No. 19-56271

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cara O'Callaghan and Jeneé Misraje,

Plaintiffs-Appellants,

v.

Michael V. Drake,[1] in his official capacity as President of the University of California; Teamsters Local 2010; and Xavier Becerra, in his official capacity as Attorney General of California,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-02289
Hon. James V. Selna

APPELLANTS' SUPPLEMENTAL BRIEF

Brian K. Kelsey*
bkelsey@libertyjusticecenter.org
Reilly Stephens
rstephens@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702
**Counsel of record*

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

Attorneys for Appellants

[1] Substituted for former Appellee and University President Janet Napolitano. *See* F.R.A.P. 43(c)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

This case is brought by two government workers, Appellants Cara O'Callaghan and Jeneé Misraje, who were faced with an unconstitutional choice at their jobs: join the union and pay union dues or do not join and pay a substantially equivalent amount in agency fees. Later, in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court held that unions cannot collect money from government workers' paychecks without their "affirmative consent." 138 S. Ct. at 2486. After Appellants withdrew their consent to pay union dues, the union trapped them into continuing to pay. Misraje was trapped for up to one year. O'Callaghan was trapped for almost four years.

O'Callaghan and Misraje submit this Supplemental Brief to distinguish this Court's decision in *Belgau v. Inslee*, No. 19-35137, 2020 U.S. App. LEXIS 29478 (9th Cir. Sep. 16, 2020), the petition for rehearing *en banc* for which was denied on October 26, 2020. Whereas *Belgau* dealt with union withdrawal restrictions of only one year, O'Callaghan has been trapped paying dues to the union for nearly four years. This Court should decide that unions cannot trap government workers into paying dues for longer than a year because doing so violates the "affirmative consent" required for dues deduction under *Janus*.

ARGUMENT

I. Unions cannot trap government workers into paying dues for longer than one year.

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2466 (2018), the Supreme Court held that government unions cannot "shanghai[]" employees "for an unwanted voyage." But this is precisely the outcome the union seeks here: trapping employees in union membership for years on end without recourse. This Court should find that the extended forced association at issue violates government workers' fundamental rights against compelled speech. Appellants raised the length of the O'Callaghan window period in their Opening Brief (Dkt. 8 at 13-15) and Reply Brief (Dkt. 27 at 5-8). Therefore, this issue is preserved in this appeal.

A. The facts show bad faith by Teamsters Local 2010.

To review the relevant facts, Appellant O'Callaghan was continually employed by the University of California for nearly nine years without ever becoming a member of Teamsters Local 2010 (the "Union"). (ER 009.) On May 31, 2018, while the *Janus* case was pending in the Supreme Court, a Union representative came to her workplace soliciting signatures. *Id.* While Union officials, presumably, knew the impending *Janus* decision could significantly affect the rights of employees like O'Callaghan, they never informed her of this. *Id*. O'Callaghan relied on this lack of information when she signed the membership application. (Opening Br. at 3.) The application prevented O'Callaghan from

withdrawing her authorization except during a window of time 30 days prior to the expiration of the Collective Bargaining Agreement on March 31, 2022—nearly four years after she signed the Union card. (ER 054.) This multiyear entrapment provision was new to the Union agreement. When Appellant Misraje signed her agreement in 2015, it required only a one-year term before she could revoke. (ER 059.) The District Court granted the Appellees' Motions to Dismiss; therefore, O'Callaghan and Misraje were not permitted discovery into the reasons the terms of the agreement changed. (Opening Br. at 7.) However, it was reasonable to assume that the *Janus* case would be decided as it was with the addition to the Court of Justice Gorsuch because its predecessor, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016), had deadlocked 4-4 after Justice Scalia's death between the oral argument and issuance of the decision. In a recent, similar case in this circuit, discovery did reveal that the union had changed its membership application in anticipation of the impending *Janus* decision. *See Wolf v. University Professional and Technical Employees*, N. D. Cal. Case No. 3:19-cv-02881-WHA, ECF No. 78-2 at 8-9, Deposition of Jamie McDole at 18, 22 (union president admitting her union's window period was adopted in anticipation of the *Janus* decision to prevent employees from exercising their rights under *Janus*). Therefore, Appellants submit that the most reasonable interpretation of the facts in this case is that the Union began imposing the multiyear window period before the

Janus decision in order to prevent employees from exercising the rights *Janus* recognized. And then they did not tell workers like O'Callaghan that they were waiving such rights.

Another intentional omission on the part of the Union occurred because the Union card that O'Callaghan signed did not actually state when her 30-day opt-out window would occur. Instead, it simply referenced that she could give written notice to stop her dues deduction "during the 30 days prior to the expiration of the CBA." (ER 054.) A lay person like O'Callaghan could not be expected to parse this complicated contractual language, track down the Collective Bargaining Agreement, and then find the appropriate expiration date of the agreement. Had she read this language on the membership application at all, she still would have no idea how long she was trapping herself into paying Union dues. But the Union knew and used this obfuscation to intentionally trap government workers like her for up to five years. The term of the CBA lasted from April 2017 to March 2022. *See* Teamsters Local 2010 and University of California Agreement, CX-Unit.[2] O'Callaghan signed her membership application on May 31, 2018 (ER 009); therefore, the Union used this omission on their membership application to trap O'Callaghan for almost four years!

[2] Available at https://teamsters2010.org/wp-content/uploads/2018/06/FULL-CX-2017.pdf (last retrieved Oct. 30, 2020).

B. *Belgau* should be distinguished.

While the facts in the *Belgau* case are similar to the facts in this case, one significant fact differs: in *Belgau*, the government worker was trapped into paying union dues for up to one year; however, O'Callaghan is trapped into paying union dues for the length of the collective bargaining agreement, which is almost four years. The *Belgau* opinion does not stand for the proposition that unions can trap government workers into paying union dues indefinitely. The *Belgau* decision is explicit that government workers can only be trapped into paying union dues "subject to a *limited* payment commitment period." 2020 U.S. App. LEXIS 29478 at *20 (emphasis added). What this Court failed to answer in *Belgau* is how limited is "limited?" Appellants argue that one year is long enough. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 315 (2012) ("[g]iving employees only one opportunity per year to make this choice is tolerable").

As this Court explained in *Belgau*, "[t]he dangers of compelled speech animate *Janus*." *Belgau*, 2020 U.S. App. LEXIS 29478 at *18. The dangers of compelled speech rise exponentially beyond a year because, over the course of three or four years, the Union speaks for workers on issues that were not even contemplated when the adhesion contracts were first signed.

Even Judge McKeown, during oral argument in *Belgau*, made reference to the fact that the plaintiffs in *Belgau* only suffered a constitutional deprivation for

less than a year: "What about that period after they decide they want to give up the ship, and then they're kind of held hostage 'til the end of that one year period? Are they not in a compelled situation there?" *Belgau*, Video R., December 10, 2019 at 17:31-17:45.[3] Thus, Judge McKeown, at oral argument, intimated that plaintiffs were being compelled to subsidize speech that they disagreed with, but she ultimately wrote the *Belgau* decision in favor of the defendants because this time period was "limited" to one year. She continued this line of questioning with the State of Washington defendants, who also premised their defense on the fact that the constitutional deprivation lasted less than one year.

> McKeown, J: "What about that--that kind of, um, no-man's-land after you revoke, but you can't really get out?"
> Alicia Young, Deputy Solicitor General, State of Washington: "Um, that is a limited time period, and it's essentially when the employee joins the union and avails themself of union member benefits. They've agreed to, essentially, a one-year commitment--or a financial commitment. It's no different than if the employee had paid the annual membership dues on day one of signing up for the member--for the union--or had agreed to do it over a twelve month installment, which is essentially what happened here.
> Christen, J.: "An open enrollment period, right?"
> Ms. Young: "Sure."
> McKeown, J: "It is, but the difference, of course, is if you don't want to pay the money, you ought to be able to get out."

Id. at 26:15-26:58.

[3] Available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016731 (last retrieved Oct. 30, 2020).

Thus, the State Defendants in *Belgau* compared the union agreement to an annual contract paid in monthly installments, and Judge Christen compared the opt-out period to an annual enrollment period for changing one's employee benefits and paycheck deductions. No party in *Belgau* argued that workers could be trapped into paying union dues for longer than a year. This question remains unanswered after *Belgau*, and the Court should answer it in this case.

C. Other legal precedents hold that employees are entitled to an escape window at least once per year.

Both under the prior agency fee regime and after *Janus*, courts have sometimes approved window periods but only if they are for a year or less, on the theory that "[g]iving employees only one opportunity per year to make this choice [whether to join the union or be an agency fee payer] is tolerable if employees are able at the time in question to make an informed choice." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 315 (2012). Protecting the rights of employees requires courts to look seriously at the procedures used by the union because "the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement." *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). A procedural apparatus that provides only a brief, unpublicized period every four years to make a decision, whether informed or not, denies O'Callaghan "a fair opportunity to identify the impact of the governmental action on [her] interests." *Id.*

For this reason, courts subject multiyear window periods to heightened First Amendment scrutiny. Indeed, in a similar case decided last year in the District of New Jersey, the court expressed skepticism at trapping government workers into paying union dues for even six months. *See Smith v. N.J. Educ. Ass'n,* No. 18-10381 (RMB/KMW), 2019 U.S. Dist. LEXIS 205960, at *19 (D.N.J. Nov. 27, 2019). The *Smith* decision addressed the constitutionality of a New Jersey statute requiring dues deductions to continue for up to one year after union resignation. In that case, the union agreements allowed members to cease dues deductions two times a year: once in January and once in July. *Id*. at *6. While it did not ultimately reach the issue of the constitutionality of what it deemed the "draconian" statute, it nonetheless, offered its opinion of such an annual entrapment period:

> If it were enforced as written, the Member Plaintiffs are correct that the [law]'s revocation procedure would, in the absence of a contract providing additional opt-out dates and a more reasonable notice requirement (as is present here), unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union.

Id. at *19-*20.

Nor is the opinion in *Smith* an aberration in articulating limits on union revocation periods. Courts have held for decades that onerous opt-out windows longer than a year infringe the rights of employees. In the private-sector context, the U.S. Supreme Court has recognized that the right to resign union membership "at any time . . . protects the employee whose views come to diverge from those of

his union." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 (1985). In *McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp. 2d 522 (M.D. Pa. 2007), a case where plaintiff union members wished to resign after their union voted in favor of a strike action they opposed, the court noted the Supreme Court's holding in *Pattern Makers' League* and went on to state that because the 3-year "maintenance of membership" provision "locks plaintiffs into union membership for the duration of the CBA – the only way plaintiffs can resign from the union is to leave their employment." 491 F. Supp. 2d. at 527. That court further stated that "union members who are unable to resign unilaterally because of a 'maintenance of membership' provision" have a reasonable likelihood of success in their claim to the First Amendment right not to associate held by non-members. *Id.; see also Debont v. City of Poway*, No. 98CV0502, 1998 WL 415844 (S.D. Cal. Apr. 14, 1998) (8-year membership concurrent with CBA violates right of member to resign when he changes his mind after several years in the union).

Indeed, the Federal Labor Relations Authority recently issued an opinion clarifying, in the light of *Janus*, that it will no longer allow Federal Employees to be tied to a union for longer than one year. The FLRA determined that "it would assure employees the fullest freedom in the exercise of their rights under the Statute if, after the expiration of the initial one-year period . . . an employee had the right to initiate the revocation of a previously authorized dues assignment at

any time that the employee chooses." *In re Petition of Office of Personnel Management*, 71 FLRA No. 571 (Feb. 14, 2020). As the concurrence from Member Abbott elaborated:

> The Court's decision in *Janus* leads me to one conclusion -- once a Federal employee indicates that the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be "freely given" and the earlier election can no longer serve as a waiver of the employee's First Amendment rights. Thus, restricting an employee's option to stop dues withholding -- for whatever reason -- to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights.

Id. at 575 (Abbott, concurring).

The FLRA decision is consistent with the opinions of at least three State Attorneys General. Texas Attorney General Ken Paxton, in assessing the impact of *Janus*, reaches the conclusion that "a one-time, perpetual authorization is inconsistent with the Court's conclusion in *Janus* that consent must be knowingly and freely given." Attorney General of Texas Opinion No. KP-0310, May 31, 2020, at 3. As General Paxton explains, "Organizations change over time, and consent to membership should not be presumed to be indefinite," *Id.* (citing *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 315 (2012). Indiana's Attorney General, likewise, found that "[t]o ensure an employee's consent is up-to-date, as required for it to be a valid waiver of the employee's First Amendment rights, an employee must be provided a regular opportunity to opt-in and opt-out."

Attorney General of Indiana Opinion 2020-5, June 17, 2020, at 6. He went on to say that workers should be able to opt out at any time, and for opt-in, "we think it is reasonable that such a waiver be obtained annually." *Id*. This is consistent also with the opinion of the Attorney General of Alaska, who determined that, "In order to secure clear and compelling evidence of a knowing waiver, the State should also provide for a regular 'opt-in' period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages." Attorney General of Alaska Opinion dated August 27, 2019 at 12. Texas Attorney General Paxton concluded his opinion by adopting exactly the position that Appellants ask this Court to adopt—one year is as long as the Constitution will allow:

> [T]he Court in *Janus* did not articulate the appropriate interval in lieu of a one-time consent that extends indefinitely for employee deductions. The period of time for which employee consent to a payroll deduction validly operates therefore remains an open question. However, a court would likely conclude that consent is valid for one year from the time given and is sufficiently contemporaneous to be constitutional.

Att'y Gen. of Texas Op. No. KP-0310, May 31, 2020, at 4 (citing *Knox*).

A holding requiring regular intervals to proactively renew one's membership also fits well with the Supreme Court's general approach to waiver of rights. The Supreme Court in *Janus* characterized the decision to pay money to a union as a "waiver" of the right *not* to belong or pay money to a union, citing *Johnson v.*

Zerbst and its progeny. *Janus*, 138 S. Ct. at 2486 (citing 304 U.S. 458 (1938)).

Waiver of a constitutional right "should not, once uttered, be deemed forever binding." *United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988). This principle has been recognized in multiple decisions. *See, e.g., United States v. Groth*, 682 F.2d 578, 580 (6th Cir. 1982); *United States v. Lee*, 539 F.2d 606, 610 (6th Cir. 1976); *Zemunski v. Kenney*, 984 F.2d 953, 954 (8th Cir. 1993); *People v. Crayton*, 48 P.3d 1136, 1146 (Cal. 2002) (collecting authorities); *Wilson v. Horsley*, 974 P.2d 316, 322 (Wash. 1999).

Many post-*Johnson* cases recognize that waiver can become stale due to the passage of time or intervening events and that, in those instances, citizens must be given a new opportunity to make an informed choice about whether to again waive their rights. *United States v. Hinkley*, 803 F.3d 85, 92 (1st Cir. 2015); *United States v. Van Phong Nguyen*, 608 F.3d 368, 375 (8th Cir. 2010); *United States v. Pruden*, 398 F.3d 241, 246 (3d Cir. 2005); *State v. Miah S. (In re Miah S.)*, 861 N.W.2d 406, 412-13 (Neb. 2015) (collecting cases). The rule sought by Appellants here fits well doctrinally with those cases because it ensures the right to reevaluate the waiver of a constitutional right after the passage of time.

When union membership is irrevocable for years upon years and dues self-perpetuate by unilateral union fiat, with no requirement of notice when your window is coming open, consent is not contemporaneous. This situation violates

the constitutional requirement under *Janus* that government workers must give their "affirmative consent."

D. Government union action constitutes state action because it was directed by both California statutes and a Collective Bargaining Agreement not at issue in *Belgau*.

This case also differs from the *Belgau* case in another important aspect: state action. For that reason, the District Court in this case found state action to have occurred (ER 014-016), while the Circuit Court in *Belgau* denied state action. State action is required for a violation of the Free Speech clause at issue in *Janus*, *Belgau,* and this case. As the District Court found, Drake, the Union, and Becerra acted jointly in this case to deprive O'Callaghan and Misraje of their free speech rights. (ER 016.) Appellants thoroughly detailed this joint state action in their Reply Brief at 10-16, and they repeat here the two relevant facts that distinguish *Belgau*.

First, Defendants in this case relied on California statutes not at issue in *Belgau* because that case arose in the State of Washington. As the District Court put it, "The state enforces California Government Code §§ 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." (ER 016.) Thus, when the Union followed the directives of the two statutes and when Drake and Becerra enforced the two statutes, that constituted "joint action" between the

Union and the state defendants. This joint action trapped O'Callaghan into having union dues taken from her state paycheck for almost four years. District Op. at 9, citing *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984 (9th Cir. 2013) (ER 016).

Second, the Union in this case relied on a Collective Bargaining Agreement with the state to create the four-year obligation to pay Union dues. In *Belgau*, the Court found no state action because it found that the obligation to pay union dues rested solely on the union membership application between the union and the workers. 2020 U.S. App. LEXIS 29478 at *14. But in this case, the Union membership application incorporates the Collective Bargaining Agreement between the state and the Union. And it is the Collective Bargaining Agreement that sets the opt-out period that is unconstitutional in this case. Because Drake entered into the Collective Bargaining Agreement with the Union and because Becerra and Drake both enforced it, they acted jointly with the Union and converted its actions into state action.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below.

Dated: November 3, 2020

Respectfully submitted,

/s/ Brian K. Kelsey
Brian K. Kelsey*
bkelsey@libertyjusticecenter.org
Reilly Stephens
rstephens@libertyjusticecenter.org
Liberty Justice Center

190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: 312-263-7668
Fax: 312-263-7702

/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

*Counsel of record
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(g)

9th Cir. Case Number: 19-56271

I am the attorney.

This brief contains 4179 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

/s/Brian K. Kelsey
Brian K. Kelsey

November 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, I electronically filed the forgoing Supplemental Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Brian K. Kelsey
Brian K. Kelsey

Counsel for Appellants