No. 24-____

IN THE

Supreme Court of the United States

AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN; FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT; JEFFREY LAX; MARIA PAGANO,

Petitioners,

v.

PROFESSIONAL STAFF CONGRESS/CUNY; CITY UNIVERSITY OF NEW YORK; JOHN WIRENIUS, in his official capacity as Chairperson of the New York Public Employee Relations Board; ROSEMARY A. TOWNLEY, in her official capacity as Member of the New York Public Employee Relations Board; ANTHONY ZUMBOLO, in his official capacity as Member of the New York Public Employee Relations Board; CITY OF NEW YORK; THOMAS P. DINAPOLI, in his official capacity as New York State Comptroller,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of New York is prohibiting several professors, all but one of whom are Jews, from dissociating themselves from a union's representation to protest its anti-Semitic and anti-Israel conduct and other expressive activities. The question presented is:

Whether it violates the First Amendment for a state to prohibit individuals from dissociating from a union's representation to protest that union's expressive activities?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption identifies all parties to this action.

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

STATEMENT OF RELATED PROCEEDINGS

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

1. *Goldstein v. Professional Staff Congress/CUNY*, No. 23-384, U.S. Court of Appeals for the Second Circuit. Judgment entered March 18, 2024.
2. *Goldstein v. Professional Staff Congress/CUNY*, No. 1:22-cv-00321, U.S. District Court for the Southern District of New York. Final judgment entered March 14, 2023.

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JURISDICTION

The Second Circuit issued its opinion on March 18, 2024, and denied a petition for rehearing en banc on April 22, 2024. Pet.App. 1a–11a, 49a–50a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, as well as relevant provisions of the New York Taylor Law, N.Y. Civ. Serv. Law §§ 204, 209a, are reproduced at Pet.App. 51a–61a.

INTRODUCTION

The core issue in this case is straightforward: can the government force Jewish professors to accept the representation of an advocacy group they rightly consider to be anti-Semitic? The answer plainly should be "no." The First Amendment protects the rights of individuals, and especially religious dissenters, to disaffiliate themselves from associations and speech they abhor.

The Second Circuit, however, answered "yes" to this question because it believed it was bound by the Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). It thought this because

the advocacy group styles itself as a union and its mandatory representation stems from a labor statute. This was error.

Knight did not involve a compelled speech and association claim. The question in *Knight* was whether faculty members had an affirmative right to participate in a public university's nonpublic meetings with a union. 465 U.S. at 273. The Court held they did not, reasoning that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id*. at 283. The petitioners here, six professors at the City University of New York ("CUNY"), do not want to participate in the university's meetings with their exclusive union representative, the Professional Staff Congress/CUNY ("PSC"). The Professors want to completely dissociate themselves from PSC's representation to protest its anti-Israel conduct and other failings. In other words, because PSC wants to boycott Israel, the Jewish Professors want to boycott PSC.

The State of New York is prohibiting the Professors from engaging in this expressive activity by forcing them to remain exclusively represented by PSC. This amounts to compelled expressive association under the First Amendment because it means PSC has legal authority to both speak and contract for the Professors. As the Court recognized in *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018), "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees" and inflicts "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 887, 916.

There is no reason to tolerate it in this context. *Knight* did not sanction a state forcing Jewish faculty

members who are ardent Zionists to accept the representation of a union that supports policies they consider anti-Israel, such as the "Boycott, Divestment, and Sanctions" (BDS) movement. Indeed, it defies credulity to believe this Court would hold such compelled expressive association to not even be worthy of First Amendment scrutiny, but mere rational basis review. Yet that is how lower courts have construed *Knight*.

The Court should correct the dangerous misapprehension among lower courts that *Knight* allows states to dictate that individuals must accept particular advocacy groups as their exclusive representatives. The Court should grant this petition to clarify *Knight* and make clear that the First Amendment protects individuals' right to dissociate themselves from advocacy groups that support policies contrary to their deeply held beliefs.

STATEMENT

A. Legal Background: Exclusive Representatives Are Mandatory Agents Vested with Legal Authority to Speak and Contract for Individuals

New York's Taylor Law provides that, when a union is certified by New York's Public Employment Relations Board ("PERB"), "it shall be the exclusive representative . . . of all the employees in the appropriate negotiating unit." N.Y. Civ. Serv. Law § 204. Unions vested with this extraordinary power have the "exclusive right to speak for all the employees in collective bargaining," *Janus*, 585 U.S. at 898, as well as the right to enter into binding contracts for those employees, *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); N.Y. Civ. Serv. Law § 201.

An exclusive representative's authority is "exclusive" in the sense "that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 585 U.S. at 887. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Allis-Chalmers*, 388 U.S. at 180.

This power creates a mandatory agency relationship between the union and employees that the Court has likened to that between an attorney and client or a trustee and beneficiary. *ALPA v. O'Neill*, 499 U.S. 65, 74–75 (1991). This agency relationship carries with it a fiduciary duty to employees. *See id*. However, "an individual employee lacks direct control over a union's actions taken on his behalf." *Teamsters, Loc. 391 v. Terry*, 494 U.S. 558, 567 (1990). Consequently, unions can engage in advocacy that represented individuals oppose. *See Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310 (2012). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

B. Facts: The Professors Are Forced to Accept an Advocacy Group They Abhor as Their Exclusive Representative

Avraham Goldstein, Michael Goldstein, Frimette Kass-Shraibman, Mitchell Langbert, Jeffrey Lax, and Maria Pagano ("Professors") are CUNY faculty members. Pursuant to New York's Taylor Law, CUNY and the

State Respondents[1] require the Professors to accept PSC as their exclusive representative. This means PSC has legal authority both to speak for the Professors and to enter into binding contracts on their behalf.

The Professors—all but one of whom are Jews and Zionists—want nothing to do with PSC. Pet.App. 75a. They oppose PSC's political positions and how it negotiates their employment terms and conditions. Pet.App. 4a. Most of all, the Jewish Professors detest PSC's positions on Israel. This includes PSC's support of the "BDS movement," which the Professors believe vilifies Zionism, disparages the national identity of Jews, and seeks to destroy Israel as a sovereign state.

The Professors' opposition to PSC crystalized in June 2021 when PSC adopted a Resolution supporting the BDS movement. Pet.App. 74a, 93a. The Professors "believe that this Resolution is openly anti-Semitic and anti-Israel," a belief supported by the Resolution's terms. *See* Pet.App. 74a. As a result of PSC's Resolution and subsequent conduct, the Jewish Professors have been ostracized on campus based on their identities, religious beliefs, and support for Israel. Pet.App. 69a–73a, 75a.

PSC has persisted in the wake of the October 7, 2023 terror attacks on Israel and subsequent campus protests against Israel. In an April 2024 press release, where PSC touted that it is "the union representing 30,000 City University of New York employees," PSC declared that it "joins fellow unionists and academics in

[1] "State Respondents" refers to John Wirenius, Rosemary A. Townley, and Anthony Zumbolo, in their official capacities as members of New York Public Employee Relations Board.

condemning the recent actions of Columbia University administration to suppress student protest . . . ."[2]

The Professors want to effectively boycott PSC to express their displeasure with its advocacy. They do not want PSC to represent them or speak for them. But New York's Taylor Law forbids the Professors from completely dissociating themselves from PSC. They are compelled to continue to accept PSC as their exclusive agent and spokesman.

C. Proceedings Below: The Lower Courts Hold *Knight* Forecloses the Professors' Claims

To dissociate themselves from PSC and its objectionable speech, the Professors filed suit and allege Respondents are violating their First Amendment rights by compelling them to associate with PSC, with PSC's speech, and with a mandatory association of CUNY staff. Pet.App. 62a. Despite finding the Professors' plight "undeniably sympathetic," Pet.App. 33a, the district court held that *Knight* foreclosed their compelled speech and association claims. Pet.App. 32a–33a.

On appeal, the Second Circuit affirmed in a per curiam opinion, holding, "The Supreme Court's decision in *Knight* forecloses [the Professors'] claims challenging PSC as their exclusive representative." Pet.App. 7a. In so doing, the Second Circuit joined other circuits that also construed *Knight* to foreclose First Amendment claims alleging individuals forced to accept an exclusive representative are compelled to

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[2] *Statement on the Arrest of Students Demonstrating at Columbia University*, PSC-CUNY (Apr. 22, 2024), https://psc-cuny.org/news-events/statementarreststudentsdemonstratingcolumbiauniversity/.

associate with that entity and its speech. Pet.App. 6a–7a n.3 (collecting cases).

The Second Circuit denied a petition for hearing en banc on April 22, 2024. Pet.App. 49a–50a.

REASONS FOR GRANTING THE PETITION

The First Amendment guarantees individuals a right to dissociate from expressive organizations that advocate for policies contrary to the individuals' religious, moral, or political convictions. The Court should take this case to clarify that *Knight* does not give states free license to quash that right for any rational basis whenever that organization is an exclusive union representative, as several lower courts have concluded.

Knight did not concern a situation where individuals sought to escape a union's representation. *Knight* did not address, much less resolve, claims for compelled speech and expressive association. *Knight* thus did not hold that states can force dissenting individuals to remain in a union for any rational basis. Indeed, such a holding would create a conflict between *Knight* and this Court's precedents concerning exclusive representation and the First Amendment scrutiny that applies to compelled expressive associations.

The lower courts' misconception of *Knight* threatens individual liberties that lie at the heart of the First Amendment. This includes the right of religious dissenters to disaffiliate themselves from organizations that are hostile to their faith. It also includes the right of individuals to choose what advocacy group, if any, speaks for them. The lower courts' mistaken belief that, under *Knight*, states can force anyone to accept an exclusive representative for any rational basis must be corrected by this Court.

Because the Professors' case presents an ideal vehicle for the Court to consider this conflict and craft a workable solution, this Court should grant certiorari.

I. The Professors Have the Right Under the First Amendment to Dissociate from PSC as an Act of Protest and Free Speech

The First Amendment's guarantee of "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 585 U.S. at 892 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). "The right to eschew association for expressive purposes is likewise protected" by the First Amendment because "'[f]reedom of association . . . plainly presupposes a freedom not to associate.'" *Id*. (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

The act of dissociating from a person or entity can itself be an affirmative expressive activity. It is a common way for individuals to express their displeasure with the conduct or positions of the person or entity being shunned.

The Court recognized the right of individuals to boycott entities to express a message in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982). In that matter, the NAACP organized a boycott of white-owned businesses to pressure a county government to accept integration-related demands. *Id.* at 889. The Court found that the First Amendment protected the NAACP's refusal to deal with the businesses in order to make a political point and to pressure the businesses to change their policies. *Id*. at 911. The Court further found it unconstitutional for a state to compel the NAACP to end its boycott.

The Professors want to engage in similar expressive conduct. They want to dissociate themselves from PSC

and its representation to protest its anti-Semitic positions, political agenda, and failings as a union. Pet.App. 69a–81a.

The State is suppressing the Professors' expressive activity by compelling them to remain exclusively represented by PSC and to remain part of its bargaining unit. As a result of New York's Taylor Law, PSC continues to have the right to speak and contract for the Professors, even though they want nothing to do with PSC. This amounts to compelled expressive association under the First Amendment.

An analogy proves the point. The Court has found that exclusive representation creates an agency relationship between a union and employee akin to that between a trustee and beneficiary and an attorney and client. *ALPA*, 499 U.S. at 74–75. The State of New York would violate the Professors' First Amendment rights if it prohibited them from severing their relationship with a trustee to protest its decision to boycott and divest from Israel. The State would also violate the Professors' rights by forcing them to retain a known anti-Semite as their attorney. The same principle applies to the State forcing the Professors to retain PSC as their bargaining agent notwithstanding their religious and moral objections to associating with this partisan advocacy group.

The Court's recent decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), supports this proposition. In *Moody*, the Court explained that the government violates the First Amendment when it compels an entity to associate with another party or its speech if that compulsion interferes with the entity's desired message. *Id*. at 2401–02. That is what is occurring here. The Professors want to express their displeasure with PSC by disaffiliating themselves from this

advocacy group. But the State is interfering with the Professors' expressive activity by forcing them to continue to accept PSC as their exclusive representative. This state-compelled association violates the Professors' First Amendment rights.

II. The Court Should Take This Case to Correct Lower Courts' Misreading of *Knight*

A. *Knight* addressed only the narrow question of whether individuals have a right to participate in nonpublic meetings with public officials.

Knight did not address, much less resolve, the Professors' claim that compelling them to accept a union as their exclusive representative compels them to associate with that union and its speech. *Knight* merely held that government officials are constitutionally free to choose to whom they listen in nonpublic forums.

The Court addressed a narrow issue in *Knight*: whether it is constitutional for a government employer to prevent nonunion employees from participating in its nonpublic meetings with union officials.[3] The opinion states that the "question presented in these

[3] The lower court's decision in *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 571 F. Supp. 1 (D. Minn. 1982), makes clear there were only three claims before that court: (1) that exclusive representation violates the non-delegation doctrine, *id*. at 3–5; (2) that agency fees unconstitutionally compel nonmembers to subsidize political activities, *id*. at 5–7; and (3) that it is unconstitutional for the college to bar nonmembers from participating in union "meet-and-negotiate" and "meet-and-confer" sessions, *id*. at 7–12. Conspicuously absent is any claim that exclusive representation compels speech and association in violation of the First Amendment.

cases is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273. The Court held it did not because "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283. The Court further reasoned that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 288. Consequently, the Court concluded that "[t]he District Court erred in holding that appellees had been unconstitutionally denied an opportunity to participate in their public employer's making of policy." *Id.* at 292.

That holding has no bearing here. The Professors do not allege they are being wrongfully excluded from CUNY's meetings with PSC. They are not demanding a seat at the bargaining table. They are not asserting they have a "constitutional right to force the government to listen to their views." *Id.* at 283.

Rather, the Professors assert their constitutional right not to be compelled to accept PSC as their agent for speaking and contracting with CUNY. *Knight*'s holding that the government can choose to whom it *listens* says little about the government's ability to dictate who *speaks* to the government for individuals.

Some lower courts have recognized that *Knight* is not directly on point on this issue. The Ninth Circuit in *Mentele v. Inslee* found that "*Knight*'s recognition that a state cannot be forced to negotiate or meet with individual employees is arguably distinct" from a compelled representation claim, but it then declared *Knight* controlling anyway simply because it saw it as "a closer fit than *Janus*." 916 F.3d 783, 788 (9th Cir. 2019). The Sixth Circuit in *Thompson v. Marietta*

Education Association stated that "[e]ven assuming plaintiff's compelled-representation theory is technically distinguishable [from the claims made in *Knight*]," and even though "*Knight's* reasoning conflicts with the reasoning in *Janus*," the Court would still deem *Knight* controlling because "a cramped reading of *Knight* would functionally overrule the decision." 972 F.3d 809, 814 (6th Cir. 2020).

In short, *Knight* does not answer the question presented in this case. The Court's rejection of one constitutional challenge to one distinct aspect of exclusive representation does not mean that all other applications of exclusive representation are inherently constitutional. *Knight* is not so broad.

B. The lower courts' misinterpretation of *Knight* conflicts with Court precedents concerning exclusive representation and compelled expressive associations.

1. The lower court's mistaken belief that *Knight* held *sub silentio* that regimes of exclusive representation do not compel association cannot be squared with this Court's precedents concerning this type of mandatory association. The Court has consistently held that compelling individuals to accept an exclusive representative impinges on their rights.

In 1944, the Court in *Steele v. Louisville & Nashville Railroad Company* held this impingement gives rise to a duty of fair representation. The Court recognized that the union's exclusive representation authority "clothe[s] the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." 323 U.S. 192, 202 (1944). It also found that

"minority members of a craft are . . . deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." *Id*. at 200. To address this issue, the Court construed the Railway Labor Act to impose on exclusive representatives a duty to fairly represent all employees subject to their representation. *Id*. at 202–03.

In the decades after *Steele*, the Court reiterated that an exclusive representative's authority to speak and contract for nonconsenting employees restricts their individual liberties. In *Am. Commc'ns Ass'n v. Douds*, the Court recognized that, under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" and that "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." 339 U.S. 382, 401 (1950). In *Allis-Chalmers*, the Court recognized that exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." 388 U.S. at 180. In 2009, the Court in *14 Penn Plaza v. Pyett* held that exclusive representatives can contractually waive individuals' statutory rights without their consent and acknowledged "the sacrifice of individual liberty that this system necessarily demands." 556 U.S. 247, 271 (2009).

Most recently, in *Janus*, the Court stated not just once, but twice, that "[d]esignating a union as the employees' exclusive representative substantially

restricts the rights of individual employees." 585 U.S. at 887; *see id*. at 901 (similar). If that were not clear enough, the Court also held that requiring individuals to accept an exclusive bargaining agent is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id*. at 916. The lower courts' position that *Knight* reached opposite conclusions would bring *Knight* into conflict with *Janus* and make *Knight* an outlier in this Court's jurisprudence.

2. The lower courts' position would also place *Knight* at odds with this Court's precedents concerning compelled expressive association. Infringements on the "right to associate for expressive purposes" are subject to at least exacting scrutiny, under which a state must prove its conduct is justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. The Court has required, in a variety of contexts, that mandatory associations must satisfy this scrutiny. *See Boy Scouts of Am. v. Dale,* 530 U.S. 640, 658–59 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 577–78 (1995); *Rutan v. Republican Party,* 497 U.S. 62, 74 (1990); *Roberts*, 468 U.S. at 623 (citing seven earlier cases).

An exclusive representative is the epitome of a compelled expressive association.[4] The government is requiring individuals to accept a designated advocacy group as their exclusive agent for engaging in an

[4] A bargaining unit also is a compelled expressive association, albeit an artificial one, because it is a group of individuals forced together by the government for the expressive purpose of petitioning a public employer. *See* Pet.App. 85a–86a.

expressive activity—speaking and contracting with the government. A union's "exclusive right to speak for all the employees in collective bargaining," *Janus*, 585 U.S. at 898, necessarily associates those employees with their union's speech. That is the point of this mandatory association—to give a union the power to speak not just for itself or its voluntary members, but for everyone in a bargaining unit. *See Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987) ("The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union."). As the Eleventh Circuit recognized in *Mulhall v. Unite Here Local 355*, a union's status as an employee's "exclusive representative plainly affects his associational rights" because the employee is "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees. 618 F.3d 1279, 1286–87 (11th Cir. 2010).

Yet lower courts have construed *Knight* to hold that this type of compelled expressive association is not subject to First Amendment scrutiny, but mere rational basis review. *See, e.g.*, *Hill v. SEIU*, 850 F.3d 861, 866 (7th Cir. 2017). Relying on their view of *Knight*, the district court and Second Circuit did not apply any constitutional scrutiny to the egregious situation presented here. The courts believed that, under *Knight*, a state forcing Jewish Professors to accept the representation of a union they consider anti-Semitic raises no First Amendment concerns.

This interpretation of *Knight* cannot be correct. It defies this Court's precedents concerning compelled expressive associations. Indeed, it defies common sense to believe that the Court, when deciding in 1984 whether a public university can exclude nonunion faculty from its meeting with union officials, intended

to rule that the First Amendment is no barrier whatsoever to states forcing dissenting individuals to associate with exclusive representatives. The Court should take this case to make clear that *Knight* did not adopt such an untenable position.

III. The Question Presented Is Important Both for Individual Liberties and for the Polity

A. The Professors' religious and political beliefs compel them to act against the union. They should be free to do so.

1. The issue in this case has significant implications for a number of fundamental individual rights. This includes an individual's rights: to choose with whom to associate for expressive purposes, *see Roberts*, 468 U.S. at 623; to refrain from speaking, *see Janus*, 585 U.S. at 891–92; and to dissociate from organizations or causes to express opposition to them, *see Claiborne Hardware*, 458 U.S. at 907–09. The Second Circuit and other lower courts have misinterpreted *Knight* to give states a free hand to infringe on all of these rights whenever a union is involved.

Under their misconception of *Knight*, a state can force individuals to accept a union as their exclusive representative, give that advocacy organization the power to speak and contract for those individuals, and forbid dissenters from escaping this mandatory association if they object to its advocacy. And a state can do all this without having to satisfy First Amendment scrutiny.

These actions severely impinge on the speech and associational rights of dissenters, especially those with religious or moral reasons for wanting to dissociate from a union. Free exercise of religion "implicates more than just freedom of belief." *Burwell v. Hobby*

Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (Kennedy J., concurring). "It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Id.* at 737. The government interferes with that right by forcing individuals to remain part of organizations that act contrary to their religious principles.

That is the situation here. The Jewish Professors want to escape PSC representation primarily because of the union's advocacy for the BDS movement, which violates their religious commitment to Zionism. The Jewish Professors' antipathy to PSC has only grown as the union continues to advocate against Israel. *Supra* pp. 4–6. PSC is not alone amongst unions in supporting the BDS movement.[5]

It is important for the Court to establish that *Knight* does not deprive the Professors and other dissenters of their First Amendment right to dissociate from unions that pursue policies contrary to the individuals' religious, political, or moral convictions. No individual should be compelled to accept the representation of an interest group that advocates for policies the individual abhors.

2. While a decision to that effect would go far to protect the individual liberties of dissenting employees, it would not upend systems of collective bargaining. Under *Knight*, public employers could continue to meet and bargain with only one union if they so choose.

For example, if the Professors were allowed to escape PSC's representation, that would not stop

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[5] *Groups Question University of California Over Union BDS Resolution*, Brandeis Center, https://brandeiscenter.com/groups-question-university-of-california-over-union-bds-resolution/ (last visited July 16, 2024).

CUNY from bargaining only with PSC. The union would lack authority to speak and contract for the Professors, but it would remain the only faculty advocacy group that meets and bargains with CUNY officials. PSC could continue to speak and bargain for the roughly 30,000 individuals in the bargaining unit, minus only the six Professors and others who oppose associating with PSC. New York's system of labor relations could continue to function while accommodating dissenters' First Amendment rights.

B. States will have free rein to force individuals to accept mandatory agents if exclusive representation is subject only to rational basis review.

The Court also should take this case because of the staggering implications of the lower courts' expansive interpretation of *Knight*. It allows states to vest advocacy groups with exclusive authority to speak and contract for individuals for any rational basis. Unless corrected by this Court, states will be free to politically collectivize entire professions or industries under the aegis of a state-favored interest group.

This threat is not hypothetical. Relying on *Knight*, lower courts have held that states can force individuals who are *not* public employees, but who merely receive monies for their services from public programs, to accept exclusive representatives to petition states over those programs. The Seventh and Eight Circuits held, respectively, that Illinois and Minnesota could constitutionally impose an exclusive representative on independent providers who receive Medicaid payments for providing home-based services to persons with disabilities. *See Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Hill,* 850 F.3d at 864. Many of these providers are the parents or guardians of the persons

they serve. *See Harris v. Quinn*, 573 U.S. 616, 620–23 (2014). The First, Seventh, and Ninth Circuits similarly held the First Amendment to be no impediment to states designating exclusive representatives for home-based childcare providers. *See Mentele*, 916 F.3d at 785; *Hill*, 850 F.3d at 864; *D'Agostino v. Baker*, 812 F.3d 240, 243–44 (1st Cir. 2016).

There is no limiting principle to exclusive representation under the lower courts' understanding of *Knight*. Here, the Second Circuit believed that *Knight* required it to find no constitutional impediment to a state forcing Jews to be represented by an advocacy group they consider anti-Semitic.

The Court should disabuse lower courts of the notion that *Knight* gives states broad discretion to impose mandatory representatives on dissenting individuals. An individual's right to choose which organization, if any, speaks for him or her is a fundamental liberty protected by the First Amendment. *See Claiborne Hardware*, 458 U.S. at 907–09; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294–95 (1981). The government tramples on this liberty when it dictates who will be an individual's advocate in dealing with the government. "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers . . . ; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790–91 (1988).

The Court thus cannot "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" or "'practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.'" *Harris*, 573 U.S. at 630

(quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id*.

The lower courts have approved such a device by wrongly interpreting *Knight* to allow the government to compel individuals to accept an exclusive representative for speaking and contracting with the government for any rational basis. It is imperative that the Court correct this error and make clear that this type of compelled expressive association is permissible only if it satisfies heightened First Amendment scrutiny.

IV. The Court Should Use This Case as a Vehicle to Clarify Its Holding in *Knight*

The time has come for the Court to provide lower courts with guidance on *Knight*. Seven circuit courts have now misread *Knight* to exempt regimes of exclusive representation from all First Amendment scrutiny. *See* Pet.App. 6a–7a n.3. There is no reason to wait for any further percolation of this issue amongst the lower courts. If the Court wants to correct this error, it should do so now.

This case is an ideal vehicle for resolving the question presented. The facts here are straightforward and stark. The case presents no thorny procedural or jurisdictional issues that could complicate review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 19, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-384

AVRAHAM GOLDSTEIN, MICHAEL GOLDSTEIN, FRIMETTE KASS-SHRAIBMAN, MITCHELL LANGBERT, JEFFREY LAX, MARIA PAGANO,

Plaintiffs-Appellants,

v.

PROFESSIONAL STAFF CONGRESS/CUNY, CITY UNIVERSITY OF NEW YORK, JOHN WIRENIUS, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE NEW YORK PUBLIC EMPLOYEE RELATIONS BOARD, ROSEMARY A. TOWNLEY, IN HER OFFICIAL CAPACITY AS MEMBER OF THE NEW YORK PUBLIC EMPLOYEE RELATIONS BOARD, ANTHONY ZUMBOLO, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NEW YORK PUBLIC EMPLOYEE RELATIONS BOARD, CITY OF NEW YORK, THOMAS P. DINAPOLI, IN HIS OFFICIAL CAPACITY AS NEW YORK STATE COMPTROLLER,

Defendants-Appellees.

August Term 2023

Argued: November 20, 2023
Decided: March 18, 2024

Appeal from the United States District Court
for the Southern District of New York
No. 22-cv-321, Paul A. Engelmayer, *Judge*.

Before: KEARSE, CALABRESI, and NATHAN, *Circuit Judge*s.

Plaintiffs are six full-time professors employed by Defendant the City University of New York and exclusively represented by Defendant Professional Staff Congress/CUNY (PSC) for collective bargaining purposes. Their complaint alleges that New York's Public Employees' Fair Employment Act (the Taylor Law) violates Plaintiffs' First Amendment rights to free speech and association because it requires them to belong to a bargaining unit exclusively represented by PSC. They also challenge Section 209-a.2(c) of the Taylor Law, which allows PSC to decline to represent non-union employees in certain proceedings. Defendants filed motions to dismiss these claims, which the United States District Court for the Southern District of New York (Engelmayer, *J.*) granted.

Plaintiffs appeal the district court's dismissal of their First Amendment claims. We agree with the district court that Plaintiffs' claims are foreclosed by the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). We also agree with the district court that Plaintiffs have failed to allege that Section 209-a.2(c) of the Taylor Law violates the First Amendment. Accordingly, we AFFIRM the judgment of the district court.

NATHAN J. MCGRATH, Danielle Susanj, The Fairness Center, Harrisburg, PA (Milton L. Chappell, William L. Messenger, Glenn M. Taubman, National Right to Work Legal Defense Foundation, Inc., Springfield, VA, *on the brief*) *for Plaintiffs-Appellants*.

CLELAND B. WELTON, II (Barbara D. Underwood, Ester Murdukhayeva, *on the brief*) for Letitia James, Attorney General, State of New York, New York, NY, *for Defendants-Appellees City University of New York, John Wirenius, Rosemary A. Townley, Anthony Zumbolo, and Thomas P. DiNapoli.*

SCOTT A. KRONLAND, Matthew J. Murray, Altschuler Berzon LLP, San Francisco, CA (Hanan B. Kolko, Cohen Weiss and Simon LLP, New York, NY, *on the brief*) *for Defendant-Appellee Professional Staff Congress/CUNY.*

PER CURIAM:

BACKGROUND

New York's Public Employees' Fair Employment Act, N.Y. Civ. Serv. Law §§ 200, *et seq*., commonly referred to as the Taylor Law, authorizes public employees to bargain collectively with their employer. Under the Taylor Law, public employees are separated into distinct bargaining units composed of employees who share "a community of interest." *Id.* § 207. A union may then be certified as the exclusive representative for a bargaining unit. *Id.* § 204. Once designated as the exclusive representative, the union is given broad authority to act on behalf of the bargaining unit. Only the exclusive representative may negotiate with the employer over "the terms and conditions of employment" of all employees in the bargaining unit. *Id.* § 204.2. Indeed, the employer is

"required to negotiate collectively" with the exclusive representative and is prohibited from bargaining with anyone else. *See id.*

Plaintiffs-Appellants Avraham Goldstein, Michael Goldstein, Frimette Kass-Shraibman, Mitchell Langbert, Jeffrey Lax, and Maria Pagano are six full-time professors employed by Defendant-Appellee the City University of New York (CUNY). Each belongs to the same bargaining unit composed of over 30,000 full-time and part-time faculty and staff of CUNY and the CUNY Research Foundation. Since 1972, this bargaining unit has been exclusively represented by Defendant-Appellee Professional Staff Congress/CUNY (PSC) for collective bargaining purposes.

PSC engages in political advocacy on issues related to Israel and Palestine with which Plaintiffs "vehemently disagree." App'x 37. Five of the six Plaintiffs, who identify as Jewish and Zionists, resigned their membership from PSC in 2021 in response to what they describe as PSC's "anti-Semitic and anti-Israel statements, actions, and positions." App'x 29. The sixth Plaintiff, Pagano, resigned around 2010 after PSC allegedly interfered with and refused to represent her in a grievance proceeding with CUNY. While all Plaintiffs have resigned from union membership in PSC, each remains part of the bargaining unit represented by PSC. PSC and CUNY have entered into various agreements that control the terms and conditions of Plaintiffs' employment.

Plaintiffs not only oppose PSC's political positions but also disagree with how PSC negotiates their employment terms and conditions. As full-time faculty, Plaintiffs allege that PSC prioritizes the economic and employment interests of part-time adjunct professors and other groups over their own.

Plaintiffs also take issue with Section 209-a.2(c) of the Taylor Law, which limits PSC's duty of fair representation "to the negotiation or enforcement of the terms of an agreement with [their] public employer" and excludes any obligation to represent non-union members in grievance proceedings, disciplinary matters, or other interactions with CUNY. N.Y. Civ. Serv. Law § 209-a.2(c). As non-union members who have expressed vocal opposition to PSC's political views, Plaintiffs believe that PSC will not fairly represent them in these proceedings.

In 2022, Plaintiffs filed suit against PSC, CUNY, the City of New York, and affiliated individuals[1] in their official capacities (collectively, Defendants). Plaintiffs allege that their First Amendment rights to freedom of association are violated by the Taylor Law in two respects. First, it unconstitutionally compels them to associate with PSC and second, it unconstitutionally compels them to associate with the other CUNY instructional staff in their bargaining unit. Plaintiffs also assert that their free speech rights are violated because the Taylor Law authorizes PSC to speak and contract for them.[2]

Defendants filed motions to dismiss. In a thorough and well-reasoned decision, the district court granted the motions to dismiss, concluding that these claims

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[1] The individual Defendants sued in their official capacities are Chairperson of the New York Public Employee Relations Board (PERB) John Wirenius, PERB members Rosemary A. Townley and Anthony Zumbolo, and New York State Comptroller Thomas P. DiNapoli.

[2] Three of the Plaintiffs also alleged an additional claim that PSC violated their First Amendment rights by continuing to deduct union dues from their wages after they resigned. The parties settled this claim, so it is not before us on appeal.

were "necessarily foreclosed" by the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which remains binding law after *Janus v. AFSCME*, 585 U.S. 878 (2018). *Goldstein v. Pro. Staff Cong./CUNY*, 643 F. Supp. 3d 431, 443 (S.D.N.Y. 2022). The district court also explained that even if *Knight* did not foreclose these claims, the complaint nonetheless failed to state a claim that Plaintiffs' First Amendment free speech or associational rights were violated. The district court also rejected Plaintiffs' challenge to Section 209-a.2(c) of the Taylor Law, which limits the duty of fair representation owed by an exclusive representative to its non-union members.

DISCUSSION

"We review a district court's grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Henry v. Cnty. of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021) (quotation marks omitted).

We conclude that PSC's exclusive representation of Plaintiffs in collective bargaining with CUNY does not violate the First Amendment. In reaching our conclusion, we join each of our sister circuits to have addressed this issue since the Supreme Court's decision in *Janus*.[3]

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[3] *See e.g.*, *Peltz-Steele v. UMass Faculty Fed'n*, 60 F.4th 1, 4–8 (1st Cir. 2023); *Adams v. Teamsters Union Loc. 429*, No. 20-1824, 2022 WL 186045, at *2–3 (3d Cir. Jan. 20, 2022) (unpublished); *Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 725–27 (8th Cir. 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 968–70 (10th Cir. 2021), *cert. denied,* 142 S. Ct. 423 (2021); *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724, 727, 733–35 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021); *Akers v. Maryland State Educ. Ass'n*, 990 F.3d 375, 382–83 n.3 (4th Cir. 2021); *Ocol v. Chicago Tchrs. Union*, 982 F.3d 529, 532–33 (7th Cir. 2020), *cert. denied*, 142

We also reject Plaintiffs' challenge against Section 209-a.2(c) of the Taylor Law, which limits the duty of an exclusive representative to represent non-union employees in certain proceedings.

I. PSC as the Exclusive Representative

The Supreme Court's decision in *Knight* forecloses Plaintiffs' claims challenging PSC as their exclusive representative. In *Knight*, community college professors challenged two provisions of a Minnesota law requiring the state to (1) "meet and negotiate" with the plaintiffs' exclusive representative over employment terms and conditions, and (2) "meet and confer" with the exclusive representative on policy questions outside the scope of mandatory bargaining. 465 U.S. at 274–75. Under the law, "the employer may neither 'meet and negotiate' nor 'meet and confer' with any members of that bargaining unit except through their exclusive representative." *Id.* at 275.

The Supreme Court summarily upheld the validity of the "meet and negotiate" provision, *Knight v. Minnesota Cmty. Coll. Fac. Ass'n*, 460 U.S. 1048 (1983), and issued a separate opinion concluding that the "meet and confer" provision was also constitutional, *Knight*, 465 U.S. at 273. The Court held that excluding non-union members from "meet and confer" sessions did not violate their First Amendment rights because public employees do not have a "constitutional right to force the government to listen to their views." *Id.* at 283.

Plaintiffs argue that *Knight* does not foreclose their claims because their complaint seeks only to prevent

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S. Ct. 423 (2021); *Thompson v. Marietta Educ. Ass'n,* 972 F.3d 809, 813–14 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2721 (2021); *Mentele v. Inslee*, 916 F.3d 783, 786–91 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 114 (2019).

PSC from speaking on their behalf; it does not seek any right to attend meetings between PSC and CUNY. That reading of *Knight* is far too narrow. In *Knight*, the Court explained that excluding non-union members from "meet and confer" sessions to discuss policy questions separate from collective bargaining "in no way restrained [the employees'] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 288. The employees' "associational freedom ha[d] not been impaired" because they remained "free to form whatever advocacy groups they like[d]" and were "not required to become members" of the union. *Id.* at 289. Moreover, while the union's "unique status" as the exclusive representative "amplifie[d] its voice in the policymaking process," the Court explained that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 288. Therefore, restricting attendance at these meetings to the exclusive representative violated neither the plaintiffs' free speech nor associational rights. *Id.* at 288–90.

For the same reasons, the exclusive collective bargaining regime that Plaintiffs are subject to under the Taylor Law poses no First Amendment problem. Designating PSC as Plaintiffs' exclusive bargaining representative does not impermissibly burden Plaintiffs' ability to speak with, associate with, or not associate with whom they please, including CUNY and PSC. Plaintiffs are free to resign their membership from the union or to engage in public dissent against PSC's views. The prudential pressure that Plaintiffs may reasonably feel to *join* the union—despite their deep objections to its political positions—"is no different from the pressure to join a majority party that persons in the minority always feel" and thus "does not create an

unconstitutional inhibition on associational freedom." *See id.* at 290.

Any legal authority that PSC has to negotiate on behalf of Plaintiffs is restricted to the narrow scope of collective bargaining with CUNY. This means only that Plaintiffs may not themselves directly bargain with or select their own representative to bargain with CUNY over their employment terms. However, the First Amendment does not guarantee public employees the right to engage in collective bargaining with their employer. *See id.* at 283 ("[Public employees] have no constitutional right to force the government to listen to their views.").

Despite Plaintiffs' contentions, reading *Knight* to foreclose Plaintiffs' claims does not contravene the Supreme Court's more recent decision in *Janus*, which held that the First Amendment prohibits a public-sector union from assessing mandatory "agency fees" against non-union members of the collective bargaining unit. 585 U.S. at 929–30. *Janus* invalidated these mandatory agency fees because the First Amendment prohibits "[c]ompelling a person to *subsidize* the speech of other private speakers." *Id.* at 893. But that holding does not undermine the constitutionality of exclusive representation by public-sector unions that do *not* assess mandatory agency fees. To the contrary, as we recognized in a recent opinion, "*Janus* invalidated the collection of agency fees from non-union members but left intact labor-relations systems exactly as they are." *Wheatley v. New York State United Tchrs.*, 80 F.4th 386, 388 (2d Cir. 2023) (quotation marks omitted); *see also Janus*, 585 U.S. at 904–05 n.7 ("[W]e are not in any way questioning the foundations of modern labor law.").

Accordingly, we conclude that Plaintiffs' First Amendment challenges against the designation of PSC as their exclusive bargaining representative are directly foreclosed by *Knight*.

II. Section 209-a.2(c) of the Taylor Law

We also reject Plaintiffs' contention that Section 209-a.2(c) of the Taylor Law, which limits the fiduciary duty that an exclusive representative owes to non-union members in its bargaining unit, "exacerbate[s]" and "compound[s]" their First Amendment injuries. Appellant's Br. at 22–24.

Section 209-a.2(c) of the Taylor Law relieves an exclusive representative of any obligation to represent its non-union employees in any "grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee" where the employee may select their own representative. N.Y. Civ. Serv. Law § 209-a.2(c). Under the duty of fair representation, an exclusive representative must fairly represent all employees, including those who are not union members, when bargaining on their behalf. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 201 (1944). This "duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit," *Janus*, 585 U.S. at 901, because employees in the unit have no choice but to be represented by the exclusive representative in negotiating their employment terms. Courts have not, however, suggested that the duty of fair representation extends beyond collective bargaining—to proceedings where employees are free to select their own representatives.

To the contrary, the Supreme Court has invited the precise approach to exclusive representation adopted

by New York's Taylor Law. In invalidating mandatory agency fees, *Janus* rejected an argument that employees who have resigned from union membership should still be required to pay agency fees because the union still represents them in disciplinary proceedings. *See id.* at 900–01. The Court reasoned that unions can "eliminate[]" this "unwanted burden" by simply denying non-union members representation in these proceedings altogether. *See id.*

We therefore disagree with Plaintiffs that the limited fiduciary duty imposed by Section 209-a.2(c) of the Taylor Law burdens their First Amendment rights.

CONCLUSION

For the reasons stated above, the judgment of the United States District Court for the Southern District of New York is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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22 Civ. 321 (PAE)

AVRAHAM GOLDSTEIN *et al.*,

Plaintiffs,

-v-

PROFESSIONAL STAFF CONGRESS/CUNY *et al.*,

Defendants.

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

This case involves First Amendment challenges by professors at a public university to their compulsory inclusion in a bargaining group and consequent representation by a union whose political advocacy the professors claim to abhor. The six plaintiffs are faculty members (the "professors") employed by the City University of New York ("CUNY"). For purposes of collective bargaining, the professors are exclusively represented by the Professional Staff Congress/CUNY (the "PSC"). The professors, however, have denounced the PSC's political advocacy, particularly on issues relating to Israel and Palestine, and have resigned from the PSC. In this lawsuit against the PSC, CUNY, the City of New York (the "City"), and affiliated individuals, the professors claim that New York state law governing public sector unions violates their First Amendment speech and associational rights insofar as

it compels them to be represented in collective bargaining by the PSC. Relatedly, they challenge a 2019 amendment to state law, which allows the PSC to forego representing non-members in individualized proceedings, such as investigations, grievances, and disciplinary hearings.

Pending now are motions to dismiss from the PSC, CUNY, and individual defendants Thomas DiNapoli, John Wirenius, Rosemary A. Townley, and Anthony Zumbolo.[1] These take aim at all three counts in the Complaint: Count One, which challenges the professors' compelled association with the PSC; Count Two, which challenges the professors' compelled association with other faculty and staff in the same bargaining unit; and Count Three, which challenges certain plaintiffs' compelled financial support of the PSC through wage deductions that allegedly continued to be made after their resignations from the PSC. The motions addressed to Counts One and Two are brought under Federal Rule of Civil Procedure 12(b)(6); those addressed to Count Three are brought under Rule 12(b)(1).

For the following reasons, the Court grants the motions to dismiss Counts One and Two, and denies the motion to dismiss Count Three as moot, on account of concessions by the parties and one plaintiff's acceptance of an offer of judgment that together have significantly narrowed the scope of that Count.

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[1] The City also moved to dismiss, Dkt. 59, but as all agreed at argument, the City is not a named defendant as to Counts One and Two, *see* Dkt. 82 ("Tr.") at 10-11, and a plaintiff's acceptance of an offer of judgment and concessions by the parties have mooted the claims for relief from the City as to Count Three. *See infra* Section IV.

I. Background

A. Factual Background[2]

1. New York's System of Exclusive Representation and the PSC

New York State's Public Employees' Fair Employment Act, N.Y. Civ. Serv. Law §§ 200, *et seq*. (the "Taylor Law"), puts in place an exclusive representation model of collective bargaining. Under the Taylor Law, the Public Employee Relations Board ("PERB") separates public employees into distinct "bargaining units"[3] for the purpose of collective bargaining. *See id*. § 207. A bargaining unit comprises a group of public employees that share "a community of interest" with respect to the terms and conditions of their employment. *Id*. § 207.1(a). A bargaining unit (or units) is then represented by a union after the union's certification or recognition by the state. *See id*. § 204.2. That union, under the Taylor Law, then has exclusive legal

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[2] This account is based upon the Complaint, Dkt. 1 ("Compl."), and the exhibits incorporated therein. *See DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010) ("In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.").

For the purpose of resolving the motion to dismiss under Rule 12(b)(6), the Court presumes all well-pled facts to be true and draws all reasonable inferences in favor of plaintiff. *See Koch v. Christie's Intl PLC*, 699 F.3d 141, 145 (2d Cir. 2012); *Nat. Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006).

[3] The Taylor Law uses the terms "bargaining unit" and "negotiating unit" interchangeably. *See*, *e.g.*, N.Y. Civ. Serv. Law §§ 208.1(d) (referring to "bargaining unit"), 204,2 (referring to "negotiating unit"). For the balance of this Opinion and Order, the Court adopts the term "bargaining unit."

authority to speak for all employees in its bargaining unit or units. *See id*. § 204.

On June 16, 1972, PERB certified the PSC—a union—to represent a bargaining unit containing approximately 30,000 members of CUNY's instructional staff. *See* Compl. ¶¶ 57, 60. The PSC and CUNY have entered into a Collective Bargaining Agreement ("CBA") and Memorandum of Agreement ("MOA") that, along with other agreements, today control many terms and conditions of the employment of the covered instructors. *Id.* ¶ 24; *see also id.*, Exs. A (CBA), B (MOA).

The bargaining unit today includes the six plaintiffs: Avraham Goldstein ("Goldstein"), Michael Goldstein, Frimette Kass-Shraibman, Mitchell Langbert, Jeffrey Lax, and Maria Pagano. *See id.* ¶¶ 58, 60. Each has resigned from the PSC. *See id.* ¶¶ 10-15, 47. Under a 2019 amendment to the Taylor Law, the union owes them, as non-members whom it represents in collective bargaining, a duty of fair representation "limited to the negotiation or enforcement of the terms of an agreement with [their] public employer." N.Y. Civ. Serv. Law § 209-a.2(c). However, the PSC is not required to provide representation to non-union members of the bargaining unit, in circumstances involving "questioning by the employer," *id.* § 209-a.2(c)(i), "in statutory or administrative proceedings or to enforce statutory or regulatory rights," *id.* § 209-a.2(c)(ii), or "in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate," *id.* § 209-a.2(c)(iii). Further, a union is permitted to "provid[e] legal, economic or job-related services or benefits beyond those provided

in the agreement with a public employer only to its members." *Id.* § 209-a.2.

B. The CUNY Professors' Relationship with—and Opposition to—the PSC

The six plaintiffs are full-time instructional staff employed by CUNY. Compl. ¶ 1. The details of their employment vary—some are tenured professors, others are adjunct lecturers, and they teach across several CUNY schools, in subjects including accounting, math, and business. *Id.* ¶¶ 10-15. Each, however, is included in the instructional staff bargaining unit that the PSC exclusively represents. *See id.* ¶ 23.

For two reasons, plaintiffs seek to shed the PSC as their representative in collective bargaining.

First, plaintiffs, all but one of whom identify as Jewish, *id.* ¶ 3, "abhor" the PSC's political advocacy, *id.* ¶ 2, and stated positions on Israel and international affairs, *id.* ¶¶ 3, 27-35. In June 2021, after the PSC adopted a "Resolution in Support of the Palestinian People," *see id.* ¶ 3; *see also id.*, Ex. C. (the "Resolution"), the five Jewish plaintiffs resigned, *see id.* ¶ 36, based on what they termed the PSC's "anti-Semitic, anti-Jewish, and anti-Israel" pronouncements, *id.* ¶ 3. The PSC's political advocacy, they stated, "harms the Jewish plaintiffs and singles them out for opprobrium, hatred, and harassment based on their religious, ethnic, and/or moral beliefs and identity." *Id.* Relatedly, plaintiffs state, since the adoption of the Resolution, PSC members "have held chapter-level discussions, as required by the Resolution," *id*. ¶ 41, on the subjects discussed in the Resolution; these meetings, plaintiffs state, have fomented anti-Jewish sentiment among other members of the union, *id.* Plaintiffs oppose the PSC's use of members' dues,

including to support financially the Working Families Party and the Occupy Wall Street movement. *Id.* ¶ 45; *see id.* ¶ 30.

Second, plaintiffs state that the PSC's representation of them in negotiating employment terms and conditions has been low quality, causing them to lose confidence in the union. *Id.* ¶ 27, 46. The PSC, they state, has prioritized the economic and employment interests of part-time adjunct professors over those of full-time CUNY faculty and staff. *Id.* ¶ 46; *see id.* ¶¶ 28-33. Plaintiffs also fault the PSC for treating them, as non-members, less favorably than PSC members of the bargaining unit, based on a recent Taylor Law amendment allowing unions to decline to represent non-members of the bargaining unit in individualized proceedings, such as investigations, grievances, and disciplinary hearings. *Id.* ¶¶ 53-56.

As of September 17, 2021, all six plaintiffs had resigned from the PSC. *See id*. ¶¶ 10-15. Nonetheless, plaintiffs claim, the City and DiNapoli continued to deduct dues for three plaintiffs following their resignations—Goldstein, *id.* ¶ 75, Kass-Shraibman, *id.* ¶ 76, and Langbert, *id.*—to transmit to the PSC.

C. Procedural History

On January 12, 2022, plaintiffs filed a Complaint against the PSC, CUNY, the City, and four individuals in their official capacities: Wirenius, PERB's chairperson; Townley and Zumbolo, each a PERB member; and DiNapoli, the New York State Comptroller. *See generally* Compl. The Complaint brought First Amendment claims against the PSC, CUNY, and all individual defendants except DiNapoli; and claims of improper post-resignation dues deductions against the PSC, the City, and DiNapoli. On all counts, plaintiffs seek declaratory,

injunctive, and monetary relief, plus attorneys' fees and costs. On March 9, 2022, the Court held an initial conference and granted a joint request to stay discovery pending resolution of the anticipated motions to dismiss. Dkt. 47.

On April 20, 2022, the Court received motions to dismiss and supporting memoranda from: (1) CUNY, DiNapoli, Townley, Wirenius, and Zumbolo (the "State Defendants"), Dkt. 55 ("State MTD"); (2) the PSC, Dkt. 58 ("PSC MTD"); and (3) the City, Dkt. 60. On May 24, 2022, plaintiffs filed a combined memorandum opposing these motions. Dkt. 64 ("Pl. Response MTD"). On June 14, 2022, the State Defendants and the PSC each filed a reply in support of dismissal, Dkts. 66, 68 ("PSC Reply MTD"). The City did not file a reply, but later filed a notice that Goldstein had accepted an offer of judgment under Federal Rule of Civil Procedure 68 as to his claims against the City of improper wage deductions. Dkts. 67, 77 (as refiled).

On September 28, 2022, the Court scheduled argument on Counts One and Two, and ordered the parties to file a joint letter as to Count Three's surviving scope. Dkt. 70. On October 7, 2022, the parties filed that letter. Dkt. 72. On October 26, 2022, the Court held argument on Counts One and Two. On November 2, 2022, the City filed a proposed judgment as to Goldstein's Count Three claim, Dkt. 77, which the Court entered the following day, Dkt. 78.

On November 11, 2022, the parties filed another joint letter apprising the Court of the status of Count Three. Dkt. 80. On November 17, 2022, Goldstein moved for attorneys' fees and costs pursuant to 42 U.S.C. § 1988. Dkt. 84.

II. Legal Standards Governing Motions to Dismiss Under Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is properly dismissed where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558. When resolving a motion to dismiss, the Court must assume all well-pled facts to be true, "drawing all reasonable inferences in favor of the plaintiff." *Koch*, 699 F.3d at 145; *see also A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993) ("[All allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party."). That tenet, however, does not apply to legal conclusions. *See Iqbal*, 556 U.S. at 678. Pleadings that offer only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

III. Analysis of Plaintiffs' First Amendment Claims (Counts One and Two)

Counts One and Two bring closely related claims. Each challenges the Taylor Law's requirement that the professors be represented in collective negotiations over employment terms and conditions by the PSC, as the exclusive representative of the professors' bargaining unit. The professors contend that this infringes their First Amendment speech and associational rights by

compelling them to associate with the PSC (Count One) and the bargaining unit's other instructional staff (Count Two).

In moving to dismiss, defendants contend that settled *precedent—Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) ("*Knight*"), and its progeny—disposes of these claims. Plaintiffs dispute that. And, plaintiffs argue, even if *Knight* foreclosed their claims, the decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), compels a reassessment of *Knight*. The Court reviews these arguments and then addresses, in light of these decisions, plaintiffs' various theories of a First Amendment injury.

A. The Pertinent Holding in *Knight*

At issue in *Knight* was a Minnesota statute that, to establish "orderly and constructive relationships" between public employers and their employees, authorized public employees to bargain collectively over the terms and conditions of employment. *Knight*, 465 U.S. at 273 (quoting Minn. Stat. § 179.61 (1982) (internal quotation marks omitted)). It provided for the division of employees into appropriate bargaining units. *See id.* at 273-74. It also established a procedure, based on majority support within a unit, for the designation of an exclusive bargaining agent for that unit. *Id.* Consistent with the statute, a faculty union (the Minnesota Community College Faculty Association ("MCCFA")) was designated the exclusive bargaining representative for the state's community college's faculty, which had been deemed a single bargaining unit. *Id.* at 275-76. Twenty professors, who were not members of the union, brought suit against the state board that operated the community college system. *Id.* at 278. Before a three judge district court panel, they challenged, under the First Amendment, the constitutionality both of exclusive representation

in bargaining over terms and conditions of employment *and* of a statutory provision requiring the public employer to engage in "meet and confer" sessions, *id.* at 271, with *only* the exclusive representative—that is, the union—"on policy questions relating to employment but outside the scope of mandatory bargaining," *id.* at 273. The district court panel upheld the requirement of exclusive representation in bargaining, but it struck down the designation of the exclusive representative as the bargaining unit's sole representative at the "meet and confer" sessions regarding policy. *Id.* at 278-79.

The Supreme Court summarily affirmed as to the statute's designation of an exclusive representative in negotiations over mandatory employment terms and conditions. *Knight v. Minn. Cmty. Coll. Fac. Ass'n*, 460 U.S. 1048 (1983) (summary disposition). But it granted *certiorari* on the professors' challenge to the meet-and-confer provision with respect to non-mandatory policy questions, and, in *Knight*, sustained that provision, reversing the district court panel. The Court rejected the professors' contention that that provision abridged their speech and associational rights and unconstitutionally denied them "a government audience for their views." *Knight*, 465 U.S. at 282, 286. The professors' speech and association rights, the Court held, were not infringed by exclusively empowering the union to negotiate for the state on behalf of the bargaining unit and to express "the faculty's official collective position," *id.* at 276; *see id.* at 288. The statute left the professors "free[] to speak on any education-related issue," *id.* at 288, and "to associate or not to associate with whom they please, including the exclusive representative," *id.; see id.* at 276 ("Not every instructor in the bargaining unit is a member" of the association, and "not every instructor agrees with the official faculty view on every policy question."). And the professors

had "no constitutional right to force the government to listen to their views," whether "as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The parties disagree over *Knight's* scope—and relevance—here. Plaintiffs cast *Knight's* holding as "modest": "that government officials are constitutionally free to choose to whom they listen in nonpublic fora." Pl. Response MTD at 24. The decision, plaintiffs state, speaks only to the constitutionality of denying non-union members of a bargaining group the right to participate in meet-and-confer sessions with the public employer regarding policy. *Id.* It is irrelevant, they contend, to their claims here that "an exclusive representative's authority to speak and contract" unconstitutionally compels dissenting employees to associate with the union and the other members of the bargaining unit. *Id.* at 23.

For a number of reasons, plaintiffs' attempt to cabin and marginalize *Knight* is unsustainable.

First and most obviously, before it granted *certiorari* on the meet-and-confer issue, the Supreme Court in *Knight* summarily *affirmed* the portion of the decision below that upheld the exclusive bargaining arrangement against a First Amendment challenge. Rejecting that challenge, the district court panel had held: "The provisions of [the statute] that allow for an exclusive representation system of collective bargaining and that impose duties to 'meet and negotiate' with respect to compensation and other terms and conditions of employment are constitutionally valid on their face and as applied in the community colleges . . . ." *Knight v. Minn. Cmty. Coll. Fac. Assn*, 571 F. Supp. 1, 12-13 (D. Minn. 1982), *aff'd in part*, 460 U.S. (summary disposition), *and rev 'd in part sub nom.* 465 U.S. The Court's

summary affirmance of that ruling binds lower courts to the judgment. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *see also Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("The lower courts are bound by summary decisions by the Supreme Court until such time as the court informs them that they are not." (cleaned up)). And while "the rationale of the affirmance may not be gleaned solely from the opinion below," *Mandel*, 432 U.S. at 176, the Court, in *Knight*, supplied its reasoning for the summary order. *See Knight*, 465 U.S. at 288-90.

Second, the Court's analysis in *Knight* upholding the exclusive meet-and-confer system referenced the exclusive negotiation process and treated it as logically analogous. In language that emphasized the similarity between the meet-and-negotiate and meet-and-confer provisions, the Court wrote:

> Appellees' associational freedom has not been impaired. Appellees are free to form whatever advocacy groups they like. They are not required to become members of MCCFA . . . . Appellees may well feel some pressure to join the exclusive representative in order to give them the opportunity to serve on the 'meet and confer' committees or to give them a voice in the representative's adoption of positions on particular issues. *That pressure*, *however*, *is no different from the pressure they may feel to join MCCFA because of its unique status in the 'meet and negotiate' process*, *a status the Court has summarily approved.* Moreover, the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create

> an unconstitutional inhibition on associational freedom.

Id. at 289-90 (emphasis added).

Third, a Second Circuit panel in 2016 rejected the narrow construction of *Knight* that plaintiffs propose, in upholding against a First Amendment challenge an exclusive bargaining unit arrangement for public employees. *See Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016) (summary order), *cent. denied*, 137 S. Ct. 1204 (2017). Although *Jarvis* was resolved by a non-binding summary order, *see* Local Rule of the Second Circuit 32.1.1(a) ("Rulings by summary order do not have precedential effect."), "[d]enying summary orders precedential effect does not mean that" the Circuit, and by extension a lower court, should "consider[] itself free" to disregard the panel's ruling "in similar cases," *United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010) (cleaned up). And here, the *Jarvis* panel's reasons for reading *Knight* to uphold such an arrangement are convincing.

At issue in *Jarvis* was a challenge by 10 operators of home childcare businesses to Article 19-C of the New York Labor Law, which permitted day-care providers to organize and join a union. *See Jarvis*, 660 F. App'x at 74. Under Article 19-C, New York State had certified a union as the exclusive representative for the plaintiffs' bargaining unit. *See Jarvis v. Cuomo*, No. 14 Civ. 1459 (LEK) (TWD), 2015 WL 1968224, at *2 (N.D.N.Y. Apr. 30, 2015), *aff'd*, 660 F. App'x. That arrangement, the plaintiffs claimed, compelled them to associate with the union and its expressive activities, in violation of their First Amendment rights. The district court expressly rejected the plaintiffs' narrow reading of *Knight*, *id.* at *4 ("Knight's holding is broader than Plaintiffs suggest."), stating: "The Supreme Court's language

indicates that it broadly considered whether exclusive representation by MCCFA infringed the plaintiffs' associational rights," *id.* In affirming, the Second Circuit panel, quoting the passage reproduced above, similarly held that *Knight* had "foreclosed" claims that exclusive bargaining arrangements, by putting non-members to the choice of joining a union or losing influence over the exclusive representative's advocacy, breached their First Amendment speech and association rights. *Jarvis*, 660 F. App'x at 74.[4]

Fourth, every other Circuit to consider the question has similarly held *Knight* to foreclose speech and association claims by employees within the bargaining group exclusively responsible for negotiating with the public employer. *See*, *e.g.*, *D'Agostino v. Baker*, 812 F.3d 240, 243 (1st Cir. 2016) (Souter, J. by designation) (non-members' ability to "speak out publicly on any subject" and "free[dom] to associate themselves together outside the union however they might desire" defeated compelled association claim), *cert. denied*, 579 U.S. 909 (2016)

[4] The Circuit had previously reached a compatible conclusion in the context of private sector employees. *See Virgin Atl. Airways, Ltd v. Nat'l Mediation Bd.*, 956 F.2d 1245 (2d Cir.), *cert. denied*, 506 U.S. 820 (1992). The employees there objected to the certification of a union as their exclusive representative, on the ground that, due to the improper consideration of votes by ineligible persons, the union chosen to represent the bargaining group had been selected by less than a majority of the eligible workers. *See id.* at 1247-49. Rejecting a First Amendment challenge, the Circuit noted that the right of free association "has never been held to mandate 'majority rule' in the labor relations sphere," adding, in language apposite to the situation addressed in *Knight:* "If the First Amendment did protect individuals from being represented by a group that they do not wish to have represent them, it is difficult to understand why that right would cease to exist when a majority of the workers elected the union," *id.* at 1251-52.

(mem.); *Adams v. Teamsters Union Loc. 429*, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022) (reading *Knight* as "only about whether the employees could demand a forum with their employer" would be "simply at odds with what it says," as "*Knight* foreclose[d] the First Amendment [speech and association] challenge"), *cert. denied*, 2022 WL 4651460 (mem.); *Akers v. Md. State Educ. Ass'n*, 990 F.3d. 375, 382 n.3 (4th Cir. 2021) (*Knight* "foreclosed" a freedom of association claim, in holding that Minnesota's exclusive representation regime "did not violate speech and associational rights of those who were not members of [the] organization selected as exclusive representative"); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813-14 (6th Cir. 2020) (*Knight* precluded First Amendment compelled speech and association challenge to exclusive representation; plaintiff's attempt to distinguish *Knight* was "such a cramped reading of *Knight*" that it "would functionally overrule the decision"), *cert. denied*, 141 S. Ct. 2721 (2021) (mem.); *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724, 734-35 (7th Cir. 2021) (rejecting argument that *Knight* "addressed only whether the plaintiffs could force the government to listen to their views," as "*Knight* speaks directly to the constitutionality of exclusive representation," and barred the free speech and association claim), *cert. denied sub nom. Bennett v. AFSCME, Council 31*, 142 S. Ct. 424 (2021) (mem.); *Hill v. Serv. Emps. Intl Union*, 850 F.3d 861, 864 (7th Cir. 2017) (per *Knight*, an "exclusive-bargaining-representative scheme is constitutionally Firm" where non-members "are also free to form their own groups, oppose the [union], and present their complaints to the State"), *cert. denied*, 138 S. Ct. 446 (2017) (mem.); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (*Knight* "summarily affirmed the constitutionality of exclusive representation for subjects of mandatory

bargaining" and thereby foreclosed the claim that the "'mandatory agency relationship' between [public employees] and the exclusive representative . . violates their right to free association under the First and Fourteenth Amendments"), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019) (mem.); *Mentele v. Inslee*, 916 F.3d 783, 788 (9th Cir. 2019) ("*Knight* is the most appropriate guide" for a compelled association challenge and forecloses First Amendment challenge), *cert. denied sub nom Miller v. Inslee*, 140 S. Ct. 114 (2019) (mem.); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 969 (10th Cir. 2021) (*Knight* "found exclusive representation constitutionally permissible" and "thus belies the plaintiffs claim that exclusive representation imposes [compelled speech and association] in violation of the First Amendment"), *cert. denied*, 142 S. Ct. 423 (mem.).

The Court accordingly holds—following all courts of appeals to have addressed the issue—that under *Knight*, the "exclusive representation by public-sector labor unions does not violate the speech or associational rights of non-union members." *Peltz-Steele v. UMass Fac. Fed'n, Loc. 1895 Am. Fed'n of Tchrs., AFL-CIO*, 21 Civ. 11590 (WGY), 2022 WL 3681824, at *6 (D. Mass. Aug. 25, 2022). And although plaintiffs declare that "*Knight* cannot bear [such] incredible weight," Pl. Response MTD at 24, they do not cite any contrary authority.

B. Whether *Knight* Controls Here

Knight unavoidably controls here. The facts here are on all fours with those in *Knight*—indeed, strikingly so. With the exception of a 2019 amendment to the Taylor Law, addressed *infra* Section III.D.4, plaintiffs have not identified any salient difference between the Minnesota statute upheld in *Knight* and New York's

Taylor Law. Both statutes prescribe exclusive bargaining with respect to public sector employees, *see N.Y.* Civ. Serv. Law § 204; *Knight*, 465 U.S. at 271; utilize a "bargaining unit" feature, *see* N.Y. Civ. Serv. Law § 204.2; *Knight*, 465 U.S. at 271; and do not compel public employees to join the union elected by the majority of the bargaining unit, *see* N.Y. Civ. Serv. Law § 209-a.2(a); *Knight*, 465 U.S. at 289. And like *Knight*, this case consists of a First Amendment challenge by professors at a public university who do not belong to the union selected by a majority of instructors to represent the bargaining unit in collective bargaining. *Compare Knight*, 465 U.S. at 298, *with* Compl. 10-15, 47.

C. The Impact of *Janus* on *Knight*

Plaintiffs next argue that the 2018 decision in *Janus* repudiates, at least implicitly, the holding in *Knight*, requiring its reassessment. This, too, is wrong.

Janus addressed the mandatory payment of agency fees—a portion of union dues—by non-members who are part of an exclusive bargaining unit of public employees. The plaintiff, Janus, had resigned from the public sector union that had been majority-selected to represent the bargaining unit. *See Janus*, 138 S. Ct. at 2460-62. Janus argued that, insofar as he had not consented to the union's representation of him, forcing him to subsidize the union breached his First Amendment rights. *Id.* at 2462-68. Michigan's labor law permitting such deductions had been based on the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had upheld the charging by public sector unions of non-members for a proportionate share of union dues attributable to a union's activities as its collective-bargaining representative. Ruling for Janus, the Supreme Court overturned *Abood*. It held that where "public employees are forced

to subsidize a union, even if they choose not to join and strongly object to the positions [of] the union[,] . . . [such] violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Janus*, 138 S. Ct. at 2459-60.

Although contesting the mandatory payment of agency fees by non-members, Janus's claim did not, more broadly, challenge the exclusive representation model for public employees, under the First Amendment or otherwise. Plaintiffs here nonetheless argue that *Janus* is a doctrinal sea-change that repudiates *Knight* or logically calls it into doubt. *See* Pl. Response MTD at 21-22. In contrast, defendants depict *Janus* as consistent with, and indeed confirming, *Knight's* vitality. *See* State MTD at 12; PSC MTD at 10.

Plaintiffs are again incorrect. *Janus* repudiated existing law insofar as it overturned *Abood*, the 1977 precedent that had upheld extraction of agency fees from non-members against a First Amendment challenge. But although the decision thus reflects heightened sensitivity to the First Amendment issues implicated by the payment of such fees, *Janus*, as a brief review reflects, cannot fairly be read more broadly to impugn the exclusive representation model of public sector exclusive bargaining upheld in *Knight*.

Janus does not cite *Knight*. And *Janus* explicitly assumed that the "labor peace" accomplished by the exclusive representation of public employees was a "compelling state interest," insofar as it avoided the "confusion" and "conflicting demands" that would ensue were a public employer compelled to negotiate with multiple unions on behalf of members of the same bargaining unit, *Janus*, 138 S. Ct. at 2465 (cleaned up). The Court further emphasized that the "designation

of a union as the exclusive representative of all employees in a unit" is not "inextricably linked" with "the exaction of agency fees," *id.* Its decision invalidating the extraction of agency fees instead turned on the non-member's compulsory subsidization of a union whose views and values he did not share. *See*, *e.g.*, *id.* at 2463-64 ("Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command," and "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns"). That interest is not implicated by the inclusion of a nonmember in a bargaining unit. *Janus* therefore drew the bounds of its ruling as follows:

> It is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.

Id. at 2478. Lest the point be unclear, the Court added: "States can keep their labor-relations systems exactly as they are," *id.* at 2485 n.27, including by "requir[ing] that a union serve as exclusive bargaining agent for its employees," *id.* at 2478. *See also id.* at 2471 n.7 ("[W]e are not in any way questioning the foundations of modern labor law.").

Unsurprisingly, every court of appeals to address *Knight* since *Janus* has upheld state systems of exclusive representation against First Amendment challenges. *See*, *e.g.*, *Reisman v. Associated Facs. of Univ. of Me.*, 939 F.3d 409, 414 (1st Cir. 2019), *cert. denied*, 141 S.

Ct. 445 (2020) (mem.); *Adams*, 2022 WL 186045, at *2 ("[W]e hold that, consistent with every Court of Appeals to consider a *post-Janus* challenge to an exclusive-representation law, the law does not violate the First Amendment."), *cert. denied*, 2022 WL 4651460 (mem.); *Oliver v. Serv. Emps. Intl Union Loc. 668*, 830 F. App'x 76, 80-81 (3d Cir. 2020); *Akers*, 990 F.3d at 382 n.3 (First Amendment challenge to exclusive representation barred by *Knight*); *Thompson*, 972 F.3d at 812 (noting that "when the Supreme Court decided *Janus*, it left on the books . . . *Knight*," which "directly controls the outcome of the First Amendment claim against exclusive representation), *cert. denied*, 141 S. Ct. (mem.); *Bennett*, 991 F.3d at 727 (plaintiff "cannot establish that *Janus* rendered the longstanding exclusive-bargaining-representative system of labor relations unconstitutional"), *cert. denied sub nom.*, 142 S. Ct. (mem.); *Ocol* v. *Chi. Tchrs. Union*, 982 F.3d 529, 532-33 (7th Cir. 2020) ("[The *Janus*] Court gave no indication that its ruling on fair-share fees necessarily undermined the system of exclusive representation."), *cert. denied*, 142 S. Ct. 423 (2021) (mem.); *Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 726 (8th Cir. 2021) (First Amendment challenge barred where plaintiff's claim "look[ed] very similar to a claim brought by a different group of Minnesota professors in *Knight*"); *Bierman*, 900 F.3d at 574 (*Janus* did not overrule *Knight;* "where a precedent like *Knight* has direct application in a case, [courts] should follow it, even if a later decision arguably undermines some of its reasoning"), *cert. denied sub nom.* 139 S. Ct. (mem.); *Mentele*, 916 F.3d at 789 (*Janus* did not overrule *Knight*, and the court must "leave to the Supreme Court the prerogative of overruling its own decisions even if subsequent decisions call into question some of that precedent's rationale" (cleaned up)), *cert denied sub nom.* 140 S. Ct. (mem.);

Hendrickson, 992 F.3d at 969 (*Janus* "reinforces" the holding in *Knight* that exclusive representation is constitutionally permissible), *cert. denied*, 142 S. Ct. (mem.). There have not been any dissents to these decisions.[5]

Accordingly, *Janus* does not disturb *Knight*, or assist plaintiffs' cause.

D. Plaintiffs' First Amendment Claims in Light of *Knight*

In light of *Knight's* continuing vitality and its unambiguous approval of exclusive bargaining arrangements as against First Amendment challenges, plaintiffs' free speech and association claims are necessarily foreclosed by binding precedent. Although plaintiffs are at liberty to seek reassessment on appeal, the Court, under the doctrine of vertical *stare decisis*, lacks authority to depart from such precedent.[6] That is so whether plaintiffs' First Amendment claim is viewed as challenging their compelled association with the PSC (Count One) or with the bargaining unit's other members (Count Two).

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[5] The Sixth Circuit, although holding the plaintiff's compelled association claims barred, opined that "*Knight's* reasoning conflicts with the reasoning in *Janus*." *Thompson*, 972 F.3d at 814, *cert. denied*, 141 S. Ct. (mem.). But the Circuit recognized that, because the Supreme Court had not overruled *Knight*, it lacked authority to treat *Knight* as no longer good law. *Id.*

[6] "[V]ertical *stare decisis is* absolute, as it must be in a hierarchical system with 'one supreme Court.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) (quoting U.S. Const., Art. III, § 1). This doctrine "provides little, if any, leeway for a district court judge to stray." *Dodge v. Cnty. of Orange*, 282 F. Supp. 2d 41, 80 (S.D.N.Y. Sept. 9, 2003); *see also Palin v. N.Y. Times Co.*, 482 F. Supp. 3d 208, 215 (S.D.N.Y. Aug. 8, 2020), *modified*, 510 F. Supp. 3d 21 (S.D.N.Y. Dec. 29, 2020).

In the interest of completeness, the Court nonetheless evaluates why, under governing doctrine, the four theories of a First Amendment violation that plaintiffs have ventured in this lawsuit do not state a viable claim. As explained, the first three of these are foreclosed, either literally or effectively, by *Knight*. The fourth concerns a recent amendment to the Taylor Law.

1. Compelled Association with the PSC

Plaintiffs' first theory is that New York impermissibly compels them to associate with the PSC and its speech by forcing them to accept the PSC as their mandatory agent for speaking and contracting with CUNY. Pl. Response MTD at 13-14. The association with the PSC is particularly toxic, plaintiffs plead, because the PSC has expressed abhorrent anti-Semitic and anti-Zionist views on extraneous (*i.e.*, non-employment) matters. Compl. ¶ 3. Plaintiffs claim that this further causes them to lack confidence in the PSC to fairly represent the bargaining unit in collective bargaining over the terms and conditions of employment. *Id.* ¶ 43.

Although plaintiffs' dismay at being situated in a bargaining unit led by persons with views they find reprehensible is undeniably sympathetic, *Knight* and its circuit-court progeny squarely foreclose such as a basis of a viable First Amendment claim. As these cases reflect, the remedies for a member of the bargaining unit are instead to resign from the union,[7]

[7] The Complaint alleges, in fact, that plaintiff Lax resigned from the PSC after his complaints against the union before the Equal Employment Opportunity Commission prevailed in various respects. These allegedly resulted in determinations that certain defendants "discriminated" and "retaliated" against Lax on the basis of his religion. Compl. ¶ 32.

to decline to subsidize the union as *Janus* now permits, and/or to otherwise disassociate from the noxious speech. An employee may also seek to vote out the union as representative of the bargaining unit, to work within the union to change its leadership, or to pursue, through appropriate channels, claims of a denial of fair representation. But these authorities do not support a First Amendment right for the minority members to bargain separately with the employer on account of their discomfort with the union's views. *See*, *e.g.*, *D'Agostino*, 812 F.3d at 244 ("[T]he freedom of the dissenting appellants to speak out publicly on any union position further counters the claim that there is an unacceptable risk the union speech will be attributed to them contrary to their own views; they may choose to be heard distinctly as dissenters if they so wish, and as we have already mentioned the higher volume of the union's speech has been held to have no constitutional significance."), *cert. denied*, 579 U.S. (mem.); *Mentele*, 916 F.3d at 788 (no First Amendment violation "where plaintiff raises concern that a union she dislikes is speaking for her"), *cert denied sub nom.* 140 S. Ct. (mem.).

2. Compelled Association with the Bargaining Unit

Plaintiffs' second theory is that New York impermissibly compels them to associate with "tens of thousands of other instructional staff" in the same bargaining unit, despite the fact that many of these other instructors "do not share [plaintiffs'] beliefs or are overtly hostile to them." Compl. ¶ 48; *see id.* ¶¶ 99-100; Pl. Response MTD at 16 (claiming that New York has interfered with the professors' "right to select with whom they join in a common endeavor").

Plaintiffs depict this theory of a First Amendment violation as an open question, insofar as the challenge by the Minnesota professors in *Knight* was based on dissident instructors' compelled association with the union itself, as opposed to with other members of the bargaining group, and ensuing cases have had a similar factual basis. As a formal matter, such may be so. But even if this feature distinguished this entire line of cases, it would be of no moment. That is because the logic of *Knight* and its progeny would equally dispose of this theory of a First Amendment violation.

By definition, a bargaining unit is comprised of a large number of employees—even tens of thousands, as with plaintiffs' unit. These masses cannot be expected to agree on every issue, employment-related or otherwise, any more than a dissident member of the bargaining unit can be expected invariably to share the views of the bargaining representative elected by the unit. And like the union and its leadership, the other members of a bargaining unit have First Amendment rights of expression. The analysis in Knight—holding that a dissident within the bargaining group does not have a First Amendment right to bargain separately with the public employer so as to enable them to dissociate from others whose views they do not share—equally applies to this theory of plaintiffs. And, taken to its logical extreme, plaintiffs' theory would entitle every single member of a bargaining group to negotiate separately with the public employer over terms and conditions of employment, lest the employee be clustered with another whose views he or she found disagreeable, a point plaintiffs conceded at argument. *See* Tr. at 54-56. Under the case law, that thesis is untenable. *See Knight*, 465 U.S. at 291 ("The goal of reaching agreement makes it imperative for an employer to have before it only one

collective view of its employees when 'negotiating.'"); *see also Oliver*, 830 F. App'x at 80-81 (government's interests served by "choos[ing] to listen to a union while ignoring nonmembers without infringing upon the nonmembers' rights"); *Peltz-Steele*, 2022 WL 3681824, at *9 ("Although private in nature, exclusive union representation echoes the representative structures of American democracy both in its assets and its imperfections, fostering a majoritarianism tempered by constraints of fair representation but which inescapably yields a dissenting minority.").

In any event, this theory fails for a separate reason. The case law does not support that including a person in a bargaining group alongside other people is an act of "expressive" quality implicating the First Amendment. The decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), is instructive. Law schools there challenged a federal law (the "Solomon Amendment") requiring that if any part of an institution of higher education denied military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. *Rumsfeld*, 547 U.S. at 51. In the part of its decision pertinent here, the Supreme Court rejected the law schools' challenge, finding that "the schools are not speaking when they host interviews and recruiting receptions." *Id.* at 64.[8] "[T]he conduct regulated by the Solomon Amendment," the Court held, "is not inherently expressive" because it requires only "explanatory speech" to communicate its message. *Id.* at 66. The Court added: "Compelling a law school that sends scheduling

[8] The law schools separately argued that the Solomon Amendment placed an unconstitutional condition on their receipt of federal funds. *See Rumsfeld*, 547 U.S. at 57-66. The Court's assessment of that claim is not relevant here.

e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in [*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)] and [*Wooley v. Maynard*, 430 U.S. 705 (1977)] to suggest that it is." *Id.* at 62.

So, too, here. The Complaint does not allege that CUNY's professors are required to "say" anything, or take any action,[9] as members of the bargaining unit, beyond being bound by the terms and conditions negotiated on their behalf by the unit's elected exclusive representative, the PSC. It is thus not of any moment, under the First Amendment, that other members of the bargaining unit "do not share their same economic interests," Compl. ¶ 48, "do not share their beliefs," *id.*, and "are overtly hostile to them," *id.* That people with different viewpoints are in a common unit for purposes of collective bargaining does not associate each—within the meaning of the First Amendment—with the viewpoints of the others, any more than the travelers on a common public carrier such as a municipal bus or train, or the students in a common public school, are associated with one another's ideas or perspectives.[10] The Complaint here does not

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[9] Although the Complaint alleges that the Resolution "requir[es] chapter-level discussion of possible support by PSC," Compl. ¶ 34, for the Palestinian-led "Boycott, Divestment, Sanctions" movement against Israel, the Complaint does not allege that the professors are obligated to attend or participate in those discussions. Nor does the Resolution's text suggest an obligation of all union members, let alone non-union members, to participate in these discussions. *See* Resolution at 1-2.

[10] For this reason, the compelled speech cases that plaintiffs cite are far afield. Plaintiffs, as pled, have not been required to

plead any concrete facts why outsiders would reasonably impute an association between a professor and any of the many viewpoints held among the approximately 30,000 other instructors in the bargaining unit. Just as the Solomon Amendment was held not to infringe on the law school's associational rights even if the school found the military recruiter's messages in interviews, receptions, bulletin boards, and emails "repugnant," *Rumsfeld*, 547 U.S. at 70, that the CUNY professors vehemently disagree with the messages of others in the bargaining unit does not bespeak a cognizable injury under the First Amendment.

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carry, endorse, or embrace any message of another—whether the PSC or its members. *See Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) (state may not require organizers of private parade to include among marchers a group imparting message the organizers do not wish to convey); *Pac. Gas & Elec. Co. v. Pub. Utility Comm'n of Cal.*, 475 U.S. 1 (1986) (state may not require privately owned utility to include in its billing envelopes speech of a third party with which it disagrees); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state cannot compel citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (state cannot require newspaper to run rebuttals to its editorials); W. *Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (public school students may not be compelled to recite Pledge of Allegiance); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (public accommodations law that required Boy Scouts to readmit homosexual member violated Boy Scouts' First Amendment right of expressive association). To the extent that the PSC's speech presumptively reflects the views of the majority of its members, plaintiffs are free to dissent, and have exercised that right. *See, e.g.*, Avraham Goldstein, *I'm Stuck with an Anti-Semitic Labor Union*, Wall Street J. (Jan. 21, 2022), https://www.wsj.com/articles/im-stuck-anti-semitic-semitism-public-labor-union-intimidation-dues-cuny-city-university-new-york-janus-11642714137 (last visited November 29, 2022).

3. The PSC as a Hostile Political Group

Plaintiffs' third theory—a variant of the first—casts the PSC as the equivalent of "a hostile political group," Pl. Response MTD at 14, with which New York is forcing the professors to affiliate, *see* Compl. ¶ 68. In support, plaintiffs cite cases giving public employees the right not to be discharged for refusing to support a political party or its candidates. *See*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976) (First and Fourteenth Amendments violated where non-civil-service employees were threatened with discharge for failure to affiliate with Democratic Party); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (promotions, transfers, and recalls based on political affiliation or support are impermissible infringements on public employees' First Amendment rights; conditioning hiring decisions on political belief and association violates applicants' First Amendment rights absent vital governmental interest); *O'Hare Truck Serv.*, *Inc. v. City of Northlake*, 518 U.S. 712 (1996) (governmental retaliation against city contractors for exercising rights of political association or expression impermissible).

These cases, however, are far afield. Each involves a state actor's consideration of the political affiliation of an employee or applicant to favor or penalize their career prospects. There is no analog alleged here. Quite the contrary, the Complaint is notably devoid of any claim that non-union instructors in the bargaining unit have been, or stand to be, treated in any way disadvantageously relative to members (or supporters) of the union.[11] Nor does it plead any facts indicating

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[11] To the extent the professors argue that they, as non-members, are treated "worse" than members owing to a 2019 amendment to the Taylor Law which limits the PSC' s duty to

that instructors have been differentially treated based on political affiliation or point of view. The Complaint instead faults New York for treating the non-union-member instructors *in pari passe* with the union instructors, as common members of the bargaining unit. Notably, too, although the Complaint states that the six plaintiffs subjectively doubt the PSC can ably serve as a fiduciary for them in negotiating terms and conditions of employment, Compl. ¶ 43, it does not allege that any have experienced adverse consequences from their decisions to resign from the PSC.

4. Facial Challenge to the Taylor Law's Section 209-a.2

Plaintiffs' final theory is of a different character. They contend that a 2019 amendment to the Taylor Law, *see* N.Y. Civ. Serv. Law § 209-a.2, gives rise to a facial First Amendment violation.[12] That amendment states that the union designated as the exclusive bargaining representative owes "non-members" or the bargaining unit a duty of fair representation "limited to the negotiation or enforcement of the terms of an agreement with [their] public employer," *id.* § 209-a.2(c). But, it states, such a union is not required to provide representation to non-members in situations that involve "questioning by the employer," "in statutory or administrative proceedings or to enforce statutory or regulatory rights," or "in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the

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nonmembers in individualized grievance settings, that argument is addressed *infra* Section III.D.4.

[12] Although neither the Complaint nor plaintiffs' memorandum of law denotes the challenge as facial, counsel at argument agreed that the challenge is necessarily facial. *See* Tr. at 17, 47.

non-member is permitted to proceed without the employee organization and be represented by his or her own advocate." *Id.* § 209-a.2(c)(i)–(iii).

Plaintiffs contend that this provision—added in the wake of the *Janus* decision—authorizes the PSC to "treat [the CUNY Professors] less favorably than PSC members, solely because they have exercised their constitutional rights to become or remain non-members," Compl. ¶ 53, and that such violates the First Amendment. As plaintiffs put the point: "This state of affairs leaves [plaintiffs'] and other non-members' interests vulnerable to arbitrary and discriminatory union conduct," PI. Response MTD at 12, notwithstanding the admonition in *Janus* that the "duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative," *Janus*, 138 S. Ct. at 2456.[13]

Plaintiffs' argument based on *Janus* is unpersuasive, as § 209-a.2, as amended, in fact responds to the analysis in *Janus.* Addressing a union's duty of fair representation to members and non-members, the Court there held: "What this duty entails, in simple terms, is an obligation not to act solely in the interests of [the union's] own members." *Id.* at 2467 (cleaned up). The Court further made clear that a union henceforth is at liberty to decline to represent non-members in the grievance process, thereby eliminating the risk, after *Janus*, of freeriding by a non-member who declined to pay agency fees. "[W]hatever unwanted burden is imposed by the representation of non-members in disciplinary

[13] At argument, plaintiffs acknowledged that this challenge is unlike that in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), which held that a union could not exclude or deny equal treatment to non-union members based on a protected classification. *See* Tr. 39-40.

matters can be eliminated through means significantly less restrictive of associational freedoms. Individual non-members could be required to pay for that service *or could be denied union representation altogether." Id.* at 246869 (emphasis added) (cleaned up).

The amendment to the Taylor Law adopts the approach invited by *Janus*. It does so by limiting the public employee union's duty to represent non-members, so as to apply to collective bargaining, but not to individualized proceedings such as disciplinary grievances. To this end, § 209-a.2 states that a union need not represent a non-member "during questioning by the employer," N.Y. Civ. Serv. Law § 209-a.2(c)(i), "in statutory or administrative proceedings or to enforce statutory or regulatory rights," *id.* § 209-a.2(c)(ii), and "in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline," *id.* § 209-a.2(c)(iii), "where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate," *id.* Plaintiffs' claim that § 209-a.2 as amended is inconsistent with *Janus'* s reminder that a union must discharge its duty of fair representation thus overlooks the line the Court in *Janus* drew between collective and individualized proceedings. Read on its face and evaluated in light of *Janus*, § 209-a.2 faithfully applies *Janus*. It does not infringe on the rights of a non-member, whether to free speech and expression under the First Amendment or to fair representation.[14]

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[14] With this caveat: The parties have not drawn to the Court's attention case law construing the amended § 209-a.2. *See* Tr. 63. Should that provision be construed differently than the Court has here and so as to intrude on the duty of fair representation, the above analysis would not apply.

In a bid to avoid this result, plaintiffs suggest that the final clause of the amended section—"where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate"—might be read to modify only § 209-a.2(c)(iii), and not § 209-a.2(c)(i) and § 209-a.2(c)(ii). That construction is textually unpersuasive. *See Am. Intl Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 782 (2d Cir. 2013) ("When there is no comma, as in the statute considered in *Barnhart* [*v. Thomas*, 540 U.S. 20, 26 (2003)], the subsequent modifier is ordinarily understood to apply only to its last antecedent. When a comma is included, . . . the modifier is generally understood to apply to the entire series."). And even if § 209-a.2 were ambiguous on this point, the canon of constitutional avoidance would dictate the same outcome. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."). That is because the reading the professors suggest—under which a union would be permitted not to represent the non-member in settings where the member was not allowed to "be represented by his or her own advocate"—would leave the non-member unassisted "during questioning by the employer," N.Y. Civ. Serv. Law § 209-a.2(c)(i), and "in statutory or administrative proceedings or to enforce statutory or regulatory rights," *id.* § 209-a.2(c)(ii). The constitutional questions potentially raised under *Janus* by this reading are, however, avoided by construing the final clause to apply to all of § 209-a.2's subsections.

Consistent with this, the Complaint does not allege that nonmembers of the PSC have been denied representation by the PSC, where they *cannot select their own advocate for representation*, in any category of individualized proceeding described in § 209-a.2.[15]

The Court therefore rejects plaintiffs' final theory of a First Amendment violation. New York's statutory amendment restricting the scope of a public employee union's obligatory representation of non-members is, on its face, in accord with *Janus.* There is no basis to hold that it breaches the First Amendment rights of the non-members.

Plaintiffs' First Amendment challenges to their representation by the PSC and inclusion in the bargaining unit alongside members of the PSC, as brought in Counts One and Two, therefore fail to state a claim. These Counts must be dismissed.

IV. Status of Certain Plaintiffs' Improper Dues-Deduction Claims (Count Three)

The scope of Count Three has narrowed substantially since the filing of the Complaint, as a result of concessions by the parties and plaintiff Goldstein's acceptance of an offer of judgment by the City.

At the outset, three plaintiffs—Goldstein, Kass-Shraibman and Langbert—sought prospective and retroactive relief against the PSC, DiNapoli, and the City. *See* Compl. ¶¶ 108-18. In their reply to the motions to dismiss, plaintiffs conceded that their Count Three

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[15] The PSC's collective bargaining agreement, which the Complaint attaches and incorporates, *see* CBA, is in accord. In Section 21.3, it provides that an employee, whether or not a union member, can choose to be represented by either an attorney or a union representative in grievance proceedings. CBA at 57.

"claims for prospective relief are not justiciable," Pl. Response MTD at 33. Goldstein then accepted an offer of judgment from the City, in the amount of $223.35, "plus reasonable attorneys' fees, expenses, [and] costs in an amount to be determined by the Court." Dkts. 77, 78.[16]

This leaves intact—as the parties have confirmed in a joint letter, *see* Dkt. 80, and at argument, *see* Tr. at 5—only the claims for retroactive relief by the three plaintiffs[17] against the PSC. *See* Dkt. 80. The PSC did not move to dismiss these claims. *See* PSC Reply MTD at 12. Therefore, the Court denies as moot all motions to dismiss as to Count Three.

CONCLUSION

For the reasons above, the Court grants defendants' motions to dismiss in full. The Court therefore dismisses Counts One and Two, and the portions of Count Three on which defendants have moved.

The case will now proceed to discovery on the surviving portion of Count Three, which is limited to the claims against the PSC by Goldstein, Kass-Shraibman, and Langbert, with respect to dues and interest allegedly deducted from their wages after their resignations from the union. Because no live claims remain against any defendants other than the PSC, the Court accordingly dismisses all other defendants from this case. The Court directs counsel for the

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[16] Goldstein moved shortly thereafter for an award of attorneys' fees and costs. Dkt. 84. In the interests of economy and consistency, the Court will not entertain any such motion until Count Three, whose resolution could prompt further motions for fees and costs, has been resolved.

[17] Goldstein has indicated, in the latest joint letter, Dkt. 80 at 1, that he plans to drop his remaining claim against the PSC.

remaining parties (Goldstein, Kass-Shraibman, Langbert, and the PSC) to jointly submit, by December 9, 2022, a proposed case management plan contemplating, *inter alia*, the completion of discovery on the remaining claim by February 9, 2023.

The Court respectfully directs the Clerk of the Court to close the motions pending at docket numbers 53, 56, and 59, and to terminate the City of New York, CUNY, DiNapoli, Wirenius, Townley, and Zumbolo as defendants in this matter.

SO ORDERED.

/s/ Paul A. Engelmayer
Paul A. Engelmayer
United States District Judge

Dated: November 30, 2022
New York, New York

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 1:22-cv-00321-PAE

AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN;
FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT;
JEFFREY LAX; MARIA PAGANO,

Plaintiffs,

v.

PROFESSIONAL STAFF CONGRESS/CUNY, *et al.*,

Defendants.

Hon. Paul A. Engelmayer

FINAL JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED THAT FINAL JUDGMENT IS HEREBY ENTERED in accordance with the November 30, 2022 Opinion and Order granting in full the Motions to Dismiss filed by Defendants Professional Staff Congress/CUNY ("PSC"), City University of New York ("CUNY"), DiNapoli, Wirenius, Townley and Zumbolo and dismissing counts one and two of the complaint and all Defendants other than Defendant PSC (Doc. No. 95) and the February 14, 2023 Order of Dismissal with Prejudice of Count Three as to Defendant PSC (Doc. No. 110).

IT IS FURTHER ORDERED that the Unopposed Motion for Entry of Final Judgment, Doc. No. 111, be, and the same hereby is, GRANTED.

FINAL JUDGMENT is therefore entered in favor of Defendants CUNY, DiNapoli, Wirenius, Townley and Zumbolo against all Plaintiffs on all three counts of the complaint; in favor of Defendant PSC against all Plaintiffs on counts one and two of the complaint; AND with the voluntary dismissal of count three by the remaining Plaintiffs against Defendant PSC, the complaint is HEREBY DISMISSED IN ITS ENTIRETY.

Dated this 14 day of March, 2023.

SO ORDERED

/s/ Paul A. Engelmayer
Hon. Paul A. Engelmayer
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 23-384

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand twenty-four.

AVRAHAM GOLDSTEIN, MICHAEL GOLDSTEIN, FRIMETTE KASS-SHRAIBMAN, MITCHELL LANGBERT, JEFFREY LAX, MARIA PAGANO,

Plaintiffs-Appellants,

v.

PROFESSIONAL STAFF CONGRESS/CUNY, CITY UNIVERSITY OF NEW YORK, JOHN WIRENIUS, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE NEW YORK PUBLIC EMPLOYEE RELATIONS BOARD, ROSEMARY A. TOWNLEY, IN HER OFFICIAL CAPACITY AS MEMBER OF THE NEW YORK PUBLIC EMPLOYEE RELATIONS BOARD, ANTHONY ZUMBOLO, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NEW YORK PUBLIC EMPLOYEE RELATIONS BOARD, CITY OF NEW YORK, THOMAS P. DINAPOLI, IN HIS OFFICIAL CAPACITY AS NEW YORK STATE COMPTROLLER,

Defendants-Appellees.

ORDER

Appellants, Avraham Goldstein, Michael Goldstein, Frimette Kass-Shraibman, Mitchell Langbert, Jeffrey Lax and Maria Pagano, have filed a petition for rehearing en banc. The active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[United States Court of Appeals
Second Circuit Seal]

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

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

N.Y. Civ. Serv. Law § 204

1. Public employers are hereby empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

2. Where an employee organization has been certified or recognized pursuant to the provisions of this article, it shall be the exclusive representative, for the purposes of this article, of all the employees in the appropriate negotiating unit, and the appropriate public employer shall be, and hereby is, required to negotiate collectively with such employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

3. For the purpose of this article, to negotiate collectively is the performance of the mutual obligation of

the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

N.Y. Civ. Serv. Law § 209-a

1. Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article; (f) to utilize any state funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee

from participating in a union organizing drive; (g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation; or (h) to disclose home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a public employee, as the term "public employee" is defined in subdivision seven of section two hundred one of this article, except (i) where required pursuant to the provisions of this article, (ii) to the extent compelled to do so by lawful service of process, subpoena, court order, or (iii) in accordance with subdivision four of section two hundred eight of this article, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-

related, publicly available information such as title, salary, and dates of employment.

2. Improper employee organization practices. It shall be an improper practice for an employee organization or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so provided, however, that an employee organization does not interfere with, restrain or coerce public employees when it limits its services to and representation of non-members in accordance with this subdivision; (b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer; or (c) to breach its duty of fair representation to public employees under this article. Notwithstanding any law, rule or regulation to the contrary, an employee organization's duty of fair representation to a public employee it represents but who is not a member of the employee organization shall be limited to the negotiation or enforcement of the terms of an agreement with the public employer. No provision of this article shall be construed to require an employee organization to provide representation to a non-member (i) during questioning by the employer, (ii) in statutory or administrative proceedings or to enforce statutory or regulatory rights, or (iii) in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate. Nor shall any provision of this article prohibit an employee organization from providing legal, economic or job-related

services or benefits beyond those provided in the agreement with a public employer only to its members.

3. The public employer shall be made a party to any charge filed under subdivision two of this section which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

4. Injunctive relief.

(a) A party filing an improper practice charge under this section may petition the board to obtain injunctive relief, pending a decision on the merits of said charge by an administrative law judge, upon a showing that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief.

(b) Within ten days of the receipt by the board of such petition, if the board determines that a charging party has made a sufficient showing both that there is reasonable cause to believe an improper practice has occurred and it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to, the status quo to provide meaningful relief, the board shall petition the supreme court, in Albany county, upon notice to all parties for the necessary injunctive relief or in the alternative may issue an order permitting the charging party to seek

injunctive relief by petition to the supreme court, in which case the board must be joined as a necessary party. The board or, where applicable, the charging party, shall not be required to give any undertakings or bond and shall not be liable for any damages or costs which may have been sustained by reason of any injunctive relief ordered. If the board fails to act within ten days as provided herein, the board, for purposes of review, shall be deemed to have made a final order determining not to seek injunctive relief.

(c) If after review, the board determines that a charging party has not made a sufficient showing and that no petition to the court is appropriate under paragraph (b) of this subdivision, such determination shall be deemed a final order and may be immediately reviewed pursuant to and upon the standards provided by article seventy-eight of the civil practice law and rules upon petition by the charging party in supreme court, Albany county.

(d) Injunctive relief may be granted by the court, after hearing all parties, if it determines that there is reasonable cause to believe an improper practice has occurred and that it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to, the status quo to provide meaningful relief. Such relief shall expire on decision by an administrative law judge finding no improper practice to have occurred, successful appeal or motion by respondent to vacate or modify pursuant to the provisions of the civil practice law and rules, or subsequent finding by the board that no improper practice had occurred. The administrative law judge shall conclude the hearing process and issue a

decision on the merits within sixty days after the imposition of such injunctive relief unless mutually agreed by the respondent and charging party.

(e) A decision on the merits of the improper practice charge by an administrative law judge finding an improper practice to have occurred shall continue the injunctive relief until either: (i) the respondent fails to file exceptions to the decision and implements the remedy, or (ii) the respondent successfully moves in court, upon notice, to vacate or modify the injunctive relief pursuant to provisions of the civil practice law and rules.

(f) Any injunctive relief in effect pending a decision by the board on exceptions: (i) shall expire upon a decision by the board finding no improper practice to have occurred, of which the board shall notify the court immediately, or (ii) shall remain in effect only to the extent it implements any remedial order issued by the board in its decision, of which the board shall notify the court immediately.

(g) All matters in which the court has granted injunctive relief pursuant to this subdivision shall be given preference in the scheduling, hearing and disposition over all other matters before the board or its administrative law judges.

(h) The appeal of any order granting, denying, modifying or vacating injunctive relief ordered by the court pursuant to this subdivision shall be made in accordance with the provisions of article fifty-five of the civil practice law and rules except that where such injunctive relief is stayed pursuant to section fifty-five hundred nineteen of the civil practice law and rules, an appeal for removal of such stay may be given preference in the same manner as provided in

rule fifty-five hundred twenty-one of the civil practice law and rules.

(i) Nothing in this section shall be deemed to eliminate or diminish any right that may exist pursuant to any other law.

(j) Pursuant to paragraph (d) of subdivision five of section two hundred five of this article, the board shall make such rules and regulations as may be appropriate to effectuate the purposes and provisions of this subdivision.

5. Injunctive relief before the New York city board of collective bargaining.

(a) A party filing an improper practice charge under section 12-306 of the administrative code of the city of New York may petition the board of collective bargaining to obtain injunctive relief before the supreme court, New York county, pending a decision on the merits by the board of collective bargaining, upon a showing that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that immediate and irreparable injury, loss or damage will result and thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief.

(b) Within ten days of the receipt by the board of such petition, if the board of collective bargaining determines that a charging party has made a sufficient showing both that there is reasonable cause to believe an improper practice has occurred and it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to, the

status quo to provide meaningful relief, said board shall petition the supreme court in New York county, upon notice to all parties, for the necessary injunctive relief, or in the alternative said board may issue an order permitting the charging party to seek injunctive relief by petition to the supreme court, New York county, in which case said board must be joined as a necessary party. Such application shall be in conformance with the civil practice law and rules except that said board, or where applicable, the charging party shall not be required to give any undertaking or land and shall not be liable for any damages or costs which may have been sustained by reason of any injunctive relief order. If the board of collective bargaining fails to act within ten days as provided in this paragraph, the board of collective bargaining, for purposes of review, shall be deemed to have made a final order determining not to permit the charging party to seek injunctive relief.

(c) If after review, the board of collective bargaining determines that a charging party has not made a sufficient showing and that no petition to the court is appropriate under paragraph (b) of this subdivision, such determination shall be deemed a final order and may be immediately reviewed pursuant to article seventy-eight of the civil practice law and rules upon petition by the charging party to the supreme court, New York county.

(d) Injunctive relief may be granted by the court, after hearing all parties, if it determines that there is reasonable cause to believe an improper practice has occurred and that it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or

return to, the status quo to provide meaningful relief. Any injunctive relief granted by the court shall expire upon decision of the board of collective bargaining finding no improper practice to have occurred or successful challenge of the said board's decision pursuant to article seventy-eight of the civil practice law and rules. The said board shall conclude the hearing process and issue a decision on the merits within sixty days after the imposition of such injunctive relief unless mutually agreed by the respondent and charging party.

(e) A decision on the merits of the improper practice charge by the board of collective bargaining finding an improper practice to have occurred shall continue the injunctive relief until either: (i) the respondent fails to appeal the decision and implements the remedy, or (ii) the respondent successfully moves in court, upon notice, to vacate or modify the injunctive relief pursuant to provisions of the civil practice law and rules.

(f) Any injunctive relief in effect pending a decision by the board of collective bargaining on appeal: (i) shall expire upon a decision by the said board finding no improper practice to have occurred, of which the said board shall notify the court immediately, or (ii) shall remain in effect only to the extent it implements any remedial order issued by the said board of its decision, of which the said board shall notify the court immediately.

(g) All matters in which the court has granted injunctive relief upon petition by the charging party pursuant to this subdivision shall be given preference in the scheduling, hearing and disposition over all other matters before the said board. The said board shall establish rules and regulations dealing

with the implementation of this section including time limits for its own actions.

(h) The appeal of any order granting, denying, modifying or vacating injunctive relief ordered by the court pursuant to this subdivision shall be made in accordance with the provisions of article fifty-five of the civil practice law and rules except that where such injunctive relief is stayed pursuant to section fifty-five hundred nineteen of the civil practice law and rules, an appeal for removal of such stay may be given preference in the same manner as provided in rule fifty-five hundred twenty-one of the civil practice law and rules.

(i) Nothing in this section shall be deemed to eliminate or diminish any right that may exist pursuant to any other law.

(j) The board of collective bargaining shall make such rules and regulations as may be appropriate to effectuate the purposes and provisions of this subdivision.

6. Application. In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 1:22-cv-321

AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN; FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT; JEFFREY LAX; MARIA PAGANO,

Plaintiffs,

v.

PROFESSIONAL STAFF CONGRESS/CUNY; CITY UNIVERSITY OF NEW YORK; JOHN WIRENIUS, in his official capacity as Chairperson of the New York Public Employee Relations Board; ROSEMARY A. TOWNLEY, in her official capacity as Member of the New York Public Employee Relations Board; ANTHONY ZUMBOLO, in his official capacity as Member of the New York Public Employee Relations Board; CITY OF NEW YORK; THOMAS P. DiNAPOLI, in his official capacity as New York State Comptroller,

Defendants.

(Hon. _____)

COMPLAINT

AND NOW come Plaintiffs Avraham Goldstein, Michael Goldstein, Frimette Kass-Shraibman, Mitchell Langbert, Jeffrey Lax, and Maria Pagano, by and through their undersigned attorneys, and state the following claims for relief against Defendants

Professional Staff Congress/CUNY ("PSC"); the City University of New York ("CUNY"); John Wirenius, in his official capacity as Chairperson of the New York Public Employee Relations Board; Rosemary A. Townley, in her official capacity as Member of the New York Public Employee Relations Board; Anthony Zumbolo, in his official capacity as Member of the New York Public Employee Relations Board; the City of New York ("City"); and Thomas P. DiNapoli, in his official capacity as New York State Comptroller:

SUMMARY OF THE CASE

1. Plaintiffs are faculty of CUNY who strongly object to being exclusively represented by PSC and forced to associate with other employees within their assigned bargaining unit. They object to being forced to associate with PSC in any manner, to having PSC speak for them in any manner, and to providing support to PSC in any form.

2. Plaintiffs have all chosen to resign their memberships in PSC due to their opposition to its representation of them, based largely on its ideological and political advocacy, which they abhor, as well as its representation of them in their employment.

3. All but one of the plaintiffs are Jewish, and several of them resigned from PSC following its adoption in June 2021 of a "Resolution in Support of the Palestinian People" ("Resolution") that Plaintiffs view as anti-Semitic, anti-Jewish, and anti-Israel. Since the Resolution, PSC has continued to advocate positions and take actions that Plaintiffs believe to be anti-Semitic, anti-Jewish, and anti-Israel, in a manner that harms the Jewish plaintiffs and singles them out for opprobrium, hatred, and harassment based on their religious, ethnic, and/or moral beliefs and identity.

Because of this, they have no faith and confidence in PSC's ability to represent them as their exclusive, fiduciary representative, and they desire to end such forced representation.

4. Despite Plaintiffs' resignations from membership in PSC, Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo, acting in concert and under color of state law, force all Plaintiffs to continue to utilize PSC as their exclusive bargaining representative. Thus, under color of state law, Plaintiffs are forced to remain part of a bargaining unit that is represented exclusively by PSC and are forced to associate with PSC and other employees within the bargaining unit.

5. Plaintiffs bring this civil rights action pursuant to 42 U.S.C. § 1983 for declaratory, injunctive, and monetary relief to redress and to prevent the ongoing deprivation of rights, privileges, and/or immunities under the First and Fourteenth Amendments to the United States Constitution caused by state statutes and Defendants' contracts, policies, and practices that designate PSC as Plaintiffs' exclusive bargaining representative with their Employer, force Plaintiffs into a defined bargaining unit with others who do not share the same interests, and require some Plaintiffs to continue to financially subsidize PSC's speech even though they have resigned their membership in the union. PSC's designation as exclusive bargaining representative and Plaintiffs' mandatory inclusion in a bargaining unit violate Plaintiffs' speech, petitioning, and associational rights under the First Amendment.

JURISDICTION AND VENUE

6. This action arises under the Constitution of the United States of America and the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the depriva-

tion, under color of state law, of Plaintiffs' rights, privileges, and immunities under the Constitution of the United States, particularly the First and Fourteenth Amendments thereto.

7. The Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331, because their claims arise under the Constitution of the United States, and 28 U.S.C. § 1343, because Plaintiffs seek relief under 42 U.S.C. § 1983.

8. This action is an actual controversy in which Plaintiffs seek declarations of their rights under the United States Constitution. Pursuant to 28 U.S.C. §§ 2201 and 2202, this Court may declare plaintiffs' rights and grant further necessary and proper relief, including injunctive relief, pursuant to Federal Rule of Civil Procedure 65.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because one or more defendants are domiciled in and operate or do significant business in this judicial district. Additionally, many of Plaintiffs' injuries and a substantial part of the events giving rise to this action occurred in this judicial district.

PARTIES

10. Plaintiff Avraham Goldstein is a "public employee" within the meaning of the Public Employees' Fair Employment Act, N.Y. Civ. Serv. Law, Article 14 (the "Taylor Law"), *see* N.Y. Civ. Serv. Law § 201.7 (McKinney 2020). He is employed full-time by CUNY as an assistant professor of math at Borough of Manhattan Community College. Professor Goldstein is represented by PSC exclusively for purposes of collective bargaining with CUNY. He was a member of PSC but has not been a member since the date of his resignation letter on August 2, 2021.

11. Plaintiff Michael Goldstein is a "public employee" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.7. He is employed full-time by CUNY as a Higher Education Officer and Adjunct Professor. Professor Goldstein is represented by PSC exclusively for purposes of collective bargaining with CUNY. He was a member of PSC but has not been a member since the date of his resignation letter on June 22, 2021.

12. Plaintiff Frimette Kass-Shraibman is a "public employee" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.7. She is employed full-time by CUNY as a professor of accounting at Brooklyn College. Professor Kass-Shraibman is represented by PSC exclusively for purposes of collective bargaining with CUNY. She was a member of PSC but has not been a member since the date of her resignation letter on September 17, 2021.

13. Plaintiff Mitchell Langbert is a "public employee" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.7. He is employed full-time by CUNY as an associate professor of business at Brooklyn College. Professor Langbert is represented by PSC exclusively for purposes of collective bargaining with CUNY. He was a member of PSC but has not been a member since the date of his resignation letter on June 22, 2021.

14. Plaintiff Jeffrey Lax is a "public employee" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.7. He is employed full-time by CUNY as a professor of business at Kingsborough College. Professor Lax is represented by PSC exclusively for purposes of collective bargaining with CUNY. He was a member of PSC but has not been a member since the date of his resignation letter on June 17, 2021.

15. Plaintiff Maria Pagano is a "public employee" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.7. She is employed full-time by CUNY as an associate professor at the New York City College of Technology. Professor Pagano is represented by PSC exclusively for purposes of collective bargaining with CUNY but was not a member of PSC at any time relevant to this Complaint.

16. Defendant PSC is an "employee organization" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.5. PSC and its affiliates represent over 30,000 faculty and staff at CUNY and the CUNY Research Foundation, including both full-time and part-time employees. PSC represents Plaintiffs, and all those in their bargaining unit, exclusively for purposes of collective bargaining with CUNY. PSC maintains a place of business at 61 Broadway, 15th Floor New York, New York and conducts its business and operations in the Southern District of New York.

17. Defendant CUNY is a "government" or "public employer" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.6. CUNY recognizes PSC as Plaintiffs' exclusive representative pursuant to the Taylor Law and pursuant to both its memorandum of understanding ("MOA") and collective bargaining agreement ("CBA") with PSC.

18. Defendant John Wirenius is Chairperson of the New York Public Employee Relations Board ("PERB"). In a certification order issued in 1972, PERB defined the "instructional staff" bargaining unit that includes Plaintiffs and certified PSC as the exclusive representative for that unit of more than 30,000 CUNY instructional staff. Defendant Wirenius is sued in his official capacity.

19. Defendant Rosemary A. Townley is a Member of PERB, which defined Plaintiffs' bargaining unit and certified PSC as the exclusive representative for Plaintiffs' bargaining unit. She is sued in her official capacity.

20. Defendant Anthony Zumbolo is a Member of PERB, which defined Plaintiffs' bargaining unit and certified PSC as the exclusive representative for Plaintiffs' bargaining unit. He is sued in his official capacity.

21. Defendant City of New York is a "government" or "public employer" within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201.6. The City issues wages to certain CUNY employees, including Plaintiffs A. Goldstein, M. Goldstein, and Lax, and processes payroll deductions of union dues and/or fees pursuant to the requirements of the CBA and the Taylor Law.

22. Defendant Thomas P. DiNapoli, in his official capacity as the New York State Comptroller, is responsible for, among other things, issuing wages to certain CUNY employees, including to Plaintiffs Kass-Shraibman, Langbert, and Pagano. He oversees the payroll system for the state, which includes processing payroll deductions, including union dues and/or fees deductions pursuant to the requirements of the CBA and the Taylor Law. Mr. DiNapoli is sued in his official capacity.

FACTUAL ALLEGATIONS

Plaintiffs Desire to End Association with PSC

23. Plaintiffs are all employed by CUNY within the instructional staff bargaining unit that is exclusively represented by PSC and are all former members of PSC.

24. Acting in concert under color of state law, CUNY and PSC have entered into the MOA, CBA, and other agreements that control the terms and conditions of Plaintiffs' employment. The CBA is attached hereto as "Exhibit A," and incorporated by reference herein. The MOA is attached hereto as "Exhibit B," and incorporated by reference herein.

25. PSC is Plaintiffs' exclusive representative under state law—PERB certified PSC as the exclusive representative for Plaintiffs' bargaining unit in 1972—and pursuant to Article 1 of the CBA between CUNY and PSC.

26. PSC purports to represent over 30,000 employees, the majority of which, on information and belief, are included in Plaintiffs' bargaining unit.

27. Plaintiffs have lost confidence in and become alienated from PSC due to its political advocacy and stated positions on Israel and involvement in international affairs, as well as the quality of PSC's representation, especially as to Plaintiffs, in the terms and conditions of their employment.

28. Professor Avraham Goldstein is an observant Orthodox Jew. He was born in the former Soviet Union, where he and his family suffered from extreme anti-Semitic and anti-Jewish abuse at the hands of the Soviet authorities. Their request to leave the Soviet Union was denied for 15 years, until in 1986 the Soviet authorities permitted them to relocate to Israel. Professor Goldstein is a citizen of the State of Israel, he has friends and family residing there, and he is a supporter of that country based on his religious and moral beliefs. Professor Goldstein has felt marginalized and ostracized by PSC because the union has made it clear that Jews who support the Jewish homeland,

the State of Israel, are not welcome. Since Zionism is an integral component of Professor Goldstein's Jewish identity, the impact of PSC's conduct has been to marginalize and ostracize him on the basis of his identity as a Jew. Professor Avraham Goldstein also believes that his employment, economic, and career interests as a full-time tenured faculty member often conflict with the interest of others in the bargaining unit, such as part-time adjunct faculty. He believes that his inclusion in a bargaining unit with these other groups, which greatly outnumber the full-time tenure-track faculty, infringes on his employment interests and that PSC's rules give some of these other groups more power to advance their interests, because of their size, at the expense of the interests of the full-time faculty.

29. Professor Michael Goldstein is a Jew and an ardent Zionist. He bases his love of the State of Israel and his Zionism on his belief in God and the Jewish people. He has worked for CUNY for over 32 years, and, combined with his parents, has over 100 years of service to CUNY, including his father's service as Acting Chancellor of CUNY. Professor Goldstein has experienced anti-Semitic and anti-Zionist attacks from members of PSC, including what he sees as bullying, harassment, destruction of property, calls for him to be fired, organization of student attacks against him, and threats against him and his family. He now has a guard follow him everywhere he goes on campus. Professor Goldstein has felt marginalized and ostracized by PSC because the union has made it clear that Jews who support the Jewish homeland, the State of Israel, are not welcome. Since Zionism is an integral component of Professor Goldstein's Jewish identity, the impact of PSC's conduct has been to marginalize and ostracize him on the basis of his identity as a Jew. Professor

Goldstein resigned from PSC because he believes PSC was behind the anti-Semitic and anti-Zionist attacks against him on campus. He believes that PSC does not represent Jewish and pro-Israel members of the bargaining unit and instead works to eliminate them from CUNY. He also believes PSC hurts some members of the bargaining unit economically, does not offer the same level of representation to Higher Education Officers ("HEOs"), and prioritizes the pay of part-time adjuncts and others over HEOs.

30. Professor Kass-Shraibman is an Orthodox Jew and lifelong Zionist. She was born and still resides in Brooklyn, New York. She and her family helped raise funds for Israel before and during its War of Independence in 1948 and during the Six-Day War in 1967. She hopes to emigrate to Israel after retiring from CUNY. She believes that the PSC's Resolution and other positions and activities support those who would destroy Israel and are antithetical to all she believes in. Furthermore, she believes that the PSC's positions considering support of the "Boycott, Divestment, and Sanctions" ("BDS") movement and the current Palestinian regime in the achievement of its stated goals would bring death and destruction to her immediate and extended family living in Israel. Professor Kass-Shraibman has felt marginalized and ostracized by PSC because the union has made it clear that Jews who support the Jewish homeland, the State of Israel, are not welcome. Since Zionism is an integral component of Professor Kass-Shraibman's Jewish identity, the impact of PSC's conduct has been to marginalize and ostracize her on the basis of her identity as a Jew. Professor Kass-Shraibman also believes that she and her colleagues have been harmed economically by PSC's actions and inaction over the years. She believes that instead of negotiating contracts on behalf of the

CUNY faculty as it should have, PSC frequently acted as a "social justice" agency instead of a labor union. For example she believes that, instead of prioritizing the pay of full-time faculty, PSC expended resources advocating on behalf of teachers in Peru, graduate students at various other universities and the so-called "Occupy Wall Street" movement.

31. Professor Langbert is a business professor, a political libertarian, a Jew, and a Zionist. He has long been opposed to PSC's political and ideological activities and causes. He has published op-eds and other writings that questioned the political activities of PSC and its leadership. Professor Langbert has also filed complaints concerning the failure of PSC to adequately represent business faculty, failure to represent the views of dues payers who do not agree with the leadership's political speech and activities, and failure to represent Jews like him who support Zionism and the State of Israel. Professor Langbert has felt marginalized and ostracized by PSC because he believes that the union has made it clear that Jews who support the Jewish homeland, the State of Israel, are not welcome. Since Zionism is an integral component of Professor Langbert's Jewish identity, the impact of PSC's conduct has been to marginalize and ostracize him on the basis of his identity as a Jew.

32. Professor Lax is an observant Orthodox Jew who supports the State of Israel and believes in biblically-based Zionism, as described in the book of Genesis. Professor Lax resigned from PSC after 17 years of membership on June 17, 2021, due to EEOC-substantiated claims that PSC discriminated against him on his campus because he was a Zionist and observant Jew, and because of PSC's failure to represent its Zionist members, as shown by the Resolution and

similar actions. In a separate case brought by Professor Lax, the EEOC issued a letter of determination that CUNY and PSC leaders discriminated against him, retaliated against him, and subjected him to a hostile work environment on the basis of religion. PSC members failed to accommodate Professor Lax by holding at least one event on a Friday night, the Jewish Sabbath, so he could not attend. The EEOC also substantiated that PSC leaders excluded Professor Lax and other observant or Zionist Jews from a powerful faculty group called the Progressive Faculty Caucus. Professor Lax has felt marginalized and ostracized by PSC because the union has made it clear that Jews who support the Jewish homeland, the State of Israel, are not welcome. Since Zionism is an integral component of Professor Lax's Jewish identity, the impact of PSC's conduct has been to marginalize and ostracize him on the basis of his identity as a Jew.

33. Professor Pagano resigned from PSC in approximately 2010, after PSC attempted to interfere with the settlement of a grievance her retained attorney had negotiated with CUNY, after PSC had refused to handle that grievance. She has often disagreed with positions PSC has taken in contract negotiations, where it acts as her mandatory exclusive representative. She opposes PSC's failure to negotiate adequate raises for the faculty, and its adoption of compulsory contributions for paid family leave insurance that she does not desire and would not purchase on her own. In recent years, Professor Pagano has become increasingly concerned over PSC's political radicalization, culminating in the adoption of the Resolution and PSC's continued defense of its involvement in political activities following the Resolution. She would consider choosing another union if she was not forced to associate with PSC.

34. Plaintiffs' opposition to PSC's political and ideological positions crystalized in June 2021, when PSC adopted the Resolution regarding what it termed "the continued subjection of Palestinians to the state-supported displacement, occupation, and use of lethal force by Israel," and requiring chapter-level discussion of possible support by PSC for the BDS movement. The Resolution is attached hereto as "Exhibit C" and is incorporated by reference herein.

35. Plaintiffs believe that this Resolution is openly anti-Semitic and anti-Israel, as it attacks and applies a double standard to the one Jewish nation in the world, Israel, while ignoring every other nation.

36. In protest of PSC's anti-Semitic and anti-Israel statements, actions, and positions, particularly the Resolution, Plaintiffs A. Goldstein, M. Goldstein, Kass-Shraibman, Langbert, and Lax resigned their memberships in PSC after the adoption of the Resolution.

37. Plaintiffs' resignations, through correspondence sent to Defendants PSC, CUNY, the City, and/or DiNapoli, ended their memberships in PSC and revoked the authorization for the continued deduction of union dues from their wages.

38. Despite their resignations and revocations of authorization, dues deductions continued from the wages of Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert.

39. Plaintiff Pagano had already ended her membership in PSC years before PSC adopted the Resolution, and she signed a resolution opposing PSC's Resolution.

40. On information and belief, over 260 members of PSC have resigned and revoked their authorizations for dues deductions since PSC adopted the Resolution.

41. In the months since the Resolution, PSC members have held chapter-level discussions, as required by the Resolution. These discussions encourage support for the anti-Semitic and anti-Israel BDS movement among rank-and-file members of PSC, who are Plaintiffs' colleagues, as well as PSC officials. By ensuring that the Resolution and the BDS movement's goals would be discussed over and over again at chapter meetings across the CUNY campuses, PSC ensured that the isolation, marginalization, harassment, and ridicule experienced by the pro-Israel Zionist faculty would continue throughout the academic year.

42. Plaintiffs strongly oppose the political positions and speech of PSC, including the positions espoused in the Resolution, and do not want to be associated with, represented by, or linked to PSC in any way.

43. The Jewish Plaintiffs believe the Resolution, and related conduct by PSC, sets them and their co-religionists apart and singles them out for disparate treatment, opprobrium, and hostility, based solely upon their religious, ethnic, and moral beliefs and identity, including their support for Israel, the nation-state of the Jewish people. Due to PSC's expressed anti-Semitism and anti-Zionism, none of the Plaintiffs believe PSC can serve as a fiduciary to represent them fairly in negotiating their terms and conditions of employment, or in any interactions with their Employer.

44. All Plaintiffs believe, based on past experiences they have had with PSC's poor representation of them or refusal to represent them, along with their opposition to PSC's positions and speech, that PSC could not and would not fairly represent them in grievances, disciplinary matters, or other interactions with their Employer.

45. Plaintiffs oppose the ways in which PSC spends members' dues money, including, among other things, its support for a political party known as the Working Families Party.

46. Plaintiffs also oppose the ways in which PSC represents them in the negotiation of their terms and conditions of employment. Among other things, Plaintiffs believe that PSC prioritizes the economic and employment interests of part-time adjunct professors and other groups in the bargaining unit over their interests as full-time faculty and/or staff of CUNY. For example, PSC has prioritized securing health insurance for part-time adjuncts over higher raises for full-time faculty. Plaintiffs believe that PSC cannot and does not fairly represent the wide variety of positions and large numbers of employees who are forced to associate within their bargaining unit. In fact, PSC's representation policies and practices are performed to the detriment of Plaintiffs.

Plaintiffs Cannot End Association with PSC or the Bargaining Unit

47. Although Plaintiffs have resigned from PSC and want to have no connection with it, they are forced by the Taylor Law, CBA, and MOA to accept and associate with PSC as their exclusive representative with CUNY.

48. Although Plaintiffs' interests in the terms and conditions of their employment diverge from the interests of others in their bargaining unit, they are still forced to be in the bargaining unit and to associate with PSC and tens of thousands of other instructional staff of CUNY in the unit who do not share their same economic interests, and who also do not share their beliefs or are overtly hostile to them.

49. Under New York law, a union may become public employees' exclusive representative for collective bargaining purposes by recognition or certification. A union so designated has exclusive legal authority to speak for all employees in the bargaining unit, irrespective of whether each individual employee agrees to or desires such exclusive representation. N.Y. Civ. Serv. Law § 204.

50. When a union has been certified or recognized as the exclusive representative, the public employer is required by law to negotiate only with that union regarding the terms and conditions of employment for the public employees the union exclusively represents. N.Y. Civ. Serv. Law § 204.2. This requirement on the public employer includes a "mutual obligation" to meet at reasonable times and confer in good faith. N.Y. Civ. Serv. Law § 204.3.

51. The Taylor Law requires that "[a] public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights: . . . (b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees. . . ." N.Y. Civ. Serv. Law § 208.1.

52. The Taylor Law also provides that "[t]he right to such membership dues deduction shall remain in full force and effect until: (i) an individual employee revokes membership in the employee organization in writing in accordance with the terms of the signed authorization." N.Y. Civ. Serv. Law § 208.1.

53. The Taylor Law also limits the duties an exclusive representative owes to any employees in its bargaining unit who choose not to be union members. The Taylor Law authorizes PSC, Plaintiffs' exclusive

representative, to treat Plaintiffs less favorably than PSC members, solely because they have exercised their constitutional rights to become or remain nonmembers.

54. Specifically, the Taylor Law provides that "[n]otwithstanding any law, rule or regulation to the contrary, an employee organization's duty of fair representation to a public employee it represents but who is not a member of the employee organization shall be limited to the negotiation or enforcement of the terms of an agreement with the public employer." N.Y. Civ. Serv. Law § 209-a(2).

55. In addition, the Taylor Law specifically provides,

> No provision of this article shall be construed to require an employee organization to provide representation to a non-member:
>
> (i) during questioning by the employer,
>
> (ii) in statutory or administrative proceedings or to enforce statutory or regulatory rights, or
>
> (iii) in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate.

N.Y. Civ. Serv. Law § 209-a(2).

56. Finally, the Taylor Law also provides: "Nor shall any provision of this article prohibit an employee organization from providing legal, economic or job-related services or benefits beyond those provided in

the agreement with a public employer only to its members." N.Y. Civ. Serv. Law § 209-a(2).

57. PSC was certified by the New York State Public Employment Relations Board on June 16, 1972, to represent the "instructional staff" of CUNY.

58. Pursuant to state law, the certification order, the CBA, and the MOA, the CUNY instructional staff, including Plaintiffs, are forced to be included in the instructional staff bargaining unit and be exclusively represented by PSC.

59. Article 4 of the CBA grants certain rights to PSC, including "exclusive check-off of annual PSC dues." Ex. A, art. 4.1.

60. Due to its status as exclusive representative for the instructional staff bargaining unit, PSC represents 30,000 CUNY employees, which it touts on its website. PSC represents these employees regardless of whether the employees are union members and regardless of whether these employees agree with PSC's speech and its positions.

61. No Plaintiff has ever participated in a vote to certify or recognize PSC as his or her exclusive representative.

62. Pursuant to state law, the duty of fair representation that PSC owes to Plaintiffs and other nonmembers is limited to "the negotiation or enforcement of the terms of an agreement with the public employer," and PSC has no duty to represent Plaintiffs in any of the situations designated in Section 209-a of the Taylor Law. *See also* paragraphs 53–56.

63. Plaintiffs believe that PSC does not and cannot represent their interests, beliefs, or needs related to

the terms and conditions of their employment or in interactions with their Employer.

64. Plaintiffs' forced inclusion in their bargaining unit does a disservice to them and causes them to be disadvantaged in their terms and conditions of employment and in their relations with their fellow employees and the general public.

65. Plaintiffs object to being forced into a bargaining unit with other CUNY employees whose interests in terms and conditions of employment differ from their own.

66. Plaintiffs strongly disagree with PSC on many issues, including those related to the terms and conditions of employment and to PSC's political positions, advocacy, and public speech.

67. Plaintiffs believe that PSC's actions, including the Resolution, subject the Jewish Plaintiffs to hostility in the workplace and in the general public, and single them out for opprobrium, discrimination, and hatred based upon their religious, ethnic, and/or moral beliefs and identity.

68. Due to PSC's status as Plaintiffs' exclusive representative, Plaintiffs have no ability to represent themselves in connection with their terms and conditions of employment with their Employer or to associate with a different collective bargaining representative of their choosing. Under New York law, Plaintiffs are forced to accept PSC's representation even though they vehemently disagree with its speech, actions, and positions in negotiations and elsewhere.

69. PSC's statutory entitlement to speak and bargain exclusively with CUNY as Plaintiffs' sole and mandatory representative deprives Plaintiffs of their ability to

speak and bargain with CUNY regarding their terms and conditions of employment, both individually and through other associations they might choose.

70. Plaintiffs do not want to be associated with PSC in any way, including having PSC as their exclusive representative or through forced financial support of PSC or its affiliates.

71. Plaintiffs do not want to be associated with all members of their bargaining unit.

Certain Plaintiffs Cannot End Financial Support of PSC

72. Pursuant to the CBA, the MOA, state law, and/or other agreements between Defendants, the City of New York, through its Office of Payroll Administration ("OPA"), oversees or oversaw the deduction of union dues and/or fees from Plaintiff A. Goldstein for PSC, and transmits or transmitted them to PSC.

73. Pursuant to the CBA, the MOA, state law, and/or other agreements between Defendants, Defendant DiNapoli oversees or oversaw the deduction of union dues and/or fees from Plaintiffs Kass-Shraibman and Langbert for PSC and transmits or transmitted them to PSC.

74. The City of New York and Defendant DiNapoli have denied requests of Plaintiffs and other CUNY employees to end union dues deductions from their wages unless authorized by PSC.

75. After Plaintiff A. Goldstein resigned his union membership, the City continued to deduct union dues from his wages.

76. After Plaintiffs Kass-Shraibman and Langbert resigned their union memberships, Defendant DiNapoli continued to deduct union dues from their wages.

77. Since the resignations of Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert, the City and Defendant DiNapoli transmitted and/or continues to transmit union dues deducted from their wages to PSC.

78. Since the resignations of Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert, PSC has continued to accept union dues deducted from their wages.

79. Acting in concert under color of state law, Defendants PSC and the City or DiNapoli have taken and continue to take and/or have accepted and continue to accept union dues from certain Plaintiffs' wages as a condition of employment pursuant to state law, the CBA, the MOA, and other agreements between them, and/or their joint policies and practices.

80. Defendants PSC and the City or DiNapoli have taken and continue to take and have accepted and continue to accept union dues from Plaintiffs' wages even though the seizure of union dues from their wages was and is against Plaintiffs' wills and without their consent.

81. Plaintiffs object to being forced to fund PSC, including any of its speech and activities, for any purpose.

CLAIMS FOR RELIEF

COUNT ONE
Compelled Association with Exclusive Representative (Violation of 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution)

82. Plaintiffs re-allege and incorporate by reference all allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

83. The First Amendment protects "[t]he right to eschew association for expressive purposes," *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018), because the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

84. "[M]andatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310 (2012) (alterations in original) (quoting *Roberts*, 468 U.S. at 623).

85. In the context of public-sector unions, the Supreme Court has recognized that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460. Indeed, such compelled union representation "extinguishes the individual employee's power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

86. The duty of fair representation "is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit." *Janus*, 138 S. Ct. at 2469.

87. PSC's status as exclusive representative compels Plaintiffs to associate with PSC, and to therefore be associated with PSC's speech and PSC positions with which Plaintiffs vehemently disagree and that they believe to be anti-Semitic and anti-Israel.

88. PSC's status as exclusive representative compels Plaintiffs to speak and to petition the government because it authorizes PSC to speak for Plaintiffs and to petition the government for Plaintiffs.

89. PSC's status as exclusive representative attributes PSC's speech and petitioning to Plaintiffs.

90. PSC's status as exclusive representative diminishes Plaintiffs' own speech and petitioning.

91. PSC's status as exclusive representative restricts Plaintiffs' ability to associate, or not to associate, with a labor organization and with other members of the bargaining unit.

92. PSC's status as exclusive representative carries with it only a limited duty to fairly represent Plaintiffs and other nonmembers under the Taylor Law, which exacerbates the associational and other harms Plaintiffs suffer as a result of being compelled to accept PSC as their exclusive representative.

93. Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo, by compelling Plaintiffs to accept PSC as their exclusive representative, have deprived and are depriving Plaintiffs of their First Amendment rights to free speech and association, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

94. Section 204 of the Taylor Law and the CBA are unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States to the extent they authorize and empower PSC to act as Plaintiffs' exclusive representative.

95. Section 204 of the Taylor Law's provision of exclusive representation is unconstitutional under the First and Fourteenth Amendments to the Constitution

of the United States because Section 209-a of the Taylor Law limits the duty of fair representation that PSC owes to Plaintiffs.

96. As a direct result of the concerted actions of Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo, taken pursuant to state law, the certification order, CBA, MOA, and/or other agreements between Defendants, and their joint policies and practices, Plaintiffs are suffering irreparable harm, damage, and injury inherent in the violation of First and Fourteenth Amendment rights, for which there is no adequate remedy at law.

97. If not enjoined by this Court, Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo and/or their agents will continue to effect the aforementioned deprivations and abridgments of Plaintiffs' constitutional rights, thereby causing them to suffer irreparable harm for which there is no adequate remedy at law.

COUNT TWO
Compelled Association with Bargaining Unit
(Violation of 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution)

98. Plaintiffs re-allege and incorporate by reference all allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

99. Under New York law, and specifically Section 204 of the Taylor Law, PERB, through Defendants Wirenius, Townley, and Zumbolo, and/or their predecessors, issued the certification order that defined the "instructional staff" bargaining unit at CUNY and designated PSC as the exclusive representative for that unit.

100. Because Plaintiffs' positions are defined as "instructional staff" under the certification order and the CBA and/or MOA, it is a term and condition of employment for Plaintiffs that they must be in the bargaining unit with tens of thousands of other CUNY employees, regardless of whether they desire to be included or whether they have shared economic, political, or employment interests with other employees in the unit.

101. Because Plaintiffs' positions are defined as "instructional staff" under the certification order and the CBA and/or MOA, as required by the Taylor Law, only PSC may negotiate with CUNY regarding the terms and conditions of Plaintiffs' employment.

102. PSC's status as exclusive representative of Plaintiffs' bargaining unit compels Plaintiffs to associate with other employees within the bargaining unit and restricts their ability not to associate with other employees in the bargaining unit.

103. Plaintiffs oppose being forced to associate with other employees within the bargaining unit who do not share their political views and who espouse views Plaintiffs believe to be anti-Semitic or anti-Israel.

104. Plaintiffs also oppose being forced into the same bargaining unit with CUNY instructional staff, such as part-time adjuncts, whose employment interests diverge from their own.

105. Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo, by compelling Plaintiffs to associate with employees in the bargaining unit whose views they oppose and whose interests are not aligned with Plaintiffs, have deprived and are depriving Plaintiffs of their First Amendment rights to free speech and association, as secured against state infringement by

the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

106. As a direct result of the concerted actions of Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo, taken pursuant to state law, the CBA, MOA, the certification order, and/or other agreements between Defendants, and their joint policies and practices, Plaintiffs are suffering irreparable harm, damage, and injury inherent in the violation of First and Fourteenth Amendment rights, for which there is no adequate remedy at law.

107. If not enjoined by this Court, Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo and/or their agents will continue to effect the aforementioned deprivations and abridgments of Plaintiffs' constitutional rights, thereby causing them to suffer irreparable harm for which there is no adequate remedy at law.

COUNT THREE

Compelled Financial Support of Union Speech by Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert (Violation of 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution)

108. Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert re-allege and incorporate by reference all allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

109. The United States Supreme Court held that the First Amendment to the Constitution of the United States prohibits the government and unions from compelling public employees to pay dues or fees to a union as a condition of employment. *See Janus*, 138 S. Ct. at 2486.

110. The First Amendment requires that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486.

111. There is no state interest, compelling or otherwise, justifying the state's requirement that individuals remain members of or provide financial support to a private organization, including a labor organization, for any length of time.

112. Sections 201 and 208 of the Taylor Law authorize Defendants to compel employees to continue to financially support a union even after they provide notice that they resigned their union membership and want to end financial support of the union.

113. Defendants PSC and the City or DiNapoli compelled these Plaintiffs to financially support PSC and its speech, as nonmembers and over their objections, by seizing payments for PSC from these Plaintiffs' wages after they provided notice that they resigned their membership in PSC and did not consent to union dues deductions.

114. Defendants PSC and the City or DiNapoli, by compelling these Plaintiffs to financially support PSC and its speech as nonmembers and over their objections, deprived these Plaintiffs of their First Amendment rights to free speech and association, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

115. At no time did Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert waive their First Amendment right to refrain from financially supporting PSC and

its speech. A valid waiver of constitutional rights requires clear and compelling evidence that a putative waiver was voluntary, knowing, and intelligent and that enforcement of the waiver is not against public policy. Defendants cannot prove, by clear and compelling evidence, that these Plaintiffs voluntarily, knowingly, and intelligently waived their First Amendment right or that enforcement of any such waiver is consistent with public policy.

116. Sections 201 and 208 of the Taylor Law are unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States to the extent they authorize Defendants PSC and the City or DiNapoli to compel public employees to continue to financially support PSC and its speech over their objections and after they resigned their union membership.

117. As a direct result of the concerted actions of Defendants PSC, the City, and/or DiNapoli, taken pursuant to state law, the CBA, MOA, and/or other agreements between Defendants, and their joint policies and practices, these Plaintiffs are in imminent danger of suffering irreparable harm, damage, and injury inherent in the violation of First and Fourteenth Amendment rights, for which there is no adequate remedy at law.

118. If not enjoined by this Court, Defendants and/or their agents and officials will continue to effect the deprivations and abridgments of these Plaintiffs' constitutional rights, thereby causing irreparable harm, damage, and injury for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court order the following relief:

A. Declaratory: A judgment based upon the actual, current, and *bona fide* controversy between the parties as to the legal relations among them, pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, declaring that:

i. the certification and recognition of PSC as Plaintiffs' exclusive representative by Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo, pursuant to the Taylor Law, CBA, and MOA violate Plaintiffs' First Amendment rights of free speech and free association and are unconstitutional;

ii. Defendants PSC, CUNY, Wirenius, Townley, and Zumbolo violate Plaintiffs' First Amendment rights of free speech and free association by compelling them to associate with other employees in the bargaining unit for purposes of speech and expressive activities;

iii. Section 204 of the Taylor Law is unconstitutional under the First Amendment to the United States Constitution to the extent that it requires or authorizes PSC to be Plaintiffs' exclusive representative and compels Plaintiffs to associate with other employees in the bargaining unit for purposes of speech and expressive activities; and

iv. any taking of union dues from any Plaintiffs after their resignation of membership in PSC violates those Plaintiffs' rights under the First and Fourteenth Amendments of the United States Constitution, and that any provisions of the Taylor Law, the CBA and/or MOA, other agreements between Defendants,

and/or any other purported authorizations that allow or require such deductions of union dues from Plaintiffs' wages are unconstitutional.

B. Injunctive: A permanent injunction enjoining Defendants, their officers, employees, agents, attorneys, and all others acting in concert with them, from:

i. engaging in any of the activities listed in Part A above that the Court declares illegal;

ii. certifying or recognizing PSC, or any other union, as Plaintiffs' exclusive representative without their consent; and

iii. enforcing any provisions in the Taylor Law, the CBA or MOA, other agreements between Defendants, and/or Defendants' policies and practices that require Plaintiffs to provide financial support to PSC.

C. Monetary: A judgment against Defendants PSC, CUNY, and the City, awarding Plaintiffs nominal and compensatory damages, including but not limited to the dues seized from the wages of Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert after they resigned their membership in PSC and revoked their dues deduction authorizations, for the injuries sustained as a result of Defendants' unlawful interference with and deprivation of their constitutional and civil rights, plus interest thereon, and such amounts as principles of justice and compensation warrant.

D. Attorneys' Fees and Costs: A judgment awarding Plaintiffs their costs and reasonable attorneys' fees under 42 U.S.C. § 1988.

E. Other: Such other and further relief as the Court may deem just and proper.

Dated: January 12, 2022

Respectfully submitted,

s/ Nathan J. McGrath
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Attorneys for Plaintiffs

*motions for admission *pro hac vice*
to be filed

Exhibit C
PSC's Resolution in Support of the Palestinian People

Resolution in Support of the Palestinian People
June 10, 2021

Whereas, as an academic labor union committed to anti-racism, academic freedom, and international solidarity among workers, the PSC-CUNY cannot be silent about the continued subjection of Palestinians to the state-supported displacement, occupation, and use of lethal force by Israel; and

Whereas, beginning on May 15, 2021, the escalating violence against Palestinians in East Jerusalem and Gaza killed hundreds of Palestinians, injured thousands more, and destroyed entire neighborhoods, including hospitals, schools, and residences; and

Whereas, on May 18, 2021, Palestinian workers across the region staged a general "strike for dignity" as a demonstration of unity and support for the residents of targeted communities; and

Whereas, Israel's pattern and practice of dispossession and expansion of settlements, dating back to its establishment as a settler colonial state in 1948, has been found to be illegal under international law, international human rights organizations such as Human Rights Watch and B'Tselem have designated these practices of Israel as "apartheid" and a regime of legalized racial discrimination perpetrated against the Palestinian people; and the International Criminal Court has opened an investigation into these practices; and

Whereas, the PSC-CUNY condemns racism in all forms, including anti-Semitism, and recognizes that

criticisms of Israel, a diverse nation-state, are not inherently anti-Semitic; and

Whereas, state-sponsored policies of settler colonialism link the Palestinian struggle for self-determination to the struggles of Indigenous people and people of color in the United States; and

Whereas, since World War II, Israel has been the largest overall recipient of U.S. foreign aid, including $3.8 billion in 2020, the vast majority of which was military assistance; and

Whereas, by failing to challenge the U.S. government's support for Israeli expansionism and violent incursions in the occupied territories, U.S. labor organizations have largely given approval to these policies; and

Whereas, in 2016, the PSC-CUNY "Resolution on the Freedom of Speech and Assembly for All Faculty, Staff and Students at the City University of New York" affirmed the right of faculty, staff, and students to advocate for campaigns of boycott, divestment, and sanctions without penalty, as protected freedom of speech; therefore be it

RESOLVED, that the PSC-CUNY condemns the massacre of Palestinians by the Israeli state; and be it further

RESOLVED, that in fall 2021, the PSC-CUNY facilitate discussions at the chapter level of the content of this resolution and consider PSC support of the 2005 call for Boycott, Divestment, and Sanctions (BDS)—a movement launched by 170 Palestinian unions, refugee networks, women's organizations, professional associations and other Palestinian civil society organizations, which calls on "people of

conscience in the international community" to act as they did against apartheid South Africa "in the spirit of international solidarity, moral consistency and resistance to injustice and oppression"—and report back on these conversations to the Delegate Assembly by the end of 2021; and be it further

RESOLVED, that the PSC-CUNY calls on the administration of U.S. President Joe Biden to stop all aid funding human rights violations and an occupation that is illegal under international law.