19-56271

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARA O'CALLAGHAN and JENEE MISRAJE,

Plaintiffs and Appellants,

v.

JANET NAPOLITANO, in her official capacity as President of the University of California; TEAMSTERS LOCAL 2010; XAVIER BECERRA, in his official capacity as Attorney General of California,

Defendants and Appellees.

On Appeal from the United States District Court
for the Central District of California

No. 2:19-cv-02289-JLS-DFM
Hon. James V. Selna, Judge

ANSWERING BRIEF OF DEFENDANT AND APPELLEE XAVIER BECERRA

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANTHONY R. HAKL
Supervising Deputy Attorney General

MAUREEN C. ONYEAGBAKO
Deputy Attorney General
State Bar No. 238419
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7324
Fax: (916) 324-8835
Email: Maureen.Onyeagbako@doj.ca.gov
Attorneys for Xavier Becerra, in his official capacity as Attorney General of California

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INTRODUCTION

This case is one of many filed by public-sector employees in the wake of the Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees Council 31*, 138 S. Ct. 2488 (2018). Plaintiffs here raise three claims, two of which are constitutional challenges brought against the Attorney General.

First, Plaintiffs challenge California's laws that allow for a system of exclusive representation. *See* Cal. Gov't Code §§ 3570, 3571.1(e), 3574, 3578 (exclusive-representation statutes). These laws allow specified segments of California's workforce (here, employees of higher education institutes) to designate with a majority vote an exclusive representative to bargain over certain terms and conditions of their employment. *Id.* §§ 3570, 3573, 3574. Plaintiffs disagree with their exclusive representative's positions on various issues, and claim that the representative's ability to negotiate over the terms and conditions of their employment violate their First Amendment rights to free speech and free association. That claim, however, is foreclosed by binding Supreme Court and Ninth Circuit precedent. *See Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984); *Mentele v. Inslee*, 916 F.3d 783 (9th 2019). And even if those cases did not control this case, California's exclusive representation laws are

constitutional because they serve a compelling state interest. Exclusive representation arrangements promote efficiency and managerial logistics, and do not restrain employees' rights to speak on issues, nor restrain their rights to associate or not associate with whomever they please, including the exclusive representative. Moreover, Plaintiffs have not identified means for serving the state interests that are significantly less restrictive of associational freedoms.

Second, Plaintiffs challenge the continued deduction of union membership dues from their paychecks to the union that represents them in collective bargaining. Those dues, however, are being deducted pursuant to a private agreement that Plaintiffs voluntarily signed with the union. Plaintiffs now claim that these continued deductions violate their First Amendment rights; but they do not identify any statute that required them to agree to union dues deductions. Nor could they. California law does not require any employee to join a union or pay dues to a union as a condition of employment. Indeed, California law guarantees Plaintiffs the right to decline to join the union. And *Janus* does not support a contrary result. That case made it unlawful for public employers to require *non-union* members to pay "agency fees" as a condition of employment. It has no

application to the claim here, where the dues deductions stem from their private agreements with the union.

For these reasons, and for the reasons discussed further below, Attorney General Becerra respectfully requests that this Court affirm the District Court's decision granting his motion to dismiss and denying Plaintiffs' motion for preliminary injunction.[1]

STATEMENT OF JURISDICTION

The district court properly exercised jurisdiction over the claims at issue in this appeal. 28 U.S.C. § 1331, 1343. This Court has appellate jurisdiction over the subsequent appeal under 28 U.S.C. § 1291.

Plaintiffs timely filed their notice of appeal on November 1, 2019, Appellants' Excerpts of Record (ER) 1–5, within thirty days of the October 4, 2019 entry of judgment, *id.* 6–7. *See* Federal Rule of Appellate Procedure 4(a)(1)(A).

[1] Because it does not involve a challenge to a California statute, the Attorney General does not address Plaintiffs' argument that they are entitled to retrospective relief for agency fees they paid before *Janus*. *See* AOB 19–40. The Attorney General notes, however, that a panel of this Court recently rejected a similar claim. *See Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019); *see also Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368, 369–70 (7th Cir. 2019) (rejecting similar claim).

ISSUE STATEMENT

1. Did the district court correctly conclude that California Government Code sections 3570, 3571.1(e), 3574, 3578, which provide for a system of exclusive representation during collective bargaining, are constitutionally permissible?

2. Did the district court correctly conclude that Plaintiffs' First Amendment rights are not violated by the continued deduction of dues from their paychecks, when those dues are being deducted pursuant to a private agreement Plaintiffs voluntarily signed?

STATEMENT OF THE CASE

I. EXCLUSIVE REPRESENTATION IN CALIFORNIA

There are more than two million state and local public employees in California.[2] The many different agencies and entities of the State of California employ over 200,000 people.[3] Over 80 percent of those employees, comprising twenty-one different bargaining units, are

[2] *See* United States Census—Number of Employees at the State and Local Level by State: 2012, https://www2.census.gov/govs/apes/2012_summary_report.pdf (as of February 29, 2020).

[3] *See* California Legislative Analyst's Office—Bargaining Unit Profiles, https://lao.ca.gov/stateworkforce/BargainingUnits?unit=0 (as of February 29, 2020).

represented by labor unions.[4] The state's collective bargaining system provides a regulated mechanism by which unions representing rank-and-file employees and public employers can negotiate terms and conditions of employment—including wages, hours, and benefits—that can be applied uniformly across a broad and diverse workforce.[5] *See also* Cal. Gov't Code § 3562(q)(1) ("scope of representation" under the Higher Education Employer-Employee Relations Act (HEERA) encompasses wages, hours of employment, and other terms and conditions of employment).

To facilitate administration of these extensive collective bargaining systems, California has enacted numerous laws. Public employers must meet and confer with a bargaining unit's chosen exclusive representative on all matters within the scope of representation. Cal. Gov't Code § 3570. The exclusive representative is chosen by a majority of the employees in the appropriate bargaining unit who wish to be represented by that union and recognition from the state that the union will serve as the exclusive representative. *Id.* §§ 3573, 3574. Exclusive representatives are required to

[4] *See id.*

[5] *See* California Department of Human Resources, Bargaining/ Contracts, http://www.calhr.ca.gov/state-hr-professionals/Pages/bargaining-contracts.aspx (as of February 29, 2020).

represent all employees in the representative bargaining unit fairly and impartially. *Id.* §§ 3571.1(e), § 3578. State employees are free to refuse to join or participate in union activities. *Id.* § 3515.

II. PROCEDURAL HISTORY

On March 27, 2019, Plaintiffs filed their complaint for declaratory relief, injunctive relief, and damages based on alleged First Amendment violations against Teamsters Local 2010, the Regents of the University of California, and Attorney General Becerra. Dkt 1. In addition to the immediate cessation of payroll deductions for union dues and refund of past dues paid, Plaintiffs sought an order enjoining Attorney General Becerra from enforcing statutes related to the administration of payroll deductions for union dues and exclusive-representation. Appellees' Supplemental Excerpts of Record (SER) 13.[6]

Plaintiffs moved for preliminary injunction on April 23, 2019, and Defendants opposed the motion. Dkt 26, 34, 38, 41. The district court denied Plaintiffs' motion for preliminary injunction on June 10, 2019. Dkt 51; ER 35–43. The court concluded that Plaintiffs had not shown a likelihood of success on the merits with respect to the dues deductions or

[6] The page numbers referenced herein are to Amended Supplemental Excerpts of Record that the Attorney General understands will be filed.

exclusive representation. ER 42. Driving that decision was the court's determination that "*Janus* limits its holding to situations in which employees have *not* consented to deductions," *id.* at 38 (emphasis in original), and that "Plaintiffs affirmatively agreed to the terms of union membership, including the terms regarding dues deductions," *id.* at 39. On the issue of exclusive representation, the court determined that "both Supreme Court and Ninth Circuit precedent have 'specifically acknowledged that exclusive representation is constitutionally permissible.'" *Id.* at 41. Thus, the court held that Plaintiffs are unlikely to succeed on a claim for relief under the First Amendment. *Id.*

The Regents of the University of California and Attorney General Becerra also moved to dismiss the original complaint, Dkt 44, 45, and Teamsters Local 2010 moved for partial dismissal, Dkt 43. Plaintiffs filed the First Amended Complaint on June 14, 2019, in lieu of opposing the motions. Dkt 52. The First Amended Complaint was substantively similar to the original complaint and substituted Janet Napolitano, in her official capacity as President of the University of California system, in place of the Regents. SER 3, ¶ 9, 7, ¶ 44.

Defendants each moved to dismiss the First Amended Complaint. Dkt 53, 54, 55. Plaintiffs opposed the motions but did not request leave to

amend. Dkt 57, 58, 59. On September 30, 2019, the district court granted Defendants' motions. ER 8–21. As in the order denying Plaintiffs' motion for preliminary injunction, the court concluded that *Janus*'s holding is limited to non-consenting union members and Plaintiffs "affirmatively agreed to the terms of union membership, including the terms regarding dues deductions." *Id.* at 13. The court also concluded that the union was entitled to a good-faith defense with respect to Plaintiffs' claim for retrospective relief. *Id.* at 18–21. Further, the court maintained that both Supreme Court and Ninth Circuit precedent settled the issue on the constitutionality of exclusive representation statutes. *Id.* at 17. Thus, Plaintiffs could not state a claim for relief under the First Amendment. *Id.*

The district court entered judgment against Plaintiffs on October 4, 2019. ER 6–7.

III. PLAINTIFFS AND THEIR PRIVATE AGREEMENTS WITH THE UNION

Plaintiff O'Callaghan works as a finance manager at the University of California, Santa Barbara (UCSB). SER 3, ¶ 7. She has continuously worked for UCSB since August 2009, and previously worked for UCSB from 2000 to 2004. *Id.* at 4, ¶ 14. "When O'Callaghan began her latest stint of employment at UCSB" in August 2009, she paid only fair-share fees until joining the Teamsters union in May 2018. *Id.* at 4, ¶¶ 14–16.

On July 25, 2018, after learning about the *Janus* decision, O'Callaghan sent the Teamsters a letter resigning from the union, as well as a written request to UCSB requesting that it stop deducting union dues from her paycheck. SER 4, ¶ 17. The union responded by letter, informing O'Callaghan that she was free to resign her membership at any time but that payroll deductions would continue unless and until she gave notice pursuant to the terms of the collective bargaining agreement between the Teamsters and UCSB. *Id.* at 4, ¶ 18. Those terms required that the resignation request be sent during the thirty days prior to expiration of the collective-bargaining agreement on March 31, 2022. *Id.* at 4 ¶ 19. UCSB directed O'Callaghan's request to the union, which confirmed that the dues deductions should continue. *Id.* at 4, ¶¶ 20–21. O'Callaghan estimates deductions of approximately $41 per month in union dues from her paycheck. *Id.* at 5, ¶ 24.

Plaintiff Misraje has been employed by the University of California, Los Angeles (UCLA) since May 2015. SER 5, ¶ 25. She joined the Teamsters and authorized membership dues deductions in July 2015. *Id.* at 5, ¶ 26. On August 8, 2018, Misraje requested to withdraw her union membership. *Id.* at 5, ¶ 27. The union advised her that she "would be dropped as a full member of the Union, but she could not end the deduction

of union dues from her paycheck" at that time. *Id.* at 5, ¶ 28. Misraje followed up with additional written requests to the union and to UCLA, requesting immediate termination of the dues deductions. *Id.* at 5–6, ¶¶ 29, 32, 34, 36, 37. Neither entity stopped the deductions. *Id.* at 6, ¶¶ 30, 31, 33, 35, 38, 39. Under the terms of Misraje's union application, she must send the notice to stop dues deductions "'at least sixty (60) days, but not more than seventy-five (75) days' before the anniversary date of the signed agreement." *Id.* at 6, ¶ 40. Misraje estimates deductions of approximately $53 per month from her paycheck for union dues. *Id.* at 6, ¶ 41.

STANDARD OF REVIEW

An order granting a motion to dismiss is reviewed de novo. *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013). A dismissal can be affirmed on any basis fairly supported by the record. *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

SUMMARY OF ARGUMENT

The district court properly granted Defendant Becerra's motion to dismiss and denied Plaintiffs' motion for preliminary injunction.

1. Plaintiffs' challenge to the exclusive-representation statutes fails as a matter of law. This claim is controlled by the Supreme Court's decision in *Knight*, 465 U.S. 271, and this Court's more recent decision in *Mentele*,

916 F.3d 783. Plaintiffs' attempt to distinguish those authorities is unavailing; and a three-judge panel of this Court is not empowered to overturn Supreme Court or prior circuit precedent.

In any event, California's exclusive representation system is constitutionally permissible. Even assuming that these exclusive representation arrangements interfere with Plaintiffs' First Amendment rights, the appropriate standard to apply is exacting scrutiny. *Mentele*, 916 F.3d at 790. That standard involves a balancing of the strength of the government's interest against the "seriousness of the actual burden on First Amendment rights," and asks whether the government action serves "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (citation omitted).

Here, that balance weighs heavily in favor of the state. Any burden that California's exclusive representation laws impose on Plaintiffs' First Amendment rights is far less than the kinds of impingements that the Supreme Court has held to be constitutionally problematic. Exclusive representation systems do not require Plaintiffs to be the public bearer of an unwanted message or modify the expressive message of any public conduct they may choose to engage in. And they do not restrain employees' rights to speak on issues, or to associate or not associate with whomever they please,

including the exclusive representative. On the other hand, exclusive representation serves a compelling state interest of promoting efficiency and managerial logistics, and is necessary to avoid the chaos, confusion, and dissension that might otherwise occur. And Plaintiffs have not identified means for serving the state interests that are significantly less restrictive of associational freedoms.

2. Plaintiffs' challenge to the payroll deductions for union dues fails as a matter of law. Plaintiffs voluntarily became members of Teamsters Local 2010 and agreed to pay union dues through their membership and dues authorization agreements, and so the First Amendment is not implicated. Further, the state did not take any actions to compel Plaintiffs to enter into their agreements with the union, nor did it draft the membership and dues authorization agreements. The dues deductions from Plaintiffs' paychecks arise from their private agreements with the union, and so are not traceable to any statute or other state action. And the Supreme Court's decision in *Janus*, which held that non-union members could not be *required* to pay agency fees, has no application in this case, because *Janus* involved a compulsory payment of fees from *non-union members* as a condition of employment.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO THE EXCLUSIVE REPRESENTATION STATUTES FAILS AS A MATTER OF LAW

More than thirty-five years ago, the Supreme Court upheld an exclusive representation system like the one at issue here against a First Amendment challenge. *See Knight*, 465 U.S. at 289–90. And just last year, this Court re-affirmed that exclusive representation arrangements are "constitutionally permissible" and do not violate the First Amendment. *Mentele*, 916 F.3d at 789–90. *Knight* and *Mentele* control here, and Plaintiffs' attempts to distinguish them are unavailing. And even if those cases could be distinguished, California's exclusive representation laws are constitutional, because any burden they impose on Plaintiffs' First Amendment rights are far outweighed by the state's compelling interest in promoting efficient and effective workplace management.

A. The Supreme Court and Ninth Circuit Have Upheld the Constitutionality of Exclusive Representation Laws

Plaintiffs' challenge to exclusive representation is not a novel one, and the district court correctly relied on binding precedent when rejecting the challenge. *See* ER 17 (holding that "Supreme Court and Ninth Circuit precedent have 'specifically acknowledged that exclusive representation is

constitutionally permissible'"); *see also* ER 40–41 (similar). Plaintiffs try to narrow the scope of the relevant rulings—*Knight* and *Mentele*—and, alternatively propose overruling the precedential authorities. *See* Appellants' Opening Brief (AOB) 43–49. The decisions directly apply here, however, and foreclose Plaintiffs' claims.

Knight involved a First Amendment challenge by non-union member college faculty to Minnesota's exclusive representation laws. 465 U.S. at 273. That State's labor relations act authorized public-sector employees to select an exclusive bargaining agent, and required public employers covered by the act to "meet and negotiate" with the exclusive representative over certain "mandatory" terms of employment, including the hours of employment, compensation, and the employer's "personnel policies affecting the working conditions of the employees." *Id.* at 273–74. Separately, the act authorized certain professional employees (including college faculty) to "meet and confer" with employers on "nonmandatory" matters—those related to employment but outside the scope of mandatory bargaining. *Id.* at 274. If, however, the employees had selected an exclusive representative, only the exclusive representative could "meet and confer" with the employer about non-mandatory subjects. *Id.* at 273–75, 279.

The Supreme Court summarily affirmed the "meet and negotiate" requirement in *Knight*. *See* 465 U.S. at 279 (citing *Knight v. Minn. Cmty. College Faculty Ass'n*, 460 U.S. 1048 (1983) (mem.)). It further held that the "meet and confer" process did not violate the First Amendment rights of non-union members. *Id.* at 280, 288. In reaching that conclusion, the Court reasoned that "[the plaintiffs] 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. Thus, the government was "free to consult or not to consult whomever it pleases." *Id.* at 285.

Knight also rejected the claim that these provisions violated the plaintiffs' First Amendment rights to freedom of speech and association. 465 U.S. at 288. With respect to the alleged infringement on the plaintiffs' speech rights, the Court reasoned that the state had not restrained the plaintiffs' right to speak on education-related issues, nor suppressed any of the plaintiffs' ideas. *Id.* at 289. And while the "meet and confer" process "amplifies" the exclusive representative's voice in the policy making process, that amplification did not impair individual instructors' constitutional freedom to speak. *Id.* at 288. As the Court concluded, "[a]

person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.*

The Court rejected the plaintiffs' claim that the exclusive representation arrangements violated their associational rights for similar reasons. *Knight*, 465 U.S. at 289–90. It held that the challenged laws did not "impair[]" the plaintiffs' associational freedoms because they remained "free to form whatever advocacy groups they like" and were "not required to become members" of the exclusive representative. *Id.* at 289. And while the plaintiffs may have "fe[lt] some pressure" to join the exclusive representative to "give them a voice in the representative's adoption of positions on particular issues," the Court reasoned that pressure is "no different from the pressure to join a majority party that persons in the minority always feel," a pressure that is "inherent in our system of government." *Id.* at 289–90.

In *Mentele*, this Court reaffirmed that exclusive representation laws do not violate the First Amendment. 916 F.3d at 789–90. The plaintiffs in that case were childcare providers who were partially paid by the State of Washington. *Id.* at 784–85. Washington law categorized them as "'public employees' for purposes of the State's collective bargaining legislation," and authorized childcare providers to elect an exclusive representative to

negotiate with the state on their behalf. *Id.* at 785. Pursuant to that law, childcare providers in Washington elected SEIU as their exclusive bargaining representative to negotiate over certain terms and conditions. *Id.* The plaintiffs filed suit challenging that arrangement, arguing principally that the Supreme Court's decision in *Janus* had *sub-silentio* overruled *Knight*. *Id.* at 789.

This Court rejected that argument. *Mentele*, 916 F.3d at 788. It concluded that it was bound by *Knight*'s holding that an employee's "speech and associational freedom" rights were "wholly unimpaired" by the exclusive representation agreement. *Id.* at 788 (emphasis omitted). *Knight* "addressed the First Amendment rights of non-union members who were excluded from union meetings with the State," and concluded that they did not have a viable claim, even though that meant the union would express the employee's "'official collective position' on behalf of even dissenting non-union members." *Id.* at 788, 789. *Knight* also "expressly concluded" that such a system "'in no way restrained [the plaintiffs'] freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 789 (emphasis and ellipses omitted).

Mentele also rejected the argument that *Janus* overruled *Knight*. *Mentele*, 916 F.3d at 789. *Janus* held that the First Amendment prohibited

states from "compelling full-fledged, non-union member state employees to pay agency fees" as a condition of employment. *Id.* at 787; *see also Janus*, 138 S. Ct. at 2486.[7] In analyzing a passage from *Janus*, the *Mentele* court noted that *Janus* "suggested that exclusive bargaining representation . . . significantly impinge[s] on associational freedoms." *Mentele*, 916 F.3d at 787 (analyzing and quoting *Janus*, 138 S. Ct. at 2478 ("It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts.")). But that passage from *Janus* did not "indicat[e] that the [Supreme] Court intended to revise the analytical underpinnings of *Knight* or otherwise reset the longstanding rules governing the permissibility of mandatory exclusive representation." *Mentele*, 916 F.3d at 789. On the contrary, *Janus* "expressly affirm[ed] the propriety" of such arrangements. *Id.*; *see also Janus*, 138 S. Ct. at 2478 (noting that it was "not disputed that the State may

[7] "Agency fees are reduced union dues paid by non-union member employees to support the union's collective bargaining efforts." *Mentele*, 916 F.3d at 785 n.1; *see also Janus*, 138 S. Ct. at 2460–61. In a case preceding *Janus*, the Supreme Court held that a state could not compel agency fees from non-union members "who are partial state employees" like the ones at issue in *Mentele*. *Mentele*, 916 F.3d at 787 (citing *Harris v. Quinn*, 573 U.S. 616 (2014)).

require that a union serve as [an] exclusive bargaining agent for its employees").

Finally, *Mentele* concluded that it "would reach the same result" even assuming that *Knight* "no longer governs the question presented." *Mentele*, 916 F.3d at 790. Citing *Janus*, the Court concluded that "exacting scrutiny" was the appropriate constitutional test when considering an alleged impingement of First Amendment rights "in the context of organized labor." *Id.* Under that standard, a law must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (quoting *Janus*, 138 S. Ct. at 2465). Exacting scrutiny "encompasses a balancing test," under which the government action is constitutional if it is shown that "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights." *Id.* (quoting *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1037, 1312 (9th Cir. 2015)).

The Court held that the exclusive representation laws at issue in *Mentele* were constitutional under this standard. *Mentele*, 916 F.3d at 790. It began by assessing the "seriousness of the burden" on the plaintiff's constitutional rights. *Id.* Because the union's "scope of representation [was] relatively circumscribed"—it could not negotiate the providers' retirement

providers, families retained the right to "choose and terminate any provider," and the legislature retained the "unilateral right to adopt personnel requirements and to make programmatic modifications"— *Mentele* concluded that any burden on the providers' speech and associational rights was "correspondingly reduced." *Id.* The state, on the other hand, had a "compelling" and "enduring" interest in "labor peace." *Id.* at 790; *see also id.* (noting that *Janus* "did not revisit the longstanding conclusion that labor peace is 'a compelling state interest'"). Exclusive representation agreements serve that goal; without them, "employers might face 'inter-union rivalries' fostering 'dissension within the work force,' 'conflicting demands from different unions,' and confusion from multiple agreements or employment conditions." *Id.* (quoting *Janus*, 138 S. Ct. at 2465).

In light of these competing interests, *Mentele* concluded that the state's "continued compelling interest in labor peace" justified the "minimal infringement" imposed on the plaintiffs' speech and associational rights for three reasons. *Mentele*, 916 F.3d at 790. First, Washington had an "interest in negotiating with only one entity," which was necessary to "avoid[] the competing demands of rival representatives, the potential confusion that would result from multiple agreements, and possible dissension among the providers." *Id.* at 791. Second, the Court noted that *Janus* "specifically

acknowledged that exclusive representation is constitutionally permissible." *Id.* (citing *Janus*, 138 S. Ct. at 2478). And third, the Court knew of "no alternative that is 'significantly less restrictive of associational freedoms.'" *Id.* (quoting *Janus*, 138 S. Ct. at 2465). The plaintiffs had not "suggested an alternative way for the State to solicit meaningful input from childcare providers while simultaneously avoiding the chaos and inefficiency of having multiple bargaining representatives or negotiating with individual providers." *Id.* While the plaintiffs "want[ed] to be left alone," it was unclear "what sort of system Washington would or could implement to satisfy this demand, apart from unilaterally deciding the terms of employment." *Id.*

B. *Mentele* and *Knight* Foreclose Plaintiffs' Claims That California's Exclusive-Representation Statutes Violate the First Amendment

Knight and *Mentele* are directly applicable to the claims at issue here. In those cases, as here, the plaintiffs argued that exclusive representation arrangements violated the First Amendment's guarantees of the "right to both speak and to associate." *Knight*, 465 U.S. at 288; *see also Mentele*, 916 F.3d at 788; AOB 41 (arguing that California's system of exclusive representation has "two constitutional problems": it "compel[s] speech" and it "compel[s] association"). As *Knight* held, however, exclusive

representation systems do not "restrain [an employee's] freedom to speak" on any issue or their "freedom to associate or not to associate with whom they please," and leaves employees "free to form whatever advocacy groups they like." *Knight*, 465 U.S. at 288, 289. And *Mentele* confirms that *Knight* continues to apply to claims like the one raised here. *Mentele*, 916 F.3d at 788–89.

Plaintiffs here attempt to distinguish *Knight* and *Mentele*, but their arguments are unavailing. AOB 43–48. They argue that *Knight* addressed only the question of whether employees had a First Amendment right to "compel the government to negotiate with them," not whether an employee's First Amendment associational rights are implicated when a union "bargain[s] on their behalf." *Id.* at 45; *see also id.* at 46 (question presented in this case is "whether someone can speak in" Plaintiffs' name during collective bargaining). *Mentele*, however, rejected the same attempt to distinguish *Knight*. *Mentele*, 916 F.3d. at 788–89. The Court recognized that *Knight*'s conclusion that a "state cannot be forced to negotiate or meet with individual employees" is "arguably distinct" from the assertion that "employees' associational rights are implicated when a state recognizes an exclusive bargaining representative with which non-union employees disagree." *Id.* at 788. But the Court held that *Knight* applied to the latter

claim as well as the former. *Id.* *Knight* "expressly concluded" that exclusive bargaining systems do not restrain an employee's "freedom to associate or not associate with whom they please" even though "not every instructor agrees" with the exclusive representative's positions. *Id.* at 789 (quoting *Knight*, 465 U.S. at 288). In other words, *Knight* forecloses a claim that an employee's "First Amendment rights are infringed when [an exclusive representative] purports to speak on her behalf," even if the employee "abhors" what the representative has to say. *Id.* at 788.

Plaintiffs' attempt to distinguish *Mentele* is also unpersuasive. That *Mentele* involved only "partial state employees" who were only employees for purposes of the "States' collective bargaining legislation," AOB 46–47, does not make it inapposite. As the district court reasoned, *Mentele*'s "primary reasoning is based on *Knight*'s analysis of full public employees." ER 17. And while there are differences between Plaintiffs in this case and the employees in *Mentele* (most notably, the employees here can be "hired and fired by the government," AOB 47), plaintiffs do not explain why those distinctions make a constitutional difference. In both instances, the employees are "not required to become members of the" exclusive representative, and retain the right to "speak on any" issue they choose, "associate or not associate with whom they please," and "form whatever

advocacy groups they like." *Mentele*, 916 F.3d at 788 (quoting *Knight*, 465 U.S. at 288–89); *see also* Cal. Gov't Code § 3515 (guaranteeing state employees the "the right to refuse to join or participate in the activities of" unions).[8]

Moreover, since *Janus* was decided, other courts have similarly held that *Knight* forecloses a claim like the one at issue here.[9] The Eighth Circuit "ruled that the exclusive representation did not impinge on the right of association" and expressly acknowledged "that the State treated the position of the exclusive representative as the official position of the faculty, even though not every instructor agreed." *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) *cert. denied* 139 S. Ct. 2043 (May 13, 2019). The Supreme Judicial Court of Massachusetts also engaged in extensive analysis of *Knight* and exclusive representation after *Janus* was decided, and concluded that exclusive representation "is necessary to effectively and efficiently negotiate

[8] The Supreme Court's decision in *Harris*, 573 U.S. 616, does not suggest a different result. *See* AOB 47–48. That decision held that agency fees could not be collected from partial state employees, and did not decide whether such fees could also be collected from "full-fledged public employees." *Harris*, 573 U.S. at 646–47. The Court then extended its conclusion in *Harris* to these "full" public employees in *Janus*. *See Mentele*, 916 F.3d at 787.

[9] Other decisions issued before *Janus* similarly held that *Knight* remains good law. *See Mentele*, 916 F.3d at 787 (collecting cases).

collective bargaining agreements and thus promote peaceful and productive labor-management relations." *Branch v. Commonwealth Emp't Relations Bd.*, 481 Mass 810, 820 (2019).

Plaintiffs also ask this Court to overrule *Knight* and *Mentele*. AOB 48–49. But this Court is "bound to follow a controlling Supreme Court precedent" unless it is overruled by that Court. *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011) (citation, internal quotation marks, and brackets omitted). And a three-judge panel of this Court is not "free to overrule prior circuit precedent" unless it is "'clearly irreconcilable'" with an intervening Supreme Court or en banc decision. *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1199 (9th Cir. 2017). To the extent that Plaintiffs suggest, AOB 48–49, that *Janus* overruled *Knight sub-silentio*, *Mentele* forecloses that claim. *See Mentele*, 916 F.3d at 789.

In sum, Plaintiffs' challenge to the exclusive-representation statutes fails under *Knight* and *Mentele*. This Court should, therefore, affirm the district court order granting Attorney General Becerra's motion to dismiss and denying Plaintiffs' motion for preliminary injunction on that ground alone.

C. The Exclusive Representation Statutes Are Constitutional

Even if *Knight* and *Mentele* do not control the outcome of this case, California's exclusive-representation statutes are constitutional. Even assuming that exclusive representation systems burden Plaintiffs' First Amendment rights, the standard this Court applied in *Mentele*—that a law will be upheld if it serves "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms," *Mentele*, 916 F.3d at 790 & n.3 (quoting *Janus*, 138 S. Ct. at 2465) (internal quotation marks omitted)—is easily satisfied here.[10] This analysis requires a "balancing test" that weighs the "strength of the governmental interest" against the "seriousness of the actual burden on First Amendment rights." *Id.* at 790 (quoting *Ctr. for Competitive Politics*, 784 F.3d at 1312). Here, the strength of the government's interests far outweighs any burden on Plaintiffs' associational or speech interests.

Exclusive representation laws are not like other kinds of laws that the Supreme Court has concluded were constitutionally problematic. They do

[10] Before *Janus*, the First and Seventh Circuit held that heightened scrutiny did not apply to challenges to exclusive representation claims because they do not "create a mandatory association." *Hill v. SEIU*, 850 F.3d 861, 865 (7th Cir. 2017); *see also D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (Souter, J., by designation).

not force employees to "act as public bearers of an ideological message they disagree with." *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (Souter, J., by designation) (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)). Nor do they require employees to "accept an undesired member of any association they belong to." *Id.* (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 540 (2000)). And they do not compel employees to "modify the expressive message of any public conduct they may choose to engage in." *Id.* (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995)).

Further, public employees in California are statutorily guaranteed "the right to refuse to join or participate" in the exclusive representative's activities. Cal. Gov't Code § 3515. And they can "speak on any" issue they choose, "associate or not associate with whom they please," and "form whatever advocacy groups they like." *Mentele*, 916 F.3d at 788 (quoting *Knight*, 465 U.S. at 288–89).

The state's interest in an exclusive representation system, on the other hand, is "compelling—and enduring." *Mentele*, 916 F.3d at 790. These laws serve the state's vital interest in the efficient management of its public workplaces. *See id.* at 791. As *Mentele* explained, absent exclusive representation arrangements, state employers "might face 'inter-union

rivalries' fostering 'dissension within the work force,' 'conflicting demands from different unions,' and confusion from multiple agreements or employment conditions.'" *Id.* at 790. Avoiding the "competing demands of rival representatives," the "potential confusion that would result from multiple agreements," and the "possible dissension among" employees are compelling state interests. *Id.* at 791.[11]

In addition, neither the plaintiffs in *Mentele* nor Plaintiffs here have identified a means of advancing these interests that is "significantly less restrictive of associational freedoms." *Mentele*, 916 F.3d at 790. They have not suggested an alternative avenue through which the state can "solicit meaningful input" from its workers while "simultaneously avoiding the chaos and inefficiency of having multiple bargaining representatives or negotiating with individual" workers. *Id.* at 791. Here, as in *Mentele*,

[11] *See also Branch*, 481 Mass at 820 (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)) ("National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.").

Plaintiffs claim that their associational and speech interests are violated when the exclusive representative negotiates on their behalf. *See, e.g.*, AOB 43. But here, as in *Mentele*, it is unclear what sort of system California could implement to satisfy this demand, "apart from unilaterally deciding the terms of employment." *Mentele*, 916 F.3d at 791.

To be sure, the laws at issue here authorize the exclusive representative to bargain over more issues than those in *Mentele*. *See Mentele*, 916 F.3d at 790 (because the exclusive representative has a "limited role in representing partial employees, any impingement of the employees' [First Amendment] freedoms is correspondingly reduced"); *see also* AOB 47 (employees in this case can be "hired and fired" by the government). But that does not change the outcome in this case. As discussed above, exclusive representation systems leave employees free to associate or not associate with whom they please and to speak out on any public issue. And even if, as Plaintiffs argue, California's exclusive representation laws impose a greater burden on plaintiffs' First Amendment rights than those in *Mentele*, that impingement is far less than laws that (for example) require them to bear a message they disagree with, or accept a member of an association they belong to. Finally, any burden on Plaintiffs' First Amendment rights is far outweighed by the government's compelling

interest in negotiating with one representative, which is necessary to avoid the chaos, dissension, and confusion that might otherwise reign.

II. PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO THE DUES-DEDUCTIONS FAILS AS A MATTER OF LAW

A. Plaintiffs Consented to the Dues Deductions and the Consent Was Not Compelled By the State

Plaintiffs also argue that their First Amendment right not to "pay fees to a union" absent their consent is being violated because their requests that their exclusive representative stop deducting dues from their paychecks have been "ignored or denied." AOB 7. They further argue that the Attorney General has "enforced California statutes upholding this unconstitutional scheme." *Id.* at 8. They do not, however, identify which *statutes* they believe require them to continue contributing dues. Nor could they identify any such law. As the district court explained, the reason that Plaintiffs' dues are being deducted is because they "affirmatively agreed to the terms of union membership, including the terms regarding dues deduction." ER 13. Plaintiff O'Callaghan "voluntarily authorize[d her] employer to deduct from [her] earnings and transfer to Teamsters Local 2010 an amount equal to the regular monthly dues uniformly applicable to members of Local 2010[.]"

ER 54.[12] Similarly, Plaintiff Misraje "voluntarily submit[ted]" her application for membership "so that [she] may fully participate in the activities of the Union" and "authorize[d her] employer to deduct from [her] wages . . . an amount equal to the monthly dues and/or initiation fees[.]" ER 59. The authorization was "voluntary and [was] not conditioned on [her] present or future membership in the union." *Id.*[13]

It is these agreements rather than any statute that have authorized the continued dues deduction. No state law compelled Plaintiffs' membership in the Teamsters union, or their consent to deduction of dues. On the contrary, Plaintiffs have a First Amendment right not to join a union. *See NLRB v. Virginia Power Co.*, 314 U.S. 469, 477 (1941). California secures that right via statute. *See* § 3515 ("State employees also shall have the right to refuse to join or participate in the activities of [unions.]").

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[12] The same sentence goes on to set forth the terms of Plaintiff O'Callaghan's revocation: "I agree that this authorization shall remain in effect for the duration of the existing collective bargaining agreement, if any, and yearly thereafter until a new CBA is ratified, unless I give written notice . . . during the 30 days prior to the expiration of the CBA or, if none, the end of the yearly period." ER 54.

[13] Plaintiff Misraje's dues authorization form also set forth the terms of revocation, requiring "written notice . . . at least sixty (60) days, but not more than seventy-five (75) days before any periodic renewal date of this authorization and assignment[.]" ER 59.

To be sure, California has laws *relating* to the deduction of dues membership. But those are only meant to facilitate the collection of such dues when an employee voluntarily decides to join the union. Government Code section 1157.3, for example, provides that public employers must "honor" their employees' choices to "authorize deductions" from their salaries "for the payment of dues in . . . any employee organization." *See also* Cal. Gov't Code § 1152 (requiring public employers to honor requests for deductions made by employee organizations). Other statutes prevent public employers from terminating those deductions on terms other than those set forth in the "employee's written authorization." *Id.* § 1157.10. But none require an employee to join a union, or contribute to one as a condition of employment.

Nor does the state exercise coercive power over the union in the creation or enforcement of the dues deduction agreement between the union and Plaintiffs. To the contrary, state law requires public employers to keep at arm's length any changes to membership dues deductions, by "direct[ing] employee requests to cancel or change deductions for employee organizations to the employee organization." Cal. Gov't Code § 1157.12(b); *see also id.* §§ 3571, 3571.1 (it is "unlawful" for employers or exclusive representatives to "impose or threaten reprisals on employees, to

discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of their exercise of rights"). Because Plaintiffs gave their express written consent for the deduction of union dues, and because that consent was not compelled by the state, their challenge to the collection of dues fails as a matter of law.

B. *Janus* Does Not Apply to This Case

In arguing that the continued dues deduction violates the First Amendment rights, Plaintiffs rely primarily on *Janus*. AOB 10–16. But "[t]he relationship between unions and their voluntary members was not at issue in *Janus*." *Cooley v. Cal. Statewide Law Enforcement Ass'n*, No. 2:18-cv-02961-JAM-AC, 2019 WL 331170, at *2 (E.D. Cal. Jan. 25, 2019), appeal docketed No. 19-16498 (9th Cir. July 31, 2019). Rather, as the district court here concluded, *Janus* "limits its holding to situations in which employees have *not* consented to deductions." ER 13 (emphasis in original); *see also Janus*, 138 S. Ct. at 2486 (noting that no form of employee consent was required for imposition of the agency fees, which was permitted by state law and which violated the First Amendment). *Janus* does not implicate Plaintiffs' status as union members who expressly consented to the deduction of union dues from their wages. *See Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1016 (W.D. Wash. Feb. 15, 2019), appeal docketed

No. 19-35137 (9th Cir. Feb. 20, 2019) ("*Janus* does not apply here—Janus was not a union member, unlike Plaintiffs the here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here.").[14]

Nor does it make a difference that "the Supreme Court had not yet issued its decision in *Janus*" when Plaintiffs agreed to have their dues deducted. AOB 11. That Plaintiffs might have made a different choice had they known that "the Supreme Court would later invalidate public employee agency fee arrangements" does not void their "previous, knowing agreement." *Cooley*, 2019 WL 331170, at *2. Simply put, "[t]he relationship between unions and their voluntary members was not at issue in *Janus*," and *Janus* therefore has no application in this case. *Id.*

C. No State Law or Action Is Responsible for the Dues Deductions

Finally, even if Plaintiffs' constitutional challenge to the dues-deductions were colorable, it still fails as a matter of law because their alleged injury—the deduction of union dues before and after they announced their resignations—is not traceable to any state statute or state conduct.

[14] On December 10, 2019, a panel of this Court heard oral arguments in the *Belgau* matter, which also involves the deduction of union dues.

Rather, the injury is a product of Plaintiffs' private membership agreements with the Teamsters.[15]

"To state a claim under § 1983, a plaintiff must show that the allegedly unconstitutional conduct is fairly attributable to the State." *Bain v. Cal. Teacher Ass'n*, 156 F. Supp. 3d 1142, 1149 (C.D. Cal. 2015) (*citing Caviness v. Horizon Cmty. Learning Ctr., Inc*., 590 F.3d 806, 812 (9th Cir. 2010)). "At bottom, the state action requirement serves to 'avoid[ ] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'" *Naoko Ohno v. Yuko Yatsuma*, 723 F.3d 984, 994 (9th Cir. 2013) (quoting *Lugar v. Edmonson Oil Co., Inc*., 457 U.S. 922, 936 (1982)).

Here, Plaintiffs' claimed injury—the continued deduction of union dues after resignation from the union—do not arise from any statute. The claimed injury arises from the terms of the union membership agreements that

[15] The District Court denied Attorney General Becerra's "state action" argument, finding that Government Code sections 3513(i) and 3583, "which permit the Union to set a time limitation for when notice must be given pursuant to the terms of the Union's collective bargaining agreement," qualify as "'joint action,' [between the state and the union] because the state is facilitating the allegedly unconstitutional conduct Plaintiffs complain of 'through [the state's] involvement with a private party.'" ER 16 (quoting *Naoko Ohno*, 723 F.3d at 996).

Plaintiffs voluntarily signed, and from the Teamsters' enforcement of that agreement. *See* ER 54, 59 (dues deduction forms). Neither the state nor the University of California were parties to Plaintiffs' membership and dues authorization agreements. Because the state is not "*responsible* for the specific conduct of which the plaintiff complains," Plaintiffs' statutory challenge fails as a matter of law. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original); *see also Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 299 (4th Cir. 1991), cert. denied, 503 U.S. 1005 (1992) (union's internal membership and procedural decisions did not constitute state action although they had an impact on who could participate in the union's duties as exclusive representative).

CONCLUSION

For the foregoing reasons, Attorney General Becerra respectfully requests that this Court affirm the District Court's decision granting the

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Attorney General's motion to dismiss and denying Plaintiffs' motion for preliminary injunction.

Dated: March 2, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANTHONY R. HAKL
Supervising Deputy Attorney General

S/ MAUREEN ONYEAGBAKO

MAUREEN C. ONYEAGBAKO
Deputy Attorney General
Attorneys for Xavier Becerra, in his official capacity as Attorney General of California

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19-56271

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARA O'CALLAGHAN and JENEE MISRAJE,

Plaintiffs and Appellants,

v.

JANET NAPOLITANO, in her official capacity as President of the University of California; TEAMSTERS LOCAL 2010; XAVIER BECERRA, in his official capacity as Attorney General of California,

Defendants and Appellees.

STATEMENT OF RELATED CASES

The following related cases are pending:

1. *Allen v. Santa Clara County Correctional Peace Officers Association, No. 19-17217*

2. *Belgau v. Inslee*, No. 19-35137

3. *Cooley v. California State Law Enforcement Association, et al.* No. 19-16498

4. *Martin v. California Teachers Association*, No. 19-55761

5. *Seager v. United Teachers Los Angeles, et al.*, No. 19-55977

6. *Smith v. Bieker*, No. 19-16381

7. *Smith v. Teamsters Local 2010*, No. 19-56503

Dated: March 2, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANTHONY R. HAKL
Supervising Deputy Attorney General

S/ MAUREEN ONYEAGBAKO

MAUREEN C. ONYEAGBAKO
Deputy Attorney General
Attorneys for Xavier Becerra, in his official capacity as Attorney General of California

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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