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

20 Isaac Wolf,  
21 Plaintiff,

22 v.

23 University Professional & Technical  
24 Employees, Communications Workers of  
25 America Local 9119 et al.,  
26 Defendants.

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

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT NAPOLITANO'S  
MOTION TO DISMISS**

Date: September 26, 2019

Time: 8:00 A.M.

Courtroom: 12

Judge: Hon. William Alsup

Action Filed: May 24, 2019

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1 **TABLE OF AUTHORITIES**

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1 **INTRODUCTION**

2 Plaintiff, Isaac Wolf, brings this action to vindicate his First Amendment right not to  
3 join or support a union. Defendant Janet Napolitano, sued in her official capacity as  
4 President of the University of California, filed a Motion to Dismiss (Dkt. 48) (“UC MTD”).  
5 Defendants University Professional & Technical Employees, Communications Workers of  
6 America Local 9119 (“UPTE” or the “Union”), and Defendants Joshua Golka, in his official  
7 capacity as Executive Director of the California Public Employee Relations Board  
8 (“PERB”), and Xavier Becerra, in his official capacity as Attorney General of California  
9 (collectively, the “Government Defendants”) have filed their own Motions to Dismiss.  
10 Their arguments are addressed in separate oppositions filed concurrently with this one.

11 Wolf’s First Amended Complaint (Dkt. 39) asserts three claims for relief. Count I  
12 requests a declaration that the deduction of union dues from Wolf’s paycheck was carried  
13 out without the affirmative consent required by *Janus v. AFSCME*, Council 31, 138 S. Ct.  
14 2448, 2486 (2018). Count II requests a declaration that the provisions of California law  
15 pursuant to which this money was taken violate Wolf’s First Amendment rights under  
16 *Janus*. Count III requests damages in the amount of union dues previously deducted from  
17 Wolf’s paycheck.

18  
19 **ARGUMENT**

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

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1 **I. This action for violations of First Amendment rights is properly brought before**  
2 **this Court rather than before a state labor regulator.**

3 Napolitano’s first contention is that Wolf’s claims “would form the basis for[] unfair  
4 practice allegations against the Union . . . within the exclusive jurisdiction of [PERB].”  
5 Napolitano MTD at 3. But PERB’s role is to interpret and apply California’s labor  
6 regulations. Wolf’s claim is not that UPTE or Napolitano are committing an unfair labor  
7 practice under California law—indeed, Wolf’s injury derives in significant part from the  
8 faithful application of California law. Wolf contends, instead, that the application of  
9 California’s labor regime to him abridges his First Amendment rights of speech and  
10 association. Such a suit is properly brought in this Court under 42 U.S.C. § 1983.

11 Napolitano argues that Wolf “alleges that the Union continues to charge him dues in  
12 an unfair or excessive manner, and he further alleges that the Union has caused the employer  
13 (the University) to deliver the payment of union dues for services that Plaintiff did not want  
14 performed –allegations that would sound in unfair practice charges against the Union under  
15 HEERA.” Napolitano MTD at 4. But Plaintiff’s claim is not that the Union has charged  
16 dues that would be excessive or unfair under HEERA; Plaintiff’s claim is that being charged  
17 dues at all violates the First Amendment. Whether or not the dues are appropriate under  
18 California law is of no moment when considering whether they are permissible at all under  
19 the U.S. Constitution.

20 Nor is Wolf’s First Amended Complaint about services he did not want performed.  
21 The representational services the Union provides are imposed on Wolf whether he is a dues  
22 paying member or not, as a function of UPTE’s status as his exclusive representative. Wolf  
23 has not challenged that status in this case. He desires only to assert his right not to fund  
24 these activities against his will. As the Supreme Court explained, “a significant  
25 impingement on First Amendment rights occurs when public employees are required to  
26 provide financial support for a union that takes many positions during collective bargaining  
27 that have powerful political and civic consequences.” *Janus*, 138 S. Ct. at 2464 (quoting  
28

1 *Knox v. SEIU*, 567 U.S. 298, 310-311 (2012)) (internal quotation marks omitted). Wolf  
2 expects that the Union will continue to take such positions leading to such consequences,  
3 but he prefers it not be done with his wages.

4 Napolitano quotes several cases where “the controversy presented to the court would  
5 require a decision as to whether the district had engaged in unfair labor practices.”  
6 Napolitano MTD at 5 (citing *El Rancho Unified School Dist. v. Nat’l Educ. Ass’n*, 33 Cal.  
7 3d 946, 952-960 (1983)). But Plaintiffs have not alleged anything that constitutes an unfair  
8 labor practice. Rather they allege that in following California labor law, Defendants are  
9 violating the U.S. Constitution.

10 The other cases cited are no less helpful. In *Stevenson v. L.A. Unified Sch. Dist.*, the  
11 union was alleged to have “breached their basic employment fiduciary duty of protecting  
12 Plaintiff’s tenure and contract rights to work, and responsibilities to Plaintiff.” No. CV 09-  
13 6497 ODW (PLAx), 2010 U.S. Dist. LEXIS 153333, at \*8 (C.D. Cal. June 28, 2010). It  
14 may well be that a union’s breach of its fiduciary duty to protect a member’s employment  
15 rights is a claim within the ambit of the PERB because that is ultimately a claim that rests  
16 on the duties owed by the union under California law. Wolf’s First Amended Complaint  
17 does not allege that UPTE or Napolitano violated a right granted to him under California  
18 law. His allegation is that they have violated rights granted to him under the First  
19 Amendment.

20 Similar distinctions apply to Napolitano’s other citations. In *Anderson v. Cal. Faculty*  
21 *Ass’n*, 25 Cal. App. 4th 207, 209, 31 Cal. Rptr. 2d 406, 407 (1994), the Court explained that  
22 “the basis for the lawsuit against the university defendants is that the layoffs allegedly  
23 violated their employment contract... The basis for the claim against the union defendants  
24 is that they failed or refused to file grievances in response to the layoff notices.” Failure to  
25 file grievances or adhere to an employment contract are not First Amendment violations.

26 It is instructive that most of Napolitano’s citations are to California state courts,  
27 where judges may well be under some procedural obligation to defer to the Board. That  
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1 PERB has “exclusive jurisdiction” in examining issues of California law is of no moment  
2 when questions of federal law are asserted in a federal court. “The Civil Rights Act of 1871  
3 . . . guarantees a federal forum for claims of unconstitutional treatment at the hands of state  
4 officials, and the settled rule is that exhaustion of state remedies is not a prerequisite to an  
5 action under [42 U. S. C.] § 1983.” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019)  
6 (quoting *Heck v. Humphrey*, 512 U. S. 477, 480 (1994) (internal quotation marks omitted)).  
7 In contradiction to settled federal law on the subject, Napolitano asserts that Wolf must  
8 exhaust his claims in a state administrative proceeding instead of invoking his right to a  
9 federal forum. This assertion, if accepted, would undermine the very purpose of § 1983 in  
10 enforcing constitutional rights against state officials.

11  
12 **II. *Janus* establishes a duty not to take money without affirmative consent.**

13 Finally, Napolitano next contends that *Janus* doesn’t apply to this case because it  
14 doesn’t prevent the deduction of dues from employees who have provided affirmative  
15 consent. Napolitano MTD at 6-7. Napolitano fails to recognize the claim brought by Wolf  
16 that he did not provide affirmative consent.

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

24 In Wolf’s case, he could not have waived his First Amendment right to not join or  
25 pay a union. First, Wolf could not have voluntarily, knowingly, and intelligently waived  
26 his rights not to join or pay a union because neither UPTE nor Napolitano informed him he  
27 had a right not to join the union. Second, at the time Wolf signed his union membership  
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1 application, he did not know about his right not to pay a union because the Supreme Court  
2 had not yet issued its decision in *Janus*. Therefore, Wolf had no choice but to pay the  
3 union, and he did not voluntarily waive his First Amendment rights.

4 Because the Court will “not presume acquiescence in the loss of fundamental  
5 rights,” *Ohio Bell Tel. Co.*, 301 U.S. at 307, the waiver of constitutional rights requires  
6 “clear and compelling evidence” that the employees wish to waive their First Amendment  
7 right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. In addition, “[c]ourts indulge  
8 every reasonable presumption against waiver of fundamental constitutional rights.”  
9 *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666  
10 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

11 The union application Wolf signed did not provide a clear and compelling waiver of  
12 his First Amendment right not to join or pay a union because it did not expressly state that  
13 Wolf had a constitutional right not to pay a union and because it did not expressly state that  
14 Wolf was waiving that right.

15 After the decision in *Janus*, Napolitano maintained that Wolf may only withdraw his  
16 dues deduction during an arbitrary time period of the Union’s choice, despite Wolf’s  
17 repeated requests to be removed from the union rolls and to stop the dues deduction from  
18 his paychecks.

19 The invalid union dues authorization applications signed by Wolf before the  
20 Supreme Court’s decision in *Janus* cannot meet the standards set forth for waiving a  
21 constitutional right, as required by the Supreme Court in *Janus*; therefore, Napolitano  
22 cannot hold Wolf to the time window to withdraw his union membership set forth in the  
23 union membership application.

24 In addition, Napolitano negotiated a collective bargaining agreement with the Union  
25 that explicitly protected Wolf’s right to end his dues deduction at any time of his own  
26 choosing:

27 An employee may at any time cancel her/his authorization for payroll dues  
28 deduction by presenting her or his written request for termination and



1 cancellation to the designated University office. The University will send a  
2 copy of the written request for cancellation of dues deduction to UPTE.

3 Collective Bargaining Agreement between University of California and UPTE, December  
4 20, 2013 – September 30, 2017, at 148.<sup>1</sup> Napolitano’s refusal to enforce the terms of her  
5 own collective bargaining agreement with UPTE is unexplainable—and unconstitutional.

6 Napolitano’s refusal to protect the affirmative consent required by both the collective  
7 bargaining agreement and *Janus* constitutes the unconstitutional state action against which  
8 § 1983 provides Wolf a remedy.

9  
10 **CONCLUSION**

11 For the reasons stated above, Wolf has stated claims upon which relief may be  
12 granted, and Napolitano’s Motion to Dismiss should be denied.

13  
14 Dated: September 6, 2019

Respectfully submitted,

15 /s/ Brian K. Kelsey

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27 <sup>1</sup> While the agreement ended prior to Wolf signing his Union membership application, it  
28 remained in effect until the subsequent agreement was ratified in August 2019.

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