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**IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA**

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| JANE LADLEY and CHRISTOPHER MEIER,<br>Plaintiffs,<br><br>v.<br><br>PENNSYLVANIA STATE EDUCATION ASSOCIATION,<br>Defendant. | No. CI-14-08552<br>Judge Leonard G. Brown, III |

**BRIEF IN OPPOSITION TO DEFENDANT PENNSYLVANIA STATE EDUCATION ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT BASED ON MOOTNESS**

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**COUNTER STATEMENT OF THE CASE**

Fair Share Fees and Litigation

Defendant Pennsylvania State Education Association ("PSEA") offers this Court a white-washed version of the history of the law surrounding fair share (or "agency") fees in its Brief in Support of Summary Judgment 1–8, Aug. 29, 2018. The PSEA's historic view of agency fees would be incomplete without mention of public-sector unions' enterprising efforts to exploit public-sector employees in violation of the United States Supreme Court's decision in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and its progeny.[1] The National Education

[1] See, e.g., Knox v. SEIU, Local 1000, 567 U.S. 298, 322 (2012) (holding that union violated employees' rights when it exacted special dues assessment without consent); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 520, 537 (1991) (holding that union lobbying was unconstitutionally charged to nonmembers); Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986) (holding that union's procedure violated nonmembers' rights for failing to provide adequate notice and opportunity to challenge); Seidemann v. Bowen, 584 F.3d 104 (2d Cir. 2009) (holding unconstitutional union's efforts to charge nonmembers for lobbying activity); Wessel v. City of Albuquerque, 299 F.3d 1186 (10th Cir. 2002) (holding unconstitutional union's nonmember fee notices); Weaver v. Univ. of Cincinnati, 942 F.2d 1039 (6th Cir. 1991) (holding unconstitutional union's efforts to collect from nonmembers); Perry v. Local Lodge 2569 of Int'l Ass'n of Machinists and Aerospace Workers, 708 F.2d 1258 (7th Cir. 1983) (holding unconstitutional union's refund system); Swanson v. Univ. of Hawaii Prof'l Assembly, 269 F. Supp. 2d 1252 (D. Haw. 2003) (enjoining union's calculation procedure which included insufficient notice, inadequate audits, and no prompt rebate); Lindenbaum v. City of Philadelphia, 584 F. Supp. 1190 (E.D. Pa. 1984) (holding unconstitutional union's efforts to deny pension benefit increase to nonmembers).

Association ("NEA"), of which the PSEA is an affiliate, has also demonstrated a willingness to press its authority under United States Supreme Court precedent.[2] Indeed, the NEA has actually sanctioned lawsuits against teachers to recover fees even when it has failed to observe minimum constitutional standards set forth by the Supreme Court.[3]

Defendant Pennsylvania State Education Association ("PSEA") has contributed to that story by playing fast and loose with Supreme Court precedent. See Otto v. Pennsylvania State Educ. Ass'n–NEA, 330 F.3d 125 (3d Cir. 2003). In

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

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

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 307 (1986), the United States Supreme Court determined that public-sector unions exacting agency fees must provide "adequate disclosure" of expenditures to objecting nonmembers, explaining that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." (Emphasis added). Six years later, the independent auditor requirement was affirmed by the Third Circuit in Hohe v. Casey, 956 F.2d 399, 415 (3d Cir. 1992), which explained that "the purpose of requiring the verification . . . is to give the nonmembers some prior assurance that the fee was properly calculated" and that, "[w]hen nonmembers do not receive that assurance, their constitutional rights are violated under Hudson, and they are at least entitled to nominal damages of $1.00."

Despite Hudson and Hohe, the PSEA refused to secure independent audits for its local unions, relying instead on its theory that "Hudson's independent auditor requirement was merely dictum or applie[d] only to large unions . . . that can afford an independent auditor." Otto, 330 F.3d at 131.

In 2003, after nearly seven years of litigation against the PSEA,[4] the Third Circuit reaffirmed what was clearly stated by the United States Supreme Court in 1986: "We are bound by the Supreme Court's decision in Hudson, and its directive of 'verification by an independent auditor' means just that." Id. at 132.

History of This Case

This civil rights case was filed on September 18, 2014, to address the PSEA's treatment of Plaintiffs Jane Ladley and Christopher Meier ("Plaintiffs") under title 71, section 575, of the Pennsylvania Statutes ("section 575"), which authorizes fair share fees for public school teachers. See Compl. for Declaratory & Injunctive Relief. Despite the relatively small dollar amounts at issue, the PSEA defended its internal practices against Plaintiffs' challenge, relying chiefly on Abood and its progeny. See, e.g., Prelim. Objs. Filed on Behalf of Def. PSEA ¶¶ 13–14, 35–37, Oct. 9, 2014; PSEA's Br. in Opp'n to Pls.' Mot. for Summ. J. & in Supp. of Its Cross Mot. for Summ. J. 28–29, Aug. 1, 2017.

After nearly two years of litigation over the PSEA's practices, the PSEA finally recognized that "[t]he absence of a clearly established timeline for action on religious objector issues as well as the inability to reach a final determination

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

when PSEA and the religious objector are at impasse over agreement on a charity" was a legitimate problem. Answer of Def. PSEA to Pls.' Mot. for Summ. J. & Def.'s Cross Mot. for Summ. J. ¶ 106. However, without notification to or discussion with Plaintiffs, the PSEA unilaterally implemented new written procedures, this time directly contravening the text of section 575. Despite section 575(h)'s requirement that religious objectors' funds be directed "to a nonreligious charity agreed upon by the nonmember and the exclusive representation," the PSEA's policy claimed power to, under certain circumstances, send religious objectors' funds "to a nonreligious charity chosen by the PSEA at its sole discretion." Pls.' Mot. for Prelim. Inj. ¶ 11.c. (quoting the PSEA's written policy).

Equally surprising, the PSEA's new policy also included a take-it-or-leave-it, binding arbitration requirement seemingly copied-and-pasted from neighboring section 575(g), see id. at ¶ 11, even though the Third Circuit had specifically ruled—24 years earlier—that section 575(g) was "invalid in its entirety" for requiring arbitration of constitutional issues, Hohe, 956 F.2d at 409; see also Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 876–77 (1998) (holding that union violated employees' rights when it required arbitration before filing a lawsuit challenging agency fees); Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982)

("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."). Plaintiffs moved for a preliminary injunction to prevent the PSEA from imposing on them its obviously unconstitutional procedures.[5]

Shortly thereafter, a federal court in a separate case also involving the PSEA's new procedures observed that "[t]he PSEA's introduction of such procedures appear[ed] . . . to be an attempt to overwrite the pending lawsuit" and ordered the PSEA to stay implementation of its procedures until the motion for preliminary injunction in that matter was fully briefed. Order 1–2, Misja v. Pennsylvania State Educ. Ass'n, No. 1:15-cv-1199-JEJ (M.D. Pa. Aug. 8, 2016), ECF No. 30. That same day, Plaintiffs came to an agreement with the PSEA under which the PSEA's new procedures would not be enforced against them, preserving the status quo in this matter, and withdrew their motion for preliminary injunction. Praecipe to Withdraw Mot. for Prelim. Inj. ¶ 4.

On September 28, 2017, the United States Supreme Court granted certiorari in Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018). In recognition of

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[5] A Pennsylvania federal court, in another case involving the PSEA's new policies, remarked that, "[c]learly, [the PSEA] could not enforce the arbitration provision, as it is effectively unenforceable" under Hohe and the United States Supreme Court's decision in Patsy. Mem. & Order 13, Williams v. Pennsylvania State Educ. Ass'n, No. 1:16-cv-02529-JEJ (M.D. Pa. Apr. 25, 2017), ECF No. 14.

their shared expectation "that the Supreme Court's ruling in Janus is nearly certain to impact the disposition of this matter," the parties jointly requested that this Court stay the proceedings until Janus was decided. Joint Mot. to Stay Proceedings ¶ 5–6.

Janus v. AFSCME, Council 31

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

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

Janus, 138 S. Ct. at 2459–60. The Supreme Court remanded the case to the lower courts, ostensibly to excise the unconstitutional provisions from Illinois' statutes. See id. at 2486. The Supreme Court did not analyze any other states' laws in conjunction with its decision.

## ARGUMENT

### I. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

This Court should deny the PSEA's Motion for Summary Judgment and instead grant Plaintiffs' Motion for Summary Judgment because Plaintiffs, not the PSEA, are entitled to judgment as a matter of law.

A motion for summary judgment will be granted if, after viewing all evidence and inferences in light most favorable to the non-moving party, the court concludes there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010).

State courts are obligated under the Supremacy Clause[6] to apply United States Supreme Court precedent, perhaps particularly where the job is relatively straightforward. See Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 221 (1931) ("The determination by this [C]ourt of [a federal] question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding."). By way of illustration, when the Supreme Court decided another high-profile case with national implications, Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), there was little doubt that many state

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

statutes were constitutionally dubious; however, lower courts were still required to apply that decision to other federal and state statutes.[7] This was also true for lower court cases litigated contemporaneously with Citizens United and decided in its immediate aftermath.[8]

A similar round of lower court decisions followed the Supreme Court's decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015),[9] even over objections of

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

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

[9] See, e.g., Rosenbrahn v. Daugaard, 799 F.3d 918, 922 (8th Cir. 2015); Jernigan v. Crane, 796 F.3d 976, 979 (8th Cir. 2015); Waters v. Ricketts, 798 F.3d 682, 685 (8th Cir. 2015); Robicheaux v. Caldwell, 791 F.3d 616, 619 (5th Cir. 2015);

mootness.[10] For example, in Waters v. Ricketts, 798 F.3d 682 (8th Cir. 2015), the State of Nebraska argued that a challenge to its state statute was moot because Obergefell had addressed the constitutionality of Michigan's, Kentucky's, Ohio's, and Tennessee's bans on gay marriage in a manner that made clear Nebraska could not enforce its gay marriage ban. The Eighth Circuit did not agree:

> Nebraska suggests that Obergefell moots this case. But the Supreme Court specifically stated that "the State laws challenged by Petitioners in these cases are now held invalid." Id. at 2605 (emphasis added). . . . The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee—not Nebraska. The Court also did not consider state benefits incident to marriage, which were addressed by Plaintiffs and the district court here. Nebraska has not repealed or amended the challenged constitutional provision.
>
> Nebraska's assurances of compliance with Obergefell do not moot the case. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) ("[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.").

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Conde Vidal v. Garcia-Padilla, 167 F. Supp. 3d 279, 283 (D.P.R. 2016) Marie v. Mosier, 122 F. Supp. 3d 1085, 1102 (D. Kan. 2015).

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

> These assurances may, however, impact the necessity of continued injunctive relief. The district court should consider Nebraska's assurances and actions and the scope of any injunction, based on Obergefell and Federal Rule of Civil Procedure 65(d).

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

Here, Plaintiffs and the PSEA do not dispute that Janus controls. Pennsylvania law, like the Illinois law that was at issue in Janus, permits public-sector unions to collect agency (or "fair share") fees over the objection of nonmembers. Compare 71 P.S. § 575(b) ("If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee.") with Janus, 138 S. Ct. at 2459–60 ("Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities."). Section 575 violates nonmembers' First Amendment rights, just as Illinois law did.

Given the United States Supreme Court's decision in Janus, this Court has no choice but to conclude that portions of Pennsylvania law, like portions of the Illinois law at issue in Janus, are invalid. Section 575(b) obligates nonmembers to pay fair share fees to their public-sector union if required by a collective

bargaining agreement, and subsections (c) through (i) set forth the legal regime for the extraction of and challenges to fair share fees. Only subsections (j) through (m), which set forth certain union reporting requirements, may lawfully be enforced.[11]

Accordingly, Pennsylvania law should be declared unconstitutional under the rationale set forth in Janus. This Court should deny the PSEA's Motion for Summary Judgment, grant Plaintiffs' Motion for Summary Judgment declaring section 575 unconstitutional, and issue an injunction to prevent the PSEA from reinstituting any form of collection from nonmembers.

## II. THIS CASE IS NOT MOOT BECAUSE NO COURT HAS APPLIED JANUS TO PENNSYLVANIA LAW

Nevertheless, the PSEA submits that this case is moot because Janus, "[w]ith one broad, unequivocal, nation-wide stroke . . . overturned . . . the agency fee laws of Illinois and over 20 other states, including Pennsylvania." PSEA's Br. in Supp. of Summ. J. 6. However, this represents a profound misunderstanding of basic principles of federal (and state) jurisdiction.

"A judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the right of strangers to those proceedings."

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

Martin v. Wilks, 490 U.S. 755, 762 (1989) (superseded on other grounds by statute). "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular plaintiffs . . . ." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); see also Edward A. Hartnett, A Matter of Judgment, Not A Matter of Opinion, 74 N.Y.U. L. Rev. 123, 126 (1999) ("The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment."); Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 Cardozo L. Rev. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did.").

Janus involved Illinois litigants and Illinois law.[12] The Supreme Court could not and did not strike down Pennsylvania law when it decided Janus because no one raised a justiciable challenge to Pennsylvania's fair share fee statutes. The Supreme Court did not even happen to discuss how Pennsylvania laws authorizing fair share fees might relate to the Illinois statute at issue in Janus. Janus necessarily left Pennsylvania law intact. See Waters, 798 F.3d at 685 ("The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee—not Nebraska.");

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

see also Rosenbrahn v. Daugaard, 799 F.3d 918, 922 (8th Cir. 2015) (“not South Dakota”); Jernigan v. Crane, 796 F.3d 976, 979 (8th Cir. 2015) (“not Arkansas”).

Accordingly, this Court can and should grant relief, namely, a declaration that section 575(a)–(i) is invalid and an injunction against recalcitrant behavior. See Al Hamilton Contracting Co. v. Commonwealth, 494 A.2d 516, 518 (Pa. Cmwlth. 1985) (“In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of the necessary stake in the outcome, or whether the court (or agency) will be able to grant effective relief.”) (citations omitted); see also DeJohn v. Temple Univ., 537 F.3d 301, 308 (3d Cir. 2008) (“The court’s ability to grant effective relief lies at the heart of the mootness doctrine.”) (quoting Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 216 (3d Cir. 2003).

Such relief would be analogous to that granted to litigants in Pennsylvania after Citizens United. Four years after Citizens United—and despite the “parties[’] agree[ment] that the challenged Election Code provision cannot stand constitutional scrutiny”—a federal district court applied the Citizens United ruling to Pennsylvania law, held invalid a specific provision of Pennsylvania’s Election Code, and entered a permanent injunction against its enforcement. General Majority PAC v. Aichele, No. 1:14–CV–332, 2014 WL 3955079, *1 (M.D. Pa. Aug.

13, 2014). The plaintiffs in General Majority PAC, who would otherwise be operating a PAC in violation of state law, were understandably in practical need of security and certainty, just as the Plaintiffs in the instant case would be if made to rely on the promises of the PSEA without declaratory or injunctive relief.

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

Again, the fact that a Supreme Court decision controls a case does not make it moot. In another set of post-Obergefell cases, the Fifth Circuit remanded with instructions to various district courts to enter final judgment on the merits in light of the Supreme Court's decision—even though all parties conceded that

Obergefell dictated a particular outcome—because any change in law did not finally and conclusively dispose of the controversy. See Robicheaux v. Caldwell, 791 F.3d 616, 619 (5th Cir. 2015) ("[The parties] are agreed that the judgment should be reversed and remanded for entry of judgment in favor of plaintiffs."); Campaign for Southern Equality v. Bryant, 791 F.3d 625, 627 (5th Cir. 2015) ("Because, as both sides now agree, the injunction appealed from is correct in light of Obergefell, the preliminary injunction is AFFIRMED. This matter is REMANDED for entry of judgment in favor of the plaintiffs."); De Leon v. Abbott, 791 F.3d 619, 625 (5th Cir. 2015) (same).

In sum, Janus controls the matter, but that does not mean the work of this Court or any other lower court is unnecessary. Because the United States Supreme Court did not specifically invalidate Pennsylvania law, there is no change in Pennsylvania law and certainly no change sufficient to make judgment for Plaintiffs impossible to grant. This Court must formalize in Pennsylvania the Supreme Court's Janus precedent.

## III. THIS CASE IS NOT MOOT BECAUSE A VOLUNTARY CHANGE IN POLICY IS NOT SUFFICIENT PROTECTION AGAINST RECURRENCE

The PSEA places great weight on its promises not to violate Janus in the future, even presenting a statement of policy from its Assistant Executive Director for Administrative Services that the PSEA will no longer collect fair share fees in

the future. But even assuming a statement from the PSEA's Assistant Executive Director for Administrative Services constitutes new PSEA policy, the PSEA fails to carry its burden of proving that its conduct will not recur.

A party claiming mootness carries "a heavy burden" of "prov[ing] that there is no reasonable expectation that the past conduct will be repeated." Pennsylvania Interscholastic Athletic Ass'n, Inc. v. Greater Johnstown Sch. Dist., 463 A.2d 1198, 1201 (Pa. Cmwlth. 1983). Federal courts, to which Pennsylvania courts frequently look for guidance on deciding questions of mootness,[13] further describe this burden as "formidable." Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc., 528 U.S. 167, 170 (2000); DeJohn, 537 F.3d at 309.

The PSEA appears to realize that collecting fair share fees under Janus would result in additional lawsuits and $1.00 in nominal damages, but the new statement of policy by the PSEA's Assistant Executive Director for Administrative Services is hardly enough to guard against a calculated decision to frustrate nonmembers' rights or press the PSEA's authority under section 575. Merely disclaiming any intent to resume illegal activity is insufficient to render a matter

[13] Pap's A.M. v. City of Erie, 812 A.2d 591, 600 n.4 (Pa. 2002) ("This Court has frequently looked to cases from the U.S. Supreme Court for guidance in deciding questions of mootness.").

moot. United States v. W. T. Grant Co., 345 U.S. 629, 633 ("Such a profession does not suffice to make a case moot . . . .").

Plaintiffs have no responsibility to help the PSEA carry its formidable burden to show that this matter is moot;[14] however, Plaintiffs observe several ways in which the PSEA undercuts its own supposed promises not to violate Janus in the future. First, and most obviously, the PSEA's Motion for Summary Judgment demonstrates that the PSEA not only refuses a consent judgment in this matter but actively fights against a ruling that section 575 is unconstitutional. Were the PSEA to mean what it says, invalidation of section 575 would make no difference.

Second, the PSEA has made no showing that it has amended Plaintiffs' respective collective bargaining agreements (CBAs) to remove its fair share fee authorizations. To the contrary, the CBA currently on Penn Manor School

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

District's website continues to show authorization of fair share fees,[15] a fact of which this Court may take judicial notice. See Hill v. Dep't of Corr., 64 A.3d 1159, 1165 n.3 (Pa. Cmwlth. 2013) ("We take judicial notice of DOC's policies and handbooks, which appear on DOC's official website.").

Third, as set forth above,[16] the PSEA has already demonstrated a willingness, historically and in this case, to disregard United States Supreme Court rulings. The possibility of not getting caught—with the potential penalty of $1.00 nominal damage claims and returning a limited number of plaintiffs' funds, sometimes only after years of litigation—may be too tempting to resist here as well. It is essential to Plaintiffs' relief that this Court grant their request for a permanent injunction, allowing them to resume this four-year long case where they left off instead of starting from scratch.

Fourth, and relatedly, the PSEA continues to express disagreement with the United States Supreme Court's ruling and a desire to collect and impound Plaintiffs' money, suggesting that it would look for opportunities, as it did after the United States Supreme Court's decision in Hudson, to test new legal theories

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[15] See Penn Manor Sch. Dist., Teacher Contract Agreement 2017–2021, https://www.pennmanor.net/employment/negotiated-agreement-2017-2021-4-3-17-1-2/ (last visited Sept. 16, 2018).

[16] See supra, at Counter Statement of the Case.

that hurt Plaintiffs. In its Status Conference Memorandum, filed on July 26, 2018, the PSEA mused that

> [t]he loss of fair share fees was anything but voluntary. Indeed, but for the Supreme Court's decision in Janus, PSEA would have continued to escrow Plaintiffs' fair share fees until this [C]ourt ruled on and established the validity of the procedures used by PSEA to resolve disputes over the selection of a charity.

PSEA's Status Conference Memo. 8.

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

remaining to be decided is the scope of this court's order permanently enjoining its enforcement.").

The PSEA cites a decision granting a motion to dismiss filed by state officials in Washington State to support its claim that its self-policed promises make this case moot. PSEA's Br. in Supp. of Summ. J. 15 (citing Danielson v. Inslee, No. 3:18-CV-05206-RJB, 2018 WL 3917937, at *1 (W.D. Wash. Aug. 16, 2018)). However, given that the public-sector union involved in Danielson did not join in the motion to dismiss—and the state officials had no financial interest in seizing nonmembers' funds—it is difficult to estimate how relevant the decision would be for the instant matter.

For what it is worth, the Court in Danielson also erred in its "voluntary cessation" analysis, distinguishing post-Obergefell cases on specious grounds. First, the Court in Danielson, 2018 WL 3917937, at *3, assumed incorrectly that post-Obergefell cases did not apply because "there was reason to believe that some states would ignore the Supreme Court's binding precedent [in Obergefell], unlike in this case." However, as shown previously, the parties in post-Obergefell cases appeared instead to agree as to the invalidity of state law under

Obergefell.[17] And second, the court in Danielson, 2018 WL 3917937, at *3, incorrectly believed that Obergefell did not, like "Janus[,] utilize[ ] broad language in a lengthy discussion overturning precedent" but instead "at most summarily addresses conflicting precedent." A fair reading of both Obergefell and Janus is that neither leave any doubt that the challenged activities are unconstitutional, whether it is agency fees in Janus or prohibitions on same-sex marriage in Obergefell.

Accordingly, the PSEA has failed to carry its formidable burden to show it will not violate Plaintiffs' rights in the future. This Court should provide necessary certainty and security—the purpose of the Declaratory Judgments Act—by ruling on the merits of this dispute and entering an appropriate injunction. See 42 Pa.C.S. § 7541(a) ("Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.").

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[17] See Waters, 798 F.3d at 686 ("Nebraska's assurances of compliance with Obergefell do not moot the case.") (emphasis added); Robicheaux, 791 F.3d at 619 ("[The parties] are agreed that the judgment should be reversed and remanded for entry of judgment in favor of plaintiffs.") (emphasis added); Campaign for Southern Equality, 791 F.3d at 627 ("Because, as both sides now agree, the injunction appealed from is correct in light of Obergefell, the preliminary injunction is AFFIRMED. This matter is REMANDED for entry of judgment in favor of the plaintiffs.") (emphasis added); De Leon, 791 F.3d at 625 (same).

## IV. EVEN IF THE CASE IS MOOT THIS COURT SHOULD DECIDE THE ISSUE BASED ON THE PUBLIC INTEREST EXCEPTION BECAUSE THE CASE INVOLVES FIRST AMENDMENT PROTECTIONS

Even assuming for the sake of argument that this case is moot, this Court should not dismiss this case because it involves First Amendment protections of great public importance. See Commonwealth v. Benn, 680 A.2d 896 (Pa. Super. 1996) (citing Meyer v. Strouse, 221 A.2d 191, 192 (Pa. 1966)). Accordingly, irrespective of mootness, this Court should hold that section 575(a) through (i) is unconstitutional and issue an injunction against the PSEA.

Issues like the ones presented in this case, involving First Amendment or state-related claims, can survive technical mootness under the "great public importance" exception. See Pap's A.M. v. Erie, 812 A.2d 591, 599-601 (Pa. 2002) (refusing to dismiss free expression challenge for mootness even though the establishment ceased operating because the dispute involved an issue of "great public importance" and law could impact future litigants); In re Duran, 769 A.2d 497, 502 (Pa. Super. Ct. 2001) ("The issues in this appeal, rights to privacy and bodily integrity, are matters of public importance."); In re Estate of Dorone, 502 A.2d 1271, 1275 (Pa. Super. 1985) ("The rights alleged to have been violated include the First Amendment right to freedom of religion, a matter of public importance."). Even if this Court were hesitant to rule on a matter of

constitutional concern, Plaintiffs are only asking this Court to apply United States Supreme Court precedent.

**CONCLUSION**

For the reasons stated above, Plaintiffs respectfully request that this Court deny the PSEA's Motion for Summary Judgment Based on Mootness, grant Plaintiffs' Motion for Summary Judgment, declare that section 575(b)–(i) is unconstitutional under Janus v. AFSCME, Council 31, enjoin the PSEA from seizing or impounding Plaintiffs' funds in the future, and award Plaintiffs' attorneys' fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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Dated: September 18, 2018

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has on this date been served on the following:

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