**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| AVRAHAM GOLDSTEIN; MICHAEL GOLDSTEIN; FRIMETTE KASS-SHRAIBMAN; MITCHELL LANGBERT; JEFFREY LAX; MARIA PAGANO,<br><br>Plaintiffs,<br><br>v.<br><br>PROFESSIONAL STAFF CONGRESS/CUNY, *et al.*,<br><br>Defendants. | **Case No. 1:22-cv-00321-PAE**<br><br>Hon. Paul A. Engelmayer |

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANTS' MOTIONS TO DISMISS**

Nathan J. McGrath (*pro hac vice*)
Email: njmcgrath@fairnesscenter.org
Danielle R. Acker Susanj (*pro hac vice*)
Email: drasusanj@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Suite 600B
Harrisburg, Pennsylvania 17101
Telephone: 844.293.1001
Facsimile: 717.307.3424

Milton L. Chappell (*pro hac vice*)
Email: mlc@nrtw.org
William L. Messenger (*pro hac vice*)
Email: wlm@nrtw.org
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
Telephone: 703.321.8510
Facsimile: 703.321.9319

*Attorneys for Plaintiffs*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Administrative Decisions**



**Statutes**

Plaintiffs Avraham Goldstein, Michael Goldstein, Frimette Kass-Shraibman, Mitchell Langbert, Jeffrey Lax, and Maria Pagano ("Professors") submit this memorandum of law in opposition to the motions to dismiss filed by Defendant Professional Staff Congress/CUNY ("PSC"), ECF No. 56; Defendants 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, and Thomas P. DiNapoli, in his official capacity as New York State Comptroller, and City University of New York ("CUNY") (collectively, "State Defendants"), ECF No. 53; and Defendant City of New York ("City"), ECF No. 59.

## PRELIMINARY STATEMENT

The State Defendants are compelling the Professors to associate with PSC, an advocacy group that supports anti-Semitic policies the Professors abhor. Among other things, PSC supports the so-called Boycott-Divest-Sanction movement that the Professors believe vilifies Zionism, disparages the national identity of Jews, and seeks to destroy Israel as a sovereign state. For this and other reasons, the Professors—all but one of whom are Jewish, with several being devoutly Orthodox—want nothing to do with PSC or its advocacy.

The Professors are nonetheless compelled, as a condition of their employment at CUNY, to associate with PSC and its speech. Acting under authority of New York State's Taylor Law, N.Y. Civ. Serv. Law § 201, State Defendants require the Professors to accept PSC as their exclusive representative, a status that grants PSC legal authority to both speak for the Professors and to enter into binding legal contracts on their behalf without their consent. State Defendants further require the Professors to be part of a State-defined bargaining unit of instructional staff, a mandatory

association of persons conjoined together for the expressive purpose of petitioning CUNY over its employment policies.

These compelled arrangements infringe on the Professors' First Amendment rights. The Supreme Court has recognized that "exclusive representation" schemes such as these work "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). The schemes also impinge on free speech rights because they grant unions the "exclusive right to speak for all the employees in collective bargaining," *id.* at 2467, which is nothing more than petitioning the government for redress. Indeed, exclusive bargaining agents owe a duty of fair representation to all employees subject to their mandatory representation precisely because the grant of exclusive state power "substantially restricts the nonmembers' rights." *Id.* at 2469; *see Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

Unlike most compulsory representation statutes, New York requires the Professors to accept an exclusive bargaining agent that *lacks* a full duty to fairly represent their interests. While the Taylor Law vests PSC with legal authority to exclusively represent the Professors and other nonmembers in the administration of grievances, *see* N.Y. Civ. Serv. Law § 204(1)–(2), the law, passed in response to *Janus*, purports to relieve PSC of any duty to represent nonmembers with respect to workplace grievances that arise solely as a result of the union-negotiated contract, *id.* § 209-a(2). This limitation on PSC's duties only compounds the Professors' First Amendment injuries, as they are not only forced to accept an unwanted agent, but an agent that does not even owe them the full constitutionally requisite duty.

The Supreme Court "said many years ago that serious 'constitutional questions [would] arise' if the union were *not* subject to the duty to represent all employees fairly." *Janus*, 138 S. Ct. at 2469 (emphasis in original) (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944)). The Court

was prescient. Mandatory 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) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). New York, by granting PSC authority to speak and to enter contracts for the Professors—especially while repealing PSC's concomitant duty to fairly represent their interests—has "raise[d] a grave constitutional issue that should be squarely faced." *Steele*, 323 U.S. at 208 (Murphy, J., concurring).

## LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead facts that support a facially plausible claim, which means enough facts to allow the Court to draw a reasonable inference that the defendants are liable for misconduct. *Quintanilla v. WW Int'l, Inc.*, 541 F. Supp. 3d 331, 339 (S.D.N.Y. 2021). When resolving the motion, the Court must assume all well-pled facts to be true, "'drawing all reasonable inferences in favor of the plaintiff.'" *Id.* (quoting *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2012)).

## FACTS

The Professors are full-time faculty of CUNY. Compl. ¶¶ 10–15. All except Pagano are Jewish, and several are devoutly Orthodox in their religious beliefs and are ardent Zionists. *Id.* ¶¶ 28–32. As a condition of their employment at CUNY, the Professors must accept PSC as their exclusive representative, and accept inclusion in an "Instructional Staff" bargaining unit composed of other CUNY employees, pursuant to New York's Taylor Law. *Id.* ¶ 58.

The 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. This status grants the union legal authority to exclusively negotiate on the employees' behalf with their public employer concerning "terms and

conditions of employment" and "administration of grievances," and to enter binding, written contracts with the employees' public employer. *Id.*

Due to a 2018 amendment to the Taylor Law, which was passed after the *Janus* decision, exclusive bargaining agents now have no duty to represent employees who are not union members with respect to the adjustment of grievances that arise under the union-negotiated contract. *Id.* § 209-a(2). The amended Taylor Law provides that "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." *Id.* The Taylor Law further specifies that:

> 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.*

PSC is the Professors' exclusive bargaining agent because PERB certified it to represent all persons employed by CUNY in an Instructional Staff bargaining unit. Compl. ¶¶ 25, 57. This State-mandated association includes thousands of CUNY employees, such as part-time adjuncts, whose employment interests diverge from those of the full-time Professors. *Id.* ¶ 104. The Professors currently are subject to a binding collective bargaining agreement and memorandum of understanding that PSC negotiated with CUNY in its capacity as their exclusive bargaining agent. *Id.* ¶ 24.

The Professors are not PSC members because they "became 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." *Id.* ¶¶ 27, 36–38. The Professors' opposition to PSC crystalized

in June 2021 when PSC adopted a Resolution requiring chapter-level discussion of possible support for the Boycott-Divest-Sanction movement. *Id.* ¶ 34 & Ex. C. Pursuant to that Resolution, PSC subsequently held those chapter-level discussions across CUNY campuses to encourage faculty to support this anti-Israel movement. *Id.* ¶ 41.

The Professors "believe that this Resolution is openly anti-Semitic and anti-Israel," as supported by the Resolutions' terms. *Id.* ¶ 35. 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. *Id.* ¶¶ 28–32, 41. "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." *Id.* ¶ 43; *see id.* ¶ 67 (similar).

In addition to opposing PSC's anti-Semitic agenda, the Professors also find PSC does a poor job negotiating and contracting with CUNY as their exclusive bargaining agent. *Id.* ¶ 46. "Among other things, [the Professors] 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." *Id.* Professor Kass-Shraibman "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." *Id.* ¶ 30.

In protest of PSC's Resolution and related conduct, the Professors other than Pagano provided notice that they resigned their membership in the union and opposed financially supporting it. Pagano was already a nonmember. *Id.* ¶¶ 36–39. The Professors "do not want to be associated with, represented by, or linked to PSC in any way." *Id.* ¶ 42.

However, the Professors have been unable to disassociate themselves from PSC notwithstanding their membership resignations. Even though they are no longer PSC members, they

still are forced to accept PSC as their exclusive bargaining agent, given its state-granted power to enter into legally binding contracts on their behalf. *Id.* ¶ 47. They must remain in a bargaining unit with tens of thousands of other instructional staff who do not share their economic interests or other beliefs. *Id.* ¶ 48. PSC retains legal authority to speak and contract for the Professors, though disclaims any corresponding duty to protect their interests in grievances arising under the union-negotiated contract. *Id.* ¶¶ 49, 53–56. Additionally, Professors Avraham Goldstein, Kass-Shraibman, and Langbert were compelled to continue to subsidize PSC, as union dues were taken from their wages after they resigned their PSC memberships and objected to those deductions. *Id.* ¶¶ 75–79.

The Professors filed this lawsuit to sever the link between themselves and an advocacy group they abhor. They assert that Defendants violate their First Amendment rights by compelling them to associate with PSC, *id.* ¶¶ 87–93; by granting PSC authority to speak and contract for them, *id.*; by forcing them into a mandatory association of CUNY instructional staff, *id.* ¶¶ 102–05; and by compelling several of the Professors to financially subsidize PSC's speech and activities, even after they became nonmembers, *id.* ¶¶ 113–17.

## ARGUMENT

The concept of mandatory representation for public employees has long lived in tension with the associational and speech rights the First Amendment guarantees to each individual. The Supreme Court has avoided resolving this tension, in cases that concerned unions discriminating against nonmembers, by holding a union's power to speak and contract for nonmembers carries with it a concomitant duty to fairly represent those nonmembers. *See Steele*, 323 U.S. 192. This case presents the novel question whether that tension can be tolerated when that duty is pulled back, and nonmembers are forced to accept a mandatory representative that is hostile to them and that does not owe them a full duty of fair representation.

The Professors discuss in Section I how State Defendants infringe on their First Amendment rights by compelling them to associate with PSC, with its controversial speech, and with a mandatory association of other instructional staff—all without the constitutional prophylactic of the duty of fair representation the Supreme Court requires. Section II addresses several Defendant arguments to the contrary. Section III establishes why no compelling government interest justifies Defendants' violation of the Professors' First Amendment rights, especially since PSC lacks a duty to fairly represent them and other nonmembers under the very contract it forced upon them. Section IV addresses Defendants' arguments that concern Count III of the Complaint.

## I. THE PROFESSORS ARE BEING FORCED TO ASSOCIATE WITH PSC, ITS SPEECH, AND A MANDATORY ASSOCIATION OF INSTRUCTIONAL STAFF IN VIOLATION OF THEIR FIRST AMENDMENT RIGHTS

### A. Exclusive Bargaining Agents Are Mandatory Associations Vested With the Power to Speak and Contract for Employees

Exclusive representatives are often called "exclusive bargaining agent[s]." *Janus*, 138 S. Ct. at 2478; *see, e.g.*, *Harris v. Quinn*, 573 U.S. 616, 649 (2014). That is for good reason. "By its selection as bargaining representative, [a union] . . . become[s] the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). This mandatory agency relationship is akin to that between trustee and beneficiary. *See Teamsters Loc. 391 v. Terry*, 494 U.S. 558, 567 (1990). "[J]ust as a beneficiary does not directly control the actions of a trustee . . . an individual employee lacks direct control over a union's actions taken on his behalf." *Id.*

Unions vested with such extraordinary authority have the "exclusive right to speak for all the employees in collective bargaining," *Janus*, 138 S. Ct. at 2467, as well as the right to contract for those employees, *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see* N.Y. Civ. Serv. Law § 204. This 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*, 138 S. Ct. at 2460.

As early as 1944, the Supreme Court recognized in *Steele* that compelling employees to accept an exclusive representative impinges on their rights when holding that impingement gives rise to a duty of fair representation. *Steele* concerned a railway union that discriminated against African American employees. In *Steele*, 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. at 202. 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. The Court recognized that, if the "[Railway Labor] Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise." *Id.* at 198. Consequently, the Court construed the Act to "impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them." *Id.* at 202–03.

In the decades after *Steele*, the Supreme Court reiterated that an exclusive representative's authority to speak and contract for non-consenting employees significantly restricts their individual liberties. In *American Communications Association 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 *Vaca*, the Court explained that it created a duty of fair representation in *Steele* because

the "grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination." 386 U.S. at 182. That same year, 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 LLC v. Pyett* held that exclusive representatives can contractually waive individuals' statutory rights without their consent, despite "the sacrifice of individual liberty that this system necessarily demands." 556 U.S. 247, 271 (2009).

The *Janus* decision most recently reaffirmed these principles. In that decision, 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." 138 S. Ct. at 2460; *see id.* at 2469 (similar). The Court reiterated that, because "[p]rotection of [nonmembers'] interests is placed in the hands of the union," "serious 'constitutional questions [would] arise' if the union were not subject to the duty to represent all employees fairly." *Id.* at 2469 (quoting *Steele*, 323 U.S. at 198). As discussed below, New York has given rise to these grave constitutional questions. The State is requiring nonmembers to accept exclusive union representatives who do not even owe the nonmembers a full duty to fairly represent them concerning their rights under the very contract the union negotiated and the Professors are forced to accept.

### B. New York Sharply Limits Exclusive Representatives' Duty to Fairly Represent Nonmembers Subject to their Mandatory Representation

While New York has granted PSC and other unions authority to exclusively represent nonmembers with respect to "administration of grievances" and other matters, N.Y. Civ. Serv. Law §§ 203, 204(2), after *Janus*, New York relieved exclusive representatives of any duty to "provide

representation to a non-member . . . 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). This is a significant limitation of a union's duty to nonmembers.

"[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government" because it is the "vehicle by which meaning and content are given to the collective bargaining agreement." *USW v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960). "The grievance procedure is, in other words, a part of the continuous collective bargaining process." *Id.*; *cf. ALPA v. O'Neill*, 499 U.S. 65, 77 (1991) ("doubt[ing] . . . that a bright line could be drawn between contract administration and contract negotiation"). "In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit" because of "the union's exclusive control over the manner and extent to which an individual grievance is presented." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

Thus, courts have long recognized that an exclusive representative's duty extends from negotiating a contract to administering the contract it exclusively negotiated—*i.e.*, to grievance processing, which is part of contract administration. *See ALPA*, 499 U.S. at 77; *14 Penn Plaza*, 556 U.S. at 271; *Conley v. Gibson*, 355 U.S. 41, 46–47 (1957), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). "The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement." *Conley*, 355 U.S. at 46. The reason is that "[a] contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit." *Id.*

And New York law required that duty, at least until the Taylor Law's post-*Janus* amendment. *See United Federation of Teachers, Loc. 2, NYSUT and Barnett*, No. U-6352, 17 PERB ¶ 3113 (N.Y. PERB, Nov. 29, 1984) (holding that union "may not discriminate between members and nonmembers, but must represent them equally with respect to all job-related benefits" and ordering union to "[c]ease and desist from . . . advising nonmembers that as nonmembers they are not entitled to the same representation afforded to members"). For example, in *Lynn*, No. U-33564, 51 PERB ¶ 4552 (N.Y. PERB, Aug. 21, 2018), PERB recognized that "[a] bargaining representative . . . owes [a duty of fair representation to] unit members in the administration of the grievance process." And in *Johnson*, No. U-29471, 45 PERB ¶ 3012 (N.Y. PERB, Mar. 5, 2012), PERB held "an employee organization breaches its duty of fair representation in violation of § 209-a.2(a) of the Act when it fails to process a grievance under a collective bargaining agreement based upon an improper motivation."

New York's post-*Janus* amendment to the Taylor Law means the Professors and other nonmembers are now forced to accept a representative that has the power to act for them on certain matters, but no duty to protect their interests on those matters. More specifically, PSC has the power to enter into binding contracts with CUNY that control the parameters of what constitutes a grievance, determine what disputes are subject to arbitration, and define the contractual processes for evaluations and discipline. The Professors are subject to those contractual terms, whether they like it or not. Under the amended Taylor Law, PSC has no duty to fairly represent the Professors and other nonmembers in a "grievance, arbitration, or other contractual process concerning the evaluation or discipline of a public employee," unless PSC allows them to represent themselves, in which case the Professors are *still* subject to the contractual process PSC negotiated. N.Y. Civ. Serv. Law § 209-a(2).

This state of affairs leaves the Professors' and other nonmembers' interests vulnerable to arbitrary and discriminatory union conduct. The Professors believe PSC would not fairly represent them in grievances due to their past experiences with PSC, their vocal opposition to PSC (which now includes this lawsuit), and PSC's "expressed anti-Semitism and anti-Zionism." Compl. ¶¶ 43–44. Section 209-a(2) of the Taylor Law gives PSC a green light to discriminate against the Professors. The Professors' situation is akin to that of the African American trainmen in *Steele*, who were subject to the exclusive representation of a union that was hostile to them based on their identity and that lacked a duty to protect their interests. 323 U.S. at 195–98.

By compelling the Professors to accept a hostile agent that lacks a concomitant duty to protect the Professors' interests, State Defendants and PSC have exacerbated the injuries the Professors are suffering to their First Amendment speech and associational rights, *see infra* at Section I(C), and undermined any basis for finding that New York's scheme satisfies exacting First Amendment scrutiny, *see infra* at Section III(C).

### C. Defendants Are Infringing on the Professors' First Amendment Rights

The First Amendment guarantee of "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). "The right to eschew association for expressive purposes is likewise protected" because "'[f]reedom of association . . . plainly presupposes a freedom not to associate.'" *Id.* (quoting *Roberts*, 468 U.S. at 623). Defendants impinge on both rights by granting PSC exclusive authority to speak and contract for the Professors with their employer and by requiring that they remain part of the Instructional Staff bargaining unit. Because Counts I and II challenge these impingements in a context no Court has previously addressed, this Court should determine that the Professors' First Amendment rights are being violated.

1. State Defendants and PSC Violate the Professors' Associational Rights By Forcing Them to Accept PSC As Their Mandatory Agent

The Supreme Court has 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." *Janus*, 138 S. Ct. at 2478. That holding not only constitutes binding precedent, but also is well founded. Defendants, by forcing the Professors into a mandatory agency relationship with PSC, in which PSC has authority to enter into legal contracts that bind the Professors, have necessarily associated the Professors with that advocacy group they abhor.

Indeed, the Professors cannot be exclusively represented by PSC and, at the same time, not be associated with PSC. That counterintuitive notion makes as much sense as saying that a principal is not associated with her agent or with its actions on her behalf. Nor can the notion be squared with PSC's duty to fairly represent the Professors and other nonmembers when negotiating or enforcing agreements. N.Y. Civ. Serv. Law § 209-a(2). PSC would not owe this fiduciary duty to the Professors if they were not forcibly associated with one another.

Just as New York would violate the Professors' associational rights if it forced them to accept an anti-Semitic trustee as the sole manager of their personal finances and property notwithstanding their wishes, New York violates the Professors' associational rights by forcing them to accept PSC as their mandatory agent for speaking and contracting with CUNY. *Cf. Terry*, 494 U.S. at 567 (analogizing an exclusive representative to a trustee). In *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1286–87 (11th Cir. 2010), the Eleventh Circuit held that a private sector employee had "a cognizable associational interest under the First Amendment" in whether he was subjected to exclusive representation. That court reasoned, correctly, that the union's "status as his exclusive representative plainly affects his associational rights" because the employee would be "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees. *Id.* at 1287.

The same is true here, except the Professors' associational injury is worse because they are thrust unwillingly into an agency relationship with what is effectively an anti-Semitic political advocacy group that is openly hostile to them and their beliefs. *Mulhall* concerned requiring a racetrack employee to accept a union representative for dealing with a private employer. The Professors are being compelled to accept PSC as their agent for dealing with a governmental entity, CUNY, their employer. The Supreme Court recognized in *Janus* that the core functions of exclusive representatives in the public sector are political in nature because they bargain with governments over matters of public concern. 138 S. Ct. at 2474–76. Further, PSC's advocacy extends to other political matters the Professors oppose, such as PSC's consideration of support for the Boycott-Divest-Sanctions movement in support of the Working Families Party. Compl. ¶¶ 35, 45.

The Supreme Court has long recognized that the First Amendment prohibits the states, with an exception inapplicable here, from requiring their employees or contractors to affiliate with a political party. *See Elrod v. Burns*, 427 U.S. 347, 357–60 (1976); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 71 (1990); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996). State Defendants' requiring the Professors to affiliate with what is effectively a hostile political interest group is indistinguishable from requiring them to affiliate with a political party, and just as unconstitutional. Just as the states' purported interests in *Elrod* and *Rutan* could not overcome the individual employees' free association rights in those case, New York's purported interests in "labor peace" can fare no better here. Mem. of Law in Supp. of the State Defs.' Mot. to Dismiss the Compl. ("State Mem.") 2–4, ECF No. 55.

2. State Defendants and PSC Violate the Professors' Free Speech Rights By Granting PSC Legal Authority to Speak and Contract for the Professors

PSC's power to exclusively speak for the Professors also associates them with PSC's speech. That is exactly the point of the exclusive-representative designation: to establish that the union speaks not just for its members, but that it has the "exclusive right to speak for all the employees in

collective bargaining." *Janus*, 138 S. Ct. at 2467. As the Court recognized in its *Janus* decision, "when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer." *Id.* at 2474 (emphasis in the original).

PSC not only has the power to speak for the Professors, but also has the power to enter into binding contracts that control their working life, *i.e.*, their terms and conditions of employment. *See Allis-Chalmers*, 388 U.S. at 180; N.Y. Civ. Serv. Law § 204. This power includes the ability to contractually waive employees' statutory rights, such as their right to bring discrimination claims against their employer. *See 14 Penn Plaza*, 556 U.S. 247. A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

State Defendants violate the Professors' free speech rights by granting PSC legal authority to speak and contract for them. Freedom of speech includes "'the right to refrain from speaking at all,'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley*, 430 U.S. at 714), and the right of each individual to control the content of his or her message, *see, e.g.*, *Pacific Gas & Elec. Co. v. Pub. Utility Comm'n of Calif.*, 475 U.S. 1, 10–11 (1986) (plurality opinion). A state violates both principles by giving an advocacy group the power to speak for citizens who oppose that advocacy group's message.

Here, the Professors do not want PSC to speak for them and vehemently disagree with PSC on many issues. Compl. ¶¶ 42, 66. Yet, to remain employed at CUNY, the Professors must suffer the indignity of PSC's speaking and entering into binding legal contracts governing their working lives. This indignity is compounded by PSC's advocacy for anti-Semitic positions the Professors abhor, which has resulted in the Jewish Professors and other Jewish faculty being set apart and singled out for opprobrium and hostility based on their identity, religion, and support for Israel. *Id.* ¶¶ 43, 67. That indignity violates core constitutional principles.

3. State Defendants and PSC Violate the Professors' Associational Rights By Forcing Them Into a Mandatory Association of CUNY Instructional Staff

In addition to infringing on the Professors' right not to associate with PSC and its advocacy, Defendants also infringe on the Professors' right to choose with which of their colleagues they associate. *See* Compl. ¶¶ 98–105 (Count II). The First Amendment guarantees each individual the freedom to band together, or to not band together, with other individuals for expressive purposes. *See Roberts*, 468 U.S. at 622. "[W]hen the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated." *Id.* at 618.

Defendants are interfering with the Professors' right to select with whom they join in a common endeavor by requiring them to be part of a bargaining unit composed of all CUNY instructional staff. *See* Compl. ¶¶ 99–100. This unit is composed of "tens of thousands of other instructional staff of CUNY . . . who do not share [the Professors'] same economic interests, and who also do not share their beliefs or are overtly hostile to them." *Id.* ¶ 48. These disparate individuals are forced together into an association by PERB's certification order and the Taylor Law. *Id.* ¶¶ 25, 99–100. The Professors would not be part of this association of CUNY staff if they had the choice. *See id.* ¶¶ 103–04. By forcing the Professors into this mandatory association of CUNY instructional staff, both full-time and part-time, State Defendants infringe on Professors' First Amendment right not to associate with this group of individuals. *Id.* ¶ 105.

State Defendants appear to misunderstand this Count of the Complaint, as they inaccurately claim "Plaintiffs' allegations go to a different issue: the fairness of the composition CUNY's 'Instructional Staff' as a negotiating unit, which was certified in June 1972." State Mem. 17. That is not the issue. The issue is that this State-certified unit is *itself* a mandatory association of individuals, it is not whether this forced association functions properly. State Defendants are mandating that certain individuals (the Professors and other instructional staff) associate with one another for the

expressive purpose of petitioning CUNY over terms of employment. In effect, State Defendants are requiring the Professors to be part of a state-organized and defined "faction"—*i.e.*, a group of similarly-situated persons who associate together to pursue self-interested policy objectives.

It makes no difference if the composition of this mandatory association is considered by some as "fair" or not. What matters for First Amendment purposes is that the Professors do not want to be part of this State-mandated faction of instructional staff. As the Supreme Court stated in *West Virginia State Board v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943). State Defendants and PSC violate these principles by subjecting each Professor's individual right to choose with whom he or she associates for expressive purposes to the tyranny of majority rule.

## II. DEFENDANTS' ARGUMENTS ARE UNAVAILING

### A. That the Professors Disagree with PSC and Speak Against Its Agenda Does Not Validate their Forced Association With PSC, But Shows That Forced Association Violates the Professors' First Amendment Rights

#### 1. The Professors' Opposition to PSC and Its Agenda Is a Reason That State Defendants Violate Their Rights by Compelling Them to Associate with PSC

PSC tries to turn a vice into a virtue by arguing that, because outside observers will realize the Professors do not "agree" with PSC's positions and often oppose it, their First Amendment rights are not violated. Mem. of Law in Supp. of Mot. to Dismiss ("PSC Mem.") 17–18, ECF No. 58. To the extent that premise is true,[1] it only supports the Professors' position. The fact the

[1] Even if PSC's speculative assertions were controlling, which they are not, the Court cannot accept the assertions as true on a motion to dismiss because nothing in the Complaint supports them. The

Professors vehemently disagree with PSC's speech is a reason that it violates the First Amendment for the Defendants to compel them to associate with PSC and its speech. After all, "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715; *accord Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995). The proposition that outside observers *may* know the Professors disagree with PSC's speech does not change that reality. If anything, that knowledge only exacerbates the Professors' injuries because a state "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464.

In other words, public knowledge of state-compelled association does not make that compulsion constitutional. In most, if not all, compelled association cases it was readily apparent to the public that the plaintiff(s) opposed the group or message with which they were compelled to associate. The plaintiff's lawsuit alone established that. For example, in *Boy Scouts of America v. Dale*, the Boy Scouts at that time made clear to any observer that they did not want to associate with gay scoutmasters, as they had a written policy on the matter and filed a highly publicized lawsuit challenging the requirement. 530 U.S. 640, 651–52 (2000). The Professors making clear in their lawsuit that they want nothing to do with PSC does not undermine their compelled-association claims, but only supports them.

PSC is thus wrong in arguing that compelled association and speech claims require proof that observers will believe the victim "agrees" with the compelled association or message.

---

Professors dispute that most outside observers will know they disagree with PSC's positions. PSC's legal authority to speak for CUNY faculty creates the impression that the faculty, which includes the Professors, support PSC's positions. PSC, in its communications, holds itself out as representing the will of CUNY faculty. To the extent that the outcome of the motions to dismiss turns on the degree to which observers may believe the Professors support PSC's position, which it should not, the motions should be denied on the basis of the allegations in the Complaint.

Compelled association is shown if a person or entity *actually* is required to associate with another person or entity against their will. *See, e.g.*, *id.* (describing the compulsion of a group to accept unwanted members); *see also Hurley*, 515 U.S. at 573 (describing the compulsion of parade organizers to accept unwanted participant). A free speech violation is shown if a person or entity actually is required to associate with a message they obviously disagree with. *See Barnette*, 319 U.S. at 641–42 (Jehovah witnesses required to salute flag); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974) (newspaper required to run rebuttals to its own editorials). The Professors have shown both, because PSC has actual, legal authority under the Taylor Law to act as their exclusive bargaining agent and to speak and contract for them, even though the Professors vehemently disagree with PSC and its positions and have informed PSC of their disagreement to no avail.[2]

2. The Professors Speaking Against PSC's Agenda Supports Their Claim That State Defendants Violate Their Rights by Compelling Them to Associate with PSC

In a similar vein, Defendants claim it is exculpatory that the Professors can and often do speak against PSC and its positions, citing *e.g.*, articles they have written against PSC and its representation.[3] But the Professors' public speech against PSC only highlights the speech with which they disagree but with which Defendants force them to associate. The Professors' ability to engage in their own speech against PSC does not render that compelled association permissible: states are

[2] *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47 (2006) is not to the contrary. The case held that allowing military recruiters to use school property did not associate the schools with the individuals' messages. *Id.* A school merely allowing individuals to use its property is nothing like a state granting an advocacy group legal authority to speak and contract for others. If anything, *Rumsfeld* supports the Professors' position because the Court held "compelled speech cases are not limited to the situation in which an individual must personally speak the government's message." *Id.* at 63.

[3] *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.

not free to *compel* association with an offensive political group so long as they do not also *restrict* the victim's right to engage in contrary speech.

In compelled speech and association cases in which the Supreme Court found constitutional violations, victims almost always were free to speak or associate with others. In *Wooley*, motorists were free to express messages different from the motto inscribed on the license plates they had to display. 430 U.S. at 714–16. In *Miami Herald*, "the statute in question . . . [did] not prevent [ ] the Miami Herald from saying anything it wished," in addition to the articles it was compelled to publish. 418 U.S. at 256. In *Pacific Gas*, a utility compelled to let an advocacy group use its property to convey a message was free to disseminate contrary messages. 475 U.S. at 15–16. In *Dale,* the Boy Scouts spoke against the positions of the activists with whom they were compelled to associate. 530 U.S. at 651–52. And in *Hurley*, the parade organizers were free to express messages opposing the group they were required to include in a parade. 515 U.S. at 573. Yet the Supreme Court held each instance of compelled speech or association unconstitutional.

If anything, that some of the Professors speak out to distance themselves from PSC and its positions intensifies, rather than relieves, their constitutional injuries. In *Pacific Gas*, the Supreme Court held that a state, by requiring a utility give space on its billing envelopes to an advocacy group to disseminate its message, unconstitutionally compelled the utility "to associate with speech which the [utility] may disagree." 475 U.S. at 2, 15. The Court reasoned the requirement pressured the utility "to respond to arguments and allegations made by [the advocacy group] in its messages to [the utility's] customers," and found this "kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16. PSC's status as the Professors' exclusive representative likewise puts the Professors in the unenviable position of having to speak out against the positions advanced by their exclusive representative—a situation akin to a principal having to

disclaim the speech of his own agent. If PSC were not taking positions on behalf of the Professors, they might feel no need to stake out their positions to the contrary.

A hypothetical illustrates these points. If CUNY required Professor A. Goldstein to wear a button stating "Down with Israel!" when on campus, would that requirement be constitutional if outside observers knew he disagreed with that message? Or if Professor A. Goldstein actively told people he disagreed with the button's message and fervently supported Israel? The answers to these questions are obvious. So too here. That the Professors disagree with their exclusive bargaining agent's positions, and sometimes speak against PSC for precisely this reason, simply proves that compelling them to associate with PSC violates their First Amendment rights.

### B. Supreme Court Precedent Supports the Professors' First Amendment Claims

#### 1. The Supreme Court Has Repeatedly Recognized That Exclusive Representation Restricts Nonmembers' Rights

The Supreme Court's decisions in *Janus, Steele*, and *Vaca* establish that an exclusive representative is a mandatory association whose power to speak and contract for nonmembers impinges on those nonmembers' rights. *See supra* at 8–9. The Court created the duty of fair representation because of that impingement. *See Vaca*, 386 U.S. at 182; *Steele*, 323 U.S. at 202–03. *Janus* flatly states that an exclusive representative has "the exclusive right to speak for all the employees in collective bargaining" and that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights." 138 S. Ct. at 2467, 2469.

Defendants ignore this language in *Janus* as if it did not exist. PSC instead selectively quotes half a sentence in *Janus* stating "It is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees . . ." PSC Mem. 10 (quoting *Janus*, 138 S. Ct. at 2478). PSC conveniently omits the remainder of that sentence in which the Court goes on to say that exclusive representation is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. State Defendants, for their part, twice cobble

together fragments of two sentences that occur seven pages apart in *Janus* to form one sentence to their liking. *See* State Mem. 1 & 12 (combining fragments of language from 138 S. Ct. at 2478 and 138 S. Ct. at 2485 n.27). That Frankenstein sentence obscures the Court's recognition that a significant constitutional impingement is, in fact and law, occurring here.

Contrary to Defendants' claims, *Janus* neither "confirmed" nor "maintained" that exclusive representation is constitutional. State Mem. 12; PSC Mem. 10. How could it when that question was not presented in *Janus*. The Court merely found the arrangement's legality was "not disputed" in the case, 138 S. Ct. at 2478, because Petitioner Mark Janus, unlike the Plaintiffs here, did not directly challenge its constitutionality. The Court not resolving in *Janus* whether exclusive representation is constitutional does not change the fact that the decision reached several conclusions relevant here: that exclusive representation grants unions the power "to speak" for nonmembers, *id.* at 2467, "substantially restricts the nonmembers' rights," *id.* at 2469, and inflicts a "significant impingement on associational freedoms," *id.* at 2478.

2. *Knight* Did Not Address the First Amendment Claims The Professors Make In This Case

Defendants' heavy reliance on *Minnesota State Board for Community Colleges v. Knight* is misplaced because the case merely held it constitutional for a public employer to *exclude* employees from its nonpublic meetings with union officials. 465 U.S. at 273. The sole "question presented" in *Knight* was whether a "restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id.* The "appellees' principal claim [was] that they have a right to force officers of the [s]tate acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. The Court disagreed, reasoning "[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. 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.

*Knight* did not address, much less resolve, whether an exclusive representative's authority to speak and contract for dissenting employees unlawfully compels those employees to associate with the union and its speech. *Knight* also did not address the claim made in Complaint Count II: that a bargaining unit is a mandatory association of individuals forced together for an expressive purpose.

Defendants try to create a false contrary impression by quoting *Knight's* statement that "[t]he State has in no way restrained appellees' freedom . . . to associate or not to associate with whom they please, including the exclusive representative." 465 U.S. at 288. But the Court was referring only to the impact of the State excluding employees from bargaining meetings, as the preceding sentence in the opinion states that "Appellees' speech and associational rights, however, have not been infringed by Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative." *Id.* (emphasis added).

The proposition that *Knight* held employees are not associated with their exclusive bargaining agent, or with its speech and binding contracts, finds no support in that opinion. The proposition also leads to two untenable ramifications that weigh heavily against its acceptance.

*First*, the proposition would place *Knight* into conflict with several other Supreme Court precedents recognizing that regimes of exclusive representation impinge on individual liberties. *See supra* at 13–14 (discussing cases). For example, the Court found before *Knight* that the "grant of power to a union to act as exclusive collective bargaining representative" results in a "corresponding reduction in the individual rights of the employees so represented," *Vaca*, 386 U.S. at 182, and reaffirmed that finding in *Janus*, 138 S. Ct. at 2460, 2469. The Court created the duty of fair representation based on those findings. *See supra* at 8–9. Defendants' misinterpretation of *Knight* cannot be squared with other Supreme Court precedents concerning exclusive representation.

*Second*, the proposition that *Knight* held that exclusive representation schemes compel neither association nor speech leads to an absurd result: it would mean governments can designate exclusive representatives to speak and contract for citizens *for any rational basis*, and without satisfying First Amendment scrutiny. It is highly unlikely the Supreme Court would ever hold that governments have free rein to dictate which organization represents individuals in their relations with the government. The First Amendment plainly reserves such decisions to each individual. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–09 (1982). The Court has refused to "'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 to "'practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades,'" because "'[t]hose brigades are not compatible with the First Amendment.'" *Harris*, 573 U.S. at 630 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884–85 (1961) (Douglas, J., dissenting)). It defies credulity to believe the Court, when deciding in 1984 whether a college can exclude faculty members from union meet and confer sessions, intended to rule that the First Amendment is no barrier whatsoever to states' imposing exclusive representatives on individuals.

*Knight* cannot bear the incredible weight that Defendants and some courts place upon it. The case supports only the modest proposition that government officials are constitutionally free to choose to whom they listen in nonpublic fora. 465 U.S. at 292. That holding does not control here. The Professors do not allege that CUNY wrongfully excludes them from its bargaining meetings with PSC, especially since the Professors want to be free from PSC's bargaining. Nor do they assert 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 associate with PSC, with PSC's speech about their terms of employment or any other topic, and with a mandatory association of CUNY instructional staff holding different values and interests. *Knight*'s holding that the government

can choose to whom it *listens* says little about the government's ability to dictate who *speaks* exclusively to the government for individuals or into what groups the government can force its citizens to associate.

### C. The Court Is Not Bound by Any Controlling Circuit Precedent

This Court is free to reach its own conclusions on the questions presented because it is not bound by any controlling Second Circuit precedent. The Second Circuit's order in *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) (per curiam), is not controlling because it is an unpublished, non-precedential order. Its perfunctory conclusion that *Knight* forecloses a claim that exclusive representation compels association, *id.* at 74–75, is unpersuasive for the reasons just discussed.

Contrary to Defendants' claim, the Second Circuit did not resolve whether exclusive representation in the public sector infringes on First Amendment rights in *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, but rather found that the constitutionality of exclusive representation in the *private* sector does not turn on whether a majority of employees support it. 956 F.2d 1245, 1251–52 (2d Cir. 1992). The plaintiffs in *Virgin Atlantic* claimed a union's certification violated the Railway Labor Act and several constitutional provisions. *Id.* at 1248–49. One of their claims was that the "First Amendment guarantees [employees] the right not to be represented by a group chosen by *less than a majority* of their co-workers." *Id.* at 1251 (emphasis added). The Second Circuit rejected the claim on the grounds that "*[i]f* 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 1252 (emphasis added). The Second Circuit did not decide, one way or the other, if the First Amendment actually protects individuals from being represented by an unwanted group because that decision was unnecessary to resolve the claim before the court.

The Court also is not bound by decisions of other circuit courts holding that *Knight* resolved whether regimes of exclusive representation compel speech and association. *See* PSC Mem. 1 n.2 (citing cases). The Professors submit those courts misinterpreted *Knight*. Indeed, two of those circuits suggested *Knight* may not be directly on point. 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 then the court illogically declared *Knight* controlling anyway because it supposedly "is 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). Neither courts' rationale justifies holding that *Knight* resolved the key constitutional question presented here—whether an exclusive representative is a mandatory expressive association—when that was not the issue *Knight* addressed.

This case also differs from *Knight* and the cases that misconstrued *Knight* in three respects. *First*, none of those involved a claim that employees were being compelled to associate with other members of the bargaining unit. *Second*, none of those cases involved members of a recognized minority who want to disassociate themselves with a union primarily because it supports policies hostile to them, their religion, and their national identity. *Third*, none of those cases involved a state compelling employees to accept an exclusive representative that lacks a full duty of fair representation to them. This case, by contrast, involves the grave constitutional problem the Supreme Court referenced in *Steele*, 323 U.S. at 198, *Vaca*, 386 U.S. at 182, and *Janus*, 138 S. Ct. at 2469: a hostile union having the power to exclusively represent nonmembers, without even having a full concomitant duty not to discriminate against them.

## III. DEFENDANTS' CONDUCT CANNOT SURVIVE EXACTING FIRST AMENDMENT SCRUTINY

Mandatory associations are "exceedingly rare" and "permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S. at 310 (quoting *Roberts*, 468 U.S. at 623). The Supreme Court applied "exacting scrutiny" to compelled-subsidization of speech in *Janus* and other cases, but suggested that a higher level of scrutiny may be appropriate. 138 S. Ct. at 2465. While strict scrutiny is appropriate because this case involves infringement on free speech rights, Defendants' conduct cannot survive even exacting scrutiny.

### A. Labor Peace Is Not a Compelling Government Interest

State Defendants claim the so-called "labor peace" interest identified in *Abood v. Detroit Board of Education*, 431 U.S. 209, 220–24 (1977) is a compelling state interest that justifies infringements on the Professors' First Amendment rights. State Mem. 18–19. Not so. *Abood*'s labor-peace holding is no longer good law because the case was overruled by *Janus*, 138 S. Ct. at 2486. *Janus* merely "assume[d]" labor peace was a compelling interest for purposes of deciding that case because the Court found the interest, even if compelling, would not justify forcing nonmembers to financially underwrite the union's speech and activities. *Id.* at 2465–66. The Court in *Janus* did not adopt *Abood*'s labor-peace holding nor elevate it to a compelling state interest.

The Court's decision in *Harris* makes this clear. There, the Court explained that "industrial peace" was its justification for holding in an earlier case (*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956)) that the Railway Labor Act's agency fee requirement was a "permissible regulation of commerce." *Harris*, 573 U.S. at 629. *Abood* relied on *Hanson* and its commerce-clause interest to hold a government's agency fee requirement permissible under the First Amendment. *See Harris*, 573 U.S. at 634–35. Both *Harris*, 573 U.S. at 635–36, and *Janus,* 138 S. Ct. at 2479–80, sharply criticized *Abood* for wrongly finding that a commerce-clause decision controlled a First Amendment issue.

"The [*Hanson*] Court did not suggest that 'industrial peace' could justify a law that 'forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought.'" *Harris*, 573 U.S at 631 (quoting *Hanson*, 351 U.S. at 236–37). The labor-peace interest is merely a rational-basis justification for a regulation of interstate commerce, and not a compelling state interest that justifies obvious constitutional violations.

*Abood*'s now-overruled conception of the labor peace interest demonstrates why it cannot justify infringements on First Amendment rights. *Abood* framed the labor peace interest as one to "free[] the employer from the possibility of facing conflicting demands from different unions," 431 U.S. at 221, and avoiding "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views . . . each sought to obtain the employer's agreement," *id.* at 224. Whatever its merits in the private sector, there is no legitimate interest in suppressing diverse expression to influence the government. That is the essence of democratic pluralism. As Justice Powell stated in his concurrence in *Abood*: "I would have thought the 'conflict' in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Id.* at 261.

Justice Powell was correct. "The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox*, 567 U.S. at 309 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). The First Amendment also guarantees freedom to associate to influence governmental policies. *See Claiborne Hardware Co.*, 458 U.S. at 907–09. Neither New York nor any other state has an interest in imposing monopoly representation to suppress the diverse petitioning of government the First Amendment protects. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Rels. Comm'n*, 429

U.S. 167, 175–76 (1976). The reason is "[t]he First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

Here, the possibility that multiple groups of CUNY faculty may petition CUNY for different employment policies is not a "problem" to be solved. It would exemplify the pluralism and diverse expression the First Amendment protects. New York does not possess a legitimate interest, much less a compelling one, in forcing the Professors and their co-workers to accept an exclusive representative in order to shield CUNY "from the possibility of facing conflicting demands" in deciding government operations. *Abood*, 431 U.S. at 221.[4]

### B. Forcing Employees to Accept an Exclusive Representative is Not the Least Restrictive Means to Achieve a Theoretical Compelling State Interest

Even if New York had a compelling labor-peace interest in ensuring that CUNY and other public employers do not have to deal with multiple associations of employees, that end could "be achieved through means significantly less restrictive of associational freedoms" than compelling every employee to accept one exclusive representative. *Roberts*, 468 U.S. at 623. Most obviously, the public employers could simply not bargain or deal with any employee association or any individual employee or group of employees. That is the usual state of affairs: a majority of government workers—around 62% in 2021—are not subject to exclusive union representation.[5] The government violates no constitutional rights by *not* collectively bargaining with a union. *See Smith v. Ark. State Hwy. Emps. Loc.*, 441 U.S. 463, 464–65 (1979).

---

[4] To the extent Defendants argue PSC's status as an exclusive representative does not interfere with the ability of faculty to petition CUNY through other associations—a contention the Professors would dispute, Compl. ¶ 68–69—that argument only proves that exclusive representation does *not* lead to labor peace.

[5] U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, ECON. NEWS RELEASE, tbl. 3, http://www.bls.gov/news.release/union2.t03.htm.

This alternative also remedies the self-inflicted "confusion" *Abood* said "would result from [a public employer] attempting to enforce two or more agreements specifying different terms and conditions of employment." 431 U.S. at 220. Public employers can avoid that ostensible problem by not entering into or enforcing exclusive union agreements that mandate terms of employment.

### C. Forcing Employees to Accept a Union Representative is Not a Least Restrictive Means to Suppress Union Strikes

State Defendants claim exclusive representation is necessary to avoid union strikes. State Mem. 19–20. The Professors dispute that claim's factual validity, which finds no support in the Complaint. Indeed, the notion that unionizing employees reduces union strikes is counterintuitive.

Even if one assumed *arguendo* that unionized employees are less likely to strike than nonunion employees, which is implausible, New York cannot force dissenting employees to accept mandatory union representation, in violation of their First Amendment rights, simply to ensure that unions do not disrupt public workplaces. States cannot violate citizens' rights to free speech and association just to mollify an unruly special interest group.

There are means less restrictive of associational freedoms to prevent union strikes in any event. The most obvious is a state enacting a law that prohibits strikes by public-sector employees. In fact, New York has such a law. It states: "No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike." N.Y. Civ. Serv. Law § 210. The existence of this law disproves State Defendants' claim that they need a regime of exclusive representation to prevent strikes. New York merely needs to enforce the current law or pass a better one.

### D. New York's Exclusive-Representation Scheme Fails Constitutional Scrutiny Because the Taylor Law Limits Unions' Duty to Fully and Fairly Represent Nonmembers

Even if exclusive representation could survive exacting scrutiny in other contexts, New York's scheme can no longer survive that scrutiny due to its recent amendment of the Taylor Law.

As earlier explained, while New York has granted PSC and other unions the power to exclusively represent nonmembers with respect to "administration of grievances," N.Y. Civ. Serv. Law §§ 203, 204(2), the State has relieved PSC and other unions of any duty to represent nonmembers with respect to the administration of most grievances *Id.* § 209-a(2). The Professors and other nonmembers are thus compelled to accept a representative that lacks a full duty to protect their interests.

PSC argues it need not owe a duty to nonmembers in grievance processing because, according to PSC, "[i]n New York, the exclusive representative role and corresponding duty of fair representation is limited to contract negotiations and does not extend to the grievance procedure." PSC Mem. 13 & n.5. That is not true. The Taylor Law repeatedly states that an exclusive representative's authority extends to grievance processing. N.Y. Civ. Serv. Law § 203 provides that "[p]ublic employees shall have the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and *the administration of grievances arising thereunder*." (emphasis added). N.Y. Civ. Serv. Law § 204 empowers public employers "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," and provides that the 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." *Id.* at § 204(1)–(2) (emphasis added). PSC clearly has legal authority to exclusively represent the Professors and other nonmembers with respect to administration of grievances, as well as the authority to negotiate and enter into contracts that set the parameters of all grievances, but generally lacks a duty to represent the Professors and other nonmembers with respect to grievances.

In *Janus*, the Supreme Court reiterated its admonition "that serious 'constitutional questions [would] arise' if the union were not subject to the duty to represent all employees fairly." 138 S. Ct. at 2469 (quoting *Steele*, 323 U.S. at 198). The Court was correct. Defendants already trample on the Professors' First Amendment rights by forcing them to accept an unwanted mandatory agent for speaking and contracting with a governmental entity. Defendants compound that injury by also forcing the Professors to associate with a mandatory agent that: (1) advocates an anti-Semitic agenda that cuts to the core of the Jewish Professors' beliefs and subjects them to opprobrium based on their identity; and, (2) lacks a full duty to fairly represent the Professors on an important matter within the scope of the agent's exclusive bargaining authority. That is too grievous a constitutional injury for any of the ostensible state interests cited by Defendants to justify.

The Court should deny the motions with respect to Counts I and II of the Complaint.

## IV. COUNT III OF THE COMPLAINT

Turning to the State Defendants and PSC's motions concerning Count III of the Complaint, Professors Kass-Shraibman, Langbert, and A. Goldstein concede their claims for prospective relief are not justiciable. Consequently, the Court need not reach the State Defendants' motion to dismiss some of those claims for relief on the merits under Rule 12(b)(6). Professor A. Goldstein contests the City of New York's motion to dismiss his claim because the City does have a policy of deducting monies for PSC from the salaries of certain CUNY faculty.

Professors Kass-Shraibman and Langbert allege that certain State Defendants and PSC violated their First Amendment rights under *Janus* by seizing union dues from them after they resigned their membership. Compl. ¶¶ 113–14. For these violations, they seek only prospective declaratory and injunctive relief against those State Defendants, but seek from PSC both prospective relief and retroactive relief (*i.e.*, damages or restitution). *Id.* at Prayer for Relief.

State Defendants and PSC move the Court to dismiss Professors Kass-Shraibman and Langbert's Count III claims for *prospective* relief on jurisdictional grounds, arguing the claims are not justiciable because dues deductions stopped and will not recur. State Mem. 20–23; PSC Mem. 18–20. State Defendants alternatively request those claims for relief be dismissed on the merits under Rule 12(b)(6). State Mem. 23. State Defendants and PSC, however, do not move for dismissal of the Professors' claims for *retroactive* relief because: (1) that relief is not sought from State Defendants[6]; and, (2) PSC "intends to move for summary judgment with respect to Count Three claims for retrospective relief at a later date." PSC Mem. 20.

Professors Kass-Shraibman and Langbert concede to the dismissal of their Count III claims for prospective relief for lack of subject-matter jurisdiction under Rule 12(b)(1).[7] The Court need not reach State Defendants' alternative motion to dismiss those claims under Rule 12(b)(6). Indeed, the Court cannot reach those claims if it lacks jurisdiction over them. However, Professors Kass-Shraibman and Langbert's Count III claims for retroactive relief remain.

Professor A. Goldstein has a Count III claim against PSC and the City, because the City violated his First Amendment rights by deducting union dues from his wages after his resignation. Compl. ¶¶ 75, 113–14. Professor A. Goldstein concedes to the dismissal of his Count III claims for prospective relief against PSC for a lack of subject-matter jurisdiction under Rule 12(b)(1). However, the Court should deny the City's motion to dismiss his claim for retroactive relief.[8]

---

[6] State Defendants refute a claim no one has made by arguing the Eleventh Amendment bars an award of monetary damages against them. State Mem. 24. Professors seek no damages from them.
[7] "Prospective relief" means, and is limited to, the relief identified in footnote 6 of PSC's memorandum of law.
[8] The City, for some reason, also moved the Court to dismiss claims that are not made against the City, namely Counts I and II. City Mem. of Law in Supp. of Mot. to Dismiss ("City Mem.") 2, ECF No. 60. The Court cannot dismiss claims never made.

The City avers Professor A. Goldstein "has not made out a [*Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 681 (1978)] claim against the City" because, according to the City, he did not plead sufficient facts to show that union dues were taken from his wages "pursuant to any *municipal* policy or custom." City Mem. 4 (emphasis in original). To the contrary, the Complaint states that "[p]ursuant 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." Compl. ¶ 72. Both the CBA and MOU, which are incorporated into the Complaint as Exhibits A and B, specify that union dues are deducted from CUNY staff "in accordance with the *forms and procedures approved by the appropriate offices of the City of New York* or State of New York." CBA Art. 4.1(a), ECF No. 1-1; MOU 12, ECF No. 1-2 (emphasis added). Professor A. Goldstein has thus more than sufficiently alleged in his Complaint that the City deducted union dues from his wages pursuant to a City policy or custom.

## CONCLUSION

Because Plaintiffs have alleged that New York's statutory scheme violates their constitutional rights, by associating them over their objections with a political advocacy group, its speech, and all those it represents, while also removing the required duty of fair representation, this Court should deny the motions to dismiss.

Respectfully submitted,

Dated: May 24, 2022

**s/ Nathan J. McGrath**
Nathan J. McGrath (*pro hac vice*)
Email: njmcgrath@fairnesscenter.org
Danielle R. Acker Susanj (*pro hac vice*)
Email: drasusanj@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Suite 600B
Harrisburg, Pennsylvania 17101

Telephone: 844.293.1001
Facsimile: 717.307.3424

Milton L. Chappell (*pro hac vice*)
Email: mlc@nrtw.org
William L. Messenger (*pro hac vice*)
Email: wlm@nrtw.org
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
Telephone: 703.321.8510
Facsimile: 703.321.9319

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on May 24, 2022, a copy of the foregoing *Plaintiffs' Memorandum of Law in Opposition to the Defendants' Motions to Dismiss* was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's CM/ECF system.

Dated: May 24, 2022

**s/ Nathan J. McGrath**
Nathan J. McGrath (*pro hac vice*)
Email: njmcgrath@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Suite 600B
Harrisburg, Pennsylvania 17101
Telephone: 844.293.1001
Facsimile: 717.307.3424

*Attorney for Plaintiffs*