Deborah J. La Fetra, Cal. Bar No. 148875
dlafetra@pacificlegal.org
Timothy R. Snowball, Cal. Bar No. 317379
tsnowball@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Phone: (916) 419-7111

Jeffrey M. Schwab (Pro Hac Vice)
jschwab@libertyjusticecenter.org
James J. McQuaid (Pro Hac Vice Application Pending)
jmcquaid@libertyjusticecenter.org
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668

Attorneys for Plaintiffs,
Michael Jackson and Tory Smith

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL JACKSON, et al., Plaintiffs, v. JANET NAPOLITANO, et al., Defendants.	3:19-cv-1427-LAB-AHG **PLAINTIFFS' COMBINED OPPOSITION TO MOTIONS TO DISMISS [ORAL ARGUMENT REQUESTED]** Honorable Larry A. Burns

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Other Authorities

INTRODUCTION

In *Janus v. AFSCME, Council 31*, the Supreme Court held that employees cannot be forced to fund the inherently political activities of public unions, 138 S. Ct. 2448, 2475–77 (2018), unless the employees affirmatively provide knowing, voluntary, and informed consent by waiving their First Amendment right to refrain from subsidizing unions against their will. *Id.* at 2486. This waiver cannot be presumed by employers, but must be confirmed as freely given through clear and compelling evidence. *Id.*

Michael Jackson and Tory Smith (Plaintiffs) are public employees at the University of California-San Diego (the University) who choose not to waive their First Amendment rights. ECF 1 at ¶¶ 30, 47. Instead, they are actively seeking to enforce their First Amendment rights to free speech and association by ending the collection of union dues to which they did not—and do not—consent. *Id.* But their attempts were rebuffed by both Teamsters Local 2010 and the University, which, pursuant to the SB 866 Gag Rule statutes, ECF 1, Exh. A, simply referred them to the union. *Id.* at ¶¶ 29, 57–60, 64. Beyond refusing their requests, these statutes prohibit their employer, the University, from providing employees with any information about the *Janus* case or their First Amendment rights related to the payment of union dues. *Id.* at ¶¶ 34, 50. The laws require Plaintiffs to communicate solely with Teamsters Local 2010, which informed them that they were locked into paying dues according to an agreement signed before *Janus* was decided. *Id.* at ¶¶ 31, 48.

To vindicate their First Amendment rights, Plaintiffs filed a federal civil rights lawsuit pursuant to 42 U.S.C. § 1983. As clearly stated in the complaint, ECF 1 at 18, the suit challenges the constitutionality of Cal. Gov't Code sections 1157.12, 3513(i), 3515, 3515.5, and 3583 (dues deduction and Gag Rule statutes). The complaint alleges five separate counts and related injuries: Count I alleges that Defendants are violating Plaintiffs' rights under the First Amendment by requiring

Plaintiffs to make financial contributions in support of Local 2010, a politically active organization, without their affirmative consent. ECF 1 at ¶¶ 70–84. Counts II and III allege that Defendants unconstitutionally burden Plaintiffs' First Amendment rights by failing to provide information necessary to choose whether or not to effect a waiver. ECF 1 at ¶¶ 85–113. Count IV alleges that Defendants are depriving Plaintiffs of protected liberty and property interests without proper procedural due process protections. ECF 1 at ¶¶ 114–133. Finally, Count V alleges that the Gag Rule statutes' requirement that Plaintiffs communicate with a third party with a direct pecuniary interest in taking Plaintiffs' money violates their right to substantive due process. ECF 1 at ¶¶ 134–151. Plaintiffs seek relief in the form of the return of unconstitutionally collected dues from Local 2010, declaratory and injunctive relief finding the practice of withholding dues from Plaintiffs' paychecks without affirmative consent is unconstitutional, and declaratory and injunctive relief against the implementation and enforcement of the Gag Rule statutes. ECF 1 at 18–19.

For the reasons set forth below, Plaintiffs' complaint states facts sufficient to overcome the Defendants' motions to dismiss. The motions should be denied.

STATEMENT OF FACTS

Plaintiffs are employees of the University of California-San Diego. ECF 1 at ¶¶ 3–4, 21, 41. When they both began at the University, neither was informed that they had a right to refuse membership in Local 2010. *Id.* at ¶¶ 23, 43. Instead, union membership was presented as a condition of employment. *Id.* at ¶¶ 24, 44. Pursuant to the Gag Rule statutes, when the *Janus* case was decided the University did not inform Plaintiffs about the decision, or its effect on their payment of union dues. *Id.* at ¶ 26, 34, 46.

The Gag Rule statutes prevent the University and all other public employers in California from communicating or giving any information to their employees regarding their First Amendment rights as they relate to union dues. *Id.* at ¶ 92. Pursuant to these statutes, the University adopted and implemented a policy of

refusing to engage in any discussion whatsoever with its employees about union membership or union dues. *Id*. at ¶ 57. Instead of confirming for themselves whether individuals like Plaintiffs waived their First Amendment rights as required by *Janus*, employers like the University are forced to rely on union representations to determine which employees have authorized dues deductions. *Id.* at ¶ 18.

Neither the University nor Local 2010 has ever advised Plaintiffs their First Amendment rights or the consequences of waiving them. *Id.* at ¶¶ 57–69. When Plaintiffs happened to hear about the *Janus* decision on the radio and television news long after the fact, *id.* at ¶¶ 26, 46, they tried repeatedly to exercise their constitutional right to cease contributing to Local 2010 against their will. Plaintiff Jackson approached a human resources official at the University directly, but the official refused to speak with him because of the Gag Rule statutes, *id.* at ¶ 28. He was instead directed to speak to Local 2010. *Id.* at ¶ 29. Local 2010 has a direct financial stake in Plaintiffs' continued payments, and a direct financial incentive not to provide such information. *Id.* at ¶¶ 138–142.

When Jackson sent a letter to Local 2010 stating that he did not consent to the continued deductions, he was told that he was bound by a membership application presented to him *before Janus was decided*. *Id.* at ¶¶ 30–31. Finally, Jackson attempted to end the unconstitutional deductions by reaching out to the University directly in another letter. *Id.* at ¶ 33. The University responded that because of the Gag Rule statutes, they were unable to communicate with him. *Id.* ¶ 34. Plaintiff Smith's experience was substantively similar, *id.* at ¶¶ 46–53, except in Smith's case the University made no response at all, *id.* at ¶¶ 49–50. Although Jackson and Smith currently are not union members[1] and do not consent to the payment of union dues, Local 2010 refuses to instruct the Controller, Defendant Yee, to cease deducting union dues from Jackson's and Smith's paychecks. *Id*. at ¶¶ 35–37, 51–53. Pursuant

[1] Jackson alleged that Local 2010 rejected his resignation, ECF 1 at ¶ 35, but Local 2010 states that it accepted it. ECF 9 at 8:10–11.

to state law, without permission from the Union, Yee will not cease the deductions. *Id.* at ¶¶ 40, 56.

LEGAL STANDARDS

Dismissal is warranted under Rule 12(b)(1) for lack of federal jurisdiction only "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682–683 (1946); *Grancare, LLC v. Thrower by and through Mills*, 899 F.3d 543, 549 (9th Cir. 2018). Under Rule 12(b)(6), "[g]enerally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Plaintiffs are required only to give a "short and plain statement" of their claims in the complaint. Fed. R. Civ. P. 8(a). When reviewing the sufficiency of a complaint, a court's task "is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Hydrick v. Hunter*, 466 F.3d 676, 686 (9th Cir. 2006). Any assumptions of factual truth must favor the plaintiffs on a motion to dismiss, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), the court must draw all reasonable inferences in favor of the plaintiffs, *Maya v. Centex Corp*., 658 F.3d 1060, 1067–68 (9th Cir. 2011), and plaintiffs' legal theories need only be "plausible." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

ARGUMENT

I. CONSTITUTIONAL CLAIMS BELONG IN FEDERAL COURT

A. Plaintiffs Have Standing

To establish Article III standing, a plaintiff must demonstrate that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). On a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct" are

sufficient, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), as the court will "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990). An injury in fact, as an element of Article III standing, must constitute an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560.

Plaintiffs allege five concrete and particularized injuries, none of which are conjectural or hypothetical.

First, Plaintiffs continue to have union dues deducted from their paychecks each month without their affirmative consent, in violation of their First Amendment rights of free speech and free association. ECF 1 at ¶¶ 38–40, 54–56. Second, because of the Gag Rule statutes, Plaintiffs did not receive information from their employer about the nature and consequences of waiving their First Amendment rights as recognized by *Janus* necessary to make a meaningful decision whether or not to consent to waiver. *Id*. at ¶¶ 57–60, 64–67, 69. Third, and relatedly, the Gag Rule statutes operate as an unconstitutional burden on Plaintiffs' ability to exercise those rights, leaving them at the mercy of Local 2010 (which provides no information, *id.* at ¶¶ 61–63, 68, as it has no incentive to do so) or mere happenstance to acquire this necessary information. *Id*. at ¶¶ 26, 46. Fourth, Plaintiffs' Fourteenth Amendment right to procedural due process is violated each month when their employer deducts union dues from their paychecks (*id.* at ¶¶ 37, 53) and transmits them to a political organization (Local 2010) without *any* opportunity to contest the deprivation. *Id.* at ¶¶ 40, 56. Finally, the Gag Rule statutes impede Plaintiffs' substantive right to exercise their First Amendment right to stop funding Local 2010 without suffering the conflict of interest imposed by designating Local 2010 as the sole point of contact. *Id*. at ¶¶ 142–146.

Each of these five injuries is directly traceable to one or more Defendants. Defendant Napolitano oversees Plaintiffs' employer, the University of California-

San Diego, which continues to deduct union dues from Plaintiffs' paychecks without their affirmative consent, and despite repeated attempts to end the deductions. *See id.* at ¶¶ 28–29. Pursuant to the Gag Rule statutes, the University also refused to provide to Plaintiffs the necessary information and opportunity to exercise their First Amendment right to refrain from financially supporting Local 2010. *Id.* at ¶¶ 5, 18–20, 57–60. As the California Attorney General, Defendant Becerra enforces the challenged statutes that limit Plaintiffs' ability to revoke their dues deduction authorizations to a specific window period without affirmative consent, prevent Plaintiffs from receiving information needed to exercise their First Amendment rights, place unconstitutional burdens on their ability to exercise those rights, and deny Plaintiffs the substantive and procedural due process to which they are entitled. Cal. Const. art. V, § 13; ECF 1 at ¶ 7. Defendant Yee, California's Controller, is responsible for disbursing Plaintiffs' paychecks, from which union dues continue to be unconstitutionally deducted. Cal. Const. art. XVI, § 7; ECF 1 at ¶ 8, 40, 56. Defendant Local 2010 refuses to honor Plaintiffs' assertions that they do not consent to the continued dues deductions, and despite these protestations continues to certify to the University that Plaintiffs have rendered affirmative consent. ECF 1 at ¶¶ 6, 35–37.[2] As a result, Local 2010 continues to benefit from the money deducted each month from Plaintiffs' paychecks.

Each of these injuries will be redressed if this Court grants Plaintiffs the declaratory and prospective injunctive relief they seek from the state Defendants, *id.* at 18–19 ¶¶ (a)–(d), (f), (h)–(j), and the monetary relief sought from Local 2010. *Id.* at 18–19 ¶¶ (e), (g). Plaintiffs have Article III standing.

[2] Even if Local 2010 were to reverse course and honor Plaintiffs' invocation of rights, including returning previously taken dues, Plaintiffs would retain their standing to challenge the deductions and the lawsuit would not be moot. *See Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 307 (2012); *Fisk v. Inslee*, 759 Fed. App'x 632, 633 (9th Cir. 2019).

B. Withholding Fees from Plaintiffs' Paychecks and Enforcement of the Gag Rule Statutes Involves State Action

The key connection between the state and the union establishing state action on behalf of the union is that *but for state law*, (Cal. Gov't Code sections 1157.12, 3513(i), 3515, 3515.5, and 3583), Local 2010 would have no entitlement to any portion of Plaintiffs' wages whatsoever. *Davenport v. Wash. Ed. Ass'n*, 551 U.S. 177, 187 (2007). State labor laws establish the conditions governing "the union's extraordinary *state* entitlement to acquire and spend *other people's money*." *Id*. *See also Smith v. United Transp. Union Local No. 81*, 594 F. Supp. 96, 99 (S.D. Cal. 1984) ("The state action in the instant case is the law, implemented by the Union and the Transit District, which allows the Union to operate an agency shop and thus compel non-members to finance Union political expression."); *Lutz v. Int'l Ass'n of Machinists and Aerospace Workers*, 121 F. Supp. 2d 498, 505 (E.D. Va. 2000) ("state action [] is the source of" the union's "authority to impose a fee on nonmembers."). The state and Local 2010 are thus acting jointly to deprive Plaintiffs of their rights. *See Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013) ("'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party.").

As in *Davenport*, *Smith*, and *Lutz*, the state action underlying Plaintiffs' complaint is the state's deduction of union dues from Jackson's and Smith's wages, without their affirmative consent, for the purposes of subsidizing a political organization (Local 2010). *See Int'l Ass'n of Machinists Dist. Ten and Local Lodge 873 v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018); *Stewart v. N.L.R.B.*, 851 F.3d 21, 22 (D.C. Cir. 2017); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. 171, 201 (2018) ("[S]tate statutes authorizing the collection of agency fees are unconstitutional state action, just as in *Lugar* [*v. Edmonton Oil Co.*, 457 U.S. 922, 934 (1982)]. And the unions 'invoked the aid of state officials' to collect those fees, just as in *Lugar*.") (footnotes omitted).

Without the state's enforcement of the statutes, Local 2010 has no independent right to garnish Plaintiffs' wages. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009).

Beyond the monetary transfer, the state's implementation of the Gag Rule statutes (ECF 1, Exh. A), by which public employers are prevented from communicating with public employees to inform them of their constitutional rights, also meets the requirement for state action.[3] Plaintiffs' complaint sets forth sufficient facts to assert that these state actions violate the First and Fourteenth Amendments. As *Janus* explained, California may only deduct money to support public employee unions from consenting employees. 138 S. Ct. at 2486. Plaintiffs may challenge the state's enactment and enforcement of laws that silence public employers' communications with their own employees about necessary information to meaningfully waive constitutional rights, place primary responsibility for this obligation to obtain affirmative waivers on the public employee unions, and place undue burdens on employees' ability to exercise First Amendment rights.

Bain v. California Teachers Ass'n, 156 F. Supp. 3d 1142 (C.D. Cal. 2015), is distinguishable because the plaintiffs in that case—unlike in this one—never contended that the laws governing their public employment or the "specific terms of any collectively bargained agreements facially violate[d] their rights." *Id.* at 1150. The *Bain* case, which predates both *Janus* and the Gag Rule statutes, did not involve allegations of a cooperative effort between the union and the state. The requirements of the challenged portions of SB 866, however, *demand* such cooperation. *See, e.g.*, Cal. Gov't Code §§ 1153(b), (h); 1157.3, 1157.10, 3553. To wit, the state must rely on the union's certification of an employee's consent to paycheck deductions, Cal. Gov't Code § 1157.12; the state cannot deal directly with employees on this matter at all. And employees cannot begin or end the deductions without state-mandated

[3] None of the defendants dispute that state action exists for Counts II–V.

communication with the union. ECF 1 at ¶¶ 12–20, 57–69.[4]

Thus, Local 2010 acts jointly with the state to confiscate Plaintiffs' wages without their consent. *Id.* at ¶¶ 77–79. Local 2010 also relies on the state's implementation and enforcement of the Gag Rule statutes to deny Plaintiffs' access to necessary information and meaningful opportunity to waive constitutional rights, *id.* at ¶¶ 89–92, 104–106, and deprive them of protected interests without procedural or substantive due process guarantees. *Id*. at ¶¶ 123–128, 138–146. *See Caviness v. Horizon Cmty. Learning Ctr., Inc*., 590 F.3d 806, 818 (9th Cir. 2010) (private school may become a state actor if the state "shows interest" in the school's disciplinary proceedings for sexual misconduct and issued regulations with standards or procedural guidelines that "could have compelled or influenced" the private school's actions).

Local 2010 dismisses the state's role as merely ministerial (ECF 9 at 12:3–4).[5] This has never been the law. Even under *Abood*, the Supreme Court found state action. *See Abood v. Detroit Bd. of Educ*., 431 U.S. 209, 226 (1977) (state action exists when a public-sector union acts pursuant to a union-shop agreement). Now, post-*Janus*, a "merely ministerial" assertion cannot be true because (1) the Supreme

---

[4] Cases naming state officials and public employee unions have proceeded in federal courts. *Janus* involved both the union and the state attorney general as defendants. *Harris v. Quinn*, 573 U.S. 616 (2014), named the union and the governor. *Beck v. Communications Workers of America*, 776 F.2d 1187, 1207 (4th Cir. 1985), which named only the union, found governmental involvement and action to be "indisputable." *Cf.* Harry G. Hutchison, *Liberty, Liberalism and Neutrality: Labor Preemption and First Amendment Values*, 39 Seton Hall L. Rev. 779, 826 (2009) ("One of the quintessential objectives of union advocates is to silence employer speech.").

[5] Local 2010 relies heavily on the Washington district court opinion in *Belgau v. Inslee*, 359 F. Supp. 3d 1000 (W.D. Wash. 2019), which currently is pending in the Ninth Circuit. The challenged Washington statutes providing for dues deductions lack the communications ban and limitations on employees' right to receive information at issue in this case.

Court placed an constitutionally-required duty *on the state* to obtain affirmative consent prior to deducting dues for the benefit of a public employee union, and (2) California enacted laws specifically to burden employees' protected First Amendment constitutional right to choose whether to subsidize a union.[6] *United Steelworkers of Am. v. Phelps Dodge Corp*., 865 F.2d 1539, 1540 (9th Cir. 1989) ("Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights."). When a public employer is statutorily commanded to assist a union in coercing public employees to finance political activities, that is state action; when a private association 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 v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986); *Dossett v. First State Bank*, 399 F.3d 940, 952 (8th Cir. 2005) (a private actor may be liable under § 1983 for conspiring with state officials to violate a private citizen's right to freedom of speech under the First Amendment, where the state and the private actor share an unlawful objective).[7]

C. The Public Employee Relations Board Does Not Have Jurisdiction

Jackson and Smith, like all civil rights plaintiffs, are entitled to pursue their claims in federal court. *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 516 (1982); *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019). Through Section 1983, Congress provided a federal judicial forum for civil rights deprivations that courts may not alter, even given the "variety of claims, claimants, and state

---

[6] *Cf. Janus*, 138 S. Ct. at 2485 n.27 (failing to anticipate that states would respond to the decision not by "keep[ing] their labor-relations systems exactly as they are," but by enacting anti-choice legislation to blunt the impact of the decision).

[7] *See also Clark v. County of Placer*, 923 F. Supp. 1278, 1284-85 (E.D. Cal. 1996) (finding state action where plaintiff brought a Section 1983 sex discrimination action against a county and a private, nonprofit corporation that operated the county fair and noting that close questions are resolved in favor of finding state action).

agencies involved." *Patsy*, 457 U.S. at 515. This specifically includes Section 1983 claims arising in the context of labor law. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869, 879 (1998) (agency shop fee payers need not participate in arbitration before suing in federal court); *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 816 (9th Cir. 1997) (same); *Heath v. Cleary*, 708 F.2d 1376, 1379 (9th Cir. 1983) ("the holding of *Patsy* is 'a flat rule without exception.'") (citation omitted). *Cf. McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 290 (1984) (administrative resolution of labor dispute has no preclusive effect in subsequent civil rights action brought under Section 1983).

In *Clark v. Yosemite Cmty. College Dist.*, 785 F.2d 781, 790 (9th Cir. 1986), a college instructor and union representative sued his college and various officials in federal court pursuant to Section 1983, alleging among other things that the College's adverse employment actions were taken in retaliation for his exercise of First Amendment rights, including his right to associate with a labor organization. As in this case, the College argued that the dispute arose under the exclusive jurisdiction of the Public Employment Relations Board. *Id.* The court rejected this argument because Clark was not "raising an unfair labor practice claim regarding an employer's violation of the state statutory right to engage in protected activities," but was pursuing a Section 1983 action "premised on the infringement of his right of association under the First Amendment." *Id.* As such, *Patsy* controlled, and Clark was not required to take his claims to the administrative agency. *Id. See also Smith*, 594 F. Supp. at 99 (the *Patsy* rule is "equally applicable to contractual as well as administrative remedies"). The same is true here.

Defendant Napolitano cites *Stevenson v. Los Angeles Unified School District*, 2010 WL 11596479 (C.D. Cal. June 28, 2010), to support a court's authority to dismiss "an assortment of claims" if they "could have constituted unfair practices." ECF 8 at 5:19–6:2. But Stevenson never asserted the court's jurisdiction under Section 1983 or raised constitutional claims. *Stevenson*, at *3 (plaintiff alleged that

union and union president breached "basic employment fiduciary dut[ies]"). Napolitano's reliance on *El Rancho Unified School District v. Nat'l Educ. Ass'n*, 33 Cal. 3d 946 (1983), is similarly misplaced as the plaintiff made no constitutional claims and did not invoke Section 1983. *See id.* at 949–50 (school district filed a tort action against four unions for damages after illegal strike).

Defendant Napolitano also asserts that Jackson's constitutional claims are "peripheral" and then offers a conclusory statement that the First Amendment does not mandate that employers disclose to employees their constitutional rights related to union membership. ECF 8 at 6:3. However, even a casual glance at Plaintiffs' complaint belies the first contention: every one of the asserted causes of action invoke the First and Fourteenth Amendment rights of free speech, association, and due process and present a detailed factual narrative supporting those claims that this Court must accept as true. ECF 1 at ¶¶ 70–151.

Defendant Napolitano's second assertion goes to the merits presented to this Court for resolution and cannot be assumed as true to support dismissal. To the extent it purports to be a fact, this approach is precisely backwards, as any assumptions of factual truth must favor the plaintiffs on a motion to dismiss. *Erickson*, 551 U.S. at 94. Further, if such arguments are presented as a legal conclusion about the scope and application of the First Amendment, this can be considered only as an alternative to Jackson's theory, and cannot justify dismissal. "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *implausible*." *Starr*, 652 F.3d at 1216. Plaintiffs' theory is plausible and supported by the allegations of the complaint.

///

D. The Eleventh Amendment Does Not Bar Plaintiffs' Claims

Plaintiffs seek only prospective declaratory and injunctive relief against the state defendants and therefore may proceed under the *Ex parte Young* doctrine. *See Koala v. Khosla*, 931 F.3d 887, 895–96 (9th Cir. 2019) (allowing lawsuit against chancellor of UCSD to proceed seeking injunctive relief to restore funding to a student newspaper); *Doe v. Lawrence Livermore Nat. Laboratory*, 131 F.3d 836, 839 (9th Cir. 1997) ("a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity"); *Edelman v. Jordan*, 415 U.S. 651, 667 (1974) (prospective injunction against state permitted to enforce federal standards). To avoid the Eleventh Amendment bar, a court conducts a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Plaintiffs' complaint plainly alleges just such ongoing violations. ECF 1 at ¶¶ 40, 56, 57, 61, 67–69.

Under *Ex parte Young*, a state official's enforcement role need not be set out in the statute itself—the connection to enforcement may come from a different source, including "the general law." 209 U.S. 123, 157 (1908). The Ninth Circuit finds a requisite connection for purposes of both standing and application of *Ex parte Young* where a law specifically grants the defendant enforcement authority, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013), or when there is a sufficient connection between the official's responsibilities and plaintiffs' injury, *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919-20 (9th Cir. 2004). As such, Defendant Becerra is properly named because the Attorney General is responsible for prosecuting violations of California's labor laws, including Cal. Gov't Code sections 1157.12, 3513(i), 3515, 3515.5, 3583, and the Gag Rule statutes. Cal. Const. art. V, § 13; *Sweeney v. Madigan*, 359 F. Supp. 3d 585, 592 (N.D. Ill. 2019) (Illinois Attorney General properly named in post-*Janus* lawsuit seeking recovery of agency shop fees). Defendant Yee is properly named

because all public employee paychecks are distributed from the Controller's office and Yee will not stop the deductions for the benefit of Local 2010 until Local 2010 submits a written request that she do so. Cal. Const. art. XVI, § 7; ECF 1 at ¶¶ 13–14, 36–38, 40, 52–54, 56.

II. PLAINTIFFS STATE A CLAIM FOR RELIEF UNDER THE FIRST AMENDMENT

A. *Janus* Applies to All Public Employees

All four Defendants argue that *Janus* applies only to non-union members and that, as a result, Plaintiffs may not avail themselves of the First Amendment protections outlined in the decision. However, Local 2010 concedes that *Abood*, 431 U.S. 209 (1977), established the right of public employees to resign from a union, and that Jackson and Smith effectively resigned. ECF 9 at 8:10–11, 8:27–28 (Plaintiffs' resignations "had been processed."). Jackson and Smith are no longer members of the union (nor were they members when they were hired), yet they *are* still subject to full union dues deductions in contravention of the Supreme Court's holding in *Janus*. ECF 1 at ¶¶ 40, 56. *Janus* expressly held that there are explicit requirements a public employer must meet before abridging an employee's First Amendment rights.

> 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. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

138 S. Ct. at 2486. An assertion that *Janus* applies only to non-members simply begs the question of whether a membership card/dues deduction authorization signed by

a public employee before the Court's decision in *Janus* constitutes affirmative consent under *Janus*. The issue here is whether Plaintiffs could have provided affirmative consent by signing the union card when, at the time they did so, they were given an unconstitutional choice: pay the union dues as a member or pay the union agency fees as a non-member, a virtually identical amount.

Plaintiffs would retain their First Amendment rights even if the union refused to accept their resignations. *Knox* placed union and non-union members on similar footing, holding that those who choose not to join unions possess the same First Amendment rights as union members to express their views:

> Public-sector unions have the right under the First Amendment to express their views on political and social issues without government interference. *See, e.g., Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). But employees who choose not to join a union have the same rights. *The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals*.

567 U.S. at 321–22 (emphasis added). The freedom of association is thus "implicit in and supportive of the rights identified in [the First A]mendment." *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Departments, Appellate Div. of the Supreme Court of New York*, 852 F.3d 178, 185 (2d Cir. 2017). The right to choose not to associate with, or to resign from, an organization such as a union invokes basic rights of freedom, a matter of public concern. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) ("Just as '[t]he First Amendment clearly guarantees the right to join a union,', it 'presupposes a freedom not to associate' with a union.") (citation omitted). More fundamentally, but for a knowing, informed, affirmative waiver, the state action in garnishing employee wages for the benefit of a public employee union is unconstitutional.

B. Plaintiffs State a Viable First Amendment Claim for Refund of Dues Taken Without Consent

Under bedrock civil retroactivity doctrine, Supreme Court decisions state the true law as it has always been, rather than changing the law. *See* Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 Harv. J.L. & Pub. Pol'y 811, 812 (2003). Nowhere in the *Janus* decision does the Supreme Court say that the holding is intended to apply only prospectively. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), the Court explained that "the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and *as to all events*, regardless of whether such events predate or postdate our announcement of the rule." (Emphasis added). Retroactivity applies even to cases not yet filed when the decision is rendered. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 542–43 (1991). Further, a court may not refuse to apply a prior decision retroactively. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752–754 (1995). Here, Plaintiffs could not have waived their First Amendment right to not join or pay a union because they did not know they had such a right.

First, Plaintiffs could not have waived their First Amendment rights to not pay a union by signing the membership/dues deduction card because at the time they signed it, that right was not yet a "known right or privilege." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (plurality opinion).

Second, *Janus* states that an employee's waiver of First Amendment rights must be "freely given." 138 S. Ct. at 2486. The membership/dues deduction card Plaintiffs signed was based on what *Janus* recognized as an unconstitutional choice: pay dues to the union as a member or pay fees to the union as a non-member. *Id.* at 2478. Thus, Plaintiffs could not have freely or voluntarily waived their right to not pay the union because when they signed the membership/dues deduction card, they were compelled to pay Local 2010 one way or another as a condition of their

employment. *See, e.g.*, ECF 1 at ¶¶ 24–25.

Third, because the Court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 307 (1937), the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. at 2484. Thus, Defendants must prove, by clear and compelling evidence, that Plaintiffs voluntarily, knowingly, and intelligently agreed to waive their First Amendment right to not subsidize Local 2010's speech. *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Kirkpatrick v. Chappell*, 926 F.3d 1157, 1176 n.8 (9th Cir. 2017). *See infra* Section II.E.1. Given Plaintiffs' repeated attempts to make clear that they do not consent to the continued deduction of payments, *see, e.g.*, ECF 1 at ¶ 30, Defendants' ability to show that Plaintiffs waived their First Amendment rights is all but impossible.

Therefore, the Court must not presume that Plaintiffs freely, knowingly, or intelligently signed the union membership/dues deduction card, even if some employees might have been willing to agree to pay dues or fees absent the agency fee requirement. *See College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.") (citation omitted). Defendants cannot prove by clear and compelling evidence that Plaintiffs voluntarily, knowingly, and intelligently agreed to waive their First Amendment rights because the membership/dues deduction cards lack *any language* stating that the employee has a constitutional right not to pay a union and the employee is waiving that constitutional right. Additionally, under the Gag Rule statutes, Defendants provided no other communications informing Plaintiffs of this right. ECF 1 at ¶ 34. In other words, Plaintiffs' union cards are void under *Janus*. Therefore, any dues withheld from Plaintiffs were unconstitutionally taken and must be returned.

Local 2010's invocation of "good faith" resulting from their compliance with pre-*Janus* case law does not provide them a safe harbor. Money or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. 509 U.S. at 98–99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632–33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972). As noted, *Harper* requires that *Janus* "be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97. The rule announced in *Janus*, therefore, extends to analysis of pre-*Janus* conduct. Local 2010's liability for dues paid by Plaintiffs, therefore, extends backward before *Janus*; it is limited only, if at all, by the statute of limitations.

Under these precedents, Local 2010 has no basis to keep the money it seized from Plaintiffs' wages before or after the Supreme Court put an end to this unconstitutional practice. Plaintiffs properly state a claim for refund of their dues.

C. Plaintiffs Cannot Waive First Amendment Rights Without Voluntary, Informed Consent

Regardless of the retroactivity question, *Janus* clearly requires an affirmative waiver of First Amendment rights going forward. Plaintiffs plainly allege continuing deduction of dues from their paychecks against their express desires. ECF 1 at ¶¶ 38–40, 54–56. Requirements to waive constitutional rights are the same in both civil and criminal contexts. *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997).

An employee's waiver of constitutional rights is voluntary only if the employee made "a free and deliberate choice" without "coercion or improper inducement." *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007). A waiver is "knowing [and] intelligent" when "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (factors for determining when a guilty plea waives the right against self-incrimination); *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) ("Constitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent.").

The failure to provide information necessary to make an informed, knowing waiver is an unconstitutional burden on Plaintiffs' First Amendment rights. *Janus* requires the state to present "clear and compelling evidence" that employees' authorization to deduct dues and fees, a waiver of the employee's rights against compelled speech, is "freely given." 138 S. Ct. at 2486.[8] "In order for waiver to be meaningful, notice of the right must also be combined with a meaningful opportunity to exercise that right." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). An employee, therefore, must be presented with and understand "the nature of the right being abandoned and the consequences of the decision to abandon it." *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (citation omitted). A waiver of First Amendment rights "hinges on a party's knowledge of the existence" of those rights. *Erie Telecomm., Inc. v. City of Erie*, 659 F. Supp. 580, 584 (W.D. Pa. 1987). Because waivers must be informed, "a second waiver may be required if the original waiver insufficiently

---

[8] Where the state creates and facilitates a system of payroll deductions for union dues and fees that infringes on employees' First Amendment rights, the process must survive exacting scrutiny. *Janus*, 138 S. Ct. at 2465 (it must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.").

disclosed the nature" of a protected interest. *Western Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1082–84 (C.D. Cal. 2015) (invalidating client's open-ended general waiver of a conflict of interest).[9] *See also Carter v. McCarthy*, 806 F.2d 1373, 1376 (9th Cir. 1986) (defendant not fully aware of the consequences of his guilty plea did not make a "voluntary and intelligent" waiver). As applied here, prior to joining the union, Jackson and Smith could not waive their First Amendment rights and choose to subsidize the union without an opportunity to do so while being informed and understanding the consequences of waiving that right—that is, an understanding that the union could use their money to fund union speech on a wide range of inherently political matters, including speech with which they may disagree. The Constitution does not permit the state and unions to bank on employees possibly being made aware, through their own efforts, of the nature and effect of the waiver. *Curtis Publ'g Co.*, 388 U.S. at 144. Without actual evidence that a waiver of First Amendment rights was knowing and voluntary, neither the state nor Local 2010 can proceed as if it received a valid waiver.

Plaintiffs joined the union before they knew they had a choice. ECF 1 at ¶¶ 23–25, 43–45. Those uninformed decisions cannot bind them now because neither the invocation nor waiver of a constitutional right exists in perpetuity. For example, in *Maryland v. Shatzer*, 559 U.S. 98, 100–01 (2010), a criminal suspect invoked his right to an attorney during an initial interview with the police, but in a later interview,

---

[9] *Cf.* California Rule of Professional Conduct 1.7, comment [9] (referring to conflict waivers: "The effectiveness of an advance consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent.").

he waived his rights and consented to a polygraph test, after which he made several inculpatory statements. *Id.* at 101–02. When he sought to have the statements excluded, the Supreme Court held that his prior invocation of rights expired in the two weeks between the first interview and the second interview. *Id*. at 110. *See also United States v. Nordling*, 804 F.2d 1466, 1471 (9th Cir. 1986) (repeat *Miranda* warnings required where an "appreciable time" elapses between interrogations.). Just as an invocation of rights can expire, so too can a waiver grow stale over time. In *Knox*, the Supreme Court noted that the circumstances that an employee would consider in deciding whether to waive First Amendment rights are likely to change over time—not only the actions and positions of the union, but also the employee's own beliefs or opinions. 567 U.S. at 315 (an employee's choice to support a union may change "as a result of unexpected developments" in the union's political advocacy). *Janus*'s requirement that the state obtain "clear and compelling" evidence of each employee's affirmative, informed waiver therefore demands a periodic inquiry as to whether an employee wishes to waive—or reclaim—his or her First Amendment rights.

This requirement takes on heightened importance after a significant change in the law. For example, viewed as part of the "totality of the circumstances," the state may need to repeat *Miranda* warnings where intervening events give the impression that a defendant's rights have changed in a material way since a prior interrogation. *Cf. United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1129 (9th Cir. 2005). Here, too, the rights newly recognized in *Janus* demand a new waiver. The union never provided the information necessary or opportunity to make an informed decision whether to waive. ECF 1 at ¶¶ 61–62, 68, 139–140. This highlights the fact that if the employer is forbidden to talk about the constitutional rights and the union declines to talk about them, and third-parties are prevented from any access to employees, then employees are deliberately, by state action, kept ignorant of their rights and thereby unconstitutionally burdened in their ability to exercise those rights.

Given the state's communications blackout on First Amendment rights relating to union membership and dues as mandated by the Gag Rule statutes, public employees first would need to know they have constitutional rights relating to union membership and then seek out information about how to exercise those rights. The most obvious place an employee would go to ask such questions is the human resources office, which answers questions on every other topic regarding compensation and benefits.[10] Only with regard to union membership and First Amendment rights must the employer withhold information necessary for employees like Plaintiffs to make a meaningful choice. Instead, employees are referred to self-interested third-parties: public employee unions. *Id*. at ¶¶ 57–59, 64–67, 69.

By ceding the process of eliciting public employees' consent to payroll deductions of union dues and fees to the union itself, and unquestioningly accepting union-procured consent forms, the state has no way of ascertaining—let alone by "clear and compelling evidence"—that those consents are knowing, intelligent, and voluntary. The constitutional injury is even greater when the union obtains the waiver in conditions entirely unknown to the state and then declares it irrevocable for years.[11] In short, state laws that empower public employee unions to set the terms

---

[10] *See* UCSD, Faculty and Staff, Benefits, https://blink.ucsd.edu/HR/benefits/index.html#Process (Jan. 4, 2018); UCSD, Faculty & Staff, Compensation, https://blink.ucsd.edu/HR/comp-class/compensation/index.html#Policies-and-Guidelines (Jan. 23, 2019).

[11] Many unions, as in this case, limit the ability of employees to waive their rights to a short window at the end of a contract. ECF 1 at ¶ 20. If a public entity and a union agree to contract extensions, that short window may be postponed indefinitely. *See e.g.*, Extension Agreement and Amendment of MOU Between the Northern California Public Sector Region, Local 1021, of the Service Employees International Union, CTW and the County of Alameda at 2–3 (March 13, 2019), https://www.seiu1021.org/sites/main/files/file-attachments/alameda-county_ext._agrmnt_12.15.2019-12.10.2022.pdf?1557863810 (extending terms and conditions of previous MOU that include union security, agency shop (98% of union dues and

and unilaterally define the circumstances under which employees may waive their First Amendment rights cannot satisfy the constitutional protections mandated by *Janus*. The laws instead place the state in a position where it is willfully blind to the burdens placed on the First Amendment rights of its own employees. Plaintiffs state a claim for the violation of their First Amendment rights under these circumstances.

D. Plaintiffs State a Viable First Amendment Claim for the Right to Receive Information

Plaintiffs' complaint asserts a right to receive information *from their employer* necessary to make an effective waiver of their First Amendment rights. After *Janus*, neither UCSD nor the University of California generally nor California Department of Human Relations nor the Public Employee Relations Board nor Local 2010 provided *any* information to public employees, including Plaintiffs, about their First Amendment rights as they relate to union dues deductions. ECF 1 at ¶¶ 59, 67 (UCSD), 61 (Local 2010), 69 (state agencies). No public interest organizations are provided employee contact information or otherwise permitted to address employees about their rights. *Id.* at ¶¶ 65–66. Plaintiffs discovered their rights months after the *Janus* decision solely through happenstance, *id.* at ¶¶ 26, 46, and Jackson was rebuffed when he sought further information from his employer. *Id.* at ¶¶ 27–29. Plaintiffs therefore state a claim for a violation of their First Amendment right to receive information *from the state* about the existence and consequences of waiving their constitutional rights necessary to exercising their waiver. *See Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 331 (1964) ("happenstance" cannot supplant constitutional rights); *United States v. Unimex, Inc.*, 991 F.2d 546, 551 (9th Cir. 1993) (constitutional rights "could not properly be left to rely" on "fortuities.");

---

initiation fees), and payroll deduction provisions that would otherwise be invalid under *Janus*). *See also* SEIU 721, *Victory! San Bernardino Courts Ratifies Contract Extension* (Dec. 20, 2018), https://www.seiu721.org/2018/12/victory-san-bernardino-courts-ratifies-contract-extension.php.

United States v. Dockery, 447 F.2d 1178, 1195 (D.C. Cir. 1971) (where disclosure of information is a necessary component of a constitutional right, the fortuity of a *voluntary* disclosure will not suffice).

The First Amendment guarantees the right to receive truthful information. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.") (citations omitted); *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) ("[T]he state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes . . . the right to distribute, the right to receive, . . . Without those peripheral rights the specific rights would be less secure.") (citation omitted). The Ninth Circuit recognizes that freedom of expression includes the right to receive as well as the right to communicate ideas. *Clement v. Cal. Dep't of Corrs*., 364 F.3d 1148, 1151 (9th Cir. 2004) (the right to receive publications is a fundamental First Amendment right); *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) ("The right to hear and the right to speak are flip sides of the same coin.").[12]

[12] *See also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 670 n.17 (1985) (Brennan, J., concurring in part, conc. in the judgment, and dissenting in part) ("The First Amendment protects not only the right of attorneys to disseminate truthful information about the availability of contingent-fee arrangements, but the right of the public to receive such knowledge as well.") (citation omitted); *Willis v. Town of Marshall*, 426 F.3d 251, 259-60 (4th Cir. 2005) (the First Amendment protects the right to receive the speech of others); *De la O v. Hous. Auth. of El Paso*, 417 F.3d 495, 502 (5th Cir. 2005) (the right to receive information is as equally protected under the First Amendment as the right to convey it); *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 896 (6th Cir. 2003) ("[T]he First Amendment is concerned not only with a speaker's interest in speaking, but also with the public's interest in receiving information.") (citation omitted); *Kreimer v.*

The Supreme Court upheld the "right to receive information" in *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 857 (1982), which involved the removal of books from high school and junior high school libraries that were deemed "anti-American, anti-Christian, and anti-Semitic, and just plain filthy[.]" A plurality of the Court held that the right to receive information "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution," *id.* at 867, in two ways:

> First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them. . . . More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.

Id. The right to receive information may be tied specifically to the exercise of First Amendment rights. To the extent the information is withheld to "discourage the exercise of first amendment freedoms," even a minor burden may violate the Constitution. *Thomas v. Carpenter*, 881 F.2d 828, 830 (9th Cir. 1989) ("conduct used to discourage the exercise of first amendment freedoms need not be particularly great in order to find that rights have been violated") (internal quotes and citation omitted).

The right to receive information is closely tied to the public policy favoring the ability of the public—including public employees—to obtain information from the state. *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) ("a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."). When it comes to constitutional rights, knowledge is power. As James Madison wrote:

Bureau of Police, 958 F.2d 1242, 1251 (3d Cir. 1992) (the speech component of the First Amendment includes freedom to receive speech); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (same).

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

SDC Development Corp. v. Mathews, 542 F.2d 1116, 1119 (9th Cir. 1976) (quoting legislative history of the Freedom of Information Act).

There is no legitimate, much less compelling, state interest in restraining the conveyance of information about individuals' constitutional rights. A law deliberately silencing state employers with the object of leaving employees ignorant of their rights is a wholly illegitimate purpose that cannot survive even rational basis review. A state's interest is in eradicating ignorance, not promoting it. *See Dent v. W. Va.*, 129 U.S. 114, 122 (1889) (a law regulating the medical profession is legitimate where it works to secure people "against the consequences of ignorance and incapacity, as well as of deception and fraud."); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (First Amendment freedoms are "essential if vigorous enlightenment [is] ever to triumph over slothful ignorance.").

The state's additional interest in granting exclusive access to unions to enable them to bolster their membership and consequent dues payments also fails as a justification. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987), the Supreme Court explained that "an interest in raising revenue, 'standing alone, . . . cannot justify the special treatment . . . for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available[.]"' *Janus* demands that the state provide an opportunity for employees to make *informed* decisions. In this circumstance, the government must "open the channels of communication rather than [] close them." *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

E. A Union Contract Does Not Trump Constitutional Claims

Defendants assert that the existence of union contracts negates any potential constitutional claims.[13] ECF 8 at 6:10; ECF 9 at 10:13–16. But "[t]here are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386 (2011). The right to exercise First Amendment rights absent a knowing, affirmative, voluntary waiver is just such a fundamental freedom.

1. There Can Be No Knowing Waiver Before a Right Is Known

A waiver must be voluntary and Plaintiffs dispute that they voluntarily waived their First Amendment rights in this case. A contract signed before *Janus* cannot waive the First Amendment rights defined and explained in that case. *See GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007) ("The intervening-change-in-law exception to our normal waiver rules, by contrast, exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent.") citing *Curtis Publ'g Co.*, 388 U.S. at 143, *Polites v. United States*, 364 U.S. 426, 433 (1960). *See also Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (Because "the doctrine of waiver demands conscientiousness, not clairvoyance, from parties," a party will not be held to have waived newly protected rights). The signatures are the beginning of the inquiry, not the end. *See Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1126 (D. Haw. 2001) (candidate's signing away his First Amendment rights on a Code of Fair Campaign Practices was not voluntary because failure to sign meant the candidate would be branded as someone who would not "uphold basic principles of decency, honesty, and fair play.").

Although the speech and association rights protected by the First Amendment are not an overarching license to violate a contract, *Cohen v. Cowles Media Co.*,

[13] This assertion appears to be an affirmative defense, which may be raised in a motion to dismiss. *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013).

501 U.S. 663, 670 (1991), a collective bargaining agreement must give way to constitutional claims of individuals.[14] In *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981), the city revoked the plaintiff restaurant's sign permits and argued that Sambo's had waived its right to challenge the revocation. The Sixth Circuit had to decide whether Sambo's waiver of First Amendment rights was valid, employing the "clear and compelling evidence" test and "indulg[ing] every reasonable presumption against a waiver"—the same tests demanded by *Janus*. *Id*. The city argued that a contract that Sambo's voluntarily signed in 1972, waiving First Amendment rights, bound the restaurant and prevented any future First Amendment claims. The court disagreed. Critically, the company could not have earlier asserted its First Amendment rights because the relevant commercial speech rights were not recognized at that point in time. *Id.* at 692. When Sambo's became "an unwitting beneficiary of [the] new constitutional doctrine" announced in *Virginia State Bd. of Pharm.*, *Inc.*, 425 U.S. 748, protecting its commercial speech, it was entitled to invoke its newly-recognized First Amendment rights. Prior to *Virginia*, Sambo's "did not have First Amendment commercial speech rights in 1972 which it could waive." Because "waiver, at the least, is the relinquishment *of a known right*," Sambo's pre-*Virginia* "waiver" was ineffective. *Sambo's*, 663 F.2d at 693 (emphasis added).[15]

---

[14] *Cf. Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (rejecting union's position that settlement of discrimination claims would violate the seniority terms of an existing collective bargaining agreement).

[15] *See also In re Micron Tech., Inc.*, 875 F.3d 1091, 1097 (Fed. Cir. 2017) (party cannot be penalized for raising waiver issue only after a Supreme Court decision changing the controlling law makes the issue available); *United States v. Reader's Digest Ass'n, Inc.*, 464 F. Supp. 1037, 1048 (D. Del. 1978) (no waiver of First Amendment rights in consent order where the rights at issue were not recognized until five years after the consent order was issued); *Freedom From Religion Found. Inc. v. Abbott*, 2017 WL 4582804, *4 (W.D. Tex. Oct. 13, 2017) (no waiver of First Amendment rights where plaintiff signed contract that did not address constitutional

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Supreme Court considered whether consumer contracts that provided for summary repossession of goods waived the consumers' constitutional right to procedural due process. The Court held there was no waiver. Among other things, the contracts "did not indicate *how* or *through what process*" the seller could repossess the goods. *Id.* at 95–96 (emphasis added). Moreover, the parties were not equal in bargaining power and there was, in fact, no bargaining over the contractual terms between the parties. *Id.* at 95. Because waivers of constitutional rights must be made with full understanding of the consequences, the purported waiver in the contract was invalid. *Patterson*, 487 U.S. at 292–93.

Thus, the issue here is not whether Jackson and Smith knew that the membership card was an agreement to subsidize the union; the issue is whether they knew that they possessed a First Amendment right to pay nothing to the union and that they were waiving that right—and they did not. ECF 1 at ¶¶ 23–25, 43–45. The payroll deduction form, on its face, shows no evidence that employees acted with a full awareness of their First Amendment rights as required by *Janus*. ECF 1, Exh. C, H.

2. A Contract That Lacks Constitutional Protection for Waiver of Fundamental Rights Is Void as a Matter of Public Policy

Under California law, a contract between a union and its members that violates the First Amendment by imposing uninformed, nonconsensual waiver of constitutional rights is void as a matter of public policy. Cal. Civil Code § 1668 (a contract that has as its object a violation of law is "against the policy of the law."); *Santillan v. USA Waste of Cal., Inc.*, 853 F.3d 1035, 1045–46 (9th Cir. 2017) ("[A] contractual provision that contravenes public policy, as expressed in a statute or implied from its language, is 'either void or unenforceable.'") (citation omitted). As relevant here, California Civil Code section 1667 elaborates that "unlawful" means:

---

rights and the parties did not negotiate or discuss the terms prior the plaintiff signing the "stock form").

"1. Contrary to an express provision of law; [here, the First Amendment] [or ¶] 2. Contrary to the policy of express law, though not expressly prohibited [here, *Janus*]." In short, a lawful contract cannot "conflict either with express statutes or public policy"—and, as a corollary, "[a] contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced." *Vierra v. Workers' Comp. Appeals Bd.*, 154 Cal. App. 4th 1142, 1148 (2007) (citations omitted).

Because "California law includes federal law," a contract that results in violation of federal law is "unenforceable as contrary to the public policy of California." *Kashani v. Tsann Kuen China Enterprise Co.*, 118 Cal. App. 4th 531, 543 (2004) (citing *People ex rel. Happell v. Sischo*, 23 Cal. 2d 478, 491 (1943) (federal law is "the supreme law of the land (U.S. Const. art. VI, § 2) to the same extent as though expressly written into every state law")). Contracts that provide for an unconstitutional waiver of First Amendment rights have an illegal purpose. *See Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1144 n. 133 (C.D. Cal. 1976), *judgment vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979)). Beyond the federal constitution and laws, California courts will void contracts that violate federal public policy developed in court cases. *Hurd v. Hodge*, 334 U.S. 24, 35 (1948) (public policy may be found in "applicable legal precedents."). State law cannot impose liability for conduct that federal law requires. *See, e.g., Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 486–87 (2013).

If Local 2010 is correct that a pre-*Janus* signature on a membership card is a contractual waiver of constitutional rights, then the Ninth Circuit would hold that element of the contract to be void as violating public policy. In *Davies*, 930 F.2d at 1396, the court refused to enforce a contractual waiver of constitutional rights "'if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'" The plaintiff in that case signed a contract that waived his right to run for public office and the court held the policy in

favor of settlement of disputes was outweighed by the public interest in allowing the people to vote for representatives of their choosing. *Id*. at 1399. *See also Bassidji v. Goe*, 413 F.3d 928, 937–39 (9th Cir. 2005) (invalidating a contract as violating public policy where enforcement would contravene a federal Executive Order).

In this case, the Court cannot construe the union membership card and dues deduction authorization contract to thwart the state's constitutional obligation to obtain a knowing, voluntary waiver of First Amendment rights before permitting the State Controller to deduct monies to be paid to a public employee union. A contract so construed is void as a violation of public policy and cannot stand as an obstacle to Plaintiffs' lawsuit to vindicate their constitutional rights.

III. PLAINTIFFS STATE A CLAIM FOR VIOLATION OF DUE PROCESS RIGHTS

A. Plaintiffs Allege Deprivation of Protected Interests

In order to invoke the due process protections of the Fourteenth Amendment, there must be a "deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. Of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). The requirement of a deprivation of a protected interest applies to both procedural due process, *Ingraham v. Wright*, 430 U.S. 651, 672 (1977), and its substantive counterpart, *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 948 (9th Cir. 2004).

Local 2010 accuses Plaintiffs of not clearly stating which protected interests they have been deprived of by the University. ECF 9 at 29:9–10. But Plaintiffs' complaint sufficiently establishes that they have been deprived of liberty and property interests protected by the Fourteenth Amendment as a result of the Gag Rule statutes. ECF 1 at ¶ 115 ("Every public employee has a fundamental First Amendment right to *refrain from providing monetary support* to a union against his

or her will.") (emphasis added); *id*. at ¶ 116 ("The First Amendment does not allow *any payment or fee deduction* from a public employee's paycheck, or any attempt to collect such payment, unless the employee clearly and affirmatively consents.") (emphasis added).

The rights contained in the First Amendment are "liberty" rights protected by the Due Process Clause. *See Gitlow v. People of State of New York*, 268 U.S. 652 (1925) ("[T]he 'liberty' protected by the Fourteenth Amendment includes the liberty of speech…"); *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment."). This includes the "right to eschew association for expressive purposes." *Janus*, 138 S. Ct. at 2463 (citation omitted). Money falls within the meaning of "property" in the Due Process Clause. *See Roth*, 408 U.S. at 572; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("Money is property . . . "). Wages are a protected property interest. *Sniadach v. Family Finance Corp*., 395 U.S. 337, 342 (1969) (Harlan, J., concurring) ("We deal here with wages—a specialized type of property . . ."); *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983) (citing *Sniadach*, 395 U.S. at 342) ("It is obvious that [individuals have] a property interest in [their] salary."). Even when protected property interests are defined "by existing rules or understandings that stem from an independent source, such as state law," *Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Cir. 1993) (quoting *Roth*, 408 U.S. at 577), wages remain a protected interest.[16] Plaintiffs assert these protected interests in their freedom of association and wages throughout their complaint. *Id*. at ¶¶ 73, 86–87, 100–01, 115–22, 135–37.

[16] Other than payments to unions, California generally protects wages. *See* Cal. Labor Code § 2810.5 (requiring written notice related to wage payments and benefits to prevent "wage theft").

Further, Local 2010 ignores the multiple allegations regarding all defendants' unconstitutional behavior: the Gag Rule statutes prohibit communication between an employee and his or her employer regarding the decision to waive his or her First Amendment rights. *Id*. at ¶ 123. Plaintiffs allege that forcing public employers to rely on the assertions of third-party unions regarding whether a public employee has waived his or her First Amendment rights cannot meet the standard for clear and compelling evidence required by *Janus*. *Id*. at ¶ 124–25. ECF 1 at ¶ 142 (". . . the Gag Rule statutes create a conflict of interest allowing the Union to exploit the Gag Rule statutes at the expense of public employees' First Amendment rights."). Plaintiffs are forced to associate with the union against their will, depriving them of their protected right to free association. *Id*. at ¶¶ 30–35, 47–51. The complaint further asserts that Local 2010 and Yee continue to authorize deductions and remove wages from their paychecks against their will, which are diverted to Local 2010. *Id*. at ¶¶ 35–40, 51–56. Jackson and Smith each are deprived of over $500.00 annually, *id*. at ¶¶ 39, 55, and these deprivations will continue until at least 2022. *Id*. at ¶¶ 37, 53.

Plaintiffs' complaint expressly alleges deprivations of their protected liberty and property interests. Dismissal, particularly based on Local 2010's bare claims of insufficiency, is completely unwarranted.

B. Plaintiffs Allege Procedural Due Process Violations

The Fourteenth Amendment requires the provision of adequate procedures before an individual is deprived of life, liberty, or property. *Ingraham*, 430 U.S. at 672; *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *Fuentes*, 407 U.S. at 81 (constitutionally adequate procedures "minimize substantively unfair or mistaken deprivations."). The basic procedural due process requirements are notice of the deprivation, an opportunity to contest the deprivation, and access to an impartial decision-maker. Plaintiffs' complaint sufficiently establishes that they were and continue to be denied constitutionally adequate procedures for the deprivation of their First Amendment rights to free association and property interest in their own

wages, ECF 1 at ¶¶ 115–22. Plaintiffs are provided no procedure whatsoever by which to dispute that deprivation, *id.* ¶ 123 ("The Gag Rule statutes prohibit communication between an employee and his or her employer regarding the decision to waive his or her First Amendment rights."), let alone constitutionally adequate procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

First, individuals deprived of life, liberty, or property must be provided notice sufficient to alert the individual of the deprivation, and the steps available to prevent it. *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970). This notice must be "reasonably calculated" to reach the interested individual. *Greene v. Lindsey*, 456 U.S. 444, 449 (1982). Plaintiffs received no notice from the state or Local 2010 about their First Amendment rights recognized by the *Janus* decision. ECF 1 at ¶ 26 ("Jackson happened to learn of the *Janus* decision from a local radio program."); *id.* at ¶ 46 ("Smith happened to learn of the *Janus* decision from a television news program several months after the case was decided."). Specifically, Plaintiffs were provided no notice of the effect of *Janus* on their choice to permit or withhold dues deductions. *Id*. at ¶ 57 ("UCSD has adopted and implemented a policy of refusing to engage in any discussion whatsoever with its employees about union membership or union dues."). Instead, Plaintiffs were deprived of their liberty and property interests without the state or Local 2010 communicating with them about *Janus* at all. *Id*. at ¶¶ 57–64.

Second, individuals must have an opportunity to contest a deprivation, usually through a hearing. *Mathews*, 424 U.S. at 333 ("Parties whose rights are to be affected are entitled to be heard."). This requirement is a "basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes*, 407 U.S. at 80–81. As such, the required hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Plaintiffs were provided no hearing or other opportunity to contest the deprivation. ECF 1 at ¶¶ 57, 123. Instead, the University

and Local 2010 repeatedly rebuffed their attempts to seek relief. *Id*. at ¶ 34 ("In an email dated March 28, 2019, UCSD replied that, per the Gag Rule statutes, Jackson needed to communicate directly with the Union with regard to his union membership and dues."); *id*. at ¶ 50 ("UCSD never responded to Smith's demand that they stop withdrawing dues from his paychecks.").

Finally, procedural due process requires an impartial decision-maker to review a deprivation. *Goldberg*, 397 U.S. at 271; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law . . ."). To comport with due process, judges must be "neutral and detached," and "the command is no different when a legislature delegates adjudicative functions to a private party." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (citations omitted). This principle holds true even with those tasked with "quasi-judicial" authority. *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). Disqualifying bias is most plainly evident when the decision-maker has a "substantial pecuniary interest" in the result. *See, e.g*., *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). In this case, Plaintiffs allege that the state places complete reliance on Local 2010, a biased third party with a direct financial incentive, to oversee dues deductions and to decide whether Plaintiffs provided affirmative consent to waive their First Amendment rights. ECF 1 at ¶ 139 ("Public employee unions have no incentive to provide information that might result in fewer dues-paying members and no obligation to convey it to current and potential members."); *id*. at ¶ 140 ("Public employee unions have a financial incentive to represent to public employers that public employees have provided the clear and affirmative consent required by *Janus*."). Despite Plaintiffs' repeated protests that they did *not* waive their rights, *id*. at ¶¶ 30, 47, Local 2010 refuses to inform the University to cease the deductions. *Id*. at ¶ 35; 51. The state's reliance on a biased third-party decision-maker with a direct pecuniary interest in the outcome cannot

meet the standard for impartiality. *See Hudson*, 475 U.S. at 308 (process "from start to finish [] entirely controlled by [a] union" does not satisfy procedural due process).

Instead of acknowledging the alleged lack of procedures, Local 2010's motion focuses exclusively on the sufficiency of several ancillary procedures irrelevant to Plaintiffs' procedural due process claims. ECF 9 at ¶¶ 29–30. This approach cannot prevail for several reasons. First, the question at this stage is not the merits of Plaintiffs' procedural due process claim, but whether their complaint states a sufficient claim for relief. *Marder*, 450 F.3d at 448. As shown above, Plaintiffs plainly allege that their individual procedural due process rights have been violated. Whether procedures exist for the University to verify that Local 2010 has "valid authorizations for the deduction of Union fees" is beside the point. ECF 9 at 30:3–4. The Gag Rule statutes prevent the University *from communicating with employees* about their union dues, making any procedure to address the deprivation of Plaintiffs' rights impossible. ECF 1 at ¶ 34. Further, Plaintiffs' complaint seeks a remedy for their *individual* denial of basic due process guarantees for the deprivation of their liberty and property interests, ECF 1 at ¶ 131; they do not seek relief on behalf of the University.

Even if this Court considers the sufficiency of the procedures at this stage of the litigation, Plaintiffs can still establish a procedural due process violation. *Zinermon v. Burch*, 494 U.S. 113, 126 (1990) ("[T]o determine whether a [procedural due process] violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate."). *Mathews v. Eldridge* enumerates the factors to be considered in answering this question: the private interest affected, the risk of an erroneous deprivation, the probable value of additional or substitute procedures, and the government's interest, including possible additional burdens. 424 U.S. at 335. While not necessary to consider given a motion to dismiss under Rule 12(b)(6), *Hydrick*, 466 F.3d at 686, the important private liberty and property interests at stake, the continuing erroneous deprivation of these

interests, the high value of providing some minimal procedures, and the seemingly low cost to the government of providing them, all weigh in favor of allowing Plaintiffs' case to proceed.

C. Plaintiffs Allege Substantive Due Process Violations

The substantive component of the Due Process Clause "prohibits restraints on liberty that are arbitrary and purposeless." *Sagana v. Tenorio*, 384 F.3d 731, 742 (9th Cir. 2004) (citation omitted). Substantive due process thus "bar[s] certain government actions regardless of the fairness of the procedures used to implement them. . . ." *Id*., quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Infringements of substantive due process rights are subject to strict constitutional scrutiny and must be narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S.702, 720 (1997); *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

Plaintiffs alleging substantive due process violations can show that the challenged government conduct violates their rights in one of three ways: the government conduct can interfere with rights "implicit in the concept of ordered liberty," *United States v. Salerno*, 481 U.S. 739, 746 (1987); the government conduct can "shock[] the conscience," *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec*., 908 F.3d 476, 518 (9th Cir. 2018) (citation omitted); or the conduct can "offend[] the community's sense of fair play and decency." *Id*. Plaintiffs' complaint alleges the violation of their substantive due process rights under all of the above standards, any one of which is sufficient to overcome Local 2010's motion to dismiss.

First, Plaintiffs sufficiently allege that the state's and Local 2010's actions pursuant to the Gag Rule statutes infringe protected rights under the Fourteenth Amendment—freedom of association and deprivation property in the form of wages. ECF 1 at ¶¶ 121, 143 ("The Gag Rule statutes thus have the purpose and effect of arbitrarily limiting public employees' access to information about their First Amendment rights to terminate support for a union."). Because these rights are explicitly recognized as within the meaning of the Due Process Clause, there is no

need to consider other possible implicit liberty interests. *Cantwell*, 310 U.S. at 303.

Second, Plaintiffs sufficiently allege the University's and Local 2010's actions pursuant to the Gag Rule statutes meet the standard for shocking the conscience. *Regents*, 908 F.3d at 518. This standard can be met when "circumstances afford reasonable time for deliberation before acting, [and government action] was taken with deliberate indifference toward a plaintiff's constitutional rights." *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). State and Local 2010 officials had more than a reasonable amount of time for deliberation before acting. The *Janus* case was decided on June 27, 2018. The state and Local 2010 have had well over a year to inform affected individuals of their First Amendment rights and cease the continuing deprivations of protected interests but refuse to do so. ECF 1 at ¶¶ 35; 51; 67–68. *See also* Cal. Gov't Code section 3550 (prohibiting mass communications with the effect of "deterring" or "discouraging" workers from "becoming or remaining in an employee organization").

Finally, Plaintiffs sufficiently allege University's and Local 2010's actions pursuant to the Gag Rule statutes offend the community's sense of fair play and decency. When considering whether a government deprivation meets this standard, courts consider the historical context of the deprivation and related circumstances. *See, e.g*., *Marsh v. County of San Diego*, 680 F.3d 1148, 1154–55 (9th Cir. 2012). The rights to free association and property are two of the most basic and well-protected interests recognized in our system of government. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come . . .from careful respect for the teachings of history and solid recognition of the basic values that underlie our society.") (internal marks omitted). Here, the state and Local 2010 officials' implementation of the Gag Rule statutes erected an arbitrary barrier between Plaintiffs and their ability to meaningfully exercise their First Amendment rights. ECF 1 at ¶ 138 ("The sole means provided by law for public

employees to obtain information regarding their First Amendment rights recognized by *Janus* requires them to consult a private third-party (the union).").

The challenged laws effectively make Plaintiffs' exercise of constitutional rights reliant on a third party with a direct pecuniary incentive to keep them in the dark about their rights and continue extracting fees. *See id*. at ¶ 140. As Plaintiffs alleged, "[t]he Gag Rule statutes thus create a fundamentally unfair, biased procedure for exercising public employees' First Amendment rights to terminate support for a union that violates public employees' rights to substantive due process." *Id*. at ¶ 145. Although the Defendants could argue it is easier to direct public employees to take their payroll requests directly to the union itself rather than to public employers, "administrative convenience is a thoroughly inadequate basis for the deprivation of core constitutional rights." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th Cir. 2014) (internal quotation marks omitted).

On a motion to dismiss, this Court need not consider whether the state's and Local 2010's arbitrary deprivation of Plaintiffs' protected substantive interests would survive strict scrutiny. *See Hydrick*, 466 F.3d at 686.[17] But Plaintiffs allege that the statutory restrictions on their access to information about their rights and burdening their ability to communicate with their employers does not serve any legitimate (let alone compelling) government interest. ECF 1 at ¶ 141. For these reasons, Plaintiffs' complaint sufficiently alleges that their rights to procedural and substantive due process are violated by the Gag Rule statutes.

Finally, Local 2010's assertion that Plaintiffs have a remedy at state law for their due process injuries disregards the substance of their claims, which are not premised on unfair labor practices, but on constitutionally-grounded civil rights. *See, e.g*., ECF 1 at ¶ 145. *Renken v. Compton City School District* is distinguishable because the primary issue was an employee's demand that union dues be deducted

[17] *Janus* explicitly held that "labor peace" and combating a supposed "free-rider" problem are inadequate justifications. 138 S. Ct. at 2465–67.

from his pay under several California statutes. 207 Cal. App. 2d 106, 109 (1962). Plaintiffs' complaint, premised on the First and Fourteenth Amendments, alleges specific violations of their procedural and substantive due process rights. ECF 1 at ¶¶ 114–151. They do not seek to enforce California Government Code sections 1157.1 and 1157.3, *see Renken*, 207 Cal. App. 2d at 109, but rather seek basic federal due process protection. ECF 1 at ¶ 1. Plaintiffs agree that intentional deprivations do not violate the Due Process Clause so long as "adequate state post-deprivation remedies are available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). But as explained above, Plaintiffs are denied any process by which to dispute the deprivation of their liberty and property interests, while further being subjected to an inherently unfair, biased procedure for exercising their First Amendment rights. Plaintiffs have no adequate remedy at law for their federal due process claims.

CONCLUSION

The three motions to dismiss are an exercise in finger-pointing designed to prevent any challenge to the state's and union's defiance of *Janus*'s required protection for First Amendment rights and any challenge to the Gag Rule statutes. Defendants Becerra and Yee disclaim any responsibility for executing and implementing state law; Defendant Napolitano says the dispute involves only the union; and the union sees this case as nothing more than a contract dispute between private parties without any constitutional dimension at all.

So long as the complaint's recitation of facts presents a colorable claim—and it does—the motion to dismiss must be denied and the lawsuit allowed to proceed to discovery and resolution on the merits, even if the Defendants and this Court might believe at this initial stage that "recovery is very remote and unlikely." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted); *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1123–24 (9th Cir. 2008).

The motions to dismiss should be denied.

Dated: October 29, 2019.

Respectfully submitted,

/s/ Deborah J. La Fetra

DEBORAH J. LA FETRA
TIMOTHY R. SNOWBALL
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Phone: (916) 419-7111
dlafetra@pacificlegal.org
tsnowball@pacificlegal.org

JEFFREY M. SCHWAB
JAMES J. MCQUAID
Liberty Justice Center
190 South LaSalle Street
Suite 1500
Chicago, Illinois 60603
Phone: (312) 263-7668
jschwab@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

CERTIFICATE OF SERVICE

I hereby certify that that the foregoing document was electronically filed with the Clerk of the Court on October 29, 2019, using the CM/ECF system, which will send notification of said filing to the attorneys of record.

/s/ Deborah J. La Fetra
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Phone: (916) 419-7111
dlafetra@pacificlegal.org