UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN; FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT; JEFFREY LAX; MARIA PAGANO, Plaintiffs, vs. 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; CITY OF NEW YORK; THOMAS P. DiNAPOLI, in his official capacity as New York State Comptroller, Defendants.	Civil Action No. 1:22-cv-321

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs are professors at the City University of New York ("CUNY"). Their Complaint asserts three claims.

Count One asserts that CUNY's recognition of Defendant Professional Staff Congress/CUNY ("PSC" or "Union") as the exclusive collective bargaining representative of CUNY's instructional staff bargaining unit violates Plaintiffs' First Amendment rights by compelling them to associate with the Union. This claim should be dismissed because it is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which holds that an exclusive-representative bargaining system does not compel association in violation of the First Amendment. *See id.* at 288 (designation of union as bargaining representative "in no way restrain[s] … [the employees'] freedom to associate or not to associate with whom they please, including the exclusive representative").[1] Courts uniformly have rejected First Amendment challenges to exclusive representation for public employees that are indistinguishable from Plaintiffs' challenge here.[2]

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[1] *See Jarvis v. Cuomo*, No. 5:14-cv-1459, 2015 WL 1968224, at *3 (N.D.N.Y. Apr. 30, 2015) (dismissing claims "in light of controlling Supreme Court precedent that exclusive representation by a union does not violate First Amendment associational rights"), *aff'd*, 660 F. App'x 72, 74 (2d Cir. 2016) (summary order) (First Amendment challenge to exclusive representation "is foreclosed by . . . *Knight*"); *see also Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1251-52 (2d Cir. 1992) (rejecting constitutional "right of free association" challenge to certification of union as exclusive representative because "the First Amendment [does not] protect individuals from being represented by a group that they do not wish to have represent them").

[2] *See, e.g., Hendrickson v. ASFCME Council 18*, 992 F.3d 950, 968–70 (10th Cir. 2021), *cert. denied,* 142 S. Ct. 423 (2021); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 732–35 (7th Cir. 2021), *cert denied*, 142 S. Ct. 424 (2021); *Akers v. Maryland State Educ. Ass'n*, 990 F.3d 375, 382 n.3 (4th Cir. 2021); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 882 (2021); *Oliver v. SEIU Local 668*, 830 F. App'x 76, 80–81 (3d. Cir. 2020); *Reisman v. Associated Facs. of Univ. of Maine*, 939 F.3d 409, 411–14 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 445 (2020); *Branch v. Commonwealth Emp. Rels. Bd.*, 120 N.E.3d 1163, 1171–76 (Mass. 2019), *cert. denied sub nom. Branch v. Mass. Dep't of Lab. Rels.*, 140 S.

Plaintiffs assert that this case is different because New York's Taylor Law places limits on an exclusive representative's duty of fair representation. These limits do not change the First Amendment analysis, however, because the Taylor Law's duty of fair representation is coextensive with exclusivity. That is, the exclusive representative has a duty of fair representation in all situations in which employees cannot represent themselves. The Supreme Court recognized in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2468-69 (2018), that non-members can be "denied union representation" in *non*-exclusive public employee grievance procedures. Accordingly, Count One should be dismissed.

Plaintiffs allege in Count Two that their First Amendment rights are being violated because they are forced to associate with other bargaining unit workers. But Plaintiffs do not allege any facts to show forced expressive association. They allege only that all CUNY instructional staff are in the same bargaining unit. The government's authority to use an exclusive-representative system to set employment terms necessarily includes authority to define the bargaining unit. Moreover, the Supreme Court has never validated a claim of compelled expressive association where, as here: (1) the plaintiffs need not personally do anything, and (2) reasonable outsiders would not perceive that the plaintiffs personally agree with a group or its message. *See, e.g.*, *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 65, 69 (2006) (requirement that law schools grant access to military recruiters did not "violate[] law schools'

Ct. 858 (2020); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Hill v. SEIU*, 850 F.3d 861 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 579 U.S. 909 (2016); *see also Uradnik v. Inter Fac. Org.*, No. 18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086, 2018 WL 11301550 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

freedom of expressive association" where "[n]othing about recruiting suggests that law schools agree with any speech by recruiters"). Accordingly, Count Two should be dismissed for the same reasons as Count One.

Finally, Plaintiffs allege in Count Three that three Plaintiffs' First Amendment rights were violated because union dues were deducted from their wages after they resigned from union membership. Insofar as this claim seeks prospective relief, the claim should be dismissed for lack of a justiciable controversy pursuant to Rule 12(b)(1). Plaintiffs' deductions already have ended, and there is no reasonable likelihood they will resume.[3]

BACKGROUND

A. The Taylor Law and exclusive representation

New York's Public Employees' Fair Employment Act, N.Y. Civil Service Law §200 *et seq*, is commonly known as the Taylor Law. New York adopted the Taylor Law in 1967, against a backdrop of disruptive labor strikes, to "promote harmonious and cooperative relationships between the government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." N.Y. Civ. Serv. Law §200; *see generally* Governor's Committee on Public Employee Relations, Final Report (Mar. 31, 1966). The Taylor Law bars public employees from striking, while granting them the right to unionize and negotiate collectively with their public employers. N.Y. Civ. Serv. Law §§200–204.

Under the Taylor Law, the majority of employees in an appropriate bargaining unit may democratically vote to be represented by an employee organization for purposes of

[3] The Union is not moving to dismiss Count Three insofar as Plaintiffs seek retrospective relief against the Union. The Union will seek summary judgment on that claim at the appropriate time.

collective bargaining. N.Y. Civ. Serv. Law §204. If the employees in a unit choose union representation, the democratically chosen union becomes the exclusive representative of all employees in the unit for purposes of negotiating with the public employer about unit-wide terms and conditions of employment. *Id.* at §204(2).

The Taylor Law makes union membership voluntary for public employees. N.Y. Civ. Serv. Law §202 ("Public employees shall have the right to . . . refrain from forming, joining, or participating in, any employee organization…."). The exclusive representative has a duty to fairly represent all employees in the bargaining unit in negotiating the contract, regardless of whether those employees join the union. *Id.* at §209-a(2); *see also infra* at 11-13 (discussion of duty of fair representation). After the Supreme Court's decision in *Janus,* public employers cannot require employees who choose not to become union members to provide any financial support to a union. The relevant collective bargaining agreement here does not contain any fair-share fee requirement. *See* Complaint ("Compl."), Exh. A (Dkt. 1-1) at 9.

The Taylor Law's democratic system of exclusive-representative bargaining follows the same model that Congress adopted for private-sector labor relations nearly a century ago. 29 U.S.C. §§158(d), 159 (exclusive representation provisions of National Labor Relations Act, enacted in 1935); 45 U.S.C. §152 Fourth (exclusive representation provisions of Railway Labor Act, as amended in 1934). Congress adopted the model of exclusive representation as the best mechanism for stable labor relations, concluding that, because it is "practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule." S. Rep. No. 74-573, reprinted in 2 Leg. Hist. of the NLRA 2313 (1935). This same model of exclusive representation is used by

about 40 other states, the District of Columbia, and Puerto Rico for at least some of their public employees. *See* Br. for New York et al. as Amici Curiae Supporting Respondents, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681), 2013 WL 6907713, at *8 n.3 & Appendix (filed Dec. 30, 2013) (collecting statutory authorizations of exclusive representation).

B. The Taylor Law and union dues deductions

As with most public employee collective bargaining systems, public employees in New York who voluntarily choose to join the union that represents their bargaining unit may pay their dues through payroll deductions. The Taylor Law requires public employers to deduct union dues "after receiving proof of a signed dues deduction authorization card" and provides that "such dues shall be transmitted to the certified or recognized employee organization." N.Y. Civ. Serv. Law §209(1)(b). Individual employees may revoke dues deductions "in writing in accordance with the terms of the signed authorization." *Id.*

The applicable collective bargaining agreement tracks the Taylor Law by providing that the employer will "commence deduction of dues … after receiving the report from PSC of a signed dues authorization card" from an individual employee and continue dues deductions until "PSC notifies the University that the employee has revoked his/her dues check-off authorization." Compl., Exh. A (Dkt. 1-1) at 9 (CBA §4.1).

C. Plaintiffs' Complaint

PSC is the exclusive collective bargaining representative for a unit of about 30,000 CUNY faculty and staff. Compl. (Dkt. 1) ¶16. Plaintiffs are six professors in the bargaining unit who are former PSC members. *Id.* ¶¶10-15. Plaintiffs allege that they resigned from the Union because of their "opposition to its representation of them," and the Union's "ideological" advocacy, which Plaintiffs "abhor." *Id.* ¶2.

Plaintiffs allege they have felt "marginalized and ostracized" by the Union, Compl. ¶¶28-32, because Plaintiffs—five of whom are Jewish—believe that the Union "advocate[s] positions and take[s] actions that Plaintiffs believe to be anti-Semitic." *Id.* ¶3. In support of this allegation, Plaintiffs point to the Union's June 2021 adoption of a "Resolution in Support of the Palestinian People." *Id.* ¶¶3, 34. The Resolution, which Plaintiffs believe "is openly anti-Semitic," *id.* ¶35, states: "[T]he PSC-CUNY condemns racism in all forms, including anti-Semitism." Compl. Exh. C (Dkt. 1-3) at 1. The Resolution "condemns the massacre of Palestinians by the Israeli state," and resolves that the Union will "facilitate discussions" about the Resolution and "consider" whether the Union should support the Boycott, Divestment, and Sanctions (BDS) movement. *Id.* at 1-2. The Resolution does not mention the Jewish religion, other than to note that "criticisms of Israel, a diverse nation-state, are not inherently anti-Semitic." *Id.* at 1.

Plaintiffs allege that by resolving to "facilitate discussions" and "consider" whether to support the BDS movement, the Union "ensured" that Plaintiffs would experience "isolation, marginalization, harassment, and ridicule . . . throughout the academic year." Compl. ¶41. Plaintiffs believe the Union'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." *Id.* ¶67.

Although Plaintiffs do not want to be represented by the Union, *see* Compl. ¶2, they also take issue with the fact that the Union is not required to represent non-members in situations where a non-member can "be represented by his or her own advocate." *Id.* ¶55 (citing N.Y. Civ. Serv. Law §209-a(2)). Plaintiffs complain that the Taylor Law "limits the duties an

exclusive representative owes to any employees in its bargaining unit who choose not to be union members." *Id.* ¶53.

Three Plaintiffs (A. Goldstein, Kass-Shraibman, and Langbert) also allege that they were unable to stop the deduction of union dues from their wages after they resigned their memberships in the Union. Compl. ¶¶72-81.

Plaintiffs filed this action on January 12, 2022 against the Union, CUNY, several members of the New York Public Employee Relations Board, the City of New York, and the New York State Comptroller. The Complaint alleges three 42 U.S.C. §1983 claims. Count One alleges that the Union's status as exclusive representative violates Plaintiffs' First Amendment rights by compelling them to associate with the Union. Compl. ¶¶82-97. Count Two alleges that Plaintiffs' inclusion in the instructional staff bargaining unit violates their First Amendment rights by compelling them to associate with other employees in the bargaining unit. *Id.* ¶¶98-107. Count Three alleges that Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert's First Amendment rights were violated when union dues were deducted from their wages after their resignations from membership. *Id.* ¶¶108-118.

LEGAL STANDARD

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). Although the Court must accept as true all well-pled factual allegations, that tenet "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A Plaintiff must demonstrate a live Article III controversy with respect to each form of relief the Plaintiff seeks. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). In deciding a Rule 12(b)(1) motion to dismiss a claim (or claim for relief) for lack of subject matter

jurisdiction, the Court may consider extrinsic evidence that goes to lack of subject matter jurisdiction. *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 441 (2d Cir. 2022); *Carter v. HealthPort Technologies, LLC*, 822 F.3d 47, 57 (2d Cir. 2016).

ARGUMENT

I. The Court should dismiss Plaintiffs' claim that exclusive-representative collective bargaining violates the First Amendment (Count One).

A. *Knight* forecloses Plaintiffs' First Amendment compelled association claim.

Plaintiffs allege in Count One that New York's system of exclusive-representative collective bargaining compels expressive association in violation of the First Amendment. The Court should dismiss this claim pursuant to Rule 12(b)(6) because the claim is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).

In *Knight*, several community college faculty members challenged the exclusive representation system established by Minnesota's Public Employment Labor Relations Act, which permitted faculty members to democratically choose an exclusive representative to "meet and negotiate" with the Board of Community Colleges about matters within the scope of mandatory bargaining, and to "meet and confer" with the Board concerning other employment-related matters. 465 U.S. at 274-75. Members of the bargaining unit were not required to join the union, *id.* at 289 & n.11, and they were free "to speak on any 'matter related to the conditions or compensation of public employment or their betterment' as long as doing so 'is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative.'" *Id.* at 275 (quoting the statute).

The Supreme Court summarily affirmed the lower court decision that exclusive representation in the "meet and negotiate" context was permissible. *Id.* at 279 (citing *Knight v.*

Minn. Cmty. Coll. Fac. Ass'n, 460 U.S. 1048 (1983)). The Court addressed the "meet and confer" process in a full opinion, and the Court held that an exclusive-representative system did not violate faculty members' speech or associational rights. *Id.* at 288.

The Court rejected the *Knight* plaintiffs' claim that their right to free speech was impaired because (unlike the exclusive representative) they had no "government audience for their views." *Id.* at 282. The Court reasoned that the government was "free to consult or not to consult whomever it pleases," and that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.* at 285, 288; *see Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463 (1979). The government's choice to amplify the union's voice in the process did not violate non-members' speech rights because such amplification "is inherent in government's freedom to choose its advisors." *Knight,* 464 U.S. at 288.

The Court also rejected *Knight* plaintiffs' claim that the exclusive representation system violated their First Amendment rights to "associate or not to associate." *Id.* The Court reasoned that faculty members were "not required to become members" of the union and were "free to form whatever advocacy groups they like." *Id.* at 2889. The Court held that any pressure to join the union to gain access to the "meet and confer" committees did not implicate the First Amendment, as this pressure is inherent in any democratic process and "is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 290.

Thus, *Knight* held that "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit." *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (Souter, J.), *cert. denied*, 136 S. Ct. 2473 (2016); *see also Hendrickson v.*

AFSCME Council 18, 992 F.3d 950, 969 (10th Cir. 2021), *cert. denied,* 142 S. Ct. 423 (2021) ("*Knight* found exclusive representation constitutionally permissible."). Each of the nine circuits that has considered a First Amendment challenge to exclusive representation in the public sector, including the Second Circuit in an unpublished opinion, has rejected the claim. *See supra* at 1 & n.2.

There is no relevant distinction between the Taylor Law and the Minnesota statute upheld in *Knight*. Like the statute in *Knight*, the Taylor Law does not compel public employees to join the Union or stop Plaintiffs from joining other organizations or expressing their own personal views. Plaintiffs' claim is thus foreclosed by Supreme Court precedent.

B. *Janus* maintained the constitutionality of exclusive-representative bargaining.

Plaintiffs seek support in the Supreme Court's decision in *Janus*, see, e.g., Compl. ¶83, but that decision in no way altered established law with respect to exclusive representation. *Janus* held only that public employers may no longer require non-members to pay fair-share fees to a union. 138 S. Ct. at 2478. The Court explicitly distinguished the issue of exclusive representation from the requirement of providing financial support: "It is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees. . . . We simply draw the line at allowing the government to . . . require all employees to support the union [financially]." *Id.*.

Indeed, "*Janus* specifically acknowledged that exclusive representation is constitutionally permissible . . . [by] reaffirm[ing] that '[s]tates can keep their labor-relation systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.'" *Mentele v. Inslee*, 916 F.3d 783, 791 (9th Cir. 2019) (quoting *Janus*, 138 S. Ct. at 2485 n.27), *cert. denied sub nom*. *Miller v. Inslee*, 140 S. Ct. 114 (2019); *see also Hendrickson*, 992

F.3d at 969 ("*Janus* reinforces" the conclusion that exclusive representation is constitutional). Thus, *Janus* provides no support for Plaintiffs' claim.

C. The Taylor Law's limits on the scope of exclusive representation and the accompanying duty of fair representation are constitutional.

Plaintiffs allege that this case is distinguishable from *Knight*, and that New York's system of exclusive representation violates the First Amendment, "because Section 209-a of the Taylor Law limits the duty of fair representation that [the Union] owes to Plaintiffs." Compl. ¶95; *see id.* ¶¶53-56. There is no serious constitutional question, however, because the Taylor Law duty of fair representation is co-extensive with exclusivity, meaning that the Union has a duty to fairly represent non-members in the situations in which the Union serves as their exclusive representative.

A union that is recognized as an exclusive representative of the employees in a bargaining unit owes a duty of fair representation to those employees when—but only when—the union exercises its authority as exclusive representative. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984) ("A union's statutory duty of fair representation . . . is coextensive with its statutory authority to act as the exclusive representative for all the employees within the unit."); *see also Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) ("It is a principle of general application that the *exercise* of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf[.]") (emphasis added).

The core of exclusive representation is that "individual employees may not be represented by any agent other than the designated union." *Janus*, 138 S. Ct. at 2460. When an employee is barred from being represented by another agent, this restriction brings with it the duty of fair representation—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." *Id.* at 2469. If exclusive representation of an individual is not paired with the union's duty to fairly represent that individual, "serious 'constitutional questions [would] arise." *Id.* (citing *Steele*, 323 U.S. at 198).

New York courts previously interpreted the Taylor Law to contain "a similar duty of fair representation on the part of public sector unions predicated on their role as exclusive bargaining representatives" as found under federal law in the private sector. *Civil Serv. Bar Ass'n v. City of New York,* 64 N.Y.2d 188, 196 (1984). The Legislature recognized this duty in 1990 by amending the Taylor Law to specify that breaching the duty was an improper practice. 1990 N.Y. Sess. Laws, c. 467 §4. In 2018, the Legislature amended the Taylor Law to provide that the duty of fair representation to non-members "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(c). The Legislature went on to further explain how this modification interacts with bargaining representatives' exclusive representation rights:

> 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*.

Id. §209-a.2(c) (emphasis added).[4]

[4] The Complaint's formatting of § 209-a.2(c) includes indentations making it appear that "where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate" does not apply to each of the three instances described in (i)-(iii). Compl. ¶53. However, these indentations do not appear in the law as introduced or as codified. *See* 2018 N.Y. Sess. Laws, c. 59, Part RRR § 4. The qualifying phrase beginning "where" accordingly modifies the three proceeding situations. *See A.J. Temple Marble & Tile,*

Thus, under the Taylor Law, the duty of fair representation is co-extensive with a union representative's exercise of authority as exclusive representative. In all situations in which "protection of [bargaining unit employees'] interests is placed in the hands of the union," the union is not "free to disregard or even work against those interests." *Janus*, 138 S. Ct. at 2469. By contrast, the duty does not apply where the employee can "proceed without the employee organization and be represented by his or her own advocate" (N.Y. Civ. Serv. Law §209-a.2(c))—that is, in situations where the union does *not* exercise the authority of an exclusive representative.[5]

Janus confirms that such a limitation on exclusivity and the concomitant duty of fair representation is entirely consistent with the First Amendment. The Supreme Court recognized in *Janus* that "representation of nonmembers in disciplinary matters" imposes a "burden" on an exclusive representative, because nonmembers do not pay union dues. 138 S. Ct.

Inc. v. Union Carbide Marble Care, Inc., 87 N.Y. 2d 574, 580 (1996) ("Where, as here, a descriptive or qualifying phrase follows a list of possible antecedents, the qualifying phrase generally refers to and modifies all of the preceding clauses.") (citing *Budd v. Valentine*, 283 N.Y. 508, 511 (1940)).

[5] Under the National Labor Relations Act, exclusive representation and the corresponding duty of fair representation extend to both contract negotiation *and* representation of individual workers who bring grievances alleging the collective bargaining agreement has been breached. In New York, the exclusive representative role and corresponding duty of fair representation is limited to contract negotiation and does not extend to the grievance procedure. Many states have similarly statutorily limited the scope of exclusive representation and fair representation to contract negotiation. These states allow individuals to be represented by other agents during individualized grievances against their employer. For example, Florida has provided since 1977 that "certified employee organizations shall not be required to process grievances for employees who are not members of the organization." Fla. Stat. §447.401. In Nebraska, public sector employees who are non-union members must reimburse unions if they choose to be represented by the union in grievances or legal action. Neb. Rev. Stat. §48-838(4). Similarly, in Rhode Island, unions can refuse to handle grievances for police officers and firefighters who have not maintained their membership for at least 90 days prior to the events leading up to the grievance. R.I. Gen. Laws §§28-9.1-18(a); 28-9.2-(18)(a).

at 2468. The Court held that the First Amendment does not allow public employers to alleviate this burden by requiring non-members to pay fair-share fees for union representation, reasoning that it would be "significantly less restrictive of associational freedoms … [for] [i]ndividual nonmembers [to] be required to pay for that service or [to] be denied union representation altogether." *Id.* at 2468-69 (internal quotations omitted). By confirming that the duty of fair representation only extends to situations where a union has exclusive representative status, *Janus* protected unions from free-riding by non-members who seek to benefit from individualized union-paid services (such as grievance resolution, legal advice, or career counseling) undertaken at the non-member's request.

In sum, because the Taylor Law makes the scope of exclusivity and the duty of fair representation co-extensive, there is no "serious 'constitutional question[].'" *Janus*, 138 S. Ct. at 2469. If Plaintiffs want the Union to represent them in disciplinary hearings and offer them member-only benefits, *see* Compl. ¶56, they are free to rejoin the Union. Plaintiffs' claim, however, is that they do *not* want the Union to represent them. Their associational rights are certainly not impaired in situations where the Union does not do so and they can "be represented by [their] own advocate." N.Y. Civ. Serv. Law §209-a.2(c).

Moreover, even if there were a constitutional flaw in the 2018 Taylor Law amendment—and there is not—the logical conclusion would be that the 2018 amendment is invalid, not that New York's entire pre-existing system of exclusive-representative bargaining is unconstitutional, as Plaintiffs claim. Plaintiffs' argument fails for this reason as well.

* * *

For all these reasons, Plaintiffs' First Amendment compelled association challenge to exclusive-representative bargaining cannot be distinguished from claims the Supreme Court already has rejected. Count One should be dismissed.

II. The Court should dismiss Plaintiffs' claim that their inclusion in the instructional staff bargaining unit violates the First Amendment (Count Two).

In addition to claiming that exclusive-representative bargaining violates their First Amendment rights by forcing them to associate with the Union, Plaintiffs also claim, in Count Two of their Complaint, that their First Amendment rights are being violated because they are compelled to associate with *other bargaining unit members* who "do not share their political beliefs." Compl. ¶103. This claim should be dismissed pursuant to Rule 12(b)(6) for all the same reasons as Count One.

Plaintiffs do not allege any *facts* to show that they are compelled to associate for expressive purposes with other workers in the bargaining unit. All they allege is that they are included in the collective bargaining unit exclusively represented by the Union. *See, e.g.*, Compl. ¶102 ("[The Union]'s status as exclusive representative of Plaintiffs' bargaining unit compels Plaintiffs to associate with other employees within the bargaining unit."). This claim therefore is foreclosed by *Knight*.

The government's authority to use an exclusive-representative collective bargaining system to set employment terms necessarily includes the authority to define bargaining units. Otherwise, the representative would have no unit to represent. Like other federal and state laws that provide for exclusive-representative collective bargaining, the Taylor Law has provisions that address the scope of bargaining units. *See* N.Y. Civ. Serv. Law §§204–207. Bargaining unit definitions in New York consider whether the employees have a "community of interest." N.Y. Civ. Serv. Law §207(1)(a). If Plaintiffs believe they should not

be included in "the same bargaining unit with CUNY instructional staff, such as part-time adjuncts, whose employment interests diverge from their own," Compl. ¶104, that is a Taylor Law issue—not a viable First Amendment compelled association claim. Regardless of how bargaining units are defined, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

Moreover, even if Plaintiffs' Count Two was not foreclosed by on-point precedent about exclusive-representative bargaining, the claim would find no home in First Amendment caselaw about compelled expressive association. The Supreme Court has never validated a claim of compelled expressive association where, as here, (1) the complaining party is not personally required to do anything and (2) there is no public perception of an expressive association. In *Rumsfeld v. Forum for Academic & Institutional Rights,* for example, the Supreme Court rejected a claim by law schools that the government was violating their "freedom of expressive association" because the law schools were required to allow military recruiters access to campus. 547 U.S. at 68–70. The Court reasoned that "[s]tudents and faculty are free to associate to voice their disapproval of the military's message" and that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters." *Id.* at 65, 69–70. *See also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 460 (2008) (Roberts, C.J., concurring) ("Voter perceptions matter, and if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties' associational rights are adversely implicated.").

In this case, Plaintiffs are not required to "associate" with other bargaining unit workers except in the sense that they work for the same employers, a situation that would exist in the absence of any collective bargaining system. Plaintiffs also are not PSC members and need not provide financial support to PSC. Plaintiffs do not claim they are required to espouse any

official bargaining unit or PSC message or are prevented from speaking out against the Union or their fellow employees. In fact, as Plaintiffs attest, they "publish[] op-eds and other writings that question[] the political activities of [the Union] and its leadership." Compl. ¶31.

Reasonable outsiders would not perceive that Plaintiffs personally agree with the Union or its message simply because Plaintiffs are in the bargaining unit. "[W]hen an exclusive bargaining agent is selected by majority choice, it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority." *D'Agostino*, 812 F.3d at 244; *see also Reisman v. Associated Facs. of Univ. of Maine*, 939 F.3d 409, 413 (1st Cir. 2019). In all democratic systems in which a representative is chosen by the majority, it is well understood that the representative's speech is not necessarily expressing the personal views of each individual member—whether that representative is a congresswoman speaking for her constituents or a parent association speaking for parents. *See, e.g.*, *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) ("[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual.") (internal quotation marks omitted); *cf. Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (finding that even high school students understand that schools do not endorse the speech of school-recognized student groups).

Likewise, reasonable outsiders would not perceive other bargaining unit members to be speaking for Plaintiffs. In Plaintiffs' words, the instructional staff bargaining unit is made of up "tens of thousands of other CUNY employees, regardless of . . . whether they have shared economic, political, or employment interests." Compl. ¶100. A reasonable person would not perceive that 30,000 frequently opinionated and vocal college faculty and staff agree with each other about anything—and particularly not about controversial political issues. When reasonable

outsiders would not perceive a group's speech as reflecting the views or endorsement of another person, then that person has not been forced to associate with the group in a manner that implicates the First Amendment. *See supra* at 16.

As such, there is no merit to Plaintiffs' claim of compelled expressive association with other workers in the bargaining unit, and the Court should dismiss Count Two.

III. The Court should dismiss Plaintiffs' challenge to union dues deductions for lack of a justiciable controversy insofar as Plaintiffs seek prospective relief (Count Three).

In Count Three of the Complaint, Plaintiffs A. Goldstein, Kass-Shraibman, and Langbert allege that their First Amendment rights were violated when union dues were deducted from their wages after they resigned from union membership. Compl. ¶¶72-81, 108-118. In addition to seeking damages, Plaintiffs also seek prospective declaratory and injunctive relief regarding dues deductions.[6] As stated above, a plaintiff in federal court must demonstrate a live controversy with respect to each form of relief sought in the complaint, and a court ruling on a Rule 12(b)(1) motion may consider extrinsic evidence that goes to subject matter jurisdiction. *See supra* at 7–8. Plaintiffs' claims for prospective relief regarding post-resignation dues deductions do not present a live controversy because the deductions have ended and there is no reasonable likelihood they will resume.

Plaintiff A. Goldstein signed a union membership agreement on November 29, 2018. Affidavit of Denyse Procope Gregoire, ¶12. ("Procope Gregoire Aff."). His agreement

[6] Plaintiffs seek: 1) a declaratory judgment that "any taking of union dues from any Plaintiffs after their resignation of membership . . . violates those Plaintiffs' rights under the First and Fourteenth Amendments . . . , 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 . . . are unconstitutional" and 2) "[a] permanent injunction enjoining Defendants . . . from . . . 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." Compl. at 24-25 (Prayer, ¶¶A.iv, B.iii).

authorized the deduction of union dues with an annual cancellation window. *Id.* Plaintiff resigned from union membership on August 1, 2021, which was outside the window period. Procope Gregoire Aff., ¶13. He submitted a request to stop deductions within the window period on October 20, 2021; the Union processed the request; and Plaintiffs' deductions ended on October 29, 2021, months before the complaint was filed on January 12, 2022. *Id.* Under the Taylor Law and the applicable collective bargaining agreement, no further dues will be deducted unless Plaintiff voluntarily rejoins the Union. *See supra* at 5; Procope Gregoire Aff. ¶14. Thus, Plaintiff lacks standing to seek prospective relief. *See, e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (notwithstanding plaintiff's standing to seek damages, he lacked standing to seek injunctive relief because he did not show a non-speculative threat of future injury).

Plaintiff Langbert signed a union membership agreement on March 3, 2019. Procope Gregoire Aff. ¶18. His agreement authorized the deduction of union dues subject to an annual window period for cancellation. *Id.* Plaintiff resigned from union membership on June 22, 2021, which was outside the window period. Procope Gregoire Aff. ¶19. He submitted a request to stop deductions within the window period on January 24, 2022; the Union processed the request; Plaintiff's deductions ended on February 10, 2022; and Plaintiff received a refund of the dues received by PSC between his January 24, 2022 drop request and the end of deductions. *Id.* Under the Taylor Law and the applicable collective bargaining agreement, no further dues will be deducted unless Plaintiff voluntarily rejoins the Union. *See supra* at 5; Procope Gregoire Aff. ¶20. Although Plaintiff may have had standing to seek prospective relief regarding dues deductions when the Complaint was filed on January 12, 2022, his claim for prospective relief is now moot. *See, e.g.*, *Hendrickson,* 992 F.3d at 957-58 (holding that claim for injunctive and declaratory relief against policy requiring employees to opt out of paying union dues during a

specified time period became moot when the plaintiff opted out and the deductions ended); *Mayer v. Wallingford-Swarthmore Sch. Dist*., 405 F. Supp. 3d 637, 641, 641 n.27 (E.D. Pa. 2019) (collecting cases holding that challenges to dues deduction process are "moot once the dues collection has ended").

Plaintiff Kass-Shraibman signed a union membership/dues authorization card in December 2014. Procope Gregoire Aff. ¶15. Her card did not have any window period for cancelling dues deductions. Procope Gregoire Aff., Ex. E. Plaintiff resigned from union membership and cancelled dues deductions on September 17, 2021. Procope Gregoire Aff. ¶15. There was an administrative delay in processing her request, but her dues deductions ended in January 2022. Procope Gregoire Aff. ¶16. She received a refund of the dues received by PSC after her resignation. *Id.* Under the Taylor Law and the applicable collective bargaining agreement, no further dues will be deducted unless Plaintiff voluntarily rejoins the Union. *See supra* at 5; Procope Gregoire Aff. ¶17. As such, Plaintiff either lacks standing to seek prospective relief or her claims for prospective relief are moot. *See supra* at 19-20.[7]

For these reasons, the Court should dismiss Count Three for lack of jurisdiction insofar as the claim seeks prospective relief. The Union intends to move for summary judgment with respect to the Count Three claims for retrospective relief at a later date.[8]

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[7] Because mootness goes to Article III jurisdiction, a court can dismiss a claim as moot without deciding whether the plaintiff had standing when the complaint was filed. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997).

[8] Court decisions have uniformly rejected claims that the First Amendment precludes enforcement of union membership agreements that authorize dues deductions unless cancelled during a window period. *See, e.g.*, *Bennett,* 991 F.3d at 729–33; *Hendrickson,* 992 F.3d at 961; *Fischer v. Governor of N.J.*, 842 F. App'x 741, 752–53 & n.18 (3d Cir. 2021) (unpublished), *cert. denied sub nom. Fischer v. Murphy*, 142 S. Ct. 426 (2021); *Belgau v. Inslee*, 975 F.3d 940, 950-52 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021). To the extent some post-resignation deductions were made for Plaintiff Kass-Shraibman because of a Union administrative error (and then refunded), such unauthorized private conduct would not be state

CONCLUSION

The Court should dismiss Counts One and Two pursuant to Rule 12(b)(6). The Court should dismiss Count Three, insofar as it seeks prospective relief, for lack of jurisdiction pursuant to Rule 12(b)(1).

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action for purposes of a 42 U.S.C. §1983 claim. *See, e.g.*, *Espinoza v. Union of Am. Physicians & Dentists*, __ F. Supp.3d__, 2022 WL 819741, at *4-*5 (C.D. Cal. Mar. 16, 2022).