

No. 19-56271

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Cara O’Callaghan and Jenée Misraje,

Plaintiffs-Appellants,

v.

Janet Napolitano et al.,

Defendants-Appellees.

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

MOTION TO ALLOW SUPPLEMENTAL BRIEFING

Brian K. Kelsey*
bkelsey@libertyjusticecenter.org
Reilly Stephens
rstephens@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702
**Counsel of Record*
Attorneys for Appellants

Mark W. Bucher
mark@calpolicycenter.org
CA S.B.N. # 210474
Law Office of Mark W. Bucher
18002 Irvine Blvd., Suite 108
Tustin, CA 92780-3321
Phone: 714-313-3706
Fax: 714-573-2297

Appellants move this Court to enter an Order for Supplemental Briefing in this case. Appellants attach to this Motion their Proposed Supplemental Brief as Exhibit A. This Motion is not opposed by counsel for Drake or Teamsters Local 2010. Counsel for Becerra did not take a position on this Motion by time of filing. In support of this Motion, Appellants state as follows:

1. This case is about unions trapping government workers into paying dues for almost four years, in the case of Appellant Cara O’Callaghan. 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. This case explores what is required to maintain “affirmative consent.”

2. On December 27, 2019, Appellants, O’Callaghan and Misraje, filed their opening brief in this case. *See* Dkt. 8.

3. On March 2, 2020, Appellees filed their answering briefs in this case. *See* Dkts. 15, 17, 19.

4. On March 23, 2020, Appellants filed their reply brief.

5. On August 3, 2020, Appellee Teamsters Local 2010 moved the Court to stay proceedings in this case pending a decision in *Belgau v. Inslee*, No. 19-35137, a case for which this Court had held oral argument on December 10, 2019. *See* Dkt. 31. O’Callaghan and Misraje opposed the stay.

6. On August 18, 2020, this Court granted the motion to stay the case pending a decision in *Belgau*. Dkt. 35.

7. On September 16, 2020, this Court issued its decision in *Belgau*. See *Belgau v. Inslee*, No. 19-35137, 2020 U.S. App. LEXIS 29478 (9th Cir. Sep. 16, 2020).

8. On September 30, 2020, the Appellants in *Belgau* filed a petition for rehearing *en banc*.

9. On October 26, 2020, the petition for rehearing *en banc* in *Belgau* was denied by this Court.

10. While the facts in the *Belgau* case are similar to the facts in this case, one significant fact differs: in *Belgau*, the government worker was trapped into paying union dues for up to one year; however, O’Callaghan is trapped into paying union dues for the length of the collective bargaining agreement, which is almost four years.

11. As the *Belgau* opinion makes clear, government workers can only be trapped into paying union dues “subject to a limited payment commitment period.” 2020 U.S. App. LEXIS 29478 at *20.

12. Therefore, one significant question remains unanswered by this Court after *Belgau*: Can the government and a union trap a government worker into paying dues for longer than one year?

13. Because briefing in this case was completed in March, well before the issuance of the *Belgau* opinion, Appellants did not have an opportunity to address the *Belgau* decision in their Opening or Reply briefs.

14. Likewise, Defendants did not have an opportunity to address *Belgau* in their answering briefs.

15. Therefore, Appellants submit that, in the interests of fairly adjudicating this case, the Court should order the parties to submit supplemental briefs addressing the extent to which *Belgau* controls the outcome in this case or is distinguishable from Appellants' claims because the time period for being trapped in the union is longer than a year.

To serve interests of judicial economy and efficiency, Appellants attach as Exhibit A to this motion their proposed Supplemental Brief addressing the impact of the *Belgau* decision. Therefore, Appellants move that this Court enter an order accepting Appellants' Supplemental Brief as filed and providing Appellees 30 days to file their own equivalent supplemental brief in response.

Dated: November 3, 2020

Respectfully submitted,

/s/ Brian K. Kelsey
Brian K. Kelsey
bkelsey@libertyjusticecenter.org
Reilly Stephens
rstephens@libertyjusticecenter.org
Liberty Justice Center
190 S. LaSalle Street, Suite 1500

Chicago, Illinois 60603
(312) 263-7668

Mark W. Bucher
mark@calpolicycenter.org
CA S.B.N. # 210474
Law Office of Mark W. Bucher
18002 Irvine Blvd., Suite 108
Tustin, CA 92780-3321
Phone: 714-313-3706
Fax: 714-573-2297
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, I served the foregoing document upon Appellees' counsel by electronically filing it with the appellate CM/ECF system.

/s/ Brian K. Kelsey
Brian K. Kelsey
Senior Attorney
Liberty Justice Center