UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| 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; CITY UNIVERSITY OF NEW YORK; JOHN WIRENIUS, in his official capacity as Chairperson of the New York Public Employee Relations Board; ROSEMARY A. TOWNLEY, in her official capacity as Member of the New York Public Employee Relations Board; ANTHONY ZUMBOLO, in his official capacity as Member of the New York Public Employee Relations Board; CITY OF NEW YORK; THOMAS P. DINAPOLI, in his official capacity as New York State Comptroller,<br><br>Defendants. | No. 22 Civ. 321 (PAE) (JEW) |

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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**STATE STATUTES**

The State Defendants respectfully submit this reply memorandum of law in further support of their motion to dismiss the Complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

## PRELIMINARY STATEMENT

In their moving papers, the State Defendants showed that binding and persuasive authority requires dismissal of Plaintiffs' claims for lack of subject matter jurisdiction and for failure to state a claim. Plaintiffs' opposition papers offer no valid reason for the Court to reach a different conclusion. Therefore, the Complaint should be dismissed in its entirety.

## ARGUMENT

### I. PLAINTIFFS' FIRST AND SECOND CAUSES OF ACTION FAIL TO STATE A FIRST AMENDMENT CLAIM AGAINST THE STATE DEFENDANTS.

#### A. Plaintiffs' First Amendment Claims are Foreclosed by *Knight, Jarvis* and *Virgin Atlantic.*

The State Defendants showed (Mem. 8-18 (ECF 55)) that Plaintiffs' first and second claims are foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017) and *Virgin Atlantic Airways, Ltd v. National Mediation Board*, 956 F.2d 1245 (2d Cir. 1992), *cert. denied*, 506 U.S. 820 (1992), and that the claim that exclusive representation in collective bargaining offends the First Amendment has been rejected by nine circuit courts of appeals— that is, every circuit to have considered the issue.

Plaintiffs' suggestion that this settled question of law has now been reopened is misplaced. *First*, *Knight* held that exclusive representation does not violate the First Amendment (Mem. 8-10), and Plaintiffs' contrary argument (Opp. 22-25 (ECF 64)), repeatedly has been rejected. *See, e.g.*, *Adams v. Teamsters Union Loc. 429*, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022) ("[W]e hold that, consistent with every Court of Appeals to consider a post-*Janus* challenge to an exclusive-representation law, the law does not violate the First Amendment."), *pet. for cert. filed* (No. 21-1372, Apr. 22, 2022); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 969 (10th Cir. 2021) ("*Knight* found exclusive representation constitutionally permissible. Exclusive representation does not violate a nonmember's 'freedom to speak' or 'freedom to associate,' and it also does not violate one's freedom 'not to associate.' "), *cert.*

*denied*, 142 S. Ct. 423 (2021); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 382 n.3 (4th Cir. 2021); *Oliver v. Serv. Emps. Int'l Union Local 668*, 830 F. App'x 76, 80 n.4 (3d Cir. 2020); *Reisman v. Associated Facs. of Univ. of Me.*, 939 F.3d 409, 414 (1st Cir. 2019) ("*Knight* disposed of" claims that exclusive representation violated free speech and association rights), *cert. denied*, 141 S. Ct. 445 (2020); *Ocol v. Chi. Tchrs. Union*, 982 F.3d 529, 532-33 (7th Cir. 2020) ("*Knight* and its progeny firmly establish the constitutionality of exclusive representation," and plaintiff's constitutional challenge "goes nowhere"); *Bennett v. AFSCME, Council 31*, 991 F.3d 724, 735 (7th Cir. 2021) (same), *cert. denied*, 142 S. Ct. 424 (2021); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813 (6th Cir. 2020) (rejecting "argu[ment] that *Knight* did not involve a compelled-representation challenge"), *cert. denied*, 141 S. Ct. 2721 (2021); *Mentele v. Inslee*, 916 F.3d 783, 788 (9th Cir. 2019) (finding that *Knight* rejected the "contention that employees' associational rights are implicated when a state recognizes an exclusive bargaining representative with which non-union employees disagree"), *cert. denied*, 140 S. Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (holding that the argument that exclusive representation violates the First Amendment "is foreclosed by *Knight*"), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Jarvis*, 660 F. App'x at 74 (same); *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (Souter, J., by designation) (finding that *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"), *cert. denied*, 579 U.S. 909 (2016); *Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 726 (8th Cir. 2021). *Knight* is binding precedent and forecloses Plaintiffs' claims.

*Second*, *Jarvis* persuasively applies the binding precedent of *Knight* and should be followed. *See U.S. v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010) (noting that a non-precedential order "does not mean that the court considers itself free to rule differently in similar cases"); *Mendez v. Starwood Hotels & Resorts Worldwide*, 746 F. Supp. 2d 575, 595 (S.D.N.Y. Sept. 30, 2010) (summary orders provide "some indication of how the Court of Appeals might rule were it to decide the issue in a binding opinion");

*U.S. v. Tejeda*, 824 F. Supp. 2d 473, 475 (S.D.N.Y. 2010) ("It would demand an expression of utmost temerity, if not robust arrogance, for a district court to flout germane guidance of a Circuit Court panel [in a non-precedential decision] and to substitute its own conclusion of law … .").

Plaintiffs also argue that *Virgin Atlantic* did not decide that exclusive representation is consistent with the First Amendment (Opp. 25), but the Court of Appeals' reasoning that "the First Amendment [does not] protect individuals from being represented by a group that they do not wish to have represent them," *Virgin Atl.*, 956 F.2d at 1252, represents the view of the Second Circuit on this issue, and should be followed. *Cf. Cossack v. Burns*, 970 F. Supp. 108, 116 (N.D.N.Y. 1997) (adopting persuasive non-binding precedent that was implicitly approved by the Second Circuit). This case law, together with the Supreme Court's *Knight* decision, forecloses Plaintiffs' claims.

**B. *Janus* Supports Dismissal of Plaintiffs' First Amendment Claims.**

The State Defendants showed that *Janus* itself support dismissal of Plaintiffs' claims. Mem. 11-12. Plaintiffs' argument that *Knight* was limited by *Janus's* statement that exclusive representation schemes are "a significant impingement on associational freedoms" (Opp. 2, 13, 21, 22, 23 (quoting *Janus*, 138 S. Ct. at 2478)), misreads *Janus*. Contrary to Plaintiffs' contention (Opp. 21-22), *Janus* expressly reaffirmed the long-settled principle that States "may require that a union serve as exclusive bargaining agent for its employees." *Janus*, 138 S. Ct. at 2478. Plaintiffs point (Opp. 21) to the Supreme Court's observation that such a requirement is "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* But this case does not arise "in other contexts"—it arises in the same context at issue in *Janus*, where the State is acting in the role of "an employer in regulating the speech of its employees." *Id.* at 2477. *Janus* explained that the State's legitimate interest when it acts in its capacity as an employer is sufficient to allow the State to require mandatory representation, but not to allow mandatory collection of agency fees. *Id.* at 2478.

Accordingly, Plaintiffs' argument has been rejected by numerous courts. *See, e.g., Bennett*, 991

F.3d at 735 (rejecting argument that *Janus's* statement overturned or limited *Knight*); *Boardman v. Inslee*, 978 F.3d 1092, 1115 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 387 (2021) (holding that *Janus* "did not indicat[e] that the Court intended to revise the analytical underpinnings of *Knight* or otherwise reset the longstanding rules governing the permissibility of mandatory exclusive representation"); *Mentele*, 916 F.3d at 789 (same); *Bierman*, 900 F.3d at 574 (rejecting argument that *Janus's* statement limited *Knight*); *Ocol v. Chicago Tchrs. Union*, No. 18 Civ. 8038, 2020 WL 1467404, at *2 (N.D. Ill. Mar. 26, 2020) (same), *aff'd*, 982 F.3d 529 (7th Cir. 2020), *cert. denied*, 142 S. Ct. 423 (2021); *Thompson*, 972 F.3d at 814 (applying *Knight* and rejecting First Amendment challenge to exclusive representation system despite *Janus's* statement); *Oliver v. SEIU Loc. 668*, 418 F. Supp. 3d 93, 99 (E.D. Pa. 2019), *aff'd*, 830 F. App'x 76 (3d Cir. 2020) ("Read properly, *Janus* reaffirms rather than undermines *Knight*. Although *Janus* contains a brief passage stating that exclusive representation is 'a significant impingement on associational freedoms that would not be tolerated in other contexts,' earlier in that same sentence the Court held '[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees.' *Janus*, 138 S. Ct. at 2478."); *Adams v. Teamsters Union Loc. 429*, No. 19 Civ. 336, 2019 WL 8333531, at *11 & n.4 (M.D. Pa. Dec. 5, 2019) (finding that *Oliver's* "conclusion is echoed in an emerging body of case law, which consistently declines invitations to set aside public employee unions' exclusive representation status based upon an expansive reading of *Janus*," and citing cases), *adopted*, 2020 WL 1558210 (M.D. Pa. Mar. 31, 2020), *aff'd*, 2022 WL 186045 (3d Cir. Jan. 20, 2022); *Grossman v. Hawaii Gov't Emps. Ass'n/AFSCME Loc. 152*, 382 F. Supp. 3d 1088, 1092 (D. Haw. 2019) (holding that *Janus* "leaves undisturbed *Knight's* precedent regarding exclusive representation").

Accordingly, under *Janus* and its progeny, Plaintiffs' claims fail as a matter of law.

**C. Plaintiffs Fail to State a First Amendment Claim Based on Exclusive Representation.**

The State Defendants showed that Plaintiffs failed to state a First Amendment claim based on exclusive representation. Mem. 12-15. PSC represents the bargaining unit as a whole in collective

bargaining; it does not speak for individuals on political issues. The State Defendants cited many examples where Plaintiffs and others publicly opposed PSC's Resolution, showing that Plaintiffs are free to publicly express their views, rather than being associated with PSC or members of CUNY's Instructional Staff (Mem. 13 n.8), and the CBA preserves the free speech rights of union members and nonmembers alike. Mem. 14. In response, Plaintiffs argue that their associational rights are violated regardless of whether the public associates or disassociates Plaintiffs with the Resolution and even though Plaintiffs are free to express contrary views. Opp. 17-21.

However, Plaintiffs' arguments were rejected by *Knight* and its progeny. *See, e.g.*, *Knight*, 465 U.S. at 277 (rejecting First Amendment claims because individual faculty members remained free to "communicat[e] their views on policy questions"); *Mentele*, 916 F.3d at 789 ("*Knight* expressly concluded that such a system [of exclusive representation] "in no way restrained appellees' ... freedom to associate or not to associate with whom they please, including the exclusive representative") (quoting *Knight*, 465 U.S. at 288); *Bierman v. Dayton*, No. 14 Civ. 3021 (MJD), 2014 WL 5438505, at *7 (D. Minn. Oct. 22, 2014) ("There is no violation of Plaintiffs' First Amendment associational rights when they 'are free to associate to voice their disapproval of [the union's] message ... .' ") (citation omitted), *app. dismissed as moot*, 817 F.3d 1070 (8th Cir. 2016); *D'Agostino*, 812 F.3d at 244 (following *Knight* and rejecting plaintiff's argument because "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. And the freedom of the dissenting appellants to speak out publicly on any union position further counters the claim that there is an unacceptable risk the union speech will be attributed to them contrary to their own views; they may choose to be heard distinctly as dissenters if they so wish … ."); *Reisman*, 939 F.3d at 411-14 (following *Knight* and rejecting plaintiffs' argument); *Uradnik v. Inter Fac. Org.*, No. 18 Civ. 1895 (PAM), 2018 WL 4654751, at *2, 4 (D. Minn. Sept. 27, 2018) (finding that plaintiff lacked meritorious argument that exclusive representation scheme violated her speech and

association rights because "[the union] speaks for the collective, and not for individual members; those individuals may speak their mind freely and speak to their public employer on their own behalf," and plaintiff remained free to form an advocacy group), *aff'd*, 2018 WL 11301550 (8th Cir. Dec. 3, 2018).

Plaintiffs' reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) and *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (Opp. 18-20), is misplaced. Unlike those cases, the Taylor Law does not compel expressive association, and courts have explained that *Dale* and *Hurley* do not apply to exclusive representation laws. *See D'Agostino*, 812 F.3d at 244 (explaining that an exclusive representation system does not violate the First Amendment because it does not require plaintiffs "to accept an undesired member of any association they may belong to, as in [*Dale*], or to modify the expressive message of any public conduct they may choose to engage in, the issue addressed in [*Hurley*]"); *Hill*, 850 F.3d at 865 (citing *D'Agostino* and finding *Dale* and *Hurley* inapposite); *Bennett*, 2020 WL 1549603, at *6 (same), *clarified*, 2020 WL 10355789 (C.D. Ill. Sept. 16, 2020), *aff'd*, 991 F.3d 724 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (2021); *Bierman*, 2014 WL 5438505, at *8 (same). The Supreme Court distinguished *Dale* and *Hurley* on the same basis. *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47 (2006). *FAIR* held that a federal law conditioning funding on allowing the military to recruit on a law school campus did not violate the First Amendment, because "[s]tudents and faculty are free to associate to voice their disapproval of the military's message" and "[n]othing about recruiting suggests that law schools agree with any speech by recruiters." 547 U.S. at 63-64, 69-70. *Knight* was based on these same principles. *See* Mem. 9 (explaining that *Knight* found that "[t]he state has in no way restrained [the plaintiffs'] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative." 465 U.S. at 288). Accordingly, Plaintiffs' arguments are unavailing, and their claims should be dismissed.[1]

[1] Plaintiffs' citation to *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1286-87 (11th Cir. 2010) (Opp. 13-14), lends no support to their argument because *Mulhall* addressed standing to sue, and did not find a First Amendment violation. Similarly, Plaintiffs cite to *Elrod v. Burns*, 427 U.S. 347 (1976), *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) and

**D. Section 209-a(2) of the Taylor Law Does Not Violate Plaintiffs' First Amendment Rights by Allowing a Union to Provide Different Services to Nonmembers.**

The State Defendants showed that § 209-a(2) Taylor Law does not violate Plaintiffs' First Amendment rights by permitting unions to provide different services to members and nonmembers. Mem. 15-17. Plaintiffs argue that by permitting the union to deny representation at grievances to nonmembers who pay no dues, the Taylor Law sanctions hostile discrimination that violates their First Amendment rights, because 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," citing *Janus*, 138 S. Ct. at 2469, *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), and *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944). Opp. 2, 7-12.

Plaintiffs' argument is incorrect. The language Plaintiffs cite in *Janus* and *Vaca* traces back to *Steele*, which dealt with entirely different circumstances. *Steele* was not a First Amendment case and did not decide that a union owed a duty to treat members and nonmembers exactly alike. Rather, in that case the union entered into a collective bargaining agreement that prevented Black employees from obtaining jobs or promotions in order to advantage White members. *Steele*, 323 U.S. at 194-96. *Steele* held that the Railway Labor Act impliedly prohibited such an arrangement. *Id.* at 199.

*Steele* did not impose a constitutional duty to treat all represented employees identically, and neither did *Janus*. To the contrary, *Janus* opined that "the duty of providing fair representation for nonmembers … entails, in simple terms, … an obligation not to act *solely* in the interests of [the union's] own members." *Janus*, 138 S. Ct. at 2467 (emphasis added).

Plaintiffs say that § 209-a(2) was amended after *Janus* was decided. Opp. 4. That is because

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*O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (Opp. 14), but these cases concerned political patronage, and are not relevant to exclusive representation cases. *See Hill*, 850 F.3d at 865 (finding *Elrod* and *O'Hare* inapposite to a claim that an exclusive representation scheme violated nonmembers' First Amendment rights); *Bierman v. Dayton*, 227 F. Supp. 3d 1022, 1030 (D. Minn. 2017) (finding *Elrod* and *O'Hare* inapposite because an exclusive representation system does not require plaintiffs "to join [the union], financially support [the union], or otherwise associate with [the union] as a condition of continuing their relationship with the State"), *aff'd*, 900 F.3d 570 (8th Cir. 2018).

*Janus* expressly sanctioned a union's refusal to represent non-dues paying employees at grievances. Mem. 15-17. Specifically, *Janus* opined that the "unwanted burden [that] is imposed by the representation of nonmembers in disciplinary matters can be eliminated," 138 S. Ct. at 2468-69, to "prevent free ridership" by nonmembers, *id.* at 2469 n.6. The Seventh Circuit recognized on remand that *Janus* did not provide "an unqualified constitutional right to accept the benefits of union representation without paying." *Janus v. AFSCME*, 942 F.3d 352, 358 (7th Cir. 2019). Accordingly, Plaintiffs' claim should be dismissed.

**E. The State Has a Compelling Interest in Bargaining Collectively with an Exclusive Representative Chosen by a Majority of its Members.**

Since Plaintiffs have not stated a First Amendment claim, the Court should not reach the issue of whether the State's compelling interest in labor peace can be satisfied by a less restrictive approach than exclusive representation. *See Knight*, 465 U.S. 271 (holding that exclusive representation system does not offend First Amendment rights; heightened scrutiny not applied); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 866 (7th Cir. 2017) ("As the [statute] does not create a mandatory association, it is not subject to heightened scrutiny."); *Bierman*, 2014 WL 5438505, at *9 ("Because the Court concludes that the State's certification of [a union as an exclusive representative] does not infringe on Plaintiffs' First Amendment rights, the State does not need to demonstrate a compelling interest."); *Bennett v. AFSCME, Council 31*, No. 19 Civ. 4087 (SLD), 2020 WL 1549603, at *6 (C.D. Ill. Mar. 31, 2020) ("As the [statute's exclusive representation scheme] does not create a mandatory association, it is not subject to heightened scrutiny, and is not an unconstitutional impingement on Plaintiff's freedom to associate as protected by the First Amendment.") (citing *Hill* and *Knight*), *clarified*, 2020 WL 10355789 (C.D. Ill. Sept. 16, 2020), *aff'd*, 991 F.3d 724 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (2021).

Moreover, the State Defendants showed that the Taylor Law is narrowly tailored to serve the State's compelling interest in labor peace. Mem. 18-20. Plaintiffs' counterargument—that labor peace is not a compelling state interest and can be achieved by eliminating public sector unions (Opp. 27-

30)—should be rejected because it has already been established that exclusive representation is a narrowly drawn scheme that serves a compelling interest. *Janus* noted that states have a compelling interest in "labor peace" – the "avoidance of the conflict and disruption" that may occur "if the employees in a unit were represented by more than one union." 138 S. Ct. at 2465. Many courts have held likewise. *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1029-30 (D.N.M. 2020) (holding that state's compelling interest in "affordable and efficient management by allowing a public agency or entity to enter into one contract for an entire bargaining unit, rather than having to negotiate with multiple competing unions or, perhaps worse, with many individuals," justifies any purported impingement on associational freedoms), *aff'd*, 992 F.3d 950 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021); *Mentele*, 916 F.3d at 791 (finding that "*Janus* reaffirmed that labor peace is a compelling state interest" and concluding that the State's "continued compelling interest in labor peace justifies the minimal infringement associated with [the union's] exclusive representation"); *Reisman v. Associated Facs. of Univ. of Me.*, 356 F. Supp. 3d 173, 178 (D. Me. 2018) ("*Janus* itself suggests that [an exclusive representation scheme] satisfies the exacting scrutiny standard"), *aff'd*, 939 F.3d 409 (1st Cir. 2019); *Thompson v. Marietta Educ. Ass'n*, No. 18 Civ. 628, 2019 WL 6336825, at *8 (S.D. Ohio Nov. 26, 2019) ("[T]o the extent *Knight* does not foreclose Plaintiff's claims, *Janus* strongly suggests that exclusive representation, alone, is narrowly tailored to achieve the compelling State interest of labor peace."), *aff'd*, 972 F.3d 809 (6th Cir. 2020); *Uradnik*, 2018 WL 4654751, at *3 (denying injunction after: (1) finding that exclusive representation system promotes the compelling state interest in labor peace, serves the state interest in providing employees with representation and greater bargaining power, avoids the confusion and conflict that would result from attempting to enforce multiple agreements containing differing employment terms, and avoids inter-union rivalries that would create dissension and conflicting demands within the workforce; and (2) finding that these compelling interests "could not be accomplished through significantly less restrictive means" and any restrictions are tailored to

minimize First Amendment harms since nonmember employees are not charged an agency fee, are not required to join the union, can speak out against the union and speak with their employers without the union if they see fit, are not compelled to attend any union meetings or promote the union individually), *aff'd*, 2018 WL 11301550 (8th Cir. Dec. 3, 2018).

## II. PLAINTIFFS' THIRD CAUSE OF ACTION FOR A REFUND OF UNION DUES SHOULD BE DISMISSED FOR LACK OF STANDING, AS MOOT, AS BARRED BY SOVEREIGN IMMUNITY, AND FOR FAILURE TO STATE A CLAIM

The State Defendants showed that union dues are not being deducted from the wages of Professors Kass-Shraibman and Langbert, the only Plaintiffs asserting the third cause of action against a State Defendant (Comptroller DiNapoli), and that Prof. Shraibman lacks standing and Prof. Langbert's claims are moot. Mem. 20-23. In response, these Plaintiffs (i) admit that they are not seeking money damages (Opp. 33 n.6); (ii) "concede their claims for prospective relief are not justiciable" (Opp. 32); and (iii) "concede to the dismissal of their Count III claims for prospective relief for lack of subject-matter jurisdiction under Rule 12(b)(1)." Opp. 33.

However, these Plaintiffs argue that their Count III claims "for retroactive relief remain." Opp. 33. Plaintiffs have not explained what retrospective relief they seek. More importantly, Plaintiffs are not entitled to retrospective relief from the State Defendants. Plaintiffs concede that they do not allege any ongoing violation and that they are not entitled to damages. Opp. 32. The Eleventh Amendment bars the issuance of retrospective relief. *Green v. Mansour*, 474 U.S. 64, 73 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 394 (2d Cir. 2022); *Ward v. Thomas*, 207 F.3d 114, 120 (2d Cir. 2000).[2] Therefore, the third cause of action should be dismissed.

## CONCLUSION

The State Defendants respectfully request that the Court dismiss the Complaint as against them with prejudice, and without leave to replead, and grant such other relief as is just and proper.

Dated: New York, New York

**LETITIA JAMES**

[2] If Count III is not dismissed for lack of jurisdiction it may be dismissed for failure to state a claim. Mem. 23-24.

June 14, 2022

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