No. 21-3096; No. 21-3097; No. 22-1108

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3096

BRADLEY BARLOW,
Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668; MICHAEL NEWSOME, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA OFFICE OF ADMINISTRATION; BRIAN T. LYMAN, IN HIS OFFICIAL CAPACITIES AS CHIEF ACCOUNTING OFFICER FOR THE COMMONWEALTH OF PENNSYLVANIA AND DEPUTY SECRETARY FOR THE OFFICE OF COMPTROLLER OPERATIONS,
Defendants-Appellees.

_____

No. 21-3097

FRANCES BIDDISCOMBE,
Plaintiff-Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668; MICHAEL NEWSOME, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA OFFICE OF ADMINISTRATION; BRIAN T. LYMAN, IN HIS OFFICIAL CAPACITIES AS CHIEF ACCOUNTING OFFICER FOR THE COMMONWEALTH OF PENNSYLVANIA AND DEPUTY SECRETARY FOR THE OFFICE OF COMPTROLLER OPERATIONS,
Defendants-Appellees.

(Caption continued on next page)

No. 22-1108

MIRIAM FULTZ; DARLEEN DALTO; LUCINDA RADAKER; LACEY BAINBRIDGE; CAROL SHANER; JASON KOHUTE; KURTIS COATES; LISA SOUTHERS; BRITTANY ZAPPASODI; SCOTT CARTER; DEBRA KERSTETTER; ASHLEY CLUCK; BLAINE CHAPMAN; BARBARA RICHTER,
Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 13; GOVERNOR OF PENNSYLVANIA; MICHAEL NEWSOME, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA OFFICE OF ADMINISTRATION; BRIAN T. LYMAN, IN HIS OFFICIAL CAPACITIES AS CHIEF ACCOUNTING OFFICER FOR THE COMMONWEALTH OF PENNSYLVANIA AND DEPUTY SECRETARY FOR THE OFFICE OF COMPTROLLER OPERATIONS,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Case Nos. 1:20-cv-02459, 4:20-cv-02462 (Hon. Yvette Kane)
Case No. 1:20-cv-2107 (Hon. John E. Jones III)

CONSOLIDATED ANSWERING BRIEF OF DEFENDANTS-APPELLEES SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668 AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 13

RAMYA RAVINDRAN
Bredhoff & Kaiser, P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel: (202) 842-2600

Attorneys for Defendant-Appellee AFSCME Council 13

SCOTT A. KRONLAND
JEFFREY B. DEMAIN
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

Attorneys for Defendant-Appellee SEIU Local 668

AMY L. ROSENBERGER
Willig, Williams & Davidson
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Telephone: (215) 656-3622

Attorneys for Defendant-Appellee AFSCME Council 13

LAUREN M. HOYE
Willig, Williams & Davidson
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Telephone: (215) 656-3687

Attorneys for Defendant-Appellee SEIU Local 668

CORPORATE DISCLOSURE STATEMENT

Defendants-Appellees Service Employees International Union Local 668 and American Federation of State, County and Municipal Employees, Council 13 have no parent corporations or any stock held by any publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Administrative Cases

Federal Statutes

State Statutes

Court Rules and Procedures

Other Authorities

Defendants-Appellees Service Employees International Union Local 668 ("Local 668") and American Federation of State, County and Municipal Employees Council 13 ("Council 13") (collectively, the "Union Defendants") file this consolidated response to Plaintiffs-Appellants' Opening Brief ("AOB").[1]

STATEMENT OF ISSUES

1. Whether plaintiffs who voluntarily joined unions and signed written agreements to pay union dues for a specified time period, in exchange for membership rights and benefits, stated a viable claim that their First Amendment rights were violated when they paid the dues they agreed to pay.

2. Whether plaintiffs who voluntarily joined unions and signed written agreements authorizing payment of their dues through payroll deductions stated a viable claim that their due process rights were violated when their employers made the deductions Plaintiffs had authorized.

STATEMENT OF RELATED CASES AND PROCEEDINGS

These three consolidated cases have not been before this Court previously. The Union Defendants are not aware of other related cases.

[1] Local 668 is an appellee in Case Nos. 21-3096 and 21-3097; Council 13 is an appellee in Case No. 22-1108.

STATEMENT OF THE CASE

I. Factual Background

The Union Defendants are labor organizations that represent employees of the Commonwealth of Pennsylvania. App. 122 (¶ 23), 292 (¶ 11), 414 (¶ 11). Under Pennsylvania law, public employees may democratically choose to form a union to bargain collectively with the Commonwealth or its political subdivisions about employment terms. 43 Pa. Stat. Ann. §§ 1101.601, 1101.606. Pennsylvania law guarantees public employees the right to choose whether to join the union as members, and Pennsylvania law makes it unlawful for a union or public employer to coerce an employee into union membership. *See* 43 Pa. Stat. Ann. § 1101.401.

Before June 28, 2018, when the Supreme Court issued *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), public employees who chose to decline union membership could be required to pay a "fair-share" or "agency" fee to the union to cover their fair share of the costs of union collective bargaining representation. 71 Pa. Stat. Ann. § 575; 43 Pa. Stat. Ann. § 1102.3. *Janus* overturned prior precedent, *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and held that requiring public employees to pay such mandatory fees violates the First Amendment.

Plaintiffs did not pay fair-share fees. Rather, Plaintiffs chose to join their unions and pay membership dues. App. 131 (¶ 50, 54-55), 295-96 (¶¶ 21, 27), 417-18 (¶¶ 21, 27). Plaintiffs Barlow and Biddiscombe work for the Pennsylvania

Department of Human Services in a bargaining unit represented by Local 668. App. 292 (¶ 10), 414 (¶ 10). The *Fultz* plaintiffs are Commonwealth employees in units represented by Council 13. App. 117-122 (¶¶ 9-22). Plaintiffs voluntarily joined their unions by signing union membership agreements in which they agreed to abide by the union's constitution and authorized the deduction of union dues from their wages for a specified time period with an annual opportunity to revoke that authorization. App. 197-238, 365, 487.[2]

A. Plaintiffs Barlow and Biddiscombe.

Plaintiffs Barlow and Biddiscombe were Local 668 members who signed union membership agreements, Biddiscombe on June 7, 2018, App. 417-18 (¶¶ 21, 28), 478-79 (¶ 4), 487, and Barlow on June 25, 2018, App. 295-96 (¶¶ 21, 28), 358 (¶ 3), 365. In doing so, both acknowledged that they were voluntarily choosing to join Local 668 and pay membership dues; set forth their understanding that "dues deduction is a requirement for membership in SEIU Local 668"; and expressly

[2] The district court considered Plaintiffs' signed membership agreements in evaluating the Union Defendants' motions to dismiss, finding that these documents were either referenced and relied on in the complaint or integral to the claims. App. 30 n.2, 56 n.5, 84 n.5; *see also Lum v. Bank of Am.*, 361 F.3d 217, 221 n.3 (3d Cir. 2004), *abrogated on other grounds as recognized by In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 323 n.22 (3d Cir. 2010). Plaintiffs did not object to the district court's consideration of these documents, nor do they challenge this finding on appeal.

authorized the continued deduction of union dues for a limited time period following any resignation from union membership:

> This voluntary authorization and assignment of dues deduction shall be irrevocable, *regardless of whether I am or remain a member of the Union*, for a period of one year from the date of execution and for year to year thereafter as long as my employment continues, unless I give the Employer and the Union written notice of revocation not less than ten (10) days and not more than thirty (30) days before the end of any yearly period…. I acknowledge that my dues deduction authorization is a contractual agreement between myself, as a bargaining unit employee, and SEIU Local 668, separate from any statutory provisions of Act 195 and is not a condition of employment.

App. 365 (Barlow), 487 (Biddiscombe) (emphasis added); *see also* App. 296 (¶¶ 28-30), 418 (¶¶ 28-30). Under the terms of this provision, Barlow's and Biddiscombe's dues deduction authorizations were revocable during a window period each year.

Barlow and Biddiscombe remained dues paying Local 668 members until they mailed letters to the union resigning their membership and purporting to revoke their dues deduction authorizations. App. 371-72, 494-95; *see also* App. 295 (¶¶ 22-23), App. 417 (¶¶ 22-23). Because these letters were submitted outside the applicable revocation period, Local 668 acknowledged their resignations of union membership and explained that their payroll deductions would continue until the annual "window period" specified in the membership application. Local 668 explained that the payroll deduction "will stop immediately upon commencement

of the window period unless you notify us in advance that you wish to rescind your request to withdraw." App. 296 (¶¶ 25, 27-28), 319, 418 (¶¶ 25, 27-28), 441.

Neither Barlow nor Biddiscombe alleged that their payroll deductions continued beyond their window periods and neither challenges on appeal the district court's finding that the deductions ceased during their window periods. *See* App. 58-60, 86-88; *see also* AOB 6, 9 n.2.[3]

B. Plaintiffs Fultz, *et al*.

The *Fultz* plaintiffs chose to join Council 13 and signed membership agreements in which they agreed to pay membership dues for a certain period of time as specified in the agreement. App. 117-122 (¶¶ 9-22), 131 (¶ 50), 197-238. In those agreements, the plaintiffs expressly acknowledged that they were voluntarily applying for union membership and authorizing the deduction of union dues from

[3] In the district court, Local 668 moved to dismiss as moot Plaintiffs' requests for prospective injunctive and declaratory relief against future dues deductions. In support of that motion, Local 668 introduced evidence that it terminated those deductions during Plaintiffs' window periods pursuant to the terms of their membership applications and that deductions would not be instituted in the future unless Plaintiffs voluntarily rejoined the union. *See* App. 356-93, 476-513. That evidence was cognizable by the district court in support of such a motion. *See* App. 59-60, 86-87 (and cases cited therein). The district court concluded that Plaintiffs' dues deductions terminated during their window period and could not reasonably be expected to resume in the future, and on that basis dismissed Plaintiffs' requests for injunctive and declaratory relief as moot. App. 57-62, 85-90. As noted above in the text, Plaintiffs do not challenge on appeal those factual determinations or the resulting legal conclusion.

their wages, that "neither this authorization or its continuation is a condition of employment," and that the dues deduction authorization "shall be irrevocable, *regardless of whether I am or remain a member of the Union*, for a period of one year" and for successive one-year periods "unless I give my Employer and the Union written notice of revocation during the fifteen (15) days before the annual anniversary date of this authorization." App. 197-238 (emphasis added). As union members, they received access to various member rights and benefits. App. 131-32 (¶¶ 50, 57).

In 2020, each of the *Fultz* plaintiffs submitted requests to Council 13 and the Commonwealth to resign their union membership and terminate their dues payments. App. 117-122 (¶¶ 9-22), 131 (¶¶ 51-52). Because these letters were submitted outside the applicable revocation period, Council 13 acknowledged that their membership resignations had been processed and reminded them that they had agreed to "continue to provide financial support in an amount equal to dues until a certain window period" set forth in the membership agreement, and therefore they could not cancel their dues payments at that time. App. 131 (¶¶ 53-55); App. 197-238. Council 13 advised the plaintiffs of the next applicable revocation period and the process for terminating dues deductions. *Id.*; App. 131-32 (¶¶ 55-56).

II. Procedural History

A. *Barlow* and *Biddiscombe*.

Plaintiffs Barlow and Biddiscombe each filed their own actions, naming as defendants Local 668, Michael Newsome, in his official capacity as Secretary of the Pennsylvania Office of Administration, and Brian T. Lyman, in his official capacities as Chief Accounting Officer for the Commonwealth of Pennsylvania and Deputy Secretary for the Office of Comptroller Operations. App. 284-85, 289, 406-07, 411. Those two Complaints are substantively identical, share the same paragraph numbering, set forth the same legal claims, and seek the same relief. *Compare* App. 289-306 *with* App. 411-28.

Each Complaint sets out two claims for relief under 42 U.S.C. § 1983. The first claim alleges that the continuation of Barlow's and Biddiscombe's payroll deductions after their resignation of membership in Local 668 violated their First Amendment rights because "Plaintiff[s] … never waived [their] constitutional right" under *Janus* "as … nonmember[s] not to provide financial support via payroll deduction or other method to Local 668." App. 299 (¶ 48), 421 (¶ 48); *see generally id*. at 298-301, 420-23.

The second claim alleges that Barlow and Biddiscombe were deprived of their property interest in their wages without due process of law by Defendants' failure to provide them with certain procedures that the Supreme Court had

required unions to provide to public employees who never elected to join the union and who were required as a condition of their employment to pay involuntary, non-member fair-share fees to the union, *see Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 307 & n.20 (1986). App. 302 (¶ 61), 424 (¶ 61); *see generally id*. at 301-03, 423-25.

On the basis of those two claims, Barlow and Biddiscombe sought prospective declaratory and injunctive relief against continued post-resignation payroll deductions or, in the alternative, requiring *Hudson*-like procedural protections as to such deductions, and monetary damages in the amount of the post-resignation deductions, with interest. App. 303-05, 425-27.

In substantively identical decisions, the district court granted Defendants' motions to dismiss Barlow's and Biddiscombe's claims for failure to state claims upon which relief could be granted, and it held that their requests for prospective injunctive and declaratory relief were mooted by the termination of their payroll deductions during their applicable revocation window periods. App. 48-73, 76-101.

The district court held, in reliance on this Court's decisions in *Fischer v. Governor of N.J.*, 842 F. App'x 741 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 426 (2021) and *Oliver v. Serv. Emps. Int'l Union Loc. 668*, 830 F. App'x 76 (3d Cir. 2020), that Barlow's and Biddiscombe's First Amendment claims failed because they voluntarily consented to join Local 668 and to authorize payroll dues

deductions—including post-resignation deductions—in their membership applications. The district court explained that:

> *Janu*s "protects nonmembers from being compelled to support the [u]nion," but it does not "render [a union member's] knowing and voluntary choice to join [the union] nonconsensual." *See Oliver*, 830 F. App'x at 79. This is so because the First Amendment "does not provide a right to 'disregard promises that would otherwise be enforced under state law,'" *see Fischer*, 842 F. App'x at 753 (quoting *Cohen* [*v. Cowles Media Co.*], 501 U.S. [663,] at 672 [(1991)], and does not give rise to a "right to renege on [a] promise to join and support [a] union" made "in the context of a contractual relationship between the union and its employees," *see Belgau*, 975 F.3d at 950 (citing *Cohen*, 501 U.S. at 672).

App. 63-64, 91-92.

The district court also noted that "one need look no further than *Janus* and *Cohen* to dispose of Plaintiff[s'] First Amendment claims, as courts have universally recognized that *Janus* does not articulate a path to escape the terms of an agreement to pay union dues, which remain[s] binding under *Cohen* even where an employee has resigned from union membership." *Id*. at 65, 93 (quoting *Troesch v. Chicago Tchrs. Union, Loc. Union No. 1, Am. Fed'n of Tchrs*., No. 20 C 2682, 2021 WL 736233, at *4 (N.D. Ill. Feb. 25, 2021) (citing numerous decisions), *aff'd*, No. 21-1525, 2021 WL 2587783 (7th Cir. Apr. 15, 2021) (internal quotation marks omitted; substitutions added).

The district court rejected Barlow's and Biddiscombe's argument that *Janus* imposed a heightened "constitutional waiver" requirement pursuant to which

consent to pay union dues must be proven by clear and convincing evidence of a knowing and intelligent waiver of First Amendment rights. Rather, as it explained, "*Janus* itself indicates" that "employees who joined a union prior to *Janus* waived any First Amendment rights simply [b]y agreeing to pay." App. 66, 94 (quoting *Troesch*, 2021 WL 736233, at *5 (alterations in original; internal quotation marks omitted) and *Janus*, 138 S. Ct. at 2486).

The district court found the language of Barlow's and Biddiscombe's membership applications more than sufficiently clear to evidence their consent, App. 68, 96, especially as those applications were substantively similar to that approved by this Court in *Oliver*, which found it "difficult to imagine language that would be more clear and compelling as evidence of consent to join the [u]nion and also pay union dues," App. 69, 97 (quoting *Oliver*, 830 F. App'x at 79 (internal quotation marks omitted)).

The district court found Barlow's and Biddiscombe's second claim for violation of due process deficient on its face for many of the same reasons as the First Amendment claim. Thus, because "*Janus* established only protected liberty or property interests for *non-union members*, not *union members* like Plaintiff[s]," App. 71, 99 (quoting *Yates v. Washington Fed'n of State Emps., Am. Fed'n of States, Cty. & Mun. Emps., Council 28 AFL-CIO*, No. 3:20-cv-05082, 2020 WL 5607631, at *3 (W.D. Wash. Sept. 16, 2020) (emphasis in original; internal

quotation marks omitted), "[c]ourts have … rejected post-*Janus* due process claims based on a plaintiff's voluntar[y] assent[] to [u]nion membership and deduction of [u]nion dues," *id*. (quoting *Wagner v. Univ. of Wash.*, No. 2:20-cv-00091, 2020 WL 5520947, at *5 (W.D. Wash. Sept. 11, 2020) (internal quotation marks omitted; all but first substitution in original). For the same reason, the district court rejected Plaintiffs' reliance on *Hudson*, 475 U.S. 292, and the procedures it applied to non-members. App. 72, 100.

The district court further found that Barlow's and Biddiscombe's "due process claims are no more than thinly veiled First Amendment claims," which were therefore meritless for the same reasons the First Amendment claims were meritless. App. 71, 99. In the end, Barlow's and Biddiscombe's due process claim failed because they had authorized the deduction of post-resignation dues, which precluded them from alleging that they "'suffered a deprivation of a constitutionally protected interest' flowing from the deduction of 'membership dues according' to [their] Membership Application." *Id*. at 72, 100 (quoting *Wagner*, 2020 WL 5520947, at *5 (substitution added)).

B. *Fultz, et al.*

On November 12, 2020, seven of the *Fultz* plaintiffs filed a putative class action lawsuit in the Middle District of Pennsylvania against Council 13, the Governor of Pennsylvania, and two other Commonwealth officials. Citing the

Supreme Court's decision in *Janus*, the Complaint alleged that the collection of membership dues after resignation of membership as provided in the plaintiffs' signed membership agreements violated their constitutional rights. The Complaint asserted two claims under 42 U.S.C. § 1983: (1) that continued collection of union dues from plaintiffs for the remainder of the term of their membership agreement violated their First Amendment rights; and (2) that plaintiffs were not provided sufficient procedures to object to this payment of union dues in violation of their Fourteenth Amendment procedural due process rights.

By joint request of the parties, the district court stayed proceedings pending this Court's resolution of the then-pending appeals in *Fischer v. Governor of New Jersey*, No. 19-3914 (3d Cir.), and *Smith v. New Jersey Education Association*, No. 19-3995 (3d Cir.). On January 15, 2021, this Court decided *Fischer* and *Smith* in a consolidated unpublished opinion, finding no First Amendment violation in the collection of union dues from plaintiffs after their resignation of membership because "the First Amendment does not provide a right to 'disregard promises that would otherwise be enforced under state law.'" *See Fischer*, 842 F. App'x at 753 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991)). In reaching its conclusion, the *Fischer* court rejected the argument that *Janus* provides union members "a right to terminate their payments to [the union] at any time,

notwithstanding the membership agreements that they signed, which obligated them to continue paying dues until a specific date." *Id.* at 752.

Following the lifting of the stay, the *Fultz* plaintiffs filed a First Amended Complaint adding seven new plaintiffs but otherwise leaving the substance of their claims unchanged. App. 135-140. Council 13 and the Commonwealth each filed a motion to dismiss the First Amended Complaint.

On July 29, 2021, the district court granted Council 13's motion and dismissed all claims asserted against Council 13 with prejudice.[4] With respect to the First Amendment claim, the district court noted that unlike in *Janus*, here the plaintiffs had signed membership agreements consenting to payment of the dues in question, and "*Janus* does not apply when an employee has voluntarily signed a contract to join a Union." App. 37. Observing that this argument had "received approval from the Third Circuit" in *Fischer*—and recognizing that "[e]ven in the First Amendment context, the common law of contracts applies as a 'law of general applicability'"—the district court concluded that "*Janus* does not provide [plaintiffs] a basis for challenging their union membership agreements, nor the

[4] In a separate order, the district court granted in part and denied in part the Commonwealth's motion to dismiss. App. 4-25. The Commonwealth filed a motion for reconsideration. While that motion was pending, plaintiffs stipulated to voluntary dismissal of the remaining claim against the Commonwealth, App. 275, and the Commonwealth subsequently withdrew its motion.

dues paid pursuant to that agreement." App. 37-39. The district court found no significance to the fact that some of the plaintiffs had joined the union after *Janus* because these plaintiffs had also "voluntarily contracted to pay Union dues, and Plaintiffs have presented no case law which indicates that such contractual obligations can be thrown over." App. 39 n.4.

The district court also rejected plaintiffs' arguments that the membership agreements were unenforceable due to alleged ambiguities in the text or lack of consideration, finding that were "no factual allegations whatsoever that would support these contractually based arguments" and the court "cannot conjure allegations of an unenforceable contract from thin air to support Plaintiffs' § 1983 claims." App. 40. Similarly, the district court rejected Plaintiffs' arguments that Council 13 had allegedly materially breached the membership agreement, which was contradicted by the express language of the membership agreements. App. 41 ("We are only required to take as true those allegations which are plausible on their face. These are not.").

Finally, the district court dismissed Plaintiffs' procedural due process claim. Because the union dues at issue were "payments owed under a voluntary contract," App. 43 (internal quotation marks omitted), and those membership agreements "do not run afoul of Plaintiff[s'] First Amendment rights," *id*. (substitution added), the

district court held that the plaintiffs had failed to allege "a sufficient liberty interest to support their procedural due process claim," *id*. at 44.

SUMMARY OF ARGUMENT

A. The district court correctly held that the collection of union dues from Plaintiffs for a limited period of time after they resigned their union membership, in accordance with the terms of their own signed membership agreements, did not state a viable claim for violation of their First Amendment rights. There is no First Amendment right "to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Here, Plaintiffs entered into voluntary union membership agreements in which they requested union membership in exchange for their express consent to pay union dues for a specified time period subject to an annual revocation period "*regardless of whether I am or remain a member of the Union*." App. 197-238, 365, 487 (emphasis added). Plaintiffs' First Amendment rights are not violated by the deduction of union dues that Plaintiffs voluntarily agreed to pay.

For this reason, every court to have considered this type of claim has rejected it, finding that the payment of union dues as authorized by the plaintiff in his or her membership application does not infringe on any First Amendment rights. This includes a recent unpublished decision from this Court, which involved a First Amendment claim identical to the one at issue here. *See Fischer*, 842 F.

App'x at 753 ("*Janus* does not give Plaintiffs the right to terminate their commitments to pay union dues unless and until those commitments expire under the plain terms of their membership agreements.").

B. Plaintiffs' contention that, under *Janus*, a separate "constitutional waiver" above and beyond the written authorization provided in Plaintiffs' membership agreements is necessary to permit a union to collect membership dues is legally erroneous. It is not only flatly inconsistent with *Cohen*, but it rests on a fundamental misreading of *Janus*, which involved only the question of whether a *nonmember* could constitutionally be compelled to pay fees to a union and did not decide any questions relating to the relationship between unions and their *members*.

Nor it is accurate that an express contract is somehow a *lesser* form of consent given that a contract requires *both* manifestation of assent *and* consideration. Not surprisingly, none of the waiver cases on which Plaintiffs rely supports their position. In fact, any requirement that a union must secure a heightened waiver before an individual can join and agree to pay the dues required of members would itself create First Amendment problems, as it would impose special burdens or rules that would make it more difficult for an individual to exercise his First Amendment right *to associate* with the union. Additionally, a heightened waiver standard requiring *Miranda*-style warnings also would violate

the First Amendment by nullifying agreements between unions and their members on grounds that do not apply to other private associations.

Finally, even if a separate waiver analysis were necessary, Plaintiffs' First Amendment claims would still fail. *Janus* states that payments "may be deducted from a nonmember's wages" once "the employee affirmatively consents to pay," and that "*[b]y agreeing to pay*, nonmembers are waiving their First Amendment rights." *Janus*, 138 S. Ct. at 2486 (emphasis added). That is precisely what Plaintiffs did here by signing express agreements specifically authorizing the payment of union dues for the time period at issue.

C. Plaintiffs' attempt to distinguish between pre-*Janus* and post-*Janus* membership agreements is similarly without merit. "[T]he timing makes no difference. What matters is the nature of each person's decision to sign a private contract." *Ramon Baro v. Lake County Fed'n of Teachers Local 504*, 57 F.4th 582, 586 (7th Cir. 2023). Here, both sets of Plaintiffs signed membership agreements in which they expressly agreed to pay the union dues at issue.

In any event, Plaintiffs' legal arguments fail on their own terms. The suggestion that a party can renege on a contractual obligation based on a subsequent change in the law has been squarely rejected by the Supreme Court and this Court. *See Brady v. United States*, 397 U.S. 742 (1970); *Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262 (3d Cir. 2002); *Ehrheart v. Verizon Wireless*, 609 F.3d

590 (3d Cir. 2010). Moreover, nowhere in *Janus* did the Court even address union membership agreements, let alone require that any particular language be included in those agreements.

D. Plaintiffs' argument that their First Amendment rights were violated by post-resignation payroll deductions because their membership agreements were unenforceable under state contract law is premised on a misunderstanding of both state contract law and the First Amendment. According to Plaintiffs, they were already union members when they signed their agreements and did not receive "new" consideration for agreeing to pay dues for a specified period of time. Pennsylvania contract law is clear, however, that agreements lacking a set term, such as Plaintiffs' membership agreement, may be altered at will by agreement of the parties without any new or additional consideration. And, in any event, the First Amendment issue is not whether Plaintiffs would have state law grounds to escape their contracts but whether Plaintiffs agreed to the payroll deduction authorization voluntarily, as opposed to being compelled to do so.

E. The district court correctly held that Plaintiffs' allegation that union dues continued to be deducted from their wages for a limited period of time after they resigned their union membership, pursuant to the terms they had authorized in their voluntary membership agreements, did not state a viable claim for violation of procedural due process. Plaintiffs authorized the dues deductions, so they were

not deprived of any liberty or property interest when the deductions were made. Not surprisingly, every court to consider Plaintiffs' due process theory has rejected it.

There is no merit to Plaintiffs' argument that they are entitled by the Due Process Clause to the procedural protections adopted in *Hudson*, 475 U.S. 292. *Hudson* was a First Amendment case, not a due process case. Moreover, *Hudson* concerned nonmembers who were required to pay mandatory fees to a union, not individuals who voluntarily joined a union and agreed to pay membership dues. The case has no application here.

STANDARD OF REVIEW

Local 668 and Council 13 agree with Plaintiffs that the district court's dismissal of their claims is subject to *de novo* review. *See* App. 15, 30, 33.

ARGUMENT

I. The District Court Correctly Dismissed Plaintiffs' First Amendment Claim Because Enforcing the Terms of a Voluntary Agreement to Pay Union Dues Does Not Violate the First Amendment.

In Count I of each Complaint, Plaintiffs allege that their First Amendment rights were violated when union dues were deducted from their wages after their resignation of membership. The district court correctly ruled that these claims fail as a matter of law because Plaintiffs entered into voluntary agreements in which

they expressly authorized this payment of post-resignation dues, and there is no First Amendment right to renege on such commitments.

A. Plaintiffs Fail to Plausibly Allege Any Violation of Their First Amendment Rights Because They Expressly Authorized the Dues Deductions.

Plaintiffs acknowledge that they chose to join their respective unions and signed membership agreements with their unions. AOB 6, 10, 11. In those membership agreements, Plaintiffs authorized the payment of union dues through employer payroll deduction, acknowledged that this dues authorization was "voluntary" and not "a condition of employment," and expressly agreed to continue paying union dues until an annual revocation period "*regardless of whether I am or remain a member of the Union*." App. 197-238, 365, 487 (emphasis added). As the Ninth Circuit explained when addressing an identical claim, "these facts speak to a contractual obligation, not a First Amendment violation." *Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021).

"[T]he First Amendment protects our right to speak. It does not create an independent right to void obligations when we are unhappy with what we have said." *Ramon Baro*, 57 F.4th at 587 (affirming dismissal of First Amendment claim challenging post-resignation dues collected pursuant to plaintiff's membership agreement). Here, Plaintiffs expressly agreed to pay the union dues that now form

the basis of their First Amendment claims. It is well-settled that there is no First Amendment right "to disregard promises that would otherwise be enforced under state law." *Cohen*, 501 U.S. at 672.

As in *Cohen*, Plaintiffs' dues obligations were "self-imposed." *Id*. at 671. Plaintiffs chose to join their unions, gained the rights and benefits of union membership, and signed membership agreements in which they agreed to pay union dues for successive one-year periods subject to an annual revocation window. Dues deduction agreements of this kind are common and routinely enforced by the courts as contractual obligations that survive resignation from membership. *See, e.g.*, *NLRB v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987) ("*Postal Service I*") (enforcing a written dues deduction authorization that survived the member's resignation from the union); *NLRB v. U.S. Postal Serv.*, 833 F.2d 1195, 1196 (6th Cir. 1987) ("*Postal Service II*") (dues authorization not revocable, notwithstanding resignation from membership); *United Steelworkers of Am., Local 4671*, 302 NLRB 367, 368 (1991) (dues were still owing under checkoff authorization after employee's resignation of membership); *United Postal Serv.*, 302 NLRB 332, 333 (1991) (same).[5]

[5] Notably, the dues authorization agreements at issue here are materially indistinguishable from agreements that Congress has repeatedly endorsed. *See, e.g.*, 39 U.S.C. § 1205(a) (providing for payroll deduction of dues for Postal Service employees "if the…Postal Service has received from each employee…a

These cases reflect the general principle that an individual has the right to resign from a voluntary association "as he sees fit *subject of course to any financial obligations due and owing the group with which he was associated*." *NLRB v. Granite State Joint Bd., Textile Workers Union*, 409 U.S. 213, 216 (1972) (emphasis added) (internal quotation marks omitted). Plaintiffs signed membership agreements in which they committed to paying union dues for a set period of time, and those "financial obligations" remain "due and owing" even if Plaintiffs later decided they no longer wanted to be members. *See Postal Service I*, 827 F.2d at 554 ("A party's duty to perform even a wholly executory contract is not excused merely because he decides that he no longer wants the consideration for which he has bargained.") (citing 3A A. Corbin, *Corbin on Contracts* § 654, at 136, § 656, at 144-45 (1951)).

Given the well-established law in this area, every court to have considered a claim similar to Plaintiffs' has rejected it, finding that the payment of union dues as authorized by the terms of the plaintiff's membership contract does not infringe on

written assignment *which shall be irrevocable for a period of not more than one year*") (emphasis added); 5 U.S.C. § 7115(a)-(b) (similar provision for federal government employees); 29 U.S.C. § 186(c)(4) (similar provision for private-sector employees).

any First Amendment rights.[6] This Court reached the same conclusion in its recent decision in *Fischer*, which involved a First Amendment claim identical to the one at issue here.[7]

In *Fischer*, the plaintiffs were union members who signed membership agreements authorizing payment of union dues through payroll deduction and agreed that those dues payments could be terminated only at specified times each year. 842 F. App'x at 745. Like Plaintiffs here, the *Fischer* plaintiffs later resigned their union membership, stating they wished to "immediately" terminate their dues payments. *Id.* The union processed their membership resignations but continued to collect dues payments as provided under their membership agreements. *Id.* at 745-46. The plaintiffs filed suit under Section 1983 claiming that the union had "violated *Janus* by collecting union dues from them without their consent and after they indicated that they wished to terminate all such payments." *Id.* at 746-47.

---

[6] *See, e.g., Ramon Baro*, 57 F.4th 582; *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021), *cert. denied*, 141 S. Ct. 423 (2021); *Fischer*, 842 F. App'x 741; *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 424 (2021); *Oliver*, 830 F. App'x 76; *Belgau*, 975 F.3d 940.

[7] Although this Court "by tradition does not cite to its not precedential opinions as authority," 3d Cir. IOP 5.7, when an unpublished decision has "factual similarity to that before us, we look to the decision as a paradigm of the legal analysis we should here follow." *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 n.12 (3d Cir. 1996).

The panel rejected this claim, finding no constitutional violation in the collection of union dues from union members pursuant to the terms of their membership agreements: "Because *Janus* does not abrogate or supersede Plaintiffs' contractual obligations, which arise out of longstanding, commonlaw principles of general applicability, *Janus* does not give Plaintiffs the right to terminate their commitments to pay union dues unless and until those commitments expire under the plain terms of their membership agreements." *Id.* at 753 (citations and internal quotation marks omitted). In so holding, the panel relied on *Cohen*, recognizing that "the First Amendment does not provide a right to disregard promises that would otherwise be enforced under state law." *Id.* (internal quotation marks omitted); *see also id.* ("the state common law of contracts is a 'law of general applicability' that does not run afoul of First Amendment principles") (quoting *Cohen*, 501 U.S. at 670)).[8]

[8] Plaintiffs attempt to evade *Cohen* by claiming that the case involved whether the First Amendment provides the press with a "special exemption from the effects of 'generally applicable laws,'" AOB 21, but this is neither accurate nor helpful to their cause. In actuality, the *Cohen* Court found that everyone, *including* the press, must abide by the "generally applicable law that requires those who make certain kinds of promises to keep them." 501 U.S. at 672. To the extent the Court was concerned with whether the press should receive any "special exemption," that would only underscore the general rule applicable to everyone else, such as Plaintiffs, that the "First Amendment does not confer…a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.*

As the *Fischer* court noted, its decision is aligned with the "swelling chorus of courts" that have found no First Amendment violation in collecting union dues from union members in accordance with the terms of their membership agreements. *Id.* (citation omitted). Indeed, the Seventh, Ninth, and Tenth Circuits have also rejected claims identical to the claim brought by Plaintiffs here. *See Belgau*, 975 F.3d at 950 (union dues collected under membership agreement that was irrevocable for one year did not violate the First Amendment because "[t]he First Amendment does not support Employees' right to renege on their promise to join and support the union"); *Bennett v. AFSCME Council 31*, 991 F.3d 724, 727 (7th Cir. 2021) (plaintiff's First Amendment rights were not violated by continued payment of union dues until "after the lapse of the window set forth in her union-membership agreement"); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 964 (10th Cir. 2021) (applying *Cohen* to reject plaintiff's claim that two-week opt-out window in union membership agreement violated the First Amendment); *Ramon Baro*, 57 F.4th at 586.

While Plaintiffs may derisively refer to the federal judiciary's unanimity on this issue as "groupthink," AOB 2, in reality that is simply an admission that *no court* has ever endorsed the radical proposition advanced by Plaintiffs that it is unconstitutional for a membership organization to collect membership dues from someone who voluntarily chose to join the organization and expressly agreed to

pay those dues in a signed written agreement. Fixed-term payment obligations are, of course, common in many contexts, such as gym memberships, magazine subscriptions, or cell phone plans. Such commitments are routinely entered into and routinely enforced. It is therefore no surprise that the courts have uniformly rejected Plaintiffs' First Amendment theory.

Because Plaintiffs' membership agreements expressly authorized the collection of dues after resignation of membership until the specified annual revocation period, Count I fails to state a plausible claim for relief that the Union Defendants violated Plaintiffs' First Amendment rights.

B. *Janus* Does Not Require a Separate "Waiver" in Addition to Plaintiffs' Written Authorization to Pay Union Dues.

On appeal, Plaintiffs contend that the district court, as well as this Court in *Fischer* and the numerous other courts to have addressed this type of claim, *see supra* n. 6, erred in rejecting their First Amendment challenge because all of these courts allegedly neglected to apply the constitutional "waiver" analysis that Plaintiffs contend is required. According to Plaintiffs, their express authorization to pay union dues until the annual revocation period is irrelevant because "the standard for contractual waiver of constitutional rights always requires *more* than the existence of a valid contract." AOB 17. Plaintiffs' contention is legally erroneous in multiple respects.

First, as discussed above, it is flatly inconsistent with *Cohen*, which rejects the proposition that the First Amendment confers a right on a party to renege on "legal obligations" that are "self-imposed." 501 U.S. at 671. The *Cohen* Court did not require any enhanced "constitutional waiver" above and beyond the promise the newspaper made to refrain from publishing the plaintiff's identity, nor did the Court require the promise to take any particular form or use any particular words. The Court simply recognized that generally applicable state law "requires those who make certain kinds of promises to keep them." *Cohen*, 501 U.S. at 672; *see also Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (employment contract restricting post-employment speech enforceable because the petitioner "voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review").

Here, Plaintiffs signed membership agreements expressly consenting to pay union dues for the time period at issue. As the Seventh Circuit explained, "once a nonmember signs a membership agreement and agrees to pay union dues," no "secondary waiver analysis" is needed "to look beyond the membership agreement for *further* 'clear and compelling evidence' that the employee consented to pay the union." *Ramon Baro*, 57 F.4th at 586 (emphasis added).

Second, Plaintiffs' argument rests on a fundamental misreading of *Janus*. Plaintiffs rely on the following passage from *Janus*:

> 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. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Knox*, 567 U.S., at 312-313. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); *see also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680-682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

AOB 18 (citing *Janus*, 138 S. Ct. at 2486) (emphases added).

But as numerous courts have recognized, including this Court and the district court below, *Janus* involved only the question of whether a *nonmember* could constitutionally be compelled to pay fees to a union and did not decide any questions relating to the relationship between unions and their *members*. App. 63 ("Because Plaintiff voluntarily consented to join the union and pay dues, his reliance on *Janus* is misplaced."); App. 36-37; App. 91; *see also Bennett*, 991 F.3d at 732 ("*Janus* said nothing about union members who, like Bennett, freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union."); *Belgau*, 975 F.3d at 951 ("*Janus* does not address this financial burden of union membership."); *Oliver*, 830 F. App'x at 79 ("*Janus* protects nonmembers from being compelled to support the Union. Oliver

ignores the glaring reality that she was not a nonmember.");[9] *cf. Fischer*, 842 F. App'x at 753 ("*Janus* does not give Plaintiffs the right to terminate their commitments to pay union dues.").

Thus, neither the union nor the government was "required to obtain an affirmative First Amendment waiver from Plaintiffs before deducting union dues from their paychecks." *Id.* at 753 n.18; *see also Belgau*, 975 F.3d at 952 (*Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement."); *Ramon Baro*, 57 F.4th at 586 ("*Janus* creates no new waiver requirement before a valid union contract can be enforced."); *Bennett*, 991 F.3d at 733; *Hendrickson*, 992 F.2d at 962.

Plaintiffs' attempt to brand themselves "nonmembers," AOB 16, does not change the analysis. When "read in context," *Janus* "made clear it was primarily demarcating the constitutional rights of nonmembers currently or previously employed in agency shop arrangements." *LaSpina v. SEIU Pa. State Council*, 985 F.3d 278, 288 (3d Cir. 2021). Thus, as the Seventh Circuit explained, former union members like Plaintiffs are not "nonmember[s] as the term was used in *Janus*";

[9] Although non-precedential, *Oliver* also involved a similar First Amendment claim challenging the collection of union membership dues under *Janus* that were paid under the terms of the plaintiff's membership agreement. *See supra* n.7.

rather, "[r]ead as a whole, *Janus* distinguished between those who consented to join a union—as [plaintiffs] did—and those who did not." *Bennett*, 991 F.3d at 732. The plaintiff in *Bennett*, just like Plaintiffs here, signed a union membership card agreeing to pay union dues for successive one-year periods subject to an annual opportunity to revoke the authorization during a window period based on the date of the authorization. *Id.* at 728. "Having consented to pay dues to the union, regardless of the status of her membership, [Plaintiffs] do[] not fall within the sweep of *Janus*'s waiver requirement." *Id.* at 733.

Third, there is no legal support for the proposition that an express contractual agreement is somehow a *lesser* form of consent than a "waiver." That proposition is inconsistent with *College Savings Bank*, one of the cases cited in the very passage of *Janus* relied on by Plaintiffs. There, the Supreme Court indicated that its assessment that there had been no waiver of Eleventh Amendment immunity would be different if the State had made a "contractual commitment" in which it "expressly consented to being sued in federal court." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 676 (1999). Thus, far from treating a contract as a "lesser" form of consent, the Supreme Court's decisions in this area show that Plaintiffs have the law exactly backwards and that a contract is, if anything, a *superior* form of consent—one that in fact obviates the need for any separate waiver analysis—which is logical given that a contract

requires *both* manifestation of assent *and* consideration, *see* Restatement (Second) of Contracts, § 17 (Am. Law Inst. 1981), whereas a waiver requires only the former.

Indeed, contracts between private parties in which the parties agree to forgo constitutional rights are ubiquitous, whether in a confidentiality clause in a settlement agreement; a non-disclosure clause in a private employment contract (through which a party forgoes its First Amendment right to speak publicly); or in an arbitration clause in a commercial contract (through which a party forgoes its First Amendment right to petition the courts and its Seventh Amendment right to a jury trial). Such contracts are routinely enforced without any heightened standard of constitutional waiver required. *See, e.g.*, *James v. Glob. TelLink Corp.*, 852 F.3d 262, 265 (3d Cir. 2017) ("To determine whether a valid arbitration agreement exists, we apply ordinary state-law principles that govern the formation of contracts.") (internal quotation marks omitted); *Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1315 (8th Cir. 1991) (Although "what was once considered a satisfactory bargain has turned into a sour deal..., Cablevision cannot now invoke the first amendment to recapture surrendered rights").

Fourth, adopting Plaintiffs' theory would only generate First Amendment problems. The First Amendment protects *both* the choice to associate and the choice not to associate with a union. *See 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."); *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"). In signing the membership card, Plaintiffs were *exercising* their First Amendment right to support the Union. *See Oliver*, 830 F. App'x at 79 n.3 ("[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."). 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 would impose special burdens or rules that would make it more difficult for that individual to exercise his or her First Amendment right *to associate* with the union. Such a rule would not be consistent with the First Amendment.

Applying a heightened waiver standard to union membership agreements would also violate the First Amendment by nullifying agreements between unions and their members on grounds that do not apply to other private associations. No private association must give its prospective members the equivalent of *Miranda* warnings as a prerequisite to accept and rely on membership applications and basic dues commitments. Indeed, it is commonplace for private associations of all kinds to insist on a minimum term of dues payments as a condition of membership, rather than permit members to terminate their financial obligation to the

organization at any time, to safeguard against individuals signing up for membership to obtain membership benefits and then repudiating the financial obligations of membership as soon as those benefits have been received. To impose such a requirement on unions would not only unfairly stigmatize the constitutionally-protected choice to join and financially support a union but also impermissibly intrude into the internal affairs of unions and their relationships with their members. *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") (citation omitted); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795-801 (1988) (First Amendment violated by law requiring charities to tell potential donors percentage of charitable contributions made).

Finally, even if the waiver discussion in *Janus* were applicable to resigning union members like Plaintiffs, Count I still fails to state a claim that Plaintiffs' First Amendment rights were violated. *Janus* states that payments "may be deducted from a nonmember's wages" once "the employee affirmatively consents to pay," and "*[b]y agreeing to pay*, nonmembers are waiving their First Amendment rights." *Janus*, 138 S. Ct. at 2486 (emphasis added). That is precisely the situation here.

Plaintiffs signed an express, straightforward agreement to provide financial support to the union, and received membership rights and benefits in return. The membership agreement is a one-page document that states on its face that union membership was "voluntary" and not a "condition of employment," describes the dues commitment that membership requires including the annual term, expressly advises Plaintiffs that the dues authorization would continue from "year to year" subject to an annual revocation window, and makes clear that dues must be paid for the full one-year term "regardless of whether I am or remain a member of the Union." App. 197-238, 365, 487. As the district court found, it is "difficult to imagine language that would be more clear and compelling as evidence of consent to join the [u]nion and also pay union dues." App. 69 (quoting *Oliver*, 830 F. App'x at 79); App. 97; App. 38 n.3; *see also Ramon Baro*, 57 F.4th at 586 ("The voluntary signing of a union membership contract *is* clear and compelling evidence that an employee has waived her right not to join a union."); *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 292-93 (4th Cir. 1991) ("Where 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.").

While Plaintiffs generically assert that an agreement is not voluntary if it is the product of "coercion or improper inducement," AOB 19, there are no factual

allegations whatsoever in the Complaints that they were coerced or improperly induced to sign the membership agreements; rather, as noted above, the plain text of the membership agreement is to the contrary.[10] The Complaints similarly fail to allege that Plaintiffs were unaware that by signing the membership agreements, they were authorizing payment of union dues after resignation of membership. Nor could they credibly make such an allegation, given that the membership card explicitly provides that dues payments would continue until the next revocation period "regardless of whether I am or remain a member of the Union."

Plaintiffs cite to the Supreme Court's decision in *Patterson v. Illinois*, 487 U.S. 285 (1988), in support of their contention that their waiver was not knowing or intelligent, AOB 20, but that case only undermines their position. In *Patterson*, the Supreme Court rejected a claim by a defendant that a *Miranda* warning "did not adequately inform him of his … right to counsel." 487 U.S. at 289. As the

[10] Thus, Plaintiffs' conclusory invocation of "relative bargaining power," AOB 23, is unavailing. Plaintiffs do not, and cannot, allege any duress or compulsion to sign this voluntary agreement, and the "provisions authorizing the withholding of dues and making that authorization irrevocable for certain periods were in clear, readable type on a simple one-page form, well within the ken of unrepresented or lay parties." *Fisk v. Inslee*, 759 F. App'x 632, 633-34 (9th Cir. 2019). More fundamentally, the mere existence of an inequality in bargaining power is not sufficient to state a claim for compulsion. *See, e.g.*, Restatement (Second) of Contracts § 208, cmt. d (October 2022 update) (unequal bargaining power alone is not enough to set aside unfavorable contract terms); *see also Fisk*, 759 F. App'x at 634 ("temporarily irrevocable payment authorizations are common and enforceable in many consumer contracts—e.g., gym memberships or cell phone contracts").

Court explained, a defendant who had been advised he had a right to counsel "is in a curious posture to later complain that his waiver of these rights was unknowing." *Id.* at 293 (internal quotation marks omitted). Plaintiffs are in a similarly curious posture in claiming that the dues payments they expressly authorized in a signed written agreement was done without "knowledge of the right being surrendered and awareness of the consequences." AOB 19.

In sum, Plaintiffs expressly agreed to pay union dues for a specific time period even after resignation of membership, and "[b]y agreeing to pay, [Plaintiffs] are waiving their First Amendment rights." *Janus*, 138 S. Ct. at 2486.

C. Plaintiffs' First Amendment Claims Are Legally Defective Whether They Authorized Their Dues Payments Before or After *Janus*.

Plaintiffs also attempt to make a distinction between those who signed their membership agreements before *Janus* and those who did so after *Janus*. But as the Seventh Circuit has explained, "the timing makes no difference. What matters is the nature of each person's decision to sign a private contract." *Ramon Baro*, 57 F.4th at 586. Here, both sets of Plaintiffs signed a membership agreement in which they expressly agreed to pay union dues for a fixed period of time "regardless of whether I am or remain a member of the Union." As discussed above, there is no First Amendment violation in collecting union dues from members who expressly authorized payment of such dues. That principle is equally applicable to pre-*Janus* and post-*Janus* union members.

Moreover, neither of the legal propositions advanced by Plaintiffs in support of their challenge to either pre-*Janus* or post-*Janus* membership agreements has any merit. As an initial matter, both arguments are premised on Plaintiffs' "waiver" theory, which as detailed above is legally erroneous, unsupported by *Janus*, and contrary to the Court's decision in *Cohen*. *See* Section I.B *supra*. But even putting aside those defects, Plaintiffs' arguments fail on their own terms.

1. With respect to pre-*Janus* members, Plaintiffs contend that they could not have "knowingly" or "intelligently" waived their rights because at the time they joined the union, the "constitutionally protected choice to not pay the union anything, afforded by *Janus*, was unavailable." AOB 26. The district court correctly rejected this argument because "[c]hanges in decisional law, even constitutional law, do not relieve parties from their pre-existing contractual obligations." *Fischer*, 842 F. App'x at 752; *see also Oliver v. Serv. Emps. Int'l Union Loc. 668*, 415 F. Supp. 3d 602, 607-08 (E.D. Pa. 2019) (rejecting identical argument based on *Janus* because "[a] subsequent change in the law does not permit a party to a contract who has enjoyed the benefit of the bargain to rescind it with the benefit of hindsight"), *aff'd* 830 F. App'x 76 (3d Cir. 2020); *Bennett*, 991 F.3d at 731 ("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.") (quoting *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005)).

This Court has repeatedly rejected the proposition that contractual obligations can be rescinded simply because, at the time of formation, the parties did not foresee the future development of the law. *See*, *e.g.*, *Coltec Indus., Inc.*, 280 F.3d at 268, 277 (subsequent Supreme Court decision "did not provide a basis for relieving Coltec of the consequences of its bargain" because "a change in law does not, alone, justify such relief, *even when the change is based on constitutional principles*") (emphasis added); *Ehrheart*, 609 F.3d at 596 ("Where, as here, the parties have executed an agreement, a party cannot avoid its independent contractual obligations simply because a change in the law confers upon it a benefit that could have altered the settlement calculus."). Indeed, even in cases involving plea agreements—contracts that waive an individual's fundamental right to personal liberty—courts have held that the fact that a defendant may have accepted a plea agreement in part to avoid a fate later deemed unconstitutional does *not* provide a basis for rescission. *See*, *e.g.*, *Brady*, 397 U.S. at 757 ("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") (emphasis added); *United States v. Lockett*, 406 F.3d 207, 213 (3d Cir. 2005) ("where subsequent developments in the law expand a right that a defendant has waived in a plea agreement, that change does not make

the plea involuntary or unknowing or otherwise undo its binding nature"); *McKeever v. Warden SCI-Graterford*, 486 F.3d 81, 89 (3d Cir. 2007) (same).[11]

2. As to post-*Janus* members, Plaintiffs contend that the "only way" a waiver could be valid after *Janus* was for the Union Defendants to "affirmatively advis[e] Appellants of their constitutional rights," akin to a *Miranda* warning, prior to accepting and relying on their signed membership agreements. AOB 28-29. As noted above, *Janus* only involved individuals who did not join the union and had not agreed to pay anything to the union, and thus nowhere in its opinion did the Court even address union membership agreements, let alone require that any particular language be included in those agreements. Moreover, as the district court pointed out, even with respect to the nonmembers at issue in that case, the Court

[11] Plaintiffs do not mention these cases, which are binding authority in this Circuit and were cited in the *Fischer* decision. Instead, Plaintiffs rely on the Sixth Circuit's decision in *Sambo's Restaurants, Inc. v City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981), in which the court held that the plaintiff had not waived its First Amendment rights in a site plan proposal, which was submitted to the City prior to First Amendment protection being extended to commercial speech. But in that case, the court specifically *distinguished* the "situation where there is an agreement which is binding as a matter of state contract law." *Id.* at 691 (finding no such agreement because "the district court's findings of consideration were either inadequate as a matter of law or unsupported in the record as a matter of fact"). Moreover, the constitutional right to decline union membership existed long before *Janus*, as the Sixth Circuit itself noted in rejecting the very same argument that Plaintiffs advance here. *See Littler v. Ohio Ass'n of Public Sch. Employees*, 2022 WL 898767, at *6 (6th Cir. Mar. 28, 2022) ("the right recognized by the Supreme Court in *Janus* did not apply to Littler" because "[w]hen *Janus* was decided, Littler was a [union] member").

did not require any particular affirmative communications by the union or employer; rather, the Court only held that *the employee* must "affirmatively consent[] to pay." App. 38 n.3 (quoting *Janus*, 138 S. Ct. at 2486). That is exactly what the post-*Janus* members here did when they signed express agreements authorizing the payment of union dues for the time period at issue.

Furthermore, even accepting the erroneous premise of Plaintiffs' claim, their argument would still fail because the membership agreements Plaintiffs signed did affirmatively advise them that they were free to decline union membership. App. 197-238 (stating dues authorization was voluntary and "that neither this authorization nor its continuation is a condition of my employment"). There is no requirement that the membership agreement make reference to "constitutional rights" to be effective. *See, e.g.*, *Allen v. Ohio Civ. Serv. Emps. Ass'n AFSCME, Local 11*, 2020 WL 1322051, at *11 (S.D. Ohio Mar. 20, 2020) ("To the extent Plaintiffs' argument relies on the fact that the [union membership card] does not explicitly say 'You do not have to join the union,' they identify no support for the idea that such talismanic words are constitutionally required."); *see also California v. Prysock*, 453 U.S. 355, 359 (1981) ("*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."); *Perricone v. Perricone*, 972 A.2d 666, 682-83 (Conn. 2009) ("there is no requirement that the [confidentiality] agreement expressly refer to first amendment rights").

The very cases Plaintiffs cite in their brief show that waivers of constitutional rights will be found even though there is no reference to "constitutional rights" in the parties' agreement. *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 196-97, 205-07 (3d Cir. 2012); *Erie Telecomm. v. City of Erie*, 853 F.2d 1084, 1097 (3d Cir. 1988); *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 180-81 (1972). Rather, the dispositive fact in those cases was that the plaintiffs agreed to the terms at issue. *See, e.g.*, *Democratic Nat'l Comm.*, 673 F.3d at 207 ("The RNC voluntarily agreed to create and abide by the very provisions that it now challenges as unconstitutional."); *Erie Telecomm.*, 853 F.2d at 1097 (plaintiff "may not now seek to withdraw from performing its obligations and from discharging its burdens, while it still continues to retain all of the benefits it received from the City as a result of the agreements").[12]

[12] Unable to cite any caselaw supporting the contention that unions must provide the equivalent of *Miranda* warnings before enforcing a basic dues commitment—as none exists—Plaintiffs instead cite three state Attorney General letters. AOB 29 n.8. Plaintiffs fail to mention that when one such state attempted to implement the terms of that opinion letter, its actions were immediately enjoined by the state court, which found that the Attorney General's opinion was "unsupported by applicable case law" and "advances a position contrary to the express wording of *Janus*." *State of Alaska v. Alaska State Employees Ass'n*, 2019 WL 7597328, at *5-9 (Alaska Superior Court Oct. 3, 2019); *id*., 2021 WL 6288649, at *1 (Alaska Super. Ct. Aug. 4, 2021) (entering permanent injunction and awarding damages to the union). The other two letters rely solely on the same erroneous interpretation of *Janus* that Plaintiffs advance here and that courts have uniformly rejected. *See supra* at Sections I.A & I.B.

D. Plaintiffs' Arguments Regarding the Enforceability of Their Membership Agreements Under State Contract Law Are Meritless.

Plaintiffs argue that the deduction of post-resignation dues violated their First Amendment rights because their membership agreements were not valid contracts under Pennsylvania law. AOB 30-33. According to Plaintiffs, they were already union members when they signed their agreements and did not receive "new" consideration for agreeing to pay dues for a specified period of time. *Id*. at 30-31.[13]

Plaintiffs' "lack of consideration" argument fails on its own terms because they did not allege that they had a pre-existing contractual right to union membership on the same terms as set forth in their original membership agreements *in perpetuity*. Rather, agreements that do not have a set term, such as Plaintiffs' earlier membership agreements, are terminable at will. Thus, the Union Defendants were free at any time to change the requirements for membership prospectively, and continued membership provides the consideration for the new agreements setting forth window periods for termination.

[13] In the district court, Plaintiffs raised several other state law grounds for the unenforceability of the membership agreements, including failure of performance, ambiguity of the contract language, and the rule that ambiguous language should be construed against the drafter. However, the only ground they assert on appeal is the absence of additional consideration supporting the contract modification and therefore have abandoned the other grounds. *See* AOB 30-33.

Contrary to Plaintiffs' argument, Pennsylvania law is well settled that a contract that does not specify duration or conditions for termination—such as Plaintiffs' prior membership agreements—is terminable at will. *See, e.g.*, *Trainer v. Laird*, 320 Pa. 414, 183 A. 40, 40 (Pa. 1936); *Wyeth Pharms., Inc. v. Borough of W. Chester*, 126 A.3d 1055, 1064-65 (Pa. Commw. Ct. 2015) (citing *Price v. Confair*, 366 Pa. 538, 542, 79 A.2d 224, 226 (Pa. 1951)). Such contracts may be modified by either party "without limitation." *Trainer*, 183 A. at 40.[14] By signing the new membership agreements, Plaintiffs agreed to the terms set forth therein, including the authorization of post-resignation dues deductions, in exchange for the continued receipt of membership benefits. *See Green v. Edward J. Bettinger Co.*, 608 F. Supp. 35, 42 (E.D. Pa. 1984) ("The undoubted right to terminate an at-will contract necessarily includes the right to insist upon changes…as a condition of continued employment."), *aff'd*, 791 F.2d 917 (3d Cir. 1986). To the extent Plaintiffs contend they should have gotten more in exchange for signing the new membership agreement, "[i]t is an elementary principle that the law will not enter

[14] In the district court, but not on appeal, Plaintiffs cited *Corsale v. Sperian Energy Corp*., 374 F. Supp. 3d 445 (W.D. Pa. 2019), for the proposition that Pennsylvania common law requires additional consideration to modify a preexisting contract. Their failure to cite *Corsale* to this Court was well considered because it does not support their argument. *Corsale* concerned a contract for a fixed duration: an initial three-month term, followed by month-to-month extensions. *See id*. at 449-50, 454-55. As noted above, Plaintiffs' original membership agreements were not of fixed duration. As such, under the cases cited above in text, they were terminable at will and therefore modifiable by agreement of the parties without the requirement of additional consideration.

into an inquiry as to the adequacy of the consideration." *Hillcrest Found. v. McFeaters*, 332 Pa. 497, 2 A.2d 775, 778 (Pa. 1938) (quoting 1 *Williston on Contracts* § 115 (rev'd ed.)).

Equally to the point, the First Amendment issue is not whether Plaintiffs would have state law grounds to escape their contracts but whether Plaintiffs agreed to the payroll deduction authorization voluntarily, as opposed to being compelled to do so. Indeed, even *Janus*, on which Plaintiffs rely so heavily, stated that payments "may be deducted from a nonmember's wages" once "the employee affirmatively consents to pay," and that "*[b]y agreeing to pay*, nonmembers are waiving their First Amendment rights." *Janus*, 138 S. Ct. at 2486 (emphasis added). That is precisely the situation here.

To the extent Plaintiffs contend that the district court erred by not granting them leave to allege a *state law claim*, *see* AOB 30, 32-33, Plaintiffs never alleged any state law claims or sought leave to allege state law claims. Moreover, any such state claim would fail because the alleged misconduct—deducting union dues from wages without proper authorization—would constitute an unfair labor practice under the Pennsylvania Public Employe Relations Act ("PERA") and therefore be preempted by the exclusive jurisdiction of the Pennsylvania Labor Relations Board. *See Hollinger v. Dep't of Public Welfare*, 469 Pa. 358, 366-67,

365 A.2d 1245, 1249-50 (1976); *see also* 43 Pa. Stat. Ann. §§ 1101.1201(b)(1), 1101.1301.

II. The District Court Correctly Dismissed Plaintiffs' Due Process Claim Because They Authorized the Deduction of Post-Resignation Dues and Therefore Incurred No Deprivation of a Property or Liberty Interest.

Both below and in this Court, Plaintiffs' Due Process claim is but an afterthought to their First Amendment claim. They have devoted only three pages to briefing it here, AOB 33-36, and as the district court observed in *Barlow* and *Biddiscombe*, "Plaintiff[s'] due process claims are no more than thinly veiled First Amendment claims," App. 71, 99. As such, Plaintiffs' Due Process claim "suffer[s] from the same overarching defects as [their] First Amendment claims…" App. 70, 98 (substitutions added); *see also* App. 43 (Because Plaintiffs' membership agreements "do not run afoul of Plaintiff[s'] First Amendment rights," the court "consequently cannot find that they have alleged a sufficient liberty interest to support their procedural due process claim.") (substitution added). The district court's rejection of Plaintiffs' Due Process claim is in accord with all of the courts that have considered similar claims.[15]

[15] *See Wagner v. Univ. of Wash.*, 2022 WL 1658245 at *1 (9th Cir. May 25, 2022) ("Wagner was not deprived of a constitutionally protected property interest when the University deducted and remitted her voluntarily authorized dues."); *Kumpf v. New York State United Teachers*, 2022 WL 17155847, at *14 (N.D.N.Y. Nov. 22, 2022) (holding based on materially indistinguishable facts that "in adhering to the [plaintiff's] signed authorization's terms," school district did not "deprive[]

On appeal, Plaintiffs abandon any claim that the deduction of post-resignation dues pursuant to the terms of their membership agreements itself deprived them of a constitutionally protected property or liberty interest without due process of law. Rather, they argue only that they had a due process right to certain procedures (discussed below) that the Supreme Court held in *Hudson* had to be provided to nonmembers who (until *Janus* ended the practice) were compelled to pay for certain union expenses. AOB 33-34.

As a threshold matter, *Hudson* was based on the First Amendment, not the Due Process Clause, so it can provide no support for Plaintiffs' due process

---

Plaintiff of a protected liberty or property interest in violation of the Fourteenth Amendment"); *Marsh v. AFSCME Local 3299*, 2020 WL 4339880, at *10 (E.D. Cal. July 28, 2020), *subsequent order*, 2021 WL 164443, at *6 (E.D. Cal. Jan. 19, 2021) ("Plaintiffs were not deprived of a protected liberty or property interest when the government made deductions *authorized* by plaintiffs themselves.") (emphasis in original); *Molina v. Pa. Soc. Serv. Union*, *Serv. Emps. Int'l*, 2020 WL 2306650, at *11 (M.D. Pa. May 8, 2020) (analogous due process claim failed because "Molina was not deprived of an individual liberty interest. His union dues were deducted from his paycheck to satisfy his contractual obligation to the union and did not violate his First Amendment rights."); *see also Ulrich v. City and County of San Francisco*, 308 F.3d 968, 975 (9th Cir. 2002) (where plaintiff had no "right to rescind" voluntary resignation, employer's refusal to accept plaintiff's "rescission of resignation" did not "deprive[] him of his property interest in continued employment" and thus did not "trigger[] due process concerns"); *McBeth v. Himes*, 598 F.3d 708, 723 (10th Cir. 2010) ("[I]f one voluntarily relinquishes some property or liberty interest, then she cannot have a claim for a due process violation because no state official deprived her of the interest.").

claim.[16] In any event, Plaintiffs' invocation of *Hudson* is predicated on an erroneous analogy between resigned union members who had voluntarily joined the union and expressly authorized both pre- and post-resignation dues deductions, and nonmembers who never did any of those things.

Hudson was a case brought by nonmembers, under the pre-*Janus* regime established by *Abood*, when nonmembers could be required, as a condition of public employment, to pay fair-share fees to support union expenses incurred in negotiating, administering, and enforcing the collective bargaining agreement, but not political or ideological expenses. *See Hudson*, 475 U.S. at 294; *Abood*, 431 U.S. at 232, 234-36. To safeguard nonmembers' right not to pay for political or ideological expenses, *Hudson* instituted a prophylactic procedural system in which unions were required to: (1) annually disclose to their nonmembers the major categories of the union's expenditures, allocated between "chargeable" and "nonchargeable" classifications (depending on the nature of the expenditures); (2) afford the nonmembers an opportunity to object to paying for nonchargeable (*i.e.*, political or ideological) expenditures; (3) reduce the amount of the fair share fee charged to those objectors so that the fee comprised only "chargeable" expenses;

[16] *See Hudson*, 475 U.S. at 304 n.13 ("Respondents argue that this case should be considered through the prism of the procedural due process protections necessary for deprivations of property. As in *Abood* [431 U.S. 209], we analyze the problem from the perspective of the First Amendment concerns.").

and (4) submit to a neutral decisionmaker for resolution nonmembers' challenges to the union's allocation of its expenses between chargeable and nonchargeable classifications. *Hudson*, 475 U.S. at 310.

The flaw in Plaintiffs' argument is evident from the key assertion in their due process argument: "The principles underlying *Hudson* naturally extend to Appellants' situation because, like nonmembers in an agency shop, Appellants are being forced to subsidize labor unions against their will." AOB 35. To the contrary, unlike the nonmembers in *Hudson* who were required to subsidize the expenditures of a union they had neither joined nor agreed to support, Plaintiffs voluntarily joined the union and expressed in their membership application their "will" to continue to support the union after a resignation of membership. And as discussed above in Section I.B, Plaintiffs' attempt to rebrand themselves "nonmembers" for purposes of *Janus* ignores the facts of the *Janus* case.

That Plaintiffs subsequently experienced "buyer's remorse" and wished to contravene their previously expressed "will" is of no constitutional moment. Having freely authorized post-resignation deductions, "Plaintiff[s] cannot establish the 'depriv[ation] of a protected liberty or property interest' based on dues deductions [they themselves] authorized." App. 71, 99 (quoting *Marsh*, 2021 WL 164443, at *6) (substitutions added). Rather, the "post-resignation deduction of membership dues – for a limited period pursuant to a union membership agreement

– does not constitute a deprivation of an individual liberty interest when the dues were deducted…to satisfy [a] contractual obligation to the union and did not violate [the] First Amendment…" *Id*. (internal quotation marks omitted; substitution in original).

The only other authority Plaintiffs cite in support of their due process argument is the pre-*Janus* decision in *Ellis v. Brotherhood of Railway, Airline, & Steam Ship Clerks*, 466 U.S. 435 (1984). *See* AOB 35. However, if it is relevant here at all, *Ellis* supports the argument that *Hudson* provides no shelter for Plaintiffs.

As Plaintiffs recognized, *Ellis* (like *Hudson*) was decided under the pre-*Janus* interpretation of the First Amendment articulated in *Abood*, 431 U.S. 209, pursuant to which unions and public employers could agree to condition public sector employment on economic support for the union even as to employees who had declined to join or support the union that represented them, through the deduction of a "fair share fee." Plaintiffs characterize *Ellis* as holding that such "compelled payments were only justified by a guarantee that nonmembers would never be forced to fund the unions' political activities." AOB 35. To that end, *Hudson* mandated the procedural system, which we have discussed above, under which unions would disclose to nonmembers their annual "chargeable" and "nonchargeable" expenses so that the nonmembers could object to paying for the

latter and could challenge before a neutral decisionmaker the union's allocation of its expenditures between chargeable and non-chargeable categories. *See Hudson*, 475 U.S. at 310. That entire system is predicated upon the constitutional dichotomy, subsequently overturned by *Janus*, that the First Amendment permits unions to charge nonmembers against their will for collective bargaining expenses but not for political expenses, as it establishes a procedural scheme to implement nonmembers' option not to pay for the latter.

However, ever since *Janus* overturned the *Abood/Ellis/Hudson* regime for nonmember public employees, eviscerating any constitutional distinction between collective bargaining and political expenses, and holding that the First Amendment prohibits unions from compelling nonmembers to pay for *any* union expenses against their will, *see Janus*, 138 S. Ct. at 2460, the *Hudson* procedures have been nothing more than the vestige of a bygone era. There is no longer any need to distinguish between collective bargaining and political union expenses because nonmember public employees, who have not joined the union and did not authorize the deduction of union dues, simply cannot be compelled to support any union expenditures without their affirmative consent.

In contrast, union members, *i.e.*, those who—like Plaintiffs—voluntarily joined the union and authorized deductions for union dues, have never had the right to pick and choose which union expenses they would pay for, and thus have

never had the right to the notice-objection-impartial decisionmaker procedures Plaintiffs seek in this case, even under the *Abood/Ellis/Hudson* regime. Rather, by the terms of those decisions, those procedures applied only to nonmembers, not to resigned members who are still obligated by the terms of their membership agreements to pay post-resignation dues for a limited period, such as Plaintiffs.

As the Ninth Circuit made clear in *Belgau*, "[c]hoosing to pay union dues cannot be decoupled from the decision to join a union." 975 F.3d at 950-51. There is no constitutional right to be a union member without meeting the full financial obligations of union membership, *see Oliver*, 830 F. App'x at 79 n.3; *Kidwell*, 946 F.2d at 299-302, which, in the present case, includes consenting to continued dues deductions for a limited period of time after resignation of union membership. Because union dues are a *prix fixe* menu rather than à la carte, Plaintiffs have no right to choose which union expenses to support and therefore have no rights of prior notice, objection, and an impartial decisionmaker.

For all of the foregoing reasons, *Hudson* and *Ellis* are inapposite, and Plaintiffs' due process claim was properly dismissed.

///

///

///

///

CONCLUSION

For the foregoing reasons, the judgments entered in favor of the Union Defendants should be AFFIRMED.

Dated: April 3, 2023

Respectfully submitted,

/s/ Ramya Ravindran
RAMYA RAVINDRAN
Bredhoff & Kaiser, P.L.L.C.

AMY L. ROSENBERGER
Willig, Williams & Davidson

Attorneys for Defendant-Appellee AFSCME Council 13

/s/ Jeffrey B. Demain
SCOTT A. KRONLAND
JEFFREY B. DEMAIN
Altshuler Berzon LLP

LAUREN M. HOYE
Willig, Williams & Davidson

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 Defendants-Appellees SEIU Local 668 and AFSCME Council 13 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 12,448 words.

3. That, on April 3, 2023, the foregoing Answering Brief of Defendants-Appellees SEIU Local 668 and AFSCME Council 13 was electronically filed and served through the CM/ECF system to counsel of record for all parties. Seven paper copies were also sent by first-class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

4. That the virus-detection program Webroot Endpoint Protection CE 23.2(c) 2006-2022 has been run on the electronic Brief and no virus was detected.

Dated: April 3, 2023 By: */s/Ramya Ravindran*
Ramya Ravindran