No. 20-1824

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HOLLIE ADAMS, JODY WEAVER, KAREN UNGER, and CHRIS FELKER,
Plaintiffs-Appellants,

v.

TEAMSTERS UNION LOCAL 429; LEBANON COUNTY; ATTORNEY GENERAL JOSH SHAPIRO, in his official capacity, and JAMES M. DARBY, ALBERT MEZZARORA, and ROBERT H. SHOOP, JR., in their official capacities as members of the Pennsylvania Labor Relations Board,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Case No. 1:19-cv-0336 (Hon. Sylvia H. Rambo)

RESPONSE BRIEF OF DEFENDANT-APPELLEE TEAMSTERS UNION LOCAL 429

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Teamsters Union Local 429 is an unincorporated association and has no parent corporation or any stock held by any public held corporation.

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STATEMENT OF ISSUES

1. Whether the district court correctly held that Plaintiffs-Appellants are not entitled to damages under 42 U.S.C. § 1983 ("Section 1983") for having paid membership dues to the Union when they voluntarily chose to join the Union and authorized payment of those membership dues through payroll deductions.

2. Whether the district court correctly held that Plaintiffs-Appellants lacked standing for prospective declaratory relief with respect to their payment of membership dues authorized under the prior collective bargaining agreement and related provisions of state law when they are no longer subject to those provisions and there is no reasonable likelihood that they would be subject to those provisions in the future.

3. Whether the district court correctly held that the Union's exclusive representation of a collective bargaining unit of public employees that includes Plaintiffs-Appellants does not compel them to speak or associate in violation of their First Amendment rights when long-existing precedent of the U.S. Supreme Court has rejected an indistinguishable claim in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S 271 (1984) ("*Knight*"), and when Plaintiffs-Appellants need not say or do anything and reasonable observers understand that not every individual in the bargaining unit necessarily agrees with the Union's speech.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. There are no pending cases to which it is directly related. Nevertheless, the underlying legal issues presented here overlap with those recently addressed in *Fischer v. Governor of N.J.*, 2021 U.S. App. LEXIS 1158, ___ Fed. Appx. ___ (3d Cir. January 15, 2021) (non-precedential); *LaSpina v. SEIU Pa. State Council*, 985 F. 3d 278 (2021), *Diamond v. Pa. State Educ. Ass'n,* 972 F. 3d 262 (2020), and *Oliver v. Service Employees Int'l Union, Local 668,* 830 Fed. Appx. 76 (3d Cir. 2020) (non-precedential)—cases in which this Court (1) recognized the good faith defense, (2) rejected similarly-situated plaintiffs' arguments on standing, or (3) dismissed with prejudice nearly identical claims advanced by Plaintiffs-Appellants in this case.

STATEMENT OF THE CASE

I. Background

A. Public Employee Collective Bargaining in Pennsylvania

Prior to 1970, non-uniformed, public employees in the Commonwealth of Pennsylvania had no right to engage in collective bargaining.[1] The result was an "almost complete breakdown in communication." *Pa. Labor Relations Bd. v. State*

[1] In 1968, the Pennsylvania General Assembly enacted a statute affording collective bargaining rights to police officers and firefighters who elected to join a union. *See* Policemen and Firemen Collective Bargaining Act, Act of June 224, 1968, P.L. 237, No. 111, 43 P.S. §§ 217.1-217.10 (commonly referred to as "Act 111").

College Area Sch. Dist., 337 A.2d 262, 266 (Pa. 1975) (hereinafter "*State College Area Sch. Distj.*"). Public employees' inability to bargain collectively "created more ill will and led to more friction and strikes than any other single cause." *Report and Recommendations of the Governor's Commission to Revise the Public Employe Law of Pennsylvania* at 6 (June 1968).

To address the "chaotic climate that resulted from this obviously intolerable situation," and on the recommendation of a specially-appointed Governor's Commission, *State College Sch. Dist.*, 337 A.2d at 266, the Pennsylvania General Assembly enacted the Public Employe Relations Act, Act of Jul. 23, 1970, P.L. 563, No. 195, 43 P.S. § 1101.101 *et seq* ("PERA"). PERA furthers "the public policy" of Pennsylvania to "promote orderly and constructive relationships between all public employers and their employes." 43 P.S. § 1101.101; *State College Sch. Dist.*, 337 A.2d at 266 (legislature "recognized that the right of collective bargaining was crucial to any attempt to restore harmony in the public sector").

PERA gives public employees the right to "organize, form, join, or assist in employe organizations…for the purpose of collective bargaining." 43 P.S. § 1101.401. PERA permits a bargaining unit of employees to designate an "exclusive representative" by majority vote in a secret ballot election. *Id.* §§ 1101.605, 1101.606. PERA also provides a process for employees to decertify a representative that no longer enjoys majority support. *Id*. § 1101.607. If an exclusive

representative is democratically selected, the public employer and representative have a "mutual obligation…to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]" *Id.* § 1101.701.

PERA does not require workers in a union-represented bargaining unit to become union members. Rather, PERA affirmatively protects workers' right to *decline* to become union members. *Id.* § 1101.401. Unions that serve as exclusive representatives have a duty to fairly represent the entire bargaining unit, including workers who choose not to be union members. *Pa. Labor Relations Bd. v. E. Lancaster Cty. Educ. Ass'n*, 427 A.2d 305, 307-08 (Pa. Cwlth. 1981). Workers have the right "to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative." 43 P.S. § 1101.606. Workers are also free to express their opposition to the union or its positions to their employer or the public. *See Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 521 (1991); *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 173-76 & n.10 (1976).

Prior to June 27, 2018, Pennsylvania's Public Employee Fair Share Fee Law, Act of Jun. 2, 1993, P.L. 45, No. 15, 43 P.S. § 1102 and United States Supreme Court ("Supreme Court") precedent also permitted unions and public employers to enter into collective bargaining agreements requiring *non*-members to pay "fair-share" or

"agency" fees to cover their portion of the costs of collective bargaining representation. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that First Amendment allowed public employers to require employees to pay proportionate share of costs of union collective bargaining representation but prohibited requiring non-members to pay for union's political or ideological activities).

However, on July 27, 2018, in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018) ("*Janus*"), the Supreme Court overruled its precedent in *Abood* and held that requiring non-members to pay any fee to a union as a condition of public employment "violates the First Amendment and cannot continue." 138 S.Ct. at 2486. Since *Janus*, members of Plaintiffs-Appellants' bargaining unit who are not Union members have not been obligated to pay any money to the Union.

B. Plaintiffs-Appellants' Employment and Union Membership

Under PERA, Appellee Teamsters Local 429 ("Union") is an employee organization and Appellee Lebanon County, Pennsylvania ("County") an employer organization. App. 080-081; 43 P.S. § 1101.301(1), (3) and (4). The Union and County entered into to a Collective Bargaining Agreement ("CBA") outlining the terms and conditions of employment for bargaining unit employees working for the County. App. 085. At the time Plaintiffs-Appellants filed their Complaint, the term for the then-current CBA ran from January 1, 2016 through December 31, 2019.

App. 085. That CBA included provisions on membership dues, dues deductions, maintenance of membership and fair share fees. App. 085-086.

When a bargaining unit employee of the County chose to become a union member, the Local provided him or her the membership application which included the dues authorization form. App. 104. The membership application and the dues authorization form are contained on one page and were designed by the International Brotherhood of Teamsters for use by its various locals, including the Union. App. 102. Bargaining unit employees who chose to become members would complete and sign the union membership application and then the dues authorization form. App. 104. Thus, bargaining unit employees only signed a dues authorization form if they had signed the membership application. App. 104. Prior to June 27, 2018, if a bargaining unit employee working at the County chose *not* to become a union member, he or she paid fair share fees rather than dues. App. 105.

The membership application signed by bargaining unit employees stated in pertinent part that the signatory "voluntarily" submitted the membership application and understood they could choose to be non-members. App. 102. The dues authorization form acknowledged that the signatory "authorize[d]" the County to deduct dues from their paychecks and remit the same to the Union. App. 103-04.

All four Plaintiffs-Appellants were hired by the County, with the first hired in 2003 and the last hired in 2015. App. 080, 086, 090, 092, 095. Plaintiffs Adams,

Felker, and Weaber signed union authorization cards at or near the time they were hired. App. 086, 090, 095, 101, 104, 105. Plaintiff Unger began her employment as a non-member who did not sign a membership application or a union authorization card. App. 092. Later, on November 7, 2017, Plaintiff Unger became a union member and signed a membership application and union authorization card. App. 093.

C. Plaintiffs-Appellants' Resignation from Membership in the Union.

After the Supreme Court issued its decision in *Janus*, all four Plaintiffs-Appellants wrote letters within three months requesting they no longer be members of the Union. App. 087, 090, 093, 096. These letters were sent before Plaintiffs-Appellants filed their lawsuit. App. 028-046, 087, 090, 093, 096. In response, the Union ceased dues deductions for Plaintiffs-Appellants Felker and Unger prior to the filing of their lawsuit and for Plaintiffs-Appellants Adams and Weaber six (6) days after the lawsuit was filed. App. 028-046, 087, 090, 093, 096-097. The last dues deductions taken from the paychecks of Plaintiffs-Appellants Adams and Weaber occurred one day after they filed their lawsuit. App. 028-046, 088, 096-097. In May 2019, two-and-a-half months from the filing of their lawsuit, the Union remitted to all Plaintiffs-Appellants via separate checks all membership dues received from the time each originally made his or her respective request to end membership until dues

deductions ceased, plus interest. App. 089, 091-092, 094-095, 098, 105. In mid-June, each Plaintiff-Appellant cashed the check provided by the Local. App. 105.

Plaintiffs-Appellants are no longer members of the Union, do not pay any membership dues or fair-share fees, and have received a check for the dues deductions received by the Union from the time that each made their request to revoke union membership until dues deductions ceased, along with interest.[2]

III. Procedural History

On February 27, 2019, Plaintiff-Appellants filed a two-count federal complaint against the Union, the County, the Pennsylvania Attorney General, and the three appointed members of the Pennsylvania Labor Relations Board ("PLRB"). App. 028-046. Count I sought repayment of all membership dues Plaintiff-Appellants paid to Local, as well as prospective declaratory and injunctive relief. Count II sought a declaration that exclusive representation under Pennsylvania law is unconstitutional and an injunction against its enforcement.

On June 18, 2019, the Union filed a motion for summary judgment, seeking dismissal of all claims asserted against it.[3] The Union's motion was supported by a

[2] After the Magistrate Judge issued his reports and recommendations, the Union and County executed a new CBA that has no provisions regarding maintenance of membership or fair-share fees.

[3] Previously, the district court, upon consent of all parties, converted Appellees' motions to dismiss into motions for summary judgment.

brief and a Joint Statement of Material Facts Not in Dispute ("Joint Statement"), which all Appellees joined. Subsequently, on July 16, 2019, Plaintiffs-Appellants filed their own motion for summary judgment and a supporting brief, opposing the Union's motion and supporting their motion. Plaintiffs-Appellants adopted the Joint Statement as the facts of the case. On August 13, 2019, the Union, and other Appellants, filed response briefs in opposition to Plaintiffs-Appellants, which were supported by a Supplemental Joint Statement of Facts Not in Dispute, which all Appellees joined, and Plaintiffs-Appellants did not contest.

On December 5, 2019, Magistrate Judge Martin C. Carlson ("Magistrate Judge") issued two reports and recommendations regarding the several motions for summary judgment. App. 108-165. In sum, he recommended that the motions for summary judgment filed by all Appellees be granted and that the one filed by Plaintiffs-Appellees be denied. App. 127, 164. The Magistrate Judge concluded that (1) all prospective monetary, declaratory, and injunctive claims for relief were moot, (2) Plaintiffs-Appellants' request for retroactive payment of membership dues lacks merit and is barred by the good faith defense, and (3) the constitutional challenge to exclusive representation fails based on long-existing Supreme Court precedent. App. 128-155.

Plaintiffs-Appellants filed objections to the two reports and recommendations on December 17, 2020, to which Appellees responded. On March 31, 2020, the

Honorable Sylvia M. Rambo adopted the report and recommendation regarding the claims against the Union in its entirety, granted the Union's motion for summary judgment, and denied Plaintiffs-Appellants' motion for summary judgment. App. 007-008. On April 15, 2020, Plaintiffs-Appellants filed a timely Notice of Appeal, App. 003, and later filed their Opening Brief ("AOB") in support of their appeal on January 14, 2021. The Union now timely files its Response Brief.

SUMMARY OF ARGUMENT

The district court properly granted summary judgment to the Union.

1. Plaintiffs-Appellants' claim against the Union for damages arising from their pre-resignation payment of dues fails because they were not *compelled* to join the Union or pay the corresponding membership dues, as required to establish a violation of her First Amendment rights. *Cf. Janus*, 138 S.Ct. at 2464 (First Amendment prohibits "*compelled* subsidization" of private speech) (emphasis added). Each Plaintiff-Appellant chose to join the Union, and their voluntary decision to become a Union member and pay dues was an *exercise* of their First Amendment right to associate, not an infringement thereof. That Plaintiffs-Appellants regret the decision that they made does not render their decisions ones that were compelled in violation of the First Amendment.

Plaintiffs-Appellants contend that their decision to join the Union was compelled because individuals who made the opposite decision *not* to join the Union

were at that time required to pay fair-share fees (a requirement consistent with then-binding Supreme Court precedent that was subsequently overruled by *Janus*). But Plaintiffs-Appellants' right to refrain from joining the Union was well-established when they chose to join, and the mere fact that those who do *not* join now face different circumstances does not render their prior decision involuntary.

Plaintiffs-Appellants do not have a First Amendment right to disregard their promise to pay union dues in exchange for the rights and benefits of union membership (which they have already received and cannot return). *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) (no First Amendment right to renege on voluntarily assumed obligations). That conclusion is not changed simply because the alternative to joining the Union is now more appealing. *See, e.g.*, *Brady v. United States*, 397 U.S. 742 (1970) (subsequent invalidation of death penalty statute did not invalidate plea bargain made to forego possible death sentence). Because Plaintiffs-Appellants' decision to join the Union and pay union dues did not infringe any First Amendment rights, the Court need not consider whether they validly "waived" such rights. But if a waiver analysis were required, each Plaintiff-Appellant's membership agreement would constitute a valid waiver.

Plaintiff-Appellants' damages claim against the Union based on their pre-resignation payment of membership dues fails for the separate and independent reason that their payment of dues to the Union was not conduct undertaken "under

color of state law" for purposes of Section 1983. The source of Plaintiffs-Appellants claimed deprivation (their payment of union dues) was their own decision to join the Union and pay the associated membership dues, not any requirement imposed by the County or the Commonwealth. The County's ministerial role in implementing their decision by deducting membership dues from their paychecks pursuant to their voluntary authorization does not transform their union membership and dues payments into state action or make the Union a state actor subject to Section 1983 liability. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) ("That the State *responds* to such actions by adjusting benefits does not render it *responsible* for those actions.") (emphasis altered).

Finally, even if Plaintiffs-Appellants could establish the elements of a Section 1983 claim for damages, their claim would still fail because the Union acted in good-faith reliance on then-valid Pennsylvania laws and then-binding Supreme Court precedent, and private parties have a "good faith" defense to monetary liability under such circumstances. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994); *Diamond*, 972 F.3d at 273; *Oliver*, 830 Fed. Appx. at 80.

2. Plaintiffs-Appellants lack standing to seek prospective declaratory relief with respect to the payment of union dues authorized under the prior CBA and state law. At the time Plaintiffs-Appellants filed their lawsuit, all four had already resigned their Union membership and two had their dues deductions ended. The

other two had dues deductions cease being taken from their paychecks one-day after the lawsuit was filed. None are any longer subject to dues deductions provisions in the CBA or state law that they sought to challenge, and there is no reasonable likelihood they would be subject to those provisions in the future.

3. Plaintiffs-Appellants' First Amendment challenge to exclusive-representative collective bargaining is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which rejected a First Amendment challenge to an indistinguishable collective bargaining system. Even if that were not the case, Plaintiffs-Appellants' challenge would be meritless. The Supreme Court has never upheld a claim of compelled speech or compelled expressive association where—as here—the complaining party is not required to do or say *anything* and there is no public perception that the complaining party endorses any message or group.

STANDARD OF REVIEW

An order granting summary judgment is reviewed *de novo*. *See Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 692 (3d Cir. 1991). Plaintiffs have the burden to establish standing. *Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009). The district court's legal conclusions regarding standing and mootness are reviewed *de novo*, while its related factual determinations are reviewed for clear error. *See Perelman v. Perelman*, 793 F.3d 368, 373 (3d Cir. 2015).

ARGUMENT

I. Plaintiffs-Appellants Are Not Entitled to Monetary Damages for Their Voluntary, Pre-Resignation Payment of Union Dues.

Plaintiff-Appellants' claims for monetary damages in this matter are virtually indistinguishable from those this Court recently considered and rejected in *LaSpina*, 985 F.3d 278, 2021 U.S. App. LEXIS 1338, at *11-27 and *Oliver*, 830 Fed. Appx. at 79-80. Like the plaintiff in those cases, Plaintiffs-Appellants seek monetary damages from the Union for the membership dues they paid prior to resigning their Union membership, contending that paying those dues violated their First Amendment rights against compelled speech and association. *See* App. 037-41.[4] Like plaintiffs in *LaSpina* and *Oliver*, Plaintiffs-Appellants' claim for a refund of dues paid pursuant to their dues authorizations agreements is meritless.

To establish this Section 1983 claim for damages, Plaintiffs-Appellants were required to establish "[1] … the violation of a right secured by the Constitution and laws of the United States, and [2] … that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). While the Magistrate Judge and the district court did not expressly decide if these

[4] Plaintiffs-Appellants effectively concede that any claim for a refund of dues paid after their resignations are moot because those payments were already refunded to them. *See* AOB 20 (admitting that Union refunded dues paid after resignations but arguing that Plaintiffs-Appellants are entitled to refund of dues paid before then).

prongs were met, Plaintiffs-Appellants cannot establish either requirement and, even if they could, the Union's good faith defense, recognized by the Magistrate Judge and adopted by the district court, would preclude monetary liability.

A. Plaintiffs-Appellants' payment of membership dues while they voluntarily remained a union member did not violate their First Amendment rights.

1. Plaintiffs-Appellants were not compelled to join the Union.

Plaintiffs-Appellants argue that their decision to join the Union and pay membership dues violated their First Amendment rights against compelled speech and association because *Janus* held that the First Amendment prohibits states from requiring that public employees who make the *opposite* choice—*i.e.*, public employees who *decline* to join the union—pay fair-share fees to the union. AOB 14-17. But there is no evidence that Plaintiffs-Appellants were compelled to join the Union in violation of their First Amendment right of free association when they were not required to join or coerced into doing so and did so voluntarily. App. 102-104. Their voluntary decision to pay union dues rather than fair-share fees was not "compelled" in any manner that could infringe their First Amendment rights. *See Janus*, 138 S.Ct. at 2464 (First Amendment prohibits "*compelled* subsidization" of private speech) (emphasis added).

At the time each Plaintiff-Appellant began his or her employment with the County, they had a right to join the Union and pay membership dues or refrain from

joining the Union and pay a fair-share fee. App. 102-103. By signing the membership application, Plaintiffs-Appellants understood that they had the right to decline union membership. App. 102-103. Moreover, Plaintiffs-Appellants' right to refrain from joining the union was well-established at that time. *See* 43 P.S. § 1101.401 (establishing "right to refrain" from membership); *Abood*, 431 U.S. at 235-36; *Smith v. Superior Court, Cty. of Contra Costa*, 2018 U.S. Dist. LEXIS, 196089, at *3 (N.D. Cal. Nov. 16, 2018) (recognizing that "First Amendment right to opt out of union membership was clarified in 1977" in *Abood*) (hereinafter "*Superior Court*").

Plaintiffs-Appellants nevertheless chose to join the Union and authorized the County to deduct membership dues from their paycheck. App. 086, 090, 095, 101, 104, 105. In fact, Plaintiff-Appellant Unger first chose to be a non-member who paid fair-share fees and later decided to become a member who paid union dues. App. 092-093. In exchange, Plaintiffs-Appellants received the full rights and benefits of union membership. App. 102. In joining the Union, Plaintiffs-Appellants exercised their protected right to associate with their co-workers to improve their collective terms and conditions of employment. Their choice to engage in such union associational activity is *protected*, not proscribed, by the First Amendment. *See, e.g., AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("Union membership

is protected by the right of association under the First and Fourteenth Amendments."); *Oliver*, 830 Fed. Appx. at 79 n.3.

There was "no legal compulsion" for Plaintiff-Appellants to join the Union. Nor were Plaintiffs-Appellants compelled to join the Union by any other means. They have not alleged that they were threatened or intimidated into joining the Union, and "the Supreme Court has held that the background social pressure employees may feel to join a union is 'no different from the pressure to join a majority party that persons in the minority always feel' and 'does not create an unconstitutional inhibition on associational freedom.'" *Knight*, 465 U.S. at 290; *see also Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1219 (9th Cir. 2018). Where, as here, "the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily." *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 292-93 (4th Cir. 1991).

That Plaintiffs-Appellants would have been required to pay a fair-share fee had they chosen *not* to join the Union—a requirement that was constitutional under then-binding Supreme Court precedent subsequently overruled by *Janus*—does not change the analysis. *Janus* was a case about *non-union members*, and it "says nothing about people [who] join a Union, agree to pay dues, and then later change their mind about paying union dues." *Belgau v. Inslee*, 2018 U.S. Dist. LEXIS

175543, 212 L.R.R.M. 3163, at *5 (W.D. Wash. Oct. 11, 2018), *aff'd*, 975 F.3d 940 (2020). As this Court stated in *Oliver*, Plaintiffs-Appellants "may now regret [their] prior decision to join the Union, but that does not render [their] knowing and voluntary choice to join nonconsensual…. Indeed, there was an economic incentive to decline membership if [they] did not want to be associated with the Union—agency fees were nearly half the cost of membership dues." 830 Fed. Appx. at 80.

This Court in other cases has rejected plaintiffs' claims seeking repayment of union dues when he or she voluntarily joined a union. *LaSpina*, 985 F.3d 278, 2021 U.S. App. LEXIS, at *12 ("Unlike the plaintiff in *Janus*, LaSpina was a member of the Union and paid full membership dues, not a nonmember who paid compulsory fair-share fees."); *Fischer*, 2021 U.S. App. LEXIS 1158, at *17-18 (rejecting plaintiffs' claim that "*Janus* provides them a right to terminate their payments to [the union] at any time notwithstanding the membership agreements that they signed….").[5] Plaintiffs-Appellants "voluntarily chose to pay membership dues in exchange for certain benefits, and '[t]he fact that plaintiffs would not have opted to

[5] Other federal courts have likewise rejected claims that union membership was compelled by virtue of the fair-share fee requirement. *See, e.g.*, *Anderson v. SEIU Local 503*, 400 F. Supp. 3d 1113, 1116 (D. Or. 2019); *Bennett v. AFSCME, Council 31*, U.S. Dist. LEXIS, at *9-10 (C.D. Ill. Mar. 31, 2020); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F. Supp. 3d 1108, 1118 (S.D. Cal. 2020); *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1024 (D.N.M. 2020); *Seager v. UTLA*, 2019 U.S. Dist. LEXIS 140492, at *5 (C.D. Cal. Aug. 14, 2019).

pay union membership fees if *Janus* had been the law at the time of their decision does not mean their decision was therefore coerced.'" *Babb v. California Teachers Assn.*, 378 F. Supp. 3d 857, 877 (C.D. Cal. 2019) (quoting *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008) (D. Alaska 2019)).[6]

2. There is no First Amendment right to renege on contractual obligations.

Plaintiffs-Appellants' Section 1983 claim for damages is also foreclosed because, by joining the Union and authorizing dues deductions, they entered into a binding contract with the Union. *See Adams v. Int'l Bhd. Of Boilermakers*, 262 F.2d 835, 838 (10th Cir. 1958) ("It is well settled that the relationship existing between a … union and its members is contractual[.]"); *see also NLRB v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987) (dues-deduction authorization is a contract). As this Court recently observed, there is no First Amendment right to disregard contractual dues obligations, *Fischer*, 2021 U.S. App. LEXIS 1158, at *19. Thus, Plaintiffs-Appellants certainly have no right to claw back dues they paid to the Union

[6] This Court has recognized that a change in First Amendment jurisprudence does not change contractual obligations into which an individual enters. *Fischer*, 2021 U.S. App. LEXIS 1158, at *19. The *Fischer* Court explained that plaintiffs who voluntarily agree to "enter into membership agreements with [a union], rather than abstain from membership and, instead, pay nonmember agency fees … did so in exchange for valuable consideration." *Id*. This Court concluded: "*Janus* does not give [p]laintiffs the right to terminate their commitments to pay union dues unless and until those commitments expire under the plain terms of their membership agreements." *Id*. at *19-20.

in exchange for consideration they already received and cannot return—*i.e.*, the rights and benefits of membership. App. 102-103.

Plaintiffs-Appellants argue that their membership agreements/dues authorizations were not a valid contract because "*Janus* had not yet been decided" when they joined the Union. *See* AOB 12. This Court expressly rejected this argument in *Fischer*, holding:

> *"Janus* does not extend a First Amendment right to avoid paying union dues" when those dues arise out of a contractual commitment that was signed before *Janus* was decided. *Belgau v. Inslee*, [975 F.3d 940, 951 (9th Cir. 2020)] (collecting cases)."

2021 U.S. App. LEXIS 1158, at *19. Other courts to address the issue have done the same. *See, e.g.*, *Cooley v. Cal. Statewide Law Enf't Ass'n*, 385 F. Supp. 3d 1077, 1079 (E.D. Cal. 2019) (citing *Cohen* for proposition that "*Janus* did not automatically undo" union member's voluntary agreement to become dues-paying member); *Smith v. Bieker*, 2019 U.S. Dist. LEXIS 99581 (N.D. Cal. June 13, 2019), at *4 (N.D. Cal. June 13, 2019) (*Janus* did not undo membership agreement because "changes in intervening law—even constitutional law—do not invalidate a contract").[7]

[7] *See also, e.g., Smith v. Teamsters Local 2010*, 2019 U.S. Dist. LEXIS 210904, at *29 (C.D. Cal. Dec. 3, 2019) ("*Janus* is distinguishable from the present case because Plaintiffs consented to dues deductions when they signed the Membership Agreement and became union members. Conversely, Janus never agreed to become a union member and never agreed to pay union fees.") (hereinafter "*Teamsters Local*

While these decisions are not technically binding on the Court in this matter, their reasoning and rationale is consistent with well-settled precedent holding that contractual agreements are not invalidated by intervening changes in the law. *See, e.g., Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 274-75 (3d Cir. 2002) (Plaintiff could not escape its contractual obligation when it made an agreement "in exchange for valuable consideration," and it could not be revisited simply because a subsequent Supreme Court decision, if issued earlier, may have affected the plaintiff's initial choice); *Brady*, 397 U.S. 742 (Criminal defendant could not rescind a plea agreement he entered under the pressure induced by a death penalty statute later found unconstitutional); *Dingle v. Stevenson*, 840 F.3d 171, 175-76 (4th Cir. 2016) (Defendant had no right to renege based on later legal developments because "[c]ontracts in general are a bet on the future"); *United States v. Johnson*, 67 F.3d 200, 201-02 (9th Cir. 1995) (Defendant's agreement not to challenge sentence encompassed appeals arising out of law enacted after plea, even though "the sentencing law changed in an unexpected way").

2010"); *Anderson*, 400 F. Supp. 3d at 1117 ("[B]ecause Plaintiffs were voluntary union members, *Janus* does not apply[.]"); *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1016 (W.D. Wash. 2019) ("*Janus* does not apply here—Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here."); *Superior Court*, 2018 U.S. Dist. LEXIS 196089, at *3 ("[I]t's not the rights clarified in *Janus* that are relevant to [plaintiff.]").

3. No waiver analysis is required, but even if it were, Plaintiffs-Appellants' voluntary dues deduction authorization agreement would constitute a valid waiver.

For the reasons stated above, Plaintiffs-Appellants First Amendment rights were not infringed by their voluntary decision to join the Union and pay their dues via payroll deductions. That being so, this Court need not engage in any "waiver" analysis to conclude that the subsequent deduction of those dues from Plaintiffs-Appellants' paycheck did not violate their First Amendment rights, much less consider whether their waiver was "knowing, voluntary, and intelligent," as Plaintiffs-Appellants suggest. *See Cohen*, 501 U.S. at 668 (concluding that newspaper's promise not to publish plaintiff's identity was enforceable without conducting any waiver analysis); *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973) ("Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection."); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972) (assuming, but not deciding, that "knowing and voluntary" waiver standard applied, and concluding contract satisfied standard); *Fischer*, 2021 U.S. App. LEXIS 1158, at *20 n. 18 ("Because enforcement of Plaintiffs' membership application agreements does not violate the First Amendment given that those agreements are enforceable under laws of general applicability …, we reject Plaintiffs' argument that Defendants were required to obtain an affirmative First Amendment wavier

from Plaintiffs before deducting union dues from their paychecks."); *LaSpina*, 2021 U.S. App. LEXIS 1338, at *23-24 (rejecting plaintiff's argument that the court must engage in a waiver analysis when plaintiff lost standing to assert her claims for declaratory relief against the union when it processed her request to leave union membership).[8]

But even assuming that a waiver analysis was required and that the "knowing, voluntary, and intelligent" standard applied, Plaintiffs-Appellants' membership and dues authorization agreements would constitute a valid waiver. The membership agreement clearly stated their intent to apply for membership in the Union: "I voluntarily submit this Application for Membership in Local Union … so that I may fully participate in the activities of the Union." App. 102-103. The membership agreement also clearly states that non-membership is an option. App. 103. Plaintiff-Appellants' dues authorization agreements make plain that the signatory's intent is to authorize dues deductions: "I … hereby authorize my employer to deduct from

[8] The passage in *Janus* about "waiver" concerned a non-member who had not affirmatively chosen to join a union and pay dues. *Janus* did not address union membership agreements at all, much less announce a revolution in contract law. *See, e.g.*, *Teamsters Local 2010*, 2019 U.S. Dist. LEXIS 210904, at *29 (noting that "[n]umerous district courts … have declined to extend *Janus* to cover union members who voluntarily signed membership agreements but then resigned in the wake of *Janus* with the goal of immediately revoking their dues deductions" and collecting cases).

my wages each and every month an amount equal to the monthly dues, initiation fees and uniform assessments of [the] Local Union…." App. 103-104.

Plaintiffs-Appellants' entry into a contract that, *by its terms*, stated they were joining the Union waived any right not to join the Union. Indeed, it is difficult to imagine more "clear and compelling" evidence of Plaintiffs-Appellants' waiver" of their right not to join the Union than their voluntary, written agreement to join. *See Oliver*, 830 Fed. Appx. at 79 n.3 ("[B]y signing the union membership card, [plaintiff] was exercising her free association right to join the Union, effectively waiving her right not to support the Union."); *Bennett*, 2020 U.S. Dist. LEXIS 59426, at *11-14 (rejecting argument that a pre-*Janus* union membership agreement was not a valid waiver); *Superior Court*, 2018 U.S. Dist. LEXIS 196089, at *3 (same).

Plaintiffs-Appellants' cite *Curtis Publishing Company v. Butts*, 388 U.S. 130, 144-45 (1967), for the proposition that Plaintiffs-Appellants' waivers were inadequate because they could not "waive a right before knowing of the relevant law." AOB 15-16. But when they each joined the Union, their right not to join—which is the relevant right here—was well-established. *See supra* at 17-18; *see also Superior Court*, 2018 U.S. Dist. LEXIS 196089, at *3 ("[I]t's not the rights clarified in *Janus* that are relevant …. Smith's First Amendment right to opt out of union membership was clarified in 1977 [in *Abood*], and yet he waived that right by

affirmatively consenting to be a member of Local 2700."); *see also* 43 P.S. § 1101.401.[9] Moreover, Plaintiffs-Appellants understood they had the right not to join. *See* 102-103. They therefore cannot show that their "waivers" were unintelligent or involved unknown rights. *Cf. Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 U.S. Dist. LEXIS 12545, at *9 (E.D. Cal. Jan. 25, 2019) (plaintiff "knowingly agreed" to become dues-paying member of union, rather than agency fee-paying nonmember, because cost difference was minimal; decision was therefore "freely-made choice"). Plaintiffs-Appellants' argument that their "waivers" were invalid because they did not know about the not-yet-issued *Janus* decision is also foreclosed by settled law that subsequent legal developments do not permit a party to abrogate a contract simply because, had the legal development occurred earlier, the party may have made a different choice about whether to enter into the contract. *See supra* at 19-21.

[9] *Curtis* is also inapposite because the defendant in *Curtis* did not affirmatively enter into an agreement to refrain from asserting the right at issue in exchange for consideration.

B. Plaintiffs-Appellants' pre-resignation payment of membership dues was not caused by a right, privilege, or rule of conduct enforced by the Commonwealth or County, and the Union was not a state actor with respect to those payments.

As the district court in *Oliver* recognized under similar facts and claims as in this case, a Section 1983 claim for damages will fail for the independent reason that plaintiff cannot establish "that the conduct allegedly causing the deprivation of a federal right [is] fairly attribute[ed] to the State," as it must be to establish a Section 1983 claim. 415 F. Supp. 3d 602, 608-609 (E.D. Pa. 2019) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 1982)).

A private defendant's conduct is "fairly attributable to the State" only if the (1) the deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* (2) the defendant can "fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. While this Court in *Oliver* never applied *Lugar*'s test, but instead decided the matter on other grounds, Plaintiffs-Appellants satisfy neither requirement.

1. Plaintiffs-Appellants paid union dues because of their private agreement with the Union.

The reason Plaintiffs-Appellants paid dues to the Union while they were members was that they signed a membership agreement joining the Union, agreed to pay the requisite union membership dues, and authorized the deduction of those

dues from their paychecks. This was a private agreement between the Union and Plaintiffs-Appellants. *See supra* at 19-21. Neither the Commonwealth nor the County required them to enter into that agreement. 43 P.S. § 1101.401 (public employees have statutorily protected "right to refrain" from "any or all" organizing activities, including union membership). Indeed, under Pennsylvania law public employers are *prohibited* from "interfering, restraining, or coercing" employees "in the exercise of" their right to refrain from union activity. 43 P.S. § 1101.1201.

Given that Pennsylvania law protects an individual's choice to join or not join a union, it is hardly surprising that this Court has repeatedly recognized that a signed union membership card constitutes a private and valid agreement between a union and the signatory demonstrating his or her consent to join the union. *LaSpina*, 2021 U.S. App. LEXIS 1338, at *15 ("[U]nlike the plaintiff in Janus, *LaSpina* joined the Union and paid membership dues."); *Fischer*, 2021 U.S. App. LEXIS 1158, at 18 n.17 ("[N]umerous jurisdictions have concluded that union membership agreements are enforceable contracts and Plaintiffs provide no authority to the contrary."); *Oliver*, 830 Fed. Appx. at 80 ("By choosing to become a Union member, [plaintiff] affirmatively consented to paying union dues.").

Nor does the mechanism by which the Union collected Plaintiffs-Appellants' membership dues—*i.e.*, via payroll deduction—mean that their payment of dues to the Union was caused by state action. Plaintiffs-Appellants' challenge is to the *fact*

of their union dues payments, not the *process* by which the Union collected them. The County's purely ministerial role in deducting dues pursuant to Plaintiffs-Appellants' written authorizations does not make it "*responsible* for the specific conduct of which the plaintiff complains," as is necessary to establish state action. *Blum*, 457 U.S. at 1004 (emphasis in original); *see Bain v. Cal. Teachers Ass'n*, 2016 U.S. Dist. LEXIS 197652, at *17 (C.D. Cal. May 2, 2016) ("The government's ministerial obligation to deduct dues for members and agency fees for nonmembers under a collective bargaining agreement does not transform decisions about membership requirements into state actions."); *Knox v. Westly*, 2006 U.S. Dist. LEXIS 61072, at *11 (E.D. Cal. Aug. 16, 2006) (no state action when union unilaterally increased dues and fees, even though State implemented change through payroll deduction); *see also Sament v. Hahnemann Med. Coll. & Hosp. of Philadelphia*, 413 F.Supp. 434, 439 (E.D. Pa. 1976). Payroll deduction provided a convenient means for Plaintiffs-Appellants to comply with their contractual membership obligations to the Union. In the absence of those deductions, Plainitffs-Appellants would have been required to pay the same dues through some other mechanism, such as direct debits from their bank account or mailing a check to the Union each month.

Plaintiffs-Appellants' reliance on *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*") and other fair-share fees cases to support their "state

action" argument fails. They ignore the critical difference between voluntary union membership dues and compulsory fair-share fees. The public employer in *Janus II* deducted fair-share fees from the plaintiff's pay over his objection because state law permitted the public employer and the union to enter into a collective bargaining agreement requiring the payment of those fees. The sources of the alleged deprivation in that case were thus a *state statute* and a contract *between the public employer and the Union*. This Court recently recognized this distinction in *LaSpina*: "[Plaintiff[does not advance the paradigmatic *Janus* injury. Unlike the plaintiff in *Janus*, [plaintiff] was a member of Union and paid full membership dues, not a nonmember who paid compulsory fair-share fees." 2021 U.S. App. LEXIS 1338, at *12.[10]

[10] Plaintiffs-Appellants argue that their dues deduction authorizations were "a three-party assignment, not a traditional two-party contract." AOB 23-24. Their theory is that they directed their employer to assign a portion of their wages to the Union. AOB 24. But the dues authorization agreement does not assign to the Union Plaintiffs-Appellants' *right to payment*. *See* App. 102-103. As recognized by the district court in *Oliver*, "[i]n deducting dues from the employee's pay [the Commonwealth] is simply acting as a transfer agent carrying out the separate agreement between the union and its member." 415 F. Supp. 3d at 611. For these reasons, the district court in *Oliver* recognized that plaintiff's characterization of her dues authorization form, the same one advanced in this case by Plaintiffs-Appellants, is "unrealistic and artificial." *Id*. In any event, even Plaintiffs-Appellants had assigned a portion of their wages to the Union, that private agreement still would not constitute state action. *See supra*.

As was the case in *LaSpina* and *Oliver*, the County in this case merely implemented the private membership and voluntary payroll deduction agreements between each Plaintiff-Appellant and the Union. That is insufficient to satisfy the first prong of the state action test. *See Cohen*, 501 U.S. at 672 (finding no First Amendment infringement when the government simply enforced agreement between private parties.

"If the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning." *White v. Commc'ns Workers, Local 1300*, 370 F.3d 346, 351 (3d Cir. 2004). The source of Plaintiffs-Appellants' obligation to pay union membership dues—and thus the source of any claimed constitutional deprivation arising from those payments—was not the Commonwealth or the County, but their own private agreement with the Union. As this Court made clear in *White*, such a private agreement does not satisfy the first element of the state action test.

2. The Union is not a state actor.

The second requirement for state action, that the defendant can "fairly be said to be a state actor," was also not satisfied. *See Lugar*, 457 U.S. at 937-39. The Third Circuit has identified two categories of conduct by private entities that may satisfy this requirement: (1) conduct involving "an *activity* that is significantly encouraged by the state or in which the state acts as a joint participant," and (2) conduct for

which the "*actor* ... is controlled by the state, performs a function delegated by the state, or is entwined with government policies or management." *Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005) (emphases in original).

In *Oliver*, which involves similar facts and similar claims, the district court concluded, it is "simple to dispense with the second category of cases identified by *Leshko*" because the union in question "is not an actor controlled by the state, is not performing a function delegated by the state, and is not entwined with government policies or management." 415 F. Supp. 3d at 610. As was the case in *Oliver*, the Union stands in an adversarial position in negotiations with the County, and membership dues deductions are made pursuant to a contractual agreement that must be renegotiated through arms-length bargaining. *See* App. 085-087; *see also Thomas v. Newark Police Dep't*, 2013 U.S. Dist. LEXIS 31342, at *3 (D.N.J. Mar. 7, 2013) ("If anything, the role of SOA is adversarial to the Department, especially during contract negotiations"). The Union's internal membership management practices and its private, voluntary agreements with its members cannot be characterized as any kind of *state* function.

This case also does not involve "an *activity* that is significantly encouraged by the state or in which the state acts as a joint participant." *Leshko*, 423 F.3d at 340. As discussed above, union membership is optional under Pennsylvania law, and Pennsylvania law makes it *unlawful* for a public employer to "encourage or

discourage membership" in any union. *See* 43 P.S. §§ 1101.401, 1101.1201. The payment of union dues is therefore not conduct "encouraged by the state."

Again, the County's ministerial role in deducting dues is not sufficient to render it a "joint participant" in Plaintiffs-Appellants' agreement to join the Union. The same is true with respect to the Commonwealth; it is not a "joint participant" simply because the Pennsylvania General Assembly enacted provisions of PERA permitting dues deductions. "That the State responds to [the Union's and individual employees'] actions by" deducting dues pursuant to the terms of their private agreements "does not render [the State] *responsible* for those actions." *Blum*, 457 U.S. at 1005 (emphasis in original) (State's adjustment of Medicaid benefits in response to hospital's decisions to transfer nursing home patients did not turn those private decisions into state action); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. at 52 ("Action taken by private entities with the mere approval or acquiescence of the State is not state action."); *id.* at 54-55 (insurance companies' suspension of workers' compensation benefits pursuant to statutory authorization was not state action); *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 524-26 (3d Cir. 1994) (private accrediting entity's decision to withdraw accreditation from hospital residency program was not "state action," even though state agency based approval of residency programs on private entity's accreditation

decisions; State's "'mere approval of or acquiescence in' the decision [of a private actor] is not enough" to create state action) (quoting *Blum*, 457 U.S. at 1004).

In sum, the collection of dues by the Union is a creation of a private contract with each bargaining unit employee who chooses to become a member and does not constitute state action. "The union's right to collect plaintiff's dues [was] not created by the Commonwealth; it [was] created by the union's contract with [her]. The Commonwealth's role as employer … [was] strictly ministerial, implementing the instructions of the employee. The union would ultimately collect its due[s] regardless, but by some other means." *Oliver*, 415 F. Supp. 3d at 611-12. Plaintiffs-Appellants' private dues authorization, and the County's ministerial role in enforcing it, does not transform their membership and payment of membership dues into state action or make the Union a state actor. *See Am. Mfrs.*, 526 U.S. at 54-55; *White*, 370 F.3d at 351.

C. The Union's good faith defense also bars Plaintiffs-Appellants' damages claim.

Plaintiffs-Appellants damages claim also fails for a third reason. Their claim is premised on their contention that, by collecting fair-share fees from non-members to pay for collective bargaining representation, the Union compelled them to agree to join the Union and pay dues. But every court to consider the issue, including the Magistrate Judge and the district court below, has concluded that unions have a good faith defense to retrospective Section 1983 damages liability for having collected

pre-*Janus* fair-share fees, because unions were following state law and then-controlling Supreme Court precedent. *See* App. 007-008, 147-150; *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020) (holding *Janus* does not create retroactive liability to repay fair share fees); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020); *Ogle v. Ohio Civil Serv. Emps. Ass'n, AFSCME Local 11*, 951 F.3d 794 (6th Cir. 2020) *cert. denied*, 2021 U.S. LEXIS 729 (January 25, 2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, 2021 U.S. LEXIS 698 (January 25, 2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, 2021 U.S. LEXIS 631 (January 25, 2021); *Janus II*, 942 F.3d at 367, *cert. denied*, 2021 U.S. LEXIS 695 (January 25, 2021); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, 2021 U.S. LEXIS 717 (January 25, 2021); *see also Danielson*, 945 F.3d at 1104 n.7 (collecting numerous district court decisions). The reasoning of these decisions is correct, and Plaintiffs-Appellants' contrary arguments lack merit.

To avoid this conclusion Plaintiffs-Appellants make several erroneous claims arguing that this Court should reject the good faith defense in this matter. First and most surprisingly, they assert that this Court should ignore its own recent precedent in *Diamond*, *supra*, a case involving the payment of fair-share fees and plaintiffs attempt to require the reimbursement of those fees prior to *Janus*. *Id.* at 268. Plaintiffs-Appellants argue that only Judge Rendell expressly held the good faith

defense applies, and Judge Fisher, who concurred in the result, did not adopt Judge Rendell's reasoning regarding the same. AOB 28-32.

Plaintiffs-Appellants' reasoning is in error. While it is true Judge Fisher did not agree with Judge Rendell's analysis of the good faith defense, he acknowledged that "[c]ourts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision." *Id*. at 274. Ultimately, he agreed that the union should *not* be held retroactively liable for fair share fees because plaintiff failed to assert facts "suggesting that their payments were either sufficiently involuntary or exacted on a fraudulent basis" and concurred with Judge Rendell in the result, *i.e.*, that the union had no retroactive liability. *Id*. at 285; *see also Oliver*, 830 Fed. Appx. at 80 (discussing *Diamond* and adopting good faith defense). Thus, the *Diamond* holding stands for the proposition that unions are not retroactively liable for fair-share fees paid prior to *Janus*. Given that *Diamond* is a precedential decision and Plaintiffs-Appellants have offered no evidence that their voluntary choice to become members was either involuntary or based on fraud, *Diamond* is applicable.

Second, this Court in *Oliver*, consisting of a different three-judge panel than those who heard *Diamond*, unanimously concluded that the good faith defense is

applicable in a case, such as this one, in which plaintiffs sought repayment of membership dues based a similar argument advanced by the Plaintiffs-Appellants. *See Oliver*, 830 Fed. Appx. at 77-78. Relying upon *Diamond*, this Court concluded: "[Plaintiff's] appeal fails under *Diamond*. As in *Diamond*, the Union relied on PERA and *Abood* to determine, in good faith, that it could lawfully collect fair-share fees from nonmembers." *Id*. at 80. Thus, this Court concluded that "by choosing to become a Union member, [plaintiff] affirmatively consented to paying union dues …. [and] was not entitled to a refund." *Id*. While the *Oliver* decision is non-precedential, it constitutes persuasive authority that the good faith defense should apply in this case—which involves similar facts and claims.

Third, Plaintiffs-Appellants' request to reject the good faith defense is based on a flawed analysis of *Jordan*, *supra*. Plaintiffs-Appellants wrongly claim that *Jordan* limits the good faith defense to constitutional torts for which malice and lack of probable cause are elements of the constitutional claim, based on analogies to the common law. AOB 32-35. But *Jordan* concluded that the good faith defense was available and discussed the showing required to establish the defense *before* considering the separate and distinct mens rea element of procedural due process claim being pursued in that case. *See* 20 F.3d at 1275-78. Equally to the point, as the other circuits to consider the issue have concluded, the closest common law tort analogy here is to abuse of process, which is the same common law tort analogy

drawn in *Jordan. See Ogle*, 951 F.3d at 797; *Lee*, 951 F.3d at 392 n.2; *Danielson*, 945 F.3d at 1102*; Janus II*, 942 F.3d at 365.

Fourth, Plaintiffs-Appellants wrongly contend that recognition of a good faith defense "is incompatible with the text of Section 1983." AOB 35. But this Court already concluded otherwise in *Jordan.* And the Supreme Court long ago rejected Plaintiffs-Appellants' approach to applying Section 1983, concluding instead that Congress intended the contours of Section 1983 immunities and defenses to be judicially developed. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (although statutory text of Section 1983 "on its face" admits of no immunities or defenses to liability, view that statute "should be applied as stringently as it reads …. has not prevailed").

Fifth, Plaintiffs-Appellants contend that the adoption of a Section 1983 good faith defense for private parties is "incompatible with the statutory basis for qualified immunity and [the Union's] lack of that immunity." AOB 36-39. Again, this argument is foreclosed by *Jordan*, which recognized a good faith defense for private parties. As the Supreme Court explained in *Wyatt v. Cole*, 504 U.S. 158 (1992), both background common law doctrines and principles of equality and fairness suggest that private parties, who cannot invoke the same qualified immunity as government officials, should still be entitled to assert an affirmative defense to Section 1983

liability based on good-faith reliance on presumptively valid state laws. *Id.* at 168-69.

Sixth and finally, Plaintiffs-Appellants urge that applying the good faith defense is "inconsistent with equitable principles." AOB 39-41. To the contrary, "[t]he Union bears no fault for acting in reliance on state law and Supreme Court precedent"; Plaintiffs-Appellants received membership rights and benefits in exchange for their dues, "an exchange that cannot be unwound"; and "it would not be equitable to order the transfer of funds from one innocent actor to another, particularly where the latter received a benefit from the exchange." *Danielson*, 945 F.3d at 1103 (citations omitted).

D. Plaintiffs-Appellants' claim for damages fails whether or not *Janus* applies retroactively.

Plaintiffs-Appellants contend that the rejection of their Section 1983 claim for damages is inconsistent with the retroactivity of the *Janus* decision. AOB 13-14. But this argument fails for multiple reasons.

As an initial matter, Plaintiffs-Appellants oversimplify the retroactivity issue. A new rule announced by the Supreme Court applies retroactively if the Court "applie[s]" the rule "to the parties to the controversy," because the substantive law should not be different for different parties. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993). The *Janus* majority, however, did *not* apply its new rule that fair-share fees are unconstitutional retroactively to the parties before it. *See Hough*

v. SEIU Local 521, 2019 U.S. Dist. LEXIS 46356, at *2 (N.D. Cal. Apr. 16, 2019) (*Janus* did not hold that "Mr. Janus himself was entitled to the refund he sought, instead simply remanding for further proceedings"); *Bermudez v. SEIU Local 521*, 2019 U.S. Dist. LEXIS 65182, at *1 (N.D. Cal. Apr. 16, 2019) (same). To the contrary, *Janus* stated only that the new rule would apply going *forward*. *See* 138 S.Ct. at 2486 (holding that fair-share fees "cannot be allowed to continue" and that public-sector unions "may no longer extract agency fees from nonconsenting employees"); *see also Wholean*, 955 F.3d at 336 (2d Cir. 2020) ("[N]othing in *Janus* suggests that the Supreme Court intended its ruling to be retroactive."); *Lee*, 951 F.3d at 389 ("Certain language in the Supreme Court's opinion at least suggests that *Janus* was intended to be applied purely prospectively, rather than retroactively.").[11]

In any event, whether *Janus* applies "retroactively" as a matter of substantive law is irrelevant here. First, as discussed, Plaintiffs-Appellants were member of the union who paid dues and received membership rights and benefits in return, *not* non-members who paid fair-share fees. The settled law that contractual commitments are not subject to attack merely because a subsequent court decision, had it issued

[11] The Second, Sixth, Seventh, and Ninth Circuits declined to issue a definitive holding regarding *Janus*'s retroactivity, and instead simply assumed *Janus*'s retroactivity before concluding that the good faith defense bars claims against unions for their pre-*Janus* receipt of fair-share fees. *See Wholean*, 955 F.3d at 334-36; *Lee*, 951 F.3d at 389-92; *Danielson*, 945 F.3d at 1099; *Janus II*, 942 F.3d at 360 (declining to "wrestle the retroactivity question to the ground").

earlier, would have affected the party's choice whether to enter into the contract, *see supra* at 19-21, does not depend on whether that subsequent court decision applies retroactively. In *Coltec*, for example, the company could not rescind a contract even though the Supreme Court's decision regarding the Coal Act (*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)) was retroactive in the same sense that Plaintiff contends that *Janus* is retroactive. 280 F.3d at 274-75.[12]

Second, retroactivity is "a separate, analytically distinct issue" from *remedy*, and retroactive application of a new rule announced by the Supreme Court does not "determine what 'appropriate remedy' (if any)" a party should obtain when challenging actions taken under the old rule. *Davis v. United States*, 564 U.S. 229, 243 (2011); *see also Janus II*, 942 F.3d at 361 (because retroactivity and remedy are distinct, it "does not necessarily follow from retroactive application of a new rule that the defendant will gain the precise type of relief she seeks"). Thus, even if a newly recognized legal principle applies retroactively, parties are not retrospectively liable for actions taken before the new rule was announced where there is "a previously existing, independent legal basis … for denying relief" or, "as in the law

[12] Plaintiffs-Appellants contend that *Janus* adopted a new rule regarding the validity of union member dues authorization agreements. AOB 18. To the contrary, *Janus* addressed only the collection of fair-share fees from non-members. *See supra* at 17-19, 21-22. As such, it is not necessary to consider whether Plaintiffs-Appellants' purported new rule applies retroactively.

of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy justifications." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-59 (1995) (emphasis omitted). The good faith defense is such an independent, pre-existing rule that precludes Plaintiffs-Appellants' claim for damages. *See, e.g.*, *Lee*, 951 F.3d at 389-91; *see also Lugar*, 457 U.S. at 942 n.23 (characterizing good faith defense as "remedial" issue to be addressed if statute on which defendant had relied was ultimately deemed unconstitutional).

II. Because Plaintiffs-Appellants Are No Longer Members and No Longer Pay Union Dues, They Lack Standing to Assert Claims for Prospective Monetary Relief or Declaratory Relief.

This Court has Article III jurisdiction to hear a claim only if the plaintiff has standing. *Common Cause of Pa. v. Pa.*, 448 F.3d 249, 257-58 (3rd Cir. 2009). A "plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs.*, 528 U.S. 167, 185 (2000). To establish Article III standing, a plaintiff must demonstrate:

> (1) An injury in fact (*i.e.*, a concrete and particularized invasion of a legally protected interest); (2) causation (*i.e.*, a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant): and (3) redressability *(i.e.*, it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Common Cause of Pa., 558 F.3d at 258 (internal quotations omitted). A plaintiff seeking forward-looking forms of relief such as monetary, declaratory, or injunctive

relief "must show that he is 'likely to suffer future injury' from the defendant's conduct." *McNair v. Synapse Group, Inc.*, 672 F.3d 213, 223 (3rd Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

Plaintiffs-Appellants seek prospective relief in the form of declaratory judgments.[13] Specifically, Plaintiffs-Appellants seek declarations that (1) "limiting their ability to revoke the authorization to withhold dues from their paychecks to a window of time is unconstitutional because they did not provide affirmative consent"; (2) "Plaintiffs signing of the dues checkoff authorizations cannot provide a basis for their affirmative consent to waive their First Amendment rights" because that "was based on an unconstitutional choice between paying [dues to the Union] as a member or paying the Union [fair share fees] as a non-member"; and (3) "the practice by [the] County of withholding union dues from Plaintiffs' paycheck was

[13] Plaintiffs-Appellants' assertion that the Union "attempt[ed] to moot this case," AOB 45, disregards the fact that dues deductions ceased for two Plaintiffs-Appellants *before* the lawsuit was filed and ended for the two other Plaintiffs-Appellants one-day afterward. Because the Union took such action, Plaintiffs-Appellants' reliance on *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), and *Fisk v. Inslee*, 759 Fed. Appx. 632 (9th Cir. 2019)—which considered actions taken while litigation was pending—is misplaced. *See also Grossman v. Haw. Gov't Emps. Ass'n/AFSCME Local 152*, 2020 U.S. Dist. LEXIS 17866, at *30 (D. Haw. Jan. 31, 2020) (noting that *Fisk* was putative class action subject to "limited exception to the requirement that a named plaintiff with a live claim exist at the time of class certification") (internal quotation marks and citation omitted).

unconstitutional because Plaintiffs did not provide affirmative consent for [the County] to do so." App. 039-040.[14]

In *Golden v. Zwickler* 394 U.S. 103 (1969), the Supreme Court considered whether a Section 1983 plaintiff had standing to request a declaratory judgment that a New York State statute barring anonymous election hand-billing violated the First Amendment. Plaintiff had distributed handbills in 1964 decrying votes of a Congressperson and wanted to do so again in 1966. *Id*. at 106. However, the Congressperson had left office and accepted a seat as a judge of the Supreme Court of New York. *Id*. at 109 n.1.

In considering plaintiff's request for declaratory relief, the Supreme Court reasoned: "The federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." To determine if an actual case or controversy exists under the Declaratory Judgment Act, the Supreme Court stated, "…the question in each case is whether the facts alleged, under all the circumstances,

[14] Plaintiffs-Appellants' complaint did seek injunctive relief, but they concede that they are no longer seeking such a prospective remedy. AOB 42 n.2. Furthermore, Plaintiffs-Appellants acknowledge that they are no longer seeking repayment for membership dues which the Union has already reimbursed to them—*i.e.*, dues paid from the time they sent their resignation letters until dues deductions ceased. AOB 42.

show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id*. (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

In applying this legal standard, the Supreme Court concluded:

> Since the New York statute's prohibition of anonymous handbills applies to handbills directly pertaining to election campaigns, and the prospect was neither real nor immediate of a campaign involving the Congressman, it was wholly conjectural that another occasion might arise when [Appellee] might be prosecuted for distributing the handbills referred to in the complaint. His assertion in his brief that the former Congressman can be "a candidate for Congress again" is hardly a substitute for evidence that this is a prospect of immediacy and reality.

Id. at 109. *Golden* remains good law and the Third Circuit has cited it with approval in a Section 1983 claim, alleging a violation of the First Amendment. *See, e.g.*, *Versarger v. Twp. of Clinton*, 984 F.2d 1359, 1360 (3rd Cir. 1992) (concluding that there was no case or controversy because "it was highly unlikely" that a volunteer firefighter removed from a volunteer fire company under its bylaws "would ever again be a member of the Hose Company….").

For these reasons, Plaintiffs-Appellants lack standing to seek declaratory relief because they are no longer union members and no longer pay membership dues. Therefore, they are no longer subject to the provisions of the CBA or PERA regarding union security, dues authorization forms, dues deduction, or the practices

of the Union as they relate to the same. In several recent decisions, this Court has rejected plaintiffs' assertion of standing in cases in which they sought repayment of membership dues in similar circumstances as in this one. *See Thulen v. AFSCME N.J. Council 63*, 2021 U.S. App. LEXIS 3679 (3d Cir. February 10, 2021); *LaSpina*, 985 F.3d 278, 2021 U.S. App. LEXIS 1338, at *11-18; *Fischer v. Governor of N.J.*, 2021 U.S. App. LEXIS 1158, at *16-18. As is the case in *Versarger*, *supra*, there is simply no way that Plaintiffs-Appellants would ever return as a member of the Union. Thus, they cannot claim they will be harmed by PERA or the prior CBA regarding union security, or the Union's practices regarding these matters about which they complain.[15]

[15] Plaintiffs-Appellants' lack of standing does not depend on whether they were previously injured by the "union security" provisions and practices they claim are unconstitutional. *See Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 828 (2017) (even if plaintiffs were previously injured, courts lack jurisdiction to consider claims for prospective relief where plaintiff "no longer suffers actual injury that can be redressed by a favorable judicial decision") (quotations omitted); *see also City of Los Angeles*, 461 U.S. at 109. In any event, they suffered no prior injury. Notwithstanding the union security provision of the prior CBA, the Union honored Plaintiffs-Appellants' resignation notices, instructed the County to halt dues deductions, and remitted all dues deductions from the time they requested to end their union membership until dues deductions ceased. *Supra*.

III. Plaintiffs-Appellants' Challenge to Exclusive-Representative Collective Bargaining Is Foreclosed by Supreme Court Precedent and in Any Case Meritless.

A. Plaintiffs-Appellants' claim is foreclosed by precedent.

Plaintiffs-Appellants alleged in Count II of their complaint that Pennsylvania's democratic system of exclusive-representative bargaining violates their First Amendment rights against compelled speech and compelled association. App. 041-043. But that contention is foreclosed by the Supreme Court's decision in *Knight, supra*. Thus, the Magistrate Judge and the district court correctly concluded that Plaintiffs-Appellants' claim that their First Amendment rights are being violated should be dismissed pursuant to *Knight*. *See* App. 008, 150-154.

In *Knight*, a group of Minnesota college instructors argued that the exclusive representation provisions of the state public employee labor relations law violated the First Amendment rights of instructors who did not wish to associate with the faculty union. 465 U.S. at 273, 278-79. The state law granted their bargaining unit's elected representative the exclusive right to "meet and negotiate" over employment terms. *Id.* at 274-75. Because instructors are professional employees, the state law also granted the unit's representative the exclusive right to "meet and confer" with campus administrators about employment-related policy matters outside the scope of mandatory negotiations. *Id.* at 274.

The lower court rejected the *Knight* plaintiffs' constitutional challenge to the exclusive representative's status in the meet-and-negotiate process. *See id.* at 278. On appeal, the Supreme Court summarily affirmed the lower court's rejection of the *Knight* plaintiffs' "attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment." *Id.*; *Knight v. Minn. Cmty. Coll. Faculty Ass'n,* 460 U.S. 1048 (1983). The *Knight* district court, however, had ruled in favor of the plaintiffs with respect to the meet-and-confer process. *See* 465 U.S. at 278-79. On appeal, the Supreme Court reversed that portion of the district court's judgment with a full opinion, holding that even with respect to matters beyond terms of employment, the statute's exclusive representation provisions did not infringe on First Amendment associational rights. *Id.* at 288.

The *Knight* Court began its analysis by recognizing that government officials have no obligation to negotiate or confer with employees, and that the meet-and-confer process (like the meet-and-negotiate process) was not a "forum" to which plaintiffs had any First Amendment right of access. *Id.* at 280-82. The Court explained that plaintiffs (non-union members) also had no constitutional right "as members of the public, as government employees, or as instructors in an institution of higher education" to "force the government to listen to their views." *Id.* at 283. The government, therefore, was "free to consult or not to consult whomever it pleases." *Id.* at 285; *see also Smith v. Ark. State Highway Emps., Local 1315*, 441

U.S. 463, 464-66 (1979) (government did not violate speech or associational rights of union supporters by accepting grievances filed by individual employees while refusing to recognize union's grievances).

The *Knight* Court went on to consider whether Minnesota's public employee labor relations act violated those First Amendment rights that non-members could properly assert—namely, the right to speak and the right to "associate or not to associate." 465 U.S. at 288. The Court held that nonmembers' speech rights were not infringed because, while the exclusive representative's status "amplifie[d] its voice in the policymaking process," that amplification did not "impair[] individual instructors' constitutional freedom to speak." *Id.* As the Court explained, such amplification is "inherent in government's freedom to choose its advisers" and "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.*

The Supreme Court found no infringement of non-members' associational rights because they were "free to form whatever advocacy groups they like" and were "not required to become members" of the organization acting as the exclusive representative. *Id.* at 289. The Court acknowledged that non-members may "feel some pressure to join the exclusive representative" to serve on its committees and influence its positions. *Id.* at 289-90. But the Court held that this "is no different from the pressure to join a majority party that persons in the minority always feel."

Id. at 290. Such pressure "is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.*

Knight thus considered whether exclusive representation, by itself, violates the speech or associational rights of public employees who are not members of the union that has been designated as their exclusive representative, and held that it does not do so—foreclosing Plaintiffs-Appellants' claim to the contrary. *See id.* at 288 ("[T]he First Amendment guarantees the right both to speak and to associate. Appellees' speech and associational rights, however, have not been infringed[.]"); *id.* at 290 n.12 (non-members' "speech and associational freedom have been wholly unimpaired").

Not surprisingly, every court to consider the issue, including the Third Circuit, has agreed that *Knight* forecloses the claim Plaintiffs-Appellants asserts here. *See D'Agostino v. Baker*, 812 F.3d 240, 242-44 (1st Cir.), *cert. denied,* 136 S.Ct. 2473 (2016); *Jarvis v. Cuomo,* 660 Fed. Appx. 72, 74 (2d Cir. 2016), *cert. denied,* 137 S.Ct. 1204 (2017); *Hill v. SEIU*, 850 F.3d 861, 864-65 (7th Cir.), *cert. denied,* 138 S.Ct. 446 (2017); *Bierman v. Dayton,* 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied,* 139 S.Ct. 2043 (2019); *Mentele v. Inslee,* 916 F.3d 783, 786-90 (9th Cir.), *cert. denied*, 140 S.Ct. 114 (2019); *Oliver*, 830 Fed. Appx. at 80-81 (3d Cir 2020) ("The government may choose to listen to a union while ignoring nonmembers without infringing upon the nonmembers' rights."); *see also Thompson v. Marietta Educ.*

Ass'n, 2019 U.S. Dist. LEXIS 206804, at *7 (S.D. Ohio Nov. 26, 2019) (collecting district court cases reaching same conclusion).

In contending that exclusive representation violates their First Amendment rights, Plaintiffs-Appellants rely on *Janus*. AOB 50. But *Janus* held only that public employers cannot require their employees to pay fees to the exclusive representative, not that exclusive-representative bargaining is itself unconstitutional. *See Janus*, 138 S.Ct. at 2464.[16] Indeed, *Janus* expressly stated that although fair-share fees can no longer be mandated, states can otherwise "keep their labor-relations systems exactly as they are," including by "requir[ing] that a union serve as exclusive bargaining agent for its employees." 138 S.Ct. at 2478, 2485 n.27; *see also id.* at 2466, 2485 n.27 (states may "follow[] the model of the federal government," in which "a union chosen by majority vote is designated as the exclusive representative of all the employees.").

Accordingly, *Janus* did not change the settled precedent about exclusive-representative collective bargaining that forecloses Plaintiffs-Appellants' claim here. *See Reisman v. Associated Faculties of Univ. of Me.*, 939 F.3d 409, 413–14 (1st Cir. 2019) (court "cannot say that [*Janus*] provides us with a basis for

[16] *Harris v. Quinn*, 134 S.Ct. 2618 (2014) and *Knox* v. SEIU, Local 1000, 567 U.S. 298 (2012), cited by Plaintiffs-Appellants at AOB 51, likewise addressed challenges to fair-share fees, not exclusive representation.

disregarding" precedent upholding exclusive-representative bargaining); *Mentele*, 916 F.3d at 789 ("[Plaintiff] argues that *Janus* overruled *Knight* and that *Janus* controls the outcome of this case, but we are not persuaded.); *Bierman*, 900 F.3d at 574 ("Recent holdings in *Janus* … and *Harris v. Quinn*, … do not supersede *Knight*."); *Oliver*, 830 Fed. Appx. at 80 ("*Janus* acknowledged the state practice of choosing an exclusive bargaining representative, yet concluded that 'states can keep their labor-relations systems exactly as they are.'" (3d Cir 2020).[17]

B. Even if Plaintiff-Appellants' claim were not foreclosed by precedent, it would be meritless.

Even if *Knight* were not controlling, Plaintiffs-Appellants' challenge to exclusive-representative bargaining would fail based on the undisputed facts. The Supreme Court has never upheld a claim of compelled speech or compelled expressive association where—as here—the complaining party is not required to do

[17] Plaintiffs-Appellants point to a passage in *Janus* that describes exclusive-representative bargaining as an "significant impingement" on public employees' First Amendment rights. AOB 51 (citing 138 S.Ct. at 2478). But the Supreme Court explained that for that reason the "necessary concomitant" of exclusive-representative status is a requirement that the union fairly represent the entire unit, *without which* "serious constitutional questions would arise." *Id.* at 2469 (internal citation and quotation marks omitted). Pennsylvania's public sector collective bargaining law includes that "necessary concomitant" duty of fair representation. *See Case v. Hazelton Area Educ. Support Pers. Ass'n (PSEA/NEA)*, 928 A.2d 1154, 1158 (Pa. Cmlth. 2007). In any event, *Janus* stated that it was "not in any way questioning the foundations of modern labor law" but instead "simply draw[ing] the line at allowing the government to" require non-members to pay fair-share fees. 138 S.Ct. at 2471 n.7, 2478.

or say *anything* and there is no public perception that the complaining party endorses any message or group.

Plaintiffs-Appellants urge that they are compelled to speak because the exclusive representative "speak[s] in their name." AOB 55. But Plaintiffs-Appellants' premise is wrong. The exclusive representative bargains on behalf of the unit as a whole, not "in [their] name." *See Reisman,* 939 F.3d at 411-14 (rejecting same argument). In *Knight,* the Supreme Court recognized that that the union in question was speaking collectively for the members, but not every member agreed with that official position. *Knight,* 465 U.S. at 276. Likewise, as in other democratic systems, there is no public perception that Plaintiffs-Appellants necessarily share a majority-chosen union's views. *See D'Agostino* 812 F.3d at 244 ("[W]hen an exclusive bargaining agent is selected by majority choice, it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority.").

Plaintiffs-Appellants urge that they are compelled to enter into an expressive association with the Union because "the union represents everyone in the bargaining unit." AOB 51. But Plaintiffs-Appellants conceded that they need not become a Union member, and the Union's representation of their bargaining unit says nothing about their *own* views or positions, so there is no compelled *expressive* association. *Cf. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65, 69

(2006) (no compelled expressive association where law schools had to "associate" with military recruiters but recruiters did not come onto campus to "become members of the school's expressive association," and "[n]othing about recruiting suggests that law schools agree with any speech by recruiters").

Plaintiffs-Appellants get matters backwards in complaining about the Union's duty to represent the entire unit. If there were no such duty of fair representation, and the exclusive representative could, for example, "negotiate particularly high wage increases for its members in exchange for accepting no increases for others," *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in part and dissenting in part), then Plaintiffs-Appellants would likely claim that employees are pressured to join the Union. The Union's duty to represent the entire unit without discrimination protects employees' right *not to associate* with the majority-chosen unit representative. *Cf. Janus*, 138 S.Ct. at 2469 (observing that "serious 'constitutional questions [would] arise' if the union were *not* subject to the duty to represent all employees fairly") (emphasis in original) (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944)).

Finally, even if Pennsylvania's exclusive-representative bargaining system *did* impinge on First Amendment rights, it would satisfy exacting scrutiny. "*Janus* did not revisit the longstanding conclusion that labor peace is 'a compelling state interest,' and the [Supreme] 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*, 916 F.3d at 790 (quoting *Janus*, 138 S. Ct. at 2465). *Janus* held that Illinois had no compelling interest in fair-share fees because they are not necessary for a successful collective bargaining system, pointing out that the federal government and 28 states authorized exclusive-representative collective bargaining while prohibiting agency fee requirements. 138 S.Ct. at 2466.

As such, even if Plaintiffs-Appellants' claim were not foreclosed by precedent, and even if they had shown an impingement on her First Amendment rights, the district court still would have been correct to enter judgment for defendants on their challenge to exclusive-representative bargaining. *See Mentele*, 916 F.3d at 790-91 (exclusive-representative bargaining would satisfy exacting scrutiny even if such scrutiny applied); *Thompson,* 2019 U.S. Dist. LEXIS 206804, at *18 (same); *Reisman v. Associated Faculties of Univ. of Me.*, 356 F.Supp.3d 173, 178 (D. Me. 2018) (same), *aff'd on other grounds,* 939 F.3d 409 (1st Cir. 2019); *Uradnik v. Inter Faculty Org*., 2018 U.S. Dist. LEXIS 165951, at *8-9 (D. Minn. Sept. 27, 2018) *(*same).

CONCLUSION

For the foregoing reasons, the decision below should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local 28.3(d) and Local R. 46.1(e) I hereby certify that I, John R. Bielski, am admitted as an attorney and member in good standing of the bar of the United States of Appeals for the Third Circuit.

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CERTIFICATES OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Local R. 1.1, I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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3. This brief complies with the electronic filing requirements of Local R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies and because Symantec, version 14.2.5569.2100 was run on the file containing the electronic version of this brief and no viruses were detected.

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CERTIFICATE OF SERVICE

I, John R. Bielski, hereby certify that on March 2, 2021, the foregoing brief of Appellee Teamsters Local 429 was filed with the Clerk of the Court of the United States Court of Appeals for the Third Circuit using the appellate CM/ECF System. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF System.

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