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7 Secretary and Chief of Staff to The Regents of the
University of California
8

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11
12 Isaac Wolf,

13 Plaintiff,

14 v.

15 University Professional & Technical
Employees, Communications Workers of
16 America Local 9119; Anne Shaw, in her
official capacity as Secretary and Chief of
17 Staff to the Regents of the University of
California; Joshua Golka, in his official
18 capacity as Executive Director of the
California Public Employment Relations
19 Board; and Xavier Becerra, in his official
capacity as Attorney General of California,

20 Defendants.
21

Case No. 3:19-cv-02881-WHA

**DEFENDANT ANNE SHAW'S NOTICE
OF MOTION AND MOTION TO DISMISS
PLAINTIFF'S COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: September 5, 2019
Time: 8:00 a.m.
Crtrm: 12, 19th Floor
Judge: The Hon. William Alsup

Action Filed: May 24, 2019

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1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities and Request for Judicial Notice, all of the pleadings, files, and records in this
3 proceeding, all other matters of which the Court may take judicial notice, and any argument or
4 evidence that may be presented to or considered by the Court prior to its ruling.

5
6 DATED: July 26, 2019

HANSON BRIDGETT LLP

7
8 By: /s/ Gilbert J. Tsai
9 GILBERT J. TSAI
10 WINSTON K. HU
11 Attorneys for Defendant
12 ANNE SHAW, in her official capacity as
13 Secretary and Chief of Staff to The Regents of the
14 University of California
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Anne Shaw (“Ms. Shaw”), the Secretary and Chief of Staff to The Regents of
 4 the University of California (the “University”), requests that the Court dismiss the Complaint of
 5 Plaintiff Issac Wolf (“Plaintiff”), as well as his claims against her because the Court lacks subject
 6 matter jurisdiction, and because Plaintiff has failed to state a claim upon which relief can be
 7 granted. Plaintiff’s real dispute here is with the Union, not against Ms. Shaw or the University.
 8 First, both the University and Ms. Shaw, sued in her official capacity as the Secretary and Chief of
 9 Staff to the University, are entitled to sovereign immunity from lawsuits under the Eleventh
 10 Amendment. Second, the California Public Employment Relations Board has exclusive
 11 jurisdiction over Plaintiff’s claims. Third, Plaintiff has failed to state a claim against Ms. Shaw
 12 upon which relief can be granted because he voluntarily authorized payroll deductions; as a result,
 13 United States Supreme Court’s decision in *Janus v. Associated Federation of State, County, and*
 14 *Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) (“*Janus*”) does not apply here.

15 Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6), Plaintiff’s Complaint
 16 must be dismissed in its entirety against Ms. Shaw.

17 **II. ALLEGED FACTS**

18 Plaintiff, a University employee, alleges he signed a form authorizing the deduction of
 19 union dues from his paycheck on April 10, 2018. (Compl. ¶13.) Plaintiff alleges that in
 20 November 2018, he resigned his membership and requested his union dues cease, but the Union
 21 responded that he could only cancel his membership and payroll deductions during the “annual
 22 cancellation period” prior to his renewal date. (Compl. ¶¶15-17.) Plaintiff resigned from his
 23 membership and the Union ceased deducting dues in February 2019. (Compl. ¶¶20-21.)

24 **III. STATEMENT OF ISSUES**

25 The issues presented are whether Plaintiff’s Complaint must be dismissed as to Ms. Shaw
 26 for failure to state a claim upon which relief can be granted because:

- 27 1. The Eleventh Amendment bars Plaintiff’s official capacity suit against Ms. Shaw,
 28 the Secretary and Chief of Staff to the Regents of the University of California;

1 Amendment purposes, and therefore is not a ‘person’ within the meaning of section 1983.’ ”
2 *Robles v. In Name of Humanity We Refuse to Accept a Fascist America, et al.*, No. 17-cv-04864-
3 CW, 2018 WL 2554740, at *3 (N.D. Cal. June 4, 2018) (citing *Armstrong v. Meyers*, 964 F.2d
4 948, 949-950 (9th Cir. 1992); *BV Eng’g*, 858 F.2d at 1395). Accordingly, “ ‘the University of
5 California and [t]he Board of Regents are considered to be instrumentalities of the state,’ and
6 therefore enjoy the same immunity as the state of California.” *BV Eng’g*, 858 F.2d at 1395 (9th
7 Cir. 1988) (quoting *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982)).

8 Plaintiff does not dispute that the University is immune from suit under Eleventh
9 Amendment sovereign immunity. Instead, he sues Ms. Shaw under Section 1983 in her official
10 capacity as the University’s Secretary and Chief of Staff. However, in order to bring suit against a
11 state officer for alleged violations of federal law, a plaintiff must demonstrate that the officer has
12 “some connection with the enforcement of the act, or else it is merely making him a party as a
13 representative of the State, and thereby attempting to make the State a party.” *Snoeck v. Brussa*,
14 153 F.3d 984, 986 (9th Cir. 1998). Plaintiff’s suit against Ms. Shaw is invalid because she is not
15 connected to the enforcement of Government Code sections 1157.12, 3513(i), 3515.5, 3583, and
16 “all related provisions” that Plaintiff seeks the Court to declare as unconstitutional. (Compl. at p.
17 8:6-12.)

18 Plaintiff seeks to sue Ms. Shaw under the doctrine set forth in *Ex Parte Young*, 209 U.S.
19 123, 155–56 (1907) which “provides a narrow exception to Eleventh Amendment immunity for
20 prospective declaratory or injunctive relief against state officers in their official capacities for their
21 alleged violations of federal law.” *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128,
22 1134 (9th Cir. 2012) (internal quotations omitted). For the exception to apply, Plaintiff must
23 allege a requisite connection to the enforcement of the alleged violation of federal law: “This
24 connection must be fairly direct; a generalized duty to enforce state law or general supervisory
25 power over the persons responsible for enforcing the challenged provision will not subject an
26 official to suit.” *L.A. Cty. Bar Ass’n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *Lytle v. Griffith*,
27 240 F.3d 404, 412 (4th Cir. 2001) (“*Young* exception is limited, however, by its requirement that
28 named state officials bear a special relation to the challenged statute. *Young* recognized that the

1 fundamental purpose of the Eleventh Amendment would be thwarted if parties could name any
 2 state official in an action.”).

3 Here, Plaintiff has not and cannot allege the requisite connection between Ms. Shaw and
 4 the enforcement of any statutory provisions at issue because (1) Ms. Shaw has no general
 5 enforcement authority at the University, (2) the Union, not Ms. Shaw, gives these provisions their
 6 effect, and (3) the Public Employment Relations Board (“PERB” or the “Board”), not Ms. Shaw,
 7 is charged with enforcing these statutes.

8 **2. Defendant Ms. Shaw Has No Enforcement Authority.**

9 Fundamentally, Ms. Shaw lacks the requisite connection to the enforcement of any due
 10 deduction provisions at issue because she has no general enforcement authority at the University
 11 whatsoever. According to University Bylaw 23.5, which sets forth the authority and duties of
 12 principal University officers including the Secretary and Chief of Staff, Ms. Shaw lacks executive
 13 power to enforce any University policies or procedures. *See* Request for Judicial Notice, Exhibit
 14 A (“University Bylaw 23”). Instead, according to the bylaws she acts as a liaison between the
 15 Regents and the Administration of the University and serves in an advisory capacity to the Board
 16 of Regents. Among other tasks, she “executes the meetings of the Board and its Committees[,]
 17 prepar[es] the official notice and minutes of all Board and Committee meetings, and serves as
 18 custodian of the minutes and other official records of the Corporation[.]” *Id.* While she “is
 19 authorized to certify that actions have been taken by the Board [of Regents,]” she herself is not
 20 vested with any authority to make or change overall University policy or procedure. *Id.* Simply
 21 put, she cannot be enjoined from any action that would effectively stop union deductions or
 22 otherwise redress alleged injuries, because she is not responsible for any such actions in her
 23 official capacity as Secretary and Chief of Staff. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,
 24 559 (1992) (the injury must be capable of redress by a favorable decision against state official);
 25 *Okpalobi v. Foster*, 244 F.3d 405, 419 (5th Cir. 2001) (“*Young* does not minimize the need to find
 26 an actual enforcement connection—some enforcement power or act that can be enjoined—
 27 between the defendant official and the challenged statute.”).

28 ///

1 Indeed, Ms. Shaw has no duties that relate in any way to the collection or deduction of
 2 union dues from employee paychecks. Relief against her “therefore would be pointless” even if
 3 any relevant provisions were problematic. *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir.
 4 1999), vacated on other grounds by 530 U.S. 1271 (2000).

5 **3. The Union—Not Ms. Shaw (Or Any University Official)—Controls All**
 6 **Deductions Of Union Dues.**

7 Neither the University nor its officials – including Ms. Shaw – are relevant to the
 8 enforcement of dues deductions under California law. California Government Code section
 9 1157.12 (“Section 1157.12”) requires the University to rely on information from the Union
 10 regarding whether any dues should be deducted. Cal. Gov’t Code § 1157.12. Likewise, it must
 11 rely on the Union’s certification that it is authorized to deduct such dues. *Id.* The statutory
 12 scheme therefore gives the Union full management, direction, and control over the collection of
 13 dues. To put it another way, no University customs or procedures are at issue, so the University
 14 (and its officers) cannot be “the real party in interest” in this suit. *See, e.g., Hafer v. Melo*, 502
 15 U.S. 21, 25 (1991) (“Because the real party in interest in an official-capacity suit is the
 16 governmental entity and not the named official, the entity’s policy or custom must have played a
 17 part in the violation of federal law.”). Indeed, adequate relief is available to Plaintiff without any
 18 participation by or enjoinder against the University or its officers.

19 Plaintiff essentially seeks the Court to imbue the University—through Ms. Shaw—with the
 20 authority to determine if any dues are owed by union members. This is not the law. Nor does the
 21 University have the means and capability to make this determination. It should not be required
 22 to—and under the law, cannot—interfere with these dues-related contracts between the Union and
 23 its members. In other words, while the University is responsible for paying its employees, it
 24 legally is not—and practically cannot—be responsible for determining their union membership
 25 status and the amount of dues they owe. The University’s role is merely administrative—it has to
 26 set aside what is owed to the Union *as determined by the Union*. *See Sandoval v. Lanier*, No.
 27 EDCV162309JGBSPX, 2017 WL 8186677, at *6 (C.D. Cal. Aug. 9, 2017) (“Defendants’ role in
 28 relation to [the statute] is purely administrative” and does not give it its effect.) (“*Sandoval*”).

1 In *Sandoval*, plaintiffs alleged constitutional violations arising from the enactment,
 2 implementation, and/or enforcement of California Labor Code § 226.2(b), which provided
 3 employers various affirmative defenses to claims for recovery of wages and associated penalties or
 4 damages. *Id.* at *2. Plaintiffs named as defendants various agency heads, who were required to
 5 perform certain duties, including “to accept notices of election by employers, post such notices or
 6 a list of electing employers to its website for a limited period of time, and accept payments for
 7 workers in the event such workers cannot be located by electing employers.” *Id.* at *6. However,
 8 because the relevant provisions did not “establish any independent duty, on the part of the
 9 agencies Defendants head or Defendants themselves, to evaluate an employer’s eligibility for the
 10 protections” provided by § 226.2(b), or “empower Defendants to determine the accuracy of wage
 11 payments made under the provision or verify that such payments were received by employees”
 12 these Agency heads lacked the necessary connection to the enforcement of § 226.2(b). *Id.* Claims
 13 against these defendants were properly dismissed. *Id.* at *7.

14 The same analysis applies here—no University official has any duty to evaluate the union
 15 dues owed by its employees or to determine the accuracy of Union’s certification related to the
 16 deduction of dues. In fact, just the opposite is true—the University is prohibited from making any
 17 such evaluations and must rely on information from the Union. *See* Cal. Gov’t Code § 1157.12.

18 Accordingly, because the University has no control over these dues deductions, Plaintiff
 19 cannot allege any requisite connection between the enforcement of the statues related to the
 20 collection of dues and Ms. Shaw—or any University official—under *Ex Parte Young*. Plaintiff’s
 21 claims against Ms. Shaw must be dismissed, and instead he must seek relief from the Union or
 22 PERB, the entity charged with regulating public sector labor relations in California.

23 **B. Plaintiff’s Suit Arises Out Of A Dispute With His Union Over Issues Within The**
 24 **Exclusive Jurisdiction Of PERB And Must Be Dismissed As Against Ms. Shaw Under**
FRCP 12(b)(1).

25 Not only are Plaintiff’s claims against Ms. Shaw barred by the Eleventh Amendment, but
 26 because his allegations of improper dues and scope of the Union’s representation arise out of, and
 27 sound in the nature of, unfair practice allegations against the Union under the Higher Education
 28 Employer-Employee Relations Act (“HEERA”), this lawsuit falls within the exclusive jurisdiction

1 of PERB. Likewise, because the PERB is charged with enforcing HEERA—not Ms. Shaw or the
2 University—Plaintiff’s suit against Ms. Shaw must be dismissed for lack of jurisdiction on this
3 ground as well.

4 The University is a higher education employer pursuant to HEERA, the statute that grants
5 collective bargaining rights to employees in the California State University and the University of
6 California systems. Cal. Gov’t Code § 3560 et seq. HEERA requires that any exclusive
7 representative treats all these employees in the bargaining unit, whether union members or non-
8 members, “fairly and impartially.” Cal. Gov’t Code § 3578. “In enacting HEERA, the
9 Legislature, after noting that all other employees of the public school systems in the state had been
10 granted the opportunity for collective bargaining, found it desirable to expand the jurisdiction of
11 the Board [PERB] to cover the employees of the University of California, Hastings College of the
12 Law, and the California State University.” *The Regents of Univ. of California v. Pub. Employment*
13 *Relations Bd.*, 168 Cal. App. 3d 937, 943 (1985).

14 PERB is the agency charged with administering the provisions of HEERA. Cal. Gov’t
15 Code § 3563. It has exclusive jurisdiction to adjudicate unfair labor practice charges: “The initial
16 determination as to whether the charges of unfair practices are justified, and, if so, what remedy is
17 necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive
18 jurisdiction of the board.” Cal. Gov’t Code § 3563.2. PERB has been granted extensive powers to
19 implement HEERA, which includes unfair practice claims brought against employee organizations
20 like the Union. For example, under HEERA, it is unlawful for an employee organization to
21 require employees to pay fees “in an amount which the board finds excessive or discriminatory
22 under all the circumstances.” Cal. Gov’t Code § 3571.1(f). It also is unlawful for an employee
23 organization to “[c]ause, or attempt to cause, an employer to pay or deliver, or agree to pay or
24 deliver, any money or other thing of value, in the nature of an exaction, for services which are not
25 performed or are not to be performed.” Cal. Gov’t Code § 3571.1(g).

26 As noted above, Plaintiff’s allegations sound in unfair practice charges that fall squarely
27 within the purview of HEERA. He alleges that the Union continues to charge him dues in an
28 unfair or excessive manner, and he further alleges that the Union has caused the employer (the

1 University) to deliver the payment of union dues for services that Plaintiff does not want
2 performed. *See* Cal. Gov't Code § 3571.1(f), (g). PERB clearly has jurisdiction over allegations
3 about improper or excessive fees charged by unions relating to union membership, as well as
4 allegations regarding the scope of union representation. *See* Cal. Gov't Code § 3560 (describing
5 HEERA's broad scope over labor relations issues involving University employees); Cal. Gov't
6 Code § 3563 (specifying PERB powers to determine disputed cases involving representation); Cal.
7 Gov't Code § 3578 (setting forth union's duty of fair representation); *see also Anderson v.*
8 *California Faculty Assn.*, 25 Cal. App. 4th 207, 211 (1994) (declaring that PERB has exclusive
9 jurisdiction to determine unfair labor practice claims in suit against union defendants over breach
10 of the duty of fair representation).

11 Furthermore, "[t]he mere fact that constitutional rights may be implicated or have some
12 bearing on this dispute" does not divest the Board of its jurisdiction. *San Diego Mun. Employees*
13 *Assn. v. Superior Court*, 206 Cal. App. 4th 1447, 1458, 1460 (2012) (claims seeking injunctive
14 relief do not divest PERB of jurisdiction); *see also, AFSCME Local 3299 v. The Regents of Univ.*
15 *of California*, PERB Dec. No. 2300-H, at pp. 14-15 (December 20, 2012) (citing *Leek v.*
16 *Washington Unified School Dist.*, 124 Cal. App. 3d 43, 53 (1981) (Legislature intended that PERB
17 exercise jurisdiction over matters that could be unfair practices or other violations of EERA, even
18 if the claims also alleged constitutional violations) and *Link v. Antioch Unified School Dist.*, 142
19 Cal. App. 3d 765, 769 (1983) (same)).

20 Simply put, PERB's jurisdiction may be at issue even if the claims are not alleged as unfair
21 practice charges. For instance, in *Stevenson v. Los Angeles Unified School District*, the Central
22 District dismissed an assortment of claims because the dispute alleged could have constituted
23 unfair practices over which PERB has exclusive jurisdiction. No. CV096497ODWPLAX, 2010
24 WL 11596479, at *3-4 (C.D. Cal. June 28, 2010). Similarly, in *El Rancho Unified School Dist. v.*
25 *Nat'l Educ. Ass'n*, 33 Cal. 3d 946, 952-960 (1983), the California Supreme Court dismissed a tort
26 suit for lack of jurisdiction based on the preemption doctrine because the claims arose out of
27 alleged actions within PERB's exclusive jurisdiction. The Supreme Court invoked the preemption
28 doctrine because the controversy presented to the court would require a decision as to whether the

1 district had engaged in unfair labor practices, even though the claims were not alleged as such. *Id.*
2 at 959.

3 So too, here. The real dispute lies between Plaintiff and his Union. Plaintiff's claims arise
4 out of two simple issues: (1) the Union's refusal to terminate the continued collection of union
5 dues; and (2) the scope and extent of the Union's ability to serve as the exclusive representative.
6 *See* Cal. Gov't Code § 3571.1(f), (g). Accordingly, the allegations fall within the purview of
7 PERB's exclusive jurisdiction, and are improperly brought against Ms. Shaw in this forum.

8 **C. All Claims Against Ms. Shaw Are Subject To Dismissal Under FRCP 12(b)(6)**
9 **Because *Janus* Does Not Apply To Union Members Who Authorized Payroll**
10 **Deductions.**

11 State law requires the University to deduct union dues from employees' paychecks and to
12 "rely on information provided by the employee organization regarding whether deductions for an
13 employee organization were properly canceled or changed[.]" Cal. Gov't Code §§ 1150(f);
14 1157.12; 3571(b), (c).

15 Plaintiff challenges the constitutionality of these statutes on the grounds that the United
16 States Supreme Court's decision in *Janus v. Associated Federation of State, County, and*
17 *Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) prohibits the state employer's deduction
18 of dues from employees' paychecks absent their consent. Yet, *Janus* does not require state
19 employers to cease deductions for employees who had voluntarily entered into contracts to
20 become dues-paying union members. To the contrary, such employees remain subject to the terms
21 of those agreements under the laws governing contract formation and enforcement. Thus,
22 Plaintiff's claimed injuries arise not from the actions of University and that of its officers or from
23 the state laws he challenges in this lawsuit – instead, they arise from Plaintiff's own voluntary
24 decision to join the Union and authorize payroll deductions.

25 Several federal district courts, including courts in the Northern, Eastern, and Central
26 Districts of California, have agreed that the *Janus* decision does not entitle current or former union
27 members, similarly situated to Plaintiff, to the relief they seek. *Babb v. Cal. Teachers Ass'n*, 378
28 F. Supp. 3d 857, 2019 WL 2022222, at *9 (C.D. Cal. May 8, 2019) (granting defendants' motion
to dismiss because plaintiffs "voluntarily chose to pay membership dues in exchange for certain

1 benefits”); *Cooley v. Cal. Statewide Law Enforcement Ass’n*, No. 2:18-cv-02961-JAM-AC, 2019
 2 WL 2994502, at *1 (E.D. Cal. July 9, 2019) (granting defendants’ motion to dismiss because
 3 union was authorized to continue collecting agreed-upon dues from union member under valid and
 4 enforceable agreement); *Smith v. Superior Court*, No. 3:18-cv-5472-VC, 2018 WL 6072806, at *1
 5 (N.D. Cal. Nov. 16, 2018) (*Janus* does not stand for the proposition that “any union member can
 6 change his mind at the drop of a hat, invoke the First Amendment, and renege on his contractual
 7 obligation to pay dues.”), 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019) (granting
 8 defendants’ motion to dismiss in same case because *Janus* “did not concern the relationship of
 9 unions and members; it concerned the relationship of unions and non-members”), *notice of appeal*
 10 *filed*, 19-16381 (Jul. 12, 2019); *see also Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1016 (W.D.
 11 Wash. Feb. 15, 2019) (“The notion that the Plaintiffs may have made a different choice if they
 12 knew ‘the Supreme Court [in *Janus*] would later invalidate public employee agency fee
 13 arrangements does not void their previous knowing agreements.”) (citing *Cooley*, 2019 WL
 14 331170, at *2), *notice of appeal filed*, 19-35137 (Feb. 20, 2019).

15 As such Plaintiff fails to state a claim against Ms. Shaw upon which relief can be granted.

16 VI. CONCLUSION

17 For the reasons stated above, Ms. Shaw requests this Court to grant its Motion to Dismiss
 18 Plaintiff’s Complaint against her, with prejudice.

20 DATED: July 26, 2019

HANSON BRIDGETT LLP

22 By: /s/ Gilbert J. Tsai
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 Secretary and Chief of Staff to The Regents of the
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