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' REPLY 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 and Appellant Jeneé Misraje was given only a fifteen day window each year in which to withdraw. *See* Appellants' Opening Brief, Dkt. 8 ("Appellants Br."), at 1; Order Regarding Motions to Dismiss ("Opinion Below") at 3 (ER 010). The Appellees in this case have filed their responses. *See* Appellee Teamsters Local 2010's Answering Brief, Dkt. 17 ("Teamsters Br."); Answering Brief of Defendant and Appellee Xavier Becerra, Dkt. 19 ("AG Br."); Appellee Janet Napolitano's Answering Brief, Dkt. 15 ("Napolitano Br."). As Appellants addressed many of the arguments raised by Appellees in the opening brief, they here limit their reply to those points which require further elaboration.

ARGUMENT

I. *Janus* protects the rights of *all* employees not to support a union unless they first provide a knowing and intelligent waiver of their constitutional right.

Janus is clear that workers must not only consent to waive their First Amendment rights not to pay union dues, but they must "clearly and affirmatively

consent before any money is taken from them." *Janus*, 138 S. Ct. at 2486. *Janus* further explains:

> By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective the waiver must be freely given and shown by "clear and compelling" evidence.

Id. (internal citations omitted). Appellants' consent was not "freely given" because they were not informed of their right to pay nothing to the union. That right had not yet been recognized by the Supreme Court. Therefore, the waiver of that right "cannot be presumed." *Janus*, 138 S. Ct. at 2486. Appellants could not possibly have waived a right that they did not know existed.

Appellees' claim that *Janus* applies only to "nonmembers" and that it, therefore, does not apply to Appellants, who were members of the union. Teamsters Br. at 10. This is wrong for two reasons. First, Teamsters admits that both O'Callaghan and Misraje are now nonmembers of the union. Decl. of Jason Rabinowitz in Supp. of Teamsters' Opp'n to Mot. for Prelim. Inj. at 3 (ER 49). This is not just a semantic point; it has legal consequences. Appellees admit that Appellants are nonmembers of the union because they withdrew their consent to join the union. *Id*. Once their clear and affirmative consent has been withdrawn, then the *Janus* decision applies directly to them: they must "clearly and affirmatively consent before any money is taken from them." *Janus*, 138 S. Ct. at 2486. If *Janus* stands for anything at all, it stands for the proposition that you

cannot bifurcate union membership from the collection of union dues. If you're a union member, the union can take your money, and if you're not, it cannot. Union dues may only be collected from employees who have who have consented to their deduction. If that consent is invalid or withdrawn, no money can be taken. Appellants are not union members, so the Union cannot continue to take their money. A union cannot continue to take dues from nonconsenting workers like O'Callaghan and Misraje who signed union authorizations before the *Janus* decision and who affirmatively withdrew their consent to pay after the *Janus* decision was handed down.

Second, *Janus* bestows its First Amendment rights on all employees in America. It is not limited just to former union fee payers, as Appellants contend. *See* Teamsters Br. at 10. The *Janus* decision is explicit about to whom it applies: "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." 138 S. Ct. at 2486. It is all "employees" who must "clearly and affirmatively consent." *Id*. In this case, Appellants did not consent to waiving their First Amendment right to pay nothing to the union because that right had not yet been recognized.

None of Appellee's citations overcome this basic problem. For instance, Appellants invoke *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), in defense of their argument. *See* Teamsters Br. at 17-19. *Cohen* is inapposite because it involves

an agreement between two private parties with equal bargaining position and with no enforcement mechanism by the government, as exists in this case. In *Cohen* newspaper reporters agreed with their source not to reveal the identity of the source. 501 U.S. at 665-66. Having made that agreement, their editors then changed their minds and published the source anyway. *Id*. at 666. When sued, the newspaper attempted to cover its tracks by invoking the First Amendment. *Id*. Appellees cite this case to prove that parties can waive their Free Speech rights in a private agreement. Appellants do not deny this conclusion, which is consistent with *Janus*. The question before this Court is how and under what circumstances can such a waiver be given. *Cohen* involved an arms-length agreement between two private parties with equal bargaining positions. That is not the case in the present instance.

Instead, Teamsters came to O'Callaghan's workplace and pressured workers to join the Union on May 31, 2018, less than a month before the *Janus* decision would be released. First Amended Complaint (F.A.C.) ¶16 at 4 (Teamsters' Supp. Excerpts of Record (S.E.R.) 4). Prior to this pressure being asserted, O'Callaghan had held out from joining the Union for nine years. F.A.C. ¶ 15 at 4 (S.E.R. 4). In pressuring O'Callaghan to join, the Union representative failed to tell her of the impending decision in *Janus* and the important effects it would have on her rights as a public employee. F.A.C. ¶ 16 at 4 (S.E.R. 4). The Union also added new

contract language to its agreement that had not existed when Misraje joined. O'Callaghan Authorization (ER 054). This new contract language trapped O'Callaghan into paying dues to the Union for almost four years!

This effort by the Union represented an explicit attempt to trap agency fee payers in the union before the release of the *Janus* decision. The Union states in its brief, "It is difficult to imagine how Plaintiffs could have more clearly provided their affirmative consent to the dues payments they now challenge." Teamsters Br. at 31. It is not difficult at all. The authorizations could and should have informed Appellants that they were waiving their First Amendment rights to pay nothing to the Union. In O'Callaghan's case, the authorization should have informed her explicitly how long her dues deduction would last. Instead, it said only,

> I agree that this authorization shall remain in effect for the duration of the existing collective bargaining agreement, if any, and yearly thereafter until a new CBA is ratified, unless I give written notice via U.S. mail to both the employer and Local 2010 during the 30 days prior to the expiration of the CBA or, if none, the end of the yearly period.

O'Callaghan Authorization (ER 054). Expecting an employee, without access to teams of union lawyers, to know how to look up the expiration date of the massive collective bargaining agreement is unrealistic at best and intentional obfuscation at worst. If this Court were to force O'Callaghan to remain in this agreement for almost four years, it would unfairly ensconce this power imbalance into law.

Forcing Misraje to abide by the onerous terms of withdrawal in her agreement would be equally unjust. Her authorization allowed withdrawal of consent only by writing two letters within a fifteen-day period that comes around only once a year:

> This authorization and assignment shall be irrevocable for the term of the applicable collective bargaining agreement between the Union and the employer or for one year, whichever is the lesser, and shall automatically renew itself for the successive yearly or applicable collective agreement periods thereafter, whichever is lesser, unless I give written notice to the employer and the union at least sixty (60) days, but not more than seventy-five (75) days before any periodic renewal date of this authorization and assignment of my desire to revoke the same.

Misraje Authorization (ER 059).

The Supreme Court in *Janus* set a different standard for "employees." Employees are presented by unions with an adhesion contract, the terms of which they cannot negotiate. They are often, as in the case of O'Callaghan, presented this contract on their jobsite, and the contract itself is enforced by their employer, who collects their dues. F.A.C. ¶16 at 4 (S.E.R. 4). Such employer enforcement implies tacit approval of the terms of the agreement from a party who has tremendous power over workers—including the power to hire and fire them. This atmosphere presents a power imbalance that is totally foreign to the arms-length transaction in *Cohen*. In the public employee union context, the Supreme Court has prescribed a heightened standard for waiving one's constitutional rights: such a waiver "cannot

be presumed. Rather, to be effective the waiver must be freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486.

Here, no clear and compelling evidence exists because, unlike in *Cohen*, Appellants did not know of the right the Union claims they were waiving: to pay nothing at all to the Union. On the other hand, the First Amendment rights of newspapers were long established when *Cohen* was decided in 1991. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971). There was no intervening change in the law that recognized a new right of newspapers between when the promise was made and when the case was decided. In this case, by contrast, an intervening Supreme Court decision has clarified that Appellants signed their authorization subject to an unconstitutional choice between paying dues to the Union or paying agency fees to the Union.

Another case which is inapposite, upon which Appellees rely is *United States v. Brady*, 397 U.S. 742 (1970), in which a criminal defendant was held to his plea agreement. Teamsters Br. at 36-37. In that case, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment. 397 U.S. at 743-44. He waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id*. at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id*. at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication: "Central to the

plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Id*. at 748. The finality of judgments is not something a court undermines lightly, and the Supreme Court determined it could "see no reason on this record to disturb the judgment of those courts [who entered judgment against the defendant]." *Id.* at 749. There is nothing like that in this case. Appellants do not ask that this Court find its way around *res judicata*-- only that it find an alleged contract between the parties unenforceable.

Appellees' likewise contend that there is no constitutional violation in trapping employees into paying union dues as long as they can escape after four years. The Teamsters inaccurately argue that *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) "addressed a state law that potentially overrode private dues-deduction revocation periods." Teamsters Br. at 24. In this case, a state law is also at issue because California statutes condone trapping employees into paying union dues for the life of a collective bargaining agreement. *See* Cal. Gov't Code §§ 1157.12(b); 3513(i); 3515; and 3583(a) (quoted below in Section II). The question in *Smith* was not whether the statute overruled private agreements, but whether trapping employees into paying dues for an extended period of time was permissible at all. The Court recognized that a single annual opt-out escape window would be

unconstitutional, and it only saved the idea of an escape window at all in that case because the union agreements happened to be more generous than once a year. Appellants concede that this makes that portion of the opinion *dicta*, but it is instructive, nonetheless.

Nor is the opinion in *Smith* an aberration in articulating limits on union revocation periods. Courts have held for decades that multi-year windows infringe the rights of employees. *See McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp. 2d 522, 527 (M.D. Pa. 2007) (3-year membership concurrent with CBA violates rights of members who wish to resign after union decides on a strike action they oppose); *Debont v. City of Poway*, No. 98CV0502, 1998 WL 415844 (S.D. Cal. Apr. 14, 1998) (8-year membership concurrent with CBA violates right of member to resign when he changes his mind after several years in the union).

Indeed, since Appellants' filed their opening brief, the Federal Labor Relations Authority issued an opinion clarifying, in the light of *Janus*, that it will no longer allow Federal Employees to be tied to a union for longer than one year. The FLRA determined that "it would assure employees the fullest freedom in the exercise of their rights under the Statute if, after the expiration of the initial one-year period . . . an employee had the right to initiate the revocation of a previously authorized dues assignment at any time that the employee chooses." *In re Petition of Office of Personnel Management*, 71 FLRA No. 571, 573 (Feb. 14,

2020). As the concurrence from Member Abbott elaborated:

> The Court's decision in *Janus* leads me to one conclusion -- once a Federal employee indicates that the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be "freely given" and the earlier election can no longer serve as a waiver of the employee's First Amendment rights. Thus, restricting an employee's option to stop dues withholding -- for whatever reason -- to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights.

Id. at 575 (Abbott, concurring). This Court should reject the attempts to limit *Janus,* and instead recognize the rights affirmed there by reversing the Court below.

II. The District Court was correct to hold that the state taking money from state employees constitutes state action.

The District Court below held that the conduct complained of in this case "qualifies as 'joint action,' because the state is facilitating the allegedly unconstitutional conduct Plaintiffs complain of 'through [the state's] involvement with a private party.'" Order Below at 9 (ER 016) (quoting *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013)). The Attorney General and the Teamsters assert that actions taken by state officers pursuant to a state statute do not constitute state action. AG Br. at 7-13; Teamsters Br. at 41-42. When state universities use the state payroll system to deduct dues from state-issued paychecks of state employees, that is the very definition of state action required for a suit brought under 42 U.S.C. § 1983.

Moreover, the escape window time limitations that the Teamsters are enforcing are asserted pursuant to state statutes that expressly grant the Teamsters this special privilege. *See* Cal. Gov't Code §§ 1157.12(b); 3513(i); 3515; and 3583(a). California Government Code § 1157.12(b) sanctions the Union's withdraw period in this case: "Deductions may be revoked only pursuant to the terms of the employee's written authorization." The California Higher Education Employer-Employee Relations Act ("HEERA") goes further and explicitly sanctions the narrow thirty-day withdrawal period at the end of the multiyear life of the collective bargaining agreement, applied to O'Callaghan: "[N]othing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513 . . . ." Cal. Gov't Code § 3515. A "maintenance of membership" provision is limited only in that it, "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." Cal. Gov't Code § 3513(i). The narrow thirty-day time period is repeated in the code section describing the permissible forms for dues authorization: "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." Cal. Gov't Code § 3583(a). Therefore,

these statutes contribute toward the "joint action" between the state and the Union that the District Court recognized constituted state action.

Other recent courts to consider the issue have agreed with the District Court in this case. The Seventh Circuit also found the deduction of union moneys to constitute state action. It recently issued its second decision in the case of *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*). In that decision, part of the ongoing post-Supreme Court litigation in the *Janus* case itself, the issue was whether Janus could recover the agency fees that had been taken from him against his will. The Seventh Circuit held that the union had acted jointly with the state in deducting money from Janus: "[I]f AFSCME's receipt . . . of the fair-share fees is attributable to the state, then the 'color of law' requirement is satisfied." *Id.* at 361. The Seventh Circuit went on to quote *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988): "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II* at 361.

Similarly, the District of Hawaii recently came to the same conclusion of state action in a case identical to the one at hand. See *Grossman v. Haw. Gov't Emples. Ass'n/AFSCME Local 152*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866, at *17 n.10 (D. Haw. Jan. 31, 2020). As in the present case, Grossman involved a plaintiff being denied from withdrawing consent to have her

union deduct dues from her paycheck. The court found that state action gave it jurisdiction over the claim: "The Court notes that the 'under color of law' or 'state action' requirement of 42 U.S.C. Section 1983 is far more expansive than [the union] would have it." *Id*. The court noted, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id*., citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961). It further refused defendants' attempts to distinguish *Janus II*:

> Here, [the state] deducted fair-share fees from Grossman's paychecks and transferred that money to [the union] pursuant to Hawaii statute and a collective bargaining agreement. While Grossman initially had voluntarily agreed to pay these dues prior to *Janus*, the dues deducted after she sent her membership resignation letter were no longer voluntary or made pursuant to a "private" agreement. As such, *Janus II* is not inapposite merely because the case involved claims by nonmembers. 942 F.3d at 361. The dispositive fact is [the union] obtained Grossman's post-resignation dues (after she was effectively a nonmember), and that was made possible only because of [the union's] joint action with the State and its statutory regime. Therefore, [the union] is a proper defendant under Section 1983.

Grossman at *17 n.10 (citations omitted).

The Supreme Court has gone much further to impart state action to unions in cases of unconstitutional dues deductions. This Court need look no further than the *Janus* decision itself, in which the union's deduction of agency fees constituted state action. An even more extreme example is the case of *Lugar v. Edmondson Oil Co*., 457 U.S. 922 (1982), which held that a private debt collector's actions

constituted state action under § 1983. In that case, the Court also struck down an unconstitutional state statute because the private parties "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 934. In the present case, the Teamsters also have invoked the aid of state officials to take advantage of a state statutory scheme to withdraw these dues. State actors carrying out these state statutes constitutes state action under § 1983, and the question of whether such action is constitutional is properly before this Court.

The Attorney General and Teamsters argue that complained-of conduct in this case is not attributable to the state because it arises out of private agreements between Appellants and the Union. AG Br. at 35; Teamsters Br. at 43. That is not the relevant question. The relevant question is whether the state required Appellees to remain members of the union after *Janus*, and the answer is that the University of California did. State officials followed and continue to enforce Cal. Gov't Code §§ 3513(i) and 3583, which permit the Teamsters to keep Appellant O'Callaghan stuck as a member of the union for nearly four years.

Among the tests for state action, "'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." *Ohno,* 723 F.3d at 996. In this case, the government has affirmed, authorized, and facilitated the deduction of dues from Appellants' paychecks. The state university and the union sat down together and

negotiated the contractual terms by which they would take members' dues, and the state university carried out the union's instructions, just as it had regarding agency fee payers in *Janus*, where the Supreme Court never questioned the matter of state action.

Adopting Appellees' position on state action would require this Court to overturn a host of Supreme Court decisions on the subject. In *Knox v. SEIU*, union exactions were held to be a First Amendment violation with requisite state action. 567 U.S. 298, 315 (2012). Likewise, union accounting of chargeable and non-chargeable expenses from state employees amounts to state action. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). The Attorney General's argument would even mean that *Abood v. Detroit Bd. of Educ*., 431 U.S. 209, 234 (1977), which *Janus* overturned, was likewise a mistake, because there could be no First Amendment question presented to the Court if the union exaction had not constituted state action. Plaintiffs humbly submit that the Court should find that decades of Supreme Court cases applying First Amendment standards to public sector unions were not in error.

The Attorney General claims that the taking of Appellants' money is not state action because "Neither the state nor the University of California were parties to Plaintiffs' membership and dues authorization agreements." AG Br. at 36. But this elides a crucial fact as to how that money is deducted: it is deducted by the

state University of California. *Janus* holds that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 138 S. Ct. at 2486 (emphasis added).

The state University of California is subject to a constitutional duty not to take money from nonconsenting employees. It cannot claim to be an innocent middleman. That the University of California may enjoy sovereign immunity from damages claims for the money it takes does not absolve state official Napolitano from being a proper subject of injunctive relief to prevent further takings.

This Court should, therefore, affirm the District Court's holding that the conduct complained of in this case constitutes state action.

III. At most, the "good faith" defense shields Appellees from returning Union dues and fees taken before the *Janus* decision.

The Union asserts that it is entitled to a "good faith" defense because it acted in "good faith reliance on a state statute and controlling U.S. Supreme Court precedent" Teamsters Br. at 49. The court below agreed with the Teamsters on this point. Opinion Below at 14 (ER 021). This Court should reverse that determination.

Relying on a state statute is not a defense to § 1983. Reliance on a statute is an element of § 1983, which states "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 . . ." (emphasis added). It would turn § 1983 on its head to hold that a defendant acting "under color of any statute" renders it not "liable to the

party injured in an action at law." This backward interpretation of the statute conflicts with the text, history, policy, and governing precedent of § 1983. This Court should decline to recognize such a defense and should grant Appellants their chance to seek the return of the money unconstitutionally taken from them.

The Court should distinguish its recent decision of *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. petition filed*, because that case involved agency fee payers. In that case, the issue was whether former agency fee payers could receive a return of the money they had been forced to pay in agency fees before the *Janus* decision ruled them unconstitutional. The Court granted the defendants a "good faith" defense. *Id*. In this case, however, the main issue is whether Appellees can continue to take union dues from O'Callaghan and Misraje, even after the *Janus* case has been decided. Therefore, *Danielson* does not apply.[1]

In the alternative, if *Danielson* is found to control, it must be limited in its application to money taken from Appellants prior to the Supreme Court decision of *Janus* on June 27, 2018. Appellees acknowledge this limitation on their asserted "good faith" defense: "[T]he Union acted in good faith reliance on state statute and controlling U.S. Supreme Court precedent in collecting pre-*Janus* fair-share fees

[1] Appellant O'Callaghan also claims in the First Amended Complaint a return of the agency fees she was forced to pay unconstitutionally. *See* F.A.C. ¶ 68 at 10 (S.E.R. 10); ¶ f at 13 (S.E.R. 13). Appellants acknowledge that, for this claim, *Danielson* controls, and Appellants ask for *Danielson* to be overturned on this point.

from nonmembers." Teamsters Br. at 49. Even Appellees admit there is no "good faith" in continuing to take Appellants money years after the *Janus* decision.

IV. The District Court correctly found that this action for violations of First Amendment rights is properly brought in federal court rather than before a state labor regulator.

The District Court was correct in holding that the federal courts have jurisdiction over Appellants' claims. The court below held that the California Public Employee Relations Board (PERB)'s "jurisdiction is not implicated here because [Appelants'] claim is not that the Union or Napolitano are committing an unfair labor practice, but that in following California labor law, Defendants violated their First Amendment rights." Opinion Below at 5 (ER 012).

Appellee Napolitano contends that "Appellants' challenge to the continued deduction of union dues constitute[s] an unfair labor charge, and that dispute [falls] within the exclusive jurisdiction of PERB." Napolitano Br. at 20. But PERB's role is to interpret and apply California's labor regulations. Appellants' claim is not that the Teamsters or Napolitano are committing an unfair labor practice under California law—indeed, Appellants' injury derives in significant part from the faithful application of California law. Appellants contend, instead, that the application of California's labor regime to them abridges their First Amendment rights of speech and association. Such a suit is properly before this Court under 42 U.S.C. § 1983.

Napolitano argues that "Appellants allege that the Union continues to charge them dues in an unfair or excessive manner, and they further allege that the Union has caused the employer (the University) to deliver the payment of union dues for services that Plaintiffs do not want performed—allegations that would sound in unfair practice charges against the Union under HEERA." Napolitano Br. 21-22. But Appellants' claim is not that the union has charged dues that would be excessive or unfair under HEERA; Appellants' claim is that being charged dues at all violates the First Amendment. Whether or not the dues are appropriate under California law is of no moment when considering whether they are permissible at all under the U.S. Constitution.

Napolitano quotes several cases from California state courts which found that PERB has jurisdiction over unfair labor practices, but again Appellants have not alleged anything that constitutes an unfair labor practice. Rather, they allege that in following California labor law, Defendants are violating the U.S. Constitution. The lone federal citation in this portion of Napolitano's brief is to *Stevenson v. L.A. Unified Sch. Dist*., but that was a case that alleged a union breached its fiduciary duty by allowing the employer to discriminate against the employee. No. CV 09-6497 ODW (PLAx), 2010 U.S. Dist. LEXIS 153333, at *5 (C.D. Cal. June 28, 2010). A Union's breach of fiduciary duty may well be an unfair labor practice in California, but a Union enforcing the escape window at

issue in this case is not.

That PERB has "exclusive jurisdiction" in examining issues of California law is of no moment when the questions asserted are of federal law. "The Civil Rights Act of 1871 . . . guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials, and the settled rule is that exhaustion of state remedies is not a prerequisite to an action under [42 U. S. C.] §1983." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (quoting *Heck v. Humphrey*, 512 U. S. 477, 480 (1994) (internal quotation marks omitted). In contradiction of settled federal law on the subject, Napolitano asserts that Appellants must exhaust their claims in a state administrative proceeding, instead of invoking their right to a federal forum. This assertion, if accepted, would undermine the very purpose of § 1983 in giving federal courts the authority to enforce certain constitutional rights.

This Court should, therefore, affirm the District Court's holding that the federal courts have jurisdiction under § 1983.

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: March 23, 2020

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 5,119 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
Reilly Stephens

March 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2020, I electronically filed the forgoing Reply 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

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