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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

158 C.D. 2019

JANE LADLEY and CHRISTOPHER MEIER,
Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION,
Appellee

APPELLEE'S BRIEF

Appeal from a Final Order of the Court of Common Pleas, Lancaster County, Pennsylvania, dated October 29, 2018, dismissing Appellants' Complaint as moot. (Case No. CI-14-08552)

Date: April 26, 2019

Thomas W. Scott, Esquire
PA ID #15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
Email: tscott@killiangephart.com

Counsel for Appellee

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I. SUPPLEMENTAL STATEMENT REGARDING JURISDICTION

Appellants originally initiated this appeal by filing a Notice of Appeal in the Superior Court, indexed at 192 MDA 2018. The case was transferred to the Commonwealth Court by Order of the Superior Court dated February 12, 2019, "Because this appeal involves a corporation not-for-profit" pursuant to 42 Pa.C.S. § 762(a)(5)(i) (The Commonwealth Court shall have exclusive jurisdiction of appeals from all actions or proceedings relating to corporations not-for-profit).

II. SUPPLEMENTAL STATEMENT REGARDING SCOPE AND STANDARD OF REVIEW

The Pennsylvania Rules of Civil Procedure do not recognize a Motion to Dismiss as a separate motion. Pennsylvania courts characterize it as a motion for summary judgment. *Long v. Ostroff*, 854 A.2d 524, 527 (Pa. Super. 2004) citing *DiGregorio v. Keystone Health Plan E.*, 840 A.2d 361, 365-66 (Pa. Super. 2003). Where there is no genuine issue of material fact, and the moving party is entitled to relief as a matter of law, summary judgment may be entered. *Id.*

PSEA has no quarrel with the scope of review as stated by Appellants on page 3 of their Brief: Commonwealth Court has plenary authority and "*must review the record* in the light most favorable to the nonmoving (here non-prevailing) party. The problem is that Appellants then deluge the Court with 201

pages of supplemental material attached to their Brief -- identified in footnote 1 of their brief as "composite 'Exhibit A.'" None of that material was part of the record in the court below; it is not part of the Certified Record; and it is not proper for citation, review, or argument before this court.

> "An appellate court is limited to considering only those facts that have been duly certified in the record on appeal." *B.K. v. Dep't of Pub. Welfare*, 36 A.3d 649, 657 (Pa. Cmwlth. 2012). "For purposes of appellate review, that which is not part of the certified record does not exist." *Id*. "Documents attached to a brief as an appendix or reproduced record may not be considered by an appellate court when they are not part of the certified record." *Id.* (emphasis added by the court). The appellant bears the responsibility for ensuring that the certified record contains sufficient information for proper appellate review. *Id*. Failure to do so constitutes a waiver of the issues sought to be examined. *Id*.

Bright v. Pa. Bd. of Prob. & Parole, 197 A.3d 323 (Pa. Cmwlth, 2018), *Petition denied by Bright v. Pa. Bd. of Prob. & Parole*, 2019 Pa. LEXIS 1269 (Pa., Feb. 27, 2019).

(PSEA has filed a separate Application for Relief in the Nature of a Motion to Strike all material appended to Appellants' Brief that is not part of the certified record in this case and all arguments derived from or relying upon that material.)

III. COUNTER STATEMENT OF THE QUESTIONS INVOLVED

1. **Did the lower court correctly hold that the change in the law annunciated by the United States Supreme Court in *Janus v. AFSCME, Council 31,* 138 S.Ct. 2248, coupled with PSEA's actions immediately thereafter to permanently discontinue collecting fair share fees, and to promptly refund improperly collected fair share fees, made the issues presented in this case moot, justifying its dismissal?**

   Suggested Answer: YES.

2. **Alternatively, if the case is not moot, are religious objectors to the payment of fair share fees, whose sole challenge was to the charity selection process, entitled to a declaration that the Pennsylvania fair share fee statute is unconstitutional, and an injunction barring its application *in toto,* when they never challenged the statute on its face, and their only complaint was that the charity selection process, *as applied to them* by PSEA, violated their individual rights?**

   Suggested Answer: NO.

IV. COUNTER STATEMENT OF THE CASE[1]

A. Fair share fees from *Abood* to *Janus.*

Like the voyage of the Titanic, this case is divided into two distinct parts: Before *Janus v. AFSCME, Council 31,* when fair share fees were constitutional; and after *Janus,* when fair share fees were unconstitutional. From its initial filing in 2014, until June 26, 2018, this case was about how disagreements over charity selection should be resolved when PSEA and the litigating religious objectors could not agree upon a charity to receive their fair share fees. Section 575(h) of the Fair Share Fee Law provided that the fees collected from religious objectors should be paid to "a charity agreed upon" by the union and the religious objector. However, the statute did not compel "agreement," or include a mechanism to resolve disputes over charity selection when there was none. Act of July 13, P.L. 493, 71 P.S. §575(h). Then the United States Supreme Court handed down *Janus v. AFSCME, Council 31*. With one broad, unequivocal, nation-wide stroke, the

[1] The Rules of Appellate Procedure, Pa RAP 2117(b), provide that the Statement of the Case "shall not contain any argument" and that "it is the responsibility of the appellant to present in the statement of the case a balanced presentation of the history of the proceedings" Recognizing that excluding *all* argument is difficult for advocates, at page 6 of their brief Appellants begin a four page rant about "public-sector unions' enterprising efforts to exploit public-sector employees in violation of the Supreme Court's decision in *Abood* and its progeny" that goes well beyond the bounds.

Court overturned 41 years of precedent, invalidating the agency fee laws in Illinois and over 20 other states, including Pennsylvania. The Court declared:

> States and public-sector unions may no longer extract agency fees from nonconsenting employees. . . .
>
> This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

Janus, 138 S.Ct. 2248, 2486. Fair share fees were sunk. Fair share fees can no longer be collected from non-members of the union. PSEA and other unions across the state and nation stopped collecting fair share fees immediately. Consequently, there are no more "fair share feepayers." There are no longer any "religious objectors" to the payment of fair share fees. There will be no more disputes over the selection of charities to receive the fair share fees of religious objectors. The law that may have been unclear, and may have needed clarification, is no longer operative.

Although it mixes the metaphor, the seismic impact of the *Janus* decision rolled across the landscape of public sector labor relations like a tsunami. For forty-one years, since the Supreme Court's 1977 decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the collection of agency or "fair share" fees from individuals who choose not to join the unions that represented them in collective bargaining was constitutional, and was wide-spread. Twenty states, including

Pennsylvania, had laws authorizing the process. In *Abood* the Supreme Court had determined that fair share fees could be collected without any impermissible infringement on first amendment rights of free speech or assembly. The Supreme Court had reasoned that, since the union had a legal duty to represent the interests of all public employees in the bargaining unit, whether or not they were union members, it was fair to require those who declined to join the union to help pay the costs of collective bargaining and contract administration. The only restriction was that the fee was limited to those costs, to the exclusion of the union's political or ideological activities.

Enacted in 1988, Pennsylvania's law provided that a labor union, certified as the exclusive representative of a bargaining unit of public employees, could enter into an agreement with the public employer to require any members of the bargaining unit who choose not to become dues-paying union members to pay a "fair share fee" as a condition of employment. The fair share fee was equal to the portion of union dues expended by the union in negotiating and enforcing the collective bargaining agreement. *See* 71 P. S. § 575.

In authorizing such fair share requirements, Pennsylvania law followed that of many other states, as well as the National Labor Relations Act with respect to the private sector. *See* 29 U.S.C. § 158(a)(3). The Pennsylvania statute contained provisions specifying that, if a fair share requirement is negotiated in the collective

bargaining agreement, "[t]he public employer shall deduct the fee … [from the nonmembers' salary or wages] and promptly transmit the amount deducted to the exclusive representative." 71 P. S. § 575(c). The statute also contained procedures under which a nonmember could challenge the amount of the fee, *id.*, § 575 (d)-(i), and it allowed nonmembers who objected to supporting a union on religious grounds to direct their fair share fee to "a nonreligious charity agreed upon by the nonmember and the exclusive representative." *Id.*, § 575 (e), (h), (i). The constitutional validity of the Pennsylvania Fair Share Fee statute was confirmed by the Third Circuit Court of Appeals in *Otto v. Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125 (3rd Cir. 2003).

B. The procedural history of this case:

As established in the record, when this case was filed in 2014, PSEA had approximately 179,000 members, organized into 1036 local associations across the state. [R.545a-546a] In addition, there were 6,183 feepayers [R.546a] and 292 religious objectors. [R.550a] During the 2013/2014 school year PSEA and religious objectors had agreed upon 170 different charities to receive their fair share fees. [R.548a] However, there were five religious objectors who were not able to agree with PSEA on the designation of a charity: The objectors in this case, (Ladley and Meier) and two others, also represented by the Fairness Center who are Plaintiffs in litigation filed in Federal Court in the Middle District of

Pennsylvania, raising essentially identical issues to those presented in this case. *Misja v. Pennsylvania State Educ. Ass'n*, No. 1:15-cv-1199-JEJ (U.S. Dist. Ct. M.D. Pa.) and *Williams v. Pennsylvania State Educ. Ass'n*, No. 1:16-cv-02529-JEJ (U.S. Dist. Ct. M.D. Pa.).[2] One other religious objector refused to name a charity; his fair share fees, like those of the four objectors represented by the Fairness Center, were all held in an interest-bearing escrow account until a proper determination could be made as to where to send their funds. [R.550a-551a]

This case was filed on behalf of two individual religious objectors to the payment of fair share fees who refused to reach agreement with PSEA on the selection of a charity to receive their fees. Challenging the religious objector provisions of the Pennsylvania Fair Share Law, they ultimately claimed the statute that said the funds should go to a charity "agreed upon" by the union and the individual should be interpreted to mean the funds go to the charity they selected – even if over the objection of the union. This was not a class action – merely a claim by two specific individuals in their individual capacity. There was no claim for money damages. This was a claim for an injunction and for declaratory relief. The original complaint claimed that PSEA's procedures regarding the selection of

[2] Since the issues present in the Federal cases are identical to those present in this case, and since this case in state court was filed first, U.S. District Court Judge John Jones has held the Federal cases in abeyance pending a final decision in this case.

an "agreeable" non-religious charity violated first amendment freedom of speech and association rights, as well as constitutionally protected due process rights. Alternatively, they claimed the PSEA procedure violated the statute itself. PSEA filed preliminary objections to the original complaint, asserting that it failed to state a claim. On June 30, 2015, the Honorable Judge James Cullen entered an Opinion and Order dismissing most of the religious objectors' claims. [*Cullen I, contained in the Reproduced Record at R.1294a-1311a*] Judge Cullen held that the objectors were not entitled to injunctive relief because they failed to establish irreparable harm, *citing Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992). Since any harm they suffered could be remedied by money damages, they were not entitled to an injunction. [R. 1299a] Relying primarily on *Abood*, he also found that that neither the statute, nor PSEA's application of the statute, violated any Federally protected constitutional rights. [R.1302a] Judge Cullen ruled that the manner PSEA applied the statute to the objectors arguably raised a question of fact as to whether it was reasonable or not, and permitted the case to proceed on that limited issue. [R. 1308a]

The objectors filed an Amended Complaint on July 20, 2015. The First Amended Complaint raised, for the first time, allegations of violations of the Pennsylvania Constitution. PSEA responded with additional preliminary objections. On April 20, 2016, Judge Cullen filed an Opinion and Order

addressing the second set of preliminary objections. [*Cullen II,* R. 1313a – 1333a] Again relying on *Abood,* Judge Cullen ruled that the objectors' claim that the statute was facially unconstitutional was without merit. He also held that "the amended complaint does not allege a viable claim of violation of due process under the Pennsylvania Constitution." He also ruled that the Amended Complaint's re-statement of previously rejected federal constitutional claims, related to due process, freedom of speech and association did not alter his previous ruling that they failed to state a claim, citing *Abood*. (*Cullen II* at R. 1326a – R. 1327a) Judge Cullen also sustained the preliminary objection challenging the claim brought under Article I, Section 7 of the Pennsylvania Constitution, holding that "Plaintiffs have cited no authority to support the contention that they have a constitutional right to take a fee to which PSEA is otherwise entitled and direct it to entities that support Plaintiffs' political beliefs." [*Cullen II* at R. 1329a – R.1330a] As in *Cullen I,* Judge Cullen determined that the objectors' contention that PSEA acted unreasonably in denying their charity selections created an issue of fact, and permitted the case to proceed on that limited issue. [*Cullen II* at R. 1330a-1331a]

In July of 2016 PSEA adopted a written procedure applicable to all aspects of the organization's handling of religious objections to the payment of fair share fees. This "Religious Objector Procedure" was made applicable to all pending and

future requests for religious objector status. Under the new procedures, specific time lines were established for the exchange of information between PSEA and the religious objector regarding selection of an agreeable charity. If PSEA did not agree to the non-religious charity selected by the objector, PSEA would notify the objector fee payer that they could request arbitration on the issue of an appropriate charity to receive his or her fair share fee. If the objector requested arbitration on the charity selection, the arbitration was to be conducted pursuant to the rules for the Impartial Determination of Union Fees promulgated by the American Arbitration Association (AAA), before an impartial arbitrator selected by the AAA, and paid for by PSEA. [R. 1340a – R.1342a]

PSEA made the new procedures applicable to the objectors; they rejected the new procedures. Since the new procedures did change the way PSEA would make charity determinations, by agreement of the parties, the objectors filed a Second Amended Complaint challenging those procedures. Since the parties agreed that there were no material facts in dispute, after Defendant Answered the Second Amended Complaint, Cross Motions for Summary Judgment were filed by PSEA and the objectors.

This "religious objector/charity selection" dispute did not exist in a legal vacuum. As this case was moving through the Lancaster County Court of Common Pleas, other, far more reaching litigation was extant in the land. The

fundamental holding of *Abood,* that collection of fair share fees from non-union members did not violate the First Amendment, was under direct attack. On September 28, 2017 United States Supreme Court granted *certiorari* in *Janus v AFSCME Council 31, w*hich presented the following issue: "should *Abood v Detroit Board of Education* be overruled and public-sector [fair share] fee arrangements be declared unconstitutional under the First Amendment?" Since all parties anticipated that the Supreme Court would issue its ruling in *Janus* before the end of the 2017 October term, and that the Court's decision would most likely directly impact the issues present in this litigation, the parties filed a joint motion to stay the proceedings in this case, pending the *Janus* decision by the Supreme Court. The County Court granted that motion and stayed the case, pending the decision in *Janus.*

C. The Supreme Court's decision in *Janus v. AFSCME Council 31* and the PSEA response.

On June 27, 2018, the United States Supreme Court handed down its decision in *Janus v. AFSCME, Council 31*. The Court overturned *Abood* and 41 years of precedent that had permitted the collection of agency fees. The Court declared:

> States and public-sector unions may no longer extract agency fees from nonconsenting employees. . . .
>
> This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the

> union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

Janus, 138 S.Ct. 2448, 2486.

Although not explicitly declared unconstitutional, immediately following the *Janus* decision, PSEA recognized that the Pennsylvania statute authorizing fair share fees was also unconstitutional and had become unenforceable. PSEA took immediate action to stop collection of all fair share fees. 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. [*See* Declaration of Joseph Howlett, R. 1257a – R. 1259a ¶ 5] Within days, on July 2, 2018, Delores McCracken, the President of PSEA, sent letters to *every* fair share feepayer, explaining the *Janus* decision, informing them that PSEA had contacted employers and asked them to immediately stop payroll deduction of fair share fees, and notifying the feepayers that any fees that had been paid for the period after June 27, 2018 would be promptly refunded. [R. 1258a, 1259a, 1261a and 1262a]. Such a letter went to objector Meier. (Objector Ladley, who had retired prior to the filing of this case, would not have received that letter.) In addition, since PSEA no longer had a constitutional right to collect fair share fees from religious objectors, or to participate in the charitable direction of religious

objectors' fair share fees then held in escrow, on August 16, 2018, PSEA refunded all previously withheld money, plus interest, to the religious objectors. Objector Ladley received a check for $437.52; Objector Meier received a check for $2,718.28. [R. 1259a, - R. 1260a, Howlett Declaration, ¶¶ 6 and 7, attached to PSEA's Motion for Summary Judgment on account of mootness]. The money the objectors had been fighting over was now in their hands, to do with as they deemed best.

At the same time, school employers with contracts that included fair share fee provisions also recognized that statutory and contractual provisions authorizing fair share requirements were no longer enforceable after *Janus*. The record before the lower court and this court contains the affidavit of the Superintendent of Penn Manor School District, Plaintiff Meier's employer, attesting that, as a result of the *Janus* decision, Penn Manor ceased deducting fair share fees from all non-union member employees, and that in compliance with *Janus*, they will not do so in the future. [Leichliter Declaration, R. 1264a, ¶¶ 3-5, Appendix 2 attached to Defendant's Motion for Summary Judgment]. [3]

[3] One of the "non-record" documents the Objectors appended to their brief is a copy of the 2017-2021 collective bargaining agreement for objector Meier's Penn Manor School District. That agreement was negotiated more than a year before the *Janus* decision. Objectors complain that the school district and the local education association have not repudiated the agreement or removed the fair share language from the contract. What the objectors fail to mention is that the two Penn Manor contracts that are in the record, the 2014-2014 Contract [R.

The brutal truth: As of June 27, 2018, public sector unions in Pennsylvania, and across the nation, Appellee PSEA included, were simply out of the "fair share" business. The 5-4 decision of the Supreme Court in *Janus* marked the end of fair share fees in public employment in the United States. PSEA knows it; public employers know it; the objectors know it; and the lower court properly recognized and acted upon it.

V. SUMMARY OF ARGUMENT

The Brief of the Appellant religious objectors has it backwards: The Court cannot examine the vestigial remainder of Pennsylvania's fair share fee statute to decide if it should be explicitly stricken down as an unconstitutional unless it has jurisdiction to do so conferred by a pending case that raises the issue as a justiciable controversy. Courts exist to settle disputes and declare rights. There is no dispute here. There is no need for a judicial declaration of rights. All parties acknowledge that the Pennsylvania fair share fee statute is unenforceable. No one is suggesting or trying to act otherwise. PSEA did not abandon fair share fee collection voluntarily to avoid the consequences of this litigation; it abandoned fair share because the United States Supreme Court declared it unconstitutional.

358a – 402a] and the 2014-2017 Contract [R.426a – 459a] not only contain fair share provisions, they also contain identical "Separability" clauses which provide that if any provision of the contract is "contrary to law, then such provisions shall not be deemed valid or subsisting." R.390a and R. 458a.

Judge Brown of the Lancaster County Court of Common Pleas got it right – the combination of the sweeping language of the United States Supreme Court in *Janus*, coupled with the uncontroverted and clearly established response of PSEA to the decision, and the concomitant response of the school district, and the guidance from the Department of Labor setting forth how *Janus* must be implemented in Pennsylvania, have conspired to settle all legitimate questions about the elimination of fair share provisions from Pennsylvania public sector labor relations. There is no further relief available to the religious objectors – they already have it all: the right not to have future fair share fees deducted; and the right to do as they please with the fees that were deducted and were then returned to them. There is no relief that needs granting or law that needs interpreting. Closing the book on this case will not alter or affect any real issue or any real person.

There is no longer any dispute between the parties about any issue presented in any of the three complaints filed by appellant religious objectors. There is no case or controversy. The religious objectors have received their money back, with interest. No more exactions are or will be made. They no longer have a stake in the outcome and nothing the court can award will provide them with any relief. Added support for declaring this case moot, and moving on, comes from the more than half a dozen other jurisdictions who have mooted their cases

when faced with essentially the same situation: what to do with a fair share challenge of some dimension that was pending when *Janus* was decided. Courts have been unanimous: the elimination of enforceable fair share collections in public sector employment, coupled with measurable evidence no further fees will be collected, moots the issue, no matter what it was.

VI. STATEMENT OF REASONS TO DENY THE APPEAL

A. Applicable standards to determine mootness.

It is the settled law of this Commonwealth that, if at any stage of the judicial process a case is rendered moot, it will be dismissed. *Temple Univ. of the Cmwlth. System of Higher Ed. v. Pa. Dept. of Public Welfare*, 30 Pa. Cmwlth. 595, 599, 374 A.2d 991, 995 (1977). As a general rule, courts will not decide moot cases. The Commonwealth Court reviewed the fundamentals of applying mootness principles in *Phila. Pub. Sch. Notebook v. Sch. Dist. of Phila*., 49 A.3d 445, 448 (Pa. Cmwlth. 2012), as follows:

> Our Supreme Court has explained that a case is moot if there is no actual case or controversy in existence at all stages of the controversy. *Pap's A.M. v. City of Erie*, 571 Pa. 375, 389, 812 A.2d 591, 599 (2002). In *Mistich v. Pennsylvania Board of Probation and Parole*, 863 A.2d 116, 119 (Pa. Cmwlth. 2004), this Court summarized the requirements for an actual case or controversy as follows: (1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for a reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution. A controversy must continue through all

> stages of judicial proceedings, trial and appellate, and the parties must continue to have a "personal stake in the outcome" of the lawsuit. Courts will not enter judgments or decrees to which no effect can be given.
>
> Mootness problems arise in cases involving litigants who clearly had one or more justiciable matters at the outset of the litigation, but events or changes in the facts or the law occur which allegedly deprive the litigant of the necessary stake in the outcome after the suit is underway.

B. This case is entirely moot and should be dismissed.

This case was filed, and the jurisdiction of the court originally established, under the Declaratory Judgments Act. Section 7532 of the Act provides: "Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." 42 Pa.C.S. § 7532. Section 7541(a) of the Declaratory Judgments Act states that "[i]ts purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." 42 Pa.C.S. § 7541(a). It is well established that "Granting or denying a petition for a declaratory judgment is committed to the sound discretion of a court of original jurisdiction." *GTECH Corp. v. Commonwealth*, 965 A.2d 1276, 1285 (Pa. Cmwlth. 2009).

However, a declaratory judgment is appropriate only where there exists an actual controversy. *Allegheny County Constables Ass'n, Inc. v.*

O'Malley, 108 Pa. Commw. 1, 528 A.2d 716 (Pa. Cmwlth. 1987). An actual controversy exists when litigation is both imminent and inevitable and the declaration sought will practically help to end the controversy between the parties. *Chester Community Charter Sch. v. Dep't of Educ.*, 996 A.2d 68, 80 (Pa. Cmwlth. 2010) (Chester I).

> However, in order for this Court to render a declaratory judgment in this matter, the Charter Schools "must show the existence of an actual controversy related to the invasion or a threatened invasion of [their] legal rights." *Berwick Twp. v. O'Brien*, 148 A.3d 872, 881 (Pa. Cmwlth. 2016). A declaratory judgment "must not be employed to determine rights in anticipation of events that may never occur or for consideration of moot cases or for the rendition of an advisory opinion that may prove to be academic." *Mazur v. Wash. County. Redevelopment Auth*., 954 A.2d 50, 53 (Pa. Cmwlth. 2008).

Baden Academy Charter Sch. v. Commonwealth, 2018 Pa. Commw. Unpub. LEXIS 318, *21-22, 2018 WL 2749762.

In this instance, neither party has "a stake in the outcome." Objector Ladley has all of her money back and has retired. Objector Meier has all of his money back and works in a school district where the Superintendent of Schools has declared on this record that the District will no longer be collecting fair share fees from him or anyone else, and the union that represents employees of his class has disavowed any future interest in collecting fair share fees. Yes, language that was negotiated into the labor agreement prior to the *Janus* decision is still in there – however, the contract also says that unenforceable or void provisions are severable

from the contract and will be ignored. All of this is quite apart from anything claimed or done by the religious objectors or their counsel in this lawsuit. All of the changes that have occurred are attributable solely to the change in the law resulting from decision of the United States Supreme Court in *Janus*, and the response of the union and the school district to that change. All of the religious objectors' issues, past, present and future, have been resolved. As to the past, Plaintiffs have received all of their money back. In the present, Plaintiffs have no obligation to pay any fair share fees, or contribute to any charity. In the future, both PSEA, *and the employers with whom PSEA holds contracts* recognize and acknowledge that *Janus* effectively and immediately rendered the Pennsylvania Fair Share Fee Law unconstitutional and unenforceable. Neither will be collecting fair share fees in the future. Defendant PSEA and its contracted school districts are quite simply out of the fair share fee collection business. The "charity selection business" is also at an end. The 180 degree change in the law, followed immediately by the change in PSEA practice and school district practice, completely obviates not only the need for further judicial consideration of the issues raised in this case, but also the Court's ability to enter and enforce any meaningful declaratory award. Absent a case or controversy, the court has no jurisdiction over the subject matter. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983).

The Pennsylvania Supreme Court's handling of the mootness issue presented in *In re Gross*, 476 Pa. 203, 210-212, 382 A.2d 116, 120-121, (Pa. 1978) is instructive. Plaintiff, who was inpatient in a state hospital, challenged a statute that permitted the administration of medicine without his consent. Plaintiff sought declaratory and injunctive relief. However, by the time the Court heard the case, the plaintiff was no longer an inpatient in the state hospital. Therefore, as he was no longer being administered medication against his will, there was nothing for the court to enjoin. As to the declaratory judgment count, the statute the court was asked to declare unconstitutional had been materially altered by a subsequent change in the law, making further declaratory relief unnecessary, and rendering the entire case moot. The same is true here. PSEA has returned all of Plaintiffs' funds that had been held in escrow and will not be receiving any more. Whatever dispute the parties had over the proper way to select a charity to receive those funds no longer exists. Since there was never any agreement on a mutually acceptable non-religious charity, PSEA held Plaintiff's withheld fair share fees in an interest-bearing escrow account at Mid Penn Bank. When the Supreme Court declared the entire fair share fee collection process unconstitutional, PSEA promptly refunded all of the religious objectors' money directly to them. More importantly, immediately after the United States Supreme Court declared state statutes requiring non-union public sector employees to pay fair share fees against their will

unconstitutional, PSEA has stopped collecting fair share fees from all non-members, including Plaintiff Meier and all other religious objectors.[4]

C. None of the recognized exceptions to finding a case moot are applicable here.

Our courts have recognized three exceptions to finding cases moot. *Cytemp Specialty Steel Div., Cyclops Corp. v. Pa. Pub. Util. Comm'n*. 128 Pa. Commw. 349, 563 A.2d 593, 596 (Pa. Cmwlth 1989):

> **(1) The conduct complained of is capable of repetition, yet evading review**:
>
> The *Janus* decision not only mooted this case, it brought collection of fair share fees across this state, and indeed across the nation, to a screeching halt. None are being collected. None will be collected. The contract provisions authorizing such collection are unenforceable – a fact recognized by public sector unions and public sector union employers alike. Since no fair share fees are being collected from anyone, there are no religious objectors objecting, and no disputes over charity selection occurring – nor will they. If any such fees should be reinstituted (which will not happen) they would have to be in place and in force for a substantial time to provide any benefit to a union, since they would collected a little bit at a time, over the course of a work year, generally through payroll

[4] Plaintiff objector Jane Ladley retired following the 2013/2014 school year. Her claim was solely related to the fair share fee for the 2013/2014 school year that had been held in escrow; a fee that has been returned to her.

deduction. Such a scenario would present any objector with an ample, and undoubtedly successful, opportunity to challenge the practice and prevail. It would not go unreviewed or unchecked.

It is nearly impossible to fathom a circumstance that would result in a repeat fair share collection in Pennsylvania *post-Janus.* First, fair share fee collection is not a unilateral action that any union can impose and collect on its own. By definition, the practice involves active and ongoing material participation by the *public* employer. In addition to the fact that the employer has no financial or other economic incentive to participate in such a scheme, there is a specific directive from the Pennsylvania Department of Labor and Industry that expressly states that the Supreme Court in *Janus* "has affected Pennsylvania's laws regarding the collection of fair share fees from non-union employees." The Labor and Industry Bulletin goes on to state:

> The Court's decision in Janus overturned the long-established principle that public employees who decline union membership may be required to pay a fair share fee. . . . Under Janus, these fees cannot be collected from public employee non-union members without their clear and affirmative consent.
>
> . . .
>
> As of June 27, 2018, public employers were to cease the collection of fair share fees from non-union employees.

[R. 1389a – 1390a]

Two strong presumptions are at work here: one is that governmental bodies will know, respect and follow the law. *See, e.g.*, *Troiano v. Supervisor of*

Elections, 382 F.3d 1276, 1283 (11th Cir. 2004) (applying presumption in mootness context). Quite apart from that legal presumption, it is evident that Plaintiff Meier's the school employer, Penn Manor School District, will follow the law. (See, Declaration of Superintendent Leichliter, [R. 1264a, ¶¶ 3-5, Appendix 2 attached to the Motion for Summary Judgment to Dismiss for Mootness.] The school district that employs the only working plaintiff has ceased deducting and transmitting fair share fees and has attested to its intent to comply fully with *Janus*. This assurance by a public official is more than sufficient to establish that the collection of fair share fees would not be resumed – even if the Union Defendants somehow wanted to defy a decision of the Supreme Court. *See Grutzmacher v. Howard Cty.*, 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").

The other presumption at work is that when the agency of government charged with the administration of a statute or area of law provides guidance on that statute, it is entitled to great deference. If there were any question about the impact of the *Janus* decision on the Pennsylvania statute, the Department of Labor and Industry Bulletin answers it. Repetition is beyond remote; redress should it occur would be near instantaneous.

Given that all parties agree that *Janus* prohibits fair share fees in the public

sector that immediately following *Janus*, PSEA took all necessary steps to ensure that deduction and transmission of fair share fees were halted at once, and that PSEA has represented to the Court that it recognizes the unconstitutionality of fair share requirements under *Janus*, "[i]t is unreasonable to think that the Union would resort to conduct" – even assuming that it had the power to do so unilaterally – "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).

We emphasize that this is not 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), has any application, for multiple reasons. 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) ("[W]hen a change of position is wrought by a statutory provision, the change is neither voluntary nor likely to be resiled from at any time in the foreseeable future."). 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 (1972) (per curiam).

(2) The case involves questions important to the public interest:

The over-arching question – is the collection of fair share fees constitutional or not—was certainly a matter of public importance. That question has been conclusively settled. However, the actual questions initially at issue here – whether the Pennsylvania statute gave PSEA any right to participate in the selection of a charity to receive religious objector fees, and whether the process put in place by PSEA to reach agreement on a suitable charity, or resolve an impasse if no agreement could be reached – are of absolutely *no interest* to the public at large. Whatever the disputes were in the past, and whatever weight they may have had – they are over. No fees collected in the future; all past funds refunded. Case closed (for sure in the public mind, if not in the opinion of the Objectors' counsel).

(3) A party will suffer some detriment without the Court's decision.

As clearly set forth above, there is no damage to any party or anyone else if this case is dismissed as moot. The objectors did not suffer any damages. No damages were even claimed, ever. All funds collected as fair share fees have been returned, with interest. If the objectors had "law reform" expectations on their mind on account of their suit, those too have been addressed by the Supreme Court – quite probably beyond their wildest dreams. The one small aspect of the Pennsylvania Fair Share Fee Law they may have hoped to change, dealing with charity selection for religious objectors who could not agree on a charity with the

union, has been rolled up and conclusively resolved by the Supreme Court's declaration that the entire practice of collecting fair share fees is unconstitutional.

D. The courts in every other jurisdiction that have considered the application of *Janus* to pending litigation similar to this case have found that *Janus,* and the union and employer reactions to *Janus,* have made the pre-existing cases moot.

Since the practice of collecting fair share fees was nation-wide, and of long standing, it is not surprising that when *Janus* was decided there were a number of other fair share fee challenges of one sort or another (like this one) in the judicial pipeline. When the lower court determined that this case was moot there was one other court that had already considered a post-*Janus* issue and dismissed the previously filed case as moot. The first was the U.S. District Court for the Western District of Washington, in *Danielson v. Inslee*, 345 F.Supp.3d 1336 (W.D. Wash. Aug. 16, 2018). That suit was against the State of Washington and AFSCME, representing state employees. In a two-part decision the court first dismissed as moot all claims against the state defendants. The District Court held that the state defendants had been consistent in their decision to discontinue agency fee collection, that there could be no real doubt that the policy change was made because of *Janus* (as opposed to the *Danielson* litigation), and that it was improbable that the state defendants would abandon their policy in contravention of *Janus*. *Id.* at 1339. In a second opinion released three months later the court granted a similar motion to dismiss for mootness made by the union defendant. The District Court held:

> As an initial matter, the requests for declaratory and injunctive relief should be dismissed on mootness grounds, for the same reasons discussed previously. In sum, there is no reasonable likelihood that agency fees will be used and collected from Plaintiffs, either by the State Defendants or the Union Defendant.

Danielson v. AFSCME, 340 F.Supp.3d 1083 (W.D. Wash. Nov. 28, 2018).

The second case to moot out a *pre-Janus* challenge to a fair share statute is *Yohn v. Cal. Teachers Ass'n*, No. 8:17-cv-00202, 2018, WL 5264076, 2018 U.S. Dist. LEXIS 209944 (C.D. Cal. Sept. 28, 2018). The U.S District Court for the Central District of California found the reasoning of *Danielson* to be persuasive and applicable. In addition, the *Yohn* Court had occasion to address an additional claim made by the plaintiffs in an attempt to un-moot the case:

> Further, there is no evidence that [the union defendants] have attempted to collect fees in violation of Janus, and in the unlikely event that some fees are inadvertently collected, they attest that they will refund them. Plaintiffs latch onto this promise to argue that Defendants admit that improper collection of fees is possible and that the Court must enjoin the Union Defendants from collecting fees. Yet, the Union Defendants were merely reiterating their commitment to comply with Janus; this does not create a controversy that can be redressed by the Court, but rather reinforces its mootness.

Id. at *3.

In *Lamberty v. Conn. State Police Union*, No. 3:15-cv-378, 2018 WL 5115559 (D. Conn. Oct. 19, 2018), the U.S. District Court for the District of Connecticut dismissed as moot all claims against all defendants because of the cessation of

agency fee collection. Faced with an argument similar to that made by the objectors here, that the cessation was merely voluntary, and that *Janus* had not actually impacted the Connecticut law authorizing agency fees, the Court squarely rejected those arguments:

> Nevertheless, [the state comptroller] – and all the Defendants – complied with *Janus*. They did so not because they wanted to evade the Court's jurisdiction, but because the Supreme Court's new and controlling precedent not only affected the rights of the parties immediately before it (the state of Illinois) but also announced a broad rule invalidating every state law permitting agency fees to be withheld. In unequivocal terms, the Supreme Court stated that: "States and public-sector unions may no longer extract agency fees from nonconsenting employees."

Id. at *9 (citing *Janus*, 138 S.Ct. at 2486).

This year, in *Cook v. Brown*, No. 6:18-cv-01085, 2019 WL 982384 (D. Or. Feb. 28, 2019, the U.S. District Court for the District of Oregon held that all of the claims for declaratory and injunctive relief were moot. As for the requested injunctive relief, the District Court analogized a reversal of Supreme Court precedent to a statutory change that "bespeaks finality" rather than an executive action that can be more easily altered; therefore, the voluntary cessation doctrine is inapplicable. *Id.* at *4. As for the requested declaratory relief, like the other courts before it, the District Court found that no plaintiff was presently being required to pay agency fees and none had posited a "realistic possibility" that they would be required to do so in the future. *Id.* at *5.

In March, no less than three new cases – *Carey v. Inslee*, No. 3:18-cv-05208, 2019 WL 1115259 at *2-4 (W.D. Wash. Mar. 11, 2019); *Lee v. Ohio Educ. Ass'n*, No. 1:18-cv-1420, 2019 WL 1323622 at *1-2 (N.D. Ohio Mar. 25, 2019); and *Berman v. N.Y. State Pub. Emp. Fed'n*, No. 16-cv-204, 2019 WL 1472582 at *3-4 (E.D.N.Y. Mar. 31, 2019) – reached identical conclusions regarding the mootness of claims for declaratory and injunctive relief in agency fee cases following *Janus*.

While the Lancaster County Court of Common Pleas may have been the first state court to find mootness in a *pre-Janus* fair share case, it is no longer the only one. On April 9, 2019, the Supreme Judicial Court of Massachusetts held in identical circumstances:

> Because no agency fee demands are currently being made on the employees, and because any such demands are not likely to recur, there is no "actual controvers[y]" for the court to decide no "effective relief" for it to order.

Branch v. Commonwealth Emp't Relations Bd., No. SJC-12603, 481 Mass. 810 at *3-4 (Mass. Apr. 9, 2019).

Most recently as of the date of this filing, just last week, in *Akers v. Maryland Educ. Ass'n*, No. 1:18-cv-1797, 2019 WL 1745980 (D. Md. Apr. 18, 2019), the District Court for the District of Maryland joined the unanimous trend and dismissed identical claims that were brought against a nearby sister organization of PSEA: the Maryland Education Association ("MEA"). Just like PSEA, MEA had immediately

communicated with public school employers to notify them of the *Janus* decision and to instruct them to stop agency fee collection. *Id.* at 4. Just like PSEA, MEA had sent letters to every agency-fee payer to explain the *Janus* decision and inform them that no further agency fees would be deducted from their paychecks. *Id.* The District Court held:

> In sum, Plaintiffs' request for injunctive relief is moot because the union's communications are reliable evidence of a permanent shift in policy and the challenged conduct cannot be reasonably expected to recur, and declaratory relief is moot because there is no immediate legal controversy.

Id. at *5. So too here.

As a final point, we note that plaintiffs contend that their otherwise moribund litigation should continue because *Janus* dealt with an Illinois statute, and the Pennsylvania law remains on the books. There are good reasons to reject that argument. As a general matter, 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) (case was moot where prosecutors acknowledged that a Supreme Court decision made the state statute unconstitutional); *see also*, *e.g.*, *Wisconsin Right to Life v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004) ("[A] case is moot when a state agency acknowledges that it will not enforce a statute because it is plainly unconstitutional, in spite of the

failure of the legislature to remove the statute from the books."); *Brown v. Buhman*, 822 F.3d 1151, 1168 (10th Cir. 2016) (same).

Those general statements are applicable here because the Pennsylvania statute and the Illinois statute the Supreme Court declared unconstitutional are legally and functionally indistinguishable. They did the same thing: authorized collection of a fair share fee from non-union public sector employees without their consent. More importantly, the Supreme Court clearly recognized that it was declaring the *practice* unconstitutional, not just the Illinois statute. Language throughout both the Majority Opinion and the Dissent clearly establishes that all members of the Court recognized that their decision would be applicable to every state's "agency shop" or "fair share" statute. In announcing the decision of the Court, the Majority Opinion declared:

> **States and public-sector unions** may no longer extract agency fees from nonconsenting employees. This procedure violates the First Amendment and cannot continue. (emphasis supplied) *Janus*, *slip op at 48;* 201 L. Ed. 2d 924, 963-964.

Responding to an argument in the Dissent that the decision might require legislative changes in the more than 20 states with similar "agency shop" legislation (which would include Pennsylvania) the Majority Opinion acknowledged that its decision was applicable to and immediately operative to stop the practice of collecting fair share fees in all states with similar statutes. The

Majority Opinion states: "Nor does our decision 'require an extensive legislative response.' States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Janus*, *slip op* at 47, fn 27; 201 L. Ed. 2d 924, 963, fn 27.

The Majority Opinion clearly recognized that it was striking multiple state statutes, but justified the decision, stating:

> [W]hen a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. Here, **States** with agency-fee laws have abridged fundamental free speech rights. In holding that **these laws violate the Constitution**, we are simply enforcing the First Amendment as properly understood. *Janus, slip op* at 48, fn 28; 201 L. Ed. 2d 924, 963, fn 28.

Plaintiffs contend, nonetheless, that a state statute specific judicial ruling is required, pointing to *General Majority PAC v. Aichele*, No. 1:14–CV–332, 2014 WL 3955079, (M.D. Pa. Aug. 13, 2014), which applied the Supreme Court decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) to the analogous Pennsylvania statute. However, as noted in the *General Majority* opinion, that case was only filed *after* the Plaintiff asked the Pennsylvania's Bureau of Commissions, Elections and Legislation to confirm that the Commonwealth would no longer seek to enforce the provision of its Election Code that ran afoul of *Citizens United,* and the Bureau responded that Pennsylvania's contribution prohibition remained in full force and effect. That is clearly not the case here.

PSEA (and every other public sector union in Pennsylvania to the best of Defendant's knowledge) accepts that *Janus* now controls. The Department of Labor and Industry has issued a Bulletin acknowledging the controlling nature of *Janus*. PSEA has discontinued collecting fair share fees and enforcing contracts requiring payment of those fees. Of equal importance the Plaintiff's employer has confirmed that it is no longer collecting fair share fees and will not do so in the future. This case is moot; it should be dismissed.

E. If the Court decides to reach the merits of Plaintiffs' Second Amended Complaint, it should deny Plaintiffs' Motion for Summary Judgment.

Before *Janus* PSEA believed it had a winning argument on the merits of this case. The religious objectors challenged the way charities were selected to receive the fair share fees of religious objectors. PSEA had a good procedure, a fair procedure, and a successful procedure. Over the decades since fair share came on the scene, hundreds of religious objectors every year selected charities to receive their fair share fees and PSEA agreed to those selections. The religious objectors who brought this suit obdurately insisted upon identifying charities they knew PSEA could not accept (Objector Meier selecting the National Right to Work Foundation, as an example). In the first two rounds of county court decisions dealing with preliminary objections Judge Cullen dismissed all the constitutional claims but allowed the challenge to the reasonableness go on. Until the *Janus*

decision breathed life into the objectors claims, we were all headed for a rather prosaic record making experience to determine whether the PSEA procedures and their application was reasonable.

The religious objectors' complaint was always focused on the selection of a charity to receive their fees. Before *Janus* the objectors had a one claim case – that the PSEA charity screening process was unreasonable. At no time did they mount a successful frontal assault on the constitutionality of fair shares generally. Having limited their attack on the fair share statute to section 575(h), 71 P.S. §575(h) dealing with the approval of charities for religious objectors, their current demand that the entire statute be declared unconstitutional based on *Janus* goes well beyond their pleadings and seeks a remedy they never sought below and cannot achieve on appeal merely because *Janus* changed the landscape for fair share fee statutes. While the law established pursuant to *Abood* was still the law of the land, Judge Cullen relied upon the law set forth in *Abood* and its progeny to dismiss all of Plaintiffs' constitutional claims, leaving Plaintiffs with only the factual dispute of "is PSEA acting reasonably" when screening potential charities as their only surviving issue. If the Court does not dismiss the case as moot, and reaches the merits of Plaintiffs' case, the only issue for decision is whether the PSEA charity selection protocol was reasonable. That is the "merits" issue the religious

objectors raised in their motion for summary judgment and circumscribes the breadth of any possible award on the merits.

A final note: At page 23 of the objectors' brief they argue that the case cannot be moot because they have an outstanding claim for attorneys' fees that survives and keeps the case alive, citing *Giant Eagle Mkts. Co. v. United Food & Commercial Workers Union, Local Union No. 23*, 652 A.2d 1286, 539 Pa. 411, (1995). The case is distinguishable. In *Giant Eagle* picketing was enjoined. The operative statute gave the union a claim for attorneys' fees if picketing was *improperly* enjoined. Although the strike had ended by the time the case made it to the Supreme Court, the propriety of the injunction was still at issue on account of the potential for attorneys' fees and costs payable to the union based on the injunction entered. Here the relevant statute authorizing attorneys' fees is 42 U.S.C. § 1988, which may be available to the plaintiffs if they are the prevailing party. The County Court's Order specifically preserved the potential claim for counsel fees, stating: "If plaintiffs [objectors] believe they are the "prevailing parties" as defined in 42 U.S.C. 1988, they shall file a motion with supporting documentation by November 23, 2018." The objectors filed this appeal instead. The fact that Plaintiffs might be entitled to attorneys' fees if they prevailed does not provide a valid reason to permit a moot case to continue. If the case is moot, they likely will be found not to have prevailed, and have no claim for fees. The

potential for attorneys' fees follows on the decision on the merits of continuing the case or dismissing it for mootness. The fact that there is little possibility for attorneys' fees if the case is dismissed as moot, and a greater potential for fees if the case is not dismissed is a consequence of the decision, not a reason to make the decision, and is simply not a valid criterion to apply when assessing whether the case is moot or not.

VII. CONCLUSION

The United States Supreme Court has had the last word in this and every other fair share case pending across the country. *Janus* has declared that fair share assessments against individuals who are not members of the union that represents them are unconstitutional. The courts across the land are applying that decision to moot out litigation that was pending challenging various aspects of previously valid and available fair share statutes. The uniform conclusion of every court to address the issue so far is: the statutes are unenforceable, the cases are moot because no further remedy can be had – *Janus* gave fair share objectors the whole prize – declaring the statutes unconstitutional. The other cases are now moot and go by the wayside. The decision of the Court of Common Pleas dismissing the case as moot is correct and should be affirmed.

Respectfully submitted,

/s/Thomas W. Scott

Date: April 26, 2019

Thomas W. Scott, Esquire
Attorney I.D. #15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
tscott@killiangephart.com

Attorneys for Appellee

CERTIFICATION OF COMLIANCE WITH WORD COUNT LIMITS PURSUANT TO Pa. R.A.P. 910(c)

The Undersigned, Thomas W. Scott, Esquire, counsel for Appellee, certifies that the body of the foregoing Brief filed in this matter contains a total of 9,163 words as recorded by the Word processing program.

Respectfully submitted,

/s/Thomas W. Scott

Dated: April 26, 2019

Thomas W. Scott, Esquire
Attorney I.D. No. 15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
Email: tscott@killiangephart.com

Attorney for the Appellee

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Killian & Gephart, LLP

Signature: */s/Thomas W. Scott*

Name: Thomas W. Scott, Esquire

PA I.D. No. : 15681

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Appellee PSEA has on this date been served on the individuals listed below as addressed, and in the manner indicated:

Electronically through the Court's ECF system:

The Fairness Center
David R. Osborne, Esquire
Justin T. Miller, Esquire
500 North Third Street, Floor 2
Harrisburg, PA 17101
TEL: (844) 293-1001
david@fairnesscenter.org
jtmiller@fairnesscenter.org

/s/Thomas W. Scott

Date: April 26, 2019

Thomas W. Scott, Esquire
Attorney I.D. #15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886