No. 19-2391

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GREGORY J. HARTNETT; ELIZABETH M. GALASKA;
ROBERT G. BROUGH, JR.; JOHN M. CRESS,
Plaintiffs-Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; HOMER-CENTER EDUCATION ASSOCIATION; TWIN VALLEY EDUCATION ASSOCIATION; ELLWOOD AREA EDUCATION ASSOCIATION; HOMER-CENTER SCHOOL DISTRICT; TWIN VALLEY SCHOOL DISTRICT; ELLWOOD CITY AREA SCHOOL DISTRICT,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

It is said an individual is defined by their conduct when no one else is looking. When no one else was looking here, Defendants-Appellees (collectively, "Unions") fashioned numerous collective bargaining agreements ("CBAs"), despite *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), that carry on the violation of the First Amendment they promised to discontinue. Worse, Unions were fully aware of the unconstitutionality of these CBAs—as evidenced by their admissions to the trial court and this Court. Def.'s Mot. Dismiss 2–3, ECF No. 64; Br. of Appellees ("Appellees' Br.") 5–7. However, the trial court decided to ignore this conduct and only focused on the partial remedial actions taken by Unions in this litigation. (1:17–20).[1]

At the very least, the trial court's analysis is flawed because it failed to factor Unions' "surprising" and disconcerting conduct into its mootness assessment. (1:19). But that conduct was clearly relevant under controlling Supreme Court precedent, which requires the trial court to ensure it is "absolutely clear" that the wrongful behavior will not reoccur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 186 (2000). In addition, the trial court ignored Unions' previously demonstrated willingness to play fast and loose with Supreme Court precedent, and it failed to apply the proper voluntary cessation analysis, including the heavy and

[1] References to the Joint Appendix appear as follows: "([volume number]:[page number])."

formidable burden Unions bear, dictated by the Supreme Court. Accordingly, this Court should overturn the ruling of the trial court.

II. ARGUMENT

A. The Standard of Review is *De Novo,* Not Clear Error

Contrary to Unions' suggestion that the standard of review should be clear error, Appellees' Br. *passim*, the Court of Appeals reviews questions of mootness *de novo*. *CMR D.N. Corp. v. Phila.*, 703 F.3d 612, 622 (3d Cir. 2013) ("We review *de novo* a trial court's determination that claims are moot.").[2] Mootness is not a factual question; it is a legal question relevant to subject matter jurisdiction.

In addition to reviewing mootness *de novo*, this Court must also consider "which party bore the burden of proof." *EEOC v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1173 (10th Cir. 2017). Here, the Unions bear the "'heavy,' even 'formidable'" burden of proof to persuade the Court that this case is moot. *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (quoting *United States v. Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004)).

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[2] The other Circuit Courts agree. *See e.g.*, *EEOC v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1173 (10th Cir. 2017) ("We review de novo whether a claim is moot."); *Zessar v. Keith*, 536 F.3d 788, 793 (7th Cir. 2008) ("Whether a case has been rendered moot is a question of law that we review de novo."); *Anderson ex rel. Dowd v. City of Bos.*, 375 F.3d 71, 80 (1st Cir. 2004) (same); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004) (same); *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 463 (5th Cir. 2003) ("Mootness is a jurisdictional question, that this Court will determine *de novo.*"); *Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995) (same); *Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994) ("[W]e review *de novo* the questions of standing and mootness because they are questions of law.").

B. Unions' Supposed Voluntary Cessation of Unconstitutional Activity Does Not Moot this Case

The trial court's basis for mootness in this case was Unions' supposed voluntary cessation of their unconstitutional actions.[3] Although Unions agree that "the district court applied the correct legal standard," Unions also argue, surprisingly, that the voluntary cessation exception to mootness is inapplicable because their conduct was supposedly *in*voluntary. Appellees' Br. 14–15. Instead, Unions assume another mootness doctrine applies—what doctrine, they do not say—because "the Plaintiffs have failed to account for the actions of government actors." *Id.* at 30. The Unions' arguments distort the trial court's decision in an apparent effort to save it on review.

Even as they advocate for some other standard, Unions rely on *Friends of the Earth,* 528 U.S. 167, and appear to endorse the trial court's application of that standard, *see* Appellees' Br. 20 ("The district court correctly determined that the ultimate question in a case such as this is whether 'the allegedly wrongful behavior could not reasonably be expected to recur.'"). In fact, Unions argue that "the district

[3] The trial court stated that "[t]he Supreme Court has announced a 'stringent' standard for 'determining whether a case has been mooted by the defendant's voluntary conduct.'" (1:10 (quoting *Friends of the Earth*, 528 U.S. at 189). The court then further explained that the stringent standard delineated by the Supreme Court for voluntary cessation requires subsequent events to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (1:10 (quoting *Friends of the Earth*, 528 U.S. at 189)). Ultimately, the trial court arrived at the incorrect result, but the "absolutely clear" requirement was the only one that the district court used or cited in its analysis. (1:17–20).

court properly focused on whether the [Teachers] could assert claims for prospective relief based on a likelihood that they would be subjected to the same conduct in the future." *Id.* at 20–21. However, as Unions must admit, *Friends of the Earth* is a case about voluntary cessation, not the other standard for which Unions truly advocate.

Under the correct application of that standard, the trial court was wrong to accept the Unions' mere promise to comply with *Janus* and doubly wrong to do so in the face of the "surprising" evidence that Unions were continuing the unconstitutional practices they promised to cease. In a recent example involving application of *Friends of the Earth*'s voluntary cessation standard, the Supreme Court held that the Governor of Missouri's statement that it would comply with the First Amendment and allow religious organizations to receive grants on the same terms as secular organizations did not moot the case because the Governor could always reinstate his unconstitutional policy in the future. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). The Supreme Court in *Trinity Lutheran* reasoned:

> We have said that such voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). The Department has not carried the "heavy burden" of making "absolutely clear" that it could not revert to its policy of excluding religious organizations. *Id.*

Id.

In any event, Unions are seriously misguided when they argue that their actions are involuntary because of *Janus*. In fact, Unions voluntarily and without a court order decided that they would follow their interpretation of the law and cease questionable conduct. No matter the motivation, Unions say they have replaced their questionable conduct with lawful conduct, temporarily eliminating the challenged behavior. *See e.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (explaining that a "formidable burden" exists for defendants to demonstrate mootness based on voluntary cessation, because of the concern defendants might use cessation as a means to defeat jurisdiction and continue their wrongful behavior). "Voluntary cessation" is the correct term and the correct standard.

Indeed, the notion that voluntary cessation does not exist because legal precedent was the motivation behind the change is absurd. The paradigmatic application of the standard is when a defendant violated the law, but then temporarily ceases *by adopting lawful conduct*. *Id.*; *accord Friends of the Earth*, 528 U.S. at 189 (holding that compliance with a government permit was an act of voluntary cessation); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (holding that a city's repeal of objectionable language to comply with the Constitution was an act of voluntary cessation); *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) ("voluntary cessation of allegedly illegal conduct . . . does not make the case moot," meaning that cessation by definition is the substitution of illegal conduct with legal conduct).

Adopting lawful conduct does not remove a case from the scope of the standard—it is the precise pattern that triggers the doctrine.

A telling indication that the voluntary cessation standard is applicable here—besides the trial court's and Unions' unwitting references to it—is the fact that the trial court based its mootness determination almost exclusively on Unions' voluntary conduct. Taking the trial court at its word, this case would not be moot *but for* the deliberate efforts of Unions to make it go away. The issue here is whether the trial court properly *applied* the voluntary cessation standard. It did not.

C. The Trial Court Misapplied the Voluntary Cessation Standard

Although the trial court identified the correct standard—voluntary cessation—it failed to properly apply Supreme Court precedent in at least two crucial respects: first, it failed to consider relevant evidence demonstrating that Unions have not "fully complied" with *Janus*; and second, the trial court failed to analyze whether Unions' voluntary conduct "irrevocably eradicated" the effects of the violation.

The Supreme Court has consistently held that voluntary cessation ordinarily does not make a case moot, because dismissal would permit the challenged conduct to resume as soon as the case is dismissed. *Knox v. Serv. Emps Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). Because of this concern, the Supreme Court has emphasized that the standard for mootness based on voluntary concession is "stringent." *Friends of the Earth*, 528 U.S. at 190. That stringent standard requires defendants to bear the

"heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* at 189.

Further, Supreme Court precedent entails a two-pronged analysis. According to the Court, an issue only becomes moot through voluntary cessation when: "(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." *L.A. Cty. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *W. T. Grant*, 345 U.S. at 633). A case becomes moot only when *both* conditions are satisfied. *Id.*; *accord Golden State Transit Corp. v. L.A.*, 475 U.S. 608, 613 (1986) (holding that a case was not moot because of the remaining effects of an alleged violation); *L.A. v. Lyons*, 461 U.S. 95, 101 (1983) (same).

1. The Trial Court Failed to Require Unions to Meet Their Stringent Burden of Proving the Unconstitutional Actions Will Not Recur

The trial court failed to meaningfully apply the requirement that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. Although the court considered promises made and remedial actions taken by Unions in this case, the court ignored evidence demonstrating that the wrongful behavior is likely to recur—and was and is still ongoing. Well after—and despite—*Janus*, the Pennsylvania State Education Association ("PSEA") and other local affiliates continued to enter into CBAs that included fair share fee provisions. (3:499–735).

During the appeal, Plaintiffs-Appellants (collectively, "Teachers") have discovered that number is likely much higher.[4] In addition to the seven CBAs that included fair share fee requirements that Teachers disclosed to the trial court, there are at least seven more CBAs that include fair share fee requirements that were executed after *Janus* and as recently as July 2019. Decl. of Lindsey Wanner Exs. A–G. In total, Teachers have uncovered fourteen such CBAs—enacted after *Janus*—that openly defy *Janus* and violate the First Amendment. Furthermore, after the *Janus* decision, Appellant PSEA continued to advertise on its website that PSEA local associations could still collect fair share fees and that negotiating fair share fees provisions into CBAs was its priority. Pl.'s Reply Br. in Supp. of Their Mot. for Summ. J. 8–9, ECF No. 73.

In addition to the CBAs that have been drafted in contravention of *Janus*, Unions have still never removed the unconstitutional section implementing the

[4] Teachers request that this Court take judicial notice of seven additional certified CBAs executed on varying dates following the *Janus* decision, which contain fair share fee requirements for nonmember school district employees as a condition of employment. *See* Decl. of Lindsey Wanner Exs. A–G. "Federal Rule of Evidence 201 authorizes a court to take judicial notice of an adjudicative fact if that fact is 'not subject to reasonable dispute. . . . Judicial notice may be taken at any stage of the proceeding,' including on appeal . . . ." *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205–06 (3d Cir. 1995) (citations omitted). As these CBAs are official, certified documents obtained from school districts, Wanner Decl. ¶¶ 3-9, their authenticity is not subject to reasonable dispute.

challenged Pennsylvania fair share fee statute in one of Teachers' CBAs.[5] (1:18). That is, the same "surprising" conduct happening in other parts of the Commonwealth is also happening in this case. (1:19).

This pattern of conduct is difficult to explain by mere negligence,[6] especially considering the monumental impact of *Janus* and Unions' vows of adherence thereto. What this conduct demonstrates is that Unions are not only willing[7] but able to impose fair share fee requirements in CBAs even after *Janus*, and they do it despite their contrary promises to the trial court.

Unions maintain that these unconstitutional CBA provisions are not evidence of their true intent in this case. Shockingly, the trial court, after acknowledging its surprise at these CBAs, (1:19), tacitly accepted Unions' contention. But this is wrong as a matter of law. It is well settled that those entering into contracts "are presumed to have intended the necessary, natural and probable consequences of their acts and agreements." *Bluefields S S Co. v. United Fruit Co.*, 243 F. 1, 14 (3d Cir. 1917).

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[5] The CBA that Appellant Elizabeth M. Galaska's is still subject to, negotiated by Appellees PSEA and Twin Valley Education Association, still contains language that mandates nonmembers to pay fair share fees as a condition of employment. (1:18; 2:45, 323).

[6] Unions never explained to the district court and have failed to explain to this Court why they have continued to enact CBAs after *Janus* with fair share fee provisions.

[7] This is not surprising as it is consistent with Appellant PSEA's history of ignoring and violating past Supreme Court decisions it dislikes. Br. of Appellants 20–22.

Because individuals and entities do not always disclose their intent, intent is often gathered through the character of a person's or entity's actions and the surrounding circumstances, including from "conduct of a like character." *Cook v. United States*, 159 F. 919, 921 (3d Cir. 1908). This trial court was wrong to find that Unions' actions in defiance of *Janus* elsewhere are not evidence of or relevant to their intent in this case.

After *Janus*, Unions have been caught, again and again, entering into CBAs purporting to do what they have disavowed while the courts were looking. This conduct matches a past pattern of untoward behavior concerning compliance with earlier "inconvenient" Supreme Court precedent. Br. of Appellants 20–22. This historical and current conduct, which the trial court ignored, is critically important, because it goes directly to Unions' intent and credibility.

Even if Teachers were not covered by the CBAs violating *Janus*, the existence of Unions' broader conduct and compliance with constitutional law is relevant to determine the sincerity of Unions' promises and its ability to fulfill those promises. And the sincerity of a voluntary cessation is vital, since the primary concern is that a defendant might defeat jurisdiction only to resume the challenged conduct. *See e.g.*, *Knox*, 567 U.S. at 307 (noting that "resumption of the challenged conduct as soon as the case is dismissed" is the central concern regarding voluntary cessation); *W. T. Grant*, 345 U.S. at 632 n.5 ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform."); *see also Aladdin's Castle*,

455 U.S. at 289 (holding that a case was not moot, because there was "no certainty" that defendants would not resume the challenged conduct if its voluntary cessation defeated jurisdiction). Thus, Unions' broader compliance with *Janus* and relevant past conduct are critical to effectively evaluate Unions' credibility in this situation.

When all the evidence is considered, instead of selectively examined, it is clear that Unions failed to meet their "formidable burden of showing that it is absolutely clear" that its wrongful behavior will not recur. Although Unions recite the formidable burden established by the Supreme Court, they only pay lip services to its requirements. But conflicting evidence is the antithesis of "absolutely clear." Far from "fully complying" with *Janus*, as Unions contend, Unions have continued to bargain for and encourage the execution of CBAs in direct defiance of *Janus*.

Given Unions' past reluctance to comply with Supreme Court precedent and current willingness to execute contracts in contravention of *Janus* to enforce the Pennsylvania fair share fee statute, it is impossible to conclude that it is "absolutely clear" the wrongful behavior will not recur. The trial court was wrong in dismissing the case as moot.

2. The Trial Court Failed to Consider Whether Unions' Conduct Has Irrevocably Eradicated the Effects of Their Long-Term Violation of the First Amendment

The trial court also failed to analyze the remaining effects of Unions' constitutional violations. When challenges to discontinued action exists, "[t]he court must decide whether there has been complete discontinuance, whether effects

continue after discontinuance, and whether there is any other reason that justifies decision and relief." 13C Wright et al., *Federal Practice and Procedure* § 3533.7 (3d ed.). An issue is not moot when discontinued activity continues to have present effects. *Davis*, 440 U.S. at 631; *accord Golden State Transit Corp.*, 475 U.S. at 613; *Lyons*, 461 U.S. at 101.

Here, there are still remaining effects from past violations, namely, the challenged Pennsylvania statute remains enforceable and CBAs, including one in this case, exist that require payment of fair share fees. First, the existence of the Pennsylvania statute is a remaining effect of a past constitutional wrong that Unions are attempting to moot through voluntary conduct. The continued existence of the statute negates a finding of mootness, particularly because something remains for the court to do: enjoin enforcement of the statute under which Unions, and, particularly Appellant PSEA, are continuing to negotiate fair share fee provisions. The statute is particularly relevant given the existence of CBAs after *Janus* that purport to enforce the challenged Pennsylvania statute.

Second, the effects of the unlawful conduct have not been eliminated, because CBAs exist, including one in this case, that chill workers' First Amendment rights. *See e.g.*, *Charles v. Daley*, 749 F.2d 452, 458 (7th Cir. 1984). The existence of CBAs that require nonmembers to pay fair share fees as a condition of employment abuts Teachers' First Amendment right to voluntarily choose whether to fund union representation. The mere existence of CBAs that contain fair share fee provisions

encumber workers' ability to exercise their constitutional rights, whether they are enforced or not. Some teachers may not be aware of their constitutional rights, and others may be misled by CBA provisions that on their face require nonmembers to pay fair share fees.

Employees are entitled to rely on their CBAs, especially those that purport to enforce Pennsylvania law. However, these CBAs misinform employees that fair share fees are required and, at best, create a legal maze for employees to understand their rights. Even the trial court was surprised by post-*Janus* CBAs that require nonmembers to pay fair share fees. (1:19). The CBAs and Pennsylvania law misleadingly inform workers of their legal obligations, and therefore chill the exercise of constitutional rights recognized by *Janus*.[8]

In sum, Unions and Amicus have not demonstrated that the actions taken post *Janus* have irrevocably eradicated the effects of their long-term violation of the First Amendment. Neither Union nor Amicus have demonstrated that the chilling effects caused by their actions no longer exist. In fact, the Teachers have demonstrated that these actions are continuing to proliferate. Decl. of Lindsey Wanner Exs. A–G. Therefore, it was additionally improper for the trial court to dismiss this case as moot.

D. The Trial Court's Reliance on Other District Court Cases is Misplaced

[8] There is no evidence that Unions provided adequate notice that illegal language was removed by, for instance, distributing the few MOUs rescinding the those provisions. (Appellees' Br. 13, 37–39.)

The trial court and Unions argue that this case is moot because other lower courts have reached similar conclusions. (1:20); Appellees' Br. 26–27. However, their reliance on those cases is inapposite for at least two reasons.

First, none of the other district court cases involving mootness after *Janus* involved evidence of contrary intent, and those courts were careful to note as much. *See, e.g.*, *Diamond v. Pennsylvania State Educ. Ass'n*, No. 3:18-CV-128, 2019 WL 2929875, at *16 (W.D. Pa. July 8, 2019) (citing "absence of any reason to think Union Defendants will resume collecting fair-share fees").[9] It is well settled that "mootness is readily denied if the defendant has not actually discontinued the challenged activity or has discontinued it only in part, or if it is simply continued in a new form." 13C Wright et al., *Federal Practice and Procedure* § 3533.7 (3d ed.).

Second, many of the lower court cases on which the trial court and Unions rely mistakenly conflate judicial determinations and changes in law by the legislature. *Diamond*, 2019 WL 2929875, at *16 ("The law of the land thus has changed and there

[9] *See also Hamidi v. Serv. Employees Int'l Union Local 1000*, 386 F. Supp. 3d 1289, 1297 (E.D. Cal. 2019) ("no indication that defendants have employed the challenge opt-out system" since their concession); *Carey v. Inslee*, 364 F. Supp. 3d 1220, 1227 (W.D. Wash. 2019) ("while the policy has not been in place for long there is no evidence that WEA has deviated from it"); *Cook v. Brown*, 364 F. Supp. 3d 1184, 1189 (D. Or. 2019) ("I see no reason to assume, without evidence, AFSCME's willingness to flagrantly violate the law."); *Yohn v. California Teachers Ass'n*, No. SACV 17-202-JLS-DFM, 2018 WL 5264076, at *3 (C.D. Cal. Sept. 28, 2018) ("Further, there is no evidence that they have attempted to collect fees in violation of *Janus*."); *Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1339 (W.D. Wash. 2018) ("no evidence that the State has equivocated in its policy change to discontinue collecting agency fees.").

no longer is a legal dispute as to whether public sector unions can collect agency fees." (quoting *Lamberty v. Connecticut State Police Union*, No. 3:15-CV-378 (VAB), 2018 WL 5115559, at *9 (D. Conn. Oct. 19, 2018))); *Hamidi*, 386 F. Supp. 3d at 1296 (stating that *Janus* invalidated every state law and affected the rights of parties not immediately before it); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980, 982 (N.D. Ohio 2019) (same); *Cook*, 364 F. Supp. 3d at 1189 ("a reversal of Supreme Court precedent is analogous to a statutory change that 'bespeaks finality'").

When a legislature officially rejects a statute, it may either repeal or replace that statute, and the original statute no longer exists. Therefore, cases seeking prospective relief become moot when the legislature repeals a statute, because the challenged statute no longer exists and any controversy is eliminated. *New Orleans Flour Inspectors v. Glover*, 160 U.S. 170 (1895); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 4157 (1972); *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000). In such circumstances, there is nothing remaining for a court to enjoin.

By contrast, courts have no power to annul or repeal a statute, and so issues concerning that statute persist even after courts interpret the statute. Judicial review only allows a court to decline to enforce a statute or to enjoin its enforcement. Thus, there remains a statute for the court to enjoin.

In addition, judicial decisions do not impose legal obligations on non-parties and require enforcement, unlike repealed statutes that no longer exist. The court

decisions Unions and the trial court relied on are therefore fundamentally irrelevant to the situation here because they assume a judicial decision involving nonparties should be treated the same as a legislative repeal of that statute. That assumption is mistaken both in fact and as a matter of law.

E. Declaratory Relief is Necessary and Appropriate

The trial court was wrong in believing there was no relief it could grant. The challenged Pennsylvania statute continues to exist, and none of the parties are directly bound by *Janus*. Thus, there are still things that this Court can do, unlike the scenario that would exist if Pennsylvania's General Assembly had repealed the challenged statutes. To date, the General Assembly has not repealed the statute and no court, either federal or state, has enjoined the enforcement of the challenged Pennsylvania statutes.

While Unions claim that *Janus* provides the constitutional rubric, their statements lack force of law and should be recognized in the context of their fierce, longstanding defense of the challenged Pennsylvania statute. *See Rogers v. Virginia State Registrar*, No. l:19-cv-01149 (RDA-IDD), at *15 (E.D. Va. Oct. 11, 2019) (opinion attached as an addendum hereto). In Pennsylvania, the law remains unchanged. Therefore, a controversy remains to be settled.

In these circumstances, the Supreme Court has issued unambiguous directions: when a controversy "may remain to be settled," the "public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States*

v. W. T. Grant Co., 345 U.S. 629, 632 (1953). Consequently, this case is not moot, and declaratory relief is appropriate.

F. Injunctive Relief is Necessary and Prudential

Also, on remand, an injunction is necessary to prohibit Unions from enacting further CBAs with fair share fee requirements and to remove the current requirement affecting Appellant Elizabeth M. Galaska. As previously noted, the burden of proof is on Unions, to prove that they will not return to their unconstitutional behavior. *See Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135–36 (9th Cir. 1986).

If Unions sincerely intend not to infringe Teachers' First Amendment rights, as they are quick to promise but slow to perform in reality, an injunction does no harm. If, on the other hand, they do infringe as the current evidence suggests they are infringing, it provides substantial protection to the Teachers and serves the interests of judicial economy. Thus, there is no harm in the trial court granting injunctive relief, but significant harm will occur requiring further litigation and expenditure of precious judicial resources if the court fails to grant injunctive relief.

III. CONCLUSION

In sum, the trial court erred in denying Teachers' motion for summary judgment and in concluding that Unions' voluntary change in position deprived it of subject matter jurisdiction. Accordingly, this Court should reverse the trial court and remand for further proceedings so that Teachers can obtain their requested relief, including an award of reasonable attorneys' fees and costs.

Respectfully submitted,

Dated: November 8, 2019

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CERTIFICATIONS

The undersigned hereby certifies the following:

a. I am a member of the bar of this Court.

b. The text of the electronic version of this brief and attachments is identical to the text in the paper copies sent to this Court and counsel of record.

c. This brief complies with type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 4,557 words according to the word-processing system used to prepare the document.

d. The virus protection program, Sophos Endpoint, has been run on the electronic, PDF file of this brief and related attachments and no virus was detected.

e. This Reply Brief, and related attachments, have been electronically filed and served this day with the Clerk of Court using the Court's CM/ECF system. All participants were served on this day electronically through the Court's docketing system which constitutes service under Local Appellate Rule Misc. 113.4(a). Seven (7) paper copies of the Reply Brief and attachments were mailed via commercial carrier on this day to this Court at 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106-1790.

Respectfully submitted,

Dated: November 8, 2019

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