No. 19-3876

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHALEA OLIVER,
Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668; TERESA D. MILLER, Secretary, Pennsylvania Department of Human Services; MICHAEL NEWSOME, Secretary of Pennsylvania Office of Administration; JOSH SHAPIRO, Attorney General of Pennsylvania; JAMES M. DARBY, Chairman, Pennsylvania Labor Relations Board; ALBERT MEZZAROBA, Member, Pennsylvania Labor Relations Board; ROBERT H. SHOOP, JR., Member, Pennsylvania Labor Relations Board, in their official capacities,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:19-cv-00891 (Hon. Gerald A. McHugh)

ANSWERING BRIEF OF DEFENDANT-APPELLEE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668

SCOTT A. KRONLAND
P. CASEY PITTS
MEREDITH A. JOHNSON
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Phone: (415) 421-7151

Attorneys for Defendant-Appellee SEIU Local 668

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Service Employees International Union Local 668 has no parent corporation or any stock held by any public held corporation.

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INTRODUCTION

When Plaintiff-Appellant Shalea Oliver ("Oliver") first became employed by the Commonwealth of Pennsylvania, she made the voluntary decision to become a member of the union that served as collective bargaining representative for her bargaining unit, Defendant-Appellee Service Employees International Union Local 668 ("Union"). Oliver also authorized the Commonwealth to deduct her union membership dues from her paycheck. Both Pennsylvania law and the First Amendment guaranteed her the right *not* to join the Union if she did not wish to do so.

In August 2018, Oliver notified the Union that she no longer wanted to be a Union member or pay membership dues. The Union notified the Commonwealth of Oliver's resignation and asked it to terminate Oliver's dues deductions. The Union thereafter refunded Oliver all dues withheld from her pay following her notice of resignation.

Even though the Union accepted her resignation and refunded her post-resignation dues payments, Oliver has pursued this 42 U.S.C. §1983 lawsuit against the Union and various Commonwealth officials. Oliver relies on a recent Supreme Court decision holding that the First Amendment prohibits *non-union member* public employees from being compelled to provide financial support to a union to argue that her First Amendment rights were somehow violated

notwithstanding her own voluntary decision to *join* the Union. In an additional claim, Oliver alleges that the Union's ongoing recognition as the exclusive collective bargaining representative for her bargaining unit violates her First Amendment rights. Oliver seeks monetary damages from the Union based on her payment of dues before she resigned, as well as prospective relief with respect to certain provisions of Pennsylvania law and a now-expired collective bargaining agreement ("CBA") between the Union and the Commonwealth.

As demonstrated below, the district court properly granted summary judgment against Oliver on all claims. Oliver's claim for damages based on her pre-resignation dues payments fails for the fundamental reason that the First Amendment protects against *compelled* association, whereas Oliver *voluntarily* chose to join the Union and pay membership dues. Oliver's claim for prospective relief with respect to the "union security" provisions of Pennsylvania law and the expired CBA fails for lack of standing and mootness, because at the time she filed suit, Oliver was no longer subject to those provisions and there was no reasonable likelihood she would be subject to them in the future. Finally, Oliver's challenge to the Union's status as exclusive collective bargaining representative for her bargaining unit is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S 271 (1984) ("*Knight*"), which rejected an indistinguishable First

Amendment challenge to Minnesota's system of exclusive-representative collective bargaining in public employment.

STATEMENT OF ISSUES

1. Whether Oliver is entitled to damages under 42 U.S.C. §1983 for having paid membership dues to the Union while she was a Union member, even though Oliver voluntarily chose to join the Union and authorize the payment of those membership dues through payroll deduction.

2. Whether the district court had jurisdiction over Oliver's claims for declaratory relief with respect to the union security provision of an expired CBA and related provisions of state law, even though Oliver was not subject to those provisions at the time she filed suit and there was no reasonable likelihood Oliver would be subject to those provisions in the future.

3. Whether the Union's representation in collective bargaining of a unit of public employees that includes Oliver compels Oliver to speak or associate in violation of her First Amendment rights, even though the Supreme Court rejected an indistinguishable claim in *Knight,* and even though Oliver 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. Local 668 is aware of the following Third Circuit case related to this appeal: *Wenzig v. SEIU Local 668*, No. 19-3906.

STATEMENT OF THE CASE

I. Background

A. Public Employee Collective Bargaining in Pennsylvania

Prior to 1970, public employees in the Commonwealth of Pennsylvania had no right to engage in collective bargaining. The result was an "almost complete breakdown in communication." *Pa. Labor Relations Bd. v. State College Area Sch. Dist.*, 337 A.2d 262, 266 (Pa. 1975). 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, *Pa. Labor Relations Bd.*, 337 A.2d at 266, the Pennsylvania Legislature enacted the Public Employe Relations Act ("PERA"), 43 Pa.Stat.Ann. §1101.101 *et seq*. PERA furthers "the public policy" of Pennsylvania to "promote orderly and constructive relationships between all public employers and their

employes." 43 Pa.Stat.Ann. §1101.101; *Pa. Labor Relations Bd.*, 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 Pa.Stat.Ann. §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. Commw. Ct. 1981). Workers have the right "to present grievances to their employer and to have them

adjusted without the intervention of the bargaining representative." 43 Pa.Stat.Ann. §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).

PERA permits employers and unions to agree to include "union security" provisions in their collective bargaining agreements. *See* 43 Pa.Stat.Ann. §§1101.301(18), 1101.401, 1101.705. Such provisions limit the period during which employees who chose to become union members may terminate their dues payments. *Id*. §1101.301(18); *see id.* §1101.705 (providing that "the payment of dues and assessments while members[] may be the only" commitment to which public employees may be held pursuant to such a provision).

Prior to June 27, 2018, PERA and 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* 43 Pa.Stat.Ann. §1102.3; 71 Pa.Stat.Ann. §575; *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 nonmembers to pay for union's political or ideological

activities). In *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (June 27, 2018), the Supreme Court ruled that its precedent permitting such fees "is now overruled" and 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 Oliver's bargaining unit who are not Union members have not been obligated to pay any money to the Union. App. 053.

B. Oliver's Employment and Union Membership

The Union is the PERA exclusive representative of a bargaining unit that includes Income Maintenance Caseworkers employed by the Commonwealth. *See* 43 Pa.Stat.Ann. §§1101.301(3), 1101.606; App. 048-053; SAppx020. Oliver began her employment as an Income Maintenance Caseworker in December 2014. App. 048. At that time, she voluntarily chose to join the Union and authorized the Commonwealth to deduct monthly union membership dues from her paycheck. App. 050, 055.

On August 10, 2018, Oliver sent a letter to the Union requesting to withdraw her union membership and stating that the Union was no longer authorized to enforce her prior authorization for membership dues deductions. App. 050. Although the CBA between the Union and the Commonwealth that was operative from July 1, 2016 to June 30, 2019 contained a union security provision purporting to establish certain requirements regarding membership resignations, *see* App. 049,

the Union did not attempt to enforce that provision. Instead, on September 20, 2018, the Union sent a letter to the Commonwealth's Office of Administration enclosing a copy of Oliver's letter and notifying the Commonwealth to discontinue dues deductions for Oliver. App. 051; SAppx004. The Union sent letters with the same request on November 27, 2018, and January 23, 2019. App. 051-052; SAppx007, 010. The Commonwealth ceased deducting dues from Oliver's paychecks on January 18, 2019. App. 052.

After the Commonwealth processed the Union's request and terminated Oliver's dues deductions, the Union refunded to Oliver all post-resignation dues payments. On January 30, 2019, the Union sent Oliver a check for $263.01, an amount equal to all dues withheld for the pay period beginning August 4, 2018 (six days prior to her notice of resignation) through the pay period ending January 4, 2019. *Id*.; SAppx012. On March 20, 2019, the Union sent Oliver a second check in the amount of $24.48, an amount equal to all dues withheld for the pay period beginning January 4, 2019 and ending January 18, 2019. App. 052; SAppx015.

Since her August 10, 2018 letter, Oliver has not rejoined the Union. App. 053. She no longer provides financial support to the Union, nor is she obligated to do so. *See* App. 052-053.

On April 2, 2019, the Commonwealth and the Union entered into a Side Letter superseding the CBA's union security provisions and providing that Union

members could resign at any time. App. 049; SAppx018. There is no union security provision in the current CBA, which was effective July 1, 2019. *Id*.

II. Procedural History

On February 28, 2019, Oliver filed a Complaint asserting 42 U.S.C. §1983 claims against the Union and certain Commonwealth officials. *See* App. 034-047. In Count I, Oliver alleged that the deduction of union membership dues from her paycheck, including while she was a member of the Union prior to her resignation, violated her First Amendment rights. App. 041-043. Oliver sought monetary damages from the Union in the form of a reimbursement of the Union membership dues that she paid. App. 047. She also sought a declaration that the union security provision of the 2016-2019 CBA, and the provisions of Pennsylvania law authorizing such a provision, are unconstitutional. App. 046. In Count II, she alleged that the Commonwealth's system of exclusive-representative collective bargaining in public employment violates the First Amendment. App. 044-046.

The parties filed cross-motions for summary judgment based in part on stipulated undisputed facts. *See* App. 048-055.[1] The district court (Hon. Gerald Austin McHugh) granted the defendants' motions for summary judgment and denied Oliver's motion. App. 005-031.

[1] Technically, the Union moved for summary judgment and to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(h)(3).

With respect to Oliver's damages claim, the district court held that Oliver's voluntary decision to join the Union and authorize the deduction of dues from her paycheck did not establish a First Amendment violation, because she had not been compelled to join the Union. App. 010-013. The district court held that even if that were not so, Oliver's claim would still fail because the Union's receipt of her membership dues was not conduct undertaken "under color of state law," as required to state a §1983 claim, App. 013-018, and because the Union's conduct was consistent with then-valid Pennsylvania law and then-binding Supreme Court precedent, entitling the Union to a "good faith" defense to §1983 damages liability. App. 019-020.

The district court held that Oliver's claims for declaratory relief with respect to the union security provisions of the CBA and state law were not justiciable because she was no longer a Union member and no longer subject to those provisions. App. 020-021; 025-029.

Finally, the district court rejected Oliver's challenge to Pennsylvania's system of exclusive-representative collective bargaining, concluding that *Knight* had rejected such a First Amendment challenge and that *Janus* "reaffirms rather than undermines *Knight*." App. 029-031.

SUMMARY OF ARGUMENT

The district court properly granted summary judgment to defendants.

1. Oliver's claim against the Union for damages arising from her pre-resignation payment of dues fails because Oliver was not *compelled* to join the Union or pay the corresponding union 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). Oliver chose to join the Union, and her voluntary decision to become a Union member and pay dues was an *exercise* of her First Amendment right to associate, not an infringement thereof. That Oliver regrets the decision she made does not render that decision one that was compelled in violation of the First Amendment.

Oliver contends that her 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 Oliver's right to refrain from joining the Union was well-established when she chose to join, and the mere fact that those who do *not* join now face different circumstances does not render her prior decision involuntary.

Oliver does not have a First Amendment right to disregard her promise to pay union dues in exchange for the rights and benefits of union membership (which she has 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 Oliver's decision to join the Union and pay union dues did not infringe any First Amendment rights, the Court need not consider whether she validly "waived" such rights, but if a waiver analysis were required, Oliver's membership agreement would constitute a valid waiver.

Oliver's damages claim against the Union based on her pre-resignation payment of membership dues fails for the separate and independent reason that her payment of dues to the Union was not conduct undertaken "under color of state law" for purposes of §1983. The source of Oliver's claimed deprivation (her payment of union dues) was her own decision to join the Union and pay the associated membership dues, not any requirement imposed by the Commonwealth. The Commonwealth's ministerial role in implementing her decision by deducting dues from her paycheck pursuant to her voluntary authorization does not transform

her union membership and dues payments into state action or make the Union a state actor subject to §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 Oliver could establish the elements of a §1983 claim for damages, her 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).

2. Oliver lacks standing to seek declaratory relief concerning the union security provision of the expired CBA and state law authorizing such a provision. At the time she filed her lawsuit, Oliver already had resigned her Union membership and was no longer paying dues. She was not subject to the provisions she sought to challenge and there was no reasonable likelihood she would be subject to those provisions in the future.

3. Oliver's First Amendment challenge to exclusive-representative collective bargaining is foreclosed by *Knight*, which rejected a First Amendment challenge to an indistinguishable collective bargaining system. Even if that were not the case, Oliver's 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. Oliver is not entitled to monetary damages for her voluntary, pre-resignation payment of union dues.

Oliver sought monetary damages from the Union for the membership dues she paid prior to revoking her Union membership in August 2018, contending that paying those dues violated her First Amendment rights against compelled speech and association. *See* App. 047.[2] To establish this §1983 claim for damages, Oliver

[2] Oliver concedes that any claim for a refund of dues paid after her resignation is moot because those payments were already refunded to her. *See*

was 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). As the district court recognized, Oliver could not establish either requirement and, even if she could, the Union's good faith defense would preclude monetary liability. App. 010-020.

A. Oliver's payment of union dues while she voluntarily remained a union member did not violate her First Amendment rights.

1. Oliver was not compelled to join the Union.

Oliver argues that her decision to join the Union and pay membership dues violated her 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 11-15. But as the district court explained, it is "difficult to comprehend how Plaintiff can complain that she was compelled to join the Union in violation of her First Amendment right of free association" when she was not required to join or coerced into doing so. App. 010-011. Oliver's voluntary decision to pay union dues rather than fair-share

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AOB 15 (admitting that Union refunded dues paid after August 10, 2018 and arguing only that Oliver is entitled to refund of dues paid before then).

fees was not "compelled" in any manner that could infringe her First Amendment rights. *See Janus*, 138 S.Ct. at 2464 (First Amendment prohibits "*compelled* subsidization" of private speech) (emphasis added).

At the time Oliver began her employment, she had a right to join the Union and pay membership dues or refrain from joining the Union and pay a reduced fair-share fee (amounting to less than 60% of the amount paid by members). App. 050. Oliver understood that she had the right to decline union membership and thereby pay less. App. 039. Moreover, Oliver's right to refrain from joining the union was well-established at that time. *See* 43 Pa.Stat.Ann. §1101.401 (establishing "right to refrain" from membership); *Abood*, 431 U.S. at 235-36; *Smith v. Superior Court, Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018) (recognizing that "First Amendment right to opt out of union membership was clarified in 1977" in *Abood*).

Oliver nevertheless chose to join the Union and authorized the Commonwealth to deduct membership dues from her paycheck. App. 050. In exchange, Oliver received the full rights and benefits of union membership. SAppx022. In joining the Union, Oliver exercised her protected right to associate with her co-workers to improve their collective terms and conditions of employment. Her 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.").

There was "no legal compulsion" for Oliver to join the Union, "and the economic advantage in declining membership and paying an agency fee would have been self-evident." App. 011. Nor was Oliver compelled to join the Union by any other means. She has not alleged that she was 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.'" *Id.* (quoting *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 Oliver would have been required to pay a fair-share fee had she 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 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018). The federal courts that have addressed Oliver's theory after *Janus* have uniformly recognized that because former union members like Oliver "could have declined to join the union and paid agency fees instead," their dues payments "were in no part compulsory" and did not violate the First Amendment. *Anderson v. SEIU Local 503*, 400 F.Supp.3d 1113, 1116 (D. Or. 2019) (internal citation and quotation marks omitted).[3] Oliver "voluntarily chose to pay membership dues in exchange for certain benefits, and '[t]he fact that [she] would not have opted to pay union membership fees if *Janus* had been the law at the time of [her] decision does not mean [her] decision was therefore coerced.'" *Babb v.*

[3] *See also, e.g.*, *Bennett v. AFSCME, Council 31*, --- F.Supp.3d ----, 2020 WL 1549603, at *3-4 (C.D. Ill. Mar. 31, 2020) (rejecting plaintiff's argument that her "dues authorization was coerced because she was given the unconstitutional choice between paying the Union as a nonmember or a member," where plaintiff did not show she was coerced into signing agreement); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 2020 WL 619574, at *6 (S.D. Cal. Feb. 10, 2020) (employee who agrees to union membership and dues deduction "is consenting to financially support the union and its many positions during collective bargaining, and therefore his speech is not compelled") (internal quotation marks and citation omitted); *Hendrickson v. AFSCME Council 18*, --- F.Supp.3d ----, 2020 WL 365041, at *6 (D.N.M. Jan. 22, 2020) ("[The plaintiff] does not allege that he was coerced, and the parties agree that he was not required by state law to join. He could have paid a lesser fair-share fee as a nonmember, but instead he chose to join the Union."); *Seager v. UTLA*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019) (rejecting assertion that plaintiff's "voluntary decision to join [the union] should now be viewed as involuntary because when she signed the agreement, she did not know *Janus* would be decided shortly thereafter").

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)).[4]

As the district court explained, Oliver "may now regret the bargain she struck with the Union by choosing to become a member, but such later regret does not suffice to show that her past choice was unlawfully coerced or compelled." App. 013.

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

Oliver's §1983 claim for damages is also foreclosed because, by joining the Union and authorizing dues deductions, Oliver 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

[4] The law governing efforts to void allegedly involuntary contractual obligations provides a useful point of comparison. A plaintiff seeking to void a contract on grounds of duress must prove multiple elements, including that she was induced to sign the contract by an improper *threat*—i.e., a communication that instilled fear in the plaintiff that, unless she signed the demanded contract, she would face some consequence *worse than the status quo* existing in the absence of the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS §175(1). Here, the only consequence Oliver faced for failing to join the union was paying fair-share fees that were *less* than the membership dues she chose to pay. That the circumstances here would provide no basis for undoing Oliver's contractual obligations (and indeed, Oliver's agreement with the Union *did* create a valid and binding contract that remains enforceable post-*Janus*, as explained *infra* at 19-22) underscores that she was not compelled to do anything in violation of the First Amendment.

members is contractual[.]"); *see also NLRB v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987) (dues-deduction authorization is contract). Oliver does not contend otherwise. *Cf.* App. 050. There is no First Amendment right to disregard contractual obligations, *Cohen,* 501 U.S. at 672, so Oliver certainly has no right to claw back dues she paid to the Union in exchange for consideration she already received and cannot return—i.e., the rights and benefits of membership. *Cf.* SAppx022.

Oliver argues that her membership agreement/dues authorization was not a valid contract because "*Janus* had not yet been decided" when she joined the Union. *See* AOB 12-13. But the validity of Oliver's agreement was not undermined when *Janus* invalidated certain consequences of her *alternative* choice. In *Coltec Industries, Inc. v. Hobgood,* 280 F.3d 262 (3d Cir. 2002), for example, the plaintiff attempted to rescind an agreement it claimed to have accepted solely to avoid a provision of the Coal Act the Supreme Court subsequently held unconstitutional. This Court held that the plaintiff could not escape its contractual obligation: The plaintiff had 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. *Id*. at 274-75.

Indeed, even in the far more serious case of plea agreements—contracts that waive the fundamental right to personal liberty—courts have consistently held that subsequent judicial decisions do not permit rescission. In *Brady*, for example, the Supreme Court held that a criminal defendant could not rescind a plea agreement he entered under the pressure induced by a death penalty statute later found unconstitutional. 397 U.S. at 756-57; *see also, e.g.*, *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").

Nothing in *Janus* changes the law governing the formation and enforcement of voluntary contracts between unions and their members. The plaintiff in *Janus* was a *non*-member required to pay fair-share fees by *statute*, not a member who had affirmatively chosen to secure member benefits in exchange for paying dues. 138 S. Ct. at 2460. *Janus* provides no basis for union *members* to renege on voluntary membership or dues deduction agreements. *See supra* at 18 n.3; *see also, 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 WL 2476679, at *2 (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").[5]

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

For the reasons stated above, Oliver's First Amendment rights were not infringed by her voluntary decision to join the Union and pay her dues via payroll deductions. That being so, the Court need not engage in any "waiver" analysis to conclude that the subsequent deduction of those dues from Oliver's paycheck did not violate her First Amendment rights, much less consider whether her waiver was "knowing, voluntary, and intelligent," as Oliver suggests. *Compare Cohen*, 501 U.S. at 668 (concluding that newspaper's promise not to publish plaintiff's identity was enforceable without conducting any waiver analysis); *with id.* at 677-

[5] *See also, e.g., Smith v. Teamsters Local 2010*, 2019 WL 6647935, at *9 (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."); *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."); *Smith*, 2018 WL 6072806, at *1 ("[I]t's not the rights clarified in *Janus* that are relevant to [plaintiff.]").

78 (Souter, J., dissenting) (criticizing majority for failing to conduct waiver analysis); *see also 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."); *cf. 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).[6]

But even assuming that a waiver analysis was required and that the "knowing, voluntary, and intelligent" standard applied, Oliver's membership and dues authorization agreement would constitute a valid waiver. The agreement she signed was titled "Membership Application and Payroll Deduction Authorization." App. 055. It clearly stated her intent to apply for membership in the Union: "I hereby apply for membership in the Union." *Id.* It also clearly stated her intent to authorize dues deductions: "I further request and authorize the Commonwealth of Pennsylvania to deduct from my earnings an amount sufficient to provide for the

[6] 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.*, *Smith*, 2019 WL 6647935, at *9 (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).

regular payment of the current rate of union dues. Any changes in such amount shall be so certified by the union. The amount deducted shall be transmitted to the union." *Id.* Again, at the bottom of the form, the agreement said, in larger text, "I hereby wish to apply for Union Membership 0668-SEIU Local 668," and next to that was a button labeled "Join." *Id.*

Oliver's entry into a contract that, *by its terms*, stated she was joining the Union waived any right not to join the Union. Indeed, it is difficult to imagine more "clear and compelling" evidence of Oliver's "waiver" of her right not to join the Union than her voluntary, written agreement to join. *See Bennett*, --- F.Supp.3d ----, 2020 WL 1549603, at *4 (rejecting argument that a pre-*Janus* union membership agreement was not a valid waiver); *Smith*, 2018 WL 6072806, at *1 (same).

Oliver cites *Curtis Publishing Company v. Butts*, 388 U.S. 130, 144-45 (1967), for the proposition that her waiver was inadequate because she could not "waive a right before knowing of the relevant law." AOB 12. But when Oliver joined the Union, her right not to join—which is the relevant right here—was well-established. *See supra* at 16; *see also Smith*, 2018 WL 6072806, at *1 ("[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

Pa.Stat.Ann. §1101.401.[7] Moreover, Oliver understood she had the right not to join. *See* App. 039, 050. She therefore cannot show that her "waiver" was unintelligent or involved unknown rights. *Cf. Cooley v. Cal. Statewide Law Enf't Ass'n*, 2019 WL 331170, at *3 (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"). Oliver's argument that her "waiver" was invalid because she 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 19-22.

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

As the district court recognized, Oliver's claim for damages under §1983 fails for the independent reason that she cannot establish "that the conduct allegedly causing the deprivation of a federal right [is] fairly attribute[ed] to the

[7] *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.

State," as it must be to establish a §1983 claim. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *see* App. 013-18.

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. Oliver satisfies neither requirement.

1. Oliver paid union dues because of her private agreement with the Union.

Oliver's claim fails in the first instance because the alleged deprivation of her First Amendment rights resulting from her payment of union dues was not caused by the laws or conduct of the Commonwealth. In determining whether the conduct allegedly causing a deprivation is attributable to the State, the court must identify "the specific conduct of which the plaintiff complains." *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (internal quotation marks omitted). Here, Oliver complains she had to pay union dues in the time prior to her resignation from the Union. App. 042. But that supposed deprivation was caused by *private* action.

The reason Oliver paid dues to the Union while she was a member was that she signed a membership agreement joining the Union, agreed to pay the requisite union membership dues, and authorized the deduction of those dues from her

paycheck. This was a private agreement between the Union and Oliver. *See supra* at 19-22. The *Commonwealth* did not require Oliver to enter into that agreement. App. 052-053; 43 Pa.Stat.Ann. §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 Pa.Stat.Ann. §1101.1201.

Nor does the mechanism by which the Union collected Oliver's membership dues—i.e., via payroll deduction—mean that her payment of dues to the Union was caused by state action. Oliver's challenge is to the *fact* of her union dues payments, not the *process* by which the Union collected them. The Commonwealth's purely ministerial role in deducting dues pursuant to Oliver's written authorization does not make it "*responsible* for the specific conduct of which the plaintiff complains," as is necessary to establish state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original); *see Bain v. Cal. Teachers Ass'n*, 2016 WL 6804921, at *7 (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 WL 2374763, at *4 (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 Oliver to comply with her contractual membership obligations to the Union. In the absence of those deductions, she would have been required to pay the same dues through some other mechanism, such as direct debits from her bank account or mailing a check to the Union each month.[8]

Oliver relies on *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*") and other fair-share fees cases to support her "state action" argument. But Oliver ignores 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*

[8] In concluding that the first *Lugar* requirement for state action was satisfied because "Local 668 was only able to lawfully collect membership dues from Plaintiff and other employees through authorization conferred by PERA," App. 014, the district court failed to recognize that unlike the fair-share fees that were authorized by statute prior to *Janus*, membership dues are paid pursuant to a private contract between a union and its members, and would be paid in some other manner in the absence of payroll deduction.

employer and the Union. In this case, by contrast, the Commonwealth merely implemented the private agreement between Oliver and the Union and Oliver's own voluntary payroll deduction authorization. That is not sufficient 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).[9]

"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); *see* App. 016-017 (discussing *White*). The source of Oliver's obligation to pay union membership dues—and thus the source of any claimed constitutional deprivation arising from those payments—was not the Commonwealth, but her own private agreement with the Union. As this Court

[9] Oliver argues that her dues deduction authorization is "a three-party assignment, not a traditional two-party contract." AOB 20. Oliver's theory is that she directed her employer to assign a portion of her wages to the Union. AOB 21. But the dues authorization agreement does not assign to the Union Oliver's *right to payment*. *See* App. 055. Rather, "[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." App. 018. As the district court recognized, Oliver's characterization of her dues authorization is "unrealistic and artificial." App. 017. In any event, even if Oliver had assigned a portion of her wages to the Union, that private agreement still would not constitute state action. *See supra*.

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; App. 013-018. 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).

As the district court concluded, it is "simple to dispense with the second category of cases identified by *Leshko*" because "Local 668 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." App. 015. To the contrary, Local 668 has an often adversarial collective bargaining relationship with the Commonwealth, and membership dues deductions are made pursuant to a contractual agreement that must be renegotiated through arms-length bargaining. *See* App. 048-050; *see also Thomas v. Newark Police Dep't*, 2013 WL 875970, at

*3 (D.N.J. Mar. 7, 2013) ("If anything, the role of SOA is adversarial to the Department, especially during contract negotiations"). Local 668'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 the Commonwealth to "encourage or discourage membership" in any union. *See* 43 Pa.Stat.Ann. §§1101.401, 1101.1201; App. 052-053. The payment of union dues is therefore not conduct "encouraged by the state."

Again, the Commonwealth's ministerial role in deducting dues is not sufficient to render the Commonwealth a "joint participant" in Oliver's agreement to join the Union. "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.*, 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, as the district court recognized, "[t]he union's right to collect [Oliver's] dues [was] not created by the Commonwealth; it [was] created by the union's contract with [Oliver]. 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." App. 018. Oliver's private dues authorization, and the Commonwealth's ministerial role in enforcing it, do not transform her 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 Oliver's damages claim.

Oliver's §1983 damages claim also fails for a third reason. Oliver's claim is premised on her contention that, by collecting fair-share fees from non-members to

pay for collective bargaining representation, the Union compelled her to agree to join the Union and pay dues. But every court to consider the issue, including the district court below, has concluded that unions have a good faith defense to retrospective §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. 019-020; *Wholean v. CSEA SEIU Local 2001*, --- F.3d ----, 2020 WL 1870162 (2d Cir. Apr. 15, 2020); *Ogle v. Ohio Civil Serv. Emps. Ass'n, AFSCME Local 11*, 951 F.3d 794 (6th Cir. 2020); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019); *Janus II*, 942 F.3d at 367; *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019); *see also Danielson*, 945 F.3d at 1104 n.7 (collecting numerous district court decisions). The reasoning of these decisions is correct, and Oliver's contrary arguments lack merit.[10]

First, Oliver contends that *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), limits the good faith defense to constitutional torts for which malice and lack of probable cause are elements of the constitutional claim,

[10] This Court has expedited its consideration of *Wenzig v. SEIU Local 668*, No. 19-3906, another appeal from a district court decision holding that the Union is not liable for having collected pre-*Janus* fair-share fees. The Union's legal arguments are fully set out in its brief in *Wenzig*, and the decision in *Wenzig* will be controlling on that issue. The Union thus responds only briefly to Oliver's arguments against application of the good faith defense.

based on analogies to the common law. AOB 22-24. But *Jordan* did not limit its holding in this manner. Instead, *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.

Second, Oliver contends that the recognition of a good faith defense "is incompatible with the text of Section 1983." AOB 24-25. But this Court already concluded otherwise in *Jordan*. And the Supreme Court long ago rejected Oliver's approach to applying §1983, concluding instead that Congress intended the contours of §1983 immunities and defenses to be judicially developed. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (although statutory text of §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").

Third, Oliver contends that the adoption of a §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 25-28. 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 §1983 liability based on good-faith reliance on presumptively valid state laws. *Id.* at 168-69.

Finally, Oliver urges that applying the good faith defense is "inconsistent with equitable principles." AOB 28-30. To the contrary, "[t]he Union bears no fault for acting in reliance on state law and Supreme Court precedent"; Oliver received membership rights and benefits in exchange for her 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. Oliver's claim for damages fails whether or not *Janus* applies retroactively.

Oliver contends that the rejection of her §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, Oliver oversimplifies 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 WL 1785414, at *1 (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 WL 1615414, 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*, --- F.3d ----, 2020 WL 1870162, at *4 ("[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]

[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*, --- F.3d ----, 2020 WL 1870162, at *4; *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").

In any event, whether *Janus* applies "retroactively" as a matter of substantive law is irrelevant here. First, as discussed, Oliver was a member of the union who paid dues and received membership rights and benefits in return, *not* a non-member 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 earlier, would have affected the party's choice whether to enter into the contract, *see supra* at 19-22, 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

[12] Oliver contends that *Janus* adopted a new rule regarding the validity of union member dues authorization agreements. AOB 14. 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 Oliver's purported new rule applies retroactively.

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 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 Oliver's 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. Oliver's constitutional challenge to the union security provisions of the collective bargaining agreement and Pennsylvania law fails for lack of standing and mootness.

In her Complaint, Oliver sought a declaration that provisions of PERA that purportedly applied to her by the terms of the expired CBA and limited her "ability to resign from the union and stop union dues" were unconstitutional. App. 042-043, 046. But when Oliver filed this action she had already resigned membership in the Union and was no longer having union membership dues withheld from her

pay.[13] *See* App. 050, 052. Oliver did not allege she intended to join the Union again. The district court therefore correctly dismissed Oliver's claims for declaratory relief with respect to the "union security" provisions of PERA and the expired CBA for lack of a justiciable controversy. App. 020.

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). A plaintiff seeking forward-looking relief such as declaratory relief "must show that [s]he is likely to suffer future injury from the defendant's conduct." *McNair v. Synapse Group, Inc.*, 672 F.3d 213, 223 (3d Cir. 2012) (internal quotation marks and citation omitted). Because Oliver had resigned and stopped paying dues before she filed suit, Oliver could no longer benefit from any declaration regarding the constitutionality of the purported limitations imposed on such resignations. Oliver therefore "ha[d] no cognizable interest in determining

[13] Oliver's assertion that the Union "attempt[ed] to moot this case," AOB 30, disregards the fact that the relevant Union actions were taken *before* Oliver filed suit. Because the Union processed Oliver's resignation and terminated her dues deductions before Oliver sued, her reliance on *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), and *Fisk v. Inslee*, 759 F. App'x 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*, --- F.Supp.3d ----, 2020 WL 515816, at *11-12 (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).

the constitutionality of the union security provisions, and an opinion rendered by [the court] on the issue would be advisory," as the district court correctly recognized. App. 020; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (where the plaintiff "lack[s] a legally cognizable interest in the outcome" of her claim for declaratory relief, the district court lacks jurisdiction to consider that claim) (internal quotation marks and citation omitted); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("[A] person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation."); *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 257-58 (3d Cir. 2009) (court has Article III jurisdiction to hear a claim only if the plaintiff has standing).

That Oliver was no longer a member of the Union and no longer subject to dues deductions at the time she filed suit was sufficient to establish her lack of standing.[14] But even if Oliver had standing when she filed suit, her claim for

[14] Oliver's lack of standing does not depend on whether she was previously injured by the "union security" provisions and practices she claims 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 v. Lyons*, 461 U.S. 95, 109 (1983). In any event, she suffered no prior injury. Notwithstanding the union security provision of the (now-expired) CBA, Local 668 honored Oliver's resignation notice and instructed the Commonwealth to halt dues deductions. *See* App. 051-052.

declaratory relief would now be moot because the operative collective bargaining agreement no longer includes a union security provision, so neither Oliver nor any other member of the Union will be subject to those provisions in the future. *See* App. 049; *see also* SAppx018 (April 2, 2019 Side Letter modifying and superseding union security provisions of prior agreement).

Oliver argues that Pennsylvania law "only permit[s] employees to opt-out from the union during the specified fifteen-day window immediately prior to the expiration of a multi-year collective bargaining agreement." AOB 16. But Oliver does not correctly describe the law. Pennsylvania law merely authorizes public employers and unions to *negotiate* over the terms of a union security provision (while providing that the only requirement that can be enforced pursuant to such a provision is the obligation to pay membership dues). *See* 43 Pa.Stat.Ann. §1101.705; *see also id.* §§1101.301(18), 1101.401. It does not make such provisions *mandatory*, and therefore does not override the Union and the Commonwealth's current CBA, which has no union security provision. Oliver is simply wrong in her baseless and unsupported assertion that Local 668 and the Commonwealth "continue to enforce" the union security provisions she challenges. AOB 30, 33. Moreover, Oliver has not alleged she intends to become a Union

member in the future, so she would have no interest in challenging a provision that would apply only to Union members if it did exist.[15]

Oliver also argues that her claim is not moot because "where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments." AOB 32. But the "capable of repetition yet evading review" exception is triggered only where, among other things, "there is a reasonable expectation that *the same complaining party will be subject to the same action again*." *United States v. Kissinger*, 309 F.3d 179, 183 (3d Cir. 2002) (emphasis added; alteration omitted). Oliver has resigned from the Union and stopped paying dues, meaning there is no reasonable expectation that she will be subject to the challenged provisions in the future. App. 052-053; *see, e.g.*, *Durst v. Oregon Educ. Ass'n*, --- F.Supp.3d ----, 2020 WL 1545484, at *2 (D. Or. Mar. 31,

[15] Because Oliver is no longer a Union member, and because the current CBA no longer contains a union security provision, there is no reason to consider the merits of Oliver's challenge to the expired CBA's union security provision. Nor does this case present any questions regarding the validity of maintenance of *dues* agreements (by which union members contractually agree to pay dues for some set period of time regardless of membership status) since Oliver was not required to pay dues after resigning her membership. *Cf.* AOB 33 (arguing that Local 668 and Commonwealth "continue with dues deduction even when an employee resigns union membership"). In any event, multiple courts have rejected the claim that *Janus* prohibits unions from enforcing maintenance of dues agreements. *See, e.g.*, *Anderson*, 400 F.Supp.3d at 1116-17; *Cooley*, 385 F.Supp.3d at 1080; *Smith*, 2019 WL 2476679, at *2; *Belgau*, 359 F.Supp.3d at 1016.

2020) (concluding that "capable of repetition yet evading review exception" to mootness did not apply where plaintiffs had resigned from union because there was "no reasonable expectation" they would be subject to deductions going forward).

In sum, Oliver has no interest in prospective relief with respect to any supposed limitations on Union members' ability to resign from membership or revoke dues deduction authorizations. The district court properly concluded that it lacked jurisdiction over her claims for declaratory relief with respect to those limitations.

III. Oliver's challenge to exclusive-representative collective bargaining is foreclosed by Supreme Court precedent and in any case meritless.

Oliver alleged in Count II of her Complaint that Pennsylvania's democratic system of exclusive-representative bargaining violates her First Amendment rights against compelled speech and compelled association. App. 044-046. But that contention is foreclosed by the Supreme Court's decision in *Knight*, which held that an indistinguishable system of exclusive representation "in no way restrained [non-union members'] freedom to speak … or their freedom to associate or not to associate with whom they please, including the exclusive representative." 465 U.S. at 288. Every court to consider the issue has recognized that Oliver's argument is foreclosed by *Knight*. *See infra* at 49. In any event, Oliver's argument would be meritless even if it were not foreclosed by precedent. The district court

therefore correctly entered summary judgment for the Union on Count II. *See* App. 008 n.1, 029-031.

A. Pennsylvania follows the essentially universal model for collective bargaining systems in the United States.

As previously stated, Pennsylvania's PERA establishes an exclusive-representative collective bargaining system in which the public employees in each bargaining unit may elect, by majority vote, a single representative to negotiate unit-wide contract terms with their public employer. *See supra* at 5; 43 Pa.Stat.Ann. §§1101.605, 1101.606. The federal government and about 40 other states all authorize collective bargaining for at least some public employees through similar exclusive-representative systems based on majority rule. SAppx026-027, 029. The National Labor Relations Act and Railway Labor Act also adopt exclusive-representative systems. 29 U.S.C. §159; 45 U.S.C. §152, Fourth. These systems reflect a longstanding legislative judgment based on experience that a democratic, exclusive-representative system provides the only practical mechanism for negotiating contract terms for an entire workforce. *See, e.g.*, House Rep. No. 1147 (1935), *reprinted in* 2 Leg. Hist. of the National Labor Relations Act 3070 (1949) ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides."); Sen. Rep. No. 573 (1935), *reprinted in* 2 Leg. Hist. of the NLRA 2313 (1949) ("[T]he making of agreements is impracticable in the absence of majority rule."). Such

systems of exclusive representation have been broadly successful in preventing labor strife, disruption to public services, and discrimination against non-union members, and "cover[] millions of employees in almost every type of industry. SAppx028, 030-031.[16]

Oliver has conceded that she is not required to become a Union member or provide financial support to the Union. App. 052-053. She has also conceded that she "has the right to criticize the Union's positions, to refrain from any Union activities, and to present her views and grievances to the Commonwealth," and, moreover, that "[t]he Union and the Commonwealth understand [she] does not necessarily agree with the views or positions of the Union." App. 053. Thus, Oliver claim reduces to the contention that PERA's adoption of an essentially universal model for collective bargaining, by itself, violates the First Amendment rights of bargaining unit workers.

B. Oliver's claim is foreclosed by precedent.

The district court correctly concluded that Oliver's claim that her First Amendment rights are being violated cannot be squared with the Supreme Court's decision in *Knight*. *See* App. 008 n.1, 029-031.

[16] In the early days of public-sector collective bargaining, several states experimented with alternative systems that did not follow the principle of exclusive representation. SAppx028-029. Those systems were quickly abandoned as failures. *Id.*

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 Oliver's 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 has agreed that *Knight* forecloses the claim Oliver 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 F. App'x 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); *see also Thompson v. Marietta Educ. Ass'n*, 2019 WL 6336825, at *7 (S.D. Ohio Nov. 26, 2019) (collecting district court cases reaching same conclusion).

In contending that exclusive representation violates her First Amendment rights, Oliver relies on *Janus*. AOB 34. 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.[17] 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

[17] *Harris v. Quinn*, 134 S.Ct. 2618 (2014) and *Knox* (cited at AOB 35), likewise addressed challenges to union fees, not exclusive representation.

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 Oliver's 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 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*.").[18]

[18] Oliver points to a passage in *Janus* that describes exclusive-representative bargaining as an "impingement on associational freedoms that would not be tolerated in other contexts." 138 S.Ct. at 2478. But the 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. Commw. Ct. 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.

C. Even if Oliver's claim were not foreclosed by precedent, it would be meritless.

Even if *Knight* were not controlling, Oliver's 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 or say *anything* and there is no public perception that the complaining party endorses any message or group.

Oliver urges that she is compelled to speak because the exclusive representative "speak[s] in her name." AOB 38. But Oliver's premise is wrong. The exclusive representative bargains on behalf of the unit as a whole, not "in her name." *See Reisman*, 939 F.3d at 411-14 (rejecting same argument). Oliver conceded that "the Union and the Commonwealth understand [she] does not necessarily agree with the views or positions of the Union." App. 053; *see also* SAppx029; *Knight*, 465 U.S. at 276 ("The State Board considers the views expressed … to be the faculty's official collective position. It recognizes, however, that not every instructor agrees with the official faculty view ….").
Likewise, as in other democratic systems, there is no public perception that Oliver necessarily shares 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.").

Oliver urges that she is compelled to enter into an expressive association with the Union because "the union represents everyone in the bargaining unit." AOB 34. But Oliver conceded that she need not become a Union member, and the Union's representation of Oliver's bargaining unit says nothing about Oliver's *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").

Oliver gets 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 Oliver 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. By contrast, the record below includes undisputed expert testimony that there are no examples of successful collective bargaining systems in the United States that do *not* use the democratic, exclusive representative model,

and that experiments with members-only or multiple representative systems were abandoned as failures. *See* SAppx028-029.

As such, even if Oliver's claim were not foreclosed by precedent, and even if Oliver had shown an impingement on her First Amendment rights, the district court still would have been correct to enter judgment for defendants on Oliver's 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 WL 6336825, at *7-8 (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 WL 4654751, at *3 (D. Minn. Sept. 27, 2018) *(*same).

CONCLUSION

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

Dated: April 20, 2020

Respectfully submitted,

By: */s/P. Casey Pitts*
P. Casey Pitts

SCOTT A. KRONLAND
P. CASEY PITTS
MEREDITH A. JOHNSON
Altshuler Berzon LLP

Attorneys for Defendant-Appellee SEIU Local 668

COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

1. That I am a member of the Bar of this Court.

2. That the foregoing Answering Brief of Defendant-Appellee Service Employees International Union Local 668 complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it was prepared in 14-point Times New Roman font, and with the exception of the portions excluded by F.R.A.P. 32(f), contains 12,873 words.

3. That, on April 20, 2020, the foregoing Answering Brief of Defendant-Appellee Service Employees International Union Local 668 was electronically filed and served through the CM/ECF system to counsel of record for all parties.

4. That the virus-detection program Windows Defender has been run on the electronic Brief and no virus was detected.

Dated: April 20, 2020 By: */s/P. Casey Pitts*
P. CASEY PITTS