IN THE COURT OF COMMON PLEAS
OF LANCASTER COUNTY, PENNSYLVANIA

JANE LADLEY and CHRISTOPHER MEIER, Plaintiffs,	:	
v.	:	Case No.: 14-08552
	:	Judge Leonard G. Brown, III
PENNSYLVANIA STATE EDUCATION ASSOCIATION, Defendant.	:	

DEFENDANT PENNSYLVANIA STATE EDUCATION ASSOCIATION'S BRIEF IN SUPPORT OF SUMMARY JUDGMENT

Respectfully submitted,

Date: August 29, 2018

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I. BACKGROUND

A. Fair share law and litigation from 1977 to June 26, 2018:

Since 1988, Pennsylvania law provided that a labor union, certified as the exclusive representative of a bargaining unit of public employees, may 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 Pa. Stat. § 575. The United States Supreme Court had upheld the constitutionality of such requirements in 1977, 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. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The Supreme Court reasoned that, where the union had a legal duty to represent the interests of all public employees in the unit, whether or not they are 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 that benefited both members and nonmembers.

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 Pa. Stat. § 575(c). The statute also contained procedures under which a nonmember may challenge the amount of the fee, *id.*, § 575 (d)-(i), and it allowed nonmembers who objected to supporting a union on religious grounds instead 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 history of this case:

This declaratory judgment action was originally brought in September of 2014 by two individual religious objectors to the payment of fair share fees. Plaintiffs challenged PSEA's implementation of the religious objector provisions of the Pennsylvania Fair Share Law, 71 P.S. 575(h) and sought declaratory and injunctive relief. There was (and is) no claim for money damages. The original

complaint claimed that PSEA's procedures and determinations to select an "agreeable" non-religious charity violated federal constitutionally protected due process rights, freedom of speech and association rights, and violated of the statute itself. PSEA filed preliminary objections to the original complaint. On June 30, 2015, the Honorable Judge James Cullen entered an Opinion and Order holding that plaintiffs were not entitled to injunctive relief because they failed to establish irreparable harm. [*Cullen I,* attached as Appendix A]. Relying primarily on *Abood,* he also found that that neither the statute, nor PSEA's application of the statute, violated any State or Federally protected constitutional rights. Judge Cullen ruled that the manner PSEA applied the statute to the plaintiffs raised a question of fact as to whether it was reasonable or not, and permitted the case to proceed on that issue.

Plaintiffs filed an Amended Complaint on July 20, 2015. The Amended Complaint raised, for the first time, allegations of violations of the Pennsylvania Constitution. Defendant responded with additional preliminary objections on August 15, 2015. On April 20, 2016, Judge Cullen filed an Opinion and Order addressing the preliminary objections. [*Cullen II,* attached as Appendix B] Judge Cullen ruled that Plaintiffs' 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* again. (*Cullen II* at 14-15) Judge Cullen also found that Plaintiffs "failed to make the necessary argument" to support their contention that the Pennsylvania Constitution provided broader protections than the Federal Constitution, and sustained the preliminary objection challenging the claim brought under Article 1, Section 7 of the Pennsylvania Constitution, and that "Plaintiffs have not adequately demonstrated that their rights under Article I, Section 7 of the Pennsylvania Constitution have been unlawfully infringed." (*Cullen II* at 17-18) As in *Cullen I*, Judge Cullen accepted that Plaintiffs' contention that PSEA acted unreasonably created an issue of fact, and permitted the case to proceed on that limited issue. (*Cullen II* at 18-19)

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 to be 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 feepayer regarding selection of an agreeable charity. If PSEA did not agree to the non-religious charity selected by the fee payer, PSEA would notify the fee payer of

that denial and advise the fee payer that they may request arbitration on the issue of an appropriate charity to receive his or her fair share fee within 40 days of the notice. If the fee payer requested arbitration, 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. (Burridge Affidavit with New Procedures attached as Appendix C).

PSEA made the new procedures applicable to the Plaintiffs. Plaintiffs rejected the new procedures. Since the new procedures did change the way PSEA would make charity determinations, by agreement of the parties, Plaintiff was permitted to file the 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 Plaintiffs and Defendant.

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, which presented the following issue: "should *Abood v Detroit Board of Education* be overruled and public-sector [fair share] fee arrangement 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. This Court granted that motion and stayed the case, pending the decision in *Janus.*

C. *Janus v. AFSCME, Council 31* – A sea change in the law and PSEA's response:

On June 27, 2018, the United States Supreme Court handed down its decision in *Janus v. AFSCME, Council 31*, 201 L. Ed. 2d 924, 138 S.Ct. 2448 (2018). With one broad, unequivocal, nation-wide stroke the Court overturned 41 years of precedent and the agency fee laws of Illinois and over 20 other states, including Pennsylvania, when it 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, slip op at 48; 201 L. Ed. 2d 924, 963-964.

In light of the *Janus* decision, PSEA recognized that the Pennsylvania statute authorizing fair share fees had become unenforceable. PSEA took immediate action 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 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, ¶ 5. On July 2, 2018, 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. *Id.* at ¶ 5 d. Such a letter went to plaintiff Meier. (Plaintiff Ladley, who 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 Plaintiffs, or to participate in the direction of Plaintiffs' fair share fees then held in escrow to a charity, on August 16, 2018, PSEA refunded all previously withheld money, plus interest, to Plaintiffs. Plaintiff Ladley received a check for $437.52; Plaintiff Meier received a check for $2,718.28. (Howlett Declaration, ¶¶ 6 and 7 Appendix 1 attached to Defendant's Motion for Summary Judgment)

School employers have similarly recognized that statutory and contractual provisions authorizing fair share requirements are no longer enforceable after *Janus*. The Superintendent of Penn Manor School District, Plaintiff Meier's employer, provided an affidavit attesting that, as a result of the *Janus* decision, they have ceased deducting and transmitting 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, ¶¶ 3-5, Appendix 2 attached to Defendant's Motion for Summary Judgment). The brutal truth: public sector unions in Pennsylvania and across the nation, Defendant PSEA included, are 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.

II. ARGUMENT

A. The procedural posture and standard of review:

The Pennsylvania Civil Rules of 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.* Further, the record must be viewed in the light most favorable to the non-moving party, and

all doubts as to the existence of a genuine issue of material fact must be removed against the moving party. *Id.* Even when a "motion to dismiss" is raised in a context other than the recommended Motion for Summary Judgment procedure, if the mootness issue, and the corresponding lack of trial court subject matter jurisdiction "adequately and thoroughly address the jurisdictional issue and the application of the mootness doctrine to the facts in the matter" the court should rule on the "motion" and dismiss moot cases. *J.M. v. NCAA*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 368, *49-51.

B. 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.

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

This case was filed, and the jurisdiction of this 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, 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." Quite apart from anything claimed or done by Plaintiffs or their counsel in this lawsuit, attributable solely to the change in the law resulting from decision of the United States Supreme Court in *Janus*, all of Plaintiffs' 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 Defendant PSEA, *and the employers with whom Defendant holds contracts* recognize and acknowledge that *Janus* effectively and immediately rendered the Pennsylvania Fair Share Fee Law unconstitutional and unenforceable, and 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. More importantly, as to the declaratory judgment count, the court

found that the statute they were 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 Plaintiff's money directly to the Plaintiffs. 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.[1]

[1] Plaintiff 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 has been held in escrow; a fee that has been returned to her.

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

Our courts have recognized at least 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.

(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 questions 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 Plaintiffs' counsel).

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

There is no damage to any Plaintiff if this case is dismissed as moot. Plaintiffs did not suffer any damages. No damages were even claimed. All funds collected as fair share fees have been returned, with interest. If the Plaintiffs had "law reform" expectations on account of their suit, those too have been addressed by the Supreme Court. What they hoped to change (one small aspect of the Fair Share Fee Law 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.

At the moment there is at least one court that has already considered a post-*Janus* issue and dismissed the previously filed case as moot. *See Danielson v. Inslee*, No. 3:18-cv-05206-RJB, 2018 WL 3917937 (W.D. Wash. Aug. 16, 2018) (holding plaintiffs' claims for declaratory and injunctive relief with respect to agency fee requirements were moot after *Janus* and the cessation of fee collections). [Because of the relevance, timeliness and quality of the reasoning

employed by the District Court for the Western District of Washington, the case is attached hereto as Appendix D.]

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).

Another case worth noting is *Christian Coalition 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. So too here: where *Janus* "changed the legal landscape," and Defendant responded to that change by immediately ceasing the collection of fair share fees, it cannot reasonably be expected that collection of such fees would be resumed.

Second, Defendant PSEA 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 Union. Governmental agencies are presumed to follow the law, *see, e.g., Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) (applying presumption in mootness context) – which now prohibits such deduction and transmission of fair share fees. 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, 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").

Given that all parties agree that *Janus* prohibits fair share fees in the public sector, that Defendant PSEA immediately following *Janus* took all necessary steps to ensure that deduction and transmission of fair share fees were halted at once, and that the Defendant PSEA has represented to this 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).

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. 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.

Defendant PSEA has withdrawn its previously filed cross motion for summary judgment, which argued that Defendant was entitled to prevail on the merits of the case as it existed *pre-Janus,* 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" as their only

surviving issue. Before *Janus* that was a correct interpretation and application of the law. It should be controlling again if the Court reaches the merits of Plaintiffs' case. To that end, if the Court elects not to dismiss the Plaintiffs' Second Amended Complaint for mootness as requested by Defendant, then Defendant relies upon and incorporates by reference all of the arguments previously set forth in its Brief in Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Defendant's Cross Motion for Summary Judgment, filed July 31, 2017 and its Reply Brief of Defendant Pennsylvania State Education Association in Support of Defendant's Cross Motion for Summary Judgment filed September 6, 2017.

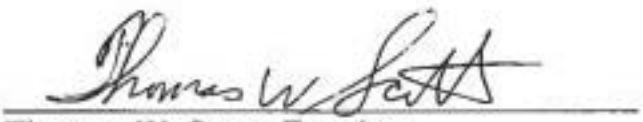
A final note: At one point Plaintiffs argued that, irrespective of the application of the United States Constitution, they should nonetheless prevail because the Pennsylvania Constitution is more protective of their rights of speech and association. That argument was rejected by Judge Cullen in *Cullen II* in the *pre-Janus* context because Plaintiffs produced, and he found, no authority to suggest that the issues presented in this case were susceptible to differential treatment under the Constitutions. That "we can rely on the PA Constitution" argument has absolutely no validity in the *post-Janus* world. The Supreme Court has declared the practice of fair share fee collection unconstitutional under the United States Constitution. The U.S. Constitution provides an impenetrable floor

of Constitutional rights. If a practice violates the U.S. Constitution, it is of no moment that, if it didn't, it might otherwise be proscribed by a more restrictive (or protective) state constitution. Fair share fees have now been interpreted to violate the U.S. Constitution. They are *kaput.* There is no need for further analysis of the practice under the PA Constitution. While it might provide rights if they were not otherwise recognized by the U.S. Constitution, if a practice violates the United States Constitution, the state's organic document never comes into play.

WHEREFORE, Defendant PSEA requests that the court enter an order GRANTING its Motion for Summary Judgment and DISMISSING Plaintiffs' Second Amended Complaint with prejudice.

Respectfully submitted,

Date: August 29, 2018



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant Pennsylvania State Education Association's Brief in Support of Summary Judgment has on this date been served on the individuals listed below as addressed, and in the manner indicated:

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