UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY J. HARTNETT, ET AL., Plaintiffs, v. PENNSYLVANIA STATE EDUCATION ASSOCIATION, ET AL., Defendants.	Case No. 1:17-cv-00100 (Hon. Yvette Kane)

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

Defendants Pennsylvania State Education Association ("PSEA"), Homer-Center Education Association, Twin Valley Education Association, and Ellwood Area Education Association (collectively the "Defendants") submit this brief in support of their Motion to Dismiss or, in the Alternative, for Summary Judgment.

INTRODUCTION

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that public employees who declined to become dues-paying members of the union that represents their bargaining unit could, consistent with the First Amendment, be required as a condition of employment to contribute their proportionate share of the union's costs of collective bargaining and contract administration. In 2017, a handful of lawsuits were filed around the country for the stated purpose of obtaining eventual Supreme Court review to overrule *Abood* and declare these "fair share" requirements in the public sector unconstitutional. This is one such lawsuit.

While this case remained in its earliest stages, the Supreme Court granted *certiorari* in a different case, *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), where the question presented was whether *Abood* should be overruled and public-sector agency fee arrangements declared unconstitutional. Recognizing that the Supreme Court's eventual ruling in *Janus* was "nearly certain to impact and control the disposition of this matter" (Dkt. 55 at ¶ 7), the Plaintiffs and

Defendants in this case jointly moved for a stay of all proceedings, which this Court promptly granted (Dkt. 56).

On June 27, 2018, the Supreme Court decided *Janus*. By a 5-4 vote, the Court expressly overruled *Abood* and held that "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees." *Janus*, 138 S. Ct. at 2459. Because that ruling plainly applied to all agency fee arrangements in the public sector, Defendants in this action promptly complied by permanently ceasing all collection of fair share fees and by returning any fees mistakenly remitted after the date of the Court's decision.

In light of these developments, Defendants submit that there is no effective form of relief that can now be ordered in Plaintiffs' lawsuit. Any judgment in Plaintiffs' favor would amount to an advisory opinion holding what *Janus* has already established and ordering the Defendants to do what they have already done. In other words, this case "is reminiscent of the coroner's verdict in The *Wizard of Oz*: It's not only merely moot, it's really most sincerely moot." *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1262 (10th Cir. 2004) (McConnell, J., concurring). Accordingly, this Court should dismiss the case in its entirety. Alternatively, if this Court concludes that Plaintiffs are entitled to an award of nominal damages, Defendants request that judgment be entered awarding Plaintiffs no attorney fees.

BACKGROUND

Since 1988, Pennsylvania law has provided that a union certified as the exclusive representative of a bargaining unit of public employees may enter into an agreement with the public employer requiring the payment of a "fair share fee" by members of the bargaining unit who choose not to become dues-paying union members. 71 Pa. Stat. § 575.

In 1977, the Supreme Court in *Abood* upheld the constitutionality of such requirements, explaining that as long as the fee was limited to the costs of collective bargaining and contract administration, to the exclusion of political or ideological activities, requiring non-union employees to pay their share of those costs did not violate their First Amendment rights to freedom of speech and association. 431 U.S. at 225–26.

Plaintiffs—four public school teachers who were obligated to pay fair share fees by the collective bargaining agreements in force for their school districts—filed this lawsuit in January 2017 challenging Defendants' collection of those fair share fees as a violation of the First Amendment. Their Amended Complaint acknowledged that this Court is "bound by *Abood*," and that the purpose of the lawsuit was to "seek the Supreme Court's review of the constitutionality of its holding in *Abood*." (Dkt. 23 at ¶¶ 7, 8.) In their prayer for relief, Plaintiffs sought declaratory and injunctive relief, nominal damages, and an award of attorney fees.

(*Id*. at ¶ 80.) Plaintiffs made no claim for compensatory damages arising from the previous collection of fair share fees. (*Id*.)

Shortly after discovery commenced, the Supreme Court granted *certiorari* in the *Janus* case to decide whether *Abood* should be overruled. The parties in this case jointly moved for a stay, recognizing that the purpose of Plaintiffs' lawsuit was to "seek[] the Supreme Court's reconsideration of its *Abood* ruling," and that the eventual ruling in *Janus* was "nearly certain to impact and control the disposition of this matter." (Dkt. 55 at ¶ 7.) This Court agreed and granted the stay. (Dkt. 56.)

On June 27, 2018, the Supreme Court issued its ruling in *Janus*, which explicitly overruled *Abood* and held that the First Amendment prohibits the mandatory collection of fair share fees from nonmembers in the public sector. 138 S. Ct. at 2448. Given the broad, categorical nature of the Court's ruling in *Janus*, the Defendants recognized that the Pennsylvania statute authorizing fair share fees had become unenforceable, and they immediately took steps to stop collection of such fees. *See* Defs.' Separate Statement of Material Facts in Supp. of Mot. to Dismiss or, in the Alternative, for Summ. J. ("DSF") at ¶¶ 8–12. On the day of the decision, PSEA contacted every school employer with which a PSEA affiliate had a contractual fair share clause, notifying them of the *Janus* decision and instructing them immediately to cease deducting fair share fees from their employees'

paychecks. *Id.* at ¶ 8. Where school employers had already deducted and transmitted the portions of their employees' fees attributable to the period after June 27, or were unable to modify a post-June 27 payroll, PSEA established procedures to refund such fees to the nonmember feepayers, with interest. *Id.* at ¶ 9.

On July 2, 2018, PSEA also sent letters to every fair share feepayer explaining the *Janus* decision, informing them that PSEA had contacted employers and asked them to immediately stop deduction of fair share fees, and notifying the feepayers that any fees that had been paid for the period after June 27 would be promptly refunded. *Id*. at ¶ 10. Such letters went to each of the Plaintiffs, and checks have been sent to them refunding the portion of their fair share fees that was deducted and transmitted by their school district employers prior to June 27, but that was attributable to the period from June 27 to August 31, 2018 (the end of the fiscal year for which agency fees would otherwise be paid). *Id.* at ¶ 11.

In addition, PSEA paid each of the Plaintiffs $100 by cashier's check. *Id.* at ¶ 12. As PSEA explained in the accompanying letter, the payments were meant to compensate Plaintiffs for any claim of nominal damages in connection with this lawsuit. *Id.*

All of the relevant government actors also recognized *Janus*'s import and moved promptly to implement the decision. The three school districts that employ

Plaintiffs immediately ceased deducting and transmitting fair share fees, and they confirmed that no further fees would be deducted. *See* DSF at ¶ 17.

QUESTIONS PRESENTED

1. Are Defendants entitled to dismissal of the case given that the Supreme Court has conclusively settled the only legal question raised by Plaintiffs' lawsuit, the Defendants promptly complied with that Supreme Court decision, and any relief from this Court would be an empty order that merely reiterates the Supreme Court's holding and requires the Defendants to do what they have already done?

Suggested Answer to the Above in the Affirmative.

2. If Plaintiffs are entitled to only an award of nominal damages, should this Court enter a judgment awarding no attorney fees, given the substantial difference between an award of nominal damages and the relief sought in the Amended Complaint, the fact that the Supreme Court has already conclusively resolved the legal issue on which the nominal damages award would be based, and the impossibility of the complained-of conduct recurrimg even in the absence of a nominal damages award?

Suggested Answer to the Above in the Affirmative.

ARGUMENT

As we now show, the claims in Plaintiffs' Amended Complaint—which primarily seek declaratory and injunctive relief with respect to the constitutionality

of collecting fair share fees—are moot as a result of the *Janus* decision and the consequent cessation and refund of all such fee assessments after the date of the decision. Those claims therefore must be dismissed.

To the extent Plaintiffs seek an award of nominal damages, that claim is also moot. Defendants have already paid Plaintiffs more than they could recover in nominal damages. This Court also lacks the authority to grant nominal damages in connection with a fair share fee regime that is no longer in existence.

Finally, Plaintiffs are not entitled to an award of attorney fees. Because their claims for substantive relief are moot, they lack the "prevailing party" status that is a prerequisite to a fee award. And, even if Plaintiffs ultimately prevail in the limited sense of receiving an award of one dollar for nominal damages, the appropriate fee award for such a trivial victory is no fee at all.

A. Standard for Evaluating Motions Under Rule 12(b)(1) and Rule 56

A challenge to the court's ability to hear a lawsuit—including a claim that the case has become moot—is properly brought as a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014). In the face of a 12(b)(1) motion, "the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) (internal quotations omitted).

Summary judgment under Rule 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. Plaintiffs' Claims for Injunctive and Declaratory Relief are Moot

The doctrine of mootness requires that an actual controversy exist at every stage of the case, not merely at the time the complaint is filed. *See Seneca Res. Corp. v. Twp. of Highland*, 863 F.3d 245, 254 (3d Cir. 2017). 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).

Because the justiciability of plaintiffs' claims must be demonstrated "separately for each form of relief sought," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000), we begin by analyzing Plaintiffs' claims for injunctive and declaratory relief, which ask this Court to declare unconstitutional and enjoin the enforcement of: (a) various provisions of Pennsylvania law that authorize fair share fees; and (b) provisions of collective

bargaining agreements that require the collection of fair share fees from the Plaintiffs. (Dkt. 23 ¶ 80(a)-(b).) The claims are plainly moot and must therefore be dismissed.

"Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief. . . ." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Thus, 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); *see also D.F.*, 694 F.3d 488, 496–97 (holding that mootness follows whenever the court is unable to grant the requested relief).

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). As a result, when a change of circumstances occurs making it "highly unlikely" that a plaintiff will ever be subject again to an action challenged as unlawful, any claim for declaratory relief becomes moot and must be dismissed. *Versarge v. Twp. of Clinton*, 984 F.2d 1359, 1369 (3d Cir. 1993); *see also Policastro v. Kontogiannis*, 262 F. App'x 429, 433 (3d Cir. 2008) (observing that a claim for declaratory relief becomes moot

when it would "amount to no more than an advisory opinion regarding the 'wrongfulness' of past conduct").

At this point, Plaintiffs face no credible threat of continued collection of fair share fees in violation of their constitutional rights. *Janus* completely resolved the question Plaintiffs seek to adjudicate here. In the wake of that decision, Defendant PSEA moved immediately to permanently cease the collection of fair share fees from all Pennsylvania school employers that had fair-share provisions in their collective bargaining agreements with PSEA local associations. Both the Defendants and the school districts that were party to collective-bargaining agreements containing fair share provisions have stated their intention to comply fully with the *Janus* decision and, accordingly, will not give further effect to such contract provisions. All of the relevant actors have recognized that these provisions are unenforceable after *Janus*, and letters acknowledging that have been mailed to all nonmember feepayers in Pennsylvania, including Plaintiffs in this action.

Given the *Janus* Court's conclusive resolution of the question on which Plaintiffs seek declaratory and injunctive relief, as well as the immediate and unconditional implementation of the ruling in *Janus* by both the Defendants and the school district employers, there is no longer any dispute between the parties over the issue Plaintiffs seek to adjudicate. Because there is no longer any actual controversy between the parties, this issue is moot and the Court lacks Article III

jurisdiction over Plaintiffs' claims. *See N.J. Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 31 (3d Cir. 1985) ("[T]he cessation of the conduct complained of makes the case moot if subsequent events make it clear that the wrongful behavior could not reasonably be expected to recur.").

Indeed, one court considering a post-*Janus* challenge has already so held. *See Danielson v. Inslee*, No. 3:18-cv-05206-RJB, 2018 WL 3917937 (W.D. Wash. Aug. 16, 2018). *Danielson*, like this case, involved a First Amendment challenge to the collection of agency fees. *Id*. at *1. And, like this case, the union and public employer promptly ceased the collection of agency fees after the Supreme Court issued its ruling in *Janus*. *Id*. at *2. The court concluded that this action mooted plaintiffs' claims for injunctive and declaratory relief, noting there was "no evidence" that the public employer or union "equivocated in [the] policy change to discontinue collecting agency fees"; that there was "no serious doubt that the policy change was made because of *Janus*, not because of [the plaintiffs'] lawsuit, given the timing of the policy change and direct reliance on *Janus* as the stated basis for the change"; and that there was little or no likelihood that the changed policy "will be abandoned in contravention of *Janus*." *Id*. All of that and more is true of the circumstances presented here.

Nor is this a case in which the "voluntary cessation" exception to the mootness doctrine, *see United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953),

applies. First, when a defendant changes its position in response to a change in the law, the cessation of the challenged conduct is not considered "voluntary" for purposes of mootness analysis. *See 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, *id.*, 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. v. Cole*, 355 F.3d 1288 (11th Cir. 2004).

Christian Coalition is virtually on all fours with this case. It involved a challenge to an opinion of the Alabama Judicial Inquiry Commission stating that a judge standing for election was prohibited from declaring her position on legal and political issues. Subsequently, when the Supreme Court held such prohibitions contrary to the First Amendment, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Commission withdrew its challenged opinion. That changed position in response to an intervening Supreme Court decision, the Eleventh Circuit explained, mooted the case. Because "*White* changed the legal landscape on which the [Commission] initially based its Advisory Opinion," the plaintiff challenging the opinion "can reasonably expect that the [Commission] will not issue another opinion preventing judges from answering the questionnaire at issue in this case." 355 F.3d at 1292–93. The same is true here: where *Janus* "changed the legal landscape," and Defendants have responded to that change by

immediately ceasing the collection of fair share fees, it cannot reasonably be expected that collection of such fees will be resumed.

Second, the Defendants can collect fair share fees only with the active assistance of the school employers in deducting such fees from nonmembers' paychecks and transmitting them to the Defendants. Such action is now unlawful, and governmental agencies are presumed to follow the law. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004); *see also Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) (applying presumption in mootness context). And, quite apart from that legal presumption, it is evident that the Plaintiffs' employers *will* follow the law, as they have already ceased deducting and transmitting fair share fees and have attested to their intent to comply fully with *Janus*. *See Grutzmacher v. Howard County*, 851 F.3d 332, 349 (4th Cir. 2017) (holding that previous policies were unlikely to be readopted based on "formal assurances" of public officials and "absence of any evidence to the contrary").

Given all of foregoing, "[i]t is unreasonable to think that the Union would resort to conduct"—even assuming for the moment that it could do so unilaterally (which it obviously cannot)—"that it had admitted in writing was constitutionally deficient and had attempted to correct." *Carlson v. United Academics*, 265 F.3d 778, 786 (9th Cir. 2001). It has become "absolutely clear that the allegedly

wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). That being so, there is nothing for this Court to enjoin, and Plaintiffs' requests for declaratory and injunctive relief are moot.

As a final point, we note that some of Plaintiffs' demands for prospective relief concern statutes and contract provisions that, in light of the short time since the *Janus* decision, have not been formally repealed.[1] But it is settled law that "[t]he mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue." *Winsness v. Yocom*, 433 F.3d 727, 732–37 (10th Cir. 2006); *see also Danielson*, 2018 WL 3917937, at *2–3 (finding plaintiff's challenge to the collection of agency fees moot in light of *Janus*, despite no formal repeal of the relevant statutory and contractual provisions). Plaintiffs' challenges to the statutes and collective bargaining agreements authorizing fair share fees are therefore moot.

[1] On September 10, 2018, Homer-Center School District and Defendant Homer-Center Education Association executed a memorandum of understanding formally removing the fair share fee provision from their collective bargaining agreement. *See* DSF at ¶ 14.

C. Plaintiffs' Claim for Nominal Damages is Moot

Plaintiffs claim for nominal damages does not change matters. It is moot as well, for two separate reasons. First, mootness follows from the complete payment Defendants have already made to Plaintiffs for any potential award of that nature. *See generally In re Cent. R. Co.*, 521 F.2d 635, 637 (3d Cir. 1975) (finding claims moot where plaintiff has already paid the claimed amount). As noted above, shortly after the Court's decision in *Janus*, Defendants issued each Plaintiff a cashier's check in the amount of $100 in satisfaction of any claim for nominal damages. That amount far exceeds the one dollar that courts in this circuit may award in nominal damages. *See Nicholas v. Pa. State Univ.*, 227 F.3d 133, 146 (3d Cir. 2000). The nominal damages claim is therefore moot, as it would be "impossible for the court to grant effectual relief for a wrong that has already been remedied," and a "favorable decision . . . could not provide the plaintiffs with more than the defendant has already given them." *Rosetti v. Shalala*, 12 F.3d 1216, 1232 (3d Cir. 1993).

Second, even in the absence of any payment, Plaintiffs' claim for nominal damages is moot because an award in their favor would not provide the kind of meaningful relief necessary for a case to remain a live controversy. Nominal damages "do not purport to compensate for past wrongs." *Utah Animal Rights Coal*, 371 F.3d at 1264 (McConnell, J., concurring). Instead, they are a "symbolic"

remedy that, like an award of a declaratory relief, serves "to obtain an authoritative judicial determination of the parties' legal rights." *Id.; accord Morrison v. Bd. of Educ. of Boyd County*, 521 F.3d 602, 610 (6th Cir. 2008). Nominal damages can therefore be an effective form of relief, "but only with respect to future dealings between the parties." *Morrison*, 521 F.3d at 611 (citations, quotation marks, and emphasis omitted).

By contrast, in the situation presented by this case, where Plaintiffs' other claims are moot and they seek "nominal damages based on a regime no longer in existence," an award in their favor would have no meaningful "effect on the parties' legal rights." *Id*. (citations and quotations omitted). Allowing Plaintiffs' claims "to proceed to determine the constitutionality of an abandoned policy—in the hope of awarding [them] a single dollar—vindicates no interest and trivializes the important business of the federal courts." *Id*. As a result, Plaintiffs claim for nominal damages must be deemed moot, as courts have done in similar circumstances. *See id*.; *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012); *Kerrigan v. Boucher*, 450 F.2d 487, 489–90 (2d Cir. 1971); *see also Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist*., 832 F.3d 469, 482–91 (3d Cir. 2016) (Smith, J., concurring).

D. Plaintiffs are not entitled to an Award of Attorney Fees

Lastly, Plaintiffs are not entitled to an award of fees under 42 U.S.C. § 1988. As we have already shown, all of the claims for relief in Plaintiffs' Amended Complaint are now moot and therefore cannot support a fee award. Moreover, even if Plaintiffs were to prevail on their claim for nominal damages, the proper fee award for such a trivial victory would be no fee at all.

1. Plaintiffs are not prevailing parties for purposes of a fee award

In an action under 42 U.S.C. § 1983, a court may, in its discretion, award to a "prevailing party" a "reasonable attorney's fee." 42 U.S.C. § 1988. A party prevails for purposes of § 1988 if it can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). In other words, a fee-eligible party is one that "has been awarded some relief by the court." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001). *Id*. at 603. If a party has not received court-ordered relief, it is not a "prevailing party" under § 1988.

As we have already explained in detail above, *supra* at 8–16, all of Plaintiffs' claims have become moot. As such, those claims cannot result in an enforceable judgment or consent decree that would make Plaintiffs "prevailing parties" for purposes of a fee award. And it goes without saying that the Plaintiffs' interest in obtaining fees cannot itself rescue a case that must otherwise be

dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[L]itigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself."). Plaintiffs are therefore ineligible for an award of attorney fees.

2. Even if Plaintiffs are entitled to nominal damages, this Court should not award attorney fees

A plaintiff that is eligible for attorney fees under § 1988 by virtue of being a "prevailing party" does not automatically receive them. *Farrar*, 506 U.S. at 115. In determining whether any fee award is proper, "the most critical factor . . . is the degree of success obtained" by the prevailing party. *Id*. at 114. Some victories are so slight that "the only reasonable fee is . . . no fee at all." *Id*. at 115. Any award of nominal damages in this case would fit that description.

Indeed, the Third Circuit instructs that "a nominal damages award is *presumptively* a technical victory that does not merit an award of attorneys' fees." *Velius v. Twp. of Hamilton*, 466 F. App'x 133, 140–41 (3d Cir. 2012) (emphasis added). As the *Velius* Court explained, every award of nominal damages "vindicates some right," so "it cannot be the case that the mere vindication of rights alone suffices to distinguish those cases in which the presumption of no fee is overcome." *Id*. at 141 n.4. Instead, an award of fees "despite the technical victory manifested by an award of nominal damages" is reserved only for "rare" circumstances not present here. *Id*. at 140; *see also Yarnall v. Phila. Sch. Dist*., 203

F. Supp. 3d 558, 566 (E.D. Pa. 2016) (applying presumption articulated in *Velius* and awarding no fees for plaintiff's successful claim for nominal damages), *appeal dismissed*, No. 16-3649, 2017 WL 4315008 (3d Cir. Mar. 29, 2017); *Carroll v. Clifford Twp.*, No. CIV.A. 3:12-0553, 2014 WL 2860994, at *3 (M.D. Pa. Jun. 23, 2014) (same), *aff'd in relevant part*, 625 F. App'x 43 (3d Cir. 2015); *Jordan ex rel. Arenas-Jordan v. Russo*, No. CIV.A. 09-88, 2014 WL 869482, at *7–10 (W.D. Pa. Mar. 5, 2014) (same).

Because an award of nominal damages in this case would plainly be a mere technical victory, this Court should deny a fee award on that ground alone with no further analysis. *See Velius*, 466 F. App'x at 140–41. But in an abundance of caution, we add that this result also follows from the factors outlined in Justice O'Connor's concurrence in *Farrar*, which this Court may examine to confirm that this is not one of those rare cases warranting a departure from the presumption against a fee award. *See Velius*, 466 F. App'x at 140–41.

The primary factor in Justice O'Connor's analysis in *Farrar* is whether there is "a substantial difference between the judgment recovered and the recovery sought." 506 U.S. at 121 (O'Connor, J., concurring). Where a plaintiff "ask[s] for a bundle and [gets] a pittance," fees are inappropriate. *Id*. at 120. This factor counts strongly against an award of fees for the Plaintiffs. In a case seeking declaratory and injunctive relief—as the Plaintiffs have here—"the relevant comparison, of

course, would be the scope of the injunctive relief sought to the relief actually granted." *Mercer v. Duke Univ.*, 401 F.3d 199, 205 (4th Cir. 2005). Plaintiffs sought broad declaratory and injunctive relief, but we have already shown that they are entitled to nothing on those now-moot claims. No fee should be awarded given the substantial disconnect between the ambitions stated in Plaintiffs' Amended Complaint and the reality of a recovery that is trivial at best. *See Carroll*, 2014 WL 2860994 at *3 (noting that a court need not consider additional factors in denying a fee if there is a substantial difference between the overall relief sound and an award of nominal damages).

The other factors relevant to this inquiry are "the significance of the legal issue on which the plaintiff claims to have prevailed" and "the public purpose th[e] litigation might have served." *Farrar*, 506 U.S. at 121–22 (O'Connor, J., concurring). Again, these factors count strongly against the Plaintiffs. The Supreme Court's decision in *Janus* has already settled the issue in this litigation conclusively. Plaintiffs in this case had nothing to do with that decision, and no public interest would be served by an award of nominal damages under these circumstances. *See Carroll* 2014 WL 2860994, at *3 & n.1 (denying fees where plaintiff received an award of nominal damages for a "technical" victory on a First Amendment claim and a change in circumstances mooted claims for prospective equitable relief); *see also Jordan*, 2014 WL 869482, at *10 (same where the

complained-of harm was "unlikely to occur with any frequency in the future" and the litigation did not "clarify[] an otherwise ambiguous area of the law").

Thus, even if Plaintiffs are entitled to an award of nominal damages, it is clear that this case is *not* the rare instance where attorney fees are appropriate. Plaintiffs' stated goal in this lawsuit was to obtain an order overruling *Abood* and permanently enjoining and declaring unconstitutional relevant state laws and collective bargaining agreements. Because of intervening events, this Court is without authority to award that relief. A trivial award of nominal damages may give Plaintiffs some psychic satisfaction, but it is not legally significant enough to warrant attorney fees.

CONCLUSION

For the reasons stated above, the Defendants respectfully request that this Court dismiss the Amended Complaint. Alternatively, if this Court concludes that Plaintiffs are entitled to an award of nominal damages, Defendants respectfully request that judgment be entered awarding Plaintiffs no attorney fees.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that this brief contains 4,983 words, which is less than the total words permitted by Local Rule 7.8(b)(2). I rely on the word count feature of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Middle District of Pennsylvania by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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