19-56271

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARA O'CALLAGHAN and JENEÉ MISRAJE,

Plaintiffs and Appellants,

v.

JANET NAPOLITANO, in her official capacity as President of the University of California; TEAMSTERS LOCAL 2010; XAVIER BECERRA, in his official capacity as Attorney General of California,

Defendants and Appellees.

On Appeal from the United States District Court
for the Central District of California

Case No. 2:19-cv-02289-JLS-DFM,
Hon. Judge James V. Selna

SUPPLEMENTAL BRIEF OF APPELLEE CALIFORNIA ATTORNEY GENERAL

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Defendant-Appellee Xavier Becerra, Attorney General of the State of California (the "Attorney General"), sued in only official capacity, submits the following supplemental brief in response to the November 3, 2020, supplemental brief of Plaintiffs-Appellants Cara O'Callaghan and Jeneé Misraje (together, "O'Callaghan"), addressing this Court's decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020).

BACKGROUND

This appeal reviews the trial court's October 14, 2019, final judgment dismissing O'Callaghan's first amended complaint. In that complaint, O'Callaghan first attacked the constitutionality of California statutes that designate non-governmental labor unions – elected by California public-sector, higher-education employees – as the exclusive representatives of covered employees in collective bargaining with California public-sector, higher-education employers over the terms and conditions of employment. Second, O'Callaghan attacked dues contracts between those unions and their members, in the wake of the U.S. Supreme Court decision in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, __ U.S. __, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

In the briefing of this appeal so far, the Attorney General has made two primary arguments. First, the Attorney General defended the trial court's dismissal of O'Callaghan's First Amendment claims seeking to invalidate California statutes

that establish exclusive-representation, union-management negotiations over the terms and conditions of employment for California's public-sector, higher-education employees. (*See* of Answering Brief of Attorney General ("AG Brief"), Dkt. No. 19, at 13-30 (discussing California Government Code sections 3570, 3571.1(e), 3573, 3574, and 3578).) Second, the Attorney General defended the trial court's rejection of O'Callaghan's theory that California infringes the freedom of speech of California public-sector, higher-education employees just because labor unions can deduct union fees from those employees' paychecks, pursuant to union-member contracts by which the members can terminate the dues payments at only certain times, instead of at any time. (*See* AG Brief at 30-36.)

Several months after briefing was completed for this appeal, but before the (still-pending) oral argument, this Court released the *Belgau* decision. That decision, about Washington state public employees, held that public-sector employees who voluntarily join labor unions cannot invalidate their union membership agreements for lack of express waivers of alleged constitutional (free-speech) rights not to join unions. *Belgau*, 975 F.3d at 946–47. No state-government law, policy, or action ("state action") compels the making of those agreements; they are private agreements governed by common law or statutory law, not constitutional law. *Id.* at 947. Union members cannot legitimately invoke against their unions constitutional rights, because the unions are private entities.

Id. Furthermore, there is not enough of a connection to state action, and thus to constitutional rights, that state laws or policies permit – or even subtly encourage – public-sector employees to join non-governmental employee unions. *Id.* Nor is it relevant, for the purposes of determining state action, that the state government may process deductions of union dues from union-member employees' paychecks. *Id.* at 948.

ARGUMENT

The *Belgau* decision bolsters both of the Attorney General's arguments on appeal.

I. THE *BELGAU* DECISION AFFIRMS THE CONTINUING VIABILITY OF PUBLIC-SECTOR, EXCLUSIVE-REPRESENTATION, COLLECTIVE BARGAINING SYSTEMS

Regarding the Attorney General's first argument, about California's public-sector, exclusive-representation, collective-bargaining systems, the *Belgau* decision recognizes the continuing viability of these systems. As *Belgau* notes, in recognizing a free-speech right of public-sector employees in labor unions to refuse to pay any dues to the unions, the U.S. Supreme Court, in *Janus*, otherwise left public-sector "labor-relations systems exactly as they are." *Belgau*, 975 F.3d at 944 (quoting *Janus*, 138 S. Ct. at 2485, n. 27). Indeed, *Janus* does not address, much less overrule, the U.S. Supreme Court decision in *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984), and other case law, upholding state laws that establish exclusive-representation

labor-relations systems for public-sector employers and unionized employees. The Attorney General cites to *Knight* and its progeny in defending the California statutes' constitutionality. (*See* AG Brief at 30-36.) Therefore, under *Belgau*, this Court should affirm the part of the lower court's decision that denied O'Callaghan's motion for a preliminary injunction because "Plaintiffs are unlikely to succeed on their claim and do not pose serious questions going to the merits of their claim that exclusive representation by the Union violates their First Amendment rights." *O'Callaghan v. Regents of the Univ. of California*, No. CV 19-02289-JVS (DFMX), 2019 WL 2635585, at *4 (C.D. Cal. June 10, 2019).

Notably, O'Callaghan's supplemental brief about the *Belgau* decision does not even mention the issue of the constitutionality of exclusive-representation labor-relations systems in the public sector.

II. THE *BELGAU* DECISION FORECLOSES FIRST AMENDMENT CLAIMS AGAINST CALIFORNIA FOR PRIVATE DUES-PAYING AGREEMENTS BETWEEN LABOR UNIONS AND CALIFORNIA PUBLIC-SECTOR EMPLOYEES

Regarding the Attorney General's second argument, the *Belgau* decision establishes that California and its public officials cannot have liability, under the U.S. Constitution, for O'Callaghan's dues-paying arrangements with non-governmental labor unions. *Belgau* held that generally there can be no constitutional violations when non-governmental unions for public-sector employees make arrangements or contracts with those employees about paying

union dues. 975 F.3d at 946-47. For liability to attach, the source of the alleged constitutional harm would have to be state action potentially governed by the U.S. Constitution. *Id.* at 947. But an agreement between a non-governmental union and its members does not contain state action and is governed by common law or statutory law (not constitutional law). *Id.* The *Belgau* decision does affirm that there are two exceptions under which sufficient state action could be found in private-party conduct: (1) where the government affirms, authorizes, encourages, or facilitates conduct through involvement with a private party, or (2) where the government has so far insinuated itself into a position of interdependence with the non-governmental party that the government is recognized as a joint participant in the challenged activity. *Id*. (citing *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984 996 (9th Cir. 2013)). *Belgau* goes on to clarify that there is no state action if the government provides mere approval or acquiescence, subtle encouragement, or permission of private choices regarding membership in labor unions. *Belgau*, 975 F.3d at 947. Nor is there state action if the government enforces union-member dues-paying arrangements, including by processing deductions from members' government paychecks. *Id.* Finally, there is no state action merely because the government enforces a private agreement. *Id.* at 949 (citing *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 839 (9th Cir. 2017)).

Under *Belgau*, there is no state action and hence no viable constitutional claim in the present case. California law does no more than not stand in the way as California higher-education employees and their non-governmental labor unions make dues-paying contracts (which, just like other contracts, may be enforced). California law does provide for merely ministerial acts of processing paycheck deductions of union fees for California higher-education employees, in accordance with the terms of those contracts. But *Belgau* made clear that merely "providing a 'machinery' for implementing the private agreement by performing an administrative task does not render" a state and a union "join actors." 975 F.3d at 948.

Nothing in the *Belgau* decision supports O'Callaghan's contrary position that California law allowing for the processing of deductions of labor-union fees from the paychecks of California public-sector, higher-education employees, who are union members, makes the dues-paying agreements state action subject to federal constitutional limits. (Appellants' Reply Brief, Dkt. 27, p. 10.) Not surprisingly, O'Callaghan does not reiterate that argument in the supplemental brief. Instead, O'Callaghan makes the dubious assertion that there is the requisite state action because the union sign-up cards reference collective-bargaining agreements that the unions have negotiated with California public-sector, higher-education employers, which are state actors. (Appellants' Supplemental Brief,

Dkt. 37, p. 4.) It does appear to be the law that public-sector collective-bargaining agreements can constitute state action. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 n.4, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) (plurality opinion, citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 218, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), overruled by *Janus*, 138 S. Ct. at 2460). But the proper subject of analysis here is not collective-bargaining agreements; those contracts are not in dispute with respect to dues-payment arrangements. Rather, the focus properly should be on the union-member due-payment agreements in public-sector employment – and, according to *Belgau*, those contracts reflect private action, not state action. 975 F.3d at 946-47. Notably, *Belgau* made that holding even though the dues-paying agreements at issue in that case were authorized and mentioned in associated collective-bargaining agreements. *Id.* at 945.

Furthermore, *Janus* itself recognizes that, in the context of a union-member dues-paying agreement related to public-sector employment, both the union and the member are private parties, not state actors. 138 S.Ct. at 2464 ("Compelling a person to subsidize the speech of other *private* speakers raises […] First Amendment concerns" (emphasis added; some internal punctuation omitted)).

O'Callaghan also tries to distinguish *Belgau* factually from this case by noting that the public-sector workers in *Belgau* committed to pay union dues for one year, whereas the public-sector workers here committed themselves for up to

four years. (Appellants' Supplemental Brief, p. 5.) This is a classic distinction without a difference. On the crucial question of whether there is state action, it does not matter if a private dues-paying obligation lasts one year or four years. The length of time is simply irrelevant.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Attorney General's previous briefing, the Attorney General respectfully requests that this Court affirm the final judgment of the trial court in this matter.

Dated: December 21, 2020

Respectfully Submitted,

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