No. _____

In the Supreme Court of the United States

TERRY C. COOLEY, PETITIONER

v.

CALIFORNIA STATEWIDE LAW ENFORCEMENT ASSOCIATION, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After this Court's ruling in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), petitioner Terry Cooley resigned his membership in the California State Law Enforcement Association (CSLEA) and demanded that the union stop diverting membership dues from his wages. The union, however, refused to accept Mr. Cooley's resignation and continued tapping his paycheck. The union claimed that its contract with the state of California prohibits employees from resigning their union membership until 30 days before the contract's expiration date, and Article 3.1A1 of this collective-bargaining agreement says that "any employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract."[1] The district court held that Article 3.1A1's restrictions on union resignations were "valid and enforceable," App. 10a, and the Ninth Circuit affirmed, holding that this collective-bargaining agreement between the union and the state compelled Mr. Cooley to remain a dues-paying union member until June 1, 2019. App. 2a–3a. The question presented is:

> Does the Constitution allow a public-sector union to enter into a contract with a state employer that restricts a public employee's constitutional right to resign his union membership?

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1. Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2016–2019), article 3.1A1, Dkt. Entry 50-1, at p. 16.

2. On December 17, 2013, Mr. Cooley typed his initials on an online union-membership application that contains the following sentence: "Per the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member."[2] The district court and the Ninth Circuit held that this document established a legally binding contract, and that the terms of this contract obligated Mr. Cooley to remain a member of the CSLEA until June 1, 2019. App. 3a; App. 9a–11a. But the "Unit 7 contract" that existed at that time was the 2013–2016 agreement between the union and the State, *not* the 2016–2019 contract that purported to prevent Mr. Cooley from resigning his union membership until June 1, 2019. Under the terms of the 2013–2016 Unit 7 contract, Mr. Cooley was required to maintain his union membership only until June 1, 2016.[3] The question presented is:

> Did Mr. Cooley promise to maintain his union membership until June 1, 2019, when he initialed the union-membership application on December 17, 2013?

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2. Dkt. Entry 50-9.

3. Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2013–2016), article 3.1A1, Dkt. Entry 50-10, at p. 12.

PARTIES TO THE PROCEEDING

Petitioner Terry C. Cooley was the plaintiff-appellant in the court of appeals.

Respondents California Statewide Law Enforcement Association and California Association Of Law Enforcement Employees were the defendants-appellees in the court of appeals.

A corporate disclosure statement is not required because Mr. Cooley is not a corporate entity. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial court case as this case other than those proceedings appealed here. Those proceedings are:

- *Cooley v. California Statewide Law Enforcement Association, et al.*, No. 2:18-cv-02961-JAM-AC, U.S. District Court for the Eastern District of California. Judgment entered July 9, 2019.
- *Cooley v. California Statewide Law Enforcement Association, et al.*, No. 19-16498, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 28, 2022.

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PETITION FOR A WRIT OF CERTIORARI

In the aftermath of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), many public employees have sought to resign from their unions and terminate payroll deductions now that they are no longer compelled to pay the union as a condition of employment. But many employees have been thwarted from doing so. Petitioner Terry Cooley, for example, attempted to resign from the California State Law Enforcement Association (CSLEA) shortly after *Janus*, but the union refused to accept his resignation and would not allow him to resign until June 1, 2019.

The union tried to justify its actions by pointing to a provision in its contract with the State of California,

which purports to require union members to maintain their membership in the CSLEA for the duration of the union's three-year agreement with the State, allowing them to resign only during a window that begins 30 days before the agreement's expiration date.[1] But this maintenance-of-membership requirement is patently unconstitutional. A public-sector union cannot enter into a contract with the State that limits an employee's constitutional right to resign his union membership. And a public-sector union cannot ignore an employee's request to resign unless that employee has somehow waived his constitutional right to withdraw from the union—and has done in a manner that satisfies the requirements for waiver established in *Janus*. *See Janus*, 138 S. Ct. at 2486 ("[T]o be effective, the waiver must be freely given and shown by 'clear and compelling' evidence.").

The district court and the Ninth Circuit held that the union properly refused Mr. Cooley's resignation de-

1. *See* Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2016–2019), article 3.1A1, Dkt. Entry 50-1, at p. 16 ("[A]ny employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract."); Letter from Faith Bassiouny to Terry Cooley, Dkt. Entry 50-3 ("We are unable to cancel your membership with CSLEA as you are a full paying member. Please be advised that the Janus decision did not invalidate the window period for changes in membership status. Pursuant to Article 3.lA1 of the Unit 7 Contract, the next opportunity to opt out of membership is the thirty (30) day period prior to expiration of the current MOU. i.e. June 2019. I am hoping your involvement in the next round of negotiations will cause you to reconsider your intentions at that time.").

mands on account of these maintenance-of-membership requirements in the union's collective-bargaining agreement with the state. App. 2a–3a; App. 9a–11a The Court should grant certiorari and summarily reverse the Ninth Circuit's decision.

OPINIONS BELOW

The opinion of the court of appeals is available at 2022 WL 1262015, and is reproduced at Pet. App. 1a–4a. The district court's opinion is available at 385 F. Supp. 3d 1077, and is reproduced at 5a–14a.

JURISDICTION

The court of appeals entered its judgment on April 28, 2022. Pet. App. 1a. Mr. Cooley petitioned for rehearing en banc, and the court of appeals denied his petition on June 8, 2022. Mr. Cooley timely filed this petition for a writ of certiorari on September 6, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT

Plaintiff Terry C. Cooley is a police officer employed by California Exposition, or Cal Expo. He began his employment in June of 2007 as a permanent intermittent employee. Before the Supreme Court's ruling in *Janus*, Mr. Cooley worked in an "agency shop," where employees were forced to either join the CSLEA and pay full membership dues, or else pay "fair-share service fees" to the union as a condition of their continued employment. *See* First Amended Complaint, Dkt. Entry 50, at ¶ 9.[2]

Although Mr. Cooley opposed paying dues to the CSLEA, he nevertheless joined the union at the outset of his employment because no one had informed him of his right to decline union membership. And when Mr. Cooley eventually learned of the option to decline membership and pay "fair-share service fees," he remained in the union because the difference between the cost of full union membership and the compulsory "fair-share service fees" was so minimal as to be immaterial from a financial standpoint. *See id.* at ¶¶ 12–13.

After the Supreme Court announced its ruling in *Janus*, Mr. Cooley resigned his union membership and demanded that the union stop all union-related payroll de-

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2. Because the district court dismissed Mr. Cooley's claims under Rule 12(b)(6), and the Ninth Circuit affirmed that dismissal, the statement will recite the facts as alleged in Mr. Cooley's first amended complaint, which must be accepted as true at this stage of the litigation. *See Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1927 (2019) ("Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true.

ductions. *See id.* at ¶¶ 20–21 & Ex. 2. On July 19, 2018, Mr. Cooley mailed a letter to the CSLEA's headquarters that announced:

> With this letter I am resigning my membership in the union. In accordance with my rights under the Supreme Court's decision in Janus v AFSCME and/or any right-to-work laws or other similar laws of my state, I no longer wish to pay dues or fees to the union. Therefore, I am immediately terminating my membership in the union and all of its affiliates and revoking any previous dues authorization, check off, or continuing membership form that I may have signed.

Id. at ¶ 21 & Ex. 2.

The CSLEA, however, refused to accept Mr. Cooley's resignation or stop the payroll deduction of union dues. Instead, the union wrote back to Mr. Cooley on July 30, 2018, and told him that the union's agreement with the State of California prohibits members of CSLEA from leaving the union until 30 days before the agreement expires on July 1, 2019. The union wrote:

> We are unable to cancel your membership with CSLEA as you are a full paying member. Please be advised that the Janus decision did not invalidate the window period for changes in membership status. Pursuant to Article 3.1A1 of the Unit 7 Contract, the next opportunity to opt out of membership is the thirty (30) day period prior to expiration of the current MOU,

> i.e. June 2019. I am hoping your involvement in the next round of negotiations will cause you to reconsider your intentions at that time.

Id. at ¶ 22 & Ex. 3. The union's letter relied on Article 3.1A1 of its Memorandum of Understanding (MOU) with the State of California, which prohibits employees from withdrawing from the union unless they send a "signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract."[3] This MOU was in effect from July 2, 2016 through July 1, 2019, so the earliest date that the union would allow Mr. Cooley to resign was June 1, 2019.

After the union ignored Mr. Cooley's resignation and defied his instructions to stop taking membership dues from his paycheck, Mr. Cooley e-mailed Cal Expo's Human Resources department on September 5, 2018. He wrote:

> I have resigned my membership in the California Statewide Law Enforcement Association. The union, however, refuses to accept my resignation because it says I am not allowed to resign until June 2019, and it appears that they intend to keep tapping my paycheck for union dues until then.

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3. Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2016–2019), article 3.1A1, Dkt. Entry 50-1, at p. 16.

> Because the union will not honor my resignation letter, I ask you to immediately stop diverting my paycheck to the union. I am no longer authorizing any payroll deduction of union-related fees, and I revoke any previous consent that I may have given to union-related payroll deductions.
>
> I have attached my union-resignation letter and the union's response. Please let me know if there is anything further I need to do to stop the union from taking my wages.

First Amended Complaint, Dkt. Entry 50, at ¶ 25 & Ex. 5. The Human Resources department at Cal Expo did not acknowledge or respond to Mr. Cooley's e-mail of September 5, 2018, and it did not terminate payroll deductions of union dues in accordance with his instructions. *See id.* at ¶ 26.

On November 13, 2018, Mr. Cooley sued the CSLEA and moved for a preliminary injunction to stop the union from garnishing his wages.[4] Mr. Cooley argued that public employees have a constitutional right to resign their union membership, *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate." (citing *Abood v. Detroit Board of Education*, 431 U.S. 209, 234–35 (1977)), and neither the union nor the State can agree by contract to limit their employees' constitutional right to

4. *See* Original Complaint, Dkt. Entry 1; Mot. for Prelim. Inj., Dkt. Entry 6.

withdraw from the union. Mr. Cooley further argued that he was not a party to the Memorandum of Understanding between the union and the State, so he could not be bound by the provision in article 3.1A1 that prohibits him from resigning his union membership. Finally, Mr. Cooley claimed that he ceased to be a "member" of the union when he submitted his resignation letter on July 19, 2018, and that the union was violating *Janus* by tapping the paycheck of a non-union member without first securing his "clear and affirmative consent." *Janus*, 138 S. Ct. at 2486; *see also id.* ("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.").[5]

After Mr. Cooley sued the CSLEA and moved for a preliminary injunction, the CSLEA produced an electronic union membership application that bears Mr. Cooley's typed initials. The application is dated December 17, 2013, and it includes the following language:

> I elect to become a member of CSLEA and the affiliate organization for my classification and department. Unit 7 supervisors and managers are also eligible for membership. I hereby authorize deduction from my salary of CSLEA/Affiliate dues. I understand that this membership will become effective the first month following the date of submission. Per

5. *See* Br. in Support of Mot. for Prelim. Inj., Dkt. Entry 11.

> the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member. I authorize CSLEA to send literature to the e-mail address listed above.

First Amended Complaint, Dkt. Entry 50, at ¶ 28 & Ex. 9. No other party signed or initialed this membership application of December 17, 2013. The union argued that this membership application of December 17, 2013, imposes a contractual obligation on Mr. Cooley to remain a member of the CSLEA until Article 3.1A1 of the Unit 7 Contract permits him to resign his union membership. But Mr. Cooley argued that even if this membership application *were* a legally enforceable contract, it does not contain a promise to remain a union member until June 1, 2019. Mr. Cooley affixed his typed initials to this membership application on December 17, 2013, and "the Unit 7 contract" that the membership application refers to is the Unit 7 contract in existence on December 17, 2013. *That* contract was an earlier Memorandum of Understanding that ran from July 2, 2013 through July 1, 2016, and it included the following provision:

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

> from CSLEA under this provision shall be subject to paying a CSLEA Fair Share fee as provided above.

First Amended Complaint, Dkt. Entry 50, at ¶ 32 & Ex. 10 (emphasis added). Nothing in the 2013–2016 Unit 7 contract purports to limit an employee's ability to quit the union or cancel dues deductions *after* the contract expires on July 1, 2016, and nothing purports to govern an employee's behavior beyond the contract's expiration date. Mr. Cooley did not promise in his membership application to abide by the terms of *future* CSLEA contracts that did not exist on December 17, 2013.

On January 25, 2019, the district court denied Mr. Cooley's motion for preliminary injunction. *See* Order, Dkt. Entry 42. The Court held that it was "not persuaded by Mr. Cooley's arguments that the 2013 Membership Application is not a valid contract and that he is not subject to the provisions of the collective bargaining agreement for the union to which he belongs." *Id.* at 7.

On February 22, 2019, Mr. Cooley filed an amended complaint, which sought a refund of all money that the CSLEA had garnished from Mr. Cooley's wages after he had submitted his resignation letter to the union on July 18, 2019. *See* First Amended Complaint, Dkt. Entry 50.[6] The defendants moved to dismiss the amended complaint

6. Mr. Cooley also sought injunctive relief against the union and the state defendants, but those claims have become moot now that Mr. Cooley has finally been allowed to resign his union membership and halt the payroll deduction of union dues.

under Rule 12(b)(6), and the district court granted their motions on July 9, 2019. App. 7a–16a.

The district court denied that Mr. Cooley had a constitutional right to resign his union membership in the wake of *Janus* because "Mr. Cooley voluntary agreed to become a dues-paying member of the Union, and acknowledged restrictions on when he could withdraw from membership." App. 10a. The district court further held that "*Janus* did not automatically undo Mr. Cooley's agreement to be a member of the Union, nor did it render the collective bargaining agreement's withdrawal limitation provision unenforceable." *Id.* And the court held that "[t]he collective bargaining agreement's limitation on the period of membership withdrawal is valid and enforceable, as discussed above, and Mr. Cooley's consent carries through his membership agreement." *Id.* The Ninth Circuit affirmed, holding that "[t]he district court properly found Cooley was bound to maintain union membership until June 1, 2019 under the maintenance of membership provision in the CBA," and that Cooley was "bound to refrain from resigning until the 30-day window in 2019 opened on June 1, 2019." App. 2a; App. 3a.

REASONS FOR GRANTING THE PETITION

The Court should summarily reverse the Ninth Circuit's decision. Freedom of association includes the freedom not to associate,[7] and public employees have a

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7. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associ-

(continued…)

constitutional right to resign their membership when they no longer wish to be associated with a union. A public-sector union must immediately honor and implement an employee's decision to relinquish union membership, unless that employee has waived his constituitonal right to resign or bargained it away in a legally enforceable contract. *See Janus*, 138 S. Ct. at 2486 ("[T]o be effective, the waiver must be freely given and shown by 'clear and compelling' evidence.").

The CSLEA entered into a contract with the State that purported to prevent employees from resigning their union membership until June 1, 2019.[8] The Ninth Circuit and the district court held that this contractual provision between the union and the State was "valid and enforceable," App. 10a, and that it prevents Mr. Cooley—who was not a party to this contract—from resigning his union membership until July 1, 2019. That was error, and it warrants summary reversal. A public employer and a union may not agree among themselves to limit their employees' constitutional rights, and any provision in a collective-bargaining agreement that purports to abridge an public employee's constituitonal right to resign from the union is unconstitutional and unenforceable.

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ate." (citing *Abood v. Detroit Board of Education*, 431 U.S. 209, 234–35 (1977)).

8. Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2016–2019), article 3.1A1, Dkt. Entry 50-1, at p. 16.

The Ninth Circuit and the district court also found that Mr. Cooley was contractually bound to remain in the union until June 1, 2019, because he had initialed an online union-membership application on December 17, 2013, that included the following language: "Per the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member."[9] App. 2a–3a; App. 9a–11a. The lower courts' holding on this point is demonstrably mistaken. Even if one assumes that this membership application qualifies as a legally enforceable contract, Mr. Cooley did not make any promise to remain a union member until June 1, 2019. The membership application refers to the "Unit 7 contract" in existence on December 17, 2013—the date on which Mr. Cooley initialed the document. That is not the contract that ran from July 2, 2016, through July 1, 2019, which claims to lock Mr. Cooley into union membership until June 1, 2019.[10] It is instead the contract that ran from July 2, 2013, through July 1, 2016, which expired long before *Janus* and which requires employees to maintain their union membership only through June 1, 2016.[11] Mr. Cooley has more than fulfilled his supposed

9. Dkt. Entry 50-9.

10. *See* Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2016–2019), article 3.1A1, Dkt. Entry 50-1, at p. 16.

11. *See* Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2013–2016), article 3.1A1, Dkt. Entry 50-10, at p. 12.

maintenance-of-membership obligations under this document.

I. ARTICLE 3.1A1 OF THE UNION'S CONTRACT WITH THE STATE, WHICH PURPORTS TO LIMIT THE RIGHT OF PUBLIC EMPLOYEES TO RESIGN THEIR UNION MEMBERSHIP, IS UNCONSTITUTIONAL

The CSLEA entered into a three-year contract with the State of California, and this contract purports to prohibit employees from resigning their union membership unless they do so within 30 days of the contract's expiration date. *See* Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2016–2019), article 3.1A1, Dkt. Entry 50-1, at p. 16 ("[A]ny employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract."). This language appears in Article 3.1A1 of the union's 2016–2019 contract with the State, *see id.*, and the union refused to accept Mr. Cooley's resignation on account of this contractual provision.[12]

12. *See* Letter from Faith Bassiouny to Terry Cooley, Dkt. Entry 50-3 ("We are unable to cancel your membership with CSLEA as you are a full paying member. Please be advised that the Janus decision did not invalidate the window period for changes in membership status. Pursuant to Article 3.lA1 of the Unit 7 Contract, the next opportunity to opt out of membership is the thirty (30) day period prior to expiration of the current MOU. i.e. June2019. I am hoping your involvement in the next round of negotiations will cause you to reconsider your intentions at that time.").

Article 3.1A1 is unconstitutional and unenforceable. A union and a public employer cannot agree among themselves to limit an employee's constitutional right to quit the union—any more than they can agree to limit an employee's right to practice his religion or marry a person of another race. And they cannot agree to resurrect the vestiges of forced unionism by preventing employees from quitting the union during the term of a collective-bargaining agreement. The Ninth Circuit and the district court should have declared Article 3.1A1 unconstitutional, and they should have barred the union from relying on it.

The district court, however, rejected Mr. Cooley's constitutional attack on Article 3.1A1, and held that Article 3.1A1 is "valid and enforceable." App. 10a; *see also id.* ("*Janus* did not . . . render the collective bargaining agreement's withdrawal limitation provision unenforceable."). The district court denied that public employees have a constitutional right to resign their union membership, and it denied that *Janus* established such a right. App. 9a ("*Janus* did not explicitly announce the right of resignation Mr. Cooley seeks to enforce."); App. 21a (rejecting the notion that "*Janus* held that public employees have a constitutional right to resign their union membership at their discretion and effective immediately, and any restriction on that right, like Article 3.1.A.1. of the CBA, is unconstitutional."). The Ninth Circuit affirmed, holding that the maintenance-of-membership provision in the union's contract with the state compelled Mr. Cooley to maintain his union membership until June 1, 2019. App. 2a ("The district court properly found Coo-

ley was bound to maintain union membership until June 1, 2019 under the maintenance of membership provision in the CBA.").

But a public employee's constitutional right to resign his union membership pre-dates *Janus*; it is part of the freedom of association recognized in cases such as *Abood*, 431 U.S. 209, *Roberts*, 468 U.S. at 623 ("Freedom of association . . . plainly presupposes a freedom not to associate" (citation omitted)), and *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same). *Abood*'s holding presupposes that public-sector employees have a constitutional right to resign their union membership, because resignation from membership was the *only* way that the employees in *Abood* could have withheld payments from the objectionable union activities that were financed with membership dues. *See Abood*, 431 U.S. at 213. Compelled *membership* in a public-sector union was unconstitutional long before compelled *subsidies* were, and *Janus* recognized that the Court's pre-*Janus* decisions had already protected "[t]he right to eschew association for expressive purposes." *Janus*, 138 S. Ct. at 2463; *see also id.* ("The right to eschew association for expressive purposes is likewise protected.").

Finally, it is illogical to deny that public employees have a constitutional right to resign their union membership when *Janus* holds that compelled *subsidies* of the union violate the First Amendment. Membership in a union automatically entails the payment of dues. So if a state can compel union membership as a condition of employment then it has the power to compel subsidies as well—an outcome that would render *Janus* a dead let-

ter. Suppose that the union and the state entered into a contract that prohibited members of the CSLEA from resigning their union membership until 2050, or until the termination of their employment. Would a contract of that sort be "valid and enforceable"? Surely not. Yet to avoid this outcome, one must acknowledge that public employees have a constitutional right to terminate their union membership if they no longer wish to associate with the union, consistent with the holdings of *Roberts* and *Boy Scouts*, and consistent with the constitutional principle of associational freedom that protects the right to decline or withdraw from membership in an organization that one no longer supports.

Mr. Cooley is not even a party to the contract between the union and the state, so Article 3.1A1 cannot be treated as a contractual waiver of Mr. Cooley's constitutional right to quit the union. A public-sector union may not enter into contracts with a state employer that limit an employee's constitutional right to withdraw from union membership, and it cannot rely on those contracts to reject an employee's resignation efforts or continue tapping the employee's paycheck. Article 3.1A1 is unconstitutional, and the district court and the Ninth Circuit erred in finding it "valid and enforceable." App. 10a; *see also* App. 2a.

II. MR. COOLEY DID NOT WAIVE HIS CONSTITUTIONAL RIGHT TO RESIGN FROM THE UNION WHEN HE INITIALED AN ONLINE UNION-MEMBERSHIP APPLICATION ON DECEMBER 17, 2013

The district court and the Ninth Circuit also held that Mr. Cooley waived any right that he might have had to withdraw from the union when he submitted this online "membership application" on December 17, 2013:

CSLEA MEMBERSHIP APPLICATION

California Statewide Law Enforcement Association • 2029 H Street • Sacramento, CA 95811

Name: Terry Cooley	**SS#:** Redacted
DOB: Redacted	**E-Mail:** Redacted
Sex: M	
Home Address: Redacted	
Work Address:	
Home Phone: Redacted	**Work Phone:** Redacted
Classification: Police Officer	**Department:** California Exposition & State Fair Police Department
Affiliate: CALEE	

I elect to become a member of CSLEA and the affiliate organization for my classification and department. Unit 7 supervisors and managers are also eligible for membership. I hereby authorize deduction from my salary of CSLEA/Affiliate dues. I understand that this membership will become effective the first month following the date of submission. Per the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member. I authorize CSLEA to send literature to the e-mail address listed above.

Initials: TCC	**Date:** 12/17/2013

Dkt. Entry 50-9. The district court held that by initialing this document, Mr. Cooley undertook a contractual obligation to remain a union member until June 1, 2019. App. 9a–11a; App. 22a–24a. The Ninth Circuit affirmed. Pet. App. 2a–3a.

The lower courts' holding on this point is demonstrably wrong and warrants summary reversal. Even if one assumes that the membership application of December 17, 2013, qualifies as a legally binding contract, it did *not* require Mr. Cooley to remain a union member until June 1, 2019. The membership application says: "Per the Unit

7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member."[13] This refers to the "Unit 7 contract" that existed on December 17, 2013, and the terms of *that* contract required Mr. Cooley to remain a union member only until June 1, 2016.[14] Nothing in the membership application of December 17, 2013—and nothing in the Unit 7 contract that ran from July 2, 2013, through July 1, 2016—purports to bind Mr. Cooley to the terms of a future contract that did not exist when he initialed the membership application.

A. The Union Membership Contract That Mr. Cooley Signed In December of 2013 Refers To The 2013–2016 Unit 7 Contract, Which No Longer Exists

Mr. Cooley's membership application was submitted on December 17, 2013, and the Unit 7 contract in existence at that time was the 2013–2016 agreement (which expired on July 1, 2016), *not* the 2016–2019 contract that purported to prevent Mr. Cooley from quitting the union in July of 2018. Article 3.1A1 of that 2013–2016 contract reads as follows:

> A written authorization for CSLEA dues deductions in effect on the effective date of this Contract or thereafter submitted *shall contin-*

13. First Amended Complaint, Dkt. Entry 50, at ¶ 28 & Ex. 9.

14. Agreement Between the State of California and California Statewide Law Enforcement Association (CSLEA) Governing Bargaining Unit 7 (2013–2016), article 3.1A1, Dkt. Entry 50-10, at p. 12.

> *ue in full force and effect during the life of this Contract*; provided, however, that any employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract. Employees who withdraw from CSLEA under this provision shall be subject to paying a CSLEA Fair Share fee as provided above.

First Amended Complaint, Dkt. Entry 50, at ¶ 32 & Ex. 10 (emphasis added). So even if one assumes that Mr. Cooley's membership application incorporates by reference the 2013–2016 Unit 7 contract—and even if one assumes that this imposes an contractual obligation upon Mr. Cooley to comply with that 2013–2016 agreement—this means only that Mr. Cooley was obligated to remain in the union until June 1, 2016, 30 days before the 2013–2016 Unit 7 contract expired. Article 3.1A1 says that written authorizations for dues deductions "shall continue . . . during the life of *this* Contract," and that union members may withdraw by sending a letter "within thirty (30) calendar days prior to the expiration of *this* Contract." *See id.* (emphasis added). Nothing in the 2013–2016 Unit 7 purports to govern the behavior of CSLEA members after the contract's expiration date. And no contract can regulate behavior that occurs when the contract no longer exists.

There is also nothing in Mr. Cooley's membership application that promises to abide by the terms that appear in *future* contracts or collective-bargaining agreements that the CSLEA might negotiate. It refers to "the

Unit 7 contract"—meaning the Unit 7 contract in existence on December 17, 2013—not the future contracts that the CSLEA might negotiate with the State. If the union wanted to impose an ongoing obligation to comply with its future collective-bargaining agreements, then it should have insisted that its members sign contracts that say: "I promise not to withdraw from union membership except in accordance with the terms of present and future collective-bargaining agreements that the union negotiates with the State." No language of this sort appears anywhere in Mr. Cooley's membership application.

The district court acknowledged that "the collective bargaining agreement in effect at the time of the 2013 Membership Application has since expired." App. 24a. Yet the district court did not think that this defeated the union's claim that Mr. Cooley had contractually waived his right to resign. The Court wrote:

> While Mr. Cooley is correct the collective bargaining agreement in effect at the time of the 2013 Membership Application has since expired, Mr. Cooley could have properly resigned from the Union in June 2016 (during the CBA-provided window), but he did not do so and thus, in effect, chose to remain in the Union. Under the current CBA, Mr. Cooley can resign as of June 1, 2019 and CSLEA has indicated it would honor his resignation at that time. Until then, Mr. Cooley remains obligated to pay the union dues to which he agreed.

Id. These observations, however, do not show that Mr. Cooley *executed a contr*act that prevents him from quit-

ting the union until June 1, 2019—and the district court's opinions do not explain how Mr. Cooley could be subject to a contractual obligation of that sort. App. 9a–11a; App. 21a–24a. When Mr. Cooley failed to quit the union in June of 2016, he did not sign a document—or assent to anything—that purported to lock him into union membership until June 1, 2019. And Mr. Cooley did not sign and is not a party to the 2016–2019 Unit 7 contract, or any other document that incorporates the provisions of that contract. Mr. Cooley has not undertaken any contractual obligation to remain in the union until June 1, 2019.[15]

* * * * *

Mr. Cooley acknowledges that First Amendment rights can be waived by contract, and that public employees (like criminal defendants) may enter into contracts that relinquish their constitutional rights under *Janus* in exchange for something that they value more. *See, e.g.*, Frank H. Easterbrook, *Plea Bargaining as*

15. Indeed, it is far from clear that the membership application even reflects a promise to abide by the terms of the 2013–2016 Unit 7 contract. The relevant sentence in the membership application states: "Per the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member." Dkt. Entry 50-9. That is nothing more than a declaratory statement that the then-extant Unit 7 contract included provisions that purported to limit a CSLEA member's right to quit the union. It serves only to inform applicants for union membership that the union's agreement with the State claims to limit their right to leave. It is not phrased as an independent contractual promise to abide by the terms in the Unit 7 contract.

Compromise, 101 Yale L.J. 1969 (1992); *see also Janus*, 138 S. Ct. at 2486. The question is whether Mr. Cooley *had in fact* executed a contractually valid waiver of his right to resign from the union before June 1, 2019. He did not execute such a waiver because membership application that Mr. Cooley initialed on December 17, 2013, requires Mr. Cooley (at most) to maintain his union membership until June 1, 2016, *not* June 1, 2019.

The union was required to honor Mr. Cooley's resignation letter of July 18, 2018, and immediately halt payroll deductions upon receiving this letter. The union violated Mr. Cooley's First Amendment rights by refusing to accept his resignation and continuing to tap his paycheck in defiance of his explicit instructions. The Court should summarily reverse the Ninth Circuit and require the union to return the money that it took from Mr. Cooley's wages after July 18, 2018.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the Ninth Circuit.

Respectfully submitted.

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September 6, 2022

APPENDIX

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY C. COOLEY, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. CALIFORNIA STATEWIDE LAW ENFORCEMENT ASSOCIATION; CALIFORNIA ASSOCIATION OF LAW ENFORCEMENT EMPLOYEES, as an individual defendant and as Representative of the Class of all Affiliate Associations of the California Statewide Law Enforcement Association, Defendants-Appellees.	No. 19-16498 D.C. No. 2:18-cv-02961-JAM-AC MEMORANDUM*

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

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted February 8, 2022
Portland, Oregon

Before: PAEZ and NGUYEN, Circuit Judges, and
TUNHEIM,[**] District Judge.

Appellant Terry Cooley appeals the district court's order granting Defendants' motion to dismiss. We affirm.

1. The district court properly found that Cooley's membership application met the essential elements of a contract. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999) (quoting Cal. Civ. Code § 1550). Both Cooley and CSLEA manifested consent to the contract—Cooley by signing the application and CSLEA by treating Cooley as a union member. *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). And the benefits of union membership were sufficient consideration. *See* Cal. Civ. Code § 1605; *N.L.R.B. v. U.S. Postal Service*, 827 F.2d 548, 554 (9th Cir. 1987).

2. The district court properly found Cooley was bound to maintain union membership until June 1, 2019 under the maintenance of membership provision in the CBA. Under California law, "[a] voluntary acceptance of

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

the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Cal. Civ. Code. § 1589. California law also recognizes implied contracts supported by conduct from which a promise can be inferred. *Id.* § 1621.

Cooley could have resigned from his union membership on June 1, 2016 but continued to allow union dues to be remitted from his paycheck and accept the benefits of union membership for nearly two years until he first attempted to resign in 2018. Cooley's performance and acceptance of union membership benefits sufficiently establish that he was bound to refrain from resigning until the 30-day window in 2019 opened on June 1, 2019. The district court thus properly dismissed Cooley's state law claims.

3. The district court properly concluded that Cooley does not have a First Amendment right to resign from his union. Although the freedom of association contained within the First Amendment includes the freedom against compelled associations, none of the cases cited to the district court or to this Court establish that there is a constitutional right to end voluntary contractual associations. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Cooley agreed to become a member of CSLEA subject to the stated membership resignation limitations and the First Amendment cannot and does not erase that voluntary association.

4. The district court did not err in dismissing Cooley's § 1983 claims against CSLEA. Cooley failed to show that he was deprived of a constitutional right as a result of state action and that CSLEA was fairly attributed as a state actor. Although the district court did not have the decision in *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), when making its determination, *Belgau* controls this Court's analysis and the district court's dismissal must be affirmed.

5. The district court properly dismissed Cooley's claim for a refund of the union dues he paid before the decision in *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). *Belgau*, 975 F.2d at 946–49. As Cooley conceded in his briefing, this Court's decision in *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), precludes recovery of such fees under § 1983. *Danielson*, 945 F.3d at 1104.

AFFIRMED.

FILED
JUN 8 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY C. COOLEY, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. CALIFORNIA STATEWIDE LAW ENFORCEMENT ASSOCIATION; CALIFORNIA ASSOCIATION OF LAW ENFORCEMENT EMPLOYEES, as an individual defendant and as Representative of the Class of all Affiliate Associations of the California Statewide Law Enforcement Association, Defendants-Appellees.	No. 19-16498 D.C. No. 2:18-cv-02961-JAM-AC Eastern District of California, Sacramento ORDER

Before: PAEZ and NGUYEN, Circuit Judges, and TUNHEIM,[*] District Judge.

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

Judge Nguyen has voted to deny the petition for rehearing en banc, and Judge Paez and Judge Tunheim have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for rehearing en banc is denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TERRY C. COOLEY, on behalf of himself and all others similarly situated, Plaintiff, v. CALIFORNIA STATEWIDE LAW ENFORCEMENT ASSOCIATION, et al., Defendants.	No. 2:18-cv-02961-JAM-AC **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS**

This case arises out of Plaintiff Terry Cooley's attempt to end his union membership after the Supreme Court's decision in Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018) ("Janus"). Terry Cooley ("Plaintiff" or "Mr. Cooley"), brings this putative class action alleging the California State Law Enforcement Association ("CSLEA" or "the Union") violated his constitutional rights by refusing to accept his resignation from union membership, by continuing to deduct union-related fees from his paycheck, and for having assessed him the equivalent of now-impermissible agency fees. Mr. Cooley seeks a declaratory judgment, an injunction, and a refund of certain payments made to the Union.

CSLEA and the California Association of Law Enforcement Employees ("CALEE"; and with CSLEA, the "Union Defendants") move to dismiss Mr. Cooley's claims. Union Mot., ECF No. 58. Defendant Xavier Becerra (the "State") moves to dismiss Mr. Cooley's claims that California Government Code Sections 1152(a) and 1153(a) are unconstitutional. State Mot., ECF No. 59.

For the reasons set forth below, this Court GRANTS the Union Defendants' and State's motions.[1]

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

A recitation of the primary factual allegations in this case can be found in a prior order issued by this Court and will not be repeated here. See Cooley v. California Statewide Law Enf't Ass'n, No. 2:18-CV-02961-JAM-AC, 2019 WL 331170, at *1-2 (E.D. Cal. Jan. 25, 2019). In that prior order, this Court denied Mr. Cooley's Motion for a Preliminary Injunction, finding, among other things, that he failed to establish a likelihood of success on the merits of his claims. Id.; PI Order, ECF No. 42.

On February 22, 2019, Mr. Cooley filed a First Amended Class-Action Complaint ("FAC") alleging five counts: (1) declaratory judgment; (2) injunctive relief; (3) monetary relief under 42 U.S.C. § 1983; (4) conversion and trespass to chattels; and (5) unjust enrichment. FAC,

1. This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for June 4, 2019.

ECF No. 50, ¶¶ 58-68. The FAC includes additional allegations regarding Mr. Cooley's purported union membership application (¶¶ 27-32); allegations that California Government Code Sections 1152(a) and 1153(a) are unconstitutional (¶¶ 38-40); and allegations as to certain anticipated affirmative defenses (¶¶ 50-57). But the foundation of the FAC remains the same as in the original complaint: that the Union violated Mr. Cooley's constitutional rights by refusing to accept his resignation and by continuing to collect money from his paycheck. Mr. Cooley seeks a refund of all compulsory fees paid before Janus, and all dues paid after Mr. Cooley's attempted resignation in the wake of Janus.

The Union Defendants move to dismiss the FAC in its entirety. Union Mot., ECF No. 58. The State moves to dismiss Mr. Cooley's claims that California Government Code Sections 1152(a) and 1153(a) are unconstitutional. State Mot., ECF No. 59. The Union Defendants join the State's motion. ECF No. 60. Mr. Cooley opposes the motions. Opp'n to Union Mot., ECF No. 61; Opp'n to State Mot., ECF No. 62.

II. OPINION

A. Right to Resign Membership Immediately

Mr. Cooley argues that, under Janus, he has a constitutional right to resign his union membership at his discretion and with immediate effect. As this Court explained in its prior order, Janus did not explicitly announce the right of resignation Mr. Cooley seeks to enforce. PI Order at 5-6. Janus invalidated non-consensual fees charged by unions to nonmembers (i.e. "agency

fees"). Janus, 138 S. Ct., at 2486. The relationship between unions and their members was not at issue in Janus. Id. at 2461. Here, unlike in Janus, Mr. Cooley voluntary agreed to become a dues-paying member of the Union, and acknowledged restrictions on when he could withdraw from membership. ECF No. 50-9. Janus did not automatically undo Mr. Cooley's agreement to be a member of the Union, nor did it render the collective bargaining agreement's withdrawal limitation provision unenforceable. See Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991).

B. Refund of All Dues Paid Post-*Janus*

Mr. Cooley further contends, with his attempted resignation after Janus, he revoked any purported consent to pay the Union and that the Union must therefore refund to him all dues deducted from his paycheck after he announced his desire to withdraw from the Union. But, as this Court has previously explained, the continued deduction of dues by the Union here does not offend the requirement of freely given, affirmative consent of nonmembers discussed in Janus. PI Order at 7–8.

The collective bargaining agreement's limitation on the period of membership withdrawal is valid and enforceable, as discussed above, and Mr. Cooley's consent carries through his membership agreement. Mr. Cooley knowingly agreed to become a dues-paying member of the Union, rather than an agency fee-paying nonmember, because the cost difference was minimal. FAC ¶ 13. That freely-made choice was not without consequences: Mr. Cooley had to pay dues as long as he remained a member; he could only withdraw from membership with-

in a certain time frame; and, as a matter of logic and consistent with the structure of this arrangement, if he did not withdraw during that time frame his membership would automatically continue. ECF Nos. 50-1, 50-9. This was valid assent, and an intervening change in law does not taint that consent or invalidate his contractual agreement. See Brady v. United States, 397 U.S. 742, 757 (1970).

This Court acknowledges Mr. Cooley's reference to his prior contractual arguments in order to preserve them for appeal. Opp'n to Union Mot. at 7-9, n.1. As before, this Court is unpersuaded by these arguments. Moreover, while Mr. Cooley contends he did not affirmatively agree to continue his union membership after June 30, 2016, it is worth noting that he did not, despite paying dues after June 30, 2016, seek to assert these contract-based arguments of non-membership until the disparity in payments for members and non-members increased substantially after Janus was decided.

Thus, the Union was contractually authorized to continue collecting agreed-upon dues from Mr. Cooley, a union member.

C. Refund of Compulsory Portion of Membership Dues Paid Pre-*Janus*

Mr. Cooley asserts an entitlement to a refund of the compelled portion of his membership dues—equivalent to the Union's charged fair-share service fee (or agency fee)—paid to the Union before Janus was decided. FAC ¶¶ 63(a), 68(a). Mr. Cooley reasons that, even though he voluntarily agreed to join the Union and pay full membership dues, in the pre-Janus world he would have, at

minimum, been compelled to pay the Union an agency fee. Mr. Cooley contends that Janus invalidated such agency fees and, because Janus applies retroactively, a refund is warranted. This Court finds that the Union owes Mr. Cooley no such refund.

First, Mr. Cooley made an affirmative choice to become a member of the Union, obligating him to pay full membership dues. As a union member, Mr. Cooley acknowledges he never paid an "agency fee." Opp'n to Union Mot. at 12 ("Mr. Cooley never paid agency fees or fair-share fees to anyone; he is demanding a return of the compulsory portion of his union-membership dues."). But the Union membership dues are deducted as a single charge, not a split payment for compulsory fees and some extra membership charge in the manner for which Mr. Cooley seeks reimbursement. See ECF No. 50-4. Mr. Cooley's contractual dues payments to the Union were in no part compulsory. Mr. Cooley is not entitled to a reimbursement for compulsory agency fees which he never paid.

Second, and independently, Mr. Cooley's argument relies on Janus applying retroactively in a manner this Court does not sanction. This Court acknowledges the general rule that a "controlling interpretation of federal law must be given full retroactive effect." Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993). But in Janus the Supreme Court itself did not specify whether the plaintiff was entitled to retrospective monetary relief for conduct the Supreme Court had authorized for the previous forty years. See Janus, 138 S. Ct. at 2486 (remanding for further proceedings). This Court declines to forge

new ground and create such liability here. Moreover, this Court notes that numerous lower courts have denied this retrospective monetary relief, finding the unions' good-faith reliance on then-existing law bars liability under Section 1983. See, e.g., Babb v. California Teachers Ass'n, 378 F. Supp. 3d 857 (C.D. Cal. 2019) (collecting cases).

Mr. Cooley's claims seeking a reimbursement of the compulsory portion of his union dues are dismissed.

D. Constitutionality of California Government Code Sections 1152(a) and 1153(a)

Mr. Cooley contends that a public employer must immediately halt union-related payroll deductions upon learning that an employee has withdrawn his or her "affirmative consent" to those assessments. FAC ¶ 40 (citing Janus). Mr. Cooley submits that California Government Code Sections 1152(a) and 1153(a) require public employers to divert employees' wages to the union upon the union's request, regardless of whether the employee consents to the deductions and even if the employee specifically instructs the employer not to divert his wages to the union. Opp'n to State Mot. at 1. Thus, Mr. Cooley argues, Sections 1152(a) and 1153(a) are unconstitutional because they prevent public employers from ending those allegedly impermissible deductions. Id. ¶¶ 38-40, 58(e), 59(d), 60(d).

Mr. Cooley's argument fails for two reasons. First, this argument hinges on a finding that Mr. Cooley has a First Amendment right to immediately resign union membership and cease paying dues. But, as discussed above, Janus did not announce such a right and no such

right exist here. See supra. Second, the argument fails for the independent reason that the Union's refusal to immediately accept Mr. Cooley's resignation and cease fee deductions does not constitute state action.

It is well-settled that the First Amendment protects individuals only from state action, not private action. See, e.g., Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019). There is no argument that the Union is acting as the state, or that the state itself took direct action. Under these circumstances, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. 991 (1982). Mr. Cooley contends that the Union's failure to cease deductions is grounded in compliance with Sections 1152(a) and 1153(a), rather than a binding obligation to pay based on the terms of his membership. Opp'n to State Mot. at 3. This theory, unsupported by factual allegations, is insufficient to withstand a motion to dismiss. See Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). Indeed, the FAC includes allegations that the Union attributed its refusal to accept the resignation to existing contractual rights based in Article 3.1.A.1. of the collective bargaining agreement, not any mandate of Sections 1152(a) and 1153(a). FAC ¶ 22.

Even still, the existence of these provisions does not amount to coercive power or compulsion by the state itself. See Roberts v. AT&T Mobility LLC, 877 F.3d 833, 845 (9th Cir. 2017), cert. denied, 138 S. Ct. 2653, 201 L.

Ed. 2d 1051 (2018) ("Permission of a private choice cannot support a finding of state action, and private parties do not face constitutional litigation whenever they seek to rely on some statute governing their interactions with the community surrounding them.") (internal quotation marks and citations omitted); see also Apao v. Bank of New York, 324 F.3d 1091, 1094–95 (9th Cir. 2003). Holding otherwise, particularly where, as here, the state took no direct action and the parties have existing contractual rights, would stretch state action doctrine beyond its current limits.

Nor does the Union's refusal to accept the resignation qualify as state action under any other Supreme Court test. See Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 995 (9th Cir. 2013) ("The Supreme Court has articulated four tests for determining whether a [non-governmental person's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test.") (internal quotation marks and citations omitted).

Thus, Mr. Cooley's constitutional challenge to California Government Code Sections 1152(a) and 1153(a) is dismissed. Accordingly, Defendant Xavier Becerra is dismissed from the suit.

E. Refund of All Dues Paid Post-*Janus*

The Union Defendants argue that any claims against CALEE must be dismissed because the FAC contains no allegations that CALEE participated in any of the wrongful conduct and does not allege how CALEE harmed Mr. Cooley. Union Mot. at 4. Mr. Cooley's oppo-

sition does not address this point, and the Court takes this omission as a concession by Plaintiff that CALEE should be dismissed as a defendant in this case. This Court also agrees with the Union Defendants' arguments. Accordingly, Defendant California Association of Law Enforcement Employees is dismissed from the suit.

F. Conclusion

The FAC's five counts seek relief on the overlapping legal theories addressed above. Mr. Cooley's suit rises and falls with his claims of constitutional rights violations under Janus. Because Mr. Cooley's legal theories fail to support any of the causes of action, each count of the FAC is dismissed.

III. ORDER

For the reasons set forth, this Court GRANTS the Union Defendants' Motion to Dismiss (ECF No. 58) and GRANTS the State's Motion to Dismiss (ECF No. 59).

While leave to amend should be freely given under certain circumstances, Fed. R. Civ. P. 15(a), in this case Plaintiff has already amended his complaint once and, given that the legal issues clearly predominate over any factual disputes, the Court finds that a second bite at the apple is futile. Plaintiff's First Amended Complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: July 9, 2019.

/s/ John A. Mendez
JOHN A. MENDEZ
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TERRY C. COOLEY, on behalf of himself and all others similarly situated, Plaintiff, v. CALIFORNIA STATEWIDE LAW ENFORCEMENT ASSOCIATION, et al., Defendants.	No. 2:18-cv-02961-JAM-AC **ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Terry Cooley ("Plaintiff" or "Mr. Cooley") seeks to enjoin the California State Law Enforcement Association ("CSLEA" or "the Union") from (1) refusing to accept Mr. Cooley's resignation from union membership and (2) continuing to collect money from Mr. Cooley's paycheck. Mot., ECF No. 11, at 1. CSLEA and the California Association of Law Enforcement Employees (with CSLEA, the "Union Defendants"), oppose the motion. Opp'n, ECF No. 24. The Court held a hearing on the motion on January 22, 2019.

For the reasons set forth below, and after consideration of the arguments made during the hearing and all papers filed in support of and in opposition to the motion, the Court DENIES Plaintiff's motion.

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiff Terry Cooley works as a police officer for Cal Expo. Compl., ECF No. 1, ¶ 9. Mr. Cooley enrolled as a member the CSLEA union upon beginning his employment with Cal Expo in June 2007. Id. ¶ 11. Mr. Cooley believes that he was automatically enrolled in union membership, though Mr. Cooley acknowledges "he may have signed a union membership card in the stack of paperwork he was given at the outset of his employment." Id. However, Mr. Cooley alleges he "is certain" that he was never informed, at the start of his employment, of his right to decline union membership and pay fair-share service fees (or agency fees) instead of dues. Id. Mr. Cooley only continued as a member, he alleges, rather than leave the Union because the financial difference between paying nonmember fair-share service fees and membership dues was "so minimal as to be immaterial from a financial standpoint." Id. ¶ 13. Nevertheless, Mr. Cooley alleges he opposes continued payment of dues to CSLEA because he disapproves of CSLEA's representation of him and feels there is no benefit derived from his membership in the Union. Id. ¶ 12.

By letter dated July 18, 2018, Mr. Cooley purported to resign his union membership and stated his desire to no longer pay dues or fees to the Union. Compl. ¶¶ 20–21; Cooley Letter, ECF No. 11-2. Mr. Cooley's decision to submit the letter was prompted by the Supreme Court's decision in Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018) ("Janus"). Compl. ¶¶ 20–21; Cooley Letter. On July 30, 2018,

CSLEA responded to Mr. Cooley saying it was unable to cancel his current membership until the next window period for changes in membership status, which would not begin until June 1, 2019. Compl. ¶ 22; CSLEA Letter, ECF No. 11-3. CSLEA directed Mr. Cooley to Article 3.1.A.1 of the collective bargaining agreement between the State of California and CSLEA covering Bargaining Unit 7 (the "CBA") which states "any employee may withdraw from CSLEA by sending a signed withdrawal letter to CSLEA within thirty (30) calendar days prior to the expiration of this Contract. Employees who withdraw from CSLEA under this provision shall be subject to paying a CSLEA Fair Share fee as provided above." Compl. ¶ 23; CSLEA Letter; CBA, ECF No. 11-1.

Despite his purported resignation, the Union continued deducting membership dues from Mr. Cooley's paycheck. Compl. ¶ 24. In response, Mr. Cooley emailed Cal Expo Human Resources on September 5, 2018 stating he had resigned his membership from CSLEA and, while CSLEA had refused to accept his resignation until June 2019, he was requesting that Cal Expo immediately stop diverting any part of his paycheck to union dues. Id. ¶ 25; Cooley Email, ECF No. 11-5. Mr. Cooley alleges the Cal Expo Human Resources department, as of the filing of the Complaint, had not acknowledged or responded to his email. Compl. ¶ 26.

Mr. Cooley filed suit on November 13, 2018, bringing three claims: (1) "Unconstitutional Agency Shop," (2) "Unconstitutional Garnishment of Wages," and (3) "Failure to Secure Freely Given and Fully Informed Consent." See Compl. Mr. Cooley purports to sue all defend-

ants under 42 U.S.C. § 1983 and the Declaratory Judgment Act, and to sue the Union Defendants under the state-law torts of conversion, trespass to chattels, and replevin for unlawful seizure of personal property. Compl. ¶¶ 43–44. Mr. Cooley further seeks to certify a separate class for each of his three claims. Compl. ¶¶ 17, 34, 41.

The same day he filed his Complaint, Mr. Cooley also filed this Motion for Preliminary Injunction. Notice of Mot., ECF No. 6. Mr. Cooley seeks to enjoin CSLEA from refusing to accept Mr. Cooley's membership resignation and from deducting membership dues from Mr. Cooley's paycheck. Mot., ECF No. 11, at 1. Mr. Cooley subsequently withdrew his initial request to enjoin the enforcement of Section 1157.12(b) of the California Government Code and his request that the preliminary injunction be issued on a class-wide basis. ECF No. 35, at 1–2. The Union Defendants oppose the motion. Opp'n, ECF No. 24.

II. OPINION

A. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter, 555 U.S., at 20.

B. Likelihood of Success on the Merits

For Mr. Cooley's claims to succeed, this Court is required to find CSLEA is violating Mr. Cooley's First Amendment rights as explained in Janus, without a valid contractual waiver.

In Janus, the Supreme Court held: "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." Janus, 138 S. Ct., at 2486 (internal citations omitted).

1. Rights Under *Janus*

First, Mr. Cooley argues Janus held that public employees have a constitutional right to resign their union membership at their discretion and effective immediately, and any restriction on that right, like Article 3.1.A.1. of the CBA, is unconstitutional. Mot. at 4. But that is not the holding of Janus, nor does Janus apply to the situation at bar. The plaintiff in Janus was not a union member, never agreed to be a union member, and never affirmatively agreed—beyond by virtue of his public employment—to have any union-related fees deducted from his paycheck. Id. at 2461. Put simply, the relation-

ship between unions and their voluntary members was not at issue in Janus.

Here, unlike in Janus, Mr. Cooley agreed to become a dues-paying member of the Union. On December 17, 2013, Mr. Cooley initialed and submitted an electronic CSLEA membership application, agreeing as follows: "I elect to become a member of CSLEA and the affiliate organization for my classification and department . . . I hereby authorize deduction from my salary of CSLEA/Affiliate dues. I understand that this membership will become effective the first month following the date of submission. Per the Unit 7 contract and State law, there are limitations on the time period in which an employee can withdraw as a member . . ." 2013 Membership Application, ECF No. 24-2, at Exhibit A. Mr. Cooley's alleged harm stems from his previous consent to pay union membership dues, not from a compulsory nonmember agency fee. Thus, on its face, Janus does not provide the relief Mr. Cooley seeks.

Indeed, the Supreme Court has made clear that a person can contract away and waive his or her First Amendment rights. Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991) ("[T]he First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law."). And Mr. Cooley affirmed his understanding of the membership withdrawal limitations in the 2013 Membership Application. Janus does not invalidate such agreements.

This Court therefore does not find Mr. Cooley likely to succeed on his claim that the refusal to immediately

honor his resignation, as required by the CBA, violates his First Amendment rights under Janus.

2. Valid Contract and Waiver

Second, Mr. Cooley contends he is either not a union member at all or not constrained by the CBA's restrictions because he has not executed a contractually valid waiver that meets the Supreme Court's standards in Janus. Reply, ECF No. 29, at 2–14. This Court is not persuaded by Mr. Cooley's arguments that the 2013 Membership Application is not a valid contract and that he is not subject to the provisions of the collective bargaining agreement for the union to which he belongs.

Nor can Mr. Cooley now decide to simply withdraw and revoke his assent to membership in violation of his prior agreement. Mr. Cooley's reliance on Penn Cork, a 1967 Second Circuit case, for this argument is misplaced. Reply at 6–8 (discussing NLRB v. Penn Cork & Closures, Inc., 376 F.2d 52 (2d Cir. 1967) (Friendly, J.)). Penn Cork is not binding on this Court and easily distinguished because CSLEA, unlike the union in Penn Cork, has not removed the withdrawal limitation provision for dues-paying members from its collective bargaining agreement.

Mr. Cooley knowingly agreed to become a dues-paying member of the Union, rather than an agency fee-paying nonmember, because the cost difference was minimal. That decision was a freely-made choice. The notion that Mr. Cooley may have made a different choice in 2013 (or before) if he knew the Supreme Court would later invalidate public employee agency fee arrangements does not void his previous, knowing agreement.

And while Mr. Cooley is correct the collective bargaining agreement in effect at the time of the 2013 Membership Application has since expired, Mr. Cooley could have properly resigned from the Union in June 2016 (during the CBA-provided window), but he did not do so and thus, in effect, chose to remain in the Union. Under the current CBA, Mr. Cooley can resign as of June 1, 2019 and CSLEA has indicated it would honor his resignation at that time. Until then, Mr. Cooley remains obligated to pay the union dues to which he agreed.

Therefore, this Court finds Mr. Cooley is not likely to succeed on the merits of his First Amendment claim as underpinned by an invalid contract or invalid waiver of rights.

3. Conclusion

In addition, this Court draws attention to two recent district court rulings which denied motions for preliminary injunctions under similar circumstances – where union members, bound by contractual withdrawal limitation provisions, sought to immediately resign and stop paying dues in the wake of Janus. See Belgau v. Inslee, No. 18-5620 RJB, 2018 WL 4931602 (W.D. Wash. Oct. 11, 2018); see also Smith v. Superior Court, Cty. of Contra Costa, No. 18-CV-05472-VC, 2018 WL 6072806 (N.D. Cal. Nov. 16, 2018). And in a non-binding opinion, the Ninth Circuit also suggested its approval of this outcome. See Fisk v. Inslee, No. 17-35957, 2019 WL 141253 (9th Cir. Jan. 9, 2019). This Court is not persuaded by Mr. Cooley's attempt to distinguish these cases, and finds the opinions instructive.

Thus, this Court finds Mr. Cooley has failed to establish a likelihood of success on the merits.

C. 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 (1976). And in the Ninth Circuit, a party seeking preliminary injunctive relief on a First Amendment claim can establish irreparable harm "by demonstrating the existence of a colorable First Amendment claim." Warsoldier v. Woodford, 418 F.3d 989, 1001–02 (9th Cir. 2005). But, as discussed above, Mr. Cooley has not presented a colorable First Amendment claim. Even still, this Court is not persuaded by Mr. Cooley's contention that any union-related deduction of funds from his paycheck constitutes irreparable harm where, as here, since the purported resignation the funds have been placed into a separate interest-bearing escrow account and not used in any way by the Union.

Consequently, this Court finds Mr. Cooley has failed to establish that he is likely to suffer irreparable harm absent an injunction.

D. Balance of the Equities and the Public Interest

This Court recognizes that "it is always in the public interest to prevent the violation of a party's constitutional rights" and the loss of such rights would tip the equities in a party's favor. See Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012). But, as with the irreparable harm element, findings on these elements depend on this Court's view of the merits. As discussed, this Court does

not find that Mr. Cooley is likely to succeed on the merits of his First Amendment claim.

Without an attendant violation of the moving party's constitutional rights, this Court does not find the balance of equities or public interest weigh in favor of the injunction. Instead, this Court is persuaded by the Union Defendants' arguments that an injunction would impair the administration of the union by subjecting it to oft-changing payrolls, prevent the union from confidently making long-term financial commitments, and allow the breach of valid contracts.

Thus, this Court finds the balance of equities weigh in favor of the Union Defendants and that an injunction is not in the public interest.

E. Conclusion

Mr. Cooley has failed to establish any of the four elements required for the issuance of a preliminary injunction. Winter, 555 U.S., at 20.

III. ORDER

For the reasons set forth above, the Court DENIES Plaintiff's Motion for Preliminary Injunction (ECF No. 6).

IT IS SO ORDERED.

Dated: January 25, 2019.

/s/ John A. Mendez
JOHN A. MENDEZ
United States District Judge