No. 20-1621

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUSAN BENNETT,

Plaintiff-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO; AFSCME LOCAL 672; MOLINE-COLE VALLEY SCHOOL DISTRICT NO. 40; ATTORNEY GENERAL KWAME RAOUL, in his official capacity; and ANDREA R. WAINTROOB, chair, JUDY BIGGERT, GILBERT O'BRIEN JR., LYNNE SERED, and LARA SHAYNE, members, of the Illinois Educational Labor Relations Board, in their official capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of Illinois
Hon. Sara L. Darrow, Chief U.S. District Judge

JOINT BRIEF OF APPELLEES AFSCME COUNCIL 31, AFSCME LOCAL 672, AND MOLINE-COAL VALLEY SCHOOL DISTRICT NO. 40

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1621

Short Caption: Bennett v. AFSCME, Council 31

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

COUNCIL 31 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

AFSCME LOCAL 672

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

BREDHOFF & KAISER, P.L.L.C.; DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

NONE

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Jacob Karabell Date: 04/17/2020

Attorney's Printed Name: Jacob Karabell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ April H. Pullium Date: 04/17/2020

Attorney's Printed Name: April H. Pullium

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Moline-Coal Valley School District No. 40

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Hodges Loizzi Eisenhammer Rodick & Kohn LLP

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N/A

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Jason T. Manning Date: 12/18/2020

Attorney's Printed Name: Jason T. Manning

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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JURISDICTIONAL STATEMENT

The jurisdictional statement in Appellant's brief is not complete and correct. The District Court had original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343, as Plaintiff-Appellant Susan Bennett brought claims under 42 U.S.C. § 1983 alleging violation of her First Amendment rights. Subsequently, Defendant-Appellee Moline-Coal Valley School District No. 40 ("School District") filed a cross-claim for indemnification against Defendants-Appellees AFSCME Council 31 and AFSCME Local 672; the District Court had supplemental jurisdiction over the School District's cross-claim pursuant to 28 U.S.C. § 1367(a).

The District Court entered final judgment on April 2, 2020, granting judgment for Defendants on all of Plaintiff's claims and dismissing the School District's cross-claim. S.A. 16. Plaintiff filed a notice of appeal on April 15, 2020. District Court ECF No. 44. On April 28, 2020, the School District filed a motion for reconsideration of the District Court's dismissal of the cross-claim, pursuant to Fed. R. Civ. P. 59(e). District Court ECF No. 49. The filing of that timely motion suspended Plaintiff's notice of appeal. Fed. R. App. P. 4(a)(4)(B)(i). On September 16, 2020, the District Court issued an order disposing of the Rule 59(e) motion. District Court ECF No. 53. That order deemed Plaintiff's notice of appeal effective. *Id.* This Court therefore has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did it violate Plaintiff's First Amendment rights for the Union to enforce Plaintiff's membership agreement, in which Plaintiff agreed to have annual union dues deducted from her paychecks in exchange for receiving the benefits of union membership?

II. Did the Union act under color of state law, as is required for a private party to be liable for violating another private party's constitutional rights, when it instructed the School District to continue deducting union dues from Plaintiff's paychecks pursuant to the terms of her membership agreement?

III. Does the principle of exclusive representation—the principle that, if a majority of employees in a bargaining unit elects to be represented by a union, that union bargains on behalf of the entire unit with respect to the terms and conditions of their employment, and any agreement the union negotiates with the employer thus runs to the benefit of all employees in the unit—violate the First Amendment?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Under the Illinois Educational Labor Relations Act ("IELRA"), employees of public educational employers in Illinois have the right to join a labor organization for purposes of representation, if they so choose. 115 ILCS 5/3. When a majority of employees in a particular unit demonstrates support for union representation, that

union is recognized as the exclusive representative for that unit of employees with respect to wages, hours, and other terms and conditions of employment. *Id.* § 5/8. Employees, however, need not become dues-paying members of a union that has been recognized as an exclusive representative, *id.* § 5/3, and a union recognized as an exclusive representative has the duty to represent all employees within the bargaining unit without regard to whether they are dues-paying members or not, *see Jones v. Ill. Educ. Labor Relations Bd.*, 650 N.E.2d 1092, 1097 (Ill. App. Ct. 1995). Pursuant to the IELRA, Defendant AFSCME Council 31 has been certified as the exclusive representative of a bargaining unit of custodial and maintenance employees of Defendant-Appellee Board of Education of Moline-Coal Valley School District No. 40 ("School District"). S.A. 18-19.

Plaintiff-Appellant Susan Bennett began her employment with the School District in August 2009, in a bargaining-unit position represented by Defendants-Appellees AFSCME Council 31 and AFSCME Local 672 (collectively, "the Union"). S.A. 17. Since becoming employed by the School District, Plaintiff has had the option at all times to join or not to join the Union. S.A. 20-21. Until June 27, 2018, if Plaintiff had not joined the Union, she would have had a "fair-share fee" (also known as an "agency fee") deducted from her wages to cover her proportionate share of the Union's expenditures devoted to collective bargaining, grievance handling, and representational activities, as was permitted under Illinois law, *see* 115 ILCS 5/11 (2018), and the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431

U.S. 209 (1977). On June 27, 2018, the Supreme Court overruled *Abood*, holding that unions and public employers no longer could require employees to pay an agency fee as a condition of their employment. *See Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

In November 2009, Plaintiff chose to become a member of the Union by signing a union membership agreement on a form drafted by the Union. Union App'x 14; S.A. 19. On August 21, 2017, Plaintiff signed a revised membership agreement, which also was on a form drafted by the Union and presented by the Union to Plaintiff for her review and signature. That agreement, in relevant part, stated that:

> I hereby affirm my membership in AFSCME Council 31, AFL-CIO….
>
> I recognize that my authorization of dues deductions, and the continuation of such authorization from one year to the next, is voluntary and not a condition of my employment.
>
> I hereby authorize my employer to deduct from my pay each pay period that amount that is equal to dues and to remit such amount monthly to AFSCME Council 31 ("Union"). This voluntary authorization and assignment shall be irrevocable for a period of one year from the date of authorization and shall automatically renew from year to year unless I revoke this authorization by sending written notice by the United States Postal Service to my Employer and to the Union postmarked not more than 25 days and not less than 10 days before the expiration of the yearly period described above, or as otherwise provided by law.

S.A. 19-20; Union App'x 16.

Thus, under the membership agreement—which was voluntary by its terms—Plaintiff committed to have an amount equal to union dues deducted from her paychecks and remitted to the Union until August 21 of each year; on that date, the

authorization automatically would renew for the following year unless it had been revoked. S.A. 21-22. A union member's advance commitment to pay dues for a discrete period of time, not exceeding one year, allows the Union to plan and budget effectively by making financial commitments, such as renting offices, hiring staff, and entering into contracts with vendors. S.A. 25. It also makes the administration of dues deductions easier for the Union and the public employers that deduct dues than would be the case if employees could toggle back and forth between authorizing and deauthorizing deductions. S.A. 25.

Employees who choose to join the Union by signing a membership agreement like the one Plaintiff signed receive membership rights and access to benefits that are not available to nonmembers, such as the ability to vote in union-officer elections, the ability to vote in elections to ratify collective bargaining agreements, and access to scholarship programs. S.A. 26. Plaintiff had access to these benefits when she was a member of the Union. S.A. 26. She availed herself of those benefits as recently as August 2018, when she attended a union-membership meeting and voted in an election on whether to ratify a proposed collective bargaining agreement between the Union and the School District. S.A. 26.

In November 2018, Plaintiff wrote an email to the chief financial officer of the School District, informing him that she intended to resign her union membership and requesting that the School District not honor any prior dues-deduction authorization she had signed. S.A. 22-23. In response to that email, the chief financial officer told

Plaintiff to contact the Union regarding her inquiries, as the School District has no role, authority, or discretion in determining union membership or dues deductions. S.A. 23. Ten days later, on December 13, 2018, the Union wrote Plaintiff, noting that she had contacted the Union by phone about her membership status. S.A. 23. The letter went on to inform her that the Union would accept her resignation from membership as soon as it received written notice that she wanted to resign but, regardless of whether she resigned from the union, she had committed to have an amount equal to union dues deducted from her paychecks until August 21, 2019. S.A. 23-24. The letter added that, pursuant to the terms of the dues-deduction authorization in the membership agreement, Plaintiff would have an opportunity to revoke that authorization between July 27 and August 11. S.A. 24.

Plaintiff resigned her union membership on March 4, 2019. S.A. 24. Then, on or around July 29, 2019, Plaintiff sent a letter to the School District requesting to revoke her dues-deduction authorization. S.A. 24. The Union learned of that letter and treated it as an effective revocation of her dues-deduction authorization pursuant to the terms of the membership agreement; accordingly, it instructed the School District to stop deducting union dues from her paychecks. S.A. 24-25. The School District thus terminated Plaintiff's dues deductions in August 2019. S.A. 25.

II. PROCEDURAL BACKGROUND

On April 26, 2019, Plaintiff brought this action under 42 U.S.C. § 1983 against the Union, the School District, and certain Illinois state officials ("State Defendants"). Union App'x 1-12. Count I of Plaintiff's Complaint, brought against the Union and the School District (but not the State Defendants), alleged that Plaintiff's First Amendment rights were violated when union dues were deducted from her paychecks. Union App'x 7-9. As a remedy, Plaintiff sought damages from the Union in the amount of the dues deducted from her paychecks as far back at the statute of limitations would allow (*i.e.*, both before and after she resigned her union membership), as well as various forms of declaratory and injunctive relief from the Union and the School District. Union App'x at 10-12. Count II of the Complaint, brought against the Union and the State Defendants (but not the School District), alleged that the system of exclusive representation set forth in the IELRA violates Plaintiff's First Amendment rights. Union App'x at 9-10.

The parties submitted a joint stipulated record to the District Court, after which they cross-moved for summary judgment on both of Plaintiff's claims. S.A. 1-2 & n.2. The District Court granted the Defendants' motions and denied Plaintiff's cross-motion. With respect to Count I of Plaintiff's Complaint, the court held that the deduction of Plaintiff's union dues pursuant to the membership agreement that she signed did not violate the First Amendment. The court first addressed Plaintiff's argument that the membership agreement should be set aside because the agency-fee

requirement that was in effect for nonmembers at the time improperly "coerced" her to join the Union. The court rejected this argument both on the facts and on the law. As a factual matter, the court concluded that "there is no evidence that she only joined the Union because of the then-applicable fair-share fee requirement." S.A. 7-8 & n.7 (citation omitted). And in finding the claim legally unsupportable, the court observed that "courts faced with similar challenges post-*Janus* have rejected coercion arguments." S.A. 8 (citing five cases).

The District Court then addressed Plaintiff's "related[ ]" argument that she did not knowingly and voluntarily waive her First Amendment rights because *Janus* had not been decided at the time she signed the membership agreement. S.A. 9-11. The court observed that "[p]arties may enter into mutually beneficial contracts that by implication foreclose future opportunities." S.A. 10. It then cited two decisions of this Court holding that criminal defendants who failed to anticipate changes in the law could not rescind their plea agreements, holding that "[i]f incarcerated defendants cannot rescind agreements as involuntary in light of subsequently developed constitutional caselaw, civil litigants … should fare no differently." *Id.* (citing *United States v. Vela*, 740 F.3d 1150 (7th Cir. 2014) & *Oliver v. United States*, 951 F.3d 841 (7th Cir. 2020)). "Accordingly," the court concluded, "Plaintiff's obligation to pay union dues pursuant to the 2017 Card remains enforceable despite the new constitutional right identified in *Janus*." *Id.*

With respect to Count II of Plaintiff's Complaint, the Court held that the system of exclusive representation set forth in the IELRA does not violate the First Amendment. In so holding, the court relied on the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), and this Court's decision in *Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017), both of which squarely addressed and rejected First Amendment challenges to exclusive representation. S.A. 12-15. The Court added that *Janus* "did not reach the issue [of exclusive representation] and instead, reaffirmed the traditional labor system." S.A. 14.

STANDARD OF REVIEW

This Court's review of the District Court's order granting the Defendants' motions for summary judgment, and denying Plaintiff's cross-motion for summary judgment, is *de novo*. *See Kopplin v. Wis. Cent. Ltd.*, 914 F.3d 1099, 1102 (7th Cir. 2019).

SUMMARY OF ARGUMENT

I. The District Court, consistent with every other court to confront a similar claim in the wake of *Janus*, correctly held that the Union's decision to enforce the dues-deduction authorization in Plaintiff's membership agreement did not violate the First Amendment.

By entering into the membership agreement, Plaintiff received consideration—access to benefits available only to union members—in exchange for her commitment to have union dues deducted from her paychecks for a yearly period. The continuation of payroll deductions pursuant to the clear terms of a bilateral contract

enforces the Union's rights under generally applicable contract law, and under the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), enforcing such a self-imposed restriction on speech does not violate the First Amendment. Under *Cohen*, where, as here, a private party voluntarily enters a contract agreeing to forgo its constitutional rights, that is the end of the matter; the party seeking to enforce the agreement need not satisfy a heightened standard of constitutional waiver.

Even if a waiver analysis were necessary, the Union membership agreement would constitute a waiver of Plaintiff's First Amendment rights. Plaintiff concedes that she voluntarily joined the Union by signing the membership agreement, which by its plain terms committed Plaintiff to have union dues deducted from her paychecks for a discrete period of time not exceeding one year. That is all that is necessary for Plaintiff to have waived her constitutional right through a contract with another private party. Plaintiff argues that her membership agreement cannot be enforced because she was not specifically notified of her First Amendment right not to subsidize the Union's speech, but it is incoherent to bifurcate the right to become a member of a voluntary association from the right to financially support a voluntary association in this way, and in all events, the membership agreement clearly set forth Plaintiff's commitment to pay union dues.

Plaintiff's additional argument that she can escape from her agreement to pay union dues because her commitment preceded the Supreme Court's *Janus* decision also fails. Contracts are a bet on the future, in which each party assumes the risk of

changes in circumstances that may render the agreement unfavorable in retrospect. Accordingly, it is well-established that changes in law—even constitutional law—do not invalidate a contract.

The District Court's judgment also can be affirmed on the ground that the Union cannot be deemed a state actor—as is required for a private party to be held liable under 42 U.S.C. § 1983 for violating another private party's constitutional rights—for informing the School District to continue deducting dues from Plaintiff's paychecks pursuant to the dues-deduction authorization in her membership agreement. That is because the source of Plaintiff's alleged harm is the membership agreement, a contract between two private parties. The fact that the School District took the ministerial action of continuing to deduct Plaintiff's dues after being informed by the Union to do so, pursuant to the terms of the membership agreement, is insufficient to satisfy the state-action requirement.

Finally, there are separate, independent defects in two of Plaintiff's specific claims for relief. Plaintiff's claim for damages in the amount of union dues remitted to the Union prior to the Supreme Court's *Janus* decision is barred by the good-faith defense available to private parties sued under Section 1983, and Plaintiff's claims for declaratory relief are moot.

II. The District Court also correctly held that the principle of exclusive representation by a majority-selected union, which is the foundational principle of American labor relations in both the public and private sectors, does not violate the

First Amendment. As this Court has held, the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), forecloses claims that public employees' speech and associational rights are violated simply because they are part of a bargaining unit represented by an exclusive-representative union.

Plaintiff heavily relies on the Supreme Court's decision in *Janus* in support of her argument that exclusive representation violates the First Amendment, but the Court in *Janus* was careful to distinguish the agency-fee issue it was addressing from any question about the constitutionality of exclusive representation. Moreover, the *Janus* Court reaffirmed the principle of exclusive representation by expressly assuring states that they could keep their labor-relations systems for public employees exactly as they are, except that states no longer can require nonconsenting public employees to pay an agency fee.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE DEDUCTION OF UNION DUES FROM PLAINTIFF'S PAYCHECKS, PURSUANT TO THE CLEAR TERMS OF THE MEMBERSHIP AGREEMENT SHE SIGNED, DID NOT VIOLATE THE FIRST AMENDMENT.

"To state a claim under [42 U.S.C.] § 1983, a plaintiff [1] must allege the violation of a right secured by the Constitution and laws of the United States, and [2] must show that the alleged deprivation was committed by a person acting under color of state law." *L.P. v. Marian Cath. High Sch.*, 852 F.3d 690, 696 (7th Cir. 2017) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). We take these elements—the deprivation

element and the state-action element—in turn, first showing that the District Court correctly held that the Union's decision to enforce the dues-deduction authorization in Plaintiff's membership agreement did not violate Plaintiff's First Amendment rights even on the assumption that the Union was engaged in state action (Part I.A). We then show that Plaintiff's Section 1983 claim fails for the separate reason that the Union, in instructing the School District to deduct dues from Plaintiff's paychecks in accordance with the membership agreement between Plaintiff and the Union, was not engaged in state action (Part I.B). Finally, we show that Plaintiff's claims for a refund of pre-*Janus* dues and for declaratory relief have additional, independent fatal defects (Part I.C).

A. Plaintiff's Agreement To Pay Annual Union Dues, in Exchange for Receiving the Benefits of Union Membership, Did Not Violate Her First Amendment Rights.

1. Under the Supreme Court's Decision in Cohen v. Cowles Media Co., a "Self-Imposed" Restriction on Speech Made in Exchange for Consideration Does Not Violate the First Amendment.

The facts material to Plaintiff's dues-deduction claim are undisputed and straightforward. On August 21, 2017, Plaintiff signed a union membership agreement. *See supra* p. 4. By the express terms of that agreement, Plaintiff's assent was "voluntary and not a condition of [her] employment." Union App'x 16.

As part of this membership bargain, Plaintiff authorized her employer—the School District—to deduct union dues from her paychecks for a yearly period. Such a dues-deduction authorization is similar to agreements that Congress expressly

authorized for employees in the private sector more than 70 years ago. *See* 29 U.S.C. § 186(c)(4).[1]

Plaintiff does not dispute that the language of the union membership agreement was clear, nor does she argue that she did not understand what she was signing. She also does not dispute that, when she informed the Union in December 2018 that she sought to revoke her dues-deduction authorization, her next opportunity to stop dues deductions, according to the express terms of the membership agreement, was August 21, 2019—the anniversary date of Plaintiff's signature on the agreement.

The question before this Court, then, is whether it violates a public employee's First Amendment rights for a union to inform a public employer to continue deducting union dues from that employee's paychecks for a discrete period of time, when the employee consented to those payments as part of a contract through which the employee became entitled to the benefits of union membership. As every court to have addressed this issue has held, including the Ninth Circuit and more than two

[1] *See also* 5 U.S.C. § 7115(a) (dues-deduction authorizations permissible for federal civil-service employees and "may not be revoked for a period of 1 year"); 39 U.S.C. § 1205 (dues-deduction authorizations permissible for postal employees "which shall be irrevocable for a period of not more than one year"); 45 U.S.C. § 152, Eleventh(b) (dues-deduction authorizations permissible for employees covered by Railway Labor Act and "shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner").

dozen federal district courts, it does not. *See Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020).[2]

[2] *See also Fisk v. Inslee*, 2017 WL 4619223, at *5 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F. App'x. 632 (9th Cir. 2019); *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1016-17 (W.D. Wash. 2019), *aff'd*, 975 F. 3d 940 (9th Cir. 2020); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1007-08 (D. Alaska 2019), *appeal pending*, No. 19-35299 (9th Cir.); *Bermudez v. SEIU Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 877 (C.D. Cal. 2019), *appeal pending*, No. 19-55692 (9th Cir.); *Smith v. Bieker*, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019), *appeal pending*, No. 19-16381 (9th Cir.); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 385 F. Supp. 3d 1077, 1079-80 (E.D. Cal. 2019), *appeal pending*, No. 19-16498 (9th Cir.); *Seager v. United Teachers L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019), *appeal pending*, No. 19-55977 (9th Cir.); *Anderson v. SEIU Local 503*, 400 F. Supp. 3d 1113, 1116-18 (D. Or. 2019), *appeal pending*, No. 19-35871 (9th Cir.); *O'Callaghan v. Regents of the Univ. of Cal.*, 2019 WL 6330686, at *4-5 (C.D. Cal. Sept. 30, 2019), *appeal pending*, No. 19-56271 (9th Cir.); *Oliver v. SEIU Local 668*, 415 F. Supp. 3d 602, 606-08 (E.D. Pa. 2019), *aff'd*, 830 F. App'x 76 (3d Cir. 2020); *Smith v. Teamsters Local 2010*, 2019 WL 6647935, at *8-9 (C.D. Cal. Dec. 3, 2019), *appeal pending*, No. 19-56503 (9th Cir.); *Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 922-25 (E.D. Cal. 2019), *appeal pending*, No. 20-15076 (9th Cir.); *Mendez v. Cal. Teachers Ass'n*, 419 F. Supp. 3d 1182, 1186 (N.D. Cal. 2020), *appeal pending,* No. 20-15394 (9th Cir.); *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1023-24 (D.N.M. 2020), *appeal pending*, No. 20-2018 (10th Cir.); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F. Supp. 3d 1108, 1118-19 (S.D. Cal. 2020), *appeal pending*, No. 20-55266 (9th Cir.); *Loescher v. Minn. Teamsters Pub. & Law Enf't Emps.' Union, Local No. 320*, 441 F. Supp. 3d 762, 772-74 (D. Minn. 2020); *Campos v. Fresno Deputy Sheriff's Ass'n*, 441 F. Supp. 3d 945, 956-57 (E.D. Cal. 2020); *Allen v. Ohio Civ. Serv. Emps. Ass'n*, 2020 WL 1322051, at *7-12 (S.D. Ohio Mar. 20, 2020); *Durst v. Or. Educ. Ass'n*, 450 F. Supp. 3d 1085, 1090-91 (D. Or. 2020), *appeal pending*, No. 20-35374 (9th Cir.); *Molina v. Pa. Soc. Serv. Union*, 2020 WL 2306650, at *7-8 (M.D. Pa. May 8, 2020); *Creed v. Alaska State Emps. Ass'n*, 2020 WL 4004794, at *5-10 (D. Alaska July 15, 2020), *appeal pending*, No. 20-35743 (9th Cir.); *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 2020 WL 4038999, at *4-6 (S.D. Ohio July 17, 2020), *appeal pending*, No. 20-3795 (6th Cir.); *Polk v. Yee*, 2020 WL 4937347, at *7-9 (E.D. Cal. Aug. 24, 2020), *appeal pending*, No. 20-17095 (9th Cir.); *Savas v. Cal. State*

These courts correctly have relied on the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), to reject such claims. In *Cohen*, the plaintiff offered to provide documents about a candidate in an upcoming election to newspaper reporters only if he was given a promise of confidentiality; after the reporters made the requested promise, the plaintiff gave the reporters the documents. *Id.* at 665. The newspapers then breached the reporters' promise by publishing the plaintiff's identity. *Id.* at 666.

The plaintiff sued the newspapers under the quasi-contractual doctrine of promissory estoppel. *Id.* The Court rejected the newspapers' argument that the First Amendment barred the plaintiff from enforcing the reporters' promise, holding that the restrictions placed on the newspapers were "self-imposed," *id.* at 671, and therefore that the application of generally applicable state-law promissory estoppel principles in this circumstance did not "offend the First Amendment." *Id.* at 669.

The same is true with respect to the dues-deduction authorization in the union membership agreement that Plaintiff signed. The continuation of payroll deductions pursuant to the clear terms of an agreement into which Plaintiff freely entered enforces the Union's rights under generally applicable principles of Illinois contract law in the same manner as the Supreme Court in *Cohen* held that the plaintiff could

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Law Enf't Agency, 2020 WL 5408940, at *3-5 (S.D. Cal. Sept. 9, 2020), *appeal pending*, No. 20-56045 (9th Cir.); *Wagner v. Univ. of Wash.*, 2020 WL 5520947, at *4 (W.D. Wash. Sept. 11, 2020), *appeal pending*, No. 20-35808 (9th Cir.).

enforce his rights under generally applicable principles of Minnesota promissory estoppel law. *See id.* at 668.

Thus, as the Ninth Circuit recently observed in rejecting a constitutional claim indistinguishable from Plaintiff's claim here, "[t]he First Amendment does not support Employees' right to renege on their promise to join and support the union." *Belgau*, 975 F.3d at 950. That is because, the court held, the First Amendment does not "provide a right to 'disregard promises that would otherwise be enforced under state law.'" *Id.* (quoting *Cohen*, 501 U.S. at 671).[3]

Even though *Cohen* is the fountainhead for the unbroken line of authority holding that dues deductions made pursuant to a union membership agreement do not violate the First Amendment, Plaintiff does not even acknowledge *Cohen* in her brief.[4] Instead, she contends that "Supreme Court precedent provides that certain

[3] The Ninth Circuit in *Belgau* separately addressed the plaintiffs' constitutional claims against the Union and against the plaintiffs' employer. The *Belgau* court affirmed the district court's dismissal of the claim against the union for lack of state action—a holding that would provide independent grounds for affirming the district court's judgment in favor of the Union here. *See infra* Part I.B. The *Belgau* court affirmed the district court's dismissal of the claim against the plaintiffs' employer on the ground that the plaintiffs' First Amendment rights were not violated by the deduction of dues pursuant to the plaintiffs' union membership agreements. *Belgau*, 975 F.3d at 952. That second holding, discussed above in text, also would foreclose Plaintiff Bennett's claim here even assuming *arguendo* that the Union was engaged in state action.

[4] While Amici Joanne Troesch *et al.* do at least acknowledge *Cohen*, their attempt to distinguish that decision on the ground that "[t]he Court did not address whether the newspaper waived its First Amendment rights because the state action *did not violate those rights in the first place*," Amicus Br. 11, is entirely circular. The reason that the

standards be met in order for a person to properly waive his or her constitutional rights" and goes on to cite cases in support of that proposition. Pl.'s Br. 11. None of those cases is in any way inconsistent with *Cohen*. All but one of those cases involved litigants who had *not* affirmatively undertaken any obligations, much less entered into bilateral contracts to undertake obligations in exchange for consideration. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (state had not waived Eleventh Amendment immunity); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (defendant had not waived defense that plaintiff had to prove actual malice to prevail on libel claim); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (defendant had not waived Sixth Amendment right to counsel); *Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio*, 301 U.S. 292, 306-07 (1937) (petitioner had not waived Fourteenth Amendment right to present evidence prior to rate-setting determination). As *Cohen* makes clear, the outcome in those cases would have been different if the affected parties had entered into a contractual agreement to forgo a constitutional right in exchange for a benefit.[5] *Cohen* is also consistent with the remaining case cited by Plaintiff, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), where the Court held that the respondent *could* enforce

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Supreme Court in *Cohen* found no violation of the First Amendment was that the plaintiff and the newspaper reporters voluntarily entered into an agreement containing a self-imposed restriction on the newspapers' speech, which was enforceable under state law. *See Cohen*, 501 U.S. at 669. The same is true here.

[5] Indeed, in *College Savings Bank*, the Court specifically noted that the outcome would have been different had the state entered into a "contractual commitment" to waive its Eleventh Amendment immunity. 527 U.S. at 678.

a bilateral contract between the parties, valid under state law, in which the petitioner had agreed to confess judgment if it defaulted on a promissory note. *Id.* at 185-87.

Plaintiff makes the related argument that the District Court erred by failing to apply "the waiver analysis set forth in *Janus*." Pl.'s Br. 13. *Janus*, however, was not brought by an individual who was a member of a union; it instead was brought by an individual who *never* had entered into any contractual or other similar arrangement with a union but nonetheless was compelled to pay agency fees for the costs of union representation as a condition of his public employment. *Janus*, 138 S. Ct. at 2461. The question before the Court in *Janus*, therefore, was whether the nonmember plaintiff had affirmatively consented to pay agency fees such that he had waived his First Amendment right not to subsidize the speech of a labor union. Indeed, in *Harris v. Quinn*, 573 U.S. 616 (2014), an earlier challenge to an agency-fee requirement, the Court contrasted the nonmember plaintiffs with union members, observing that, given that the union in that case had received majority support in a union-representation election, "it may be presumed that a high percentage of [the bargaining unit] became union members and are *willingly* paying union dues." 573 U.S. at 651 (emphasis added).

Once it is understood that the relationship between a union and its own members was not at issue in *Janus*, it is clear that the passage in *Janus* that Plaintiff repeatedly cites in her brief is of no help to her. That passage is the concluding section of the Court's opinion, which begins by noting that in Illinois (where Mr. Janus

resided) an agency fee was "automatically deducted from the *nonmember's* wages" and that "[n]o form of employee consent is required." 138 S. Ct. at 2486 (emphasis added). The Court held that "[t]his procedure violates the First Amendment and cannot continue." *Id.* The Court continued: "Neither an agency fee nor any other payment to the union may be deducted from a *nonmember's* wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, *nonmembers* are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* (emphases added).

The Court in *Janus* thus was addressing the question presented: whether employees such as Mr. Janus, who never "affirmatively consent[ed]" to pay an agency fee but nonetheless were required to do so as a condition of their employment, had their constitutional rights violated. That is not at all the situation presented here, where Plaintiff consented to join the Union and pay the dues required of members. For this reason, the Ninth Circuit in *Belgau* rejected a similar argument that *Janus* should be extended to cover union members like Plaintiff, observing that "the dangers of compelled speech animate *Janus*" and that *Janus* "in no way created a new First Amendment waiver requirement for union *members* before dues are deducted pursuant to a voluntary agreement." *Belgau*, 975 F.3d at 950, 952 (9th Cir. 2020) (emphasis added). *See also, e.g.*, *Allen v. Ohio Civ. Serv. Emps. Ass'n*, 2020 WL 1322051, at *8 (S.D. Ohio Mar. 20, 2020) ("Plaintiffs consented to pay dues to the union for at least a specific term, regardless of the status of their membership. Because *Janus* dealt with

the rights of nonconsenters, it says little about the scope of the rights of consenters like Plaintiffs.").

Indeed, contracts between private parties in which the parties agree to forgo constitutional rights are ubiquitous, such as confidentiality clauses in settlement agreements (through which a party forgoes its First Amendment right to speak publicly) or arbitration clauses in commercial contracts (through which a party forgoes its Seventh Amendment right to a jury trial).[6] If such contracts are valid as a matter of state law, they are enforced; no heightened standard of constitutional waiver need be satisfied.

Moreover, applying a heightened waiver standard to protect an individual's right *not* to associate with a labor union itself would be constitutionally fraught given the other constitutional rights implicated in the relationship between a union and its (potential) members. The First Amendment, of course, protects not only the decision to refrain from associating with a union but also the affirmative decision to associate with a union by joining it. *See AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("Union membership is protected by the right of association under the First

[6] To the extent that Amici rely on decisions involving an agreement with the *government* through which a private party forwent a constitutional right, *see, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (private party, in contract with municipality, waived right to bring § 1983 claim against police officer), different constitutional considerations are at stake. *Cf. Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment *constrains* governmental actors and *protects* private actors." (emphases added)).

and Fourteenth Amendments."); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984) (First Amendment protects both "right to associate" and "freedom not to associate"). Any requirement that a union must secure a heightened waiver before an individual can join a union and agree to pay the dues required of members, such as a *Miranda*-type warning, would impose special burdens or rules that would make it more difficult for that individual to exercise her First Amendment right *to associate* with the union. That is not consistent with the First Amendment.

A heightened waiver standard also would violate the First Amendment by nullifying contracts between unions and their members on grounds that do not apply to other private associations. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (it is unconstitutional to "burden th[e] freedom [of association]" through "intrusion into the internal structure or affairs of an association") (internal quotation marks omitted). It is common for private associations of all kinds to insist on an annual-dues commitment as a condition of membership, rather than permit members to make *pro rata* dues payments that could be terminated at any time. *Cf. NLRB v. Granite State Joint Bd. Textile Workers Union*, 409 U.S. 213, 216 (1972) (noting that "the law which normally is reflected in our free institutions" is that an individual has the right "to join or to resign from associations, as he sees fit *subject of course to any financial obligations due and owing the group with which he was associated*" (emphasis added and citation omitted).

2. Even If a Waiver Analysis Were Necessary, the Union Membership Agreement Waived Plaintiff's First Amendment Rights.

As we have shown, no waiver analysis is required to conclude that Plaintiff's First Amendment rights were not violated by the deduction of union dues pursuant to the membership agreement that she voluntarily signed. But even if such an analysis were necessary, the union membership agreement—in which Plaintiff received the benefits of union membership in exchange for a dues commitment not exceeding one year—would qualify as such a waiver.

A party's decision to voluntarily enter into a contract that, by its terms, limits the potential exercise of its constitutional rights is sufficient to constitute a waiver of those rights. This Court's decision in *Hawkins v. Aid Association for Lutherans*, 338 F.3d 801 (7th Cir. 2003), is instructive. In *Hawkins*, the plaintiff policyholders purchased life-insurance policies from the defendant association; each policyholder's contract incorporated by reference the bylaws of the association and specified that any future amendment to the bylaws would be binding on the policyholder. *Id.* at 804. After the plaintiffs signed their respective contracts, the association amended its bylaws to include a mandatory arbitration provision for the resolution of any disputes between policyholders and the association. *Id.* The plaintiffs argued that they should be permitted to litigate their dispute with the association in court because, *inter alia*, the contract was insufficient to waive their Seventh Amendment right to a jury trial. This Court summarily rejected that contention, holding that "[b]y acquiescing to the terms

and conditions of their open contract with [the association], Appellants waived their right to a trial by jury and agreed to resolve their dispute through AAA arbitration procedures instead." *Id.* at 808.

If the contract at issue in *Hawkins* constituted a waiver of the plaintiffs' Seventh Amendment rights—even though the contract, as of the date the plaintiffs signed it, did not even contain an arbitration clause—it follows that the membership agreement at issue here constituted a waiver of Plaintiff's First Amendment rights, which clearly and expressly committed Plaintiff to have annual union dues deducted from her paychecks from the moment she signed it.

Plaintiff makes several arguments, all unavailing, as to why the union membership agreement she signed does not amount to a waiver. Plaintiff first argues that "she did not freely or voluntarily waive her right to *not pay money* to the Union," which, she claims, "is not the same as claiming that she was coerced *to join* the Union." Pl.'s Br. 13.

Plaintiff's argument fails on multiple levels. As a threshold matter, Plaintiff's concededly voluntary decision to become a member of the Union, in and of itself, plainly encompassed a "waiver" of her First Amendment right not to pay money to the Union. It is simply incoherent to bifurcate the right to become a member of a voluntary association from the right to financially support a voluntary association in this way. As one court recently put it in rejecting this argument:

> While Plaintiffs now try to disaggregate the decision to join the union from the decision to subsidize the union's speech, it is impossible to do so. By joining the union, Plaintiffs simultaneously acquired all of the benefits and burdens of membership. In doing so, they voluntarily forfeited the right to object to how the union used their money.

Allen, 2020 WL 1322051, at *8; *see also Oliver v. SEIU Local 668*, 830 F. App'x 76, 79 n.3 (3d Cir. 2020) ("[B]y signing the union membership card, Oliver was exercising her free association right to join the Union, effectively waiving her right not to support the Union. She cannot simultaneously choose to both join the Union and not pay union dues.").

Moreover, to the extent that Plaintiff argues that the dues-deduction authorization in the union membership agreement cannot be enforced because it does not expressly reference the First Amendment or expressly state that Plaintiff is "waiv[ing] her right to pay no money to the Union," Pl.'s Br. 13, she is incorrect. We are aware of no case—and Plaintiff cites none—that requires such language in order for a court to find a waiver of a constitutional right in a contract. On the contrary, "when an agreement clearly sets forth the restrictions on constitutionally protected speech, the talismanic recital of the words 'first amendment' would not add materially to the party's understanding of the right being waived." *Perricone v. Perricone*, 972 A.2d 666, 682 (Conn. 2009). Here, Plaintiff's membership agreement clearly states that "the authorization of dues deductions, and continuation of such authorization from one year to the next, is voluntary and not a condition of my employment," as well as when the authorization can be revoked. Union App'x 16. By way of example, this Court has

never held that, in order for an arbitration clause to be enforceable, it must expressly reference the Seventh Amendment or state that the contracting parties are waiving their right to trial by jury. *See Hawkins*, 338 F.3d at 808; *Koveleskie v. SBC Cap. Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999).

The balance of Plaintiff's arguments amount to an assertion that, as a matter of law, she could not have waived her First Amendment rights prior to the Supreme Court's *Janus* decision. In essence, Plaintiff argues that the membership agreement was not a sufficient waiver because "*Janus* had not yet been decided, so she was unaware that she was entitled to pay nothing to the Union." Pl.'s Br. 12.[7]

For this point, Plaintiff cites *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), in which the Supreme Court held that "an effective waiver" must "be one of a known right or privilege." *Id.* at 143 (citations omitted). *Curtis*, however, did not involve the situation here, where a party *received consideration* in exchange for foregoing the

[7] Plaintiff's argument is predicated on an assumption that the Supreme Court's decision in *Janus* has retroactive effect. *See* Pl.'s Br. 10-11. But the question of whether Janus applies retroactively is not as straightforward as Plaintiff would have it, as this Court has observed. *See Janus v. AFSCME Council 31*, 942 F.3d 352, 360 (7th Cir. 2019) (observing that question of whether Supreme Court intended for its decision in *Janus* to be retroactive "poses some knotty problems"), *petition for cert. filed*, No. 19-1104 (U.S. Mar. 9, 2020). *See also Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 389 (6th Cir. 2020) (observing that "[c]ertain language in the Supreme Court's opinion at least suggests that *Janus* was intended to be applied purely prospectively, rather than retroactively"), *petition for cert. filed*, No. 20-422 (U.S. Sept. 28, 2020). This Court need not decide the retroactivity of the Supreme Court's decision in *Janus* if it concludes that, even assuming *arguendo* that the decision has retroactive effect, Plaintiff's constitutional claim fails.

possibility of favorable developments in the law. *See supra* p. 18. When courts have been presented with that situation, they have not hesitated to enforce the agreement in question. For example, in *Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262 (3d Cir. 2002), the Third Circuit rejected a coal company's attempt to rescind a contract on the ground that it entered into the agreement because of the existence of a statutory provision that the Supreme Court later held unconstitutional. The court reasoned "that a change in law does not, alone, justify such relief, even when the change is based on constitutional principles." *Id.* at 267-68, 277.

Even in cases involving plea agreements—contracts that waive an individual's fundamental right to personal liberty—the fact that a defendant signed the agreement to avoid a fate later deemed unconstitutional does *not* provide a basis for rescission. In *Brady v. United States*, 397 U.S. 742 (1970), for example, the Supreme Court held that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Id.* at 757. Likewise, in *United States v. Bownes*, 405 F.3d 634 (7th Cir. 2005), this Court rejected the defendant's argument that the waiver of his appeal rights through a plea agreement "was not knowing and intelligent because he had no reason to anticipate" the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which caused a "sea change" in sentencing law. *Bownes*, 405 F.3d at 636-37. As the Court explained:

> In a contract (and equally in a plea agreement) one binds oneself to do something that someone else wants, in exchange for some benefit to oneself. By binding oneself one assumes the risk of future changes in circumstances in light of which one's bargain may prove to have been a bad one. That is the risk inherent in all contracts; they limit the parties' ability to take advantage of what may happen over the period in which the contract is in effect.

Id. at 636.

The claimed hardships Plaintiff complains of here—paying union dues for the remainder of her one-year commitment—pale in comparison to the hardships faced by the defendants in *Brady* and *Bownes*, yet those agreements were held enforceable notwithstanding the subsequent legal developments that rendered their decision to forgo their constitutional rights, in hindsight, disadvantageous.

Plaintiff and Amici each make a distinct argument as to why *Brady* and the other plea-bargain cases are distinguishable, both of which fail. Plaintiff argues that these cases are distinguishable because they "are about *res judicata*, not whether a contract signed by a person constitutes waiver of a constitutional right." Pl.'s Br. 17. That is incorrect. It is blackletter law that "[a] plea agreement is a type of contract," *Bownes*, 405 F.3d at 636, and the Supreme Court in *Brady* held that the defendant's plea agreement must be enforced because his "waiver[ ]" of his jury-trial right was a "voluntary" and "knowing" act; the Court never suggested that principles of *res judicata* influenced its waiver analysis. *See* 397 U.S. at 748.

As for Amici, they try to escape the clear import of *Brady* by citing *Bousley v. United States*, 523 U.S. 614 (1998), *see* Amicus Br. 16-17, but *Bousley* highlights the flaw

in their position. There, the defendant was given incorrect information by the district court about the "essential elements" of the charges against him, and therefore his choice was held to have been tainted *at the time he made that choice*. *Id.* at 618-19. In *Brady*, by contrast, the defendant was correctly apprised of the statute applicable to his case, and the Court rejected his contention that a subsequent decision by the Supreme Court holding the statute unconstitutional reached back to taint his choice based on information that was accurate when the choice was made. *See Brady*, 397 U.S. at 756-57; *see also Bousley*, 523 U.S. at 619 (distinguishing *Brady* because that case "involved a criminal defendant who pleaded guilty after being *correctly informed* as to the essential nature of the charge against him") (emphasis added). Plaintiff is thus analogous to the defendant in *Brady*, not the defendant in *Bousley*.

Finally, accepting Plaintiff's argument that dues deductions in pre-*Janus* membership agreements cannot amount to a First Amendment waiver as a matter of law would subject to invalidation the agreements of a union president, shop steward, and the many other members who "are *willingly* paying union dues." *Harris*, 573 U.S. at 651 (emphasis added). Interfering with the private agreements between the Union and those individuals who voluntarily became union members and chose to pay dues in exchange for receiving the benefits of membership not only would be at odds with basic principles of contract law, it would threaten the *Union's* own First Amendment associational rights. *See supra* pp. 21-22.

In sum, the enforcement of Plaintiff's voluntary commitment to pay union dues for a discrete period of time in exchange for receiving the benefits of union membership does not violate her First Amendment rights.

B. Plaintiff's Section 1983 Claim Fails for the Independent Reason that the Union's Decision To Enforce Its Membership Agreement Was Not Attributable to the State.

In granting summary judgment for the Union, the District Court did not reach the question of "state action," *i.e.*, whether the Union, as a private party, acted under color of state law such that it could be sued for violating Plaintiff's constitutional rights under 42 U.S.C. § 1983. S.A. 7 n.6. This Court also need not reach that issue if it affirms the District Court's decision on the merits of the alleged constitutional violation. *See supra* Part I.A. In all events, however, the Union did *not* act under color of state law when it informed the School District to continue to deduct membership dues from Plaintiff's paychecks pursuant to the membership agreement that she signed—as the Ninth Circuit recently held in indistinguishable circumstances. *See Belgau*, 975 F.3d at 946-49.[8] The absence of state action here is an independent ground

[8] *See also Cooley v. Cal. Statewide Law Enf't Ass'n*, 385 F. Supp. 3d 1077, 1081-82 (E.D. Cal. 2019) (union in similar situation not state actor under § 1983); *Oliver v. SEIU Local 668*, 415 F. Supp. 3d 602, 608-12 (E.D. Pa. 2019) (same); *Smith v. Teamsters Local 2010*, 2019 WL 6647935, at *4-8 (C.D. Cal. Dec. 3, 2019) (same); *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1025-26 (D.N.M. 2020) (same); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F. Supp. 3d 1108, 1114-17 (S.D. Cal. 2020) (same); *Molina v. Pa. Soc. Serv. Union*, 2020 WL 2306650, at *9-10 (M.D. Pa. May 8, 2020) (same); *Quezambra v. United Domestic Workers AFSCME Local 3930*, 445 F. Supp. 3d 695, 702-06 (C.D. Cal. 2020) (same), *appeal pending*, No. 20-55643 (9th Cir.). *But see Hernandez v. AFSCME Cal.*, 424 F. Supp. 3d 912, 919-22 (E.D. Cal. 2019).

on which the District Court's judgment can be affirmed. *See St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019) ("We can affirm on any ground supported by the record.").

A threshold requirement of a Section 1983 claim is that the challenged actions were performed under color of state law. "Unions are not state actors; they are private actors." *Hallinan v. Chicago FOP Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009). For the actions of a private party such as a union to satisfy Section 1983's under-color-of-state-law requirement, the "plaintiff must identify a sufficient nexus between the state and the private actor to support a finding that the deprivation [of a federal right] committed by the private actor is 'fairly attributable to the State.'" *L.P. v. Marian Catholic High Sch.*, 852 F.3d 690, 696 (7th Cir. 2017) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). The Union's decision to hold Plaintiff to the terms of the membership agreement between Plaintiff and the Union, which contained a dues-deduction authorization with a discrete period of revocability, was *not* "fairly attributable to the State."

The Supreme Court has set forth a two-prong framework for determining when the conduct of a private party can satisfy Section 1983's state-action requirement. The first prong, sometimes referred to as the "state policy" requirement, asks whether "the deprivation [is] 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." *Lugar*, 457 U.S. at 937. The second prong, sometimes

referred to as the "state actor" requirement, asks whether "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Id.* A plaintiff must satisfy both prongs in order for a private party's conduct to be "attributable to the state." *Id.* Here, neither prong is satisfied.

1. Plaintiff cannot show that the alleged First Amendment violation resulted from the exercise of a right or privilege created by, or a rule of conduct imposed by, the state. This is a "state causation" requirement, and state action is present only if the alleged harm "reflect[s] a state cause." *Greco v. Guss*, 775 F.2d 161, 166 (7th Cir. 1985). Here, Plaintiff claims a First Amendment violation by virtue of her dues deductions and argues that the underlying contractual commitment to pay dues was invalid. *See* Pl's. Br. 10-18. That alleged harm—the deduction of Plaintiff's dues—was caused by the agreement that Plaintiff signed, which contained a dues-deduction authorization with discrete periods of revocability. That agreement is a contract between two private parties, Plaintiff and the Union; indeed, the Union drafted the agreement, presented it to Plaintiff, and asked her to sign it. *See supra* p. 4. The School District had no role in drafting or approving the terms of the agreement. *See supra* p. 6.

As the Ninth Circuit put it in holding that employees similarly situated to Plaintiff could not satisfy the "state causation" requirement of a Section 1983 claim against their union:

> It is important to unpack the essence of Employees' constitutional challenge: they do not generally contest the state's authority to deduct dues according to a private agreement. Rather, the claimed constitutional harm is that the agreements were signed without a constitutional waiver of rights. Thus, the "source of the alleged constitutional harm" is not a state statute or policy but the particular private agreement between the union and Employees.

Belgau, 975 F.3d at 946-47 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013)).[9]

In this respect, this case is similar to this Court's decision in *Hallinan*, *supra*. The plaintiffs in *Hallinan* argued that the union's decision to expel them from membership satisfied the state-action requirement under Section 1983 because the City of Chicago implemented the union's decision by deducting an agency fee (rather than membership dues) from the plaintiffs' paychecks at the union's request. 570 F.3d at 818. This Court disagreed. After observing that "[d]ecisions about membership are between the Union and its … members," *id.*, the Court held that the employer's

[9] In the District Court, Plaintiff argued that the School District was a party to the membership agreement. District Court ECF No. 34 at 11-12 (characterizing the membership agreement as a "three-party assignment" between Plaintiff, the Union, and the School District). That is wrong. The membership agreement does not require the School District to do anything; it instead simply "*authorize[s]* my employer to deduct from my pay each pay period that amount that is equal to dues and to remit such amount monthly to AFSCME Council 31." Union App'x 16 (emphasis added). Nor does the School District receive any consideration through the membership agreement, as would be required for the School District to be a party to the agreement. *See Nat'l Prod. Workers Union Ins. Tr. v. Cigna Corp.*, 665 F.3d 897, 901 (7th Cir. 2011) ("Under Illinois state law, an enforceable contract requires an offer, acceptance, consideration, and mutual assent."). As the Sixth Circuit held in a related context, a union member's dues-deduction authorization "is only a means employed by the union to collect dues from the employee," and it is not the source of any duty that the employer may have to deduct and remit dues. *Carpenters, Dresden Local No. 267 v. Ohio Carpenters Health & Welfare Fund*, 926 F.2d 550, 557 (6th Cir. 1991).

implementation of the union's membership decision "does not render [the state] *responsible* for those actions," *id.* at 819 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (emphasis in *Blum*)). The same is true here, as the School District's implementation of the Union's decision to enforce the dues-deduction authorization in Plaintiff's membership agreement does not render the School District *responsible* for the parties' actions. The dues deductions therefore were not under color of state law.

Plaintiff cites this Court's decision in *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus Remand*), in an attempt to argue that the Union's conduct constituted state action, Pl.'s Br. 21 n.3, but the source of Plaintiff's alleged harm is starkly different from *Janus* and other cases challenging the deduction of agency fees from nonmembers. In *Janus*, the state action was the deduction of agency fees from nonmembers pursuant to state law and a collective bargaining agreement (to which the state was a party) that expressly required the deduction of those fees as a condition of employment. *See Janus*, 138 S. Ct. at 2479 & n.24. Here, in contrast, there is no provision of state law or the collective bargaining agreement between the Union and the School District that required Plaintiff to sign a membership agreement, let alone a membership agreement with a dues-deduction authorization with limited revocability. *See Belgau*, 975 F.3d at 948 n.3 (distinguishing *Janus* with respect to state action); *see also Molina v. Pa. Soc. Serv. Union*, 2020 WL 2306650, at *9 (M.D. Pa. May 8, 2020) (same). Dues deduction was instead a matter left to two private parties: Plaintiff and the Union.

2. Plaintiff also cannot show that the Union could "fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. A union can be considered a state actor only if the state "has exercised coercive power or has provided such significant encouragement, either overt or covert" that the union's action "must in law be deemed to be that of the [government]." *Hallinan*, 570 F.3d at 820 (quoting *Blum*, 457 U.S. at 1004). Two of the limited circumstances in which private action can be deemed state action occur "when private actors conspire or are jointly engaged with state actors to deprive a person of constitutional rights," *id.* at 815 (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)), or "when there is such a close nexus between the state and the challenged action that seemingly private behavior reasonably may be treated as that of the state itself," *id.* at 816 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Neither circumstance is present here.

The courts have made clear that governmental acquiescence in the decisions of private parties does *not* render the private parties' decision "joint[ ]" action where the government does not exercise its own independent review. For instance, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Supreme Court concluded that private nursing homes' transfer and discharge decisions, which directly affected the patients' state-provided Medicaid benefits, did not constitute state action because there was not a sufficient nexus between the nursing homes' decisionmaking and the state. *Id.* at 1004-05, 1010. Similarly, in *McKeesport Hospital v. Accreditation Council for Graduate Medical Education*, 24 F.3d 519 (3d Cir. 1994), the Third Circuit held that an

accreditation council's decision to withdraw a hospital's accreditation was not state action, even though the state relied entirely on the private council to make its accreditation decisions. *Id.* at 524-26.

Like the private nursing homes in *Blum* and the private accreditation council in *McKeesport Hospital*, the private-party Union here made its own decision to enforce the dues-deduction authorization in the membership agreement between Plaintiff and the Union. The mere fact that the School District "provid[ed] a 'machinery' for implementing the private agreement by performing an administrative task does not render [the School District] and [the Union] joint actors. Much more is required; the state must have 'so significantly encourage[d] the private activity as to make the State responsible for' the allegedly unconstitutional conduct." *Belgau*, 975 F.3d at 948 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53, 54 (1999) (internal citation omitted)).

Count I of Plaintiff's Complaint therefore fails on the independent ground that the Union did not act under color of state law in enforcing Plaintiff's membership agreement.

C. Plaintiff's Claims for Pre-*Janus* Damages and Declaratory Relief in Count I of Her Complaint Are Deficient for Additional Reasons.

In addition to her claim for damages in the amount of dues deducted after she resigned her union membership, Plaintiff also asserts a claim for damages in the amount of union dues deducted *prior* to the *Janus* decision—when she was a union member at all relevant times—as well as claims for various forms of declaratory relief. Given that Plaintiff's First Amendment rights were not violated at any time when the Union enforced the dues-deduction authorization in Plaintiff's membership agreement, *see supra* Parts I.A and I.B, Plaintiff is not entitled to this relief. But even if Plaintiff could establish that the Union committed a constitutional violation by enforcing the membership agreement, there are additional, independent grounds on which these specific claims for relief would fail.

1. This Court's decision on remand in *Janus* precludes Plaintiff's claim for a refund of pre-*Janus* membership dues. In that case, this Court held that the good-faith defense, available to private parties sued under 42 U.S.C. § 1983, shields labor unions from monetary liability for having relied on the Illinois statute authorizing agency fees at a time when the Supreme Court's decision in *Abood*, upholding the constitutionality of such statutes, was the law of the land. *See Janus Remand*, 942 F.3d at 364-67. While the plaintiff in *Janus* sought a refund of pre-*Janus* agency fees, the good-faith defense recognized in that case necessarily bars Plaintiff's Section 1983 claim for a refund of pre-*Janus* membership dues, which is predicated on Plaintiff's allegation that she

"joined the union because, at the time that she signed the union card, [she was] required [ ] to pay money to the union even as a non-member, in the form of agency fees." Union App'x 5.[10] As such, every court to address a claim for the refund of pre-*Janus* membership dues has held that the good-faith defense bars such a claim. *See, e.g.*, *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1026-27 (D.N.M. 2020); *Oliver v. SEIU Local 668*, 415 F. Supp. 3d 602, 612-13 (E.D. Pa. 2019), *aff'd*, 830 F. App'x 76 (3d Cir. 2020); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 876 (C.D. Cal. 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1007-08 (D. Alaska 2019).

2. Plaintiff also cannot obtain the declaratory relief she seeks in Count I of her Complaint, as she waived those claims for relief by failing to pursue them in the District Court. *See, e.g.*, *In re Veluchamy*, 879 F.3d 808, 821 (7th Cir. 2018) ("It is well established that a party waives the right to argue an issue on appeal if he failed to raise that issue before the lower court."). Plaintiff did not move for summary judgment on her declaratory-relief claims, nor did she respond to the Union's or the School District's arguments in their cross-motions that those claims were moot. *See* District Court ECF No. 28 (Plaintiff affirmative summary-judgment brief), No. 31 at 15-16 (pertinent section of Union summary-judgment brief); No. 33 at 2 (School District

[10] As the District Court noted, there is no record evidence that supports this allegation. *See supra* p. 8. This is yet another ground for rejecting Plaintiff's pre-*Janus* dues claim.

summary-judgment brief adopting and incorporating by reference Union's arguments); No. 34 (Plaintiff opposition brief).

In all events, it is readily apparent that the District Court correctly dismissed those claims as moot. S.A. 5 n.5.[11] Federal courts may issue a declaratory judgment only where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Bell v. Taylor*, 827 F.3d 699, 711 (7th Cir. 2016) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)). Even if an immediate and actual controversy existed at the time the lawsuit was filed, a claim for declaratory relief becomes moot where such a controversy ceases to exist. *Id.* (no actual controversy warranting declaratory judgment on copyright claim where copyright-infringing photos had been removed from website and website no longer existed); *see also Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001) (declaratory judgment claim was moot where "relief … would have no impact on the parties").

Here, pursuant to the terms of the membership agreement, the Union has accepted Plaintiff's revocation of her dues-deduction authorization, and the School District subsequently stopped her dues deductions in August 2019 at the Union's direction. *See supra* p. 6. Because there is no risk that Plaintiff's dues will be deducted in the future unless Plaintiff chooses to rejoin the Union and reauthorize dues

[11] Plaintiff acknowledges that the District Court correctly dismissed her claims for injunctive relief in Count I of her Complaint as moot. Pl.'s Br. 18.

deductions—in which case there will be no conceivable constitutional injury, as even Plaintiff acknowledges, *see* Pl.'s Br. 19—her claims for declaratory relief are moot. *See, e.g.*, *Seager v. United Teachers L.A.*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019) (claim for prospective relief moot where dues-deduction authorization had been revoked, because plaintiff "'would have to rejoin his union for his claim to be live, which, given his representations in this lawsuit, seems a remote possibility'") (quoting *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 886 (C.D. Cal. 2019)).[12]

3. Even if not waived or moot, Plaintiff's claim for declaratory relief against the School District in Count I is precluded by lack of state action, *see supra* Part I.B., and by the Supreme Court's decision in *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978). As previously noted, the School District, at the Union's behest, simply performed the ministerial task of honoring Plaintiff's request to deduct union dues from her paychecks after she chose to sign the union membership agreement. Thus, there is no state action to support Plaintiff's claim for declaratory relief against the School District. *Hallinan*, 570 F.3d at 818 ("decisions about membership are between the Union and its … members.") Likewise, the School District can only be subjected to *Monell* liability under Section 1983 if the plaintiff can point to a specific

[12] Plaintiff asserts, without citing any supporting authority, that her "requests for declaratory relief are necessary in order for the court to grant her damages claims." Pl.'s Br. 20. As the Supreme Court has held, however, a plaintiff must satisfy Article III's justiciability requirement "separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 185 (2000).

official governmental policy or custom that proximately caused the alleged constitutional injury. *Strauss v. City of Chicago*, 760 F.2d 765, 768 (7th Cir. 1985). Here, the parties' stipulated record contains no reference to any School District policy or custom that led to Plaintiff's alleged injury—her decision to join the Union. A public employer's "general decision to contract with unions using an agency shop arrangement [does] not 'cause' the specific allegedly unconstitutional conduct that forms the basis of" a union dues deduction claim such as Plaintiff's claim in this case. *See Aliser v. SEIU California*, 419 F. Supp. 3d 1161, 1165 (N.D. Cal. 2019).

Because Plaintiff has failed to show any causal link between a District policy or custom and the alleged constitutional injury, her claim for declaratory relief against the School District fails for this independent reason.[13]

II. THE DISTRICT COURT CORRECTLY HELD THAT EXCLUSIVE REPRESENTATION OF A BARGAINING UNIT BY A MAJORITY-SELECTED UNION DOES NOT VIOLATE THE FIRST AMENDMENT.

The Union fully adopts the State Defendants' brief, which thoroughly demonstrates that Illinois' system of exclusive representation is consistent with the First Amendment. As a result, the District Court correctly entered judgment for the Defendants on Count II of Plaintiff's Complaint. We add only the following points.

[13] Plaintiff appears to have waived any claim against the School District for money damages under Count I (Pl.'s Br. 6), but to the extent Plaintiff argues otherwise, any claim for money damages against the District also fails for these same reasons and the reasons set forth throughout Section I of this brief.

The principle of exclusive representation—the principle that, if a majority of employees in a bargaining unit elects to be represented by a union, that union bargains on behalf of the entire unit with respect to the terms and conditions of their employment, and any agreement the union negotiates with the employer thus runs to the benefit of all employees in the unit—"lies at the heart of our system of industrial relations." *Janus Remand*, 942 F.3d at 354; *see also Houde Eng'g Corp.*, 1 N.L.R.B. (Old) 35, 43 (1934) (recognizing that exclusive representation is "in accord with American traditions of political democracy, which empower representatives elected by the majority of the voters to speak for all the people").

Congress adopted an exclusive-representation model for private-sector labor relations nearly 90 years ago. 29 U.S.C. §§ 158(d), 159 (exclusive-representation provisions of National Labor Relations Act, enacted in 1935); 45 U.S.C. § 152 Fourth (exclusive-representation provisions of Railway Labor Act, as amended in 1934). It also is the model that Illinois and approximately 40 other states have adopted for at least some of their public employees[14]; while a few states initially experimented with other systems, they promptly abandoned them in favor of exclusive representation. District Court ECF No. 31-1, at 6-7. And it is the model that Congress adopted for federal civil-service employees in 1978, on the basis that "experience in both private

[14] *See* Br. for New York et al. as Amici Curiae Supporting Respondents, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681), 2013 WL 6907713, at *8 n.3 & Appendix (citing statutory authorizations of exclusive representation).

and public employment indicates that the statutory protection of the right … to … bargain collectively … safeguards the public interest [and] contributes to the effective conduct of public business." 5 U.S.C. § 7101(a)(1)(A), (B); *see also id.* § 7111.

Plaintiff argues that this foundational principle of exclusive representation violates her First Amendment speech and associational rights. Pl.'s Br. 22-28. This Court rejected such an argument in *Hill v. SEIU*, 850 F.3d 861 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017)—a case Plaintiff does not cite, even though the District Court relied on it in dismissing her claim. S.A. 13-14. In *Hill*, the plaintiffs argued that the Illinois statute allowing for exclusive representation for a bargaining unit of state-compensated personal assistants and childcare providers violated the providers' First Amendment rights because "the statute forces [them] into an agency-like association with the [union]." 850 F.3d at 863. This Court held that the Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), "foreclose[d]" that argument because the *Knight* Court held that that exclusive representation "'in no way restrained appellees' freedom to speak or to associate or *not to associate* with whom they please, including the exclusive representative.'" 850 F.3d at 864 (quoting *Knight*, 465 U.S. at 288) (emphasis added by Seventh Circuit; other alterations omitted). This Court continued:

> Similarly, here, appellants do not need to join the [union] or financially support it in any way. They are also free to form their own groups, oppose the [union], and present their complaints to the State. Thus, under *Knight*, the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny.

Id.

Plaintiff argues that *Knight* is "inapposite" because, she asserts, "[t]he central issue of the *Knight* decision" was whether the plaintiffs could force the government to listen to their views, whereas Plaintiff here simply asserts a right against compelled association. Pl.'s Br. 27-28. Plaintiff ignores the fact that, after the *Knight* Court addressed whether the government was required to listen to the plaintiffs' views in Part II.A of its opinion, *see* 465 U.S. at 280-88, the Court went on to address broader issues of speech and association in Part II.B of its opinion—holding that "[t]he State has in no way restrained appellees' freedom to speak on any education-related issue or their freedom to associate *or not to associate* with whom they please, including the exclusive representative," *id.* at 288 (emphasis added).[15] Thus, as this Court recently reiterated in affirming the dismissal of a First Amendment challenge to the same exclusive-representation provisions of the IELRA that are at issue in this appeal, "*Knight* and its progeny firmly establish the constitutionality of exclusive representation." *Ocol v. Chi. Teachers Union*, --- F.3d ---, 2020 WL 7239992, at *2 (7th Cir. Dec. 9, 2020).

[15] Like Plaintiff here, the plaintiffs in *Hill* prominently argued that "*Knight* addressed only whether the First Amendment restricts the government's ability to choose to whom it listens, and not whether exclusive representation is a mandatory association." *See* Appellants' Br., *Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017) (No. 16-2327), 2016 WL 3854683, at *22-25 (section heading; capitalization omitted). This Court did not read *Knight* so narrowly. *See* 850 F.3d at 864.

While *Hill* is controlling, we hasten to add that six other courts of appeals recently have considered similar claims that exclusive representation violates speech and associational rights under the First Amendment. Each of those courts, like this Court, have rejected such claims on the ground that *Knight* controls. *See D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir.) (Souter, J.) ("[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. And the freedom of the dissenting appellants to speak out publicly on any union position further counters the claim that there is an unacceptable risk the union speech will be attributed to them contrary to their own views…."), *cert. denied*, 136 S. Ct. 2473 (2016); *see also Reisman v. Assoc. Facs. of the Univ. of Me.*, 939 F.3d 409 (1st Cir. 2019), *cert. denied*, 2020 WL 5883778 (U.S. Oct. 5, 2020); *Jarvis v. Cuomo*, 660 F. App'x 72, 75-76 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Oliver v. SEIU Local 668*, 830 F. App'x 76, 80-81 (3d Cir. 2020); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809 (6th Cir. 2020); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir.), *cert. denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019). As these cases show, the Supreme Court repeatedly has declined to grant certiorari to revisit this issue.

Plaintiff repeatedly cites the Supreme Court's decision in *Janus* in the section of her brief arguing that exclusive representation is unconstitutional. But under

principles of stare decisis, this Court must follow *Hill* unless there is a "compelling reason to overturn circuit precedent"—such as the Supreme Court "overrul[ing] or undermin[ing]" that precedent. *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006) (citations omitted).

No such circumstance is present here. *Janus* did not even mention *Knight*, and the Court was careful to distinguish the agency-fee question it was addressing from any question about exclusive representation. *See Janus*, 138 S. Ct. at 2478 (noting that "it is … not disputed that the State may require that a union serve as exclusive bargaining agent for its employees"). Moreover, the *Janus* Court if anything *reaffirmed* the constitutionality of exclusive representation by specifically assuring Illinois and other states that they "can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2485 n.27. "In this way," the Court explained, "these States can follow the model of the federal government and 28 other States" that provided for exclusive representation but had *not* authorized agency fees. *Id.*; *see also id.* at 2466. By expressly holding out the labor-law regimes in the federal government and these 28 states as a "model" for the remaining states to follow in the wake of *Janus*, the Court was supporting—not criticizing—exclusive representation.[16] Thus, as the District Court put it, *Janus* "leaves

[16] To the extent Plaintiff relies on the *Janus* Court's statement that exclusive representation entails "a significant impingement on associational freedoms that would not be tolerated in *other* contexts," *id.* at 2478 (emphasis added), that statement

Knight, *Hill*, and exclusive representation undisturbed." S.A. 14. *See also IUOE Local 139 v. Daley*, --- F.3d ---, 2020 WL 7396048, at *7 (7th Cir. Dec. 17, 2020) ("*Knight* remain[s] good law" and was not addressed by *Janus*).[17]

Binding precedent thus forecloses Plaintiff's claim that exclusive representation violates her First Amendment rights. As a result, this Court should affirm the District Court's decision granting summary judgment to the Defendants on Count II of Plaintiff's Complaint.

CONCLUSION

The judgment of the District Court should be affirmed.

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is yet another acknowledgement that the principle of exclusive representation in *the collective-bargaining context* was not being called into question. Indeed, this statement is taken from a paragraph of the *Janus* opinion in which the Court explained that exclusive representation, in contrast to compelled financial support for the bargaining representative through an agency-fee requirement, would survive constitutional scrutiny under the Supreme Court's line of cases pertaining to the government-employment context. *See id.* at 2477-78 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

[17] Because exclusive representation is "not subject to heightened scrutiny," *Hill*, 850 F.3d at 866, there is no need for this Court to determine whether exclusive representation would satisfy such scrutiny. But even if an exacting-scrutiny inquiry were required, it is clear—as the *Janus* Court itself assumed—that states have a "compelling interest" in organizing labor relations with their public-sector employees through a system of exclusive-representation collective bargaining, in order to achieve "labor peace" and avoid "the conflict and disruption that … would occur if the employees in a unit were represented by more than one union." *Janus*, 138 S. Ct. at 2465-66. The State Defendants set forth the sufficiency of the state's interest in exclusive representation in their brief; we incorporate that analysis here.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Appellees AFSCME Council 31, AFSCME Local 672, and Moline-Coal Valley School District No. 40 complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Circuit Rule 32(c). The brief was prepared in 14-point Garamond font, and with the exception of the portions excluded by F.R.A.P. 32(f) it contains 12,949 words.

/s/ Jacob Karabell
JACOB KARABELL

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I electronically filed the foregoing Brief of Appellees AFSCME Council 31, AFSCME Local 672, and Moline-Coal Valley School District No. 40 with the Clerk by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jacob Karabell
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