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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Cara O'Callaghan and Jenée Misraje,

Plaintiffs,

v.

Regents of the University of California et al.,

Defendants.

Case No. 2:19-cv-02289-JLS-DFM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: June 7, 2019
Time: 10:30 a.m.
Judge: Hon. Josephine L. Staton

INTRODUCTION

Government employees have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Plaintiffs, Cara O'Callaghan ("O'Callaghan"), employed at the University of California, Santa Barbara, and Jenée Misraje ("Misraje"), employed at the University of California, Los Angeles (collectively, "Plaintiffs"), have repeatedly advised Defendant Teamsters Local 2010 (the "Union") that it does not have their affirmative consent to withdraw its dues from their paychecks or to represent them as a member of the Union. These requests have been ignored or denied. The Union has insisted, instead, that Plaintiffs must wait until an opt-out period the Union prefers in order to exercise their First Amendment right not to pay union dues.

Forcing Plaintiffs to continue to pay union dues until the Union's preferred opt-out period is unconstitutional. Plaintiffs' union membership applications are not valid because they were not given the option to pay nothing to the union. The burden is on the Union to prove by "clear and compelling" evidence that Plaintiffs provided "affirmative consent" to pay union dues, and the union cannot meet this burden because of the unconstitutional nature of the choice it gave them. *Id.* Plaintiffs were given the unconstitutional choice between paying union dues as members of the union or paying union agency fees as non-members of the union. The Supreme Court in *Janus* recognized that Plaintiffs should have been given the choice to pay nothing at all to the union as non-members of the union. Because they were not given this choice, their union authorization cards are no longer valid.

Also, it is a violation of the First Amendment to force citizens to associate with organizations or causes with which they do not wish to associate. Yet California law grants public sector unions the power to speak on behalf of employees as their exclusive representative. Pursuant to this law, the Union purports to act as the exclusive representative of Plaintiffs. This compelled arrangement abridges their rights of speech and association.

Given that the Supreme Court has recently spoken directly on both these issues, Plaintiffs are more than likely to succeed on the merits of their case. Plaintiffs are currently suffering irreparable harm by having union dues deducted from their paychecks against their will to go towards union advocacy they do not support. They are also suffering irreparable harm by having the Union misrepresent their views in its negotiations with Defendant Regents of the University of California (the "Regents").

Plaintiffs respectfully request that the Court enter a preliminary injunction preventing further injury as the case is litigated. The Court should enter a preliminary injunction 1) enjoining the Union to accept Plaintiffs' resignation, to stop directing the Regents to deduct union dues from Plaintiffs' paychecks, and to stop accepting those dues; 2) enjoining the Regents from deducting union dues from Plaintiffs' paychecks; 3) enjoining Xavier Becerra, in his official capacity as Attorney General of California ("General Becerra") from enforcing Cal. Gov't Code §§ 1157.12, 3513(i), 3515, 3515.5, 3583, and all other provisions of California law that require Plaintiffs to wait until a specified window of time to stop the deduction of union dues from their paychecks; 4) enjoining the Union from acting as Plaintiffs' exclusive representative in bargaining negotiations with their employer, the University of California system; 5) enjoining the Regents from recognizing the Union as the exclusive representative of Plaintiffs for collective bargaining purposes; and 6) enjoining General Becerra from enforcing Cal. Gov't Code §§ 3570, 3571.1(e), 3574, 3578, and all other provisions of California law that provide for exclusive representation of employees who do not affirmatively consent to union membership. The failure to enjoin these activities will lead to further abridgments of First Amendment rights which cannot be remedied at the conclusion of the litigation.

FACTS

O'Callaghan was employed by the University of California, Santa Barbara ("UCSB") from 2000 to 2004 and has been employed by UCSB continuously since

August 2009. Misraje has been employed by the University of California, Los Angeles ("UCLA") since May 2015. Defendant Regents are sued in their official capacity as the board responsible for administering the University of California system.

When O'Callaghan began her employment at UCSB, she did not join the union, instead paying a "fair share" fee to the union. On May 31, 2018 a representative of the Union came to O'Callaghan's workplace, pressuring workers to join. The Union representative did not inform O'Callaghan that she had a right not to join or pay any money to the Union, nor did the Union representative inform her of the impending decision in *Janus* and the potential effects that would have on her rights as an employee. Because of this lack of relevant information, O'Callaghan signed an application joining the Union and authorizing it to deduct dues from her paycheck.

On June 27, 2018, the Supreme Court issued its decision in *Janus*. On July 25, 2018, O'Callaghan sent a letter to the Union rescinding the application she had signed. The same day she sent a letter to UCSB requesting that it stop deducting union dues from her paycheck. In a letter dated July 24, 2018, the Union responded that she was free to resign her membership at any time; however, her payroll deductions would continue unless she gave notice pursuant to the terms of the collective bargaining agreement between the Union and UCSB. The letter did not explain what those terms were. Under the terms of the collective bargaining agreement, notice was required to be written and sent via U.S. mail to both the Union and UCSB during the thirty days prior to the expiration of their collective bargaining agreement, which would not occur until March 31, 2022.

On October 16, 2018, Liberty Justice Center sent a letter to UCSB demanding that it immediately stop deducting union dues from O'Callaghan's paycheck. On October 24, 2018, UCSB referred Liberty Justice Center to the Union. On November 9, 2018, the Union confirmed to UCSB via email that it should continue to deduct dues from O'Callaghan's paycheck.

On July 27, 2015, two and a half months after beginning employment at UCLA,

Misraje signed an application joining the Union.

On August 8, 2018, Misraje submitted a resignation letter to the Union, directing it to stop the deduction of its dues from her paycheck and explaining that the union agreement she had signed in July 2015 was invalid after the Supreme Court's decision in *Janus*. On August 9, 2018 the Union responded to Misraje that she could not withdraw her membership except during a specific time window. The Union did not specify when that time window would occur. On August 27, 2018, Misraje sent an email to the Union, requesting that it immediately terminate her union membership and stop deducting union dues from her paycheck. She also sent an email to UCLA's Human Resources department explaining that she was withdrawing her authorization for the Regents to deduct union dues from her paycheck. On the same day, the Union responded that Misraje was no longer a member of the union, but she could not end the deduction of union dues from her paycheck except during a time window. Also that same day, an HR representative responded, explaining that UCLA could not process her request because, under California law, all such requests must come from the union. On October 11, 2018, Misraje sent yet another email to the union requesting that it withdraw her membership and stop deducting union dues from her paycheck. The same day, the Union responded that her membership had been terminated, but the Union would continue to receive dues from her paycheck. On November 8, 2018, Misraje requested again through email that UCLA stop the payroll deductions. The same say UCLA again said it could not because all such requests must come through the union under California law. On November 29, 2018, Misraje sent another letter to the Union. On November 30, 2018, Misraje again sent a letter to the Union and UCLA. On December 5, 2018, UCLA again rejected her request. On December 7, 2018, the Union again responded that Misraje was free to resign membership but could only cease dues deductions during a window that the Union declined to specify. Under the terms of the union application Misraje signed on July 27, 2015, notice is required to be written and sent to both the Union and UCLA during a fifteen-day window "at least sixty (60) days, but not more than seventy-five (75) days" before the anniversary

date of the signed agreement.

Since Plaintiffs began employment, the Regents have deducted union dues from Plaintiffs' paychecks and have remitted those dues to the Union. Those union dues now approximate fifty-three ($53) per month for Misraje and forty-one dollars ($41) for O'Callaghan. Despite Plaintiffs' repeated requests that the deductions be stopped, the Regents continue to deduct union dues from Plaintiffs' paychecks.

ARGUMENT

The Court should enjoin Defendants from allowing the Union to collect dues and act as Plaintiffs' exclusive representative in bargaining negotiations with their employer.

In the Ninth Circuit, plaintiffs seeking a preliminary injunction must satisfy one of two tests. The first test considers 1) the likelihood Plaintiffs will succeed on the merits, 2) whether Plaintiffs will suffer irreparable injury if the injunction is not granted, 3) the balance of equities, and 4) whether the injunction would be in the public interest. *Coffman v. Queen of the Valley Med. Ctr.*, 895 F.3d 717, 725 (9th Cir. 2018); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The second test provides that "if a plaintiff can only show that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff's favor, and the other two *Winter* factors are satisfied." *Alliance for the Wild Rockies v. Peña*, 865 F.3d 1211, 1217 (9th Cir. 2017). Under either mode of analysis, the Court should grant Plaintiffs a preliminary injunction on their claims.

I. Plaintiffs are likely to succeed on the merits.

A. Plaintiffs are likely to succeed in their claim that continued deduction of union dues violates their First Amendment rights to free speech and freedom of association.

The Court in *Janus* explained that payments to a union could be deducted from a non-member's wages only if that employee "affirmatively consents" to pay:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. 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. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted).

Supreme Court precedent provides that certain standards be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Finally, the Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

In Plaintiffs' case, they could not have waived their First Amendment right to not join or pay a union. First, at the time Plaintiffs signed their union membership applications, they did not know about their rights not to pay a union because the Supreme Court had not yet issued its decision in *Janus*. Second, Plaintiffs could not have voluntarily, knowingly, or intelligently waived their rights not to join or pay a union because neither the Union nor the Regents informed them they had a right not to join the union at all. Therefore, Plaintiffs had no choice but to pay the Union, and they did not voluntarily waive their First Amendment rights.

Because the Court will "not presume acquiescence in the loss of fundamental

rights," *Ohio Bell Tel. Co.*, 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. In addition, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (*citing Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

The union applications Plaintiffs signed did not provide a clear and compelling waiver of Plaintiffs' First Amendment right not to join or pay a union because they did not expressly state that Plaintiffs have a constitutional right not to pay a union and because they did not expressly state that Plaintiffs were waiving that right.

After the decision in *Janus*, the Union maintains that Plaintiffs may only withdraw their dues deduction during arbitrary windows of the Union's choice, despite Plaintiffs' repeated requests to be removed from the union rolls and to stop the dues deduction from their paychecks.

The invalid union dues authorization applications signed by Plaintiffs before the Supreme Court's decision in *Janus* cannot meet the standards set forth for waiving a constitutional right, as required by the Supreme Court in *Janus*; therefore, the Union cannot hold Plaintiffs to the time window to withdraw their union membership set forth in the union applications.

Since they were apprised of their constitutional rights by the *Janus* decision, Plaintiffs have not signed any additional union authorization applications. Therefore, Plaintiffs have never been given their constitutional right to pay nothing to the union, and they have, therefore, never given the Union the "affirmative consent" required by the *Janus* decision.

The likelihood that Plaintiffs will succeed in their claim is, thus, considerable. Plaintiffs have a clearly established right not to support the Union, and they have not waived that right. This Court should prohibit the Union, the Regents, and the Attorney General from treating Plaintiffs as if they have waived their First Amendment rights. At

the very least, Plaintiffs have certainly "raised a serious question going to the merits" of whether continuing to allow the Union to take money from their paycheck to fund union advocacy violates their rights under the First Amendment. *Alliance for the Wild Rockies*, 865 F.3d at 1217.

B. Plaintiffs are likely to succeed in their claim that compelled representation violates their First Amendment rights.

As the Supreme Court has recently recognized,

> Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer.

Janus, 138 S. Ct. at 2460. The First Amendment should not countenance such a substantial restriction. "[M]andatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 567 U.S. at 310 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted). Because forced union representation does not further a compelling state interest, Plaintiffs are likely to succeed in their claim that compelled representation by the Union violates their constitutional rights.

Unions and state governments have proffered various claimed interests for compelling the association of employees. One interest often proffered by the government is "labor peace," meaning the "avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union" because "inter-union rivalries would foster dissension within the work force, and the employer could face 'conflicting demands from different unions.'" *Janus*, 138 S. Ct. at 2465. Other interests typically asserted in support of exclusive representation status amount to much

the same claim: that it is in the state's interest to have a "comprehensive system" that bundles all employees into a single bargaining representative with which the state can negotiate. *See, e.g.,* Brief for Respondents Lisa Madigan and Michael Hoffman at 4, *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (No. 16-1466).

In *Janus* the Supreme Court assumed, without deciding, that labor peace might be a compelling state interest but rejected it as a justification for agency fees. The interest should, likewise, be rejected as a justification for exclusive representation. The Supreme Court recognized that "it is now clear" that the fear of "pandemonium" if the union couldn't charge agency fees was "unfounded." *Janus*, 138 S. Ct. at 2465. To the extent that individual bargaining is claimed to raise the same concerns of pandemonium, this rationale, too, remains insufficient. The Supreme Court rejected the invocation of this rationale due to the absence of evidence of actual harm. *Id.* It may be that the State finds it convenient to negotiate with a single agent, but that, in and of itself, is not enough to overcome First Amendment rights. The rights to speech and association cannot be limited by appeal to administrative convenience. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972) (in free speech cases, a "small administrative convenience" is not a compelling interest); *see also Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) (holding that a state could "no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party"). While it may be quicker or more efficient for the state to negotiate only with the union, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Even if the state could claim that it saves monetary resources by negotiating only with the union, the preservation of government resources is not an interest that can justify First Amendment violations. In other contexts where the state's burden receives only rational basis review, the Supreme Court has rejected such justifications. *See, e.g., Romer v. Evans,* 517 U.S. 620, 635 (1996) (rejecting the "interest in conserving public resources" in a case applying only heightened rational basis review); *see also Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("a concern for

the preservation of resources standing alone can hardly justify the classification used in allocating those resources"). Such claimed interests are not enough to leave Plaintiffs "shanghaied for an unwanted voyage." *Janus*, 138 S. Ct. at 2466.

Under Cal. Gov't Code §§ 3570, 3571.1(e), 3574, and 3578, Plaintiffs must allow the Union to speak on their behalf as a condition of their employment on matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. California law grants the Union prerogatives to speak on Plaintiffs' behalf on all manner of contentious matters. For example, the union is entitled to speak on Plaintiffs' behalf regarding the grievance procedure Plaintiffs would have to go through to settle disputes with their employer. These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467.

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

The Supreme Court's compelled association and speech cases provide good examples of how the current arrangement injures Plaintiffs. Allowing an individual the ability to speak publicly in disagreement with a group is not an excuse for continuing to compel association with the group. In New Hampshire, for example, motorists could not be compelled to associate with the state motto by bearing it on their license plates even though they were given the outlet to speak publicly against it. *Wooley v. Maynard*, 430 U.S. 705 (1977). The Boy Scouts could not be compelled to associate with members who engaged in activism with which the Boy Scouts disagreed even when they were given the outlet to express such disagreement publicly. *Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000). Florida newspapers could not be compelled to print editorials from the

state even when they were given the freedom to print their disagreement with such editorials. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974). Each of these instances of compelled association or speech was held unconstitutional. So too, here Plaintiffs' ability to express a message different from that of the Union does not make it constitutional for California to forcibly associate Plaintiffs with the Union and its views.

Unions in similar cases have attempted to rely on *Minnesota State Board v. Knight*, 465 U.S. 271 (1984) for the proposition that states can require exclusive representation and choose to bargain with only one union. The *Knight* case holds that other employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Id. Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the issue, "The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id.* at 273. Based on this question, the aggrieved employees' "principal claim [was] that they have a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. The Supreme Court disagreed, holding "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283. As the court's own words reveal, the Supreme Court did not address the question of whether the aggrieved employees must be compelled to associate with the union that has been granted exclusive representation status for bargaining purposes. In short, *Knight* is not a freedom of association case but a free speech case.

Unions in similar cases have also attempted to rely on *Mentele v. Inslee*, No. 16-35939, 2019 U.S. App. LEXIS 5613 (9th Cir. Feb. 26, 2019). But *Mentele* recognizes that the question presented in *Knight* can be distinguished from the current question of whether a union can act as exclusive representative of non-members. *Id.* at *12 (the two questions are "arguably distinct"). Nonetheless, *Mentele* goes on to state that *Knight*

continues to apply to "partial" state employees with limited representation by the union. *Mentele* should be distinguished from this case on this point. The plaintiffs in *Mentele* are not government workers but private employees: "families choose independent childcare providers and pay them on a scale commensurate with the families' income levels. The State covers the remaining cost." *Id.* at *3. The State of Washington only considers the plaintiffs in *Mentele* to be "'public employees' for purposes of the state's collective bargaining legislation." *Id.* at *3-4. As such, the exclusive representation provided these employees by their union is limited. The union cannot organize a strike, negotiate over retirement benefits, or even govern the hiring or firing of employees. *Id.* at *4. Therefore, the harm of being forced to associate with such an exclusive representative is minimal, and as in the case of *Harris v. Quinn*, 573 U.S. 616 (2014), the holding should be limited in its application to partial state employees only. 573 U.S. at 647.

In contrast, legally compelling full-fledged public employees like Plaintiffs to associate with an exclusive representative with the bargaining rights of the Union substantially demeans their First Amendment rights. Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . a law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). California's laws command Plaintiffs' involuntary affirmation of objected-to beliefs; therefore, the laws should be enjoined.

None of the state interests offered in favor of depriving Plaintiffs of their right to free association rise to the level of being immediate, urgent, or compelling. The traditionally proffered compelling state interests for exclusive representation do not apply to Plaintiffs. They have, therefore, demonstrated a substantial likelihood that they will succeed on the merits of their claim. At a minimum, they have "raised a serious question going to the merits" of whether compelling them to associate with the Union violates their First Amendment rights. *Alliance for the Wild Rockies*, 865 F.3d at 1217.

II. Plaintiffs will suffer irreparable injury.

A. Irreparable injury will result if the Union is allowed to continue deducting dues from Plaintiffs' paychecks.

The continued deduction of union dues constitutes an irreparable injury to Plaintiffs of several hundred dollars a year. The deduction is a hardship on Plaintiffs that cannot be compensated merely by returning their money with interest. The immediate injury being suffered by Plaintiffs from the current lack of these funds is irreparable at a later date.

The withholding from Plaintiffs' paychecks also constitutes irreparable injury because it is a compelled subsidy that the Union will use to fund ideological activities that Plaintiffs object to. Such deductions are not simply a matter of money, which could be returned with interest at the conclusion of litigation. Refunding their money at the close of the case would merely render a compelled subsidy, instead, to be a compelled loan. It would not resolve Plaintiffs' injury:

> [E]ven a full refund would not undo the violation of First Amendment rights. . . . [T]he First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full.

Knox, 567 U.S. at 317.

Long before *Janus* recognized that agency fees were too great an imposition to pass constitutional muster, the Supreme Court put safeguards in place to "avoid the risk that [objecting employees'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 305 (1986). In the public sector context, even bargaining itself inherently implicates political and ideological concerns. See *Janus*, 138 S. Ct. at 2473. "Given the existence of acceptable alternatives, [a] union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Ellis v. Bhd. of Ry. Employees*, 466 U.S. 435, 444 (1984). The temporary deprivation to which the union claims an entitlement should not be countenanced. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special

subsidies for speech on the side that [the government] favors." *United States v. United Foods*, 533 U.S. 405, 429 (2001). The only way to avoid that risk in this case is to enjoin the collection of Plaintiffs' dues immediately and to enjoin the Attorney General from enforcing Cal. Gov't Code §§ 1157.12, 3513(i), 3515, 3515.5, 3583, and all other provisions of California law that require Plaintiffs to wait until a specified window of time to stop the deduction of union dues from their paychecks.

B. Irreparable injury will result if the Union continues to act as Plaintiffs' exclusive representative.

Even without access to Plaintiffs' money, the Union would continue to impinge their First Amendment rights by acting as their exclusive representative. As the Supreme Court observed,

> [T]hat status gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. Designation as exclusive representative thus 'results in a tremendous increase in the power' of the union.

Janus, 138 S. Ct. at 2467 (quoting *American Communications Ass'n. v. Douds*, 339 U.S. 382, 401 (1950)) (internal citations omitted). Continuing to force Plaintiffs to associate with the Union in this way irreparably denies them the independent voice guaranteed them by the First Amendment.

California law expressly grants unions the right to speak on Plaintiffs' behalf on matters of serious public concern, including the wages, hours, and other conditions of employment of full public employees like Plaintiffs. Cal. Gov't Code § 3562(q)(1). This speech that Plaintiffs are forced to associate with is not only personal, it is political: "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues." *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014). Forcing Plaintiffs to associate with political speech with which they disagree is a violation of their First Amendment

freedoms.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The only solution which gives proper weight to Plaintiffs' rights under the Constitution is to enjoin the Attorney General from enforcing Cal. Gov't Code §§ 3570, 3571.1(e), 3574, and 3578 because they compel Plaintiffs to associate with the Union as their exclusive representative. Such representation should be stopped immediately and for the duration of the case.

III. The balance of equities in this case favors granting Plaintiffs an injunction.

A. Enjoining the collections of Plaintiffs' dues will not harm Defendants.

"[U]nions have no constitutional entitlement to the fees of nonmember-employees." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007). Nor do they have the right to claim membership of employees who have not provided affirmative consent to membership. *Janus,* 138 S. Ct. at 2486. Given that the entire risk of constitutional deprivation falls on employees rather than the union, courts must ask "[w]hich side should bear this risk? The answer is obvious: the side whose constitutional rights are not at stake." *Knox*, 567 U.S. at 321.

As the Supreme Court recognized when considering the pre-*Janus* agency fee regime, "if unconsenting nonmembers pay less than their proportionate share, no constitutional right of the union is violated because the union has no constitutional right to receive any payment from these employees . . . The union has simply lost for a few months the 'extraordinary' benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund." *Knox,* 567 U.S. at 321 (internal citations omitted). The same logic applies here: at most, the Union can try to claim a contractual right to some dues from Plaintiffs. Weighed against Plaintiffs'

interest in the vindication of their First Amendment rights, the Union desire for their dues is insubstantial.

The balance of equities, therefore, favors Plaintiffs. Given their significant likelihood of success on the merits, the Court should, therefore, issue a preliminary injunction. And in this case the balance of equities so strongly favors Plaintiffs that, under this Circuit's alternative test, the Court should enjoin dues collection even if it believes Plaintiffs have only raised a substantial question going to the merits of their claim. *Alliance for the Wild Rockies*, 865 F.3d at 1217.

B. Enjoining the Union' status as Plaintiffs' exclusive representative will not harm Defendants.

Enjoining the Union from acting as Plaintiffs' exclusive representative will impose no substantial harm on Defendants. The Union will still collect dues from thousands of other government workers and will maintain thousands of members. The Union will still be allowed to represent those other workers in their negotiations with the Regents. Thus, the balance of equities favors preventing harm to Plaintiffs instead of to the Union.

Given that the balance of equities here so strongly favors Plaintiffs, the Court should issue the injunction under the 9th Circuit's alternative test, even if it feels Plaintiffs have raised only a substantial question as to the merits. *Alliance for the Wild Rockies*, 865 F.3d at 1217.

IV. Sustaining Plaintiffs' constitutional rights is in the public interest.

The enforcement of constitutional rights is, by definition, in the public interest. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)). Moreover, there is no countervailing private interest in having the Union continue to collect Plaintiffs' dues or to act as their exclusive representative. The Union rightfully enjoys substantial rights

under the First Amendment to advocate for the issues it cares about. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 364 (2010) (striking down spending limits on union issue advocacy).

CONCLUSION

For the above stated reasons, the motion for preliminary injunction should be granted.

Dated: April 22, 2019

Respectfully submitted,

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