No. ___

IN THE
Supreme Court of the United States

JONATHAN SAVAS, et al.
Petitioners,

v.

CALIFORNIA STATEWIDE LAW ENFORCEMENT AGENCY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court in *Janus v. AFSCME, Council 31* held it violates the First Amendment for a state and union to compel employees to subsidize union speech. 138 S. Ct. 2448, 2486 (2018). Notwithstanding *Janus*, the State of California continues to compel objecting employees to subsidize union speech pursuant to "maintenance of membership" agreements that require all employees who are union members to remain union members, and to pay full union dues, for the duration of the collective bargaining agreement. Also notwithstanding *Janus*, the United States Court of Appeals for the Ninth Circuit held a "maintenance of membership requirement does not implicate the First Amendment." Pet.App. 5.

The questions presented are:

1. Does it violate the First Amendment for a state and union to compel objecting employees to remain union members and to subsidize the union and its speech?
2. To constitutionally compel objecting employees to remain union members and to subsidize the union and its speech, do states and unions need clear and compelling evidence the objecting employees waived their First Amendment rights?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Jonathan Savas, Lauren Ashby, Ethan Balter, Bella Bardeen, Paul Carey, Andrew Cox, Carter Fenley, Alec Fletes, Moses Haase, Frank Harwood, Jon Hernandez, Cole Heydorff, Jess Hiller, Mackenzie Koepsell, Jennifer Marshall, Kent Mertins, Yuruan Quinones, Josua Raymond, Brad Rollins, Tristan Traub, and Adam Wright were Plaintiff-Appellants in the court below. Christian Espinoza and Andres Mendoza were Plaintiff-Appellants in the court below, but are not Petitioners.

Respondents California State Law Enforcement Agency, Betty Yee, in her official capacity as State Controller of California, and Rob Bonta, in his official capacity as Attorney General of California, were Defendants-Appellees below.

Because Petitioners are not corporations, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

1. *Savas v. California State Law Enforcement Agency,* No. 20-56045, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 28, 2022.

2. *Savas v. California State Law Enforcement Agency,* No. 20-cv-00032, U.S. District Court for the District of Southern California. Judgment entered September 9, 2020.

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The district court's order dismissing Petitioners' complaint for failure to state a claim is reported at 485 F. Supp. 3d. 1233 and reproduced at Pet.App. 6. The Ninth Circuit's memorandum opinion affirming that order is unreported and reproduced at Pet.App. 1. The Ninth Circuit order denying rehearing en banc is reproduced at Pet.App. 22.

JURISDICTION

The Ninth Circuit issued its memorandum opinion on April 28, 2022 and denied a petition for rehearing en banc on June 8, 2022. Pet.App. 1, 22. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution and California Government Code §§ 3513(i), 3513(k), and 3515.7 are reproduced at Pet.App. 24.

STATEMENT OF THE CASE

The State of California and a union are compelling objecting employees to remain dues-paying members of a union for four years pursuant to a "maintenance of membership" requirement. This case concerns whether that compulsion violates employees' First Amendment rights under *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448 (2018).

A. Legal background

1. California law authorizes the State to enter into two types of "organizational security" agreements with unions that require employees to support a union financially: "maintenance of membership" agreements and "fair share fee" agreements. Cal. Gov. Code

§ 3515.7(a) (Pet.App. 25). The former requires all employees who are or become union members to remain members in good standing for the duration of the collective bargaining agreement and permits employees to withdraw from the union thirty-days before the expiration of the agreement. *Id.* § 3513(i) (Pet.App. 24). The latter requires all employees who are not union members to pay fees to the union. *Id.* § 3513(k) (Pet.App. 24). The State enforces both forms of organizational security by "deduct[ing] the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee." *Id.* § 3515.7(b) (Pet.App. 25).

Both forms of union organizational security are unconstitutional under this Court's precedents. In 1977, the Court held it violates the First Amendment for a government employer and union to require employees to pay full union dues as a condition of their employment. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-37 (1977), overruled by *Janus*, 138 S. Ct at 2486. *Abood* held the most the constitution can tolerate is to require employees to pay reduced union fees that exclude union expenses for political activities and other conduct unrelated to collective bargaining. *Id.* These fees became known as "fair share" or "agency" fees.

In 2018, the Court in *Janus* overruled *Abood* and held agency fee requirements also violate the First Amendment. 138 S. Ct. at 2486. The Court recognized that "compelled subsidization of private speech seriously impinges on First Amendment rights" and is subject to at least exacting constitutional scrutiny. *Id.* at 2464. The Court found agency fee requirements fail that scrutiny. *Id.* at 2465–69. The Court held that "[n]either an agency fee nor any other payment to the

union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.* at 2486.

The Court in *Janus* added that, because "nonmembers are waiving their First Amendment rights" by agreeing to pay monies to a union, establishing that employees consent to pay requires proof those employees waived their constitutional rights. *Id.* "[T]o be effective, the waiver must be freely given and shown by 'clear and compelling' evidence.'" *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967)).

2. In the wake of *Janus*, California's Attorney General's Office issued an advisory acknowledging that, under *Janus*, "it is unconstitutional for public-sector unions to collect 'agency fees'—also known as 'fair-share' fees—from public employees who choose not to join the union."[1] California's Public Employee Relations Board also determined it could no longer enforce agency fee requirements. Pet.App. 8. The State of California, however, continues to enforce maintenance of membership requirements.

This case concerns California's maintenance of membership agreement with the California State Law Enforcement Agency ("CSLEA"), effective from July 2, 2019 to July 1, 2023. It states:

> A written authorization for CSLEA dues deductions in effect on the effective date of this Contract or thereafter submitted shall continue in full force and effect during the life of this Contract; provided,

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[1] *See* Affirming Lab. Rts. and Obligations in Pub. Workplaces, Cal. Att'y Gen. Op. (undated), rb.gy/wwetc5.

> however, that any employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract.

Pet.App. 28.

Employees subject to this organizational security clause are required, as a condition of their employment, to remain members of and pay full dues to CSLEA for the four-year term of the agreement—i.e., from July 2019 until July 2023. Even then, the employees only can escape a subsequent maintenance of membership requirement by withdrawing from CSLEA during a thirty-day period in June 2023. The employees are thus prohibited from exercising their First Amendment rights under *Janus* except during one thirty-day period every four years.

3. California is not alone in enforcing maintenance of membership requirements and other restrictions on when employees can exercise their rights under *Janus*. Pennsylvania law also authorizes "maintenance of membership" agreements that require employees who join or joined a union to "remain members for the duration of a collective bargaining agreement so providing with the proviso that any such employe or employes may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement." 43 P.S. § 1101.301(18). The Commonwealth has enforced such requirements. *See Weyandt v. Pa. State Corr. Officers Ass'n*, No. 1:19-cv-1018, 2019 WL 5191103, at *2 (M.D. Pa. Oct. 15, 2019). So has the State of Ohio. *See Allen v. Ohio Civ. Serv. Emps. Ass'n AFSCME, Local 11*, No. 2:19-cv-

3709, 2020 WL 1322051, at *2 (S.D. Ohio Mar. 20, 2020).

To resist this Court's holding in *Janus*, a dozen states also amended their labor laws to require government employers to enforce other restrictions on when employees can stop paying union dues. This includes California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington.[2] These restrictions typically prohibit employees from stopping government deductions of union dues for one year, except during a ten or fifteen-day withdrawal period.[3]

B. Proceedings below

1. Petitioners Jonathan Savas et al. ("Lifeguards") are twenty-one (21) state employees who work or worked as lifeguards for the California Department of Parks and Recreation. C.A. E.R. 29. At various times between 2004 and 2019, they signed one of two forms that purport to authorize membership in CSLEA and for the State to deduct union dues from their wages. *Id*. at 29-30. Neither form states that the signatory

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[2] *See* Cal. Gov't Code § 1157.12; Cal. Educ. Code §§ 45060; Colo. Rev. Stat. § 24-50-1111(2); Conn. Publ. Act No. 21-25, §§ 1(a)(i–j); Del. Code Ann. tit. 19, § 1304; Haw. Rev. Stat. Ann. § 89-4(c); 5 Ill. Comp. Stat. § 315/6(f); Mass. General Laws ch.180 § 17A; Nev. Rev. Stat. § 288.505(1)(b); N.J. Stat. Ann. §52:14-15.9e; N.Y. Civ. Serv. Law § 208(1)(b); Or. Rev. Stat. § 243.806(6); Wash. Rev. Code § 41.80.100(d).

[3] *See, e.g*., 5 Ill. Comp. Stat. § 315/6(f) (authorizing ten-day period for stopping dues deductions and "a period of irrevocability that exceeds one year"); Del. Code Ann. tit. 19, § 1304 (authorizing annual fifteen-day period for stopping payroll deductions).

agrees to remain a union member for the term of a collective bargaining agreement.

One of the forms, however, vaguely states that "[p]er the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member." C.A. E.R. 30. The nature of these "limitations" are not explained. The Lifeguards were not provided a copy of the "Unit 7 contract" when they were solicited to sign the form. *Id.*

When *Janus* was decided in June 2018, the Lifeguards were subject to a maintenance of membership requirement effective from July 2, 2016 to July 1, 2019. CSLEA C.A. Supp. E.R. 283. This self-styled "union security" requirement prohibited employees from withdrawing from CSLEA except in June 2019. *Id*. The State and CSLEA then entered into a subsequent maintenance of membership requirement, effective from July 2, 2019 to July 1, 2023, that prohibits employees from withdrawing from CSLEA except in June 2023. Pet.App. 8, 28. Taken together, the State and CSLEA have prohibited the Lifeguards from exercising their right under *Janus* to stop subsidizing the union except in June 2019 and June 2023.

The Lifeguards nevertheless attempted to exercise their rights on or around September 2019 by notifying CSLEA that they resigned their union membership. Pet.App. 8. CSLEA refused to honor their resignations because of its maintenance of membership agreement with the State. *Id.* Since September 2019, the State and CSLEA have compelled the Lifeguards, over their objections and as a condition of their employment, to remain CSLEA members and to pay full union dues, which the State seizes directly from the Lifeguards'

wages. C.A. E.R. 32–33. Under the State and CSLEA's maintenance of membership arrangement, the State and union will continue to force the Lifeguards who remain employed with the State to be full dues-paying members of CSLEA until at least July 2023. *Id*.

2. The Lifeguards filed a class action lawsuit against the State and CSLEA alleging their maintenance of membership requirement compels the Lifeguards and similarly situated employees to subsidize CSLEA and its speech in violation of the First Amendment. Pet.App. 10; C.A. E.R. 25. The district court dismissed the Lifeguards' constitutional claims for failure to state a claim. Pet.App. 21. The court declared that "*Janus* is inapplicable to Plaintiffs' situation, because Plaintiffs are union members, unlike the nonmembers at issue in *Janus*." *Id*. at 13. The court found their constitutional challenge to the maintenance of membership requirement "fail[s] because Plaintiffs agreed to join the union." *Id*. at 17.

On April 28, 2022, in an unpublished opinion, the Ninth Circuit "affirm[ed] the district court's holding that the Lifeguards have failed to state a plausible claim because the maintenance of membership requirement does not implicate the First Amendment." Pet.App. 5. The court declared "the holding in *Janus* applied to nonunion members only and because the Lifeguards are union members, *Janus* is inapplicable here." *Id*. at 2.

The court found the Lifeguards to be union members, notwithstanding their notices of resignation, because they supposedly "entered into a contract with the union through which they agreed to be bound by certain limitations on when they could resign that

membership." Pet.App. at 3. "The fact that the maintenance of membership requirement appeared in a separate document does not render the term unenforceable." *Id*. at 4.

The Ninth Circuit held its "decision in *Belgau v. Inslee*, [975 F.3d 940 (9th Cir. 2020), *cert. denied* 141 S. Ct. 2795 (2021)] controls" this case and that "[t]he claims against CSLEA also fail for lack of state [sic] action under *Belgau*." Pet.App. 2, 4 n.2. According to the court, "[t]he only potentially relevant difference [between this case and *Belgau*] is that the irrevocability period in *Belgau* was one year whereas here it is four." *Id*. at 4. The court saw no "plausible reason why an irrevocability period of one year is constitutionally permissible, but four years would not be." *Id*. at 4-5.

On these grounds, the Ninth Circuit found no constitutional infirmity with a maintenance of membership agreement that requires employees to remain members of a union and to financially support its expressive activities for four years. The court then refused to reconsider its decision en banc, denying a rehearing petition on June 8, 2022. Pet.App. 22.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has upheld a union security requirement that is even more pernicious than the requirement *Janus* held unconstitutional: a clause that compels employees to remain full dues-paying members of a union for four years. The Ninth Circuit did so on the flimsiest of grounds, reasoning the dissenting employees acquiesced to this onerous infringement on their First Amendment rights because some of their dues deduction forms state that "[p]er the Unit 7 contract and State law, there are limitations on the

time period in which an employee can withdraw as a member." C.A. E.R. 30. The Court should grant review to establish that the free speech rights it recognized in *Janus* cannot be so severely and easily repressed.

1. The Ninth Circuit's decision conflicts with *Janus* because a maintenance of membership requirement, just like an agency fee requirement, compels employees to financially support union speech that they do not want to support. 138 S. Ct. at 2486. If anything, maintenance of membership requirements are *more* injurious to First Amendment rights because they also compel employees to remain union members over their objection—which infringes on associational rights—and to subsidize union speech unrelated to collective bargaining. The lower court's holding that a "maintenance of membership requirement does not implicate the First Amendment," Pet.App. 5, is untenable under *Janus*.

Equally untenable is the Ninth Circuit's conclusion that a vague reference in a dues deduction form to a maintenance of membership requirement is constitutionally sufficient to subject employees to that requirement. The Court held in *Janus* that states and unions cannot seize union payments from nonconsenting employees unless there is "'clear and compelling' evidence'" the employees waived their First Amendment rights. 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). The lower court's refusal to conduct that waiver analysis not only defies *Janus*, but also imperils employee rights under the decision because it allows states and unions to easily restrict those rights.

The Ninth Circuit further imperiled employees' rights by holding that a union is not a state actor, and thus not constitutionally liable for its conduct, when enforcing a union security agreement with a state. Pet.App. 4 n.2. This holding contravenes *Janus*—which involved a union engaging in the same state action—and conflicts with two Seventh Circuit precedents. *Janus v. AFCSME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) ("*Janus* II"); *Hudson v. Chi. Teachers Union Loc. No.* 1, 743 F.2d 1187, 1191 (7th Cir. 1984), *aff'd,* 475 U.S. 292 (1986).

2. The Court should resolve these conflicts because whether states and unions can restrict employee rights under *Janus* with (i) maintenance of membership requirements and (ii) without proof employees waived their rights are exceptionally important questions. Maintenance of membership requirements severely restrict the speech and associational rights of employees who do not want to associate with a union or fund its speech. The Lifeguards' plight is illustrative. They provided notice in September 2019 that they did not want to be union members, but are forced to remain dues-paying union members until June 2023. The Court should make clear that this onerous form of union "organizational security," Cal. Gov. Code § 3515.7(a) (Pet.App. 25), is just as unconstitutional as lesser agency fee requirements.

Janus' waiver requirement is a bulwark against ongoing state and union attempts to restrict employees' ability to exercise their right to stop paying for union speech. The standard for proving that an individual waived a constitutional right is exacting: there must be clear and compelling evidence the waiver was voluntary, knowing, and intelligently made and that its

enforcement is not against public policy. *See D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972); *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). In contrast, under the lower courts' analysis, all it takes to bind employees to a four-year prohibition on exercising their First Amendment rights is oblique reference in a dues deduction form to an unspecified limit on withdrawing from the union. The Court should not permit states and unions to so easily obstruct the speech rights it recognized in *Janus*. To ensure that employees can freely exercise those rights, the Court must instruct the lower courts to enforce *Janus*' waiver requirement.

3. This case is an excellent vehicle for resolving the questions presented. It also differs from other post-*Janus* cases in which the Court denied review because this case involves a maintenance of membership requirement. To counsels' knowledge, the Court has not had an opportunity to review the constitutionality of this type of organizational security agreement under *Janus*. The Court should take that opportunity by granting review in this case.

I. The Ninth Circuit's Decision Conflicts With *Janus*.

A. The Ninth Circuit upheld a union security requirement that is more onerous than the requirement *Janus* held unconstitutional.

1. The Ninth Circuit's decision that a "maintenance of membership requirement does not implicate the First Amendment," Pet.App. 5, cannot be reconciled with this Court's holding that agency fee requirements violate the First Amendment. *Janus*, 138 S. Ct. at 2486. If it is unconstitutional for states and unions

to seize agency fees from employees who provide notice that they resign their union membership—which it is under *Janus*—then it is unconstitutional for states and unions to seize full union dues from such employees.

There is no exculpatory distinction between maintenance-of-membership and agency-fee requirements. California law considers both to be forms of union "organizational security." Cal. Gov. Code § 3515.7(a) (Pet.App. 25). Both forms of organizational security require certain employees to support a union financially through state deductions of union payments from their wages. *See id*. §§ 3513(i), 3513(k) & 3515.7(b) (Pet.App. 24-25).

When enforced against employees who oppose supporting the union, maintenance of membership and agency fee requirements both compel employees to subsidize union speech against their wishes. This compulsion violates the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

If anything, maintenance of membership requirements inflict a *greater* First Amendment injury than agency fee requirements. An agency fee requirement does not require that an employee be a union member or pay full union dues. It requires that employees pay reduced fees that exclude charges for union activities unrelated to collective bargaining, such as political campaigning. *See Janus*, 138 S. Ct. at 2460-61; Cal. Gov. Code § 3513(k) (Pet.App. 24). California and CSLEA's maintenance of membership requirement compels the Lifeguards and other objecting employees

to remain full union members against their will, which itself violates their associational rights.[4] The requirement also compels the Lifeguards to pay full union dues and subsidize union activities unrelated to collective bargaining. C.A. E.R. 32–33.

This Court recognized decades before *Janus*, in *Abood*, that it violates the First Amendment for government employers and unions to require dissenting employees to pay full union dues. 431 U.S. at 232-37, overruled by *Janus*, 138 S. Ct. at 2486. The Court also has recognized that private sector employees cannot lawfully be compelled to remain dues-paying union members, but have a right to resign their union membership at any time and, at most, can be compelled to pay reduced agency fees. *See Pattern Makers v. NLRB*, 473 U.S. 95, 107 (1985); *CWA v. Beck*, 487 U.S. 735, 745 (1988). Given that a maintenance of membership requirement would not survive judicial review even under *Abood* or in the private sector, the requirement cannot possibly survive heightened constitutional scrutiny under *Janus,* 138 S. Ct. at 2465. The Ninth Circuit's conclusion that this oppressive form of union "organizational security," Cal. Gov. Code § 3515.7(a) (Pet.App. 25), does not violate the First Amendment cannot be squared with *Janus*.

2. The Ninth Circuit tries to brush away *Janus* by claiming "the holding in *Janus* applied to nonunion

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[4] Given that a state infringes on associational rights by compelling expressive organizations to accept individuals as members, *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000), it follows that a state infringes on associational rights by compelling an individual to remain a member of an expressive organization.

members only and because the Lifeguards are union members, *Janus* is inapplicable here." Pet.App. 2. This reasoning is perverse because the State and CSLEA are refusing to honor the Lifeguards' resignations and forcing them to remain union members against their will.

Employees who joined a union in the past have a right under *Janus* to stop subsidizing that union's speech in the future if they choose to become nonmembers. The First Amendment, after all, protects an individual's right to cease supporting expressive activities that he or she no longer wants to support. A state and union violate that right by continuing to seize union payments from employees who provide notice that they no longer consent to union membership or to supporting the union financially.

States and unions cannot strip employees of their First Amendment right under *Janus* to stop subsidizing union speech by prohibiting those employees from resigning their union membership for several years. One constitutional violation does not justify another. Thus, California is not free to violate the Lifeguards' First Amendment right to not subsidize CSLEA's speech because the State also is compelling the Lifeguards to remain CSLEA members in violation of their associational rights. The State compelling these employees to associate with an unwanted union is one reason why its maintenance of membership requirement violates the First Amendment. It is not the requirement's saving grace.

B. The Ninth Circuit's refusal to conduct a waiver analysis contravenes *Janus*.

The Ninth Circuit claims the Lifeguards contractually consented to the State and CSLEA's maintenance of membership requirement by signing dues deduction forms. Pet.App. 3. The claim not only is unfounded, but defies *Janus* because the court applied the wrong legal standard. *Janus* requires that courts use a constitutional-waiver analysis to determine whether employees consent to pay for union speech. 138 S. Ct. at 2486.

1. Foremost, the Lifeguards never agreed to abide by the State and CSLEA's 2019-2023 maintenance of membership requirement. The dues deduction form that some Lifeguards signed years earlier merely states that "[p]er the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member." Pet.App.7. A vague reference to unspecified limitations in "the Unit 7 contract and State law" does not establish the Lifeguards contractually consented to any limit later included in a Unit 7 contract[5] or found in State law.

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[5] Contrary to the Ninth Circuit's conclusion (at PetApp. 4), this language is insufficient to incorporate by reference the Unit 7 contract into the dues deduction form. "In order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms." 11 Williston on Contracts § 30:25 (4th ed.). No such clear evidence exists here because the form does not describe the Unit 7 contract's limit on withdrawal and the Lifeguards were not given a copy of the contract when they signed the form. C.A. E.R. 30. Indeed, the Lifeguards could not have knowingly assented to the State and CSLEA's 2019-2023 mainte-

If anything, that language only confirms that "the Unit 7 contract and State law," and not a term of the dues deductions form, limits the Lifeguards' right to stop associating with CSLEA and funding its speech. The language refutes the Ninth Circuit's contrary conclusion that "a maintenance of membership requirement is not invalidated by the First Amendment because the limitation stems from a private agreement." Pet.App. 4. The limitation stems not from a private agreement, but from the *State's* maintenance of membership agreement with CSLEA (Pet.App. 28) and from the *State* law that authorizes this organizational security requirement (Cal. Gov. Code § 3515.7(a)) (Pet.App. 25).

2. The Ninth Circuit's more significant error was not using a constitutional-waiver analysis to determine if the Lifeguards agreed to this severe limit on their First Amendment rights. The Court held in *Janus* that:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see *also Knox* [v. *SEIU, Loc. 1000*, 567 U.S. 298, 312–13 (2012)]. Rather, to be effective, the waiver must

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nance of membership requirement because they signed dues deduction forms years before that requirement came into being. C.A. E.R. 29–30.

> be freely given and shown by "clear and compelling" evidence. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); see also *Coll. Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S. Ct. at 2486.

The Court's waiver requirement makes sense. Given that employees have a First Amendment right not to pay for union speech, it follows that states must have proof employees waived that right to constitutionally take payments from them for union speech.

The need for a waiver analysis is especially apparent when a state and union *restrict* when employees can exercise their rights under *Janus*. Here, the State and CSLEA claim they can seize union dues from employees who object to being union members—which violates their First Amendment rights under *Janus*—because the employees supposedly consented to a four-year maintenance of membership requirement. This situation necessarily requires an analysis of whether the employees agreed to waive their First Amendment right to stop paying for CSLEA's speech for four years. The Ninth Circuit acted contrary to *Janus* by refusing to conduct this waiver analysis.

3. The lower court's refusal is significant because *Janus*' waiver requirement protects employees from state and union attempts to suppress their rights under the decision. The standard to establish a waiver of constitutional rights is a high one. The Court explained in *Janus* that "a waiver cannot be presumed,"

but "must be freely given and shown by 'clear and compelling' evidence." 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). The Court then cited three precedents holding an effective waiver requires proof of an "'intentional relinquishment or abandonment of a known right or privilege.'" *Coll. Sav. Bank*, 527 U.S. at 682 (quoting *Johnson*, 304 U.S. at 464); *see Curtis Publ'g*, 388 U.S. at 143–45 (applying this standard to an alleged waiver of First Amendment rights). The Court also formulates these criteria as requiring that a waiver be "voluntary, knowing, and intelligently made." *D. H. Overmyer.*, 405 U.S. at 185; *see Fuentes v. Shevin,* 407 U.S. 67, 94–95 (1972) (same). Along with these criteria, a purported waiver is unenforceable as against public policy "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392.

These stringent criteria protect employees from unwittingly surrendering their speech rights under *Janus* and from being subjected to unduly onerous restrictions on those rights. This case is illustrative. If the lower courts had conducted the waiver analysis *Janus* requires, the courts could only have found that the Lifeguards did not waive their First Amendment right to stop subsidizing CSLEA's speech.

There is no clear and compelling evidence the Lifeguards knew of their First Amendment rights under *Janus*, or intelligently chose to waive those rights, when they signed dues deduction forms. C.A. E.R. 31. Indeed, almost all the Lifeguards signed the forms years before *Janus* was decided. They could not have knowingly waived a constitutional right that was not yet recognized. *See Curtis Publ'g*, 388 U.S. at 143–45

(holding that a defendant did not knowingly waive a First Amendment defense because the defense was recognized only after the trial had concluded). Nor could the Lifeguards have voluntarily waived their right to not financially support CSLEA because they were *required* to financially support CSLEA at those times. C.A. E.R. 31.

A maintenance of membership requirement is unenforceable as against public policy in any event. The policy weighing against prohibiting employees from exercising their rights under *Janus* for four years is of the highest order: employees' First Amendment right not to subsidize speech they do not wish to support. *See Janus*, 138 S. Ct. at 2463–64. "[C]ompelled subsidization of private speech seriously impinges on First Amendment rights" and "cannot be casually allowed." *Id*. at 2464. In *Curtis Publishing*, the Court rejected an alleged waiver of First Amendment freedoms, finding that "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." 388 U.S. at 145. There is no countervailing interest in enforcing a four-year maintenance of membership requirement. The Court held in *Knox* that unions have no constitutional entitlement to monies from dissenting employees. 567 U.S. at 313. Union financial self-interests in collecting monies from dissenting employees also do not outweigh employees' First Amendment rights. *Id*. at 321.

The lower courts' refusal to conduct a waiver analysis has allowed the State and union to wrongfully violate the Lifeguards' First Amendment rights for years. The same fate will befall countless other employees if

Janus' waiver requirement is not enforced. The Ninth Circuit's decision that a state and union can seize union dues from dissenting employees, without clear and compelling evidence those employees validly waived their First Amendment rights, conflicts with *Janus* and should be reversed.

C. The Ninth Circuit's state action holding conflicts with this Court's precedents and Seventh Circuit case law.

The Ninth Circuit's holding that "[t]he claims against CSLEA also fail for lack of stat [sic] action under *Belgau,*" Pet App. 4 n.2, conflicts not only with *Janus*, but also Seventh Circuit precedents.

This case involves the same state action as *Janus*: a state and union compelling employees to financially support a union, through state deductions of union payments from their wages, pursuant to a union security agreement. *See* 138 S. Ct. at 2486. The Court's holding that "public sector unions" violate the First Amendment when engaging in this action presupposes that such unions are state actors. *Id*. Indeed, the Court has long held that unions can violate individuals' constitutional rights when working with a state to seize payments from those individuals. *See Harris*, 573 U.S. at 656; *Chi. Teachers Union Loc. No. 1 v. Hudson*, 475 U.S. 292, 310 (1986); *Abood*, 431 U.S. at 235–37.

On remand in *Janus*, the Seventh Circuit explained that it is "sufficient for the union's conduct to amount to state action" if a state agency "deducted fair share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the

collective bargaining agreement." *Janus* II, 942 F.3d at 361. The Seventh Circuit reached a similar conclusion decades earlier, holding:

> when a public employer assists a union in coercing public employees to finance political activities, that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 along with the agency.

Hudson, 743 F.2d at 1191.

The Seventh Circuit's conclusions are consistent with this Court's precedents finding state action when a private party uses an unconstitutional state procedure to seize money or property from another party. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932–34, 941–42 (1982) (discussing *Fuentes,* 407 U.S. 67, and other cases). In *Lugar*, the Court explained that a party is liable for constitutional deprivations under 42 U.S.C. § 1983 if the deprivation was "caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed by the state" and "the party charged with the deprivation . . . [is] a person who may be fairly said to be a state actor." 457 U.S. at at 937. The *Lugar* Court held a statutory procedure permitting a private party to attach disputed property "obviously is the product of state action." *Id.* at 941. The Court further found "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor.'" *Id.*

CSLEA is a state actor under *Lugar* because it works hand-in-glove with the State to seize disputed

property from the Lifeguards. The State's procedure for taking union dues from the wages of employees subject to its maintenance of membership requirement "obviously is the product of state action," *Lugar*, 457 U.S. at 941, because it is authorized by Cal. Gov. Code § 3515.7(b) (Pet.App. 25). CSLEA's "joint participation with state officials in the seizure of disputed property"—here, monies from the Lifeguard's wages—"is sufficient to characterize that party as a 'state actor'" under *Lugar*, 457 U.S. at 941. The Ninth Circuit's decision below conflicts with *Lugar* as well as with *Janus* and Seventh Circuit precedents.

The Court should resolve this conflict because the Ninth Circuit's state-action holding imperils employees' First Amendment rights under *Janus*. The holding frees unions from constitutional constraints when working with governments to seize union dues from dissenting employees. The Ninth Circuit has effectively given unions a free pass to infringe on employees' speech rights without fear of liability under Section 1983.

D. The Ninth Circuit's decision in *Belgau* conflicts with *Janus*.

The Ninth Circuit held its decision in *Belgau* required its holdings here. Pet.App. 4. The proposition that *Belgau* requires courts within the Ninth Circuit to uphold maintenance of membership requirements only shows that *Belgau* itself conflicts with *Janus*.

Belgau did not involve a maintenance of membership requirement. *Belgau* concerned the constitutionality of a state and union enforcing a one-year restriction on when employees could stop state deduc-

tions of union dues that was found only in dues deduction forms the employees signed. 975 F.3d at 945. The Ninth Circuit reasoned, incorrectly, that "the 'source of the alleged constitutional harm' [was] not a state statute or policy but the particular agreement between the union and Employees." *Id*. at 947. The court then concluded that "private dues agreements do not trigger state action and independent constitutional scrutiny." *Id.* at 949. The court also concluded that the state, when deducting union dues from the dissenting employees, did not compel those employees to subsidize union speech in violation of their First Amendment rights. *Id*. at 950-52.

On its own terms, *Belgau* contravenes *Janus*. The decision's premise is flawed because a dues deduction authorization is not a private agreement, as the court supposed, but is an agreement with a *government employer* because it purports to authorize that employer to make payroll deductions. *See Int'l Ass'n of Machinists Dist. Ten v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018) (recognizing that "[a] dues-checkoff authorization is a contract between an employer and employee for payroll deductions" and that "[t]he union itself is not a party to the authorization"). *Belgau's* conclusions are just as flawed. States and unions necessarily compel employees to subsidize union speech in violation of their First Amendment rights when they jointly seize union dues from *nonmembers who object* to those seizures. *See Janus*, 138 S. Ct. at 2486. The existence of a dues deduction authorization does not change that reality or make those unions not state actors. At most, the authorization may be relevant to the question of whether the objecting employees waived

their First Amendment right to stop subsidizing the union.

Belgau's rationales make even less sense when a state and a union subject employees to a maintenance of membership requirement. This requirement arises not from a private agreement, but from a collective bargaining agreement between a state and union. *See* Cal. Gov. Code § 3515.7(a) (Pet.App. 25). Here, the Lifeguards are being compelled to subsidize union speech by California's maintenance of membership agreement with CSLEA. (Pet.App. 28). The Lifeguards' constitutional injuries are directly traceable to a union "organizational security" requirement, Cal. Gov. Code § 3515.7(a) (Pet.App. 25), just as in *Janus*.

The Ninth Circuit's conclusion that maintenance of membership requirements are constitutional under *Belgau* exacerbates the conflict between that case and *Janus*. *Belgau* clearly contravenes *Janus* if it requires upholding an organizational security requirement that is even more offensive to the First Amendment than an agency fee requirement. *Belgau*'s state-action holding also cannot be reconciled with *Janus*, or with Seventh Circuit case law, if unions that are parties to maintenance of membership agreements with states are not state actors under *Belgau*.

This conflict is significant because *Belgau* is binding circuit precedent. In this case and in others, the Ninth Circuit and the district courts below it are holding that *Belgau* requires the courts to uphold restrictions on when employees can stop paying for union speech. For example, on the day this case was decided, the Ninth Circuit also affirmed under *Belgau* a district court decision upholding a four-year restriction on

when an employee could stop payroll deductions of union dues. *O'Callaghan v. Napolitano*, No. 19-56271, 2022 WL 1262135, (9th Cir. Apr. 28, 2022). *Belgau* is undermining employee speech rights under *Janus* and should be overruled.

II. This Case Is a Unique and Suitable Vehicle for Resolving the Questions Presented.

1. This is an ideal case for reviewing both questions presented. The case squarely presents the first question of whether maintenance of membership requirements are constitutional because the State and CSLEA have been subjecting the Lifeguards to a such requirement since September 2019 and will continue to do so until at least July 2023.

The case also squarely presents the second question: whether states and unions, to compel objecting employees to remain union members and financially support union speech, need clear and compelling evidence those employees waived their First Amendment rights. The Ninth Circuit refused to conduct a waiver analysis and instead used a flawed contract law analysis to find the Lifeguards acquiesced to a four year restriction on their right to disassociate with CSLEA and stop paying for its speech. Pet.App. 3.

This case does not have any standing or mootness issues that could complicate the Court's review. There are twenty-one (21) petitioning Lifeguards who were injured by the State and CSLEA's maintenance of membership requirement. This unconstitutional requirement will persist until July 2023 and then likely be followed by a subsequent membership requirement. The Lifeguards' case is filed as a class action on

behalf of similarity situated employees. C.A. E.R. 33. This case is a sound procedural vehicle.

2. This case differs from other post-*Janus* cases in which the Court denied review because it concerns a maintenance of membership requirement. Such a requirement was not at issue in *Belgau* or in two similar appellate decisions, *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), *cert. denied* 142 S. Ct. 424 (2021) and *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), *cert. denied* 142 S. Ct. 423 (2021).[6] *Belgau, Bennett,* and *Hendrickson* concerned restrictions on stopping payroll deductions of union dues found only in dues deduction forms. *Bennett*, 991 F.3d at 728; *Hendrickson*, 992 F.3d at 955. As in *Belgau*, the courts in *Bennett* and *Hendrickson* reasoned that the government did not violate employees' speech rights by enforcing those restrictions because they arose from the employees' private agreement with a union. *See Bennett*, 991 F.3d at 732–33; *Hendrickson*, 992 F.3d at 962, 964.

Whatever the merits of those decisions,[7] the situation here is different because the restriction at issue is *the State's* maintenance of membership requirement. The State is not a disinterested third-party

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[6] A maintenance of membership requirement also was not at issue in petitions arising from summary affirmance orders issued based on those decisions. *See Troesch v. Chi. Teachers Union*, No. 20-1786, 142 S. Ct. 425, *cert. denied* (Nov. 1, 2021); *Woods v. Alaska State Emp. Ass'n*, No. 21-615, 142 S. Ct. 1110, *cert denied* (Feb. 22, 2022).

[7] *Bennett* and *Hendrickson* are wrongly decided for the same reasons *Belgau* is wrongly decided. *See supra* at 23-24.

merely enforcing terms of an ostensibly private contract. The State itself is a party to an organizational security agreement with CSLEA that requires employees to remain dues-paying members of that union until July 2023. Pet.App. 28. This case is unlike any other to have come before the Court since *Janus*.

Other differences also exist between this case and *Belgau*, *Bennett*, and *Hendrickson*. In those cases, the plaintiff employees were not compelled to remain union members but were allowed to resign their membership. *See Belgau*, 975 F.3d at 952; *Bennett*, 991 F.3d at 728; *Hendrickson*, 992 F.3d at 955. The employees also were subject to a one-year restriction on stopping union dues deductions. *See Belgau*, 975 F.3d at 952; *Bennett*, 991 F.3d at 728; *Hendrickson*, 992 F.3d at 955. The State and CSLEA compel the Lifeguards to remain full *union members* and to pay union dues *for four years*. This case involves a far more significant infringement on employees' First Amendment right to not associate with a union and to not subsidize its speech.

The Ninth Circuit disregarded the severity of this infringement by callously stating it could find no "plausible reason why an irrevocability period of one year is constitutionally permissible, but four years would not be." Pet.App. 4-5. The Ninth Circuit failure to understand why it is constitutionally problematic for a state and union to prohibit employees from exercising their First Amendment rights for four years exemplifies why this Court's guidance is required.

III. The Questions Presented Are Exceptionally Important.

A. Maintenance of membership requirements severely infringe on First Amendment speech and associational rights.

1. The first question is important because the Ninth Circuit has sanctioned a union security requirement that inflicts greater First Amendment injuries than the agency fee requirement the Court held unconstitutional in *Janus*. A maintenance of membership requirement compels objecting employees to not only subsidize union expressive activities related to collective bargaining—as agency fee requirements do—but also to remain full union members and to subsidize union expressive activities unrelated to collective bargaining, such as express political advocacy.

This state compulsion violates fundamental speech and associational rights. The Court in *Janus* recognized that, just as "[c]ompelling individuals to mouth support for views they find objectionable violates . . . [a] cardinal constitutional command," 138 S. Ct. at 2463, "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* at 2464. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* (quoting A Bill for Establishing Religious Freedom, 2 *Papers of Thomas Jefferson* 545 (J. Boyd ed. 1950)). The effect of a maintenance of membership requirement is to compel employees who no longer want to contribute money to propagate union speech to continue to do so.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Maintenance of membership requirements deprive employees of their First Amendment freedoms not for minimal periods of time, but for years on end.

The Ninth Circuit's inexplicable failure to find maintenance of membership requirements unconstitutional under *Janus* means the California laws authorizing this onerous form of organizational security remain on the books. Cal. Gov. Code §§ 3513(i), 3515.7(a) (Pet.App. 24-25). Without this Court's intervention, California can and likely will continue to force state employees to remain dues-paying union members for the multi-year terms of collective bargaining agreements. Other states likely will follow suit, such as Pennsylvania, whose laws already authorize maintenance of membership requirements. 43 P.S. § 1101.301(18).

The Court's holding in *Janus* that nonmembers cannot be compelled to subsidize union speech will be undermined if states and unions can force employees to remain dues-paying union members for several years. It is important that the Court take this case to repudiate the Ninth Circuit holding that a "maintenance of membership requirement does not implicate the First Amendment." Pet.App. 5.

B. *Janus*' waiver requirement is a bulwark against restrictions on employees' right to stop subsidizing union speech.

It is equally important that the Court reaffirm that states and unions cannot seize union payments from

dissenting employees unless there is "'clear and compelling' evidence" the employees waived their First Amendment rights. *Janus*, 138 S. Ct. at 2486 (quoting *Curtis Publ'g*, 388 U.S. at 145). This waiver requirement not only makes sense, but is essential to protecting employees from state and union attempts to restrict their right to stop subsidizing union speech.

These restrictions are not limited to maintenance of membership requirements. To resist this Court's holding in *Janus*, a dozen states amended their laws to require government employers to enforce restrictions on when employees can stop payroll deductions of union dues—California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Nevada, New Jersey, New York, Oregon, and Washington. *See supra* at 5.

The Court should not allow states and unions to prohibit employees from exercising their First Amendment rights under *Janus* for time periods unless the employees agreed to waive their rights for those time periods. As discussed, a valid waiver requires clear and compelling evidence the employees voluntarily, knowingly, and intelligently waived their speech rights and that enforcement of that waiver is not against public policy. *See supra* at 18. These criteria ensure that employees who are solicited by unions to surrender their right to stop subsidizing union speech are notified of the First Amendment right they are being asked to waive. *See* La Fetra, Deborah J., *Miranda for Janus: The Government's Obligation to Ensure Informed Waiver of Constitutional Rights*, 55 Loyola L.A. L. Rev. 405 (Spring 2022). That purported waivers are unenforceable if against public policy under *Rumery*, 480 U.S. at 392, will curtail the ability of

states and unions to impose unduly onerous restrictions on employees' rights, such as four-year maintenance of membership requirements.

In contrast, states and unions can easily suppress employee rights under *Janus* if evidence of a waiver is not required. The Ninth Circuit found the State and CSLEA could subject the Lifeguards to a four-year maintenance of membership requirement just because their dues deduction forms included a sentence stating: "[p]er the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member." C.A. E.R. 30. Under this shockingly low standard, states and unions can subject employees to union security requirements just by vaguely referencing the requirement in a dues deduction form. For example, under the decision below, the State and CSLEA could have lawfully compelled employees to pay agency fees for several years notwithstanding *Janus* by simply writing into their dues deduction forms: "[p]er the Unit 7 contract and State law, agency fees must be paid by an employee who withdraws as a member."

First Amendment speech and associational rights deserve far greater protections than this. And the Court provided for such protections in *Janus* with its waiver holding. 138 S. Ct. at 2486. It is important that the Court make clear it meant what it said in *Janus*: that states and unions cannot seize payments for union speech from dissenting employees unless they waive their right not to subsidize that speech. *Id*. Otherwise, states and unions will continue to hamstring the First Amendment right the Court recognized in *Janus*.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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SEPTEMBER 6, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-56045

JONATHAN SAVAS; et al,

Plaintiff-Appellant,

v.

CALIFORNIA STATE LAW ENFORCEMENT AGENCY, A LABOR ORGANIZATION; et al.,

Defendants-Appellees.

MEMORANDUM*

Argued and Submitted February 8, 2022
Portland, Oregon
Filed April 28, 2022

Before: PAEZ and NGUYEN, Circuit Judge, and THUNHEIN**, District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

Plaintiffs-Appellants Jonathan Savas, et al. (the "Lifeguards") appeal the district court's dismissal for failure to state a claim on their 42 U.S.C. § 1983 claims against Defendants-Appellees California Statewide Law Enforcement Agency ("CSLEA" or "union") and Betty Yee and Xavier Becerra in their official capacities (the "State Defendants"). The Lifeguards are union members of CSLEA. They allege that CSLEA and the State Defendants violated their First Amendment rights by enforcing a maintenance of membership requirement that limited the period within which the Lifeguards could resign their union membership. We have jurisdiction under 28 U.S.C. § 1291.

This Court's decision in *Belgau v. Inslee* controls. 975 F.3d 940 (9th Cir. 2020). The Lifeguards, who agreed to become union members, argued that the maintenance of membership requirement, located in the collective bargaining agreement and incorporated into their membership applications, is unconstitutional under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

"Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486. The Lifeguards do not argue that union membership was a requirement of employment and agree that they voluntarily chose to join the union. The district court correctly concluded that the holding in *Janus* applied to nonunion members only and because the Lifeguards are union members, *Janus* is inapplicable here.

The Lifeguards cannot escape this conclusion by arguing they become nonmembers once they make their resignation known to the union. A member of a union continues to be bound by the requirements of their membership application, including their duty to pay dues, even if they decide that they no longer want the benefits of union membership. *See N.L.R.B. v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987) ("A party's duty to perform ... is not excused merely because he decides that he no longer wants the consideration for which he has bargained.").

The Lifeguards have made no serious argument that they were compelled to join the union. Though the Lifeguards had to choose, at the time they joined, between an agency fee and union membership, the Lifeguards still made the affirmative choice to become members. Furthermore, any assertion of compulsion is undermined by the fact that the Lifeguards had the opportunity to resign their membership during the June 2019 opt-out window, after the decision in Janus had rendered agency fees unconstitutional.

As the Court explained in *Belgau*, "[t]he First Amendment does not support [a union member's] right to renege on their promise to join and support the union." *Belgau*, 975 F.3d at 950. The Lifeguards entered into a contract with the union through which they agreed to be bound by certain limitations on when they could resign that membership.[1] The contractual term that bound the Lifeguards to the

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[1] This conclusion presumes that there was a valid contract between the Lifeguards and CSLEA. The district court held that a contract existed between the Lifeguards and the CSLEA via the

maintenance of membership requirement was neither uncertain, indefinite, or ambiguous. The fact that the maintenance of membership requirement appeared in a separate document does not render the term unenforceable. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1269 (9th Cir. 2017) ("Under California law, a contract and a document incorporated by reference into the contract are read together as a single document."). When "legal obligations are self-imposed, state law, not the First Amendment, normally governs." *Belgau*, 975 F.3d at 950 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991)) (cleaned up). Thus, a maintenance of membership requirement is not invalidated by the First Amendment because the limitation stems from a private agreement.[2]

Belgau requires this conclusion. There are no meaningful distinctions between this case and *Belgau* that persuade us a different outcome is warranted. The only potentially relevant difference is that the irrevocability period in *Belgau* was one year whereas here it is four. But the Lifeguards have failed to present any plausible reason why an irrevocability period of one year is constitutionally permissible, but four years

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membership applications. We must accept this finding unless we have a "definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods. of Cal., Inc. v. Const. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993). As the Lifeguards have not provided more than brief allegations that the district court committed clear error, no mistake was committed. Thus, there was a valid contract between the Lifeguards and CSLEA.

[2] The claims against CSLEA also fail for lack of stat action under *Belgau*.

would not be. Thus, we affirm the district court's holding that the Lifeguards have failed to state a plausible claim because the maintenance of membership requirement does not implicate the First Amendment

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 20-cv-00032-DMS-DEB

JONATHAN SAVAS, et al., individually and on behalf of all other similarly situated,

Plaintiffs,

v.

CALIFORNIA STATE LAW ENFORCEMENT AGENCY, a labor organization; BETTY YEE, in her official capacity as State Controller of California; and XAVIER BECERRA, in his official capacity as Attorney General of California,

Defendants.

Filed: September 9, 2020

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Motion for Summary Judgment

DANA M. SABRAW, United States District Judge

Pending before the Court are two separate motions to dismiss Plaintiffs' claims: one filed by Defendant California Statewide Law Enforcement Association ("CSLEA" or "the union"), and one filed by Defendants

Betty Yee and Xavier Becerra (the "State Defendants").[1] Plaintiffs filed an opposition to each motion, and CSLEA and the State Defendants each filed a reply brief. For the following reasons, the Court grants Defendants' motions to dismiss.

I.

BACKGROUND

Plaintiffs are lifeguards employed by the California Department of Parks and Recreation. (First Amended Complaint ("FAC") ¶ 35). CSLEA represents Plaintiffs exclusively in collective bargaining. (*Id.* ¶ 36). Plaintiffs joined CSLEA by signing a membership application. (*Id.* ¶ 41). CSLEA's membership application, in relevant part, authorized dues deductions from employees' wages and stated there are limitations on the time period in which an employee can withdraw as a member of the union. Specifically, it read: "I elect to become a member of CSLEA and the applicable affiliate organization for my classification and department. I hereby authorize deduction from my salary of CSLEA/Affiliate dues. [...] Per the Unit 7 contract and State law, there are limitations on the time period for withdrawal from membership." (Ex. 2 to FAC). Plaintiffs allege they were not provided with a copy of the "Unit 7" contract, nor were they directed to where they could find that contract. (FAC ¶ 43). Nevertheless, Plaintiffs signed membership applications and became members of the union. (*Id.* ¶ 41).

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[1] On the docket, Defendant is listed as "California State Law Enforcement Agency," but refers to itself in its motion as "California Statewide Law Enforcement Association." (CSLEA's Mot. at 1).

Plaintiffs allege that if a lifeguard did not sign the membership application, they were required to pay "an automatic fee greater than or equal to the amount of full union dues." (*Id.* ¶ 49). In 2018, this type of agency fee scheme was struck down in *Janus v. AFSCME, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018), in which the Supreme Court held that the deduction of union dues or "fair-share" agency fees from nonmembers of a union violated the nonmember employees' First Amendment rights, absent affirmative consent. 138 S. Ct. at 2486. Following the decision in *Janus*, California's Public Employment Relations Board, the agency which administers collective bargaining agreements for public employees, determined that it would no longer enforce any statutory or regulatory provision requiring nonmembers to pay agency fees. (Ex. A to State Defs.' Mot. at 2).

In the summer of 2019, Plaintiffs decided to leave the union. (FAC ¶ 53). They inquired about dropping membership in July 2019 and later submitted membership resignations via certified mail in or around September 2019. (*Id.* ¶¶ 54–56). In October 2019, Plaintiffs received a reply from CSLEA Membership Coordinator Kara Gapke stating she would not approve Plaintiffs' resignations because "the window [had] closed." (*Id.* ¶ 57).

The "window" referred to the time period during which union members could resign their membership, as detailed in a memorandum of understanding ("MOU") between CSLEA and the State. (*Id.* ¶ 58). The current MOU was finalized in July 2019 and expires July 1, 2023. (*Id.*). The MOU contains an organizational security provision, Article 3.1(A)(1), which

requires union members to pay dues for the duration of the bargaining agreement:

A written authorization for CSLEA dues deductions in effect on the effective date of this Contract or thereafter submitted shall continue in full force and effect during the life of this Contract; provided, however, that any employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract. (FAC ¶¶ 59–60).

Cal. Gov. Code § 3515.7(a) provides that unions may enter into an organizational security arrangement with the State in the form of "maintenance of membership." Under Cal. Gov. Code § 3513(i), "maintenance of membership" means that all state employees who voluntarily become members of a union shall remain members for a period agreed to in the MOU. The provision does not apply to any employee who withdraws from the union by submitting a signed letter within thirty days prior to the expiration of the collective bargaining agreement. *Id.*

State law further sets out the process by which union dues are deducted from members' wages. Cal. Gov. Code § 3515.7(b) authorizes the State to remit funds deducted from employee wages to the unions. Under § 1152, employee organizations may request that the State deduct membership dues and other fees from union members' wages, and the State Controller processes such deduction requests pursuant to the procedures set forth in § 1153. Plaintiffs allege that they have revoked the authority to deduct dues from their wages and object to union membership, but that union

dues continue to be deducted from their wages. (FAC ¶ 63).

On January 6, 2020, Plaintiffs filed the present case against CSLEA, Betty Yee in her official capacity as State Controller, and Xavier Becerra in his official capacity as Attorney General. Plaintiffs filed a First Amended Complaint on May 15, 2020. Plaintiffs allege, individually and on behalf of all putative class members, that Defendants violated Plaintiffs' First Amendment rights by: (1) refusing to accept Plaintiffs' resignation from union membership, (2) continuing to deduct union dues from Plaintiffs' paychecks, and (3) compelling Plaintiffs to join the union by threat of a fee. Plaintiffs also assert two state law claims against CSLEA, alleging that CSLEA committed the tort of fraudulent concealment and that CSLEA's membership applications are void for unconscionability. Plaintiffs seek declaratory and injunctive relief, nominal damages, compensatory damages, punitive damages, restitution, and attorneys' fees and costs. The present motions followed.

II.
LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material factual allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). A court, however, need not accept all conclusory allegations as true. Rather, it

must "examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff." *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation omitted). A motion to dismiss should be granted if a plaintiff's complaint fails to contain "enough facts to state a claim to relief that is plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).

III.

DISCUSSION

A. Plaintiffs' First Amendment Claims

Plaintiffs' first three causes of action are premised on violations of their First Amendment rights. They assert that the statutes relating to union membership and dues deductions are unconstitutional and that Defendants violated their First Amendment rights as secured by the Fourth Amendment and 42 U.S.C. § 1983. CSLEA argues that *Janus* is inapplicable to union members like Plaintiffs, and that the First Amendment does not invalidate Plaintiffs' contractual commitments. The State Defendants argue that State Controller Yee enjoys Eleventh Amendment immunity; that Plaintiffs lack standing; that Plaintiffs' constitutional challenges fail because Plaintiffs consented to union membership and dues deductions; and that Plaintiffs' third cause of action fails to plead sufficient facts.

To state a claim under § 1983, a plaintiff must allege (1) the violation of a right secured by the Constitution and laws of the United States, and (2) that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). "Dismissal of a § 1983 claim following a Rule 12(b)(6) motion is proper if the complaint is devoid of factual allegations that give rise to a plausible inference of either element." *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015).

1. Claims Against CSLEA

Plaintiffs' § 1983 claims against CSLEA are based on the assertion that CSLEA violated Plaintiffs' First Amendment rights. Plaintiffs claim (1) they have a right to resign union membership, which is violated by Defendants' enforcement of the "maintenance of membership" policy; (2) the continued deduction of dues from their wages violates their First Amendment right to be free from compelled speech because they did not affirmatively waive their right to not fund union advocacy, and (3) they were unconstitutionally compelled to join CSLEA because had they declined membership, they would still have been required to pay agency fees. However, Plaintiffs do not adequately plead valid claims, because by signing CSLEA membership applications, they affirmatively consented to union membership, including limitations on withdrawal and dues deductions. The holding in *Janus* does not apply to such voluntary agreements.

Relying on *Janus*, Plaintiffs contend that restricting their ability to resign union membership and continuing to deduct dues from their wages violates the First Amendment. In *Janus*, the Supreme Court concluded

that a state could not require the payment of fees from public employees who declined to join a union, because such an arrangement compelled nonmembers to subsidize private speech in violation of the First Amendment. 138 S. Ct. at 2460. It held that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id*. at 2486 (emphasis added).

Janus is inapplicable to Plaintiffs' situation, because Plaintiffs are union members, unlike the nonmembers at issue in *Janus*. Plaintiffs argue that the deduction of dues from any nonconsenting public employee is a First Amendment violation. (Pls.' Opp'n to CSLEA's Mot. 5–6). Plaintiffs do not cite to any case that extends the holding of Janus to union members. *Cf. Belgau v. Inslee*, No. 18-5620 RJB, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) ("*Janus* says nothing about people [who] join a Union, agree to pay dues, and then later change their mind about paying union dues.").

Moreover, despite Plaintiffs' contention that they did not waive their constitutional right to not fund union advocacy (FAC ¶¶ 81–82), Plaintiffs consented to the terms of union membership. When Plaintiffs became members of CSLEA, they signed a membership application that explicitly authorized dues deductions and stated that there were limitations on the time period for withdrawal. (FAC ¶¶ 40–41; Ex. 2 to FAC).

The membership application is a contract between Plaintiffs and CSLEA. "[T]he First Amendment does

not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law[.]" *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991). The Ninth Circuit recently held, in an unpublished decision, that the continued deduction of union dues in accordance with the provisions of a signed membership agreement did not violate plaintiffs' First Amendment rights. *See Fisk v. Inslee*, 759 F. App'x 632, 633–34 (9th Cir. 2019) ("[T]he First Amendment does not preclude the enforcement of 'legal obligations' that are bargained-for and 'self-imposed' under state contract law.") (quoting *Cohen*, 501 U.S. at 668–71, 111 S.Ct. 2513).

The Court joins the numerous others that have held *Janus* inapplicable in circumstances where employees voluntarily join a union and authorize the deduction of dues. *See Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F. Supp. 3d 1108, 1118 (S.D. Cal. 2020) ("Plaintiffs have not cited to, and the Court has been unable to find on its own, any case that has broadened the scope of Janus to apply Plaintiffs' waiver requirement argument when employees voluntarily agree to become members of the union and authorize the deduction of union dues."); *O'Callaghan v. Regents of the Univ. of California*, No. CV 19-02289-JVS, 2019 WL 2635585, at *3–4 (C.D. Cal. June 10, 2019) ("[N]othing in Janus's holding requires unions to cease deductions for individuals who have affirmatively chosen to become union members and accept the terms of a contract that may limit their ability to revoke authorized dues-deductions in exchange for union membership rights ... merely because they later decide to resign membership."); *Mendez v. California*

Teachers Ass'n, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020) (*Janus* does not preclude enforcement of union membership and dues deduction authorization agreements where employees voluntarily join union) (citing cases); *see also Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1024 (D.N.M. 2020) ("[E]ach court that has examined this issue has rejected the claim that *Janus* entitles union members to resign and stop paying dues on their own—rather than on the contract's—terms.") (citing cases).

The recent decision in *Cooley v. California Statewide Law Enforcement Ass'n* is instructive here. 385 F. Supp. 3d 1077 (E.D. Cal. 2019). In *Cooley*, the plaintiff alleged that CSLEA violated his constitutional rights by refusing to accept his resignation from union membership and continuing to deduct union fees from his wages. Id. at 1078. The membership application that the plaintiff signed in *Cooley* contained the same provisions regarding withdrawal and dues deductions as the one Plaintiffs signed here. *See Cooley v. California Statewide Law Enf't Ass'n*, No. 2:18-CV-02961-JAM-AC, 2019 WL 331170, at *3 (E.D. Cal. Jan. 25, 2019). The court found that CSLEA was contractually authorized to continue deducting dues from plaintiff's wages, and that "*Janus* did not explicitly announce the right of resignation [Plaintiff] seeks to enforce." *Cooley*, 385 F. Supp. 3d at 1079; *see also Campos v. Fresno Deputy Sheriff's Ass'n*, 441 F. Supp. 3d 945, 957 (E.D. Cal. 2020) ("*Janus* does not recognize a right for union members to unilaterally drop their membership and stop paying dues."). For the same reasons, Plaintiffs here do not adequately state a claim.

Next, Plaintiffs contend that they were unconstitutionally compelled to join CSLEA, because under the

organizational security arrangement between CSLEA and the State, pursuant to Cal. Gov. Code §§ 3515.6, 3515.7(a)(b), 1152, 1153, and MOU Art. 3.1(a), employees who declined union membership were still required to pay a fee. This agency fee scheme that Plaintiffs challenge is no longer enforced in the wake of *Janus*. (See supra; Ex. A to State Defs.' Mot. at 2). This claim likewise fails.

The fact that the relevant statutes permitted deductions from union nonmembers prior to *Janus* does not mean that Plaintiffs' membership was compelled. At the time Plaintiffs made the choice to join the union, Plaintiffs' right to opt out of union membership was well-established. Under California law, public employees like Plaintiffs are guaranteed the "free choice of joining the union" or "refraining from participation in any union." *Cumero v. Pub. Employment Relations Bd.*, 49 Cal. 3d 575, 601, 262 Cal.Rptr. 46, 778 P.2d 174, 190 (1989). At all times, Plaintiffs could have chosen not to sign the membership application pursuant to their First Amendment right to decline to join a union. Nevertheless, Plaintiffs signed the membership application and thereby agreed to its terms. Plaintiffs "voluntarily chose to pay membership dues in exchange for certain benefits, and the fact that plaintiffs would not have opted to pay union membership fees if Janus had been the law at the time of their decision does not mean their decision was therefore coerced." *Babb v. California Teachers Ass'n*, 378 F. Supp. 3d 857, 877 (C.D. Cal. 2019) (internal citation and quotation marks omitted). *Janus* does not change the fact that a person has the right to contract away their First Amendment protections, as Plaintiffs did here. *See Cooley*, 385 F. Supp. 3d at 1080 ("[A]n intervening

change in law does not taint that consent or invalidate [the] contractual agreement."). Plaintiffs dispute that they voluntarily consented to the terms of union membership, but to the extent that Plaintiffs argue their signed membership applications are not valid contracts, that is a state law issue.

Plaintiffs fail to allege any violation of their First Amendment rights because Janus is inapplicable to union members like Plaintiffs, who agreed to become dues-paying members of CSLEA and agreed to restrictions on when they could withdraw from union membership. Plaintiffs thus fail to adequately plead their claims against CSLEA.

2. Claims Against State Defendants

Plaintiffs challenge Cal. Gov. Code §§ 1152, 1153, 3513(i), 3515.6, 3515.7(a), 3515.7(b), and MOU Art. 3.1(A)(1) as unconstitutional, asserting that the statutes and MOU compel their union membership and compel the State to deduct union dues from Plaintiffs' wages, and thereby violate the First Amendment. Even assuming Plaintiffs' claims against the State Defendants are justiciable, their constitutional challenges fail because Plaintiffs agreed to join the union.

Under Cal. Gov. Code § 3515.7, unions may enter into "maintenance of membership" organizational security arrangements with the State. "Maintenance of membership" applies to "all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization." Cal. Gov. Code § 3513(i). Cal. Gov. Code § 3515.6 provides that employee organizations have the right to have membership dues deducted pursuant to sections 1152 and

1153. Deduction of membership dues "may be requested by employee organizations" and the State employer "shall honor these requests." § 1152. The Controller then provides for the administration of payroll deductions: after the Controller receives notification from an employee organization that it possesses a written authorization for deduction, the Controller shall commence deductions at the request of the employee organization. § 1153(a),(g). Art. 3.1(A)(1) of the MOU provides that union members' written authorization for dues deductions shall continue for the duration of the bargaining agreement. (FAC ¶¶ 59–60).

The statutes and the MOU do not compel involuntary membership or deductions. Plaintiffs' purported injuries arise out of their decision to become union members. California law does not compel employees to enter into union membership; at all times, Plaintiffs had a right to not join a union. *See* Cal. Gov. Code § 3515. As discussed above, Plaintiffs made a choice to join CSLEA when they signed their membership applications. Employees who "*voluntarily* become members of a union," as Plaintiffs did here, are required to remain members for the duration of the bargaining agreement, with a limited window in which they may withdraw. *See* Cal. Gov. Code § 3513(i) (emphasis added). The State deducts dues from Plaintiffs' wages at the request of the union, pursuant to Plaintiffs' signed membership applications which authorized such deductions. As in *Cooley*, Plaintiffs' constitutional argument "hinges on a finding that [Plaintiffs] ha[ve] a First Amendment right to immediately resign union membership and cease paying dues. But, as discussed above, *Janus* did not announce such a right and no such right exist[s] here." *Cooley*, 385 F. Supp.

3d at 1081 (dismissing constitutional challenge to §§ 1152, 1153). Plaintiffs were not compelled by state law to join CSLEA, to authorize dues deductions, or to agree to the limited window in which to resign. Rather, they agreed to do so, and the intervening change in law announced by *Janus* did not invalidate the contracts into which Plaintiffs freely entered. *See supra.*

Plaintiffs' contentions that they did not voluntarily consent to the terms of the membership agreements, or that their membership agreements are otherwise invalid contracts, are no basis for challenging the constitutionality of the statutes. Any contract dispute would be between Plaintiffs and the union. *See Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1017 (W.D. Wash. 2019) ("To the extent that the Plaintiffs now argue that the membership agreement was not supported by consideration ... or make some other assertion of validity based on contract law, they make no showing that the State Defendants are now liable under the First Amendment for those alleged failings."); *Mendez*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020) ("To the extent plaintiffs allege that the Union defendants misinformed them about their legal obligations to join the union or pay membership dues, their claims would be against the Union defendants under state law."). The State is not a party to the membership agreement between CSLEA and Plaintiffs, and Plaintiffs "cannot now invoke the First Amendment to wriggle out of [their] contractual duties." *See Smith v. Superior Court, County of Contra Costa*, No. 18-cv-05472-VC, 2018 WL 6072806 at *1 (N.D. Cal. Nov. 16, 2018). Plaintiffs' First Amendment claims against the State Defendants are therefore dismissed.

3. Conclusion

Plaintiffs' First Amendment claims are premised on the assertion that Plaintiffs have the right to resign union membership and end the deductions of union dues whenever they so choose. However, as discussed above, courts overwhelmingly agree that *Janus* does not recognize such rights. Just as in *Cooley*, Plaintiffs' suit "rises and falls with [their] claims of constitutional rights violations under *Janus*." 385 F. Supp. 3d at 1082. Because Plaintiffs are unable to establish any theory under which relief can be granted based on a violation of their First Amendment rights, Plaintiffs fail to state plausible claims. *See id*. Accordingly, Plaintiffs' First Amendment claims are dismissed.

B. State Law Claims

Plaintiffs' fourth and fifth causes of action are state law tort and contract claims against CSLEA. The Court may "decline to exercise supplemental jurisdiction" over a state law claim if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c); Sanford v. MemberWorks, Inc., 625 F.3d 550, 561 (9th Cir. 2010) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine ... will point toward declining to exercise jurisdiction over the remaining state-law claims."). The Court therefore declines to exercise jurisdiction over Plaintiffs' state law claims.

IV.

CONCLUSION AND ORDER

For the reasons set out above, Defendants' motions to dismiss Plaintiffs' FAC are GRANTED. Counts 1,

2, and 3 are dismissed with prejudice. Counts 4 and 5 are dismissed without prejudice.

IT IS SO ORDERED.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-56045

JONATHAN SAVAS; et al,

Plaintiff-Appellant,

v.

CALIFORNIA STATE LAW ENFORCEMENT AGENCY, A LABOR ORGANIZATION; et al.,

Defendants-Appellees.

ORDER

Filed June 8, 2022

Before: PAEZ and NGUYEN, Circuit Judge, and THUNHEIN*, District Judge.

Judge Nguyen has voted to deny the petition for rehearing en banc, and Judge Paez and Judge Tunheim have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en

* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

banc. See Fed. R. App. P. 35. The petition for rehearing en banc is denied.

Appendix D

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Cal. Gov't Code §§ 3513(i), 3513(k)

As used in this chapter:

* * *

(i) "Maintenance of membership" means that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization shall remain members of that employee organization in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding, commencing with the effective date of the memorandum of understanding. A maintenance of membership provision shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the employee organization by sending a signed withdrawal letter to the employee organization and a copy to the Controller's office.

* * *

(k) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a

member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

Cal. Gov't Code § 3515.7

(a) Once an employee organization is recognized as the exclusive representative of an appropriate unit it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction.

(b) The state employer shall furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization along with an adequate itemized record of the deductions, including, if required by the recognized employee organization, machine readable data. Fair share fee deductions shall continue until the effective date of a successor agreement or implementation of the state's last, best, and final offer, whichever occurs first. The Controller shall retain, from the fair share fee deduction, an amount equal to the cost of administering this section. The state em-

ployer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

(c) Notwithstanding subdivision (b), any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to financially support the recognized employee organization. That employee, in lieu of a membership fee or a fair share fee deduction, shall instruct the employer to deduct and pay sums equal to the fair share fee to a nonreligious, nonlabor organization, charitable fund approved by the Department of General Services for receipt of charitable contributions by payroll deductions.

(d) A fair share fee provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for the vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit; (2) the vote is by secret ballot; and (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during the term. If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote in a manner that it shall prescribe. Notwithstanding this subdivision, the state employer and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on a fair share fee provision.

(e) Every recognized employee organization that has agreed to a fair share fee provision shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees in the unit, within 90 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee in the unit may petition the board for an order compelling this compliance, or the board may issue a compliance order on its own motion.

(f) If an employee who holds conscientious objections pursuant to subdivision (c) requests individual representation in a grievance, arbitration, or administrative hearing from the recognized employee organization, the recognized employee organization is authorized to charge the employee for the reasonable cost of the representation.

(g) An employee who pays a fair share fee shall be entitled to fair and impartial representation by the recognized employee organization. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

Appendix E

Agreement between the State of California and CSLEA, effective July 2, 2019 through July 1, 2023, Article 3.1 Union Security

A. The State agrees to deduct and transmit to CSLEA all membership dues authorized on a form provided by the Union. The State and CSLEA agree that a system of authorized dues deductions shall be operated in accordance with Government Code sections 3513(h), 3513(j), 3515, 3515.6, 3515.7, and 3515.8, subject to the following provisions:

1. A written authorization for CSLEA dues deductions in effect on the effective date of this Contract or thereafter submitted shall continue in full force and effect during the life of this Contract; provided, however, that any employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract.

2. The amount of membership dues and other lawful deductions shall be set by CSLEA and changed by the State upon written notice from CSLEA. CSLEA agrees to notice all affected employees any time there is a change in membership dues or other deductions.

3. CSLEA agrees to indemnify, defend and hold the State harmless against any claims made of any nature and against any suit instituted against the State arising from its check-off for CSLEA deductions. CSLEA further agrees that the State employer shall not be liable in any action brought by a State employee seeking recovery of, or damages for, improper use or calculation of Fair Share fees and

CSLEA agrees to hold the State employer harmless for any such action. Under no circumstances is membership in CSLEA or payment of CSLEA Fair Share fees a condition of State employment for employees covered by this Contract.

4. CSLEA agrees to fulfill the administrative requirements of the State Controller's Office in conjunction with this provision, and to pay administrative costs incurred by the State Controller, consistent with the provisions of Government Code 1153, section D, provided however, that any increase in such costs shall be applied to CSLEA on a basis consistent with their applications to other recognized bargaining agents.

5. No provisions of this Article nor any disputes arising thereunder shall be subject to the grievance and arbitration procedure contained in this Contract.