UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 1:22-cv-321

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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ARGUMENT

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

A. Precedent forecloses Plaintiffs' claim.

Plaintiffs seek to distinguish *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), by asserting that "the case merely held it constitutional for a public employer to *exclude* employees from its nonpublic meetings with union officials." ECF No. 64, Plaintiffs' Memorandum of Law in Opposition to the Defendants' Motions to Dismiss, ("Opp.") at 22 (emphasis in original). But Plaintiffs are ignoring part of the *Knight* decision. After holding in Part II. A. of the decision that the faculty members have no First Amendment right to force the government to meet with them, 465 U.S. at 280–88, the Court went on to hold in Part II. B. that the use of an exclusive representative system does not violate any First Amendment rights the faculty members *do* have, *i.e.*, the freedom to speak and the "freedom to associate or not to associate." *Id.* at 288–90.

Thus, every court to consider Plaintiffs' proposed reading of *Knight* has correctly rejected it. As a Third Circuit panel recently explained: "This reading of *Knight* . . . is simply at odds with what it says . . . [T]he Court also considered whether the law violated the teachers' First Amendment freedoms of speech or association. It held that it did not." *Adams v. Teamsters Union Loc. 429*, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022).[1]

[1] Plaintiffs also misread *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1251–52 (2d Cir. 1992). *See* Opp. at 25. The Second Circuit held that the Railway Labor Act did not infringe on the employees' First Amendment rights even though, for purposes of collective bargaining, the employees were "represented by a group that they do not wish to have represent them." *Virgin Atl. Airways*, 956 F.2d at 1252.

Plaintiffs also misread the Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), as casting doubt on the constitutionality of exclusive representation in public employment. Plaintiffs point to a passage in *Janus* that describes exclusive-representative bargaining as "a significant impingement on associational freedoms that would not be tolerated in *other* contexts." 138 S. Ct. at 2478 (emphasis added). The quoted passage, however, is taken from a paragraph in which Justice Alito, writing for the majority, reasoned that exclusive representation in public employment (unlike compulsory agency fees) *survives* constitutional scrutiny under the line of cases pertaining to the government's greater leeway under the First Amendment when it acts as an employer. *See id.* at 2477–78 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564–68 (1968)). Thus, the reference to "other contexts" serves only to make clear that exclusive representation is *permitted* in the context of public employment. The Court "dr[e]w the line at allowing the government to go *further* . . . and require all employees to support the union." *Id.* at 2478 (emphasis added).

B. Plaintiffs' arguments find no home in Supreme Court caselaw about compelled expressive association.

In addition to being foreclosed by *Knight*, Plaintiffs' arguments are not supported by the other Supreme Court cases they rely upon. Unlike the plaintiffs in the compelled-speech cases that Plaintiffs rely upon, the Plaintiffs here are not required to personally speak, display, publish, or otherwise bear an unwanted message. *Cf. West Virginia State Board v. Barnette*, 319 U.S. 624 (requirement to recite pledge of allegiance) (Opp. at 19); *Wooley v. Maynard*, 430 U.S. 705 (1977) (requirement to display Live Free or Die license plate) (Opp. at 20); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (requirement that newspaper run rebuttals to its own editorials) (Opp. at 19); *Pacific Gas & Elec. Co. v. Pub. Utility Comm'n of Calif.*, 475 U.S. 1 (1986) (requirement that utility company include opposing views in a mailer) (Opp. at 20).

Plaintiffs are correct that "[i]f CUNY required Professor A. Goldstein to wear a button stating 'Down with Israel!'" (Opp. at 21), he could make the same compelled-speech argument as the plaintiffs in *Barnette* and *Wooley* even if he otherwise were free to express a pro-Israel message. But "it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that" this case is analogous in the absence of such a compelled-speech requirement. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006).

Similarly, unlike the plaintiffs in the compelled-association cases that Plaintiffs rely upon, the Plaintiffs here are not required to join, pledge allegiance to, financially support, or take any other affirmative action to affiliate with an organization (political or otherwise). Nor are they threatened with discrimination or retaliation for failure to do so. *Cf.* Opp. at 14 (citing *Elrod v. Burns*, 427 U.S. 347 (1976); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); and *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996)). Plaintiffs are correct that, *if* they were required to personally do something to associate with an undesired organization, the fact that the association would be perceived as forced would not foreclose their compelled-association claim. Opp. at 17-18. But Plaintiffs are not required to do *anything*.

Nor does exclusive-representative bargaining interfere with Plaintiffs' ability to affirmatively associate with organizations of their choosing to express their own desired message about any topic. Plaintiffs are not required to include PSC in other organizations they join. *Cf. Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Boy Scouts required to accept an unwanted leader) (Opp. at 20). Nor are such organizations required to communicate PSC's message. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) (parade organizers required to include unwanted message in their parade) (Opp. at 20). As such, Plaintiffs' cases

about the affirmative right to associate for expressive purposes are not on point. *See D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016) (distinguishing *Dale* and *Hurley*).

Plaintiffs urge that there is a material factual dispute about whether reasonable outsiders would believe that all bargaining unit workers agree with PSC's positions. Opp. at 17 n.1. To the contrary, reasonable outsiders understand that, in any democratic system of representation, not all individuals in the unit will necessarily agree with the representative. ECF No. 58, PSC Memorandum of Law in Support of Motion to Dismiss, ("Union MOL") at 17–18. Democratic systems of representation, including exclusive-representative collective bargaining systems, are commonplace in the United States. *Cf. Rumsfeld,* 547 U.S. at 65 (rejecting as implausible as a matter of law the assertion that law students would believe their schools necessarily agree with the speech of military recruiters); *see also* D'Agostino, 812 F.3d at 244 (it is "readily understood" that not all bargaining unit workers necessarily agree with a union's positions). In any event, as explained, Plaintiffs cannot establish a compelled-speech or compelled-association claim because they have not been compelled to say or do anything.

Finally, Plaintiffs rely on cases about economic association, which is not protected by the First Amendment. Plaintiffs are correct that the use of an exclusive-representative system means that Plaintiffs cannot individually negotiate their employment terms. But Plaintiffs have no First Amendment right to force the government to listen to their views or negotiate with them. *Knight*, 465 U.S. at 286–87; *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464–66 (1979). Many public employers unilaterally establish unit-wide employment terms and offer them on a take-it-or-leave-it basis.[2]

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[2] Plaintiffs also "get no support from *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), a case on standing that recognized only a First Amendment associational interest,

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

Plaintiffs provide no support for the proposition that the constitutionality of exclusive-representative bargaining depends on a duty of fair representation that extends *beyond* the contexts in which representation is exclusive. Further, *Janus* necessarily rejects that proposition. The Supreme Court based its decision to ban agency fees, in part, on its conclusion that concerns about non-member free riding can adequately be addressed by allowing unions to decline to represent non-members during disciplinary grievances. *See* Union MOL at 13–14. The 2018 amendments to New York's Taylor Law are consistent with "the approach that *Janus* suggested" for minimizing the burden of free riding without violating the First Amendment. Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 Cal. L. Rev. 1821, 1836–37 (2019). Plaintiffs ignore this portion of the *Janus* decision. *See Janus*, 138 S.Ct. at 2468-69.

Plaintiffs also ignore the actual reasoning of *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). *Steele* reasons that "constitutional questions" would arise unless an exclusive representative has a "duty to represent non-union members" that extends "*at least to the extent of not discriminating against them as such in the contracts which it makes as their representative*" because otherwise "the minority would be left with no means of protecting their interests." *Id.* at 201 (emphasis added). Under the 2018 Taylor Law amendment, unions have a duty of fair representation that extends to *all* contract negotiations, so the amendment is entirely consistent with *Steele*. *See,* N.Y. Civ. Serv. Law, §209-a.2(c) (McKinney 2022).

Indeed, it bears emphasis that the *only* grievance/arbitration proceedings affected by the 2018 amendment are those "concerning the evaluation or discipline of a public

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which it distinguished from a right." *D'Agostino,* 812 F.3d at 244–45; *see also Hill v. Service Employees*, 850 F.3d 861, 865 n.3 (7th Cir. 2017) (distinguishing *Mulhall*).

employee"—*i.e.*, individualized grievances—and "where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate." N.Y. Civ. Serv. Law §209-a.2(c). Plaintiffs do not provide any logical reason *why* their First Amendment rights would be violated if PSC declines to represent them in their individual grievances against their employer, where Plaintiffs are free to be represented by their own advocate, and particularly as Plaintiffs repeatedly assert that they do not want PSC to represent them. Opp. at 12 (stating that Plaintiffs "believe that PSC would not fairly represent them in grievances").[3]

Plaintiffs express concern that PSC would negotiate grievance/arbitration *procedures* that discriminate against non-members. Opp. at 11, 31. But the negotiation of grievance/arbitration procedures falls within the duty of fair representation that is unchanged by the 2018 amendment, so such discrimination is prohibited. Plaintiffs also point out that many labor relations laws do require exclusive representatives to represent non-members for free during individual grievances. Opp. at 10-11. But that does not prove that requiring unions to bear the burdens of such free riding is constitutionally required. *See* Fisk, 107 Calif. L. Rev. at 1838-40 (discussing state public employee labor relations laws that do not require unions to represent non-members for free during grievance proceedings).

Plaintiffs also fail to respond to our point that, if there were a constitutional flaw in the 2018 Taylor Law amendment, the remedy would be to invalidate and sever the 2018 amendment—not to cause labor relations chaos by invalidating the Taylor Law itself. Union

[3] Plaintiffs' opposition brief makes an error in its description of the amended Taylor Law. Plaintiffs assert that "PSC has no duty to fairly represent the Professors" in a grievance/arbitration process "unless PSC allows them to represent themselves." Opp. at 11. The amended Taylor Law provides that the exclusive representative *does* have a duty to represent nonmembers in grievance/arbitration proceedings if nonmembers cannot represent themselves.

MOL at 14. When a provision added to a longstanding statute is found to be unlawful, it is assumed that because "the statute was enacted and enforced for some time without the . . . provision[], . . . the legislature would have preferred a mere pruning of the offending . . . provision[] to a rooting out of the entire statute." *General Elec. Co. v. New York State Dept. of Labor*, 936 F.2d 1448, 1461 (2d Cir. 1991); *see also CWM Chemical Servs., LLC v. Roth*, 6 N.Y. 3d 410, 423 (2006) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920) (Cardozo, J.) ("The basic rule governing severability [is] . . . 'whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.'")).

Plaintiffs do not seek an order invalidating the 2018 Taylor Law amendment. Plaintiffs also do not allege that they even have grievances as to "evaluation or discipline" by their public employer (N.Y. Civ. Serv. Law §209-a.2(c)), much less that they want PSC to represent them in those grievances. As such, Plaintiffs lack standing to seek relief challenging the 2018 Taylor Law Amendment limiting a union's duty of fair representation.

D. Plaintiffs' allegations of antisemitism do not change the applicable legal analysis.

Plaintiffs urge that this case is distinguishable from *Knight* because they accuse PSC and their co-workers of antisemitism. As an initial matter, Plaintiffs do not contend that PSC excludes workers from membership based on religion or pro-Israel viewpoint or that anything in the governing collective bargaining agreement makes distinctions on that basis. Federal, state, and local law make it illegal for labor organizations to discriminate on the basis of religion or creed, and any such discrimination would be actionable under those laws. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c); New York State Human Rights Law, N.Y. Exec. Law §290 *et seq.* (McKinney 2022); New York City Human Rights Law,

N.Y.C. Admin. Code §8-101 *et. seq.*; *State Comm'n for Hum. Rts. v. Farrell*, 24 A.D.2d 128, 132 (N.Y. App. Div. 1965) ("A party has the right not to be excluded from the union because of race, creed, color, or religious persuasion."). PSC also has a duty of fair representation when it acts as exclusive representative, and that duty precludes discrimination. *See Civ. Serv. Bar Ass'n, Loc. 237, Int'l Bhd. of Teamsters v. City of New York*, 64 N.Y.2d 188, 196 (1984) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)) (duty of fair representation prohibits "conduct toward a member of the collective bargaining unit [that] is . . . discriminatory"). Plaintiffs therefore miss the mark in claiming that "[t]he Professors' situation is akin to that of the African American trainmen in *Steele*." Opp. at 12.

What Plaintiffs contend is that PSC (meaning PSC's Delegate Assembly) voted to approve in June 2021 a resolution "in Support of the Palestinian People" that provides for "chapter-level *discussion* of *possible* support for the Boycott-Divest Sanction movement." Opp. at 5 (emphasis added). Although the resolution states that PSC "condemns racism in all forms, including anti-Semitism" Compl. Ex. C (Dkt. 1-3) at 1, Plaintiffs "believe that this Resolution is openly anti-Semitic and anti-Israel." Opp. at 5 (quoting Compl. ¶ 35). Plaintiffs are entitled to their beliefs, but those beliefs do not change the governing legal analysis.[4]

The Supreme Court recognized in *Abood* that "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977), *overruled on other grounds in Janus*. For example, "[h]is moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." *Id.* Yet

[4] After the adoption of the June 2021 resolution, PSC adopted new procedures for the submission of resolutions to its Delegate Assembly. See ://www.psc-cuny.org/sites/default/files/Revision_to_Resolution_Policy%20.pdf

Abood assumed the constitutionality of exclusive-representative bargaining, *Knight* squarely rejected First Amendment challenges to exclusive representation, and *Janus* acknowledged that exclusive-representative bargaining is constitutional. Here, taking positions on foreign policy is not even an activity "undertaken by the union *in its role as exclusive representative*." *Abood*, 431 at 222 (emphasis added). Moreover, Plaintiffs are not required to join or financially support PSC; they are free to express their own message about Israel and all other issues; and reasonable outsiders would not assume that all CUNY instructional staff agree with PSC's Delegate Assembly resolutions about controversial issues. The strength of a plaintiff's own views about an issue does not determine whether the plaintiff has been compelled to associate for expressive purposes. *See Rumsfeld*, 547 U.S. at 70 ("A military recruiter's mere presence on campus does not violate a law school's right to associate, *regardless of how repugnant the law school considers the recruiter's message*." (emphasis added)).

E. Exclusive-representative bargaining survives exacting scrutiny.

Plaintiffs ask the Court to conclude that exclusive-representative collective bargaining fails to satisfy exacting scrutiny because "labor peace" is not a compelling interest and, in any event, there are other ways to achieve it. Opp. at 27–30. But this is not an open question. *Janus* explained that, under the *Pickering* line of cases, the government has greater authority under the First Amendment when it acts as an employer rather than a sovereign; that the Court was "draw[ing] the line at" agency fee requirements; and that, beyond eliminating agency fees, public employers could "keep their labor-relations systems exactly as they are." 138 S. Ct. at 2485 n.27, 2478.

Moreover, even if there were an open question to resolve, "*Janus* did not revisit the longstanding conclusion that labor peace is 'a compelling state interest,' and the Court has long recognized that exclusive representation is necessary to facilitate labor peace; without it,

employers might face 'inter-union rivalries' fostering 'dissention within the work force,' 'conflicting demands from different unions,' and confusion from multiple agreements or employment conditions." *Mentele v. Inslee*, 916 F.3d 783, 790 (9th Cir. 2019) (quoting *Janus*, 138 S. Ct. at 2465), *cert. denied sub nom*. *Miller v. Inslee*, 140 S. Ct. 114 (2019); *see also Reisman v. Associated Faculties of Univ. of Maine*, 356 F.Supp.3d 173, 178 (D. Me. 2018) (explaining why exclusive representation would satisfy exacting scrutiny even if this was an open question), *aff'd on other grounds*, 939 F.3d 409 (1st Cir. 2019); *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751 at *3 (D. Minn. Sept. 27, 2018) (same), *aff'd*, 2018 WL 11301550 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

Plaintiffs speculate that New York does not need collective bargaining to achieve labor peace because New York bans public employee strikes. Opp. at 29–30. But that speculation ignores the relevant history. New York's Conlin-Waldon Act, adopted in 1947, imposed draconian penalties for public employee strikes without creating a collective bargaining system. *See* Martin H. Malin, *The Motive Power in Public Sector Collective Bargaining*, 36 Hofstra Lab. & Emp. L.J. 123, 125 (2018). The Conlin-Waldon Act was a failure. *Id*. After major, disruptive, illegal strikes in 1965 and 1966, Governor Rockefeller appointed the Taylor Committee "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes." *Id*. at 123 n.5; Governor's Committee on Public Employee Relations, Final Report 15 at 9 (Mar. 31, 1966). The Committee concluded that a collective bargaining system was necessary to promote labor peace, and the Legislature, in adopting the Taylor Law, found that requiring public employers to engage in collective bargaining would best assure "the orderly and uninterrupted operations and functions of government." N.Y. Civ. Serv.

Law §200. Plaintiffs' speculation that New York can achieve labor peace without collective bargaining is therefore contrary to historical fact.

There also is no history in the United States of successful collective bargaining systems that are *not* based on the democratic principle of exclusive representation. *See* Union MPA at 4–5. In *Janus*, the Supreme Court reasoned that agency fees are not necessary for labor peace because the federal government and about half the States use collective bargaining systems without agency fees. 138 S. Ct. at 2458, 2467. There is no similar history of successful collective bargaining systems that do not use exclusive representation. Rather, experiments with alternative collective bargaining systems were eventually abandoned as unsuccessful. *See* Fisk, 107 Cal. L. Rev. at 1835.

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

Plaintiffs assert that "[t]his case . . . differs from *Knight*" because Plaintiffs claim that they "[are] being compelled to associate with other members of the bargaining unit." Opp. at 26. But Plaintiffs still have articulated no facts to support their claim of compelled expressive association with other bargaining unit members apart from the existence of an exclusive-representative bargaining system. Plaintiffs are not required to join or support PSC or attend bargaining unit meetings or express an official bargaining unit message or march with their co-workers in "goose-stepping brigades" (Opp. at 24), and they are free to join and participate in any other groups of their choosing and express any views they choose. The mere existence of a defined group that may democratically elect a representative (e.g., a parent association, alumni association, Congressional district) does not compel individuals to associate for expressive purposes with the other individuals who fall within the definition of the group.

If the government can, consistent with the First Amendment, use exclusive-representative bargaining to set employment terms, as *Knight* holds, then the government necessarily can define bargaining units. *Cf. Virgin Atl. Airways,* 956 F.2d at 1251–52 (recognizing that, if plaintiffs' First Amendment rights were infringed by exclusive-representative bargaining, it would not matter how the representative is chosen). Accordingly, Count Two should be dismissed for the same reasons as Count One.

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

Plaintiffs concede that Count Three of the Complaint does not present a justiciable controversy insofar as it seeks prospective relief. Opp. at 33.

CONCLUSION

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

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