IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LINDA MISJA, Plaintiff, vs. PENNSYLVANIA STATE EDUCATION ASSOCIATION, Defendant.	Civil Action No. 1:15-cv-1199-JEJ (Hon. John E. Jones, III)

BRIEF IN RESPONSE TO PENNSYLVANIA STATE EDUCATION ASSOCIATION'S MOTION TO DISMISS

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I. STATEMENT OF FACTS

Plaintiff Linda Misja ("Ms. Misja") is a Pennsylvania public high school teacher and religious objector to public-sector union membership. Complaint for Declaratory and Injunctive Relief ("Complaint") (Doc. 1), at ¶¶ 4, 9, 14-16. Since 2011, she has worked in school districts that compel her to pay a "fair share fee" to Defendant Pennsylvania State Education Association ("PSEA") as a condition of employment, an arrangement also known as "agency shop."[1] Id. at ¶¶ 11, 24.

However, in 2012, Ms. Misja entered a religious objection to payment of the fair share fee pursuant to subsection (e) of title 71, section 575, of the Pennsylvania Statutes ("section 575").[2] Id. at ¶ 14. Later that year, the PSEA "accepted" Ms. Misja's religious objection as bona fide and began placing a portion of her paycheck in an interest-bearing escrow account. Id. at ¶¶ 13, 16, 28. As an accepted (or "verified") religious objector, Ms. Misja is exempt from payment of fair share fees and "shall pay the equivalent of the fair share fee to a

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1. An agency shop agreement dictates that "all the employees are represented by a union selected by the majority" and that "[w]hile employees in the unit are not required to join the union, they must nevertheless pay the union an annual fee to cover the cost of union services related to collective bargaining (so-called chargeable expenses)." Knox v. Services Employees Int'l Union, Local 1000, 567 U.S. ___, 132 S.Ct. 2277, 2284 (2012).

2. Section 575 is also known as "The Fair Share Fee Law."

nonreligious charity agreed upon by the nonmember and the exclusive representative." 71 P.S. § 575(h).

Since 2012, Ms. Misja selected two separate organizations to receive her funds, each of which the PSEA rejected, for different reasons. Complaint, at ¶¶ 19-20, 25-27. The PSEA also refused her request for arbitration. Id. It rejected People Concerned for the Unborn Child because, in its view, sending her money there "would be tantamount to sending your fees to a charity that furthers your religious beliefs, which is contrary to neutral intent and requirements of the Pennsylvania Fair Share Fee Law." Id. at ¶ 19 & Exh. C. And it rejected the National Rifle Association Foundation because the "PSEA has a policy of not agreeing to the charitable subsidiaries of political organizations." Id. With respect to her request for arbitration, the PSEA simply stated that Ms. Misja "do[es] not have a right" under section 575 to arbitrate with the PSEA in this context. Id. at ¶ 27 & Exh. C.

On June 18, 2015—almost three-and-a-half years after Ms. Misja objected on religious grounds—she filed the underlying Complaint. The PSEA continues to receive and hold Ms. Misja's money in an interest-bearing escrow account. Id. at ¶¶ 13, 28.

This brief responds to the PSEA's Motion to Dismiss (Doc. 5) and accompanying brief ("PSEA's Brief") (Doc. 10).

II. QUESTIONS PRESENTED[3]

A. WHETHER THIS COURT SHOULD ABSTAIN DESPITE ITS "VIRTUALLY UNFLAGGING" OBLIGATION TO HEAR AND DECIDE THIS CASE (RESTATED)

B. WHETHER THE PSEA ACTS UNDER THE COLOR OF STATE LAW IN RELYING ON STATE STATUTES FOR AUTHORITY TO COERCE MS. MISJA (RESTATED)

C. WHETHER MS. MISJA ADEQUATELY STATED CLAIMS FOR VIOLATIONS OF HER FIRST AMENDMENT AND FREE SPEECH RIGHTS (RESTATED)

D. WHETHER THE PSEA'S ARBITRARY AND CAPRICIOUS, VIEWPOINT-BASED PRACTICE OF REJECTING CHARITY SELECTIONS AND PERPETUATING THE CHARITY SELECTION PROCESS INDEFINITELY VIOLATES SECTION 575 (RESTATED)

E. WHETHER MS. MISJA ADEQUATELY STATED A CHALLENGE TO THE FACIAL CONSTITUTIONALITY OF SECTION 575 (RESTATED)

III. ARGUMENT

A. WHETHER THIS COURT SHOULD ABSTAIN DESPITE ITS "VIRTUALLY UNFLAGGING" OBLIGATION TO HEAR AND DECIDE THIS CASE

This Court has a "virtually unflagging" obligation to hear and decide this case, which is within its jurisdiction. It should therefore decline the PSEA's invitation to abstain from ruling on the Complaint.

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3. Ms. Misja restates, in turn, each of the five "Questions Presented" by the PSEA but corrects an error in the PSEA's numbering.

" '[F]ederal courts are obliged to decide cases within the scope of federal jurisdiction' and have 'no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.' " Nat'l Collegiate Athletic Ass'n v. Corbett, 25 F.Supp. 3d 557, 563 (M.D. Pa. 2014) (quoting Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. ___, 134 S. Ct. 584, 588, 590–91 (2013). When federal jurisdiction exists, "a federal court's obligation to hear and decide a case is virtually unflagging." Id. at 591 (quotation marks omitted). "Thus, a court should abstain only in exceptional and limited circumstances." Id.; see also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule.").

1. *Younger* Abstention is Inapplicable Because No Pending State Proceedings Will Be Affected

In Younger v. Harris, 401 U.S. 37, 40-41 (1971), the United States Supreme Court ruled that a federal court should generally abstain from exercising jurisdiction over a pending state criminal prosecution that involves the same parties, unless the state proceeding is conducted in bad faith. Stated otherwise, Younger imposed "equitable restrictions on federal intervention in state prosecutions[.]" Juidice v. Vail, 430 U.S. 327, 336-37 (1977).

"Younger abstention" has since been applied in the context of non-criminal proceedings, but only "when important state interests are involved." Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). A state interest may be deemed important for Younger purposes where non-criminal proceedings "bear a close relationship to proceedings criminal in nature" or are "necessary for the vindication of important state policies or for the functioning of the state judicial system[.]" Id.

Here, the PSEA invokes Younger on the basis of a separate action pending in the Lancaster County Court of Common Pleas which is neither criminal in nature nor involving Ms. Misja. See Ladley v. Pennsylvania State Educ. Ass'n, No. 14-08552 (Lancaster Cnty. Ct. Com. Pl. Aug. 10, 2015). Additionally, Ms. Misja is not presently involved in any state court litigation that in any way touches on the federal constitutional causes of action presented in the case sub judice. Thus, this Court's hearing and determination of her case cannot, by definition, interfere with any ongoing state proceedings.

The PSEA invokes "education" as an important state interest nevertheless requiring abstention under Younger. While education is a recognized important state interest, the issue before the Court in the present case has, aside from the involvement of a teacher and a teachers' union, nothing to do with education.

The PSEA cannot point to a single student whose education will be affected by Ms. Misja's money going to one specific charity over another. Nor can it make any argument that this Court's resolution of the constitutional questions before it would pose a structural threat to the Commonwealth's administration of education. Rather, the case before the Court has to do with a public employee's constitutional and statutory rights to direct her money to a charity, with due process, free from the pernicious viewpoint discrimination of a union to which she does not even belong, and in accordance with section 575. Furthermore, Ms. Mijsa's money is being held in escrow, and public funding is not impacted at all. A religious objector's money that would otherwise be owed to the union as a fair share fee is always payable to a charity and never flows into public coffers under any circumstances.[4]

Moreover, if this Court should abstain from determining the questions presented in the instant case, it would cede authoritative interpretation of the United States Constitution to state courts that do not view the pronouncements

4. The PSEA's appeal to the "important state interest" of public sector labor relations is utterly unsupported. Defendant cites not a single case to suggest that public sector labor relations is an "important state interest" requiring federal court abstention. In any event, for reasons stated elsewhere herein, any interest the state may have in "regulation of public sector employers, labor unions and their members[,]" Defendant's Brief, p. 7 (Doc. 10, p. 12), is overcome by the overwhelming countervailing governmental interest in the protection of the citizenry's constitutional rights.

of this Court, or even the Third Circuit, as controlling precedent. See, e.g., Cianfrani v. Johns-Manville Corp., 482 A.2d 1049, 1051 (Pa. Super. 1984) ("In the absence of a ruling on the question by the United States Supreme Court, the decision of a federal intermediate appellate panel is not binding on Pennsylvania courts.").

Abstention for the prudential reasons articulated in Younger is therefore not warranted.

2. *Pullman* Abstention Not Warranted

In a second attempt at convincing this Court to abstain from hearing this case, the PSEA invokes the United States Supreme Court's decision in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). However, as with its previous argument, the PSEA's argument for Pullman abstention is misplaced.

"[A]bstention should not be ordered merely to await an attempt to vindicate the claim in a state court." Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971). Instead, federal courts must "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," and "escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, to guard, enforce, and protect every right granted or secured by the constitution of the United

States." Zwickler v. Koota, 389 U.S. 241, 248 (1967) (internal quotation marks omitted).

Three criteria must be present before abstaining under Pullman:

> First, there must be uncertain issues of state law underlying the federal constitutional claims brought in the federal court. Second, these state law issues must be amenable to an interpretation by the state courts that would obviate the need for or substantially narrow the scope of the adjudication of the constitutional claims. And third, it must appear that an erroneous decision of state law by the federal court would be disruptive of important state policies.

D'lorio v. Delaware County, 592 F.2d 681, 686 (3d Cir. 1978); see also Trone v. Preate, 770 F.Supp. 994, 999-1000 (M.D. Pa. 1991).

But abstention is wholly inappropriate where "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965). "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." City of Houston v. Hill, 482 U.S. 451, 467-68 (1987) (quoting Zwickler, 389 U.S. at 252). Further, "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions

of federal law." Harman v. Forssenius, 380 U.S. 528, 534-35 (1965) (quoting England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 415-16 (1964)).

Here, Pullman abstention is inappropriate for at least four reasons. First, Ms. Misja challenges the constitutionality of section 575 "as applied for the purpose of discouraging [First-Amendment-]protected activities." Dombrowski, 380 U.S. at 490. Specifically, she alleged that the PSEA engages in a practice that "effectively prohibit[s] her from sending her money to an organization she selected and compel[s] her to send her money to an organization she does not wish to support." Complaint, at ¶ 47. The PSEA's practice includes "impos[ition of] an extremely protracted process driven by the PSEA's own ad hoc, arbitrary determinations, while denying Ms. Misja access to an impartial decisionmaker,"[5] pernicious viewpoint-based discrimination,[6] and arbitrary and capricious application of section 575.[7] Further delay[8] would only enhance the PSEA's tactic of prolonging the religious objection process and chilling Ms. Misja's constitutional rights.

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5. Complaint, at ¶ 40.

6. Id. at ¶¶ 46-56.

7. Id. at ¶¶ 60-70.

8. Proceedings in Lancaster County Court have not been particularly expedient. As the PSEA's exhibits demonstrate, the Lancaster County Court's ruling on preliminary objections was entered over nine months after the initial complaint was filed. PSEA's Brief, at Exhs. B, D.

Second, an erroneous decision of state law by this Court would not be disruptive of important state policies. See D'lorio, 592 F.2d at 686. The state has no interest—let alone an "important" one—in requiring that religious objectors send their money to one organization over another. As previously discussed, the PSEA is unable to identify any interests sufficiently important to warrant abstention in this case, and disposition of Ms. Mijsa's money will have no impact on the state's education policy or the state budget. And to the extent that there is some state policy at stake, it cannot be "important" if it is contrary to the constitutional protections afforded to Ms. Misja.

Third, the Opinion and Order already rendered by the Lancaster County Court demonstrates that the state court is unwilling to address the constitutional issues at stake in this matter. See PSEA's Brief, at Exh. D. Instead, the Lancaster County Court is only willing to examine a potential statutory violation so as to require the PSEA to refrain from acting in an "unreasonable" manner under the circumstances, a determination that hardly avoids the constitutional problems with section 575. PSEA's Brief, at Exh. D p. 15. This Court should not withhold a hearing on the merits to await the state court's determination as to whether the PSEA has acted "unreasonably" under a statute, when that determination would

have no impact on the constitutional validity of the PSEA's practice or the statute itself.

Finally, if this Court were to determine that section 575 is unambiguous, abstention would be inappropriate. Ms. Misja has argued that section 575 is unambigious, but particularly with her alternative argument. See Constantineau, 400 U.S. at 439 ("Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim."). At that point, too, abstention would be inappropriate.

3. Identity of Law Firm Is Not Identity of Parties

In its most puzzling argument, the PSEA argues that, because Ms. Misja is represented in the present case by the same law firm which represents the plaintiffs in the Lancaster County litigation, Ms. Misja is barred from litigating her own case in this Court. The PSEA cites no authority for this startling proposition that representation of parties in state and federal proceedings by a common law firm somehow requires federal court abstention. And there is a simple reason for defendant's failure of citation: there is no such authority.

In sum, abstention under Younger, Pullman, or otherwise, is inappropriate. This Court should decline the invitation.

B. WHETHER THE PSEA ACTS UNDER THE COLOR OF STATE LAW IN RELYING ON STATE STATUTES FOR AUTHORITY TO COERCE MS. MISJA

The PSEA cannot maintain that it does not act under color of state law, even as it relies on state law for the authority to coerce Ms. Misja into sending her money to one of its preferred charities. This Court should deny the motion to dismiss.

Section 1983 establishes a cause of action against any person who deprives an individual of federally guaranteed rights "under color" of state law. 42 U.S.C. § 1983. A party has acted under color of state law for purposes of section 1983 when it has "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Harvey v. Plains Twp. Police Dep't, 635 F.3d 606, 609 (3d Cir. 2011) (quoting Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir. 1998); see also White v. Comm'ns Workers of Am., AFL-CIO, Local 1300, 370 F.3d 346, 350 (3d Cir. 2004) ("To establish that challenged conduct was state action, a plaintiff must demonstrate two things[:] . . . the conduct at issue must either be mandated by the state or must represent the exercise of a state-created right or privilege.") (citations and internal punctuation omitted). Any inquiry into a private party's liability as a state actor is "fact-specific" and accordingly necessarily not readily susceptible to

determination on a motion to dismiss except in the clearest of circumstances. Groman v. Township of Manalapan, 47 F.3d 628, 638 (3d Cir. 1995).

The United States Supreme Court and lower courts alike have long considered public-sector unions to be acting under color of state law and subject to constitutional limitations in the context of collecting funds from union nonmembers. See, e.g., Knox, 132 S.Ct. at 2289 ("[C]ompulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.' ") (quoting Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees, 466 U.S. 435, 455 (1984)); Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 181 (2007) ("[A]gency-shop arrangements in the public-sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment"); Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292, 307 (1986) ("The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) ("[T]he Constitution requires only that [union political, partisan, or ideological] expenditures be financed from [union] charges, dues, or

assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."); Hohe v. Casey, 956 F.3d 399, 411 (3d Cir. 1992) ("[W]e believe that the notice sent by Council 13 failed to meet the constitutional standard set forth in Hudson.").

In fact, the PSEA has been held to be acting under color of state law in that context. See Otto v. Pennsylvania State Educ. Ass'n-NEA, 107 F.Supp.2d 615, 619 (M.D. Pa. 2000), aff'd in part, rev'd in part, 330 F.3d 125 (3d Cir. 2003).

Here, the PSEA is a state actor because it claims power under section 575, the Public School Code,[9] and the Public Employee Relations Act.[10] The PSEA only possesses Ms. Misja's money because of those state statutes allowing it to force nonmembers to pay a fair share fee, vesting it with power to determine whether a religious objection is bona fide, and giving it control over such funds and power to require that any proposed charitable donee be "agreed upon" prior to payout. This authority arises solely from statute and is not ex contractu. In fact, Ms. Misja, who is a union nonmember, has no contractual relationship with the PSEA.

Further, the PSEA is a "willful participant in joint activity with the State or its agents." Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982). The PSEA

9. 24 P.S. §§ 11-1101-A – 11-1172-A.
10. 43 P.S. §§ 1101.301 – 1101.2301.

negotiates with the government, requires that the government deduct funds from nonmembers paychecks, and forces employees to make payments as a condition of government employment. More to the point, the Supreme Court has "consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." Id. The PSEA is holding Ms. Misja's money in escrow under authority of Section 575(h) and refuses to release it to Ms. Misja's designated charities unless plaintiff chooses a charity acceptable to the PSEA.

Even assuming arguendo that there is some ambiguity as to factual circumstances surrounding the determination of defendant's susceptibility to private actor liability under section 1983, defendant's motion to dismiss must still be denied in favor of permitting additional fact-finding. See Groman, 47 F.3d at 638.

C. WHETHER MS. MISJA ADEQUATELY STATED CLAIMS FOR VIOLATIONS OF HER FIRST AMENDMENT AND FREE SPEECH RIGHTS

Ms. Misja stated a claim upon which relief can be granted. Accordingly, this Court should deny the PSEA's motion to dismiss and permit Ms. Misja to proceed to the merits of her First Amendment and Free Speech claims.

To survive a motion to dismiss for failure to state a claim, the plaintiff need only "state a 'plausible' claim for relief, and '[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " Thompson v. Real Estate Mortgage Network, 748 F.3d 142, 147 (3d Cir. 2014) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "Under Section 1983, a plaintiff must plead a deprivation of a constitutional right and that the constitutional deprivation was caused by a person acting under the color of state law." Phillips v. Allegheny Cnty., 515 F.3d 224, 235 (3d Cir. 2008).

The United States Supreme Court, in Abood, 431 U.S. at 224, allowed "agency shop" within the public sector—an admitted[11] violation of nonmembers' First Amendment rights not to associate—on the ground that the state had an interest in "labor peace" and prevention of "free riders." Outside that context (and the context of mandatory state bar dues), "there is no threshold compulsory association that has been sanctioned as a permissible burden on employees' free association rights." Acevedo-Delgado v. Rivera, 292 F.3d 37, 42 (1st Cir. 2002).

11. Abood, 431 U.S. at 225 ("The same important government interests recognized in the Hanson and Street cases presumptively support the impingement upon associational freedom created by the agency shop here at issue.").

Here, Ms. Misja stated a plausible claim for deprivation of her First Amendment and Free Speech rights[12] and pled that the PSEA, which deprived her of her rights,[13] was acting under color of state law.[14] Specifically, Ms. Misja alleged that: (1) the First Amendment mandates an expeditious, fair process including notice, an opportunity to be heard, and access to an independent decisionmaker, pursuant to Hudson, 475 U.S. at 307 & n.20;[15] (2) the PSEA violated her rights by prohibiting her from sending her money to certain organizations and compelling her to send her money to an organization she does not support, without an interest sufficient to justify the infringement;[16] (3) the PSEA's practice amounts to a viewpoint-based restriction, using unevenly applied, arbitrary standards;[17] (4) the PSEA's practice includes ad hoc, arbitrary determinations based on subjective, unwritten policies;[18] and (5) the PSEA acts under color of state law because its power is derived from and made possible only by section 575, the Public School Code, and the Public Employe Relations Act.[19]

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12. Complaint, at ¶¶ 31-58
13. Id.
14. Id. at ¶ 6.
15. Id. at ¶¶ 32, 34-41.
16. Id. at ¶¶ 47-48, 54.
17. Id. at ¶¶ 49-54.
18. Id. at ¶ 55.
19. Id. at ¶ 6.

In its brief, the PSEA essentially argues that, because unions are allowed to force payments from nonmembers, it is also permitted to engage in pernicious viewpoint discrimination when a religious objector attempts to select a particular charity.[20] It calls Ms. Misja a "feepayer" and insinuates that she can be coerced into sending money to a charity because, otherwise, she would be a "free rider."[21]

But there is a difference between fair share "feepayers" and religious objectors. In this instance, the Pennsylvania General Assembly has allowed religious objectors to opt out of paying a fair share fee entirely. See 71 P.S. § 575(e) ("[A]ny nonmember may challenge . . . to payment of fair share fees for bona fide religious grounds."). Accordingly, unlike a feepayer, Ms. Misja—whose religious objection has been "accepted" by the PSEA[22]—owes nothing to the union, despite the fact that it continues to "represent" her as a public employee. Instead, she "shall pay the equivalent of the fair share fee to a nonreligious charity agreed upon by the nonmember and the exclusive representative." 71 P.S. § 575(h). That is, while Abood may allow unions to require nonmember fees,

20. PSEA's Brief, at p. 2.

21. Id. at p. 11.

22. See PSEA's Brief, at p. 2 ("Plaintiff objected to paying fair share fees on religious grounds and PSEA accepted Plaintiff as a bona fide religious objector.").

it does explicitly or implicitly allow a union to dictate the identity of the charity selected by a religious objector under section 575.[23]

Neither are the state interests justifying the First Amendment violation in Abood applicable here. It cannot promote labor peace to have unions dictate nonmembers' choices concerning funds to which the union is not entitled, especially when the process itself could continue ad infinitum, without resort to an independent decisionmaker. And religious objectors cannot be considered free riders. See Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO, 643 F.2d 445, 451 (7th Cir. 1981) ("Because a religious objector under a charity-substitute accommodation bears the same financial burden as his co-workers, he is not, as the Union suggests, a 'free rider' seeking something for nothing . . . ."). Although the state may have an interest in ensuring the veracity of religious objections, the PSEA has already "accepted" Ms. Misja's objection as bona fide.[24] There can be no sufficient interest remaining in having a union dictate the identity of the nonreligious charity ultimately selected.

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23. Although Abood does not apply here, Hudson's First Amendment due process considerations are entirely relevant because the impingement on Ms. Misja's First Amendment rights remains, and the process guaranteed to Ms. Misja must facilitate her ability to protect those rights. Hudson, 475 U.S. at 307 & n.20. The real difference between this case and Hudson is that the PSEA has no overriding justification for violating public employees' rights in the first instance.

24. See id.

In fact, the burden of demonstrating a compelling interest is even heavier in this instance, where the union has demonstrated that its practice is to restrict religious objectors' choice on the basis of opposition to charities' viewpoints. See R.A.V. v. City of St. Paul, 505 U.S. 377, 430 (1992). The PSEA's exercise of veto power over nonmembers' use of their money simply to impose its views on nonmembers cannot be (and has not been) justified.

D. WHETHER THE PSEA'S ARBITRARY AND CAPRICIOUS, VIEWPOINT-BASED PRACTICE OF REJECTING CHARITY SELECTIONS AND PERPETUATING THE CHARITY SELECTION PROCESS INDEFINITELY VIOLATES SECTION 575

The PSEA fails to provide any argument to support its arbitrary and capricious, viewpoint-based practice of rejecting charity selections. Nor does it offer any explanation for perpetuating the charity selection process indefinitely. This Court should deny the PSEA's motion to dismiss.

The General Assembly has directed that courts interpreting Pennsylvania statutes apply the following presumptions, inter alia:

> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
> (2) That the General Assembly intends the entire statute to be effective and certain.
> (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.
> (4) That when a court of last resort has construed the language used in a statute, the General Assembly in

> subsequent statutes on the same subject matter intends the same construction to be placed upon such language. (5) That the General Assembly intends to favor the public interest as against any private interest.

1 Pa.C.S. § 1922.

Here, the PSEA rejected Ms. Misja's charity selections on the basis that allowing her money to go to People Concerned for the Unborn Child "would be tantamount to sending your fees to a charity that furthers your religious beliefs, which is contrary to neutral intent and requirements" of section 575. Complaint, at ¶ 19 & Exh. C. It also rejected the NRA Foundation and told Ms. Misja that it had "a policy of not agreeing to the charitable subsidiaries of political organizations." Id. at ¶ 25 & Exh. C.

These ad hoc, arbitrary determinations based on subjective, unwritten policies violate section 575, properly construed. Surely, the General Assembly did not intend to grant to the PSEA the right to withhold its agreement indefinitely, to deny access to an independent decisionmaker, or to apply arbitrary "policies" to serially reject a religious objector's choices of charity. To hold otherwise would be to embrace a reading of section 575 that produces absurd and unreasonable results, creates an ineffective process fraught with uncertainty, conflicts with the

United States and Pennsylvania Constitutions, and favors the private interests of public-sector unions as opposed to the public interest.

In short, Ms. Misja has stated at least a plausible claim for relief. The motion to dismiss should be denied.

E. WHETHER MS. MISJA ADEQUATELY STATED A CHALLENGE TO THE FACIAL CONSTITUTIONALITY OF SECTION 575

The PSEA also fails to provide this Court with any reason to dismiss Ms. Misja's alternative count challenging the facial constitutionality of section 575 in the event that the PSEA correctly construes section 575. As alleged in the Complaint, section 575's "agreed upon" language, "if applied mechanically, would either produce absurd or unconstitutional results," Complaint, at ¶ 84, including an indefinite charity selection process without statutory guidance on process or substance and without legal remedy. Complaint, at ¶ 84. This is, as it happens, exactly the reading that the PSEA would have this Court adopt. See Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008) ("Our cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in

relation to the statute's plainly legitimate sweep.") (internal quotation marks omitted).

IV. CONCLUSION

For the foregoing reasons, this Court should deny the PSEA's motion to dismiss.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with the word-count limit described in Local Rule 7.8(b)(2). According to the word count feature of the word-processing system used to prepare the brief, it contains 4,969 words.

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PROOF OF SERVICE

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