No. 19-2391

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GREGORY HARTNETT, ET AL.,
Plaintiffs-Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, ET AL.
Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(NO. 1:17-CV-00100-YK)

BRIEF OF THE APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees Pennsylvania State Education Association, Homer Center Education Association, Twin Valley Education Association, and Ellwood Area Education Association (collectively, "the Unions") state that they are not publicly-held corporations, do not issue stock, and have no parent corporation.

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COUNTER-STATEMENT OF APPELLATE AND SUBJECT-MATTER JURISDICTION

The district court initially had subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343. But as the district court concluded, its jurisdiction over the case ceased when all of Plaintiffs' claims became moot. This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's mootness determination. Plaintiffs' notice of appeal from the district court's dismissal was timely.

COUNTER-STATEMENT OF THE ISSUE PRESENTED

This case was filed in 2017 for the express purpose of obtaining Supreme Court review to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld the constitutionality of public-sector "agency fee" arrangements under which non-union members could be required to pay a fee to the union in their workplace for the cost of the representation they receive. While this matter was pending in the district court, the Supreme Court overruled *Abood* in *Janus v. AFSCME Council 31* and declared that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 138 S. Ct. 2448, 2486 (2018). In the immediate wake of that decision, the

Defendant-Appellee Unions[1] and relevant government actors recognized *Janus* categorically forbids the collection of agency fees as unconstitutional, and they took steps to unequivocally and irreversibly cease the practice.

The question in this appeal is whether the district court committed clear error in finding—based on the evidence of the Unions' and government actors' compliance with *Janus*—that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," that Plaintiffs in this action "face no realistic possibility that they will be subject to the unlawful collection" of agency fees, and that Plaintiffs' claims for declaratory and injunctive relief are therefore moot. (J.A. 18).

STATEMENT OF RELATED CASES

The Unions state that Plaintiffs' statement of related cases is complete.

[1] The Defendant-Appellees are the Pennsylvania State Education Association, Homer Center Education Association, Twin Valley Education Association, and Ellwood Area Education Association. They are referred to collectively as "the Unions" in this brief.

COUNTER-STATEMENT OF THE CASE

A. Statement of Facts

Beginning in 1988, Pennsylvania law provided that a union certified as the exclusive representative of a bargaining unit of public-sector employees may enter into an agreement with the public employer requiring the payment of an agency fee by employees who choose not to become dues-paying union members. 71 Pa. Stat. § 575. In 1977, the Supreme Court upheld the constitutionality of such requirements in *Abood*, explaining that as long as the fee was limited to a non-union employee's share of the costs of collective bargaining and contract administration, it did not violate the First Amendment's protections for freedom of speech and association. 431 U.S. at 225–26.

Plaintiffs are four public school teachers. At the time this action commenced, they were obligated to pay agency fees by the collective bargaining agreements in force between the school districts that employed them and the Unions that represented teachers in each of those districts.[2]

[2] Plaintiff Gregory J. Hartnett is employed by the Homer-Central School District and is served by a collective bargaining agreement (*continued . . .*)

B. Proceedings Below

1. The complaint, dismissal of the governmental defendants, and stay of the case pending the outcome in *Janus*

Plaintiffs filed this lawsuit in 2017 for the express purpose of seeking "the Supreme Court's review of the constitutionality of its holding in *Abood*." (J.A. 38.) In their prayer for relief, Plaintiffs asked for declaratory and injunctive relief, nominal damages, and an award of attorney fees. (*Id.* at 57-58.) Their complaint named as defendants the Unions, as well as the school districts that employed each Plaintiff. (*Id.* at 40-43.)

Each of the school districts immediately moved for dismissal, arguing that *Abood* remained good law and that Plaintiffs had therefore failed to state a valid claim for relief. (J.A. 28.) Plaintiffs conceded in response to those motions that *Abood* controlled and that dismissal was

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negotiated and enforced by Defendant Homer-Central Education Association; Plaintiff Elizabeth M. Galaska is employed by the Twin Valley School District and is served by a collective bargaining agreement negotiated and enforced by Defendant Twin Valley Education Association; and, Plaintiffs Robert G. Brough and John M. Cress are employed by the Ellwood Area School District and are served by a collective bargaining agreement negotiated and enforced by Defendant Ellwood Area Education Association.

required. (J.A. 29.) The district court accepted Plaintiffs' concession and dismissed the school districts. (J.A. 30.)

At that point, only the claims against the Unions remained. Shortly after discovery commenced on those claims, the Supreme Court granted certiorari in *Janus* to decide whether *Abood* should be overruled. The parties in this case jointly moved for a stay, recognizing that the eventual ruling in *Janus* was "nearly certain to impact and control the disposition of this matter." (J.A. 30.) The district court agreed and granted the stay. (*Id.*)

On June 27, 2018, the Supreme Court handed down its ruling in *Janus,* explicitly overruling *Abood* and holding that the mandatory collection of agency fees from non-members in the public-sector violates the First Amendment. 138 S. Ct. at 2486. The Court declared in no uncertain terms that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.*

2. Actions taken by the Unions and relevant government actors to immediately comply with *Janus*

Given *Janus*'s holding, the Unions recognized that the Pennsylvania statute authorizing agency fees was no longer enforceable and immediately took steps to stop collection of those fees. On the day of

the decision, PSEA contacted every school employer with which a PSEA affiliate had a contractual agency fee arrangement (including the Plaintiffs' employers), notifying them of the *Janus* decision and instructing them immediately to cease the collection of those fees. (J.A. 354–57.) In the few instances where fees were deducted after *Janus* issued, PSEA provided prompt refunds to the affected feepayers, with interest. (*Id.*)

PSEA also sent letters to every agency feepayer in the state explaining the *Janus* decision, informing them that PSEA had asked their employers to immediately cease deductions of agency fees, and notifying the feepayers that it would refund any fees that had been remitted after *Janus* issued. (*Id.*) Plaintiffs received these letters, and PSEA reimbursed them for any post-*Janus* fees that had been collected before their employers ceased collecting fees entirely.[3] (*Id.*)

All of the relevant government actors also recognized *Janus*'s significance and moved promptly to implement the decision. All three

[3] In addition, PSEA paid each of the Plaintiffs $100 by cashier's check to compensate them for any claim of nominal damages in connection with this lawsuit. (J.A. 8 n.4.) Plaintiffs acknowledged before the district court that this payment mooted any claim for nominal damages. (*Id.*)

school districts that employ Plaintiffs immediately ceased deducting and transmitting agency fees, and their superintendents have since confirmed, by way of sworn declarations submitted in this case, that no further fees will be deducted. (J.A. 367, 371, 373.) Two of those school districts went the extra step of formalizing that commitment with the relevant Unions by executing memoranda of understanding that rescinded the agency fee provisions in their collective bargaining agreements. (J.A. 369; Dist. Ct. ECF No. 68.)

In addition, the Pennsylvania Attorney General issued guidance to all public-sector employers in the state confirming that they "may no longer deduct [agency] fees from a nonmember's wages, without the nonmember employee's 'affirmative consent.'"[4] Likewise, the Pennsylvania's Department of Labor published an advisory directing

[4] Pa. Att'y General, Guidance on the Rights and Responsibilities of Public Sector Employees and Employers Following the U.S. Supreme Court's Janus Decision (Aug. 8, 2018), https://www.attorneygeneral.gov/wp-content/uploads/2018/08/2018-08-03-AG- Shapiro-Janus-Advisory-FAQ.pdf.

(*continued . . .*)

that "[a]s of June 27, 2018, public employers were to cease the collection of [agency] fees from nonunion employees."[5]

3. The parties' dispositive motions

Shortly after the parties notified the district court of the ruling in *Janus*, the court lifted the stay and directed the parties to file dispositive motions. Plaintiffs moved for summary judgment, arguing that the district court should declare the challenged statutes and collective bargaining agreements unconstitutional under *Janus* and award attorney fees under 42 U.S.C. § 1988. The Unions moved to dismiss on the ground that the intervening events discussed *supra* at 5–7 rendered all of Plaintiffs' claims moot.

After briefing was complete on the dispositive motions—but before the district court had issued a decision—Plaintiffs submitted a series of "notices of supplemental authority" consisting of seven collective bargaining agreements entered into between school districts and local unions affiliated with PSEA. (J.A. 499–735.) Each of these agreements

[5] Pa. Dep't of Labor & Indus., Guidance Regarding the June 2018 Janus Supreme Court Decision (Sept. 6, 2018), https://www.dli.pa.gov/Businesses/Labor-Management-Relations/Pages/JANUS-Advisory.aspx.

contained provisions purporting to allow for the collection of agency fees. (*Id.*) However, none of these agreements governed the working conditions of any of the Plaintiffs, and none of them were entered into by any of the Unions. (*Id.*)

4. The district court's dismissal of Plaintiffs' claims as moot

The district court denied Plaintiffs' motion for summary judgment and granted the Unions' motion to dismiss Plaintiffs' claims as moot. As the court explained, even in cases involving the voluntary cession of challenged conduct, a claim for injunctive or declaratory relief will become moot if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (J.A. 10 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 189 (2000).) The court concluded as a factual matter that the evidence before it satisfied this standard. (*See id.* at 17–20.)

The district court pointed to evidence establishing a significant "change in circumstances that has occurred here as to these Plaintiffs in the wake of the *Janus* decision." (*Id.* at 17.) In particular, the district court emphasized: (1) PSEA's "immediate steps to cease collection of [agency] fees from all non-members of its local union affiliates

(including the four Plaintiffs) and to refund any [agency] fees collected after the date of the *Janus* decision"; (2) "the declarations of the superintendents of each school district employing Plaintiffs stating that those districts have ceased deduction of [agency] fees and will not resume such deductions in the future"; (3) the declarations from the president of each local Union representing that the agency fee provisions in their collective bargaining agreements "are not valid or enforceable, and that they will not seek to collect further [agency] fees"; and (4) the memoranda of understanding entered into between two of the local Unions and their respective school districts "formally removing the unenforceable provisions" from their agreements. (*Id.*) This evidence persuaded the district court that "Plaintiffs face no realistic possibility that they will be subject to the unlawful collection of [agency fees]." (*Id.* at 18.) As a result, the court concluded that "Plaintiffs' claims for declaratory and injunctive relief are moot." (*Id.*)

The district court took note of the collective bargaining agreements Plaintiffs had filed in their "notices of supplemental authority," observing that they been introduced in an "apparent effort to substantiate their claims that the [Unions] here may resume

unlawful deduction of [agency] fees from the Plaintiffs in this case." (*Id.* at 19.) The court determined, however, that "in light of the fact that none of [the agreements] involves any of the three school district employers of *these Plaintiffs*, or their respective local union affiliates . . ., they are irrelevant to the issue as to whether these . . . claims have been rendered moot." (*Id.* (emphasis in original).)

The district court concluded by noting that its decision was in accord with "multiple district courts that have addressed similar arguments in the wake of *Janus* and have held that plaintiffs' prospective claims for declaratory and injunctive relief were rendered moot under similar circumstances." (*Id.* at 20 (citing *Akers v. Md. State Educ. Ass'n*, 376 F. Supp. 3d 563, 571–72 (D. Md. 2019), *appeal docketed* No. 19-1524 (4th Cir. May 16, 2019); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980, 982 (N.D. Ohio 2019), *appeal docketed,* No. 19-3250 (6th Cir. Mar. 27, 2019); *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1225–27 (W.D. Wash. 2019), *appeal docketed* No. 19-35290 (9th Cir. Apr. 11, 2019); *Cook v. Brown*, 364 F. Supp. 3d 1184, 1188–90 (D. Or. 2019), *appeal docketed* No. 19-35191 (9th Cir. Mar. 11, 2019); *Yohn v. Cal. Teachers Ass'n*, No. 8:17-cv-00202, 2018 WL 5264076 at *4 (C.D.

Cal. Sept. 28, 2018); *Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1339–40 (W.D. Wash. 2018), *appeal docketed* No. 18-36087 (9th Cir. Dec. 27, 2018).)

5. Additional factual developments relevant to mootness[6]

The district court rendered its decision before the Unions could submit evidence responding to Plaintiffs' "notices of supplemental authority." However, such evidence has now been submitted for inclusion in the record before this Court, and it further reinforces the district court's ultimate factual conclusion that "Plaintiffs face no realistic possibility that they will be subject to the unlawful collection of" agency fees. (J.A. 18.) In particular, the Unions have provided this Court with a declaration confirming that no agency fees were collected pursuant to the collective bargaining agreements submitted in Plaintiff's "notices of supplemental authority"—and, for that matter, that no agency fees were collected pursuant to *any* collective bargaining

[6] The Unions recognize that this Court can only consider the additional factual matters discussed in this section if it grants the Unions' motion to expand the record, which was filed on October 4, 2019 and referred to the merits panel for a decision. If that motion is ultimately denied, the Court should disregard the facts discussed under this heading.

agreements currently in force between any PSEA affiliate and school district. (Supp. App'x 1–4.) Furthermore, the Unions have provided this Court with seven memoranda of understanding confirming that the agency fee clauses in the collective bargaining agreements Plaintiffs provided in their "notices of supplemental authority" have all been formally rescinded. (*Id*. at 5–22.)

C. Rulings Presented for Review

Plaintiffs' appeal challenges only the district court's dismissal of their claims against the Unions. (J.A. 1.) Plaintiffs have waived any appeal of the district court's earlier dismissal of their claims against the school districts. (*See* Appellants' Mot. to Correct Caption, 3d Cir. Doc. 003113324012.)

SUMMARY OF ARGUMENT

This case does not present a live controversy, and the district court did not commit error in concluding that the case is moot. *Janus* held that the First Amendment categorically prohibits the mandatory collection of agency fees in the public-sector, and both the Unions and the Plaintiffs' employers moved swiftly to fully comply with that

holding, leaving no dispute for the district court to settle with declaratory or injunctive relief.

The district court applied the correct legal standard by observing that changed circumstances will render Plaintiffs' claims for forward-looking relief moot if the allegedly wrongful behavior could not reasonably be expected to recur. Furthermore, the district court's key factual findings on that issue—that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and that Plaintiffs in this action "face no realistic possibility that they will be subject to the unlawful collection" of agency fees—were not clearly erroneous. On the contrary, those factual findings were well supported by unrebutted evidence showing that both the Union and the applicable government actors have ceased the collection of agency fees in a manner that is unequivocal and irreversible. Plaintiffs' claims for declaratory and injunctive relief are therefore moot. (J.A. 18.)

Plaintiffs' arguments to the contrary were all properly disposed of by the district court. This is not a case governed by the mootness doctrine's voluntary cessation standard. Quite apart from the extensive steps the Unions themselves took to ensure agency fees would not be

collected in the future, the actions of the public employers—who are no longer parties to the case—completely prevent the Plaintiffs' from being exposed to their complained-of harm. Moreover, the collection of agency fees did not "voluntarily" cease; they ended because the Supreme Court declared them unconstitutional in *Janus*. And, even if the voluntary cessation standard did apply here, the Unions have clearly met the standard based on the steps they have taken to abide by *Janus*'s holding.

Lastly, it is simply not relevant that no court has yet enjoined the enforcement of the Pennsylvania agency fee statute or that unenforced agency fee clauses remain in some collective bargaining agreements. The operative legal question for maintaining the court's Article III jurisdiction is whether Plaintiffs will be harmed in the future, and there is no likelihood whatsoever that either the statute or the remaining agency fee clause will or legally could be enforced against any Plaintiff.

ARGUMENT

This Court should affirm the district court's dismissal of Plaintiffs' claims as moot. The district court applied the proper legal standard for determining mootness. And, in its role as factfinder on this

jurisdictional issue, the lower court reviewed the evidence of post-*Janus* changed circumstances—including the actions of both the Unions and the relevant government actors—and found that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" and that Plaintiffs "face no realistic possibility that they will be subject to the unlawful collection" of agency fees in the future. (J.A. 18.) Plaintiffs fail to show that the court's factual findings on mootness are clearly erroneous. It therefore follows that this Court should affirm the district court's dismissal of Plaintiffs' claims.

There is, simply put, no effective form of relief that can now be ordered in Plaintiffs' lawsuit. There is no reasonable possibility that the Plaintiffs will be required to pay agency fees in the future because, as the Supreme Court held in *Janus*, agency fee requirements are unconstitutional. Prior to *Janus*, the Unions and Plaintiffs' employers were enforcing agency fee requirements in good faith, as they were unquestionably lawful under *Abood*. But as soon as the Supreme Court overruled *Abood* and held that agency fee requirements are unlawful, they stopped.

The Unions disavowal of agency fee arrangements has been unequivocal. And there is a presumption that government officials will continue to follow the law in good faith and not act in a way that everyone agrees would be unconstitutional. Any judgment in Plaintiffs' favor would therefore amount to an advisory opinion holding what *Janus* has already established and ordering the Unions to do what they have already done.

A. Standard of Review

This Court reviews the district court's legal conclusions concerning mootness *de novo*. *See New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 475 n.4 (3d Cir. 2016). The district court, rather than a jury, resolves factual questions relevant to mootness, and such findings are reviewed only for "clear error" on appeal. *Id.*; *see also Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1285 (11th Cir. 2004). Under that standard, it "does not matter whether a finding of fact is based on documentary evidence or inferences from other facts; in either event, an appellate court must respect a trial court's finding of fact unless it concludes that the finding is clearly erroneous." *Bailey v. Fed. Nat. Mortg. Ass'n*, 209 F.3d 740, 743 (D.C.

Cir. 2000). Thus, whenever this Court reviews fact findings, as opposed to legal conclusions, its "job is different—and generally easier" because those findings must be affirmed so long as they are "plausible" and may only be reversed if this Court is "left with the definite and firm conviction that a mistake has been committed." *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017); *see also Prusky v. ReliaStar Life Ins. Co.*, 532 F.3d 252, 257 (3d Cir. 2008) (describing clear-error review as "highly deferential").

B. The District Court Did Not Err in Dismissing Plaintiffs' Claims as Moot

Under Article III of the Constitution, the judicial power of the United States extends only to "cases" and "controversies." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). "A case becomes moot—and is therefore no longer a case or controversy for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 91 (cleaned up). In other words, if developments occur during the course of adjudication that eliminate a plaintiff's "personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot." *D.F. v. Collingswood Borough Bd. of Educ.*,

694 F.3d 488, 496–97 (3d Cir. 2012) (citations and quotation marks omitted).

The justiciability of a plaintiff's claims must be demonstrated "separately for each form of relief sought." *Friends of the Earth*, 528 U.S. at 185. With respect to claims for injunctive relief, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Rather, where the conduct challenged by a lawsuit ceases—and the plaintiff is no longer threatened with future harm—any claim for injunctive relief becomes moot. *See Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017).

The same is true of claims for declaratory relief. Because "the purpose of a declaratory judgment is to declare the rights of litigants," the remedy is "by definition prospective in nature." *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 628 (3d Cir. 2013) (citation and quotation marks omitted). Thus, when a change in circumstances makes it "highly unlikely" that a plaintiff will again be subject to an action challenged as unlawful, any claim for declaratory relief becomes moot. *Versarge v. Twp. of Clinton*, 984 F.2d 1359, 1369 (3d Cir. 1993).

Here, Plaintiffs no longer face the kind of imminent threat of harm necessary to support standing for claims for forward-looking relief. *See Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861–62 (3d Cir. 2012); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (holding that a plaintiff has standing to seek prospective relief only where the risk of suffering a harm is "certainly impending"). In finding that Plaintiffs' claims had become moot, the district court applied the proper legal standard, and its factual findings supporting its ultimate conclusion of mootness are not clearly erroneous. All of Plaintiffs' arguments to the contrary are unavailing. The district court's judgment must therefore be affirmed.

1. The district court applied the correct legal standards and made no clear error in its factual findings

The district court correctly determined that the ultimate question in a case such as this is whether "the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth,* 528 U.S. at 189 (citations and quotation marks omitted), or instead whether circumstances could allow the Unions to "pick up where he left off, repeating this cycle until he achieves all his unlawful ends," *Already*, 568 U.S. at 91. In other words, the district court properly focused on

whether Plaintiffs could assert claims for prospective relief based on a likelihood that they would be subjected to the same conduct in the future.

Resolving that question, the district court found that the evidence before it showed that "Plaintiffs face no realistic possibility that they will be subject to the unlawful collection" of agency fees and that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (J.A. 18.) The district court's findings in that regard are factual in nature and can only be reversed if the Plaintiffs can show clear error. *See Troiano*, 382 F.3d at 1285 (concluding, in the context of analyzing mootness, that a district court's conclusion that the alleged unlawful conduct was unlikely to recur was a factual finding to be reviewed only for clear error); *see generally Kaplun v. Att'y Gen.*, 602 F.3d 260, 269–70 (3d Cir. 2010) (explaining that determinations about the likelihood of future events are factual in nature and therefore are subject to clear error review). And, under that standard, there is more than ample evidence to support the district court's factual findings here. *See Didon v. Castillo*, 838 F.3d 313, 320 (3d Cir. 2016) (explaining that the district court's factual findings must

be upheld on appeal if its "account of the evidence is plausible in light of the record, even if we would have weighed the evidence differently") (cleaned up).

Most significantly, the district court's factual findings on mootness are supported by unchallenged evidence detailing the assurances and actions by the relevant public officials whose actions would be required to reinstate any fee requirement against Plaintiffs and therefore whose statements unequivocally establish that Plaintiffs will not be required to pay agency fees in the future. In particular, the superintendents for the school districts that employ the Plaintiffs have all verified in sworn declarations that they have ceased the collection of agency fees and will not resume them in the future. (J.A. 367, 371, 373.) Two of these three superintendents went the extra step of formalizing this commitment by entering memoranda of understanding that removed the agency fee provisions from existing contracts. (J.A. 369; Dist. Ct. ECF No. 68); *see also* 71 Pa. Stat. § 575(b) (agency fees can only be collected "if the provisions of a collective bargaining agreement so provide"). And these disavowals were bolstered even further by explicit instructions from both the Attorney General and Department of Labor declaring that

public employers in the state can no longer collect agency fees. *See supra* at notes 4 & 5.

This evidence from the relevant public officials is, on its own, more than sufficient to sustain the district court's findings. After all, it is "settled practice" for courts "fully to accept representations such as these" as sufficient to support a finding of mootness. *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974); *see also* 13C Wright et al., *Federal Practice and Procedure* § 3533.7 (3d ed.) (explaining that courts routinely find mootness based on public officials' unqualified announcements of an intention to desist from future violations). This practice makes sense because government officials are generally presumed to act in good faith and in compliance with controlling law, *see Marcavage*, 666 F.3d at 861, and when the Supreme Court announces a clear and controlling constitutional principle—as it did in *Janus*—the relevant governmental actors are duty-bound to follow it, regardless of whether they were parties to the case. *See Cooper v. Aaron*, 358 U.S. 1, 16 (1958); *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516 (2012). Furthermore, the basic principles of "[c]omity" and "respect" that a federal court "owes state and local governments"

require it to give special credence "to the solemn undertakings of local officials." *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006); *see also Salvation Army v. N.J. Dep't of Cmty. Affairs*, 919 F.2d 183, 193 (3d Cir. 1990) (holding that assurance that government would not enforce challenged statutory provisions against the plaintiffs "remove[d] those provisions from the scope of the current controversy").

Put differently, when government officials give unequivocal assurances that a challenged practice will cease, "a plaintiff disputing a finding of mootness must present more than mere speculation that the [governmental body] may return to its previous ways." *Flanigan's Enterprises, Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1256 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 1326 (2018); *see also Citizens for Responsibility & Ethics in Wash. v. SEC*, 858 F. Supp. 2d 51, 63 (D.D.C. 2012) (reasoning that "speculations about potential recurrence might be sufficient" to avoid mootness where a disavowal or change in policy comes only from a private litigant, but that "such conjecture is insufficient" when it comes from a governmental entity). Here, the Plaintiffs have offered no evidence to indicate that the

relevant public officials' sworn averments that fees will never again be collected are in any respect subject to question. That alone is enough to warrant affirmance of the district court's judgment.

What is more, the district court's factual findings on mootness are supported here by the extensive evidence of the Unions' own actions and assurances confirming that their termination of agency fee arrangements has been unequivocal and irreversible. As this evidence shows, the Unions have acknowledged without qualification that *Janus* rendered all public-sector agency fee arrangements unlawful, and they have confirmed they will no longer be enforced. (J.A. 354–57, 375, 377, 379.) Such a "broad shift in policy"—as opposed to one that is "an individually targeted effort to neutralize" claims by plaintiffs in a particular lawsuit—is strong evidence supporting mootness. *Ciarpaglini v. Norwood*, 817 F.3d 541, 545–46 (7th Cir. 2016).

The Unions' broad renunciations of any intent to collect agency fees also have independent legal significance that supports the district court's factual findings on mootness. The Pennsylvania agency fee statute provides that fees may only be collected pursuant to a valid agreement between the union and public employer. *See* 71 Pa. Stat.

§ 575(b). Here, by contrast, two of those three agreements have already been formally rescinded by the parties, and the Unions' actions have plainly rendered the third agreement unenforceable under basic principles of contract law. It is black letter contract law that where both parties have acknowledged that performing a duty under a contract would be unlawful, they are relieved of any obligation to perform that duty. *See Restatement (Second) of Contracts* § 264 & cmt. a (1981); 30 *Williston on Contracts* §§ 77:55, 77:57 (4th ed.). Likewise, a party's complete disclaimer of its intent to enforce a contract provision—as the Unions have done with respect to the collection of agency fees—releases the other party from the duty to perform. *See Restatement (Second) of Contracts* § 275; 14 *Williston on Contracts* § 40:46.

Taken as a whole, this evidence is more than sufficient to support the district court's findings that "Plaintiffs face no realistic possibility that they will be subject to the unlawful collection" of agency fees and that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (J.A. 18.) Moreover, the district court's ultimate finding of mootness is in accord with decisions from over a dozen district courts across the country that have dismissed as

moot indistinguishable claims seeking injunctive and declaratory relief from unenforced public-sector agency fee arrangements in the wake of *Janus*. In all of those cases, the courts have found that the immediate and unconditional termination of agency fee arrangements mooted the claims for declaratory and injunctive relief. *See, e.g., Carey*, 364 F. Supp. 3d at 1225–27 (emphasizing that the post-*Janus* disavowal of agency fee collection by both the unions and the government employers was "broad in scope and unequivocal in tone" and that the "combined impact" of the action by both the union and employer were "mutually-reinforcing and further suggest their lasting effect").[7] And, while some

[7] *See also Mayer v. Wallingford-Swarthmore Sch. Dist.*, No. 2:18-cv-04146, 2019 WL 4674397, at *3 (E.D. Pa. Sept. 24, 2019); *Seager v. United Teachers of L.A.*, No. 2:19-cv-00469, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019), *appeal docketed* No. 19-55977 (9th Cir. Aug. 21, 2019); *Molina v. Pa. Soc. Serv. Union*, 392 F. Supp. 3d 469, 480-82 (M.D. Pa. 2019); *Ogle v. Ohio Civil Serv. Emps. Ass'n*, No. 2:18-cv-1227, 2019 WL 3227936, at *5 (S.D. Ohio July 17, 2019), *appeal docketed* No. 19-3701 (6th Cir. July 26, 2019); *Diamond v. Pa. State Educ. Ass'n*, No. 3:18-cv-00128, 2019 WL 2929875, at *13–22 (W.D. Pa. July 8, 2019), *appeal docketed* No. 19-2812 (3d Cir. Aug. 13, 2019); *Hamidi v. SEIU Local 1000*, 386 F. Supp. 3d 1289, 1298 (E.D. Cal. 2019); *Smith v. Bieker*, No. 3:18-cv-05472, 2019 WL 2476679, at *1 (N.D. Cal. June 13, 2019), *appeal docketed* 19-16381 (9th Cir. July 22, 2019); *Babb v. Cal. Teacher's Ass'n*, 378 F. Supp. 3d 857, 870–71 (C.D. Cal. 2019), *appeal docketed* No. 19-55692 (9th Cir. June 18, 2019); *Wholean v. CSEA, SEIU Local 2001*, 3:18-cv-01008, 2019 WL 1873021, at *2–3 (D. Conn.

(*continued . . .*)

of these final judgments have now been appealed, the Unions are not aware of any case—besides this one—in which a district court's finding of mootness with respect to claims for injunctive and declaratory relief is being challenged.[8]

Far from being clearly erroneous, the district court was clearly correct in concluding as a matter of fact that the collection of agency

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Apr. 26, 2019), *appeal docketed* No. 19-1563 (2d Cir. May 24, 2019); *Akers v. Md. State. Educ. Ass'n*, 376 F. Supp. 3d at 571–72; *Lee*, 366 F. Supp. 3d at 982; *Cook*, 364 F. Supp. 3d at 1188-90; *Lamberty v. Conn. State Police Union*, 3:15-cv-378, 2018 WL 5115559, at *4–8 (D. Conn. Oct. 19, 2018); *Yohn*, 2018 WL 5264076, at *4; *Danielson*, 345 F.Supp.3d at 1339–40; *Branch v. Commonwealth Employment Relations Bd.*, 120 N.E.3d 1163, 1171 (Mass. 2019), *petition for cert. filed* (U.S. July 8, 2019) (No. 19-51).

In support of their argument, Plaintiffs can muster just one decision rejecting a union's post-*Janus* assertion of mootness, *Guppy v. City of L.A.*, 2019 WL 4187389, No. 8:18-cv-01360 (C.D. Cal. June 5, 2019). But even that outlier has been taken back by the court that issued it: shortly after Plaintiffs filed the opening brief before this Court, the district judge in *Guppy* reconsidered his earlier decision and concluded that the case had in fact become moot. *See Guppy v. City of L.A.*, No. 8:18-cv-01360, slip op. at 7 (C.D. Cal. Aug. 30, 2019) (attached as an addendum to this brief).

[8] *See*, *e.g.*, Appellants' Br., *Danielson v. Inslee*, No. 18-36087, 2019 WL 2013119, *8 n.4 (9th Cir. Apr. 29, 2019) (explicitly waiving any challenge on appeal to the district court's ruling that plaintiffs' claims for injunctive and declaratory relief are waived); Appellants' Br., *Lee v. Ohio Educ. Ass'n*, No. 19-3250, 2019 WL 3306374, *8 n.2 (6th Cir July 15, 2019) (same); Appellants' Br., *Akers v. Md. State Educ. Ass'n*, No. 19-1524, 2019 WL 3384285, *9 n.3 (4th Cir. July 21, 2019) (same).

fees from Plaintiffs "could not reasonably be expected to recur," and that Plaintiffs therefore "face no realistic possibility" of future harm that could be remedied by forward-looking relief. (J.A. 18.) Accordingly, this Court should affirm the district court's dismissal of those claims for relief as moot.

2. Plaintiffs' arguments for reversal are without merit

Faced with the district court's well supported factual findings and a wall of persuasive authority squarely against them, Plaintiffs resort to a handful of arguments that have no merit as detailed below.

a. This case does not turn on the "voluntary cessation" doctrine—and, even if it did, the Unions have established more than is necessary to establish mootness

The Plaintiffs' entire opening brief is premised on the notion that the Unions have failed to the carry the "heavy" burden required by the so-called "voluntary cessation" doctrine, *see United States v. W. T. Grant Co.*, 345 U.S. 629, 632–33 (1953), because they have only shown their own "voluntary" or "unilateral" change in position that "can easily be reversed in the future," (Appellants' Br. at 19-–24). Plaintiffs are wrong on both the law and the facts.

To begin with, this case does not implicate the voluntary cessation doctrine because the Plaintiffs have failed to account for the actions of government actors—who are no longer parties to this litigation—that independently foreclose any possibility of the Plaintiffs ever being required to pay agency fees again.[9] Contrary to Plaintiffs' suggestions, the Unions could not simply resume the collection of agency fees on their own; they would need public school employers to collect and remit those fees. *See* 71 Pa. Stat. § 575(b)–(c). Yet, the school district employers have all unequivocally sworn that they will not collect or remit agency fees, and all of the agreements that could otherwise require the collection of agency fees from Plaintiffs have either been formally rescinded or are otherwise unenforceable as a matter of contract law. *See supra* at 25–26; *see also Carey*, 364 F. Supp. 3d at 1225–27 (explaining that that the post-*Janus* disavowal of agency fee

[9] In this respect, it is telling that Plaintiffs decided to forgo an appeal of the judgment dismissing their claims against the school districts. If Plaintiffs were genuinely concerned that the collection of agency fees might resume—and that a court order was needed to prevent that outcome—they surely would have appealed the district court's dismissal of the very governmental entities responsible for deducting agency fees from their wages and remitting them to the Unions.

collection by both the unions and the government employers were "mutually-reinforcing"). In other words, "voluntary cessation" is not at issue here because there is nothing the Unions can now do unilaterally to "pick up where [they] left off." *Already*, 568 U.S. at 91.

The voluntary cessation doctrine is also inapplicable here because the termination of the challenged conduct is not considered "voluntary" when it is done in response to a change in the law. *See Christian Coal. v. Cole*, 355 F.3d 1288, 1292–93 (11th Cir. 2004); *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1194–95 (9th Cir. 2000). That is true whether the change of position is in response to a newly enacted statute, see *Smith*, 233 F.3d at 1194–95, or—as in this case—the result of a judicial decision, *see Aikens v. California*, 406 U.S. 813, 814 (1972) (per curiam); *Christian Coal.*, 355 F.3d at 1292–93.

Finally, even if the Unions were required to bear the "heavy" burden mandated by the voluntary cessation doctrine, they would do so easily here. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 71–73 (1983) (expressing doubt that the voluntary cessation doctrine applies to acts of a non-party, but holding that mootness was shown under the doctrine's standard in any event). The factors relevant to that inquiry

include: whether the policy change is evidenced by language that is broad in scope and unequivocal in tone;[10] whether the defendant continues to defend the lawfulness of its actions;[11] whether the case in question was the catalyst for the change in policy;[12] and whether the new policy could be easily abandoned or altered in the future.[13] Each of these factors weighs strongly in favor of finding mootness.

Both in this litigation and in their dealings with public employers throughout the Commonwealth, the Unions have made clear that they are bound by *Janus* and therefore will not seek to enforce public-sector agency fee arrangements of any kind. They have not attempted to hedge or condition their complete renunciation of any intent to collect fees, nor have they limited it to Plaintiffs and Plaintiffs' employers. And given that the Commonwealth's highest law enforcement authority, the agency regulating public employers and unions, and all of Plaintiffs' employers have explicitly acknowledged that agency fees may not be

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[10] *See Ciarpaglini*, 817 F.3d at 545–46.

[11] *See United States v. Gov't of V.I.*, 363 F.3d 276, 285–86 (3d Cir. 2004).

[12] *See id.* at 286.

[13] *See DeJohn v. Temple Univ.*, 537 F.3d 301, 311 (3d Cir. 2008).

collected from nonconsenting non-member employees, it is effectively impossible for the Unions to abandon or alter their commitment to cease collecting agency fees. In other words, the Unions' actions in response to *Janus* have been unequivocal and irreversible. As a result, they easily demonstrate that the conduct challenged by Plaintiffs' lawsuit could not reasonably be expected to recur.

b. The mere presence of an unenforced agency fee statute or contract provision "on the books" does not create a live controversy

The Plaintiffs also argue that their claims are not moot because the Pennsylvania agency fee statute and the agency fee provision of one of the collective bargaining agreements—while not being enforced—have yet to be formally rescinded. (Appellants' Br. at 13.) These arguments are without merit.

With respect to the statute, the mere presence of agency fee legislation on the statute books is not the kind of imminent threat of harm that supports standing for injunctive or declaratory relief—especially when the officials charged with enforcing or administering that law have explicitly disavowed any intention of doing so. *See Poe v. Ullman*, 367 U.S. 497, 501–02 (1961) (finding nonjusticiable a challenge

to a criminal statute where plaintiffs faced no "clear threat of imminent prosecution"); *see also Miller v. Mitchell*, 598 F.3d 139, 146–47 (3d Cir. 2010) (holding that a prosecutor's unambiguous commitment not to bring enforcement action is enough to render a case moot). As the en banc Eleventh Circuit has explained, "even where the intervening governmental action does not rise to the level of a full legislative repeal . . . , a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." *Flanigan's Enterprises*, 868 F.3d at 1256; *see also Winsness v. Yocom*, 433 F.3d 727, 732–37 (10th Cir. 2006); *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004).

Much the same can be said of the claim that a live controversy exists because the agency fee provision of a collective bargaining agreement covering one Plaintiff was not formally rescinded. (Appellants' Br. at 23–24.) Both the Union and the Plaintiff's employers explicitly have disavowed any intention to unlawfully collect agency fees, which as a practical matter eliminates any imminent threat to the Plaintiffs. *See Miller*, 598 F.3d at 146–47. But more than that—and as

we have explained already, *see supra* at 25–26—those explicit disavowals render unenforceable any duty to collect agency fees that might otherwise exist under the collective bargaining agreement. *See Restatement (Second) of Contracts* § 264 & cmt. a; *id.* § 275. Plaintiffs therefore face no threat of harm that would justify forward-looking relief.

c. The marriage-equality and campaign-finance cases relied on by Plaintiffs are inapposite

Plaintiffs' also claim that a live controversy exists based on cases decided in the wake of both *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), and *Citizens United v. FEC*, 558 U.S. 310 (2010). But the circumstances present in both of those sets of cases differ meaningfully from the facts here.

After *Obergefell* declared several state bans on same-sex marriage unconstitutional under the Fourteenth Amendment, there remained a number of challenges to similar laws pending in lower courts. Some of these courts determined that the issuance of the Supreme Court's decision did not render the cases before them moot. *See*, *e.g.*, *Waters v. Ricketts*, 798 F.3d 682, 685–86 (8th Cir. 2015). These cases are inapplicable here for three reasons. First, the courts in these cases

found that *Obergefell* was written very narrowly, *see Waters*, 798 F.3d at 685, whereas *Janus* broadly overruled *Abood* and determined that fair-share fees for public employees are unconstitutional, *see Janus*, 138 S. Ct. at 2486. Second, some of the post-*Obergefell* cases noted that the Supreme Court did not rule on all the issues raised by the plaintiffs in those cases, *see Waters*, 798 F.3d at 685–86, whereas *Janus*'s broad holding regarding the unconstitutionality of fair-share fees clearly resolves all of Plaintiffs' requests for declarative and injunctive relief. And, third, some of the post-*Obergefell* cases were not moot because courts had concerns about continued compliance with *Obergefell, see Strawser v. Strange,* 190 F. Supp. 3d 1078, 1081–82 (S.D. Ala. 2016), whereas here it is clear that both the Unions and Plaintiffs' employers will continue to comply with *Janus* even if the claims for declaratory and injunctive relief are declared moot*, see Salvation Army*, 919 F.2d at 193 (government official's assurances of compliance are sufficient to render claims for injunctive and declaratory relief moot); *Bagby v. Beal*, 606 F.2d 411, 413–14 & n.1 (3d Cir. 1979) (same).

The post-*Citizens United* cases relied on by the Plaintiffs are even farther afield. *Citizens United* famously held that a federal ban on

corporate- or union-funded independent political speech violated the First Amendment. 558 U.S. at 365. A series of lower court decisions then struck down similar bans at the state level in reliance on *Citizens United*'s holding. *See*, *e.g.*, *Gen. Majority PAC v. Aichele*, No. 1:14-CV-332, 2014 WL 3955079 (M.D. Pa. Aug. 13, 2014). Yet, Plaintiffs do not identify a single such case where mootness was in fact raised to the court. "[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

d. The existence of non-parties' agreements containing agency fee clauses—which were never enforced and have since been rescinded—does not create a live controversy as to these Plaintiffs

As a final matter, the Plaintiffs spill a great deal of ink arguing that they retain a personal stake in the lawsuit based on the existence of seven collective bargaining agreements that do not even apply to the Plaintiffs' employment and that have since been rescinded. The district court did not commit clear error by failing to give this irrelevant evidence the controlling weight that Plaintiffs seek.

None of the Plaintiffs in this case is employed by any school district that is party to a collective bargaining agreement introduced in Plaintiffs' "notices of supplemental authority." (J.A. 499–735.) Thus, as the district court properly concluded, these agreements are irrelevant to answering the key question of "whether *these Plaintiffs'* claims have been rendered moot." (J.A. 19 (emphasis in original).) After all, a litigant can only establish the requisite threat of harm for forward-looking relief it can show a "reasonable expectation" or a "demonstrated probability" that "the *same controversy* will recur involving the *same complaining party*." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (emphasis added).

Moreover, as the Unions have shown in the supplemental appendix, even the non-union employees who are covered by those agreements face no threat of having agency fees unlawfully collected.[14] Despite the emphasis Plaintiffs place on these agreements, they do not, and cannot, assert that any fees have actually been collected pursuant

[14] The Unions recognize that this Court can only consider the evidence in the supplemental appendix if it grants the Unions' motion to supplement the record. If that motion is denied, the Court should disregard this evidence.

to the agreements' terms. Indeed, the facts are to the contrary: in keeping with PSEA's unqualified disclaimer of any intent to collect agency fees in the wake of *Janus*, no agency fees have actually been collected under these agreements—nor, for that matter, have such fees been collected under *any* collective bargaining agreement now in effect between any school district and any PSEA affiliate in the state. (Supp. App'x. 3.)

In any event, the non-party agency fee provisions on which Plaintiffs relied so heavily are no longer in existence. As detailed in the supplemental appendix, all of these provisions were formally rescinded by their respective local union and public school district. (Supp. App'x 3, 6–22.) The district court therefore did not commit clear error by failing to give controlling weight to the non-party agreements under which *no* agency fees have been—or could be—collected.

CONCLUSION

For the reasons stated above, the Unions respectful request that this Court affirm the judgment of the district court.

Respectfully submitted,

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October 18, 2019

CERTIFICATE OF COMPLIANCE

I, Jason Walta, counsel for appellees, certify pursuant to Federal Rule of Appellate Procedure 29(d) that the attached party brief is proportionally spaced, has a type face of 14 points or more, and contains 7,901 words.

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Date: October 18, 2019

CERTIFICATE OF SERVICE

I certify that on October 18, 2019 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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ADDENDUM

Unpublished opinion in
Guppy v. City of L.A., No. 8:18-cv-01360 (C.D. Cal. Aug. 30, 2019)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 18-1360JVS (ADSx)	Date	August 30, 2019
Title	Derek A. Guppy v. City of Los Angeles, et al.		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: [IN CHAMBERS] Order Regarding Motion to Dismiss

Defendant City of Los Angeles (the "City") filed a motion to dismiss Plaintiff Derek A. Guppy's ("Plaintiff") Complaint. (Mot., Dkt. No. 70.) Defendants International Brotherhood of Electrical Workers, Local 45 ("Local 45") and Los Angeles/Orange Counties Building and Construction Trades Council, AFL-CIO (the "Trades Council") (together—the "Union Defendants") filed a Notice of Joinder in the motion to dismiss. (Joinder, Dkt. No. 72.) Plaintiff opposed the motion to dismiss. (Opp'n, Dkt. No. 75.) The City filed a reply. (Reply, Dkt. No. 76.)

For the following reasons, the Court **grants** the City's motion to dismiss.

I. BACKGROUND

Plaintiff is an individual employed by the City who is in the Building Trades Rank and File Representation Unit (Memorandum of Understanding ("MOU") #2) represented by the Trades Council and/or Local 45. (FAC, Dkt. No. 1 ¶ 7.)

The Union Defendants entered into the MOU with the City that controlled the terms and conditions of Plaintiff's employment. (Id. ¶ 12.) Pursuant to the Meyers-Milias-Brown Act, Cal. Gov't Code § 3500 et seq. (the "MMBA"), there was an "Agency Shop Fees – Payroll Dues Deductions" article, which provides in relevant part:

> A. DUES/FEES
> 1. a. Each permanent employee* in this unit (who is not on an unpaid leave of absence) shall, as a condition of continued

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 18-1360JVS (ADSx)	Date	August 30, 2019
Title	Derek A. Guppy v. City of Los Angeles, et al.		

employment, become a member of the Union, or pay the Union a service fee in an amount not to exceed periodic dues, and general assessments of the Union for the term of this MOU. Such amounts shall be determined by the Union and implemented by - Management in the first payroll period which starts 30 days after written notice of the new amount is received by the Controller.

****

b. Notwithstanding any provisions of Article 2, Section 4.203 of the Los Angeles Administrative Code (hereinafter "LAAC") to the contrary, during the term of this MOU, payroll deductions requested by employees in this Unit for the purpose of becoming a member and/or to obtain benefits offered by any qualified organization other than the Union, will not be accepted by the Controller. For the purpose of this provision qualified organization means any organization of employees whose responsibility or goal is to represent employees in the City's meet and confer process.

2. Any employees in this Unit who have authorized Union dues deductions on the effective date of this MOU or at any time subsequent to the effective date of this MOU shall continue to have such dues deductions made by the City during the term of this MOU; provided, however, that any employee in the Unit may terminate such Union dues during the thirty-day period commencing ninety days before the expiration of the MOU by notifying the Union of their termination of Union dues deduction. Such notification shall be by certified mail and should be in the form of a letter containing the following information: employee name, employee number, job classification, department name and name of Union from which dues deductions are to be cancelled. The Union will provide the City with the appropriate documentation to process these membership dues cancellations within ten (10) business days after the close of the withdrawal period.

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(Agreement, Dkt. No. 69-1, Ex. A, Art. 2.8.)

On January 22, 2016, Local 45 Business Manager/Financial Secretary Elaine Ocasio ("Ocasio") sent an attached "Hudson Notice," a copy of the IBEW's "2015 Agency Fee Payers Objection Plan," and a quarterly advance rebate check of $42.27. (Id. ¶ 15.) In a letter dated February 10, 2016, Plaintiff resigned his membership in Local 45. (FAC, Dkt. No. 69 ¶ 7.)

Plaintiff alleges that "[s]ubsequent to Plaintiff's resignation from union membership, the City continued automatically to deduct from Plaintiff's wages, and the [Union Defendants] have continued to accept payment by the City of, an amount equal to full union dues. **As of the filing of this Complaint (ECF No. 1), the deductions continued even after the Supreme Court's decision in Janus**." (Id. ¶ 16). Plaintiff indicates that he "did not receive, after his resignation from union membership, and prior to the continued collection of fees equal to full union dues from his wages, adequate notice of his rights and the procedural safeguards which are required by the United States Supreme Court's decision in Hudson" from the Union Defendants. (Id. ¶ 19.) Plaintiff also alleges that the City and/or Ron Galperin (the "Controller") "failed to meet their constitutional 'responsibility to provide procedures that minimize the impingement and that facilitate a nonunion employee's ability to protect his rights . . . and/or to insure that the [Union Defendants] had provided such procedures . . . prior to collecting fees equal to full union dues from Plaintiff's wages." (Id. ¶ 20) (internal citations omitted). In addition, Plaintiff states that "portions of the dues collected by Local 45 have been or will be used by Local 45 and/or its affiliates for purposes that are not 'germane' to the collective-bargaining activity, not justified by the government's vital policy interest in labor peace and avoiding 'free riders,' and/or significantly adds to the burdening of free speech that is inherent in the allowance of an 'agency shop.'" (Id. ¶ 25.)

Plaintiff brought claims for: (1) violation of the First Amendment and (2) violation of Hudson's requirements. (Id. ¶¶ 27–49.) Plaintiff sought (1) declaratory relief that the MMBA unconstitutionally abridges the Plaintiff's rights under the First, Fifth, and Fourteenth Amendments and that the First and Fourteenth Amendments prevent Defendants from requiring nonmembers to pay for any of the Union Defendants' activities; (2) injunctive relief (a) enjoining Defendants from engaging in illegal behavior and enforcing the agency shop fees agreement between the Union Defendants and the

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City, and (b) requiring Defendants to expunge the agency shop fees provision from the Agreement and refund to Plaintiff all union dues deducted from his wages after his February 2016 resignation; (3) compensatory damages for monies deducted and not already refunded and "such amounts as principles of justice and compensation warrant, including nominal damages;" and (4) attorneys' fees and costs (Id. at 20–21.)

Plaintiff filed this case on August 3, 2018. (Complaint, Dkt. No. 1). On October 4, 2018, Plaintiff filed a Notice of Constitutional Question stating that he had served the California attorney general via certified mail notice that he is challenging the constitutionality of the MMBA, CAL. GOV'T. CODE § 3502.5. (Notice, Dkt. No. 43.) On October 22, 2018, the City and the Controller (together—the "City Defendants") filed a motion to dismiss, Dkt. No. 44, and the Union Defendants answered the Complaint, Dkt. Nos. 45, 47. A scheduling conference was held on November 5, 2018, at which Plaintiff and the Union Defendants represented to the Court that a settlement had been reached between them, except for dispute over Plaintiff's claimed attorney's fees. (Dkt. No. 53-1 at ¶ 2). The City Defendants did not make such representations, and maintain they took no part in the settlement negotiations. Id. at ¶¶ 2, 4–5. The Court subsequently ordered "the case stayed for 60 days to explore further settlement discussions" and "to schedule a settlement conference if their own settlement discussions [were] not productive within 45 days." (Order, Dkt. No. 50). Plaintiff claimed a settlement was reached, and moved for attorney's fees. However, the Court ordered the parties submit a joint report indicating the terms of the settlement, so that a proper determination as to whether Plaintiff "prevailed" could be made. (Dkt. No. 57).

Plaintiff and the Union Defendants filed a joint report regarding the settlement, in which the "full terms" of the settlement are stated. (Joint Report, Dkt. No. 58). Specifically, the report states:

> Plaintiff and Union Defendants agreed that: (1) Plaintiff would be refunded $2,808.26 in fees deducted from his wages since February 2016, plus an additional $100 in interest; (2) the Union Defendants would cease enforcement of Article 2.8 of MOU #2, and any other agreement or understanding which requires Plaintiff to pay for the activities of the Trades Council and/or Local 45; and

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> (3) the Union Defendants agree to expunge Article 2.8 of MOU #2.
>
> Relevant portions of MOU #2 (and MOU #13) were expunged by letter of agreement between the City and the Union Defendant by agreement dated November 8, 2018. Payment was received by Plaintiff's counsel on January 17, 2019. The City Defendants did not participate in the settlement or in the negotiations leading to the settlement.

(Id. at 2).

On June 5, 2019, the Court granted in part the City Defendants' motion to dismiss. (Order, Dkt. No. 67.) Specifically, the Court denied the motion to dismiss on the basis that the case was moot, Id. at 8–9, granted the motion to dismiss the Controller, Id. at 10, denied the motion to dismiss the first claim, Id. at 12, and granted the motion to dismiss as to the Hudson violations with leave to amend, Id. at 13. The Court certified to the Attorney General of the State of California that the constitutionality of the MMBA § 3502.5 had been questioned in this case. (Certification, Dkt. No. 68.) On July 26, 2019, the Attorney General filed its Notice of Decision Not to Seek to Intervene in the case. (Not., Dkt. No. 74.)

II. LEGAL STANDARD

A. Mootness

Pursuant to Article III of the Constitution, the Court's jurisdiction over the case "depends on the existence of a 'case or controversy.'" GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994). A "case or controversy" exists only if a plaintiff has standing to bring the claim. Nelson v. NASA, 530 F.3d 865, 873 (9th Cir. 2008), rev'd on other grounds, 131 S. Ct. 746 (2011). To have standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that their injury will be redressed by a favorable decision." Friends of the Earth, Inc. v.

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Laidlaw Envt'l. Servs., Inc., 528 U.S. 167, 180–81 (2000); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Nelson, 530 F.3d at 873. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013) (citation and internal quotation marks omitted). Generally, "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" Friends of the Earth, 528 U.S. at 189 (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). "But voluntary cessation can yield mootness if a 'stringent' standard is met: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Rosebrock v. Mathis, 745 F.3d. 963, 971 (9th Cir. 2014) (quoting Friends of the Earth, 528 U.S. at 189).

The Ninth Circuit has recognized that "a policy change not reflected in statutory changes or even in changes in ordinances or regulations will not necessarily render a case moot, . . . but it may do so in certain circumstances. Id. (citations omitted). While courts are less likely to find mootness "where 'the new policy . . . could be easily abandoned or altered in the future,'" courts are more likely to find mootness where:

> (1) the policy change is evidenced by language that is "broad in scope and unequivocal in tone," (2) the policy change fully "addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case", (3) "th[e] case [in question] was the catalyst for the agency's adoption of the new policy," (4) the policy has been in place for a long time when we consider mootness, (5) "since [the policy's] implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff[ ]."

Id. at 972 (quoting Bell v. City of Boise, 709 F.3d 890, 901 (9th Cir. 2013); White v. Lee, 227 F.3d 1214, 1243–44 (2000)).

III. DISCUSSION

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A. Mootness

Under the Declaratory Judgment Act, federal courts have discretion to "declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought." 28 U.S.C. § 2201. A claim for relief under the Declaratory Judgment Act requires a dispute that is: (1) "definite and concrete, touching the legal relations of parties having adverse legal interests"; (2) "real and substantial"; and (3) "admit[ting] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (internal quotation marks and citation omitted). The Declaratory Judgment Act confers "unique and substantial discretion" upon district courts "in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ. P. 57.

In Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018), the Supreme Court held that Illinois' agency-fee scheme violated the free speech rights of nonmembers and that public-sector agency-shop arrangements violate the First Amendment. Id. at 2478. In doing so, the Court overruled Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977), which had authorized the agency-shop arrangements.

In its previous Order on the City Defendants' first motion to dismiss, the Court determined that the case was not moot as it pertained to the declaratory relief sought. (Order, Dkt. No. 67 at 8.) The Court held that the City's seizure of Plaintiff's wages post-Janus stated a claim for an actual injury, and that the City had not demonstrated that voluntary cessation mooted the case. Id. at 8–9.

In its motion to dismiss the FAC, the City cites a number of cases that universally suggest that a case like Plaintiff's is moot, several of which post-date the briefing on the prior motion to dismiss. See Smith v. Bieker, 2019 U.S. Dist. LEXIS 99581, *2 (C.D. Cal. June 13, 2019) ("[T]he claim would be moot because neither the State nor the

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Superior Court plans to enforce section 71623.5 in the wake of Janus . . . . Everyone acknowledges the statute is no longer constitutional. The day Janus was handed down, the General Counsel of the State's Public Employment Relations Board announced that the Board would no longer enforce any statutes that require non-union members to pay agency fees."); Hamidi v. SEIU Local 1000, 2019 U.S. Dist. LEXIS 101987, *7–8 (E.D. Cal. June 18, 2019) (weighing the Rosebrock factors and finding that even if voluntary cessation applied, defendants met carried their heavy burden of showing the case was moot because the California Attorney General asserted that the state could no longer collect agency fees, the new practice fully addressed the challenged conduct, the Janus decision caused the change in policy, and defendants hadn't employed the challenged system since the policy change); Hartnett v. Pa. State Educ. Ass'n, 2019 U.S. Dist. LEXIS 83755, *18–19 (M.D. Penn. May 17, 2019) (finding case moot based on changed circumstances in policy post-Janus, including ceasing collection of "fair share" union fees, refunding any such fees collected after Janus, declarations that such fees are not enforceable and an MOU removing the unenforceable provisions); Berman v. N.Y. State Pub. Emple. Fed'n, 2019 U.S. Dist. LEXIS 57312, *8 (E.D.N.Y. March 31, 2019) ("It is well established that a defendant cannot reasonably be expected to resume conduct that it acknowledges is contrary to binding precedent."); Babb v. Cal. Teachers Ass'n, 2018 U.S. Dist. LEXIS 223418, *2 (C.D. Cal. Dec. 7, 2018) (citing the decision in Yohn v. Cal. Teachers Ass'n, 2018 U.S. Dist. LEXIS 209944, *10 (C.D. Cal. Sept. 28, 2018) for the proposition that plaintiff's case for declaratory and injunctive relief was moot in light of Janus). Additional cases likewise appear to confirm that this case is moot. See, e.g., Yohn, 2018 U.S. Dist. LEXIS 209944, *10 ("[B]ecause the challenged conduct of collecting agency fees cannot be reasonably expected to recur, the case is moot.").

Plaintiff argues that his case is factually distinguishable from others relied on by the City because his fees continued to be deducted for five weeks after the Janus decision such that the City did not fully comply with Janus. (Opp'n, Dkt. No. 75 at 11.) Several district courts have found the absence of "evidence that [defendants] have attempted to collect fees in violation of Janus" a compelling reason to find that there was no "likelihood of irreparable injury." Yohn, 2018 U.S. Dist. LEXIS 209944, *8; see Danielson v. Inslee, 345 F. Supp. 3d 1336, 1339 (2018). But Yohn also determined that union defendants' statement that they would refund any fees that are inadvertently

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collected, as occurred in this case, "merely reiterat[ed] their commitment to comply with Janus" and thus did "not create a controversy that can be redressed by the Court, but rather reinforce[d] its mootness." 2018 U.S. Dist. LEXIS 209944, *8; see Hartnett, 2019 U.S. Dist. LEXIS 83755, *19 (finding case moot even when it involved a "refund[ing] any "fair share" fees collected after the date of the Janus decision" because it had "become 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'") (quoting Friends, 528 U.S. at 189).

Here, the Court finds based on the new authority submitted in the City's Request for Judicial Notice ("RJN")[1] and the additional cases offered in support of the City's motion to dismiss that the case is, indeed, moot. Plaintiff's FAC acknowledges that the deductions continued after he filed the original complaint, but the FAC is silent as to any continuing violation. (FAC, Dkt. No. 69 ¶ 16.) Meanwhile, a declaration from a Financial Management Specialist with the Controller's Office indicates that Plaintiff "paid union dues through the pay period ending on August 4, 2018" and that he "has not paid voluntary union dues through his payroll account since August 5, 2018. (Go Decl., Dkt. No. 70 at pp. 35-36 ¶ 7.)[2] Plaintiff conceded that he has since been reimbursed and the deductions are no longer occurring. (Opp'n, Dkt. No. 74 at 1.) A declaration from Felix De La Torre ("De La Torre"), General Counsel to the California Public Employment Relations Board issued September 18, 2018 includes a memorandum

[1]Under Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record if the facts are not "subject to reasonable dispute." Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001); see Fed. R. Evid. 201(b). The Court takes judicial notice of the documents in the Request for Judicial Notice ("RJN") pursuant to Fed. R. Evid. 201. All of the documents in the RJN contain facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

[2] The Central District of California Local Rules contain requirements for the filing of exhibits. Specifically, the rules state that "the exhibit number shall be placed immediately above or below the page number on each page of the exhibit. Exhibits shall be tabbed in sequential order." L.R. 11-5.3.

The City filed documents containing numerous exhibits, none of which were tabbed and none of which contained the exhibit number above or below a page number. In the future, the Court is unlikely to consider any exhibits that do not comply with the requirements of L.R. 11-5.3 and will require the parties to re-file documents that comply.

"serv[ing] to remind all Regional Attorneys that Government Code section 3546 is unenforceable." (Barquist Decl., Dkt. No. 70, Ex. A, Ex. 1.) In addition, a separate declaration from De La Torre submitted in Babb states that the Public Employment Relations Board ("PERB") "will not enforce any existing statutory or regulatory provision requiring non-members to pay an agency fee, including California Government Code section 71632.5." (Id., Ex. B ¶ 7.) The letter from the Trades Council to the City and the declaration of the Financial Management Specialist indicate that the City was not deducting Plaintiff's fees as "agency fees;" rather, his name was not on the list of non-union members. (Go Decl., Dkt. No. 70 at pp. 35 ¶ 4; Llewellyn Decl., Ex. 1.) Thus, the allegation that deductions continued after Janus does not create a current case or controversy since continued deductions cannot be reasonably expected to occur in the future.

Plaintiff complains that the City's new motion to dismiss is merely a motion for reconsideration in disguise that should be denied because it is based on facts and authority that the City had the opportunity to submit in their prior briefing, but failed to. (Opp'n, Dkt. No. 75 at 7; L.R. 7-18) Yet, the City represents that it was not aware of the existence of the documents cited, which it ultimately found on the court's electronic filing docket. (Reply, Dkt. No. 76 at 2.) Moreover, "[i]f the court determines at any time that it lacks, subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). The various declarations included by the City Defendants persuade the Court that the new policy post-Janus will not be "easily abandoned or altered in the future." Rosebrock, 745 F.3d. at 971. Since the court determines, in line with the many other cases that have addressed the issue of mootness as it pertains to California law post-Janus, that this case is moot, the Court lacks subject matter jurisdiction. Accordingly, the Court **grants** the City's motion to dismiss.

B. Attorneys' Fees: The Union Defendants

The Union Defendants joined in the City's motion to dismiss for lack of subject matter jurisdiction. (Joinder, Dkt. No. 72.) But the Union Defendants had previously settled with Plaintiff, except as to attorneys' fees. (Joint Report, Dkt. No. 58.) The Court allows Plaintiff fourteen (14) days to file any supplemental documentation for the Court

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to consider regarding its motion for attorneys' fees. The Union Defendants will have seven (7) days thereafter to respond. The Court schedules a hearing for September 23, 2019 at 1:30pm for the motion for attorneys' fees.

IV. CONCLUSION

For the foregoing reasons, the Court **grants** the City's motion to dismiss for lack of subject matter jurisdiction and schedules a hearing for September 23, 2019 for Plaintiff's motion for attorneys' fees with respect to the settlement with the Union Defendants.

IT IS SO ORDERED.

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