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In the Commonwealth Court of Pennsylvania

158 C.D. 2019

JANE LADLEY and CHRISTOPHER MEIER,
Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION,
Appellee.

APPELLANTS' INITIAL BRIEF

Appeal from a Final Order of the Court of Common Pleas, Lancaster County
(Case No. CI-14-08552)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

INTRODUCTION

This is a case of first impression concerning the application of the United States Supreme Court's decision in *Janus v. AFSCME, Council 31*, 585 U.S. __, 138 S. Ct. 2448 (2018), to Pennsylvania law. Appellants Jane Ladley ("Ladley") and Christopher Meier ("Meier") (collectively, "Teachers"), public school teachers, lodged religious objections to paying "fair share fees" to Appellee Pennsylvania State Education Association ("PSEA") under title 71, section 575, of the Pennsylvania Statutes ("section 575"). In 2014, Teachers filed a declaratory judgment and civil rights action in county court against PSEA, alleging, *inter alia*, that PSEA's practices under section 575 violated their free speech, assembly, and due process rights.

Nearly four years into litigation of this case, the United States Supreme Court held that Illinois' public employee "fair share fee" law was unconstitutional:

> Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

Janus, 138 S. Ct. 2459–60.

Following issuance of *Janus*, PSEA moved for summary judgment, arguing that the case was moot, in part, because certain PSEA officials were willing to represent that section 575, like Illinois' law, was no longer enforceable and that they intended to comply with *Janus* in the future. Unfortunately, the trial court largely agreed,

concluding that PSEA's "voluntary cessation" of its policies under section 575 rendered Teachers' claims moot.

This Court should reverse the trial court's determination below, which left section 575 intact and Teachers without certainty or security about the impact of *Janus* on Pennsylvania law. If the trial court's erroneous decision is not reversed, section 575 will remain "on the books" and fair share fee clauses will remain in PSEA's collective bargaining agreements, contributing to confusion and providing an avenue for PSEA to return to its allegedly abandoned policies. Indeed, PSEA left a fair share fee clause in Mr. Meier's collective bargaining agreement and *continues* to bargain for fair share fees in collective bargaining agreements executed well after *Janus* was decided.[1] This Court should make clear that *Janus*' ruling with respect to Illinois law applies with equal force in Pennsylvania and direct the trial court to issue a permanent injunction against PSEA to protect against further "fair share" relapse.

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[1] Teachers request that this Court take judicial notice of the attached collective bargaining agreements. *See* Penn Manor Sch. Dist., Teacher Contract Agreement 2017–2021, art. XXX, https://www.pennmanor.net/employment/negotiated-agreement-2017-2021-4-3-17-1-2/ (last visited March 27, 2019); Negotiated Agreement Between S. Fulton Sch. Dist. and S. Fulton Educ. Ass'n, July 1, 2019–June 30, 2022, art. IX, sec. 9.2; Collective Bargaining Agreement Between the Steel Valley Educ. Ass'n and Bd. of Sch. Directors, 2019–2023, art. XXIX; Agreement Between E. Stroudsburg Bd. of Educ. and E. Stroudsburg Educ. Ass'n, 2016–2021 (ratified Dec. 2018), art. XV, https://www.esasd.net/cms/lib/PA01001915/Centricity/Domain/986/ESASD_Professional_Staff_Agreement_2016_to_2021.pdf. (last visited March 27, 2019) attached hereto as composite "Exhibit A." "Judicial notice can be taken at any time, including on appeal." *In re D.A.G.*, No. 153 MDA 2018, 2018 WL 3433864, at *4 n.2 (Pa. Super. July 17, 2018) (citing Pa.R.E. 201(d) ("The court may take judicial notice at any stage of the proceeding.")).

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over this matter pursuant to section 762(a)(5)(i) of the Judicial Code, 42 Pa.C.S. §§ 101–9913.

ORDER IN QUESTION

Teachers appeal from an order of the Court of Common Pleas for Lancaster County, Pennsylvania, which reads:

> AND NOW, this 29th day of October 2018, upon review of plaintiffs' and defendant's crossclaims for summary judgment and supporting briefs, plaintiffs' motion is hereby DENIED and defendant's motion is GRANTED. The above-captioned action is DISMISSED. If plaintiffs believe they are the "prevailing parties" as defined in 42 U.S.C. 1988, they shall file a motion with supporting documentation by November 23, 2018. Any opposition to the motion shall be filed by December 7, 2018, and any reply shall be filed by December 14, 2018. The prothonotary is directed to close this case.

A copy of the order is attached hereto as "Appendix A."

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's scope of review of a trial court's grant of summary judgment is plenary; the same standard applies on appeal as before the trial court. *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159 (Pa. 1997). "When reviewing an order granting summary judgment, the reviewing court must view the record in the light most favorable to the nonmoving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party." *Minn. Fire & Cas. Co. v. Greenfield*, 855 A.2d 854, 860–61 (Pa. 2004) (internal quotation marks and citation omitted).

STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER TEACHERS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER UNITED STATES SUPREME COURT PRECEDENT.

II. WHETHER THE TRIAL COURT ERRED WHEN IT FOUND TEACHERS' CLAIMS TO BE MOOT.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This declaratory judgment and civil rights action was filed on September 18, 2014, to address PSEA's policies implementing section 575, which authorizes fair share fees for public school teachers. (R. 1447a). The operative complaint in this matter was filed on April 25, 2017, and PSEA filed an answer and new matter on June 7, 2017. (R. 22a, 501a). Teachers filed an answer to PSEA's new matter on June 27, 2017. (R. 556a).

Teachers filed a motion for summary judgment on June 30, 2017 (R. 630a), to which PSEA filed an answer and cross-motion for summary judgment on July 31, 2017 (R. 897a). On September 28, 2017, the Supreme Court granted *certiorari* in *Janus*.[2] In recognition of their shared expectation "that the Supreme Court's ruling in *Janus* is nearly certain to impact the disposition of this matter," the parties jointly requested that the trial court stay the proceedings until *Janus* was decided. (R. 1125a). The trial court stayed the proceedings on October 11, 2017. (R. 1129a).

[2] *See Janus v. AFSCME, Council 31*, 1389 S. Ct. 54 (2017) (No. 16-1466).

On July 31, 2018, in the wake of *Janus*, the trial court lifted the stay. (R. 1242a). On August 29, 2018, PSEA withdrew its cross motion for summary judgment and filed its "Motion for Summary Judgment Based on Mootness." (R. 1244a, 1247a).

On October 29, 2018, the Honorable Leonard G. Brown, III issued an opinion and order concluding that, while *Janus* did not automatically render Teachers' claims moot, PSEA's voluntary actions created a change in facts sufficient to moot the case and that no exception to the mootness doctrine applied. App. A. Pursuant to this finding, the trial court denied Teachers' motion for summary judgment, granted PSEA's motion for summary judgment, and dismissed the case for lack of subject matter jurisdiction. *Id.*

This appeal followed. (R. 1445a).

II. FACTS

A. Fair Share Fees and Litigation

In 1977, the United States Supreme Court decided in *Abood v. Detroit Board of Education*, 431 U.S. 209, 235–36 (1977), that unions could not force nonmembers to finance the unions' political and ideological agenda as a condition of public employment. Instead, "[u]nder *Abood*, nonmembers may be charged [only] for the portion of union dues attributable to activities that are 'germane to [the union's] duties as collective-bargaining representative.'" *Janus*, 138 S. Ct. at 2460. As predicted in *Abood*, in the years that followed, there were "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled,

and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Abood*, 431 U.S. at 236.

That portion chargeable to nonmembers became known as "fair share fees" in Pennsylvania. In 1988, the General Assembly passed section 575, which permits public-sector employees to impose on employees of the Commonwealth or school entities a fair share fee requirement. And in 1993, the "Public Employee Fair Share Fee Law," 43 P.S. §§ 1102.1–1102.9, which applies to all political subdivisions, was enacted. Both laws were written to implement *Abood* and its progeny, but they also contained protections not found in relevant caselaw and reporting requirements that had little to do with *Abood*. *See, e.g.*, 43 P.S. §§ 1102.5(a)(2), 1102.6–1102.8; 71 P.S. § 575(e)(2), (j)–(m). A portion of at least one of those laws, section 575(g), was later struck down as unconstitutional. *See Hohe v. Casey*, 956 F.2d 399, 415 (3d Cir. 1992).

But the history of fair share fees would be incomplete without mention of public-sector unions' enterprising efforts to exploit public-sector employees in violation of the Supreme Court's decision in *Abood* and its progeny. Court dockets reflect just a sampling of the challenges public-sector employees have faced, notwithstanding explicit constitutional protections from such union abuse.[3]

[3] *See, e.g.*, *Knox v. SEIU, Local 1000*, 567 U.S. 298, 322 (2012) (holding that union violated employees' rights when it exacted special dues assessment without consent); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520, 537 (1991) (holding that union lobbying was unconstitutionally charged to nonmembers); *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986) (holding that union's procedure violated nonmembers' rights for failing to provide adequate notice and opportunity to

The National Education Association ("NEA"), of which PSEA is an affiliate, has demonstrated a willingness to press its authority under Supreme Court precedent.[4] Indeed, NEA has actually sanctioned lawsuits *against teachers* to recover fees even when it has failed to observe minimum constitutional standards set forth by the Supreme Court.[5]

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challenge); *Seidemann v. Bowen*, 584 F.3d 104 (2d Cir. 2009) (holding unconstitutional union's efforts to charge nonmembers for lobbying activity); *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002) (holding unconstitutional union's nonmember fee notices); *Weaver v. Univ. of Cincinnati*, 942 F.2d 1039 (6th Cir. 1991) (holding unconstitutional union's efforts to collect from nonmembers); *Perry v. Local Lodge 2569 of Int'l Ass'n of Machinists and Aerospace Workers*, 708 F.2d 1258 (7th Cir. 1983) (holding unconstitutional union's refund system); *Swanson v. Univ. of Hawaii Prof'l Assembly*, 269 F. Supp. 2d 1252 (D. Haw. 2003) (enjoining union's calculation procedure which included insufficient notice, inadequate audits, and no prompt rebate); *Lindenbaum v. City of Phila.*, 584 F. Supp. 1190 (E.D. Pa. 1984) (holding unconstitutional union's efforts to deny pension benefit increase to nonmembers).

[4] *See, e.g.*, *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042 (9th Cir. 2003) (holding unconstitutionally inadequate union's financial disclosures); *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807 (9th Cir. 1997) (holding constitutionally inadequate union's provision of notice and opportunity to challenge); *Bromley v. Mich. Educ. Ass'n-NEA*, 82 F.3d 686 (6th Cir. 1996) (holding unconstitutional use of nonmember funds for "defensive organizing"); *see also Fed. Election Comm'n v. NEA*, 457 F. Supp. 1102 (D.C. Cir. 1978) (holding illegal NEA's and local unions' attempt to deduct funds for political activity without members' consent).

[5] *Fort Wayne Educ. Ass'n v. Aldrich*, 527 N.E.2d 201, 218 (In. Ct. App. 1988) ("The rebate procedure is contrary not only to *Abood* and Indiana case law, which prohibit the use of nonmembers' funds for political purposes; the rebate procedure also fails to comply with the requirements laid out by the Supreme Court in *Hudson,* to which fair share fee contracts in Indiana must now comply."); *Columbus Educ. Ass'n v. Archuleta*, 505 N.E.2d 279, 287 (Ohio Ct. App. 1986) ("[The union's rebate procedure] would permit dissenters' funds to be improperly used in some years and cause union members to subsidize non-member dissenters in other years. Thus, the intent of the rebate system to protect First Amendment rights of both dissenters and the union majority would be defeated.").

PSEA has contributed to this unfortunate history by playing fast and loose with Supreme Court precedent in Pennsylvania. *See Otto v. Pennsylvania State Educ. Ass'n–NEA*, 330 F.3d 125 (3d Cir. 2003). For years, it ignored *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 307 (1986), in which the Supreme Court determined that public-sector unions exacting agency fees must provide "adequate disclosure" of expenditures to nonmembers, explaining that "adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor*." (Emphasis added). It also ignored the Third Circuit in *Hohe*, 956 F.2d at 415, which, years after *Hudson*, explained that "the purpose of requiring the verification . . . is to give the nonmembers some prior assurance that the fee was properly calculated" and that, "[w]hen nonmembers do not receive that assurance, their constitutional rights are violated under *Hudson*, and they are at least entitled to nominal damages of $1.00."

Despite the clear precedent in *Hudson* and *Hohe*, PSEA refused to secure independent audits for its local unions, relying instead on its novel theory that "*Hudson*'s independent auditor requirement was merely *dictum* or applie[d] only to large unions . . . that can afford an independent auditor." *Otto*, 330 F.3d at 131. *Hudson* was decided in 1986, but only in 2003, after nearly *seven years of litigation* against PSEA,[6] did PSEA receive the correction it needed. The Third Circuit reaffirmed what was

[6] *See Otto v. Pennsylvania State Educ. Ass'n–NEA*, No. CIV. 1:CV–96–1233, 1999 WL 177093, at *1 (M.D. Pa. Jan. 28, 1999) ("This civil action was initiated by a complaint filed on July 2, 1996.").

clearly stated by the United States Supreme Court in 1986 and obvious to everyone else: "We are bound by the Supreme Court's decision in *Hudson*, and its directive of 'verification by an independent auditor' means just that." *Id.* at 132.

B. History of This Case

Despite the relatively small dollar amounts at issue in this case, PSEA initially defended its internal practices against Teachers' challenge, relying chiefly on *Abood*. (R. 978a–979a). But after nearly two years of litigation over the PSEA's practices, the PSEA finally recognized that those practices were partially defective. (R. 962a–963a).

However, without notification to or discussion with Teachers, PSEA unilaterally implemented new written procedures, this time *directly contravening* the text of section 575. *Id.*; (R. 1005a–1007a). Despite section 575(h)'s requirement that religious objectors' funds be directed "to a nonreligious charity agreed upon by the nonmember and the exclusive representation," PSEA's policy claimed power to, under certain circumstances, send religious objectors' funds "to a nonreligious charity chosen by the PSEA at its sole discretion." (R. 1006a).

Equally surprising, the PSEA's new policy also included a take-it-or-leave-it, binding arbitration requirement seemingly copied-and-pasted from neighboring section 575(g), even though Supreme Court precedent clearly rendered such a requirement illegal. *Id.* Indeed, the Third Circuit had specifically ruled—24 years earlier—that section 575(g) was "invalid in its entirety" for requiring arbitration of constitutional issues, *Hohe*, 956 F.2d at 409 (citing *Patsy v. Bd. of Regents*, 457 U.S. 496,

516 (1982) ("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.")). Teachers moved for a preliminary injunction to prevent PSEA from imposing on them its obviously unconstitutional procedures. (R. 103a–128a).[7]

Shortly thereafter, a federal court in a separate case also involving the PSEA's new procedures observed that "[t]he PSEA's introduction of such procedures appear[ed] . . . to be an attempt to overwrite the pending lawsuit" and ordered the PSEA to stay implementation of its procedures until the motion for preliminary injunction in that matter was fully briefed. Order 1–2, *Misja v. Pennsylvania State Educ. Ass'n*, No. 1:15-cv-1199-JEJ (M.D. Pa. Aug. 8, 2016), ECF No. 30. That same day, Teachers came to an agreement with PSEA under which PSEA's new procedures would not be enforced against them, preserving the *status quo* in this matter, and withdrew their motion for preliminary injunction. (R. 129a–133a).

C. *Janus v. AFSCME, Council 31*

On June 27, 2018, in *Janus*, a case involving an Illinois public-sector employee and an Illinois public-sector union operating under Illinois law, the United States Supreme Court overruled *Abood*:

> Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and

[7] A Pennsylvania federal court, in yet another case involving the PSEA's new policies, remarked that, "[c]learly, [the PSEA] could not enforce the arbitration provision, as it is effectively unenforceable" under *Hohe* and the United States Supreme Court's decision in *Patsy*. (R. 627a).

> strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

Janus, 138 S. Ct. at 2459–60. The Supreme Court remanded the case to the lower courts and did not analyze any other states' laws in conjunction with its decision. *Id.* at 2486.

According to PSEA's Assistant Executive Director for Administrative Services, on the day of the *Janus* decision, PSEA directed all affected employers to immediately stop processing fair share fees. (R. 1257a–1258a). PSEA's Assistant Executive Director for Administrative Services also represented to the trial court that it sent a letter to all nonmember employees informing them that they are no longer required to pay fair share fees and that their employers had been directed to stop collecting them. (R. 1258a–1259a). Finally, PSEA also refunded to Teachers their escrowed funds and claimed to have "begun to refund" other nonmembers fees collected after June 27, 2018. (R. 1258a). However, PSEA did not promise that it would remove fair share fee agreements from collective bargaining agreements or stop seeking them in other school districts. In fact, Mr. Meier's collective bargaining agreement, currently on Penn Manor School District's website, continues to show authorization of fair share fees. Ex. A. Moreover, as collective bargaining agreements executed well after *Janus* demonstrate, PSEA is *still negotiating* for fair share fee clauses. *Id.*

SUMMARY OF ARGUMENT

This Court should reverse the denial of Teachers' motion for summary judgment, declare that section 575 is partially unconstitutional following *Janus*, and remand with instructions to enter a permanent injunction and award reasonable attorneys' fees and costs to Teachers under 42 U.S.C. § 1988. Teachers were clearly entitled to judgment as a matter of law under *Janus*, which should have made the trial court's work straightforward.

Instead, the trial court granted PSEA's motion for summary judgment based on mootness. But the trial court erred in reaching its conclusion, for at least three reasons. First, because section 575 has not been declared unconstitutional under the state or federal constitution and PSEA has not been enjoined, Teachers still have a stake in the outcome of this dispute, and meaningful relief can be granted. At the very least, PSEA should be directed to excise the fair share fee clause from Mr. Meier's agreement and to cease from bargaining, as it has done in other school districts, for fair share fees in the future.

Second, PSEA failed to carry its "heavy burden" of demonstrating mootness, and the trial court erroneously suggested that the burden was on *Teachers* to prove otherwise. In fact, PSEA has uncut its own supposed promises not to violate Teachers' First Amendment rights in the future by, among other things, failing to amend its own collective bargaining agreement for Mr. Meier and negotiating for fair share fees in other school districts after *Janus*. Even if the trial court believed PSEA

promises to comply with *Janus* satisfied its heavy burden, PSEA's promises should have affected only the scope of injunctive relief and not the need for a declaration as to the constitutionality of section 575.

Finally, this case involves issues of great importance and should be decided, irrespective of mootness. Public employees, including Teachers, should have the clarity and finality of a ruling on the merits, particularly when PSEA seems intent on pressing its authority in violation of *Janus* by continuing to bargain for fair share fee agreements.

ARGUMENT

I. TEACHERS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER UNITED STATES SUPREME COURT PRECEDENT

The trial court erred in denying Teachers' motion for summary judgment. Clearly, Teachers were entitled to judgment as a matter of law under the United States Supreme Court's recent pronouncement in *Janus*. This Court should apply *Janus*—a case involving Illinois litigants and Illinois law—in Pennsylvania and reverse the trial court's denial of Teachers' motion for summary judgment.

"It is fundamental that by virtue of the Supremacy Clause,[8] the State courts are bound by the decisions of the [United States] Supreme Court with respect to the federal Constitution and federal law, and must adhere to extant Supreme Court jurisprudence." *Council 13, AFSCME ex rel. Fillman v. Rendell*, 986 A.2d 63, 77 (Pa.

[8] U.S. Const. art. VI, cl.2.

2009); *see also Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 221 (1931) ("The determination by this [C]ourt of [a federal] question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding."). "[T]he 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.'" *DIRECTV, Inc. v. Imburgia*, 577 U.S. __, 136 S. Ct. 463, 468 (2015) (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)).

This is no less true when the job is relatively straightforward. By way of illustration, when the Supreme Court decided another high-profile case with national implications, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), there was little doubt that many state statutes were constitutionally dubious; however, lower courts were still required to apply that decision to other federal and state statutes.[9]

[9] *See, e.g., General Majority PAC v. Aichele*, No. 1:14-CV-332, 2014 WL 3955079, at *1, *4 (M.D. Pa. Aug. 13, 2014) (relying on *Citizens United* to strike down as unconstitutional portion of Pennsylvania statute prohibiting contributions for independent expenditures); *and see Republican Party of N.M. v. King*, 741 F.3d 1089, 1090-91 (10th Cir. 2013) (interpreting New Mexico statute in light of *Citizens United* and finding law irreconcilable); *N.Y. Progress and Protection PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013) (citing *Citizens United* as basis for granting injunction enjoining enforcement of New York law limiting contributions); *Texans for Free Enterprise v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013) (applying *Citizens United* to suit challenging Texas law on contributions); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011) (holding Wisconsin statute limiting campaign contributions to independent groups unconstitutional after *Citizens United*); *Long Beach Area Chamber of Commerce v. Long Beach*, 603 F.3d 684, 695 (9th Cir. 2010) (striking down portion of city campaign ordinance based on *Citizens United*); *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (holding that Supreme Court opinion in *Citizens United* resolved the issue, thereby requiring that statute be stricken); *see also*

This was also true for lower court cases litigated contemporaneously with *Citizens United* and decided in its immediate aftermath.[10]

A similar round of lower court decisions followed the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015),[11] even over objections of mootness.[12] For example, in *Waters v. Ricketts*, 798 F.3d 682 (8th Cir. 2015), the State of Nebraska argued that a challenge to its state statute was moot because *Obergefell* had addressed the constitutionality of Michigan's, Kentucky's, Ohio's, and Tennessee's bans on same-sex marriage in a manner that made clear Nebraska could not enforce its same-sex marriage ban. The Eighth Circuit did not agree:

> Nebraska suggests that *Obergefell* moots this case. But the Supreme Court specifically stated that "the State laws *challenged by Petitioners in these cases* are now held invalid." *Id.* at 2605 (emphasis added). . . . The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee—not Nebraska.

N.Y. Progress, 733 F.3d at 487 n.2 (citing six federal district court cases striking down analogous laws).

[10] *See, e.g., Long Beach Area Chamber of Commerce*, 603 F.3d at 684 (decided Apr. 30, 2010); *SpeechNow.org*, 599 F.3d at 686 (decided March 26, 2010).

[11] *See, e.g., Rosenbrahn v. Daugaard*, 799 F.3d 918, 922 (8th Cir. 2015); *Jernigan v. Crane*, 796 F.3d 976, 979 (8th Cir. 2015); *Waters v. Ricketts*, 798 F.3d 682, 685 (8th Cir. 2015); *Robicheaux v. Caldwell*, 791 F.3d 616, 619 (5th Cir. 2015); *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 283 (D.P.R. 2016) *Marie v. Mosier*, 122 F. Supp. 3d 1085, 1102 (D. Kan. 2015).

[12] *See, e.g., Waters v. Ricketts*, 159 F. Supp. 3d 992, 999–1001 (D. Neb. 2016) (explaining that, in light of *Obergefell*, "there is no argument now that plaintiffs have won on the merits," and granting summary judgment to plaintiffs and entering declaratory and permanent-injunctive relief); *Marie v. Mosier*, 122 F. Supp. 3d 1085, 1106, 1112–13 (D. Kan. 2015) (granting plaintiffs' motion for summary judgment in challenge to Kansas same-sex marriage ban and awarding declaratory relief, notwithstanding that "the record [ ] suggests that defendants have taken some affirmative steps to accord the relief plaintiffs seek").

> The Court also did not consider state benefits incident to marriage, which were addressed by Plaintiffs and the district court here. Nebraska has not repealed or amended the challenged constitutional provision.
>
> Nebraska's assurances of compliance with *Obergefell* do not moot the case. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) ("[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."). These assurances may, however, impact the necessity of continued injunctive relief. The district court should consider Nebraska's assurances and actions and the scope of any injunction, based on *Obergefell* and Federal Rule of Civil Procedure 65(d).

798 F.3d at 685–86 (some citations omitted). Suffice it to say, lower court cases turning on Supreme Court precedent do not automatically resolve themselves.

Here, Teachers and PSEA do not actually dispute that *Janus* controls. Pennsylvania law, like the Illinois law that was at issue in *Janus*, permits public-sector unions to collect agency (or "fair share") fees over the objection of nonmembers.[13] Section 575(b) obligates nonmembers to pay fair share fees to their public-sector union if required by a collective bargaining agreement, and subsections (c) through (i) set forth the legal regime for the exaction of and challenges to fair share fees. Only subsections (j) through (m), which set forth certain union reporting requirements, may

[13] *Compare* 71 P.S. § 575(b) ("If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee.") *with Janus*, 138 S. Ct. at 2459–60 ("Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities.").

lawfully be enforced after *Janus*.[14] Section 575 violates nonmembers' First Amendment rights, just as the Illinois law did.

Curiously, the trial court distinguished section 575 from the laws at issue in *Citizens United* and *Obergefell* on the grounds that section 575 is "permissive," while bans on certain political contributions and same-sex marriage are "prohibitive." App. A, at 18–20. Clearly, the Supreme Court had no problem ruling that an equally "permissive" statute in Illinois was unconstitutional. *See* Ill. Comp. Stat., ch. 5, § 315/6(e) ("When a collective bargaining agreement is entered into with an exclusive representative, it *may* include in the agreement a provision requiring [nonmember fees]." (emphasis added)).

But such a distinction, even if accurate, hardly justifies setting aside Supreme Court precedent. A law that "permits" unions to exact unconstitutional fair share fees is still unconstitutional, and it allows for conduct equally objectionable to any supposedly "prohibitive" law. Section 575's *permissive* grant of authority to charge nonmembers' fair share fees is no more or less offensive than, for example, a *prohibition* on allowing nonmembers to receive free union representation. "Permissive" and "prohibitive" often represent two sides of the same coin.

Even if there were a meaningful distinction between permissive and prohibitive laws in this context, permissive laws still represent a looming threat to those targeted

[14] Subsection (a) sets forth definitions for terms used throughout section 575, including nonoffending subsections (j) through (m).

and should earn the courts' attention. If, after *Citizens United*, a state's political contribution law gave state officials *permission* to exact a 75% fee from corporations making political contributions, the law would raise the same concerns as a *prohibition* on the same contributions. Similarly, after *Obergefell*, state officials could never be given *permission* to add an extra 75% to the cost of marriage licenses for same-sex couples. Yet the trial court refused to apply *Janus* in part because Pennsylvania law merely gives *permission* to school districts and unions to charge nonmembers roughly 75% of regular dues in order to keep their jobs. (R. 546a).

In sum, given the United States Supreme Court's decision in *Janus*, this Court has no choice but to conclude that portions of Pennsylvania law, like portions of the Illinois law at issue in *Janus*, are invalid. Accordingly, section 575(b) through (i) should be declared unconstitutional under the rationale set forth in *Janus*, and the trial court should be reversed.

II. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT TEACHERS' CLAIMS WERE MOOT

The trial court's determination that Teachers' claims were moot should be reversed for at least three reasons. First, Teachers still have a stake in the outcome because no court has applied *Janus* to Pennsylvania law under the state or federal constitutions. Second, the PSEA has failed to carry its heavy burden of demonstrating that its voluntary assurances of compliance with the law unilaterally moot this case.

And finally, even if this case were moot—and it is not—it should be decided under the public interest exception to the mootness doctrine.

A. This Case is Not Moot Because No Court has Applied *Janus* to Pennsylvania Law

Teachers still have a stake in the outcome of this dispute. Section 575 is still "on the books" in Pennsylvania, and PSEA insists on keeping fair share fee provisions in Mr. Meier's and others' collective bargaining agreements. Ex. A. Indeed, the trial court could and should have provided the relief requested by Teachers, namely, a ruling that section 575 was partially unconstitutional and a permanent injunction against PSEA.

"In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of the necessary stake in the outcome, or whether the court . . . will be able to grant effective relief." *Al Hamilton Contracting Co. v. Commonwealth*, 494 A.2d 516, 518 (Pa. Cmwlth. 1985) (citations omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 308 (3d Cir. 2008) ("The court's ability to grant effective relief lies at the heart of the mootness doctrine.") (quoting *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003). Our Pennsylvania Supreme Court has ruled against mootness arguments where, for example, the labor strike at issue is over but "the question of attorney fees still remains," *Giant Eagle Markets Co. v. UFCW, Local Union No. 23*, 652 A.2d 1286, 1291 (Pa. 1995), and where

a corporation closed its business but "could attempt to open" another, similar one, *Pap's A.M. v. City of Erie*, 812 A.2d 591, 600 (Pa. 2002).

Here, the trial court could have granted effective relief to Teachers, who still have a stake in the outcome of this dispute. For one, *Janus* involved Illinois litigants and Illinois law.[15] The Supreme Court could not and did not strike down Pennsylvania law when it decided *Janus* because no one raised a justiciable challenge to Pennsylvania's fair share fee statutes in *Janus*. It is the work of lower courts—and should have been the work of the trial court here—to apply that ruling in their respective jurisdictions.[16] *See Waters*, 798 F.3d at 685 ("The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee—not Nebraska."); *see also Rosenbrahn v.*

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[15] Ill. Comp. Stat. ch. 5 §§ 315/1–315/28.

[16] PSEA argued below that this case is moot because *Janus*, "[w]ith one broad, unequivocal, nation-wide stroke . . . overturned . . . the agency fee laws of Illinois and over 20 other states, including Pennsylvania," making it unnecessary for further rulings. (R. 1274a). However, this represents a profound misunderstanding of basic principles of federal (and state) jurisdiction and the facts of this case. It is axiomatic that a decision by another court as to the facts at issue in a separate case cannot provide meaningful relief to litigants everywhere. *See Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the right of strangers to those proceedings." (superseded on other grounds by statute)). "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular plaintiffs . . . ." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *see also* Edward A. Hartnett, *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 126 (1999) ("The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment."); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did.").

Daugaard, 799 F.3d 918, 922 (8th Cir. 2015) ("not South Dakota"); *Jernigan v. Crane*, 796 F.3d 976, 979 (8th Cir. 2015) ("not Arkansas"). Teachers also raised claims under the *state* constitution, claims the Supreme Court could not have addressed. (R. 167a–170a; 176a–177a).

Additionally, PSEA left in place a fair share fee provision within Mr. Meier's collective bargaining agreement and continues to bargain for fair share fees in other school districts, conduct practically begging for injunctive relief. Ex. A. The trial court was notified that PSEA refused to remove fair share fee provisions within Mr. Meier's collective bargaining agreement, (R. 1378a–1379a), and could have, at the very least, invalidated that provision or directed PSEA to remove or refrain from using it. Here, as the litigants in *Al Hamilton Contracting Co.*, *Pap's A.M.*, or *Giant Eagle Markets Co.*, Teachers still have a stake in the outcome of this proceeding.

In fact, a ruling that section 575 is partially invalid and an injunction against fair share relapse would be analogous to the relief granted to litigants in Pennsylvania after *Citizens United*. Four years after *Citizens United*—and despite the "parties['] agree[ment] that the challenged Election Code provision cannot stand constitutional scrutiny"—a federal district court applied the *Citizens United* ruling to Pennsylvania law, held invalid a specific provision of Pennsylvania's Election Code, and entered a permanent injunction against its enforcement. *General Majority PAC v. Aichele*, No. 1:14–CV–332,

2014 WL 3955079, *1 (M.D. Pa. Aug. 13, 2014).[17] The plaintiffs in *General Majority PAC*, who would otherwise be operating a PAC in technical violation of state law, were understandably in practical need of security and certainty, just as the Teachers in the instant case would be if made to rely on the promises of PSEA without declaratory or injunctive relief.

Likewise, in another set of post-*Obergefell* cases, the Fifth Circuit remanded with instructions to various district courts to enter final judgment on the merits in light of the Supreme Court's decision—even though all parties conceded that *Obergefell* dictated a particular outcome—because any change in law in another jurisdiction did not finally and conclusively dispose of the controversy. *See Robicheaux v. Caldwell*, 791 F.3d 616, 619 (5th Cir. 2015) ("[The parties] are agreed that the judgment should be

[17] The trial court attempted to distinguish *General Majority PAC* on the mistaken basis that the Commonwealth wanted an injunction because it was otherwise intent on enforcing its contribution ban. App. A, at 19. In fact, *General Majority PAC* resembles this case in that, before the court was ready to render judgment, the parties had all *agreed* on the unconstitutionality of the law at issue. *Gen. Majority PAC*, 2014 WL 3955079, at *1 (specifying that "[t]he Commonwealth of Pennsylvania concedes that the challenged provision no longer passes constitutional muster, and the only matter remaining to be decided is the scope of this court's order permanently enjoining its enforcement" and "the parties agree that the challenged Election Code provision cannot stand constitutional scrutiny.").

The trial court in this matter appeared to be confused about the Commonwealth's request for a more onerous injunction, App. A, at 19, but the request appears to have been motivated not by a desire to enforce its law but by a desire for affirmative guidance in complying with the Supreme Court's ruling, *see Gen Majority PAC*, 2014 WL 3955079, *6 ("As for the Commonwealth's second request for us to establish a new category of 'independent political committees,' we will not usurp the role of the democratically elected General Assembly or the [agency] by substantively rewriting the Election Code.").

reversed and remanded for entry of judgment in favor of plaintiffs."); *Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015) ("Because, as both sides now agree, the injunction appealed from is correct in light of *Obergefell*, the preliminary injunction is AFFIRMED. This matter is REMANDED for entry of judgment in favor of the plaintiffs."); *De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015) (same).

Finally, Teachers note that the issue of attorneys' fees—for a case initiated in 2014 and perpetuated in part because of PSEA's conduct, (R. 2a–9a)—has yet to be resolved. *See Giant Eagle Markets Co.*, 652 A.2d at 1291 (rejecting mootness arguments on the ground that, "although the strike has been settled, the question of attorney fees still remains because under 43 Pa.S. § 206q appellee is clearly entitled to such recovery if appellant's request for an injunction should have been denied"). Had the trial court ruled for Teachers on any portion of the merits, they would have been entitled to the attorneys' fees they sought under 42 U.S.C. § 1988. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) (analyzing entitlement to attorneys' fees under § 1988 and noting "that such awards are proper where a party 'has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal'" (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980))).

In sum, *Janus* controls this matter, but that does not mean the work of Pennsylvania Courts is unnecessary or impossible. Because the United States Supreme Court did not specifically invalidate Pennsylvania law, there was no change in Pennsylvania law and certainly no change sufficient to make judgment for Teachers

impossible to grant.[18] Judgment and relief for Teachers is not only possible, but necessary, because, as discussed more fully below, PSEA has made no apparent effort to remove fair share fee provisions from Mr. Meier's collective bargaining agreement and continues to agree to fair share fee clauses with other school districts. Ex. A. This Court must formalize in Pennsylvania the Supreme Court's *Janus* precedent to protect Teachers and all similarly situated Pennsylvania workers.

B. This Case is Not Moot Because a Voluntary Change in Policy is Not Sufficient Protection Against Relapse

Before the trial court, PSEA promised not to violate *Janus* in the future, submitting a statement of policy from its Assistant Executive Director for Administrative Services that PSEA will no longer collect fair share fees in the future. (R. 1256a–1260a). But even assuming PSEA has such a policy—and its lower level employee qualified to present it—it failed to carry its burden of proving that its conduct will not recur.

[18] However, even if *Janus* were a "change in law" in Pennsylvania, *Janus* did not finally and conclusively dispose of the controversy because it did not make it impossible for this Court to grant the requested relief, which is a specific declaration as to the constitutionality of section 575 under the state and federal constitution as well as an injunction. *See Nat'l Dev. Corp. v. Planning Comm'n of the Twp. of Harrison*, 439 A.2d 1308, 1310 (Pa. Cmwlth. 1982) ("While it is well established that a legal question can, after suit has been commenced, become moot as a result of changes in the facts of the case or in the law, such changes must finally and conclusively dispose of the controversy."); *cf. In re Gross*, 382 A.2d 116, 120 (Pa. 1978) (noting that the *amendment of the underlying statute* made it "impossible to grant relief.") (emphasis added).

"[V]oluntary cessation of allegedly unlawful conduct does not moot a case because such a situation would allow the party acting wrongly to revert, upon dismissal of the proceedings, to the offensive pattern of conduct." *Salvatore v. Dallastown Area Sch. Dist.,* No. 995 C.D. 2014, 2015 WL 5162153, *6 (Pa. Cmwlth. Feb. 20, 2015). Accordingly, a party claiming mootness carries "a heavy burden" of "prov[ing] that there is no reasonable expectation that the past conduct will be repeated." *Pennsylvania Interscholastic Athletic Ass'n, Inc. v. Greater Johnstown Sch. Dist.*, 463 A.2d 1198, 1201 (Pa. Cmwlth. 1983). Federal courts, to which Pennsylvania courts frequently look for guidance on deciding questions of mootness,[19] further describe this burden as "formidable." *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000); *DeJohn*, 537 F.3d at 309.

Here, a self-serving statement of policy from a lower level employee is hardly enough to prove PSEA cannot frustrate nonmembers' rights or press its authority under section 575 in the future. Merely disclaiming any intent to resume activity—precisely what PSEA did here—is insufficient to render a matter moot. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("Such a profession does not suffice to make a case moot . . . ."); *Salvatore*, 2015 WL 5162153, at *6.

Unfortunately, the trial court suggested that the burden was on Teachers to demonstrate that PSEA will not return to its unlawful policies. App. A, at 22

[19] *Pap's A.M.*, 812 A.2d at 600 n.4 ("This Court has frequently looked to cases from the U.S. Supreme Court for guidance in deciding questions of mootness.").

("Plaintiffs have not demonstrated that there is any reason to expect that PSEA would reinstate the collection of fair share fees."). Placing the burden on Teachers violates not only Pennsylvania's standard with respect to mootness, *see, e.g.*, *Pennsylvania Interscholastic Athletic Ass'n*, 463 A.2d at 1201, but it also flies in the face of the long-settled standard with respect to consideration of motions for summary judgment, *see Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) ("When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party.").

Emphatically, Teachers have *no responsibility* to help PSEA carry its formidable burden to show that this matter is moot.[20] However, Teachers observe several ways in which PSEA undercuts its own supposed promises not to violate *Janus* in the future. First, PSEA made no showing that it amended the relevant collective bargaining agreements to remove its fair share fee authorizations. To the contrary, Mr. Meier's collective bargaining agreement, currently on Penn Manor School District's website,

[20] Federal courts explain that mootness only arises based on voluntary cessation if "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *DeJohn*, 537 F.3d at 309. The Commonwealth Court has set forth a similar set of considerations. *See Highway Auto. Serv. v. Commonwealth*, 439 A.2d 238, 240 (Pa. Cmwlth. 1982) ("In determining whether the cessation of such activity compels a finding of mootness, we consider (1) the good faith of the defendant's announced intention to discontinue the challenged activity, (2) the effectiveness of the discontinuance, and (3) the character of the past violation.").

continues to show authorization of fair share fees.[21] Ex. A. And PSEA *continues* to bargain for fair share fee agreements, as at least three other school districts' collective bargaining agreements executed *well after Janus* demonstrate. Ex. A. PSEA will surely trot out nonbinding decisions from other courts that have found unions' promises to comply with *Janus* convincing; however, none of those cases involved in-force collective bargaining agreements in blatant violation of *Janus* and instituted after *Janus*, as is the situation here. If PSEA were trying to show this Court that it could not relapse—effectively the required showing for mootness— it has utterly failed.

Second, as set forth above,[22] PSEA has already demonstrated a willingness, historically *and in this case*, to disregard Supreme Court rulings. The possibility of not getting caught—with the potential penalty of $1.00 nominal damage claims and returning a limited number of plaintiffs' funds, sometimes only after years of litigation—is apparently too tempting to resist. It is not unreasonable to conclude, based on PSEA's past and present conduct, including quietly negotiating for fair share fees in violation of Janus, Ex. A, that it will return to its ways as soon as the courts turn their backs. It is essential to Teachers' relief that this Court grant their request for a permanent injunction, allowing them to resume this four-year long case where they left off instead of starting from scratch.

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[21] *See* Penn Manor Sch. Dist., Teacher Contract Agreement 2017–2021, art, XXX, https://www.pennmanor.net/employment/negotiated-agreement-2017-2021-4-3-17-1-2/ (last visited March 27, 2019). Ex. A.

[22] *See supra*, at Facts § B.

In any event, and to the extent that the policy of PSEA's Assistant Executive Director for Administrative Services provides assurance against relapse, such assurances do not moot the need for a declaration as to the constitutionality of section 575; they merely impact the scope of injunctive relief necessary. *See W. T. Grant Co.*, 345 U.S. at 633 ("Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts."); *Waters*, 798 F.3d at 686 ("Nebraska's assurances of compliance with *Obergefell* do not moot the case. . . . These assurances may, however, impact the necessity of continued injunctive relief."); *General Majority PAC*, 2014 WL 3955079, at *1 ("The Commonwealth of Pennsylvania concedes that the challenged provision no longer passes constitutional muster, and the only matter remaining to be decided is the scope of this court's order permanently enjoining its enforcement."). If the trial court believed PSEA, it should have declined to enjoin PSEA, yet still declared section 575 invalid.

Accordingly, PSEA has failed to carry its formidable burden to establish mootness. This Court should provide necessary certainty and security—the purpose of the Declaratory Judgments Act—by reversing the trial court and either directing that Teachers' motion be granted or remanding for further proceedings. *See* 42 Pa.C.S. § 7541(a) ("Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.").

C. Even if the Case is Moot, this Court Should Decide the Issue Based on the Public Interest Exception Because the Case Involves Important First Amendment Protections

Even assuming for the sake of argument that this case is moot, the trial court's dismissal of this case should be reversed because this case involves First Amendment protections of great public importance. Accordingly, irrespective of mootness, this Court should hold that section 575(b) through (i) is unconstitutional and issue an injunction against PSEA.

Issues like the ones presented in this case, involving First Amendment or state-related claims, should survive technical mootness under the "great public importance" exception. *See Pap's A.M. v. Erie*, 812 A.2d 591, 599-601 (Pa. 2002) (refusing to dismiss free expression challenge for mootness even though the establishment ceased operating because the dispute involved an issue of "great public importance" and law could impact future litigants); *Commonwealth v. Nava*, 966 A.2d 630, 633 (Pa. Super. 2009) ("Luna's case presents a case of great public importance. The current political and public controversy concerning immigration policies in the United States, particularly the enforcement of existing laws, has landed on our state capitol and courthouse steps."); *In re Duran*, 769 A.2d 497, 502 (Pa. Super. Ct. 2001) ("The issues in this appeal, rights to privacy and bodily integrity, are matters of public importance."); *In re Estate of Dorone*, 502 A.2d 1271, 1275 (Pa. Super. 1985) ("The rights alleged to have been violated include the First Amendment right to freedom of religion, a matter of public importance."). Of course, the great public importance

exception is rare; however, Teachers are only asking this Court to apply Supreme Court precedent in a matter in which it inarguably applies.

CONCLUSION

For the reasons stated above, Teachers respectfully request that this Court reverse the trial court, declare that section 575(b)–(i) is unconstitutional under *Janus*, and remand with instructions to enjoin PSEA from seizing or impounding Teachers' funds in the future and award Teachers reasonable attorneys' fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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