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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

REBECCA FRIEDRICHS, et al.,

Plaintiffs,

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Defendants.

Case No. 8:13-cv-00676-JST-CW

PLAINTIFFS' NOTICE OF MOTION, MOTION FOR PRELIMINARY INJUNCTION, AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Judge: Hon. Josephine Staton Tucker
Hearing Date: July 26, 2013
Time: 2:30 p.m.
Courtroom: 10A
Trial Date: None Set

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE Plaintiffs Christian Educators Association International ("CEAI"), Jelena Figueroa, George W. White, Jr., Scott Wilford, Kevin Roughton, Peggy Searcy, Jose Manso, Harlan Elrich, Rebecca Friedrichs, Karen Chavez-Cuen, and Irene Zavala (collectively, "Plaintiffs") move this Court to grant a preliminary injunction barring Defendants California Teachers Association; National Education Association; Savanna District Teachers Association, CTA/NEA; Saddleback Valley Educators Association; Orange Unified Education Association, Inc.; Kern High School Teachers Association; National Education Association-Jurupa; Santa Ana Educators Association, Inc.; Teachers Association of Norwalk-La Mirada Area; Sanger Unified Teachers Association; Associated Chino Teachers; San Luis Obispo County Education Association; Sue Johnson; Clint Harwick; Michael L. Christensen; Donald E. Carter; Elliott Duchon; Thelma Melendez de Santa Ana; Ruth Perez; Marcus P. Johnson; Wayne Joseph; and Julian D. Crocker (collectively, "Defendants") from: (1) maintaining agency-shop arrangements under which the Plaintiffs, as non-union-members, are required to pay fees to the Defendant Unions; and (2) requiring Plaintiffs to pay the "non-chargeable" portion of the Defendant Unions' annual fees unless the Plaintiffs affirmatively opt out of doing so every year.

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This Motion will be and is based upon this Notice of Motion and Motion; the Memorandum of Points and Authorities attached hereto; the pleadings, papers, and other documents on file herein; and such further evidence or argument as the Court may properly consider at or before the hearing on this Motion.

Dated: June 25, 2013

Jones Day

By: */s/ John A. Vogt*
John A. Vogt

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INTRODUCTION

Plaintiffs have filed this lawsuit to challenge two unconstitutional practices engaged in by Defendants under the authority of California law. *First*, Defendants force public-school teachers to pay a fee that funds all union expenditures supposedly germane to collective-bargaining despite the fact that bargaining with public school districts over core education policies and how to spend limited tax dollars is a fundamentally political act. *Second*, Defendants further require public-school teachers who are not union members to affirmatively register their dissent every year (in writing) if those non-members wish to protect their established First Amendment right to not fund union political activities unrelated to collective-bargaining. These practices and the laws that authorize them violate Plaintiffs' First Amendment rights and irreparably injure Plaintiffs on an ongoing basis.

Plaintiffs seek immediate injunctive relief to abate these ongoing constitutional violations. Plaintiffs acknowledge, however, that binding precedent forecloses this Court from granting such relief at this time. *See* Complaint, ¶ 85. The Court can therefore best provide timely relief by denying this Motion without argument so that Plaintiffs may proceed to the appellate court(s) capable of overturning that precedent and granting relief.[1] While those decisions are binding here, they are irreconcilable with basic First Amendment principles and subsequent decisions, and are thus likely to be overruled. *See, e.g.*, *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2291 (2012) ("By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.").

[1] Should the Court desire to hear argument, Plaintiffs have noticed this motion for July 26, 2013, with the objective of pursuing relief as expeditiously as possible.

FACTS

A. *California's "Agency Shop" Law for Public-School Teachers*

1. The "Agency Shop" Arrangement

The State of California empowers school districts to require public-school teachers, as a condition of employment, to either join the union representing teachers in their district or pay the equivalent of dues to that union. This requirement, known as an "agency shop" arrangement, operates as follows.

California law allows a union to become the exclusive bargaining representative for "public school employees" in a bargaining unit (usually a public school district) by submitting proof that a majority of employees in the unit wish to be represented by the union. CAL. GOV'T CODE § 3544(a). A "public school employee" is "a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees [who facilitate employee relations on behalf of management]." *Id.* § 3540.1(j). Once a union becomes the exclusive representative, it represents all "public school employees" in that district for purposes of bargaining with the district. *Id.* § 3543.1(a). The union is thus authorized to bargain over a wide range of "[t]erms and conditions of employment" that go to the heart of education policy, including wages, hours, health and welfare benefits, leave, transfer and reassignment policies, class size, and procedures to be used for evaluating employees and processing grievances. *Id.* § 3543.2(a).

Once a union becomes the exclusive bargaining representative within a district, it is authorized by California law to establish an agency-shop arrangement (or "organizational security arrangement") with that district. State law defines this arrangement as one in which all employees "shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee." *Id.* § 3546(a). The amount of this "fair share service

fee"—commonly known as an "agency fee"—is determined by the union and "shall not exceed the dues that are payable by members" of the union. *Id.* The fee is meant to support union activities that are "germane to [the union's] functions as the exclusive bargaining representative." *Id.* California law includes a range of expenses in this category, including "the cost of lobbying activities designed to foster collective-bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer." *Id.* § 3546(b). In practice, the agency fee typically equals the amount of union dues. *See* Friedrichs Decl. at ¶ 4, Ex. 1; Laursen Decl. at ¶ 6, Ex. 11.

Although non-members must pay fees to support union activities that are "germane" to collective-bargaining, the First Amendment has long forbade compelling them to support union activities that are "*not* devoted to . . . negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." *Id.* § 3546(a) (emphasis added); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36, 97 S. Ct. 1782, 1800, 52 L. Ed. 2d 261 (1977). The latter expenses are "non-chargeable," and it is the union's responsibility to annually determine the portion of its expenses falling into that category. The union makes this determination by first calculating the total amount of the agency fee based on its expenditures for the coming year, and then calculating the non-chargeable portion of this fee based on an audited financial report of a recent year's expenditures. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(b)(1).

2. The *Hudson* Notice and Objection Process

Each fall, after the union has made the requisite determinations, it must send a "*Hudson* notice" to all non-members that sets forth the amount of the agency fee as well as a breakdown of the chargeable and non-chargeable portions of this fee. CAL. GOV'T CODE § 3546(a); REGS. OF CAL. PUB. EMP'T RELATIONS BD.

§ 32992(a).[2] The *Hudson* notice must also include either the union's audited financial report for the year or a certification from the union's independent auditor confirming that the chargeable and non-chargeable expenses have been accurately stated. *Id.* § 32992(b)(1). The independent auditor does not, however, confirm that the union has properly classified expenditures as being chargeable or non-chargeable. *See Knox*, 132 S. Ct. at 2294 (explaining as much).

To avoid paying for non-chargeable expenditures, a non-member is required to affirmatively "opt out" of such payments each year by notifying the union of his or her objection after receipt of the *Hudson* notice. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32993. The period to lodge this objection must last at least thirty days, and typically lasts no more than six weeks. *Id.* § 32993(b). Teachers who opt out are then entitled to a rebate or fee-reduction for that year. CAL. GOV'T CODE § 3546(a). If a non-member fails to affirmatively opt out by the deadline, he or she is required to pay the full agency fee, including the non-chargeable portion. *See, e.g.*, Friedrichs Decl. at ¶ 6, Ex. 1; Laursen Decl. at ¶ 7, Ex. 11.[3]

School districts in California are permitted to deduct union dues or agency fees from employees' paychecks and transfer those funds to the recognized union. CAL. GOV'T CODE §§ 3546(a), 3543.1(d); CAL. EDUC. CODE §§ 45060, 45061.5, 45168; Crocker Answer (Doc. 51), at ¶¶ 17 (admitting that "Defendant school superintendents are the executive officers in charge of the school districts that

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[2] *See generally Chicago Teachers Union v. Hudson*, 475 U.S. 292, 304-07, 106 S. Ct. 1066, 1075-76, 89 L. Ed. 2d 232 (1986) (setting forth the information unions must provide regarding their expenses).

[3] Each union must also allow non-members to challenge its determination of the chargeable portion of the agency fee. Upon the filing of such a challenge, the union must request a prompt hearing before an impartial decisionmaker selected by either the American Arbitration Association or the California State Mediation Service. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32994. Attached as Exs. 29 and 30 are two arbitration decisions yielded by this process.

employ Plaintiff teachers, pay Plaintiff teachers' wages, and process all deductions therefrom, including for union dues and 'agency fees' pursuant to 'agency shop' arrangements authorized by State law"), 19. Alternatively, employees can pay their dues or agency fees directly to the union. CAL. EDUC. CODE § 45061.

3. The Religious Objectors' Exemption

California law provides a limited exception to the agency-fee requirement for "religious objectors"—that is, "any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations." CAL. GOV'T CODE § 3546.3. Collective-bargaining agreements cannot require religious objectors to join a union or pay agency fees to a union. *Id.* The agreements can, however—and typically do—require religious objectors to pay the equivalent of the full agency fee (including the non-chargeable portion) to a "nonreligious, nonlabor organization, charitable fund." *Id.* The agreement must designate at least three approved charities, and the objecting employee then selects which one will receive his or her payment. *Id.*

B. *The Agency-Shop Arrangements Entered into by the Local-Union Defendants*

In accordance with California law, the Local-Union Defendants[4] have been designated as the exclusive bargaining agents for the districts in which each Individual Plaintiff[5] is employed as a teacher, and have entered into agency-shop

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[4] The Local-Union Defendants are: Savanna District Teachers Association, CTA/NEA; Saddleback Valley Educators Association; Orange Unified Education Association, Inc.; Kern High School Teachers Association; National Education Association-Jurupa; Santa Ana Educators Association, Inc.; Teachers Association of Norwalk-La Mirada Area; Sanger Unified Teachers Association; Associated Chino Teachers; and San Luis Obispo County Education Association.

[5] The Individual Plaintiffs are: Rebecca Friedrichs; Scott Wilford; Jelena Figueroa; George W. White, Jr.; Kevin Roughton; Peggy Searcy; Jose Manso; Harlan Elrich; Karen Cuen; and Irene Zavala.

agreements with those districts. As discussed above, each Local-Union Defendant is therefore responsible for determining both the total amount of the agency fee and the portion of this amount which will be deemed non-chargeable. This determination is often made in collaboration with Defendant California Teachers Association ("CTA"). CTA is, in turn, an affiliate of Defendant National Education Association ("NEA"), the largest union of any sort in the United States.[6]

Each of the Local-Union Defendants' agency fees includes "affiliate fees" for both CTA and NEA. *See, e.g.*, Friedrichs Decl. at ¶ 8 (explaining that she requested and obtained documents showing the breakdown), Ex. 1. The amount of these affiliate fees are uniform across local unions, as they are determined on a statewide and nationwide basis by CTA and NEA, respectively. As with each local union's fees, CTA and NEA affiliate fees are treated as partially chargeable, based on CTA's and NEA's determinations of the chargeable portions of their statewide and nationwide expenditures. In other words, the chargeable portion of the affiliate fees are not designed to correspond to actual collective-bargaining expenditures made by CTA and NEA within each district, but are instead based on the overall breakdown of CTA and NEA's chargeable expenditures in California and the United States, respectively. *See* CTA 2012 Financial Statement, Ex. 12 at 14-26.

Annual dues or agency fees typically consume roughly two percent of a new teacher's salary, and sometimes increase regardless of whether teacher pay has similarly increased. *See, e.g.*, Friedrichs Decl. at ¶ 4, Ex. 1; Laursen Decl. at ¶ 6, Ex. 11. In California, each teacher's payment of annual dues or agency fees generally exceeds $1,000. Non-members who successfully opt out of paying the non-chargeable portion of the agency fee reduce their payment by approximately $350 to $400. *See* Friedrichs Decl. at ¶ 7, Ex. 1.

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[6] The Local-Union Defendants, CTA, and NEA are collectively referred to as "the Unions."

C. *The Individual Plaintiffs*

The Individual Plaintiffs are public-school teachers who have resigned their union membership and who opt out of paying the non-chargeable portion of their agency fee every year. Each Individual Plaintiff objects to the agency-shop arrangement imposed on them, and to many of the positions taken by the Unions.

Additionally, Plaintiff Irene Zavala, an educator in San Luis Obispo County, is a religious objector under § 3546.3. She resigned her union membership in 2001, and first sought religious objector status in San Luis Obispo County in September 2012. Zavala Decl. ¶¶ 2, 5, Ex. 10. Ms. Zavala was required to submit "a detailed written statement establishing the basis for [her] religious exemption," and, after she submitted this detailed statement, she obtained an exemption on September 25, 2012. *Id.* ¶ 5.

ARGUMENT

The First Amendment to the United States Constitution protects the individual rights of free speech and free association. This includes the right to not support political causes and activities that conflict with one's beliefs, *see, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S. Ct. 2334, 2338, 150 L. Ed. 2d 438 (2001) ("[T]he [First] Amendment may prevent the government from . . . compelling certain individuals to pay subsidies for speech to which they object." (citations omitted)); and the right to not be compelled into unwanted associations, *see, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 120 S. Ct. 2446, 2451, 147 L. Ed. 2d 554 (2000) ("Freedom of association . . . plainly presupposes a freedom not to associate." (quotation omitted)). Just last year the Supreme Court noted that "[w]hen a State establishes an 'agency shop' that exacts compulsory union fees as a condition of public employment, the dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Knox*, 132 S. Ct. at 2289 (citations and alterations omitted). The Court further recognized that "[b]ecause a public-sector union takes

many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights." *Id.*

The State and the school districts in which Plaintiffs work, in cooperation with the Unions, maintain agency-shop arrangements that injure Plaintiffs in two distinct, irreparable ways, both of which require prompt relief. *First*, the agency fees that all non-members must pay constitute compelled political speech. Virtually every term that a public-employee union secures in negotiations with state and local governments is inextricably intertwined with political decisions and policy trade-offs. Forcing Plaintiffs to subsidize efforts to shape public-education policy and commandeer an ever-greater portion of the public fisc to pay for Union priorities violates Plaintiffs' First Amendment rights of free speech and free association.

Second, even assuming *arguendo* that the State may compel subsidization of a public-employee union's "bargaining" activities, it is settled law that Plaintiffs have a First Amendment right to not subsidize the Unions' concededly "political" activities. *See Abood*, 431 U.S. at 235-36 ("[T]he Constitution requires [] that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."). Nonetheless, Plaintiffs automatically forfeit this First Amendment right—and are compelled to subsidize the Unions' "political" activities—unless they send a letter to the Unions every year affirmatively objecting to providing this subsidy. This default rule—which annually presumes that every public employee wants to fund the Unions' political activities unless they affirmatively "opt out"—is illogical and is transparently designed to induce support for the Unions' political speech. It, too, violates Plaintiffs' First Amendment rights of free speech and free association.

These infringements of Plaintiffs' First Amendment rights are acute and sustained, and require judicial intervention as soon as possible. Unfortunately, this

Court's ability to intervene is foreclosed by binding precedent. *See Abood*, 431 U.S. at 232 (1977) (upholding constitutionality of compelling public employees' payment of agency fees); *Mitchell v. L.A. Unified Sch. Dist.*, 963 F.2d 258, 263 (9th Cir. 1992) (upholding the constitutionality of requiring non-members to opt out of paying the non-chargeable share of dues). Nevertheless, subsequent decisions have severely undermined that precedent and established Plaintiffs' likelihood of ultimately prevailing on the merits of their claims. *See, e.g.*, *Knox*, 132 S. Ct. at 2291. Plaintiffs thus respectfully submit that the most appropriate course is for the Court to deny this Motion without argument so they can seek prompt injunctive relief from the appellate court(s) with the authority to overturn these decisions.

I. PLAINTIFFS HAVE STANDING TO FILE THIS CHALLENGE.

"To have standing, a plaintiff must have suffered an injury in fact that is fairly traceable to the challenged conduct, and it must be likely that the injury would be redressed by a favorable decision." *Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004) (quotation omitted). The Individual Plaintiffs are public-school teachers who have resigned their union membership and opted out of subsidizing the Unions' explicitly political activities. Were it not for California's agency-shop law, no Individual Plaintiff would pay *any* fees to the Unions, and therefore would not have to opt out of paying non-chargeable fees for political spending. *See generally* Declarations of Individual Plaintiffs, Exs. 1-10. This state-mandated compulsion of speech thus imposes a "substantial impingement" on the Individual Plaintiffs' First Amendment rights, causing a clear injury-in-fact. *Knox*, 132 S. Ct. at 2295. The requested injunction would redress this injury by barring coerced payment of any fees or, failing that, enjoining the law's requirement that employees opt out of paying fees to support political causes.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor

the relief requested requires the participation of individual members in the lawsuit." *Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010) (quotation omitted). Plaintiff Christian Educators Association International ("CEAI") is a non-profit religious association whose membership "primarily consists of teachers, administrators, and paraprofessionals working in public school districts." Laursen Decl. at ¶ 3, Ex. 11. CEAI has over 600 California members, several of whom are Plaintiffs in this action. *Id.* ¶ 4. Those California members have standing to sue on their own behalf, based on their objection to paying fees to the Unions. Moreover, the First Amendment interests at stake go to the core of CEAI's purposes, one of which is protecting its members' right not to support Union positions with which they disagree. Finally, neither the claims asserted nor the relief requested require the participation of individual CEAI members (although some of those members are Plaintiffs here). *See, e.g.*, *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001) (a suit for injunctive and declaratory relief "do[es] not require individualized proof").

CEAI further has standing in its own right because it engages in counseling, referral, advocacy, and educational services relating to California's agency-shop arrangements—including the obligation of California teachers to annually "opt out" of paying for non-chargeable expenditures—as well as because those arrangements "interfere[] with CEAI's function as an exclusive professional association and create[] a drain on CEAI's resources." Laursen Decl. at ¶ 10, Ex. 11; *see also e.g.*, *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) ("[A]n organization has 'direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission.'" (quotation omitted)); *El Rescate Legal Services, Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) ("The allegation that the [challenged] policy frustrates [the organization's] goals and requires the organizations to expend resources in representing clients they

otherwise would spend in other ways is enough to establish standing.").

II. A PRELIMINARY INJUNCTION IS WARRANTED.

"To obtain a preliminary injunction, a plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)).

A. *Irreparable Harm.*

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976); *see also, e.g.*, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011) (noting the "long line of precedent establishing" this point). Parties seeking "preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002) (citations omitted). Thus, if Plaintiffs can establish "a colorable First Amendment claim," they will necessarily show irreparable injury warranting a preliminary injunction.

Indeed, in First Amendment suits such as this one, the preliminary-injunction analysis inevitably turns on whether the claim is likely to succeed on the merits. As the Ninth Circuit explained several years ago in *Klein v. City of San Clemente*, "[g]iven the free speech protections at issue in this case, [] it is clear that" the factors other than likelihood of success on the merits "are satisfied." 584 F.3d 1196, 1207 (9th Cir. 2009); *see also, e.g.*, *Sanders County Republican Central Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012) (holding that "here we view public interest factors as subsumed within our analysis of likelihood of success on the

merits, irreparable injury, and balance of hardships"; and noting that *Klein* "address[ed] irreparable injury, balance of hardships, and public interest elements in tandem"). In short, if a First Amendment claim has "colorable" merit, the plaintiff is necessarily injured, and the public interest and balance of equities inevitably are furthered by promptly ending the unconstitutional regime.

B. *Likelihood of Success on the Merits.*

Plaintiffs will ultimately prevail on the merits of both claims. *First*, the State's agency-shop arrangement "substantially impinge[s]" non-members "critical First Amendment rights," to an extent that is "an anomaly" under the Constitution. *Knox*, 132 S. Ct. at 2289-90, 2295. This anomaly can no longer be tolerated. *Second*, requiring public employees to affirmatively assert their unwillingness to support the Unions' self-declared political expression, while obviously "represent[ing] a remarkable boon for unions," burdens non-members by requiring them to take affirmative steps to eliminate the "risk that [their] fees . . . will be used to further political and ideological ends with which they do not agree." *Id.* at 2290. The opt-out requirement is therefore plainly an overbroad and gratuitous burden. In both respects, this scheme continuously violates Plaintiffs' First Amendment rights.

1. Defendants' monthly extraction of agency fees from Plaintiffs violates the First Amendment.

Defendants continuously violate the First Amendment by extracting and retaining agency fees from Plaintiffs' paychecks. Plaintiffs acknowledge, however, that the Supreme Court approved of this sort of arrangement in *Abood*, 431 U.S. at 235-36, and that, while *Abood* should be overturned, it is presently binding on this Court. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (quotation omitted)). While this Court

is without authority to depart from *Abood*, in order to preserve Plaintiffs' arguments for further review, and to show that ultimate success on the merits is probable, this Memorandum explains why that decision "rest[s] on reasons rejected in some other lines of decisions," *id.*, and why Plaintiffs are thus likely to ultimately prevail.

First, even if it is possible to distinguish between the dollars that go to collective-bargaining and those which go to avowedly political efforts,[7] public-union collective-bargaining cannot reasonably be characterized as "apolitical," as it inherently involves promoting and influencing debatable policy decisions by public officials regarding issues of public concern. As *Abood* itself recognized, "[t]here can be no quarrel with the truism that because public-employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political." 97 S. Ct. at 1797. Thus, in reality, there is no material distinction "between collective-bargaining activities . . . and ideological activities unrelated to collective bargaining." *Id.* at 1800. For public-employee unions like Defendants, every decision—whether part of collective-bargaining or not—has direct political consequences and is infused with public policy. When the union engages in collective-bargaining, it negotiates with government officials for expenditures that will necessarily come out of the same public fisc that funds all other governmental activities—thus draining the

[7] Given that money is fungible, any funds that a Union receives for *chargeable* activities inevitably support the Union's *non-chargeable* activities. Just as the "soft money" outlawed by the McCain-Feingold law was understood as supporting the federal electoral efforts of political parties even though it could be expended only on "activities intended to influence state or local elections," the portion of the agency fee supposedly limited to non-political activities indirectly supports the Unions' concededly political activities. *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 123, 155, 124 S. Ct. 619, 648, 667, 157 L. Ed. 2d 491 (2003); *cf. Sabri v. United States*, 541 U.S. 600, 606, 124 S. Ct. 1941, 1946, 158 L. Ed. 2d 891 (2004) ("Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there.").

public treasury of funds in a way that many public employees oppose. *See Knox*, 132 S. Ct. at 2289 ("[A] public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . .").

Even more starkly, the Unions consistently "bargain" for contractual provisions that embody the *very same* policy choices to which the Unions devote concededly political spending. Potential topics of collective-bargaining in California include "health and welfare benefits," "leave," "transfer and reassignment policies," "safety conditions of employment," "class size," and "procedures to be used for the evaluation of employees." CAL. GOV'T CODE § 3543.2(a). As Defendant CTA has explained: "Critical job issues that are within the legal scope of bargaining include compensation, hours of work, safety matters, class size, evaluation and disciplinary procedures, health care, access to personnel files, preparation time, seniority, transfer rights, a grievance procedure with binding arbitration to settle major disputes, discrimination, job assignments, and early retirement." CTA, *Issues & Action: Collective Bargaining*, Ex. 13; *see also* Compl., Ex. D, at p. 41 (explaining that NEA has "determined that chargeable activities and expenditures were related to" "specific terms and conditions of employment that may be negotiable, such as" "promotions," "discharge," and "performance evaluation"). These issues, which the Defendants consider to be "within the legal scope of bargaining," include many of the most contested matters of education policy. Thus, collective-bargaining is simply policymaking by other means.

Confirming the point, numerous California statutes address topics at the heart of collective-bargaining. For example:

- California Education Code § 44929.21(b) provides that district employees become "permanent employees"—that is, receive tenure—"after having been employed by the district for two complete consecutive school years."

- California Education Code §§ 44934, 44938(b)(1) and (2), and 44944 require districts to follow a complex procedure in order to terminate an employee.

- California Education Code § 44955 requires that the teachers terminated first must always be the teachers hired last ("last in, first out").

These statutes—which provide tenure, establish procedures for termination, and give seniority preference in layoffs—address issues at the heart of collective-bargaining. As CTA recently explained, each of these statutes "provide[s] teachers important employment benefits, including protection from termination without cause after a probationary period; due process rights when facing termination; and seniority-based terminations in the event of a [budget-based layoff]." *Vergara v. California*, No. BC 484642, Motion to Intervene, at 6 (Cal. Sup. Ct. May 2, 2013) (citations omitted); Declaration of CTA President Dean Vogel, at ¶¶ 11-20, Ex. 14. And indeed, many of the CBAs in Plaintiffs' districts provide benefits similar to those codified in these statutes. *See, e.g.*, Orange Unified CBA § 15.330 (specifying dismissal procedures for teachers who have not obtained tenure and are thus not covered by the above statutes), Ex. A to Ex. 3 (Figueroa Declaration); *id.* § 4.233 (providing seniority preference in school-transfers); Sanger Unified CBA § 12.8 (same), Ex. A to Ex. 9 (Elrich Declaration).

Despite the fact that these statutes cover core topics of collective-bargaining, money spent on lobbying public officials to pass or protect them would be non-chargeable under *Abood*. *See, e.g.*, CTA 2012 Financial Statement at 34 (treating "[l]obbying and political efforts before state legislatures" as a non-chargeable expense), Ex. 12; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520, 111 S. Ct. 1950, 1959-60, 114 L. Ed. 2d 572 (1991) (lobbying for "financial support of the employee's profession or of public employees generally" is non-chargeable). Yet bargaining with School Districts for the *same* policies would be *chargeable* under *Abood*. That, of course, makes no sense. There is no reason why expenditures made to obtain *identical benefits* from public officials should receive different First Amendment treatment when the money is spent on "lobbying" to obtain them, as opposed to "bargaining" to obtain them. In *both* instances, the Unions are

pressuring government officials to take official action in service of public policies favored by the Union. *See, e.g.*, CTA, *Collective Bargaining*, Ex. 13 (CBA "must be ratified . . . by the school board"); NEA, *Collective Bargaining* ("The [district's] management team generally seeks approval from the school board."), Ex. 15; *see also* CAL. EDUC. CODE §§ 35160, 35161 (district's "governing board" has authority for each district).

Second, it has become clear that *Abood*'s justification for allowing compelled collective-bargaining fees—the prevention of so-called "free riding" by non-members—is untenable. The Supreme Court reasoned in *Abood* that although an agency-shop arrangement "has an impact upon [employees'] First Amendment interests," this impact was "constitutionally justified" by the need to prevent non-members from "free-riding" on the benefits of the unions' collective-bargaining efforts without contributing to the cost of those efforts. 97 S. Ct. at 1792-93. But "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. Compelled payments to support collective-bargaining thus impose a substantial burden on First Amendment freedoms and must be supported by a compelling governmental interest. It is clear that the government has no compelling—or even legitimate—interest in empowering private organizations to extract monetary tribute from individuals, simply because the coerced citizen supposedly benefits from the organization's advocacy. As the Supreme Court explained in *Knox*:

> If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.

132 S. Ct. at 2289-90.[8]

Indeed, the "free-rider" justification is particularly irrational in the union context because the very power that purportedly *justifies* coercing fees from non-members—the unprecedented State-bestowed power given to several union members (previously selected by a bare majority of employees) to bind all employees in the bargaining unit to employment policies and conditions that the union believes best serve most employees' collective interests—is *itself* a stark deprivation of a non-member's associational freedom; one that could not be imposed by any other private organization. Thus, the *justification* for depriving non-members of their First Amendment freedom to choose which organizations they will financially support is this *preexisting deprivation* of those non-members' associational freedom to personally negotiate wages and benefits that they believe better serve their individual needs. But, in fact, compelled agency fees only *exacerbate* the already-acute subjugation of each non-member's associational freedom and individual interests. Non-members are not only compelled to associate with the Unions via contract and accept the (often disadvantageous) terms that the Unions negotiate; they must *also* devote a portion of their wages to *support* these unwanted collective-bargaining efforts.

The perverse effects of this double-deprivation of Plaintiffs' First Amendment freedoms are evident in California. In order to maximize their membership and dues, Unions have a powerful incentive to *not* bargain with the Defendant Districts for certain benefits typically provided by comparable

[8] California itself has acknowledged the absence of any "compelling interest" in mandating that agency fees be paid to the Unions by creating an ad hoc exception from making payments to Unions for "religious objectors" like Plaintiff Irene Zavala. If mandatory payments to Unions are essential to collective bargaining, as Defendants will doubtless claim, then it makes no sense to exempt teachers from those mandatory payments whenever they have a religious objection to unionism.

employers in other contexts. One stark example of this divergence in interests is disability insurance, which public school teachers need in order to, among other things, take maternity leave with pay approximating their regular salary. By excluding such benefits from their collective-bargaining agreements, the Unions obtain a monopoly on offering these benefits at low cost—an offering they limit to Union members. The Unions then leverage such benefits into recruiting additional Union members who are, in turn, required to pay full Union dues and thus fund the Unions' chargeable *and* non-chargeable activities. *See* Kern High Teachers Association Letter, Ex. 16 ("If you join CTA, you are eligible for income protection [in the event of a disability] through the insurance provider The Standard."); Compendium of Web Pages Cited in Complaint, Ex. 17; CTA 2012 *Hudson* Notice, at 1, Ex. 18; Compl. ¶ 64. The Unions' monopoly over bargaining enables them to impose this Hobson's choice whereby employees must decide between benefits like paid maternity leave and exercising their First Amendment right to not subsidize the Unions' non-chargeable activities.

Finally, even if it were true that the Local-Union Defendants focus narrowly on collective-bargaining activities, that assumption cannot credibly be applied to CTA or NEA. Those statewide and national groups do not engage in collective-bargaining with local School Districts; rather, they pursue their legislative interests through lobbying and other undeniably political activity. *See, e.g.*, 2008-2009 NEA Resolutions, *2008-2009 NEA Handbook*, Ex. 20. For example, notwithstanding NEA's distance from any actual bargaining with the Defendant Districts, that entity generally deems 40% of its expenditures to be "chargeable" expenditures—i.e., "germane to its duties as collective-bargaining agent," *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 447, 104 S. Ct. 1883, 1892, 80 L. Ed. 2d 428 (1984)—for California school teachers.

2. Defendants' annual opt-out requirement imposes an unconstitutional burden on Plaintiffs' rights.

Defendants are further continuously violating the First Amendment by requiring that Plaintiffs annually invoke their constitutional right to not fund concededly political activities or else have payments for politics automatically taken from their paychecks. Plaintiffs acknowledge, however, that the Ninth Circuit has previously upheld this opt-out regime in *Mitchell*, 963 F.2d at 262-63, which is binding on this Court. In order to preserve Plaintiffs' arguments for further review, and to demonstrate that ultimate success is likely, this Memorandum briefly explains why *Mitchell* is incorrect and should be overturned.

Courts typically "do not presume acquiescence in the loss of fundamental rights." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 119 S. Ct. 2219, 2229, 144 L. Ed. 2d 605 (1999) (internal quotation marks and citation omitted). Yet that is precisely what Defendants' scheme does, by presuming each year that *every* public employee wants to subsidize the Unions' (extremely controversial) political agenda. There is no empirical justification for such a presumption, particularly in the context of public employees like Plaintiffs who are *not* members of the Unions and who have *repeatedly* opted out of subsidizing the Unions' political activities. The only conceivable rationale for requiring that non-members affirmatively opt out of paying political fees is to burden their right to engage in unfettered, voluntary selection of what speech they wish to support. Indeed, the Unions have actively opposed attempts at eliminating California's opt-out regime, confirming that this presumption serves to protect union coffers rather than First Amendment rights. *See, e.g.*, CTA Prop. 75 Flyer, Ex. 19 (claiming that a proposition eliminating the opt-out regime would "severely crippl[e] the union's ability to participate in the political process").

As the Court explained in *Knox*: "[M]easures burdening the freedom of speech or association must serve a 'compelling interest' and must not be

significantly broader than necessary to serve that interest." 132 S. Ct. at 2291. Defendants' annual opt-out system fails that standard because there is *no* state interest—let alone a compelling one—in "shift[ing] the advantage of . . . inertia," *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 86 S. Ct. 803, 818, 15 L. Ed. 2d 769 (1966), away from employees who wish to exercise their First Amendment rights and onto Unions that "have no constitutional entitlement to the fees of nonmember-employees," *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185, 127 S. Ct. 2372, 2379, 168 L. Ed. 2d 71 (2007). The State obviously could not automatically transfer a percentage of each State employee's paychecks to the Governor's re-election campaign or the Republican party unless the employee opted out, even though employees certainly may make such donations voluntarily. That is because *failing to object* is plainly materially different from *affirmatively making* a voluntary donation. Given that the State could not force employees to affirmatively prevent automatic donations to politicians or political parties, it cannot do so for the concededly political spending of the Unions—particularly since over 95% of the Unions' donations go to one political party.[9]

Finally, even if Defendants somehow had a legitimate interest in burdening

[9] For example, the CTA was the highest spending special interest group in California in the past decade, *see* California Fair Political Practices Commission, *Big Money Talks: California's Billion Dollar Club* 11 (2010), http://www.fppc.ca.gov/reports/Report31110.pdf, Ex. 21, and was also the single largest funder of the California Democratic party, *id.* at 12. Of the nearly $102 million the CTA spent on political contributions between 2003 and 2012, 0.08 percent went to Republicans. *See* Troy Senik, *The Worst Union in America*, CITY JOURNAL, Spring 2012, http://www.city-journal.org/2012/22_2_california-teachers-association.html, Ex. 22. Similarly, in the 2012 election cycle, the NEA gave 93% of its $14.9 million in total contributions to Democrats and 7% to Republicans. *See* Center for Responsive Politics, National Education Assn: Total Contributions, Ex. 23 (last visited June 12, 2013). In its spending on U.S. House and Senate races, the union gave 95% of a total $1,848,972 to Democrats and 4% to Republicans. Center for Responsive Politics, National Education Assn: Recipients, Ex. 24. *See also* Exs. 25-28 (detailing additional union expenditures).

Plaintiffs' First Amendment rights, the scheme they operate is "significantly broader than necessary to serve that interest." *Knox*, 132 S. Ct. at 2291. The current regime requires Plaintiffs to send a new letter every year in perpetuity in order to avoid funding the Unions' political speech. Should a public employee fail to send a letter by the deadline, that employee is required to pay the full agency fee, including the non-chargeable portion supporting political activities. *See, e.g.*, Friedrichs Decl. ¶ 6, Ex. 1; Laursen Decl. ¶ 7, Ex. 11. There is no justification for requiring Plaintiffs—and others like them—to renew their objection in writing every year. The effect of this requirement is to significantly exacerbate the "risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Knox*, 132 S. Ct. at 2290. That risk could be fully avoided—and this over-breadth problem easily solved—by simply requiring the Unions to obtain affirmative consent from all public employees before extracting payments that will be used for non-chargeable purposes.

C. *Balance of the Equities.*

The balance of equities weighs heavily in Plaintiffs' favor. Absent judicial intervention, Plaintiffs are deprived of their First Amendment right not to subsidize expression with which they disagree. The Unions, in stark contrast, "have *no* constitutional entitlement to the fees of nonmember-employees." *Knox*, 132 S. Ct. at 2291 (emphasis added) (quoting *Davenport*, 551 U.S. at 185)). *Knox* made clear that when the choice is between First Amendment rights and union-subsidization, that choice must *always* be resolved against "the side whose constitutional rights are not at stake." *Id.* at 2295. Because Plaintiffs' First Amendment rights conflict with the Unions' non-constitutional interest, the equities favor Plaintiffs.[10]

[10] *See also, e.g.*, *Rodriguez v. Robbins*, No. 12-56734, 2013 WL 1607706, at *13 (9th Cir. Apr. 16, 2013) ("[The defendant-government] cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns."); *Klein*, 584 F.3d at 1208 ("[O]ur

D. *The Public Interest.*

Finally, "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano*, 303 F.3d at 974. Here, Defendants violate the First Amendment by wrongfully deducting and retaining monies from Plaintiffs' wages, and by subjecting Plaintiffs to a regime wherein they must affirmatively register dissent each year or else forfeit their First Amendment right to not subsidize admittedly political activities with no connection to collective-bargaining. The public interest thus plainly favors injunctive relief. *See, e.g.*, *Melendres*, 695 F.3d at 1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quotation omitted)); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

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caselaw clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his First Amendment claim."); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.").

CONCLUSION

Defendants violate Plaintiffs' First Amendment rights by forcing Plaintiffs to subsidize the Unions' political activities and by requiring Plaintiffs to affirmatively renew their dissent every year or else forfeit their right to not subsidize activities that the Unions admit are purely political. Prompt injunctive relief is required to end the First Amendment harm Plaintiffs suffer every day. Because this Court lacks the present authority to provide such relief, Plaintiffs respectfully ask that the Court enter its decision on this Motion as quickly as is practicable so that Plaintiffs may take their request to a forum with the power to grant it.

Dated: June 25, 2013

JONES DAY

By: */s/ John A Vogt*
John A. Vogt

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