for recognition filed pursuant to Section 3573 unless any of the following occurs:

(a) The employer reasonably doubts that the employee organization has majority support or reasonably doubts the appropriateness of the requested unit. In that case, the employer shall notify the board, which shall conduct a representation election or verify proof of majority support pursuant to Section 3577 unless subdivision (c) or (d) applies.

(b) Another employee organization either files with the employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. If the claim is evidenced by the support of at least 30 percent of the members of the proposed unit, a question of representation shall be deemed to exist and the board shall conduct a representation election pursuant to Section 3577. Proof of that support shall be submitted to either the board or to a mutually agreed upon third party.

(c) There is currently in effect a lawful written memorandum of understanding between the employer and another employee organization recognized or certified as the exclusive representative of any employees included in the unit described in the request for recognition, unless the request for recognition is filed not more than 120 days and not less than 90 days prior to the expiration date of the memorandum of understanding, provided that, if the memorandum of understanding has been in effect for three years or more, there shall be no restriction as to the time of filing the request. The existence of a memorandum of understanding, or current certification as the exclusive representative, shall be the proof of support necessary to trigger a representation election pursuant to Section 3577 to determine majority support when a request for recognition is made by another employee organization.

(d) Within the previous 12 months, either another employee organization has been lawfully recognized or certified as the exclusive representative of any employees included in the unit described in the request for recognition, or a majority of the votes cast in a representation election held pursuant to Section 3577 were cast for "no representation."

History

Added Stats 1978 ch 744 § 3, operative July 1, 1979. Amended Stats 2003 ch 216 § 1 (AB 1230).

Cal Gov Code § 3578

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 12 Higher Education Employer-Employee Relations (Arts. 1 — 11) > Article 5 Employee Organizations: Representation, Recognition, Certification and Decertification (§§ 3573 — 3578)

§ 3578. Duty of fair representation

The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

History

Added Stats 1978 ch 744 § 3, operative July 1, 1979.

End of Document

Cal Gov Code § 3583

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 12 Higher Education Employer-Employee Relations (Arts. 1 — 11) > Article 7 Organizational Security (§§ 3582 — 3587)

§ 3583. Permissible forms

Permissible forms of organizational security shall be limited to either of the following:

(a) An arrangement pursuant to which an employee may decide whether or not to join the recognized or certified employee organization, but which requires the employer to deduct from the wages or salary of any employee who does join, and pay to the employee organization which is the exclusive representative of that employee, the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the written memorandum of understanding. This arrangement shall not deprive the employee of the right to resign from the employee organization within a period of 30 days prior to the expiration of a written memorandum of understanding.

(b) The arrangement described in Section 3583.5.

History

Added Stats 1978 ch 744 § 3, operative July 1, 1979. Amended Stats 1999 ch 952 § 1 (SB 645).

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