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18 **UNITED STATES DISTRICT COURT**
19 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

20 Thomas Sweet,

21 Plaintiff,

22 v.

23 California Association of Psychiatric
24 Technicians, et al.,

25 Defendants.

Case No. 2:19-cv-00349-JAM-AC

**MEMORANDUM IN OPPOSITION TO
CAPT'S MOTION TO DISMISS
COUNT II**

Hearing Date: July 16, 2019

Time: 1:30 p.m.

Judge: The Hon. John A Mendez

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1 **PLANTIFF’S MEMORANDUM IN OPPOSITION**
2 **TO DEFENDANT’S MOTION TO DISMISS COUNT II**

3 Alfred Sweet (“Sweet”) brings this action to vindicate his right under the First
4 Amendment not to be compelled to join, financially support, or associate with a public
5 sector labor union because she does not agree with its political positions. Defendant
6 California Association of Psychiatric Technicians (“CAPT”), the union that serves as the
7 exclusive representative of Sweet’s bargaining unit, moved to dismiss Count II of the
8 Complaint. Memo in Support of Motion to Dismiss at 5 (Dkt. 17) (“MTD”). Count II
9 challenges the union’s status as Sweet’s exclusive representative in negotiations with his
10 employer, the California Department of State Hospitals (DSH”), which is overseen by
11 Defendant Stephanie Clendenin in her official capacity as Director of DSH (“Director
12 Clendenin”). Sweet opposes the Motion.

13
14 **INTRODUCTION**

15 CAPT relies primarily upon a Supreme Court case decided decades before the *Janus*
16 decision, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).
17 *Knight* rejected a claim that individual public employees should be entitled to speak during
18 negotiation sessions because of the state government’s preference to negotiate with a union
19 without dissenters present. Sweet acknowledges that *Knight* allows Director Clendenin to
20 ignore his views and not negotiate with him for bargaining purposes. But *Knight* is a private
21 forum case, not a freedom of association case. It does not stand for what CAPT would like
22 it to—a blanket license to speak on behalf of employees, irrespective of the wishes of the
23 employees themselves. *Knight* holds that if Director Clendenin wants to bargain with only
24 one union, CAPT, she may do so. Sweet does not claim a constitutional right to an audience
25 with the government. Instead he simply submits that the logic of the Supreme Court’s
26 opinion in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), supports his contention that CAPT
27 speaking on his behalf violates Sweet’s First Amendment right to freedom of association.

1 from his paycheck. *Id.* He stated that he may have to resort to legal action to uphold his
2 constitutional rights. *Id.* Sweet also sent a copy of the letter to the payroll department at
3 his employer, but he was advised that all communications should be made to CAPT. *Id.* at
4 ¶ 24.

5 CAPT responded with a letter stating that Sweet was not permitted to resign his
6 union membership except during a window thirty days prior to the expiration of the
7 collective bargaining agreement. *Id.* at ¶ 25. The current collective bargaining agreement
8 went into effect on July 1, 2016, and expires on July 1, 2019. *Id.* at ¶ 26. Employees are,
9 therefore, locked into union membership for three years at a time. *Id.* The letter from
10 CAPT stated that Sweet’s next tri-annual window to resign his membership would be June
11 1 to July 1, 2019.

12 Since Sweet began employment in January 2011, Director Clendenin and her
13 predecessors have deducted union dues from Sweet’s paychecks and have remitted those
14 dues to CAPT. Those union dues now approximate fifty-nine dollars (\$59) per month. *Id.*
15 at ¶ 27. While this motion was pending, in a letter dated June 20, 2019 the union informed
16 Sweet that it would cease further dues deductions.

17 18 ARGUMENT

19 I. Standard of Review

20 To survive this Motion to Dismiss, Sweet need only state in his Complaint “sufficient
21 factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
22 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.
23 544, 570 (2007)). He should prevail provided his First Amended Complaint demonstrates
24 something “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556
25 U.S. at 678.
26
27
28

1 **II. *Knight* is a private-forum case and does not address Sweet’s compelled**
2 **association claim.**

3 CAPT’s primary submission is that *Knight* controls as to Count II of the Complaint.
4 MTD at 8-11. But *Knight* is addressed to a different question, and more recent cases more
5 directly on point support Sweet’s claim not to be compelled to associate with CAPT.
6

7 **A. *Knight* does not control.**

8 The *Knight* case holds that employees do not have a right, as members of the public,
9 to a formal audience with the government to air their views. *Knight* does not decide,
10 however, whether such employees can be forced to associate with the union; therefore, the
11 case is inapposite. As the *Knight* court framed the issue, “The question presented . . . is
12 whether this restriction on participation in the nonmandatory-subject exchange process
13 violates the constitutional rights of professional employees.” *Knight*, 465 U.S. at 273.

14 The plaintiffs in *Knight* were community college faculty who dissented from the
15 certified union. *Id.* at 278. The Minnesota statute at issue required that their employer “meet
16 and confer” with the union alone regarding “non-mandatory subjects” of bargaining. The
17 statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276.
18 The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations.
19 *Id.* at 282.

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

26 The First Amendment guarantees citizens a right to speak. It does not deny
27 governments, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*,
28 Sweet does not claim that his employer—or anyone else—should be compelled to listen to

1 his views. Instead, he asserts a right against the compelled association forced on him by
2 exclusive representation.

3 CAPT's invocation of *Knight* makes two important missteps. First, it asserts that the
4 "the Supreme Court summarily affirmed the lower court's rejection of the Knight plaintiffs'
5 'attack on the constitutionality of exclusive representation in bargaining over terms and
6 conditions of employment.'" MTD at 9 (quoting *Knight*, 465 U.S. at 278-79). But CAPT
7 does not clarify what was summarily affirmed. What was summarily affirmed was a
8 rejection of the argument that collective bargaining violates the non-delegation doctrine,
9 not that it violates a right of association. The relevant portion of the lower court opinion
10 makes this point clearly. *See Knight v. Minn. Cmty. Coll. Faculty Ass'n.*, 571 F. Supp. 1, 4
11 (D. Minn. 1982). That the non-delegation doctrine is at issue is proven when the Supreme
12 Court cites to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and
13 *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), neither of which address a right to freedom
14 of association. *Knight*, 465 U.S. at 279. The plaintiffs in *Knight* viewed the granting of
15 negotiating rights to the union as a delegation of legislative power to a private organization,
16 and the district court rejected the claim, explaining simply that the claim "is clearly
17 foreclosed by the Supreme Court's decision in *Abod v. Detroit Board of Education*, 431
18 U.S. 209, 97 (1977)." *Knight*, 571 F. Supp. at 4. The statutory arrangement did not violate
19 the non-delegation doctrine "merely because the employee association is a private
20 organization." *Id.* at 5. In its own *Knight* decision, the Supreme Court was not affirming a
21 claim of exclusive representation equivalent to Count II of Sweet's Complaint.

22 CAPT's second misreading of *Knight* severely elevates and misinterprets dicta in the
23 decision. The central issue of the *Knight* decision is whether plaintiffs could compel the
24 government to negotiate with them instead of, or in addition to, the union. That question is
25 fundamentally different from Sweet's claim that the government cannot compel him to
26 associate with the union by making the union bargain on his behalf.

27 In arguing that these two distinct claims are the same, CAPT points only to dicta
28 towards the end of the *Knight* opinion that suggests the challenged policy "in no way

1 restrained [plaintiffs'] freedom to speak on any education related issue or their freedom to
2 associate or not associate with whom they please.” *Knight*, 465 U.S. at 288. Yet CAPT’s
3 own quotations from that portion of the opinion reinforce that the Court was still addressing
4 the question of being heard. *See* MTD at 10. The Court explained that the government’s
5 right to “choose its advisors” was upheld because a “person’s right to speak is not infringed
6 when the government simply ignores that person while listening to others.” *Knight*, 465
7 U.S. at 288. The Court raised the matter of association only to address the objection that
8 exclusive representation “amplifies [the union’s] voice in the policymaking process. But
9 that amplification no more impairs individual instructors’ constitutional freedoms to speak
10 than the amplification of individual voices” impairs the ability of others to speak, as well.
11 *Id.* This, again, is another path to the same conclusion: First Amendment “rights do not
12 entail any government obligation to listen.” *Id.* at 287.

13 *Knight* is, therefore, not responsive to the question Sweet now raises: whether
14 someone else can speak in his name, with his imprimatur granted to them by the
15 government. Sweet does not contest the right of the government to choose whom it meets
16 with, to “choose its advisors,” or to amplify CAPT’s voice. He does not demand that the
17 government schedule meetings with him, engage in negotiations with him, or assent to any
18 of the other demands made in *Knight*. He demands only that CAPT not do so in his name.

19
20 **B. *Janus* presents a new opportunity to consider the question.**

21 As the Supreme Court has recently recognized, “Designating a union as the
22 employees’ exclusive representative substantially restricts the rights of individual
23 employees.” *Janus*, 138 S. Ct. at 2460. This understanding of the “substantial restriction”
24 that exclusive representation places on Sweet’s rights cannot be squared with CAPT’s
25 interpretation of the dicta in *Knight*.

26 Of the eight citations CAPT puts forward for its interpretation of the *Knight* case,
27 only two involve Courts of Appeals opinions written after *Janus*. MTD at 11-12; *see*
28 *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Mentele v. Inslee*, No. 16-35939, 2019

1 U.S. App. LEXIS 5613 (9th Cir. Feb. 26, 2019). The remaining cases either predate *Janus*
2 or are district court decisions, and few provide more than a cursory analysis of the question
3 at issue.

4 The reasoning in *Bierman* is not persuasive because the Eighth Circuit was
5 addressing the same Minnesota statute that had been upheld in *Knight*. Understandably, the
6 court felt bound by the *Knight* holding, despite differences in the claims being made by
7 plaintiffs in the two cases. *Bierman*, 900 F. 3d. at 574. Had it considered the different
8 reasoning of the two cases, as this Court is doing, the Eighth Circuit should have reached a
9 different result. Instead, the court in *Bierman* repeated the holding of *Knight* in a few
10 perfunctory paragraphs and did not consider or make mention of any potential reasons why
11 *Knight* should be distinguished. *Id.*

12 *Mentele*, as a Ninth Circuit case, will be discussed in more detail below. The
13 remaining circuit decisions cited by CAPT predate *Janus*, and their reasoning cannot
14 survive it. The First Circuit upheld exclusive representation by explaining that “the starting
15 point for purposes of this case is [*Abood*]” before going on to address *Abood*’s extension in
16 *Knight*. *D’Agostino v. Baker*, 812 F.3d 240, 242 (1st Cir. 2016). The Second Circuit’s
17 approach was even more perfunctory than others, citing *Abood* and then *D’Agostino* in a
18 brief unpublished opinion that considered none of the arguments Sweet presents here. *Jarvis*
19 *v. Cuomo*, 660 F. App’x 72, 74 (2d Cir. 2016). The Seventh Circuit likewise followed
20 *D’Agostino* in holding, correctly at the time, but now incorrectly, that *Abood*, and therefore
21 *Knight*, remained good law. *Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir. 2017).

22 CAPT’s remaining citations are district court opinions at various, often preliminary,
23 stages of litigation and cannot control the outcome here. Nor do they stand for as much as
24 CAPT would like. *Uradnik* represents nothing more than a district court properly following
25 circuit precedent, since the “Eighth Circuit specifically found that *Knight* foreclosed a
26 similar compelled association argument” in *Bierman*, discussed above. *Uradnik v. Inter*
27 *Faculty Org.*, No. 18-1895 (PAM/LIB), 2018 U.S. Dist. LEXIS 165951, at *10 (D. Minn.
28 Sep. 27, 2018). *Reisman* is likewise a district court case following binding (but erroneous)

1 circuit precedent, in this instance the *D'Agostino* case from the First Circuit. *Reisman v.*
2 *Associated Faculties of the Univ. of Me.*, No. 1:18-cv-00307-JDL, 2018 U.S. Dist. LEXIS
3 203843, at *11 (D. Me. Dec. 3, 2018). And *Mentele v. Inslee*, 2016 WL 3017713 (W.D.
4 Wash. May 26, 2016) has been superseded by a later Ninth Circuit decision in that case
5 which will be discussed below.

6 CAPT makes much of the fact that *Janus* did not “hold” exclusive representation
7 unconstitutional, quoting *Bierman* to the effect that “*Janus* ‘never mentioned *Knight*, and
8 the constitutionality of exclusive representation standing alone was not at issue.’” MTD at
9 12 (quoting *Bierman*, 900 F. 3d. at 574). Therefore, in the view of CAPT, “both *Knight* and
10 *Janus* require rejection of plaintiffs’ claim.” MTD at 13. To the contrary, if the *Janus* court
11 had relied on *Knight* for its reasoning and had rejected an exclusive representation claim, it
12 would have mentioned *Knight* explicitly. The *Janus* court did not mention *Knight* only
13 because the issue of exclusive representation had not been disputed by the plaintiff. *Janus*,
14 138 S. Ct. 2478.

15 Instead, the *Janus* court eroded the foundations of *Knight*, which was “relying chiefly
16 on [*Abood*].” *Knight*, 465 U.S. at 278. In *Janus* the Supreme Court “cataloged *Abood*’s
17 many weaknesses.” *Janus*, 138 S. Ct. at 2484. The Court rejected both rationales that *Knight*
18 had borrowed from *Abood* to support its claim that unions may serve as the exclusive
19 representative of a dissenting member: “labor peace” and “free riders.” *Janus*, 138 S. Ct. at
20 2486. The Court determined that both governmental interests were not compelling enough
21 to override the First Amendment rights to free speech and freedom of association. *Id.* Its
22 foundations now swept from underneath it, *Knight* should be recognized as inapplicable to
23 the questions at hand.

1 **III. *Mentele v. Inslee* controls only “partial” state employees with limited**
2 **representation by the union; in contrast, Sweet is a full-fledged public**
3 **employee, and CAPT claims full representation of him.**

4
5 **A. *Mentele* does not control.**

6 CAPT also points to the recent decision of *Mentele v. Inslee*, No. 16-35939, 2019
7 U.S. App. LEXIS 5613 (9th Cir. Feb. 26, 2019), as circuit precedent. *Mentele* recognizes
8 that the question presented in *Knight* can be distinguished from the current question of
9 whether a union can act as exclusive representative of non-members. *Id.* at *12 (the two
10 questions are “arguably distinct”). Nonetheless, *Mentele* goes on to state that *Knight*
11 continues to apply to “partial” state employees with limited representation by the union.

12 *Mentele* should be distinguished on this point. The plaintiffs in *Mentele* are not
13 government workers but private employees. Under the childcare system of the State of
14 Washington, “families choose independent childcare providers and pay them on a scale
15 commensurate with the families’ income levels. The State covers the remaining cost.” *Id.*
16 at *3. Washington only considers the plaintiffs in *Mentele* to be ““public employees’ for
17 purposes of the State’s collective bargaining legislation.” *Id.* at *3-4. As such, the exclusive
18 representation provided these employees by their union is limited: “[T]hey are considered
19 ‘partial’ state employees, rather than full-fledged state employees, and Washington law
20 limits the scope of their collective bargaining agent’s representation.” *Id.* at *4. The
21 exclusive representative cannot organize a strike, negotiate over retirement benefits, or even
22 govern the hiring or firing of employees because they are private employees hired by the
23 families in need of their services. *Id.* The harm of being forced to associate with such an
24 exclusive representative is, thus, minimal.

25 By contrast, Sweet is a public employee in every aspect of the phrase. He is a public
26 university employee, is hired and fired by the government, and is being forced to associate
27 with a government union that has different views from his own on important policy issues.

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

5 Likewise, in *Harris v. Quinn*, the Supreme Court distinguished between “full-fledged
6 public employees” like Sweet and partial state employees. 573 U.S. 616, 639 (2014). In
7 fact, the plaintiffs in *Harris* were almost identical in nature to the plaintiffs in *Mentele*, and
8 the Supreme Court in *Harris* limited its holding to partial state employees because of the
9 differences between such employees and full-fledged public employees. *Id.* at 647. The
10 plaintiffs in *Harris* were personal assistants hired solely by families to provide homecare
11 services for Medicaid recipients. *Id.* at 621. Like the plaintiffs in *Mentele*, they were
12 considered partial state employees because they were paid by the state and subject to limited
13 collective bargaining and exclusive representation by state statute. *Id.* at 621-623. Just as
14 the Court in *Harris* limited its holding to employees who were public only for collective
15 bargaining purposes, so should the *Mentele* holding be limited to partial state employees
16 and not extended to full-fledged public employees like Sweet.

17
18 **B. In the alternative, *Knight* and *Mentele* should be overruled to the extent**
19 **they hold that exclusive representation does not violate Sweet’s right of**
20 **association.**

21 In the alternative, Sweet asserts that both *Knight* and *Mentele* should be overruled.
22 *Knight* asserted that exclusive representation “in no way restrained [plaintiff’s]...freedom
23 to associate,” *Knight*, 465 U.S. at 288; *Mentele* asserted that “it is difficult to imagine an
24 alternative that is ‘significantly less restrictive’ than” exclusive representation, *Mentele*,
25 2019 U.S. App. LEXIS 5613, at *19 (quoting *Janus*); however, *Janus* stated that exclusive
26 representation “substantially restricts the rights of individual employees,” *Janus*, 138 S. Ct.
27 at 2460. *Knight* and *Mentele* were, therefore, in error on this point and should be overruled
28 to bring greater clarity to the doctrine.

1
2 **IV. Sweet states a cognizable claim of compelled association under the First**
3 **Amendment that should be heard on the merits.**

4 As the Supreme Court has recently recognized, “Designating a union as the
5 employees’ exclusive representative substantially restricts the rights of individual
6 employees.” *Janus*, 138 S. Ct. at 2460. The First Amendment should not require such
7 compelled association. “[M]andatory associations are permissible only when they serve a
8 compelling state interest that cannot be achieved through means significantly less restrictive
9 of associational freedoms.” *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298,
10 310 (2012) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal
11 quotation marks omitted). Because forced union representation does not further a
12 compelling state interest, Sweet has stated a claim on which relief could be granted and
13 should be allowed to proceed to the merits.

14
15 **A. There is no state interest that can sustain this compelled association.**

16 Unions and state governments have proffered various claimed interests for
17 compelling the association of employees. One interest often proffered is “labor peace,”
18 meaning the “avoidance of the conflict and disruption that it envisioned would occur if the
19 employees in a unit were represented by more than one union” because “inter-union
20 rivalries would foster dissension within the work force, and the employer could face
21 ‘conflicting demands from different unions.’” *Janus*, 138 S. Ct. at 2465. Other interests
22 typically asserted in support of exclusive representation status amount to much the same
23 claim: that it is in the state’s interest to have a “comprehensive system” that bundles all
24 employees into a single bargaining representative with which the state can negotiate. *See*,
25 *e.g.*, Brief for Respondents Lisa Madigan and Michael Hoffman at 4, *Janus v. AFSCME*,
26 138 S. Ct. 2448 (2018) (No. 16-1466).

1 This justification does not apply to Sweet because he does not seek to introduce a
2 competing union into the bargaining mix, but only to ensure that CAPT does not speak on
3 his behalf. Furthermore, in *Janus* the Supreme Court assumed, without deciding, that labor
4 peace might be a compelling state interest but rejected it as a justification for agency fees.
5 *Janus*, 138 S. Ct. at 2465. The interest should, likewise, be rejected as a justification for
6 exclusive representation. The Supreme Court recognized that “it is now clear” that the fear
7 of “pandemonium” if the union couldn’t charge agency fees was “unfounded.” *Id.* To the
8 extent individual bargaining is claimed to raise the same concerns of pandemonium, this
9 too, remains insufficient. The Supreme Court rejected the invocation of this rationale due
10 to the absence of evidence of actual harm. *Id.* It may be that the state finds it convenient to
11 negotiate with a single agent, but that, in and of itself, is not enough to overcome First
12 Amendment rights. The rights to speech and association cannot be limited by appeal to
13 administrative convenience. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972)
14 (in free speech cases, a “small administrative convenience” is not a compelling interest);
15 *see also Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) (holding that a state could
16 “no more restrain the Republican Party’s freedom of association for reasons of its own
17 administrative convenience than it could on the same ground limit the ballot access of a
18 new major party”).

19 While it may be quicker or more efficient for the state to negotiate only with the
20 union, “the Constitution recognizes higher values than speed and efficiency.” *Stanley v.*
21 *Illinois*, 405 U.S. 645, 656 (1972). Even if the state could claim that it saves monetary
22 resources by negotiating only with the union, the preservation of government resources is
23 not an interest that can justify First Amendment violations. In other contexts where the
24 state’s burden was only rational basis review, the Supreme Court has rejected such
25 justifications. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting the “interest
26 in conserving public resources” in a case applying only heightened rational basis review);
27 *see also Plyler v. Doe*, 457 U.S. 202, 227 (1982) (“a concern for the preservation of
28 resources standing alone can hardly justify the classification used in allocating those

1 resources”). Such claimed interests are not enough to leave Sweet “shanghaied for an
2 unwanted voyage.” *Janus*, 138 S. Ct. at 2466.

3
4 **B. Exclusive representation forces Sweet to associate with the views of the**
5 **union.**

6 Under Cal. Gov’t Code § 3515.5, as a condition of his employment, Sweet must allow
7 the union to speak on his behalf on regarding matters that *Janus* recognizes to be of
8 inherently public concern. *Janus*, 138 S. Ct. at 2473. This compelled association raises
9 serious First Amendment concerns. *Id.* at 2464 (whenever “a State . . . compels
10 [individuals] to voice ideas with which they disagree, it undermines” First Amendment
11 values).

12 Unions in other states agree with Sweet on this point. In Illinois, the International
13 Union of Operating Engineers, Local 150, AFL-CIO brought a lawsuit against the State of
14 Illinois precisely because they did not want to speak as the exclusive representative of non-
15 union members: “[P]laintiffs assert that they, and therefore their membership, will be
16 compelled to speak on behalf of non-members, infringing on their First Amendment rights.”
17 *Sweeney v. Madigan*, No. 18-cv-1362, 2019 U.S. Dist. LEXIS 19389, at *6 (N.D. Ill. Feb.
18 6, 2019).

19 Legally compelling Sweet to associate with CAPT demeans his First Amendment
20 rights. Indeed, “[f]orcing free and independent individuals to endorse ideas they find
21 objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of
22 objected-to beliefs would require even more immediate and urgent grounds than a law
23 demanding silence.” *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v.*
24 *Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). California’s laws
25 command Sweet’s involuntary affirmation of objected-to beliefs. The fact that he retains
26 the right to speak for himself does not resolve the fact that CAPT organizes and negotiates
27 as his representative in his employment relations.

1
2 **V. CAPT’s contention that exclusive representation does not compel association**
3 **does not survive examination.**

4 Finally, CAPT asserts that its representation does not abridge Sweet’s rights because
5 it says he is not required to “do or say anything” and because “reasonable people” would
6 not attribute CAPT’s actions to Sweet. MTD at 13.

7 In the first instance, CAPT is right that Sweet “does not allege that he is required to
8 personally do or say anything to join or endorse CAPT.” MTD at 13. This is in fact precisely
9 his objection: he has no agency in the matter, his autonomy having been assigned to CAPT
10 as his agent despite his objections, and he cannot withdraw that endorsement under
11 California law.

12 CAPT asserts that, in this case, CAPT’s speech is not “attributed to plaintiff” on the
13 premise that “reasonable people would not believe that all bargaining unit workers
14 necessarily agree with the exclusive representative or its positions.” MTD at 13. For this
15 proposition, CAPT relies on *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006), in which law
16 schools could be pressured to “‘associate’ with military recruiters in the sense that they
17 interact[ed] with them.” Sweet does not claim a right to never interact with a representative
18 of CAPT. Indeed, he expects he will cross paths with representatives in his employment
19 from time to time and expects the interactions to be cordial. The problem is that the union
20 negotiates on Sweet’s behalf without his consent. No law student or faculty member was
21 required to follow the military’s “Don’t Ask, Don’t Tell” policy, which was the basis of the
22 law school’s objection. CAPT also incorrectly cites *FAIR* by analogy, because even
23 “high school students can appreciate the difference between speech a school sponsors and
24 speech the school permits because legally required to do so, pursuant to an equal access
25 policy.” *FAIR*, 547 U.S. at 65 (citing *Board of Educ. of Westside Community Schools v.*
26 *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). But Sweet does not object to
27 CAPT’s speech; he objects to CAPT representing him in his employment relations, so *FAIR*
28 is inapposite.

1 Another analogy offered by CAPT for the proposition that compelled association is
2 constitutional has been specifically addressed by the Supreme Court in light of *Janus*.
3 CAPT cites a concurrence in *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) for the
4 proposition that individuals can be compelled to associate with the views of a state bar
5 association. MTD at 14. However, the Supreme Court recently addressed this very issue
6 when it vacated an 8th Circuit decision upholding forced membership in the bar and
7 remanded it for further consideration in light of *Janus*. See *Fleck v. Wetch*, 139 S. Ct. 590
8 (2018). Likewise, this Court should also consider *Janus* when reviewing cases that rely on
9 *Abood*.

10 The premise that Sweet is not burdened by compelled association because he can
11 speak his own mind is not consistent with other Supreme Court rulings on the issue. An
12 individual's ability to speak in public disagreement with a group is not an excuse for
13 continuing to compel association with the group. In New Hampshire, for example, motorists
14 could not be compelled to associate with the state motto by bearing it on their license plates
15 even though they were given the outlet to publicly speak against it. *Wooley v. Maynard*,
16 430 U.S. 705 (1977). The Boy Scouts could not be compelled to associate with members
17 who engaged in activism with which the Boy Scouts disagreed even when they were given
18 the outlet to express such disagreement publicly. *Boy Scouts of America et al. v. Dale*, 530
19 U.S. 640 (2000). Florida newspapers could not be compelled to print editorials from the
20 state even when they were given the freedom to print their disagreement with such
21 editorials. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974). Each of
22 these instances of compelled association or speech was held unconstitutional. Sweet's
23 ability to express a message different from that of CAPT does not make it constitutional for
24 California to forcibly associate Sweet with CAPT and its views.

25 CAPT finally argues that the union is not Sweet's agent since any "democratic"
26 system sometimes requires dissenters to be bound by the majority. MTD at 14. But CAPT
27 does not administer a democratic system as regards to Sweet. He has no vote for the union's
28 leadership, for whether to accept or reject a contract, or for whether or not to strike. This

1 “democratic” system is reserved for union members. *Janus* rectified the deficits in this
2 “democracy” by eliminating the union’s system of taxation without representation. This
3 Court should clarify that forced association without representation is likewise
4 constitutionally infirm.

5
6 **CONCLUSION**

7 For the forgoing reasons, CAPT’s Motion to Dismiss Count II of the First Amended
8 Complaint should be denied.

9
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11 Respectfully submitted,

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