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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROBERT ESPINOZA, individual,

Plaintiff,

v.

UNION OF AMERICAN PHYSICIANS AND DENTISTS, AFSCME LOCAL 206, an employee organization; **CALIFORNIA CORRECTIONAL HEALTHCARE SERVICES,** a public agency; **BETTY T. YEE**, in her official capacity as California State Controller; and **ROB BONTA**, in his official capacity as Attorney General of California,

Defendants,

Case No.: 8:21-cv-01898

PLAINTIFF'S *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER; MEMORANDUM OF POINTS AND AUTHORITIES

***EXPEDITED HEARING REQUESTED*.**

Oral argument requested.

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TO THIS HONORABLE COURT:

Plaintiff Robert Espinoza, M.D. (Dr. Espinoza), by and through his counsel of record, hereby moves this Court, under Federal Rule of Civil Procedure 65(b), for a Temporary Restraining Order:

1. Enjoining Defendant Union of American Physicians and Dentists, AFSCME Local 206 (UAPD), from continuing to authorize deductions from Dr. Espinoza's lawfully earned wages for use in political speech without his affirmative consent in violation of his First Amendment right against compelled speech under Cal. Gov't Code §1153 and the applicable Memorandum of Understanding (MOU).[1]
2. Enjoining Defendant California Correctional Health Care Services at Chino State Prison (CCHCS), from continuing to authorize deductions from Dr. Espinoza's lawfully earned wages for use in political speech without his affirmative consent in violation of the First Amendment right against compelled speech under Cal. Gov't Code §1153 and the applicable MOU.
3. Enjoining Defendant State Controller Betty T. Yee from continuing to deduct money from Dr. Espinoza's lawfully earned wages for use in political speech without his affirmative consent in violation of the First Amendment right against compelled speech under Cal. Gov't Code §1153.

[1] https://www.calhr.ca.gov/labor-relations/Documents/mou-20160701-20200701-bu16.pdf

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4. Enjoining Defendant California Attorney General Rob Bonta from enforcing Cal. Gov't Code §1153 against Dr. Espinoza, which, as the Attorney General interprets and applies it, purportedly authorizes the actions of the State Controller, CCHCS, and UAPD.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

When Dr. Espinoza became a member of Defendant Union of American Physicians and Dentists, AFSCME Local 206 (UAPD) in 2018, Defendants California Correctional Health Care Services (CCHCS) and State Controller Betty T. Yee not only deducted membership dues from his lawfully earned wages, but an additional $16.00 per paycheck fee for UAPD's Political Action Program. This money was then used by UAPD to support specific candidates and advocate for political issues of the union's choosing. This joint state action occurred with the implicit approval of Attorney General Rob Bonta. But in December 2020, when Dr. Espinoza exercised his First Amendment rights and withdrew any purported affirmative consent to the continued withdrawals, the Defendants ignored his request and continued to take his money for use in political speech.

Yet even though the Political Action Program fees are entirely voluntary and should have ceased immediately, Exhibit B, and the membership dues should have ceased in July 2021, Verified Compl. at ¶¶ 52-54, Exhibit K, ***these deductions and their use for political speech continue unabated, in violation of Dr. Espinoza's constitutional rights.*** Dr. Espinoza's next paycheck will be Wednesday, December 1, 2021. Therefore Dr. Espinoza respectfully requests this Court issue a Temporary Restraining Order to prevent the irreparable injury to his First Amendment rights which will occur on December 1, 2021.

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II. STATEMENT OF FACTS

For all factual allegations and background on this case and motion, Dr. Espinoza refers the Court to the Verified Complaint and related Exhibits. Dr. Espinoza's UAPD membership application may be found at Exhibit A. Exhibits B and F demonstrate that the deductions from Dr. Espinoza's lawfully earned wages for UAPD's "Political Action Program" should have ceased in January 2021, and Exhibits F and K demonstrate the deductions for purported UAPD membership dues should have ceased in July 2021.

III. LEGAL STANDARDS

In deciding whether to grant a motion for temporary restraining order (TRO), courts look to substantially the same factors that apply to a court's decision on whether to issue a preliminary injunction (PI). *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id.* at 20.

However, the decision in *Winter* did not disturb the Ninth Circuit's alternative "serious questions" test. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, "serious questions going to the merits and a

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hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. Thus, a preliminary injunction may be granted "if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

In addition, a TRO is necessarily of a shorter and more limited duration than a preliminary injunction.[2] Thus, the application of the relevant factors may differ, depending on whether the court is considering a TRO or a preliminary injunction.[3] Finally, "[d]ue to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings." *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013).

[2] When a TRO is issued with notice and after a hearing, the 14-day limit for a TRO issued without notice under Fed. R. Civ. P. 65(b)(2) does not apply. *See Pac. Kidney & Hypertension, LLC v. Kassakian*, 156 F. Supp. 3d 1219, 1222 n.1 (D. Or. 2016). Nevertheless, absent consent of the parties, "[a] court may not extend a 'TRO' indefinitely, even upon notice and a hearing." *Id.* Accordingly, unless the parties agree otherwise, a court should schedule preliminary injunction hearing to occur not later than 28 days after the date that the court first issues a TRO.

[3] A preliminary injunction is of limited duration because it may not extend beyond the life of the lawsuit. That is the role of a permanent injunction, which a court may enter as part of a final judgment, when appropriate. A preliminary injunction, however, may last for months, if not years, while the lawsuit progresses toward its conclusion. *See Pac. Kidney*, 156 F. Supp. 3d at 1222 n.2.

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IV. ARGUMENT

A. Dr. Espinoza is suffering an irreparable and on-going injury.

In the Ninth Circuit, a party seeking preliminary injunctive relief can establish irreparable injury by simply demonstrating the existence of a colorable First Amendment claim. *Sammartano v. First Judicial Dist. Court in & for County of Carson City*, 303 F.3d 959, 973–74 (9th Cir. 2002); *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (same); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("Plaintiffs faced irreparable harm in the form of a deprivation of constitutional rights absent a preliminary injunction."). Indeed, even a minimal loss of constitutional freedoms "constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* 11 A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (3d ed. 2013) ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary.").

In cases like Dr. Espinoza's, it is the violation of First Amendment rights that "constitutes irreparable harm for preliminary injunction purposes." *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984). Given that Dr. Espinoza raises substantial constitutional claims, no further showing of irreparable injury is necessary. *See Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012) ("When seeking a preliminary injunction 'in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with

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infringement, at which point the burden shifts to the government to justify the restriction." (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011)). Dr. Espinoza is suffering an on-going and irreparable injury to his First Amendment rights sufficient to satisfy the requirement for granting a TRO.

B. Dr. Espinoza is likely to succeed on the merits.

As noted above, in the Ninth Circuit the "merits" requirement for the issuance of a TRO may be satisfied in two distinct ways, either by showing a "likelihood of success on the merits," *Winter*, 555 U.S. at 22, or raising "serious questions going to the merits," *Cottrell*, 632 F.3d at 1131-32. Dr. Espinoza satisfies both approaches.

1. On-going violation of Dr. Espinoza's First Amendment rights.

In *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018), the Supreme Court held that *no payments* may be deducted from a non-member's wages for union purposes unless that employee *affirmatively consents* to the payment. Nor can an attempt be made to collect such a payment without the necessary consent. *Id.* Agreeing to make such a payment constitutes a waiver of First Amendment rights. *Id.* This waiver cannot be presumed. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 312-313 (2012). "Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999). Without clear and affirmative consent, "this standard cannot be met." *Id.*

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In the case of Dr. Espinoza, this standard cannot be met. Most obviously when Dr. Espinoza withdrew consent for the deductions from his lawfully earned wages for the UAPD "Political Action Program" in December 2020, Verified Compl. at ¶¶ 32-35, Exhibit F, those payments should have immediately ceased, Verified Compl. at ¶¶ 19-21, Exhibit B. Instead, Defendants have continued to deduct money from his Dr. Espinoza's pay without his consent, remitted it to UAPD, who has then spent it on the candidates and political campaigns of its choosing, Verified Compl. at ¶¶ 55-67, Exhibits L and M. Not only did the Defendants *attempt* to take money from Dr. Espinoza without his affirmative consent, but they also have and effectively continue to do so. This is a continuing and irreparable violation of the First Amendment.

The same is true of the money purportedly taken as membership dues. Verified Compl. at ¶¶ 55-67, Exhibits L and M. Under the terms of his agreement with UAPD, Dr. Espinoza became a non-member when he sent his opt-out letter in December 2020. Exhibit A. Hence, the deductions from his pay should have ceased at the anniversary of the conclusion of the operable collective bargaining agreement on July 1, 2021. Verified Compl. at ¶¶ 52-54, Exhibit K. But the deductions have continued to this day, Verified Compl. at ¶¶ 55-64, Exhibit L, as has UAPD spending them on political speech, Verified Compl. at ¶¶ 65-67, Exhibit M. Hence, Dr. Espinoza has been a non-member who has not waived his First Amendment rights but has nonetheless had money deducted from his lawfully earned wages without his

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affirmative consent. These continuing deductions, far more than just an *attempt* which is itself prohibited, are also a violation of the First Amendment.

Unlike in *Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020) and its progeny, Dr. Espinoza was not under any contractual terms that may have required him to continue making non-dues related political payments to the union without affirmative consent and over his express objections. When it comes to both the deductions for UAPD's "Political Action Program" and any purported membership dues, Dr. Espinoza's lawfully earned wages have been taken without his affirmative consent, over his express objections, and without any potentially binding contractual language. Hence, Dr. Espinoza is likely to succeed on the merits of his First Amendment claims, or at the very least, raises "serious questions" going to the merits of his First Amendment claims.

2. Defendants have no defense to Dr. Espinoza's claims.

Despite the clear First Amendment standards laid out above, the Defendants may claim one or more of the following potential defenses to Dr. Espinoza's claims, none of which apply.

First, Dr. Espinoza's federal claims do not require state remedies. Dr. Espinoza alleges violations of his federal First Amendment rights appropriately redressed before this tribunal under 42 U.S.C. § 1983. Plaintiffs asserting a federal constitutional claim are guaranteed a federal forum under § 1983. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2169– 70 (2019); *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). This is true even given the "variety of claims, claimants, and state

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agencies involved," *Patsy v. Bd. of Regents of the State of Fla*., 457 U.S. 496, 515 (1982), including § 1983 claims arising in the context of labor law. See, e.g., *Clark v. Yosemite Cmty. College Dist*., 785 F.2d 781, 790 (9th Cir. 1986) (First Amendment claim not unfair labor practice claim). Dr. Espinoza, like all § 1983 plaintiffs, is entitled to pursue his claims in federal court.

Second, the Defendants in this case are all state actors. Defendants Yee and CCHCS are obviously state actors, as a government agency and official. As such, they may be enjoined from diverting Dr. Espinoza's lawfully earned wages to UAPD, given the constitutional First Amendment violation against compelled speech inherent in the union's use of those funds for political speech. These deductions must stop, immediately, regardless of any other consideration. Given the deductions must stop prior to December 1, 2021, it is not critical to determine whether UAPD is also a state actor. Nevertheless, UAPD is a state actor because it claims the ability to direct the government payroll officials to take Dr. Espinoza's lawfully earned wages into its coffers, acting pursuant to state statute and a collective bargaining agreement with the government. Even if UAPD claims it is private, purportedly private actors like UAPD act under "color of state law" and are subject to liability under § 1983 when the two prongs of the *Lugar* test are satisfied. *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989).[4]

[4] Even if this Court does not agree that UAPD is a proper party at this point in the litigation, this conclusion is no barrier to granting the emergency relief sought by Dr. Espinoza against CCHCS and Controller Yee. Under Federal Rule of Civil Procedure 65(d)(2) this Court may also enjoin non-parties "who are in active concert or participation" with proper parties. *Regal Knitwear Co. v. Nat'l Lab. Rels. Bd*., 324

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Finally, Attorney General Bonta is also a proper party. Under *Ex parte Young*, 209 U.S. 123 (1908), an exception to the Eleventh Amendment applies to suits seeking equitable relief against state officials alleged to enforce state laws that conflict with a provision of U.S. Constitution. To determine whether an official meets this standard, courts conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Under *Ex parte Young*, a state official's enforcement role need not be set out in the statute itself; the connection to enforcement may come from a different source, including "the general law." *Id.* at 157. All that is required is "some connection" between the state official and enforcement of the act, *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919-20 (9th Cir. 2004), that is "fairly direct," *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (enforcement authority is a sufficiently direct connection). Here, the exception to Eleventh Amendment immunity applies to the Attorney General. Not only does Dr. Espinoza allege an on-going violation of federal law, but that the Attorney General is sufficiently connected with these ongoing violations.[5]

U.S. 9, 14 (1945); *see also Chase Nat'l Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 436-37 (1934).

[5] Even if this Court does not agree that the Attorney General is a proper party at this time, he may still be enjoined under Federal Rule of Civil Procedure 65(d)(2). *Supra* at n.4.

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C. The equities weigh in favor of Dr. Espinoza.

To assess the balance of hardships, courts "balance[s] the interests of all parties and weigh[s] the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (quoting *Los Angeles Memorial Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1203 (9th Cir. 1980)).

Here, any harms the Defendants might assert are "entirely speculative and in any event may be addressed by more closely tailored regulatory measures." *Enzell v. City of Chicago*, 651 F.3d 684, 710 (7th Cir. 2011). When the government's ability to enforce otherwise invalid laws is hindered, its interests are not harmed. *E.g.*, *Melendres*, 695 F.3d at 1002. In the absence of continuing to take Dr. Espinoza's lawfully earned wages for use in political speech without his consent, any injunction will not affect the Defendants' ability to collect such monies from those who have rendered knowing and voluntary consent. On the other hand, Dr. Espinoza's First Amendment rights against compelled speech are continually violated each time the government diverts his lawfully earned wages to UAPD for its political activities, which is a far greater hardship. *Allen v. County of Lake*, 71 F. Supp. 3d 1044, 1057 (N.D. Cal. 2014) ("[T]he protection of constitutional rights is a strong equitable argument in favor of issuing [an] injunction."). The balance of equities weighs in favor of granting Dr. Espinoza's motion.

D. Granting emergency relief is in the public interest.

It is *always* in the public interest to prevent violation of constitutional rights. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002);

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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."); *see also Phelps–Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007); *Day v. Robinwood W. Cmty. Improvement Dist.*, 4:08- CV-01888, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 29, 2009); *Hughbanks v. Dooley*, 788 F. Supp. 2d 988, 997 (D.S.D. 2011). Here, Dr. Espinoza's First Amendment rights are being violated, and a TRO is in the public interest.

E. Bond should be waived or nominal.

This Court has discretion to waive the security requirements of Fed. R. Civ. P. 65(c) or require only a nominal bond. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). Where a TRO merely requires compliance with the Constitution, no bond is required. *See Doe v. Pittsylvania County*, 842 F. Supp. 2d 927, 937 (W.D. Va. 2012) (fixing the bond at zero dollars where injunction merely required compliance with the Constitution); *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 738 (C.D. Cal. 1996) (waiving bond because "to require a bond would have a negative impact on plaintiff's constitutional rights, as well as the constitutional rights of other members of the public affected by the policy").

Here, Dr. Espinoza seeks only to vindicate his constitutional rights, and to this end is being provided with *pro bono* legal representation. To require a bond when a plaintiff seeks to uphold constitutionally protected rights "would have the effect of discouraging suits to remedy more flagrant abuses." *Bartels v. Biernat*, 405 F. Supp. 1012, 1019 (E.D. Wis. 1975). Also, because Dr. Espinoza has demonstrated a high

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likelihood of success on the merits of his First Amendment claims, a waiver is appropriate. *People of State of Cal. ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985), *amended on other grounds*, 775 F.2d 998 (9th Cir.). A waiver of bond or nominal bond is appropriate.

V. CONCLUSION

"When speech is compelled…individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464. Dr. Espinoza respectfully requests this Court prevent the Defendants from continuing the inherently demeaning violation of his First Amendment rights against compelled speech by ordering they cease diverting any of Dr. Espinoza's lawfully earned wages from his December 1, 2021, paycheck to UAPD for use in political speech without his affirmative consent.

Date: November 17, 2021

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