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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Cara O'Callaghan and Jenée Misraje,

Plaintiffs,

v.

Janet Napolitano, in her official capacity as President of the University of California; Teamsters Local 2010; and Xavier Becerra, in his official capacity as Attorney General of California,

Defendants.

Case No. 2-19-CV-02289 JVS (DFM)

PLAINTIFF'S OPPOSITION TO DEFENDANT BECERRA'S MOTION TO DISMISS

Hearing Date: September 9, 2019
Time: 1:30 P.M.
Judge: Hon. James V. Selna

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INTRODUCTION

Plaintiffs, Cara O'Callaghan and Jenée Misraje ("Plaintiffs"), submit this Opposition to Defendant Attorney General Xavier Becerra's Motion to Dismiss (Dkt. 54) ("AG MTD"). Plaintiffs' First Amended Complaint ("FAC") (Dkt. 52) asserts seven causes of action, covering prior and ongoing deduction of union dues and fees and the status of Teamsters Local 2010 ("Teamsters") as Plaintiffs' exclusive representative. The Attorney General argues that the FAC should be dismissed because Plaintiffs have failed to plead state action and because exclusive representation is constitutional. The Court did not address either of these issues in its Order Regarding Motion for Preliminary Injunction (Dkt. 51 at 8). For the reasons stated below, Plaintiffs have stated a claim on which relief may be granted for both state action and the forced association foisted on Plaintiffs by the Teamsters' status as their exclusive representative.

ARGUMENT

To survive this Motion to Dismiss, Plaintiffs need only state in their First Amended Complaint "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). They should prevail provided their First Amended Complaint demonstrates something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

I. The State Taking Money from State Employees Constitutes State Action.

The Attorney General asserts that actions taken by state officers pursuant to a state statute do not constitute state action. AG MTD at 7-13. When state universities use the state payroll system to deduct dues from state-issued paychecks of state employees, that is the very definition of state action required for a suit brought under 42 U.S.C. § 1983. Moreover, the time window limitations that the Teamsters are enforcing are asserted pursuant to state statutes that expressly grant the Teamsters this special privilege. *See* Cal.

Gov't Code §§ 3513(i) and 3583.

In fact, the Supreme Court has gone much further to impart state action to unions in cases of unconstitutional dues deductions. This Court need look no further than the *Janus* decision itself, in which the union's deduction of agency fees constituted state action. An even more extreme example is the case of *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982), which held that a private debt collector's actions constituted state action under § 1983. In that case, the Court also struck down an unconstitutional state statute because the private parties "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 934. In the present case, the Teamsters also have invoked the aid of state officials to take advantage of a state labor statutory scheme to withdraw these dues. State actors carrying out these state statutes constitutes state action under § 1983, and the question of whether such action is constitutional is properly before this Court.

The Attorney General defends this assertion by arguing that "Plaintiffs' ability to revoke their dues authorizations is determined exclusively by the terms of their membership agreements." AG MTD at 9. That is not the relevant question. The relevant question is whether the state required Plaintiffs to *remain* a member of the union after *Janus*, and the answer is that the University of California did. State officials followed and continue to enforce Cal. Gov't Code §§ 3513(i) and 3583, which permit the Teamsters to keep Plaintiff O'Callaghan stuck as a member of the union for nearly four years.

Among the tests for state action, "'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013). In this case, the government has affirmed, authorized, and facilitated the deduction of dues from Plaintiffs' paychecks. The state university and the union sat down together and negotiated the contractual terms by which they would take members' dues, and the state university carried out the union's instructions, just as it had regarding agency fee payers in *Janus*, where the Supreme Court never questioned the matter of state action.

Adopting the Attorney General's position on state action would require this Court to overturn a host of Supreme Court decisions on the subject. In *Knox v. SEIU,* union exactions were held to be a First Amendment violation with requisite state action. 567 U.S. 298, 315 (2012). Likewise, union accounting of chargeable and non-chargeable expenses from state employees amounts to state action. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). The Attorney General's argument would even mean that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977), which *Janus* overturned, was likewise a mistake, because there could be no First Amendment question presented to the Court if the union exaction had not constituted state action. Plaintiffs humbly submit that the Court should find that decades of Supreme Court cases applying First Amendment standards to public sector unions were not in error.

The Attorney General claims that "the actual constitutional injuries Plaintiffs allege arise exclusively from the union's decision to continue to deduct dues from their paychecks." AG MTD at 9. But this elides a crucial fact as to how that money is deducted: it is deducted by the state University of California. *Janus* holds that "*States* and public-sector unions may no longer extract agency fees from nonconsenting employees." 138 S. Ct. at 2486 (emphasis added).

The state University of California is subject to a constitutional duty not to take money from nonconsenting employees. It cannot claim to be an innocent middleman. That the University of California may enjoy sovereign immunity from damages claims for the money it takes does not absolve state official Napolitano from being a proper subject of injunctive relief to prevent further takings.

II. Recognizing the Union as Plaintiffs' exclusive representative for bargaining purposes violates their First Amendment rights of speech and association. Plaintiffs cannot be forced to associate with a group that they disagree with.

A. Forcing Plaintiffs to have the Union serve as their exclusive representative is unconstitutional.

Under Cal. Gov't Code §§ 3570, 3571.1(e), 3574, 3578, as a condition of their employment, Plaintiffs must allow the union to speak on their behalf on wages and hours, 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 not only wages but also "terms and conditions of employment." Cal. Gov't Code § 3562(q)(1). These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467. When the state certifies the Teamsters to represent the bargaining unit, it forces all employees in that unit to associate with the Union. This coerced association authorizes the Teamsters to speak on behalf of the employees even if the employees are not members, even if the employees do not contribute fees, and even if the employees disagree with the Teamsters' positions and speech.

This arrangement has two constitutional problems: it is both compelled speech because the Union speaks on behalf of the employees as though its speech is the employees' own speech and compelled association because the Union represents everyone in the bargaining unit without any choice or alternative for dissenting employees not to associate.

Legally compelling Plaintiffs to associate with the Teamsters demeans their First Amendment rights. Although the issue has not been raised directly before the Supreme Court, it has questioned whether exclusive representation in the public sector context imposes a "significant impingement" on public employees' First Amendment rights. *Janus*, 138 S. Ct. at 2483; *see Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014); *Knox v. Service Employees*, 567 U. S. 298, 310–11 (2012). 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)). Exclusive representation forces employees "to voice ideas with which they disagree, [which] undermines" First Amendment values. *Janus*, 138 S. Ct. at 2464. California laws command Plaintiffs' involuntary affirmation of objected-to beliefs. The fact that Plaintiffs retain the right to speak for themselves in certain circumstances does not resolve the problem that the Teamsters organizes and negotiates as their representative in their employment relations.

Exclusive representation is also forced association: the Plaintiffs are forced to associate with the Union as their exclusive representative simply by the fact of their employment in this particular bargaining unit. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Yet Plaintiffs have no such freedom, no choice about their association with the Union; it is imposed and coerced by state laws.

Exclusive representation is, therefore, subject to at least exacting scrutiny, if not strict scrutiny. It must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 597 U.S. at 310. This the Defendants cannot show. *Janus* has already dispatched "labor peace" and the so-called "free-rider problem" as sufficiently compelling interests to justify this sort of mandate. 138 S. Ct. at 2465-69. And Plaintiffs are not seeking the right to form a rival union or to force the government to listen to their individual speech. They only wish to disclaim the Union's speech on their behalf. They are guaranteed that right not to be forced to associate with the union and not to let the union speak on their behalfs by the First Amendment.

B. The Union's reliance on Knight and Mentele is misplaced.

In defending the California exclusive representation statutory scheme, Defendants rely heavily on *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). *Knight* held that employees do not have a right, as members of the public, to a formal audience

with the government to air their views. *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." 465 U.S. at 273.

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

The Court explained the issue it was addressing well: "[A]ppellees' principal claim is 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. Confronted with this claim, the Court held that "[a]ppellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny the government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Plaintiffs here do not claim that their employer—or anyone else—should be compelled to listen to their views. Instead, they assert a right against the compelled association forced on them by exclusive representation.

The Attorney General's invocation of *Knight* makes two important missteps. First, *Knight* summarily affirmed a rejection of the argument that collective bargaining violates the non-delegation doctrine, not that it violates a right of association, as the relevant portion of the lower court opinion makes clear. *See Knight v. Minn. Cmty. Coll. Faculty Ass'n.*, 571 F. Supp. 1, 4 (D. Minn. 1982). That the non-delegation doctrine is at issue is demonstrated when the Supreme Court cites to *A.L.A. Schechter Poultry Corp. v. United*

States, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co*., 298 U.S. 238 (1936), neither of which address a right to freedom of association. *Knight*, 465 U.S. at 279. The plaintiffs in *Knight* viewed the granting of negotiating rights to the union as a delegation of legislative power to a private organization, and the district court rejected the claim, explaining simply that the claim "is clearly foreclosed by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 (1977)." *Knight,* 571 F. Supp. at 4. The statutory arrangement did not violate the non-delegation doctrine "merely because the employee association is a private organization." *Id.* at 5. In its own *Knight* decision, the Supreme Court was not affirming a claim of exclusive representation equivalent to Counts V, VI, and VII.

The Attorney General's second misreading of *Knight* severely elevates and misinterprets dicta in the decision. The central issue of the *Knight* decision is whether plaintiffs could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Plaintiffs' claim that the government cannot compel them to associate with the Teamsters by making the Teamsters bargain on their behalf.

In arguing that these two distinct claims are the same, the Attorney General can point only to dicta towards the end of the *Knight* opinion that suggests the challenged policy "in no way restrained [plaintiffs'] freedom to speak on any education related issue or their freedom to associate or not associate with whom they please." *Knight*, 465 U.S. at 288. But in that portion of the opinion, the Court was still addressing the question of being heard. The Court explains that the government's right to "choose its advisers" is upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight,* 465 U.S. at 288. The Court raises the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id.* This, again, is another path to the

same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

Knight is, therefore, not responsive to the question Plaintiffs now raise: whether someone else can speak in their name, with their imprimatur granted to it by the government. Plaintiffs do not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify the Teamsters' voice. They do not demand that the government schedule meetings with them, engage in negotiation, or any of the other demands made in *Knight*. They demand only that the Union not do so in their name, and they respectfully request that this Court issue a declaration to that effect.

The Attorney General also relies on *Mentele v. Inslee,* 916 F.3d 783, 784 (9th Cir. 2019). *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 788 (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 on this point. The plaintiffs in *Mentele* are not government workers but private employees. Under the childcare system of the State of Washington, "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 785. Washington only considers the plaintiffs in *Mentele* to be "'public employees' for purposes of the State's collective bargaining legislation." *Id.* As such, the exclusive representation provided these employees by their union is limited: "[T]hey are considered 'partial' state employees, rather than full-fledged state employees, and Washington law limits the scope of their collective bargaining agent's representation." *Id.* The exclusive representative cannot organize a strike, negotiate over retirement benefits, or even govern the hiring or firing of employees because they are private employees hired by the families in need of their services. *Id.* The harm of being forced to associate with such an exclusive representative is, thus, minimal.

By contrast, Plaintiffs are public employees in every aspect of the phrase. They are public university employees, hired and fired by the government, and are forced to associate with a government union that has different views from their own on important policy issues.

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

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

CONCLUSION

For the above stated reasons, the Motion to Dismiss should be denied.

Dated: August 19, 2019

Respectfully submitted,

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