Mark W. Bucher
mark@calpolicycenter.org
CA S.B.N. # 210474
Law Office of Mark W. Bucher
18002 Irvine Blvd., Suite 108
Tustin, CA 92780-3321
Phone: 714-313-3706
Fax: 714-573-2297

Brian Kelsey (*Admitted Pro Hac Vice)*
bkelsey@libertyjusticecenter.org
Jeffrey M. Schwab (*Admitted Pro Hac Vice)*
jschwab@libertyjusticecenter.org
Senior Attorneys
Liberty Justice Center
190 South LaSalle Street
Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Thomas Few,

Plaintiff

v.

United Teachers of Los Angeles; Austin Beutner, in his official capacity as Superintendent of Los Angeles Unified School District; Xavier Becerra, in his official capacity as Attorney General of California,

Defendants

Case No. 2:18-cv-09531-JLS-DFM

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT II OF THE FIRST AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT THEREOF

Hearing Date: March 29, 2019
Time: 10:30 am
Location: Courtroom 10A
Judge: Hon. Josephine L. Staton

TABLE OF CONTENTS

INTRODUCTION 5

FACTS 6

I. Standard of Review 7

II. *Knight* is a private-forum case and does not address Mr. Few's compelled association claim. 7

A. *Knight* does not control. 7

B. *Janus* presents a new opportunity to consider the question. 10

III. *Mentele v. Inslee* controls only "partial" state employees with limited representation by the union; in contrast, Mr. Few is a full-fledged public employee, and UTLA claims full representation of him. 12

A. *Mentele* does not control. 12

B. In the alternative, *Knight* and *Mentele* should be overruled to the extent they held that exclusive representation does not violate Mr. Few's right of association. 14

IV. Mr. Few states a cognizable claim of compelled association under the First Amendment that should be heard on the merits 14

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

B. Exclusive representation forces Mr. Few to associate with the views of the union. 16

C. UTLA's contention that exclusive representation does not compel association does not survive examination. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 8
Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 5, 9
Ashcroft v. Iqbal, 556 U.S. 662 (2009) 7
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 7
Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018) 10, 11
Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 19
Boy Scouts of America et al. v. Dale, 530 U.S. 640 (2000) 19
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 9
D'Agostino v. Baker, 812 F.3d 240 (1st Cir. 2016) 11
Harris v. Quinn, 573 U.S. 616 (2014) 13
Hill v. SEIU, 850 F.3d 861, 864 (7th Cir. 2017) 11
Janus v. AFSCME, 138 S. Ct. 2448 (2018) .... passim
Jarvis v. Cuomo, 660 F. App'x 72 (2d Cir. 2016) 11
Knight v. Minn. Cmty. Coll. Faculty Asso., 571 F. Supp. 1 (D. Minn. 1982) 8, 9
Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298 (2012) 14
Mentele v. Inslee, No. 16-35939, 2019 U.S. App. LEXIS 5613 (9th Cir. Feb. 26, 2019) 9, 12-14
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 19
Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) .... passim
Plyler v. Doe, 457 U.S. 202 (1982) 16
Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 15
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 14
Romer v. Evans, 517 U.S. 620 (1996) 16
Rumsfeld v. FAIR, 547 U.S. 47 (2006) 18
Stanley v. Illinois, 405 U.S. 645 (1972) 14
*Sweeney v. Madigan, No. 18-cv-1362, 2019 U.S. Dist. LEXIS 19389, at *6 (N.D. Ill. Feb. 6, 2019)* 17
Tashjian v. Republican Party, 479 U.S. 208 (1986) 15

West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624 (1943) 18

Wooley v. Maynard, 430 U.S. 705 (1977) 19

Statutes

Cal. Gov't Code § 3543 16

Cal. Gov't Code § 3543.2(3).....13, 17

Cal. Gov't Code § 3543.2(4)(c) 13, 17

Cal. Gov't Code § 3543.2(4)(d) 17

Cal. Gov't Code § 3543.2(4)(e) 17

Other Authorities

Daniel Golden, *New Battleground in Textbook Wars: Religion in History*, Wall St. J., Jan. 25, 2006.....17

Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, The New York Review of Books, June 21, 2012 17

INTRODUCTION

Thomas Few brings this action to vindicate his right under the First Amendment not to be compelled to join, support, or associate with a public sector labor union with whose political positions he disagrees. Defendant United Teachers of Los Angeles ("UTLA"), the union that serves as the exclusive representative of Mr. Few's bargaining unit, moved to dismiss Count II of the First Amended Complaint.[1] Count II challenges the union's status as Mr. Few's exclusive representative in negotiations with his employer, Los Angeles Unified School District. Mr. Few opposes the Motion and submits this Memorandum in opposition to the Motion.

In its Motion, UTLA relies primarily upon *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). *Knight* rejected a claim that individual public employees should be entitled to speak during negotiation sessions because of the state government's preference to negotiate with a union without dissenters present. *Knight* is a private forum case, not a freedom of association case. It does not stand for what UTLA would like it to—a blanket license to speak on behalf of employees irrespective of the wishes of the employees themselves.

Knight bases its reasoning upon the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which the Supreme Court recently overturned in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), explaining that "designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." 138 S. Ct. at 2460. UTLA would now deny the substantial restriction that *Janus* recognized, on the basis of a case answering an unrelated question using overruled precedent. Mr. Few's claim finds support not only in *Janus* but also in the long line of jurisprudence affirming a right under the First Amendment not to be compelled into associations against one's will. The court should, therefore, find that Mr. Few has met Fed.

[1] UTLA does not move to dismiss Count I, which challenges UTLA's deduction of union dues from Mr. Few's paycheck. Mr. Few receives this as an admission by UTLA that Count I states a viable claim for relief.

R. Civ. P. 12(b)(6)'s minimal requirement that he "state a claim on which relief can be granted."

FACTS

Mr. Few, has been a special education teacher in the Los Angeles Unified School District since August 2016. First Amended Complaint ¶ 14 (Doc. 38). Mr. Few joined the United Teachers of Los Angeles in August 2016 and was not informed by UTLA or LAUSD that he had a right not to join the union. *Id.* ¶ 16. On February 13, 2018, Mr. Few signed a union membership card that did not give him the option not to join the union and not to pay fees to the union. *Id.* ¶ 17.

On or about June 2, 2018, Mr. Few sent a letter to the union asking to resign his membership and to become an agency fee payer. *Id.* ¶ 18. On July 13, 2018, UTLA responded to Mr. Few's resignation letter by rejecting it. *Id.* ¶ 20. UTLA stated that Mr. Few could not resign from the union until his resignation window, which was "not less than thirty (30) days and not more than sixty (60) days before" the anniversary of his union membership on February 13. *Id.*

On August 3, 2018, Mr. Few submitted a letter to both UTLA and LAUSD again resigning from the union and, this time, declining to pay agency fees. *Id.* ¶ 21-22. On or about October 10, 2018, Mr. Few submitted a third letter to UTLA to resign from the union and stop having its dues deducted from his paycheck. *Id.* ¶ 23. On October 19, 2018, UTLA responded to Mr. Few's third resignation letter by rejecting it because he was only allowed to exercise his First Amendment rights within his resignation window.

On November 9, 2018, Mr. Few filed this case. On or about November 20, 2018, in an unsuccessful effort to moot this case and avoid the jurisdiction of this Court, UTLA agreed to stop taking dues from Mr. Few's paychecks and sent him a check that it represented was equal to the dues collected since his initial resignation letter of June 2,

2018.[2] In UTLA's Motion to Dismiss, UTLA misrepresents that Mr. Few was allowed to resign last June: "Until June 2018, plaintiff was a UTLA member… Plaintiff resigned from UTLA that month." Motion to Dismiss at 5 (Doc. 43-1). For the purposes of receiving a future Declaratory Judgment from this Court that union members cannot be forced to wait to exercise their First Amendment rights until a window of time specified by the union, Mr. Few appreciates that UTLA now concedes his resignation became effective upon receipt.

I. Standard of Review

To survive this Motion to Dismiss, Mr. Few need only state in his 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)). He should prevail provided his complaint demonstrates something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

II. *Knight* is a private-forum case and does not address Mr. Few's compelled association claim.

UTLA's primary submission is that *Knight* controls as to Count II of the First Amendment Complaint. MTD at 1. But *Knight* is addressed to a different question, and more recent cases more directly on point support Mr. Few's claim not to be compelled to associate with UTLA.

A. *Knight* does not control.

The *Knight* case holds 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

[2] Count I of Mr. Few's First Amendment Complaint seeks the return of all union dues paid by Mr. Few, and receipt of this partial payment does not resolve that claim.

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: "appellees' 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 "Appellees 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 government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Mr. Few does not claim that his employer—or anyone else—should be compelled to listen to his views. Instead, he asserts a right against the compelled association forced on him by exclusive representation.

UTLA's invocation of *Knight* makes two important missteps. First, it asserts that the "the Supreme Court summarily affirmed the lower court's rejection of the Knight plaintiffs' 'attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment.'" MTD at 7 (quoting *Knight*, 465 U.S. at 278-79). But UTLA does not clarify what was summarily affirmed. The relevant portion of the lower court opinion is addressed to an argument that the arrangement violates the non-delegation doctrine, not a right of association. *Knight v. Minn. Cmty. Coll. Faculty Asso.*, 571 F. Supp. 1, 4 (D. Minn. 1982). That the non-delegation doctrine is at issue is proven 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, then the Supreme Court was not affirming a claim of exclusive representation equivalent to Count II of Mr. Few's First Amended Complaint.

UTLA's second misreading of *Knight* overplays the importance of 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 Mr. Few's claim that the government cannot compel him to associate with the union by making the union bargain on his behalf. As the 9th Circuit Court of Appeals recently explained,

> We acknowledge that *Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct from [the] contention that employees' associational rights are implicated when a state recognizes an exclusive bargaining representative with which non-union employees disagree.

Mentele v. Inslee, No. 16-35939, 2019 U.S. App. LEXIS 5613, at *12 (9th Cir. Feb. 26, 2019).

In arguing that these two distinct claims are the same, UTLA points 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. Yet UTLA's own quotations from that portion of the opinion reinforce that the court is still addressing the question of being heard. *See* MTD at 8. The court explains that the government's right to "choose its advisors" 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 Mr. Few now raises: whether someone else can speak in his name, with his imprimatur granted to them by the government. Mr. Few does not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify UTLA's voice. He does not demand that the government schedule meetings with him, engage in negotiation, or any of the other demands made in *Knight*. He demands only that UTLA not do so in his name.

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

As the Supreme Court has recently recognized, "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. This understanding of the "substantial restriction" that exclusive representation places on Mr. Few's rights cannot be squared with UTLA's interpretation of the dicta in *Knight*.

Of the seven citations UTLA puts forward for its interpretation of the *Knight* case, only one involves a Court of Appeals opinion written after *Janus*. MTD at 9; *see Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018). The remaining cases either predate *Janus* or are district court decisions, and few provide more than a cursory analysis of the question at issue.

The reasoning in *Bierman* is not persuasive because the 8th Circuit Court of Appeals was addressing the same Minnesota statute that had been upheld in *Knight*. Understandably, the court felt bound by the *Knight* holding, despite differences in the claims being made by

plaintiffs in the two cases. *Bierman*, 900 F. 3d. at 574. Had it considered the different reasoning in the two cases, as this Court is doing, it should have reached a different result. Instead, the court in *Bierman* repeated the holding of *Knight* in a few perfunctory paragraphs and did not consider or make mention of any potential reasons why *Knight* should be distinguished. *Id.*

The remaining circuit decisions cited by UTLA predate *Janus*, and their reasoning cannot survive it. The First Circuit upheld exclusive representation by explaining that "the starting point for purposes of this case is [*Abood*]" before going on to address *Abood*'s extension in *Knight*. *D'Agostino v. Baker*, 812 F.3d 240, 242 (1st Cir. 2016). The Second Circuit's approached was even more perfunctory than others, citing *Abood* and then *D'Agostino* in a brief unpublished opinion that considered none of the arguments Mr. Few presents here. *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016). The Seventh Circuit likewise followed *D'Agostino* in holding correctly at the time, but now incorrectly, that *Abood*, and therefore *Knight*, remained good law. *Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir. 2017). UTLA's remaining citations are district court opinions at various, often preliminary, stages of litigation and cannot control the outcome here.

UTLA makes much of the fact that *Janus* did not "hold" exclusive representation unconstitutional, quoting *Bierman* to the effect that "*Janus* 'never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue.'" MTD at 10 (quoting *Bierman*, 900 F. 3d. at 574). Therefore, in the view of UTLA, "both *Knight* and *Janus* require rejection of plaintiffs' claim." MTD at 10. To the contrary, if the *Janus* court had relied on *Knight* for its reasoning and had required rejection of the exclusive representation claim, it would have explicitly done so and would have mentioned *Knight*. The *Janus* court did not mention *Knight* only because the issue of exclusive representation had not been disputed by the plaintiff. 138 S. Ct. 2478.

Instead, the *Janus* court eroded the foundations of *Knight*, which was "relying chiefly on [*Abood*]." *Knight*, 465 U.S. at 278. In *Janus* the Supreme Court "cataloged *Abood*'s many weaknesses." *Janus*, 138 S. Ct. at 2484. The court rejected both the rationales that

Knight had borrowed from *Abood* to support its claim that unions may serve as the exclusive representative of a dissenting member: "labor peace" and "free riders." *Janus*, 138 S. Ct. at 2486. The court determined that both governmental interests were not compelling enough to override the First Amendment rights to free speech and freedom of association. *Id*. Its foundations now swept from underneath it, *Knight* should be regarded as the impotent decision that it is.

III. *Mentele v. Inslee* controls only "partial" state employees with limited representation by the union; in contrast, Mr. Few is a full-fledged public employee, and UTLA claims full representation of him.

A. *Mentele* does not control.

In its Reply to this Memorandum, UTLA doubtless will point to the recent decision of *Mentele v. Inslee*, No. 16-35939, 2019 U.S. App. LEXIS 5613 (9th Cir. Feb. 26, 2019). As stated above, *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 on this point. The plaintiffs in *Mentele* are not government workers but private employees contracted to perform government services. 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 *3. 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: "[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.* at *4. 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, Mr. Few is a public employee in every aspect of the meaning of the phrase. He is a public school teacher, hired and fired by the government and is being forced to associate with a government union that has different views from his own on such important policy issues as whether to strike. The harm to Mr. Few of being forced to associate with the government union is great because it involves policy differences on a host of issues from textbooks and curriculum to spending levels. Cal. Gov't Code § 3543.2(3) and § 3543.2(4)(c).

The *Janus* case clearly recognized the difference between government employees like Mr. Few 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 Mr. Few 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 Mr. Few.

B. In the alternative, *Knight* and *Mentele* should be overruled to the extent they hold that exclusive representation does not violate Mr. Few's right of association.

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

IV. Mr. Few states a cognizable claim of compelled association under the First Amendment that should be heard on the merits.

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 v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) (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, Mr. Few has stated a claim on which relief could be granted, and should be allowed to proceed to the merits.

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

Unions and state governments have proffered various claimed interests for compelling the association of employees. One interest often proffered 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).

This justification does not apply to Mr. Few because he does not seek to introduce a competing union into the bargaining mix but only to speak for himself. Furthermore, 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 individual bargaining is claimed to raise the same concerns of pandemonium, this 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 was 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 Mr. Few "shanghaied for an unwanted voyage." *Janus*, 138 S. Ct. at 2466.

B. Exclusive representation forces Mr. Few to associate with the views of the union.

Under California law, as a condition of his employment, Mr. Few is expressly barred by Cal. Gov't Code § 3543 from meeting or negotiating with his employer to express his own views on matters that *Janus* recognizes to be of inherently public concern, even if his employer wants to meet with him. 138 S. Ct. at 2473. *Knight* recognizes the right of the employer not to *listen*, see *supra*, Section II.A, and Mr. Few does not demand that they do so, but the statute is not a restriction on the employer but on Mr. Few, commanding that "an employee in that unit shall not meet and negotiate with the public school employer." §3543. This restraint on Mr. Few's own speech raises serious First Amendment concerns. *Janus*, 138 S. Ct. at 2464 (whenever "a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines" First Amendment values).

Even if such a speech restriction is permissible under *Knight*, California law goes further, granting UTLA prerogatives to speak on Mr. Few's behalf on all manner of contentious matters. For example, UTLA is entitled to speak on Mr. Few's behalf regarding the priorities LAUSD should consider when laying off teachers for lack of funds. Cal. Gov't Code § 3543.2(4)(c). It is entitled to speak in his voice as to whether LAUSD should provide merit-based incentive bonuses. Cal. Gov't Code § 3543.2(4)(d). It may even take a position directly contrary to Mr. Few's best interest in advocating against a salary schedule based on merit and in favor of one based on training and years of experience. Cal. Gov't Code § 3543.2(4)(e). These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467.

California gives UTLA a right, by statute, to commandeer Mr. Few's voice to push its own views regarding "the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks." Cal. Gov't Code § 3543.2(3). Political fights over the content of curricula and textbooks in public schools are such contentious matters of public policy that they've received national headlines and been dubbed the "Textbook Wars." *See* Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, The New York Review of Books, June 21, 2012; Daniel Golden, *New Battleground in Textbook Wars: Religion in History*, Wall St. J., Jan. 25, 2006, at A1. UTLA purports to speak for Mr. Few on this issue, too. Mr. Few submits that he speaks for himself on this and other issues of public policy. (Decl. of Pl. at ¶ 13.)

Unions in other states agree with Mr. Few 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).

Legally compelling Mr. Few to associate with UTLA demeans his 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 do command Mr. Few's involuntary affirmation of objected-to beliefs. The fact that he retains the right to speak for himself does not resolve the fact that UTLA organizes and negotiates as his representative in his employment relations.

C. UTLA's contention that exclusive representation does not compel association does not survive examination.

Finally, UTLA asserts that their representation does not abridge Mr. Few's rights because it says he is not required to "do or say anything" and because "reasonable people" would not attribute UTLA's actions to Mr. Few. MTD at 10.

In the first instance, UTLA is right that Mr. Few "does not allege that he is required to personally do or say anything to join or endorse the union." MTD at 10. This is in fact precisely his objection: he has no agency in the matter, his autonomy having been assigned to UTLA as agent despite his objections, and he cannot withdraw that endorsement due to California law.

UTLA asserts that in this case UTLA's speech is not "attributed to plaintiff" on the premise that "reasonable people would not believe that all bargaining unit workers necessarily agree with the exclusive representative or its positions." MTD at 10-11. For this proposition, UTLA relies on *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006), in which law schools could be pressured to "'associate' with military recruiters in the sense that they interact[ed] with them." Mr. Few does not claim a right to never interact with a representative of UTLA. Indeed, he expects he will cross paths with them in the hallway of the school from time to time and expects the interactions to be cordial. The problem is that

Mr. Few is legally bound by the contracts UTLA negotiates. No law student or faculty member was bound by the military's "Don't Ask, Don't Tell" policy, which was the basis of the law school's objection. UTLA also incorrectly cites *FAIR* by analogy, because even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *FAIR*, 547 U.S. at 65 (citing *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). But Mr. Few does not object to UTLA's existence at school; he objects to UTLA representing him in legally binding negotiations, so *FAIR* is inapposite.

The premise that Mr. Few is not burdened by compelled association because he can speak his own mind is not consistent with other Supreme Court rulings on the issue. An individual's ability to publicly speak 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 publicly speak 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. Mr. Few's ability to express a message different from that of UTLA does not make it constitutional for California to forcibly associate Mr. Few with UTLA and its views.

UTLA finally argues that the union is not Mr. Few's agent since any "democratic" system sometimes requires dissenters to be bound by the majority. MTD at 12. But UTLA does not administer a democratic system as regards to Mr. Few. He has no vote for the union's leadership, for whether to accept or reject a contract, or for whether or not to strike.

This "democratic" system is reserved for union members. *Janus* took the first step in rectifying the deficits in this "democracy," by eliminating the union's system of taxation without representation. Mr. Few now asks the Court to resolve the remaining deficiency: association without representation.

CONCLUSION

For the forgoing reasons, UTLA's Motion to Dismiss Count II of the First Amended Complaint should be denied.

Dated: March 8, 2019

Respectfully submitted,

/s/ Mark W. Bucher
Mark W. Bucher
mark@calpolicycenter.org
CA S.B.N. # 210474
Law Office of Mark W. Bucher
18002 Irvine Blvd., Suite 108
Tustin, CA 92780-3321
Phone: 714-313-3706
Fax: 714-573-2297

/s/ Brian Kelsey
Brian Kelsey (Admitted Pro Hac Vice)
bkelsey@libertyjusticecenter.org
Jeffrey M. Schwab (Admitted Pro Hac Vice)
jschwab@libertyjusticecenter.org
Senior Attorneys
Liberty Justice Center
190 South LaSalle Street
Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702
Attorneys for Plaintiff