IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

JANE LADLEY and CHRISTOPHER MEIER, Plaintiffs	:	
v.	:	No. CI-14-08552
PENNSYLVANIA STATE EDUCATION ASSOCIATION, Defendant.	:	

OPINION

Presently before the court are the parties' cross motions for summary judgement. After briefing by both sides, this matter is ripe for review. For the reasons that follow, defendant's motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied.

The dispute between the parties involves the payment of union dues and pictures the contention created when a public union attempts to compel nonmembers to subsidize private speech. Plaintiff's, Jane Ladley[1] and Christopher Meier are public-sector employees in the public schools of Pennsylvania. They both, for various reasons, object to compulsory union dues payments. The court is guided in its analysis of the dispute by the recent decision of the Supreme Court of the United States in Janus v. AFSCME Council 31, 138 S.Ct. 2448 (2018). Plaintiffs, relying on Janus, argue that they are entitled to summary judgment. Defendant, Pennsylvania State Education Association ("PSEA"), relying on changes it has made since the Janus decision, contends that plaintiffs' claims are now moot.

[1] Ms. Ladley retired from teaching after this lawsuit commenced.

I. PROCEDURAL HISTORY

In September 2014, plaintiffs filed a declaratory judgment action challenging PSEA's implementation of the religious objector provisions of the Pennsylvania Fair Share Law, 71 P.S. 575(h) ("section 575(h)"). Plaintiffs sought declaratory and injunctive relief. On October 9, 2014, PSEA filed preliminary objections.

The court's order of June 30, 2015, disposed of the defendant's preliminary objections, sustaining all preliminary objections except those of Counts I (Ms. Ladley's right to due process), III (Ms. Ladley's right to freedom of speech and association), V (violation of statute by misconstruing "agreed upon" with respect to Ms. Ladley), VI (violation of statute by misconstruing "agreed upon" with respect to Mr. Meier), and Alternative Count I (constitutionality of section 575(h)). On July 20, 2015, plaintiffs filed their first amended complaint which included a claim for violation of due process under the Pennsylvania Constitution. Plaintiffs again sought declaratory and injunctive relief. Defendant filed preliminary objections that were disposed of by court order dated April 20, 2016. The court ruled that: (1) PSEA is a state actor; (2) no viable claim for violation of due process under the Pennsylvania Constitution exists; (3) no first-amendment issues, federal due process issues or state constitutional claims with respect to the same exist; (4) plaintiffs failed to make the necessary argument under Com. v. Edmunds, 586 A.2d 887 (Pa. 1991) or DePaul v. Com., Pennsylvania Gaming Control Bd., 969 A.2d 536 (Pa. 009); (5) plaintiffs' allegations of PSEA being unreasonable survived preliminary objections, but plaintiffs' contention that PSEA could not act as an agent of the bargaining unit did not; and (6) injunctive relief is not warranted as a remedy for money damages exists. This judge is bound by the law of the case decided in these prior orders.

On April 25, 2017, plaintiffs filed their second amended complaint to which defendant filed an answer and new matter. Plaintiffs' second amended complaint contains the following counts: Count I – denial of due process under the United States Constitution as applied to Ms. Ladley; Count II – denial of due process under the United States Constitution as applied to Mr. Meier; Count III – denial of due process under the Pennsylvania Constitution as to Ms. Ladley; Count IV – denial of due process under the Pennsylvania Constitution as to Mr. Meier; Count V – violation of federal rights to free speech, association, and expression as to Ms. Ladley; Count VI – violation of federal rights to free speech, association, and expression as to Mr. Meier; Count VII – violation of state rights to free speech, association, and expression as to Ms. Ladley; Count VIII – violation of state rights to free speech, association, and expression as to Mr. Meier; Count IX – violation of plain language of section 575 as to Ms. Ladley; Count X – violation of plain language of section 575 as to Mr. Meier; Count XI – violation of 42 U.S.C. §1983 as to Ms. Ladley; Count XII – violation of 42 U.S.C. §1983 as to Mr. Meier; and Count XIII – request for a permanent injunction against PSEA.

Plaintiffs filed their motion for summary judgment on June 30, 2017, to which defendant filed an answer and cross-motion for summary judgment. The parties briefed their motions and after it became clear that the United States Supreme Court would hear the Janus case, the parties filed a joint motion to stay this case pending the outcome of Janus. The case was stayed on October 11, 2017, and the stay lifted on July 31, 2018.

Defendant withdrew its cross-motion for summary judgment on August 29, 2018, and filed a new motion for summary judgment on the same date asserting that the case is now moot. Plaintiffs responded on September 18, 2018. On October 22, 2018, defendant filed a notice to the court of changed circumstances, drawing the court's attention to guidance issued by the

Pennsylvania Department of Labor and Industry, and two new federal cases addressing similar issues to the case at hand.

II. FACTS

Plaintiff, Jane Ladley ("Ms. Ladley") was a public school teacher in Chester County, Pennsylvania, and was not a union member. Plaintiff, Christopher Meier ("Mr. Meier") is a public school teacher in Lancaster County, Pennsylvania, and a non-union member. PSEA is a non-profit statewide employee organization organized under the laws of the Commonwealth of Pennsylvania. Both Ms. Ladley and Mr. Meier, as non-union members, lodged religious objections to paying any dues or fees to PSEA pursuant to section 575(h). There is no dispute that PSEA accepted their objections.

Plaintiff Jane Ladley

Prior to her retirement, Ms. Ladley had been a Pennsylvania public school teacher in the Avon Grove School District for seventeen years. The Avon Grove Education Association ("AGEA") is Ms. Ladley's exclusive representative for collective bargaining. Effective March 13, 2013, the AGEA and Avon Grove School District entered into an "agency shop" agreement. The agency-shop agreement requires Ms. Ladley to pay to AGEA an annual fee ("fair share fee")[2] related to collective bargaining expenses. The fair share fee for Ms. Ladley was approximately $435.14 per year.

[2]A "fair share fee" is defined as "the regular membership dues required of members of the exclusive representative less the cost for the previous fiscal year of its activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative." 71 P.S. § 575(a).

On December 12, 2013, PSEA notified Ms. Ladley that she, as a non-union member ("nonmember"),[3] would have to pay a fair share fee as a condition of her employment. On January 4, 2014, Ms. Ladley notified PSEA that she objected to the payment of fair share fees on bona fide religious grounds. On March 7, 2014, PSEA accepted Ms. Ladley's claim of a religious objection, and asked her to designate a charity to receive her fair share fee. On March 16, 2014, Ms. Ladley requested that her fair share fee be paid to the Coalition for Advancing Freedom's ("CFAF") "Sustainable Freedom Scholarship." This college scholarship fund is designed to "encourage our youth to become knowledgeable about the U.S. Constitution and the principles of freedom upon which our Country was founded." Second Am. Compl. ¶ 24, Ex. G. On March 19, 2014, PSEA rejected Ms. Ladley's designated charity on the basis that PSEA has a "policy of not allowing political organizations to receive fair share fees." Id. ¶ 25, Ex. H.

On March 30, 2014, Ms. Ladley requested clarification of this policy. On March 31, 2014, PSEA responded that it had also refused Ms. Ladley's designated charity as it considered that charity to be religious. On May 5, 2014, Ms. Ladley notified PSEA that she had chosen an alternate charity to be the recipient of her fair share fee, the Constitutional Organization of Liberty ("COOL"). Ms. Ladley contacted PSEA on June 24, 2014, after failing to receive a response to her proposal for an alternate charity. Id. ¶ 27. On March 3, 2015, nearly a year later, PSEA notified Ms. Ladley, through counsel, that it rejected her selection of COOL on the ground that it was "a partisan organization."

After Ms. Ladley retired, Avon Grove and the AGEA entered into a new collective bargaining agreement for the period of July 1, 2014 through June 30, 2017, that continued the

[3]A "nonmember" is defined as "an employe of a public employer, who is not a member of the exclusive representative, but who is represented in a collective bargaining unit by the exclusive representative for purposes of collective bargaining." Id.

public-sector union shop within the school district. At the time of the filing of the second amended complaint, Ms. Ladley's funds were in escrow. However, after the Janus decision, PSEA has refunded Ms. Ladley her fair share fees plus interest in the amount of $437.52.

Plaintiff Christopher Meier

Mr. Meier is a Pennsylvania public school teacher in the Penn Manor School District in Lancaster County. The Penn Manor Education Association ("PMEA") is Mr. Meier's exclusive representative for collective bargaining. Effective July 1, 2012, the PMEA and Penn Manor School District entered into an agency-shop agreement. The agency-shop agreement requires Mr. Meier, as a nonmember, to pay PMEA an annual fair share fee of approximately $435.14. On December 11, 2012, PSEA notified Mr. Meier that he would have to pay a fair share fee. On January 10, 2013, Mr. Meier notified PSEA that he objected to the payment of a fair share fee on bona fide religious grounds. Mr. Meier selected the National Right to Work Legal Defense Foundation ("NRWLDF") as the charity to receive his fair share fee.

On February 21, 2013, PSEA notified Mr. Meier that it would not agree to remit the fair share fee to NRWLDF, provided him with a list of charities that PSEA would accept, and asked for more information about his religious beliefs in order to determine whether Mr. Meier's objection was religious in nature. Mr. Meier wrote to PSEA through regular and electronic mail five times between March 13, 2013, and January 17, 2014, but did not receive a response until June 26, 2014.

On June 26, 2014, PSEA responded and requested that Mr. Meier provide further explanation as to why his objection was religious. On June 27, 2014, Mr. Meier contacted PSEA and explained the basis for his religious objection. On July 31, PSEA accepted that Mr. Meier's objection was religious but rejected the NRWLDF as an acceptable charity to receive his fair

share fee. PSEA claimed that its rejection was due to a fundamental conflict of interest between it and the NRWLDF, as the NRWLDF has previously sued PSEA and the National Educational Association ("NEA"). PSEA provided a list of twelve acceptable charities to which it would agree to send Mr. Meier's fair share fee. At the time of the filing of the second amended complaint, Mr. Meier's fair share fees were in escrow. However, since the Janus decision, PSEA has refunded to Mr. Meier his fair share fees plus interest in the amount of $2,718.28.

Plaintiffs' second amended complaint seeks declaratory and injunctive relief with respect to PSEA's policy of refusing to agree to remit fair share fees to charities with which it does not approve. Plaintiffs claim that this policy, as applied to Ms. Ladley and Mr. Meier, violates their right to due process,[4] freedom of speech, and association. Plaintiffs also allege that PSEA has violated the express language of section 575(h), which plaintiffs assert requires that only the exclusive representatives (AGEA and PMEA) may negotiate with plaintiffs to resolve a dispute and that the resolution should be timely. This challenge is no longer a prima facie challenge to the law as was alleged in plaintiffs' prior complaints, but is only an as-applied challenge of the law to them.

PSEA's Procedures and Current Position

On July 12, 2016, PSEA adopted new procedures for handling disputes such as the ones described above, where teachers and the union cannot agree on a charitable organization to which to donate the fair share fee. The new procedures provide, among other things, that PSEA will only approve a religious objector's nonreligious charity if "[t]he charity does not advance policies or positions inconsistent with PSEA or NEA constitution and bylaws, resolutions, or

[4] The Honorable James P. Cullen dismissed plaintiffs' due process claims and exclusive representation claims by prior order, which is the law of the case. There are no new factual allegations in plaintiffs' second amended complaint that would disturb Judge Cullen's conclusions.

policies." Rather than implementing a framework to agree upon a charity "by the nonmember and the exclusive representative" as required by section 575(h), PSEA's policy directs where a payment will go.

On the day the Supreme Court announced the Janus decision, PSEA contacted all affected employers and directed them to immediately stop processing fair share fees. The PSEA sent a letter to each fair share fee payer on July 2, 2018, informing nonmembers that they are no longer required to pay fair share fees and that PSEA had directed the employers to cease collecting them. Further, PSEA explained that it would be refunding any fees collected attributable to the period after June 27, 2017.

On July 6, 2018, the parties filed a joint notice of subsequently decided authority, that being the United States Supreme Court's Janus decision. Janus has vindicated the position of the plaintiffs, but the question remains whether it has mooted their claims.

III. SUMMARY JUDGMENT LEGAL STANDARD

The parties agree that no material issues of disputed fact exist and that their dispute may be decided as a matter of law. A party may move for summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense." Pa. R.C.P. 1035.2(1). The motion will be granted if the "adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense." Pa. R.C.P. 1035.2(2). "The moving party has the burden of proving that there is no genuine issue of material fact. The record and any inferences therefrom must be viewed in the light most favorable to the nonmoving party, and any doubt must be resolved against the moving party." Roberts v. Estate of Pursley, 700 A.2d 475, 481 (Pa. Super. 1997) (internal citations omitted). In response, the nonmoving party may not rest upon the pleadings but must set forth

facts demonstrating a genuine issue for trial. DeSantis v. Frick Co., 745 A.2d 624, 625 (Pa. Super. 1999). "A motion for summary judgment must be granted in favor of a moving party if the other party chooses to rest on its pleadings, unless a genuine issue of fact is made out in the moving party's evidence taken by itself." Curry v. Estate of Thompson, 481 A.2d 658, 660 (Pa. Super. 1984).

IV. MOOTNESS LEGAL STANDARD OF REVIEW

In order "[f]or a matter to become moot, some change in the facts or applicable law must occur so that, although the plaintiff had standing at the outset of the litigation, there is no longer a live controversy." Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist., 640 Pa. 489, 504–05, 163 A.3d 962, 972 (2017) (citing In re Gross, 382 A.2d 116, 119–20 (Pa. 1978)). In general, a court will not decide moot questions. See Sierra Club v. Pa. PUC, 702 A.2d 1131 (Pa. Cmwlth. 1996) (holding that courts will dismiss an appeal as moot unless an actual case or controversy exists at all stages of the judicial or administrative process), aff'd, 731 A.2d 133 (Pa. 1999).

The Pennsylvania Supreme Court has stated that:

> This Court generally will not decide moot questions.... [W]e [have] summarized the mootness doctrine as follows: The cases presenting mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way—changes in the facts or in the law—which allegedly deprive the litigant of the necessary stake in the outcome. The mootness doctrine requires that an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed.

Pub. Def.'s Office of Venango Cty. v. Venango Cty. Court of Common Pleas, 893 A.2d 1275, 1279 (Pa. 2006) (quoting Pap's A.M. v. City of Erie, 812 A.2d 591, 599–600 (Pa. 2002)). "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." Nat'l Dev. Corp. v. Planning Comm'n of Harrison Twp., 439 A.2d 1308, 1310 (Pa. Cmwlth. 1982). A defendant's voluntary cessation of an activity may render a legal question moot. Cox v. City of Chester, 464 A.2d 613, 616 (Pa. Cmwlth. 1983).

There are, however, instances where a court may decide a technically moot case:

> [A] case which may be rendered moot will not be dismissed where the issues raised are of a recurring nature and capable of repeatedly avoiding review. A case is capable of repetition yet evading review when the duration of the challenged action is too short to be litigated and there is a reasonable probability that the complaining party will be subjected to the same action in the future.

Erie Homes for Children & Adults, Inc. v. Dept. of Pub. Welfare, 833 A.2d 1201, 1204 (Pa. Cmwlth. 2003) (citations omitted). Another exception is in cases where the matter is of public importance. In re Gross, 382 A.2d at 120.

The essence of the mootness doctrine is whether the court has the ability to grant effective relief. PSEA claims that the case is now moot because of the change in the law and facts as a result of the Janus decision and alternatively because it changed its policy regarding the selection of a charity.

V. DISCUSSION

This dispute has changed its complexion over the course of its life. When it was originally filed on September 18, 2014, the plaintiffs asserted an as-applied challenge and a facial challenge to section 575(h) to declare the application of section 575(h) as to plaintiffs unconstitutional, or alternatively to declare section 575(h) unconstitutional. Plaintiffs' first amended complaint filed on June 20, 2015, also pled claims for facial and as-applied constitutional violations of section 575(h). The second amended complaint, filed April 25, 2017, abandoned any facial challenge to section 575(h) and pleads only an as-applied challenge to

section 575. Both parties insist that they, not the other party, are entitled to judgment as a matter of law. Plaintiffs believe this is so because Janus affirms that the statute they are challenging is unconstitutional. Defendant believes this is so because Janus has mooted plaintiffs' claims.

The PSEA makes two arguments in opposition to plaintiffs' request for summary judgment. First, PSEA argues that as a result of Janus and the steps taken by PSEA, the as-applied challenge brought by plaintiffs—and as limited by prior court orders—is moot. Second, PSEA contends that should the court reach the merits of the plaintiffs' claims, it should deny their request for summary judgment and examine the dispute as existed before Janus: that is, whether PSEA was acting unreasonably with respect to the charitable selections of plaintiffs. In this contingency, PSEA seeks to incorporate all of its arguments in response to the plaintiffs' motion for summary judgment as well as the arguments made by PSEA in the motion for summary judgment it withdrew.

For their part, the plaintiffs respond that they are entitled to judgment as a matter of law, and that the case is not moot because Janus has not been applied to the laws of Pennsylvania and the PSEA's voluntary policy change is not an adequate safeguard to prevent repetition; alternatively, plaintiffs argue that regardless of mootness, the court should decide the case based on the public interest exception as first-amendment protections are at issue. Plaintiffs contend that PSEA's association with the National Education Association ("NEA") and the NEA's penchant to press its authority to the limits of Supreme Court precedent—coupled with PSEA's failure to comply with Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), prior to 2003—demonstrate the necessity of an injunction here.

A. The Janus Decision

Janus was a sea change in the law, overruling Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977), and its forty-one years of precedent. Mark Janus was a child support specialist employed by the Illinois Department of Healthcare and Family Services. He refused to join the public-sector union because he opposed many of its public policy positions and advocacy. He also believed that "the Union's 'behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens.'" Janus, 138 S.Ct. at 2461.

The Illinois law challenged by Janus was consistent with Abood and its progeny. The law, the Illinois Public Labor Relations Act ("IPLRA"), provided: (1) the union is designated as the exclusive bargaining representative of the unit employees; (2) employees within the unit are not required to join the union; (3) employees who do not join the union are not assessed full union dues but must pay an agency fee which is the proportional fee not associated, according to the union, with the union's political and ideological projects; and (4) employees receive a notice each year of the amount to be deducted from their pay. Ill. Comp. Stat., ch. 5, § 315/6(a). The Illinois law resulted in unions assessing a chargeable amount of 78% of full union dues.

The Supreme Court concluded that Abood, with which the Illinois law would have complied, was inconsistent with standard first-amendment principles. The Court observed that the agency-shop arrangement imposed associations that citizens in the United States have the right to eschew, compelled speech in support of views those citizens find objectionable, and forced employees to subsidize speech of other private speakers that they find objectionable. The union argued that there were significant state interests in labor peace and the risk of free riders. It further asserted that the employee speech suggested above is somehow not protected by the First Amendment. The Court concluded that the restrictions on constitutionally protected speech

could not survive even a permissive review of the government's actions and rejected the assertion that employee speech rights fall outside the First Amendment. See Janus, 138 S.Ct. at 2465.

As a consequence of Janus, "States and public-sector unions may no longer extract agency fees from nonconsenting employees." Id. at 2486. The Court went on to explain, "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their first-amendment rights, and such a waiver cannot be presumed." Id.

Nowhere in its opinion does the Supreme Court mention, comment on, or analyze Pennsylvania's laws regarding public-sector unions. The law at issue in this case was not before the United States Supreme Court. However, the Supreme Court clearly contemplated that its decision would prohibit "[s]tates and public-sector unions . . . [from] extract[ing] agency fees from nonconsenting employees." Id. at 2459. Consequently, this court must apply the precedent of Janus to Pennsylvania's public-sector union in the context of PSEA.

B. The Pennsylvania Framework

The statute at issue in this dispute is the Fair Share Fee: Payroll Deduction of the Administrative Code related to the powers and duties of the Pennsylvania Department of Labor and Industry. See 71 Pa.C.S. § 575. Section 575 provides:

> (a) As used in this section, the following words and phrases shall have the meanings given to them in this subsection:
>
> "Bona fide religious objection" shall mean an objection to the payment of a fair share fee based upon the tenets or teachings of a bona fide church or religious body of which the employe is a member.
>
> "Commonwealth" shall mean the Commonwealth of Pennsylvania,

including any board, commission, department, agency or instrumentality of the Commonwealth.

"Employe organization" shall mean an organization of any kind or any agency or employe representation committee or plan in which membership includes public employes and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, employe-employer disputes, wages, rates of pay, hours of employment or conditions of work, but shall not include any organization which practices discrimination in membership because of race, gender, color, creed, national origin or political affiliation.

"Exclusive representative" shall mean the employe organization selected by the employes of a public employer to represent them for purposes of collective bargaining pursuant to the act of July 23, 1970 (P.L. 563, No. 195), known as the "Public Employe Relations Act."[1]

"Fair share fee" shall mean the regular membership dues required of members of the exclusive representative less the cost for the previous fiscal year of its activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative.

"Nonmember" shall mean an employe of a public employer, who is not a member of the exclusive representative, but who is represented in a collective bargaining unit by the exclusive representative for purposes of collective bargaining.

"Public employer" shall mean the Commonwealth of Pennsylvania or a school entity.

"School entity" shall mean any school district, intermediate unit or vocational-technical school.

"Statewide employe organization" shall mean the Statewide affiliated parent organization of an exclusive representative, or an exclusive representative representing employes Statewide, and which is receiving nonmember fair share payments.

(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.

(c) To implement fair share agreements in accordance with subsection (b), the exclusive representative shall provide the public employer with the name of each nonmember who is obligated to pay a fair share fee, the

amount of the fee that he or she is obligated to pay and a reasonable schedule for deducting said amount from the salary or wages of such nonmember. The public employer shall deduct the fee in accordance with said schedule and promptly transmit the amount deducted to the exclusive representative.

(d) As a precondition to the collection of fair share fees, the exclusive representative shall establish and maintain a full and fair procedure, consistent with constitutional requirements, that provides nonmembers, by way of annual notice, with sufficient information to gauge the propriety of the fee and that responds to challenges by nonmembers to the amount of the fee. The procedure shall provide for an impartial hearing before an arbitrator to resolve disputes regarding the amount of the chargeable fee. A public employer shall not refuse to carry out its obligations under subsection (c) on the grounds that the exclusive representative has not satisfied its obligation under this subsection.

(e) Within forty (40) days of transmission of notice under subsection (d), any nonmember may challenge as follows:

(1) to the propriety of the fair share fee; or
(2) to the payment of fair share fees for bona fide religious grounds.

(f) Any objection under subsection (e) shall be made in writing to the exclusive representative and shall state whether the objection is made on the grounds set forth in subsection (e)(1) or (2).

(g) When a challenge is made under subsection (e)(1), such challenge shall be resolved along with all similar challenges by an impartial arbitrator, paid for by the exclusive representative, and selected by the American Arbitration Association, or the Federal Mediation and Conciliation Service, pursuant to the Rules for Impartial Determination of Union Fees promulgated by the American Arbitration Association. The decision of the impartial arbitrator shall be final and binding. [This section ruled constitutionally invalid in its entirety by Hohe v. Casey, 956 F.2d 399, 409 (3rd Cir. 1992).]

(h) When a challenge is made under subsection (e)(2), the objector shall provide the exclusive representative with verification that the challenge is based on bona fide religious grounds. If the exclusive representative accepts the verification, the challenging nonmember shall pay the equivalent of the fair share fee to a nonreligious charity agreed upon by the nonmember and the exclusive representative. If the exclusive representative rejects the verification because it is not based on bona fide religious grounds, the challenging nonmember may challenge that determination within forty (40) days from receipt of notification.

> (i) When a challenge is made under subsection (e)(1), the exclusive representative shall place fifty per centum (50%) of each challenged fair share fee into an interest-bearing escrow account until such time as the challenge is resolved by an arbitrator. When a challenge is made under subsection (e)(2), the exclusive representative shall place one hundred per centum (100%) of each challenged fair share fee into an interest-bearing escrow account until such time as the challenge is resolved by an arbitrator.
>
> (j) Every Statewide employe organization required to submit a report under Title II of the Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86-257, 29 U.S.C. § 401 et seq.) shall make available a copy of such report to the Secretary of Labor and Industry.
>
> (k) All materials and reports filed pursuant to this section shall be deemed to be public records and shall be available for public inspection at the Office of the Secretary of Labor and Industry during the usual business hours of the Department of Labor and Industry.
>
> (l) Any employe organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall be subject to a fine of not more than two thousand dollars ($2,000).
>
> (m) Any person who wilfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall be fined not more than one thousand dollars ($1,000) or undergo imprisonment for not more than thirty (30) days, or both. Each individual required to sign affidavits or reports under this section shall be personally responsible for filing such report or affidavit and for any statement contained therein he knows to be false.

Like the IPLRA in Illinois, Pennsylvania law states that (1) the union is designated as the exclusive bargaining representative of the unit employees; (2) employees within the unit are not required to join the union; (3) employees who do not join the union are not assessed full union dues but must pay a "fair share" fee if the collective bargaining agreement so provides, which is the portion of the fee that the union determines is not associated with its political and ideological projects; and (4) employees receive a notice each year of the amount to be deducted from their pay.

Unlike the IPLRA, section 575(h) provides an exception to the allocation of the fair share fee for nonmembers with bona fide religious objections.

Section 575(h) provides:

> (h) When a challenge is made under subsection (e)(2), the objector shall provide the exclusive representative with verification that the challenge is based on bona fide religious grounds. If the exclusive representative accepts the verification, the challenging nonmember shall pay the equivalent of the fair share fee to a nonreligious charity agreed upon by the nonmember and the exclusive representative. If the exclusive representative rejects the verification because it is not based on bona fide religious grounds, the challenging nonmember may challenge that determination within forty (40) days from receipt of notification.

71 P.S. § 575(h). There is no provision within this section addressing what the parties are to do should they be unable to agree on a nonreligious charity. In the time between when this case was filed and the Janus decision, PSEA sought to fill in the missing contingency by implementing new written procedures in July 2016.

The new procedures provided for arbitration should PSEA and fee payer fail to agree on a charity. As pointed out by plaintiffs, the arbitration provision mirrors the provision in section 575(g) above which the Third Circuit in Hohe v. Casey declared in 1992 to be constitutionally invalid.

In the wake of Janus, PSEA have provided a sworn affidavit of Joseph Howlett, Assistant Executive Director for Administrative Services of PSEA, outlining the steps PSEA has taken to cease fair share fee collection, directives given to local associations to stop such collecting, and proof that plaintiffs have been reimbursed their fees with interest.

C. Mootness

Monumental changes in both the law and the facts have occurred since plaintiffs filed their second amended complaint. Plaintiffs assert that because Janus has not been applied to

Pennsylvania law, the case is not moot and PSEA's voluntary cessation does not moot the case. Section 575 is still the law in Pennsylvania and has not been repealed, and there appears to be no pending legislation seeking to repeal it. However, the Supreme Court's holding in Janus has made it clear that the collection of fair share fees from nonmembers is an unconstitutional abridgement of first-amendment rights.

The Pennsylvania Department of Labor and Industry recently released guidance on the impact of Janus in Pennsylvania, instructing public employers to stop collecting fair share fees from non-union members. See Pa. Dep't Labor & Indus., Guidance Regarding the June 2018 Janus Supreme Court Decision, Sept. 6, 2018. Though nothing has occurred within the legislative branch to direct a change in fair share fees, PSEA has voluntary ceased collecting the fee and the executive branch has issued guidance prohibiting the fees from being collected. Moreover, PSEA has advised all nonmember employees that PSEA can no longer collect fair share fees and has reimbursed these non-party employees for any fees collected and attributable to the post-Janus period of time. Both plaintiffs have been reimbursed the fees collected from them as well. There is no longer any harm suffered by plaintiffs.

1. The Argument that Janus Must be Applied to Pennsylvania Law is Without Merit

Plaintiffs correctly point out that Janus arose from a dispute over Illinois law and involved no Pennsylvania statutes. However, this fact is not a recognized exception to the mootness doctrine. Plaintiffs cite no case law for the proposition that a Supreme Court case cannot make moot a pending controversy based on similar facts. Instead, they argue by analogy to the lower court cases in the wake of Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), and Obergefell v. Hodges, 153 S.Ct. 2584 (2015), for the conclusion that

despite PSEA's declaration that it will comply with Janus and that it has refunded fees already collected, the court must still issue an injunction against it.

Regarding the effect of Citizens United on lower court cases, plaintiffs first cite to General Majority PAC v. Aichele, No. 1:14–CV–332, 2014 WL 3955079 (M.D. Pa. Aug. 13, 2014). However, in Aichele, the Commonwealth of Pennsylvania agreed that a permanent injunction was necessary in light of Citizens United because Pennsylvania's Bureau of Commissions, Elections and Legislation refused to stop enforcing a contribution prohibition. See id. at *4 (The Commonwealth requested a permanent injunction that "go[es] further than [its] first" preliminary injunction, thereby rewriting the election code.). Because the unconstitutional contribution prohibition was still being enforced, the court held that it was necessary to "find [the contribution prohibition] unconstitutional and enter . . . [an] order permanently enjoining the Commonwealth from enforcing it." Aichele, 2014 WL 3955079 at *6.

Plaintiffs also cite to Republican Party of N.M. v. King, 741 F.3d 1089 (10th Cir. 2013) (holding that New Mexico's statute limiting political contributions was unconstitutional). In Republican Party, the defendant did not agree that Citizens United rendered the statute in question unconstitutional. Because the law was still being enforced, there was no mootness issue.

The cases brought following Citizens United or Obergefell are readily distinguishable from the case at hand. The laws in question in Citizens United and Obergefell are prohibitive, limiting political contributions and restricting individuals' right to marry. The Pennsylvania statute in question here, section 575, is permissive: it allows the collection of fair share fees when authorized by collective bargaining agreements. It neither mandates nor forbids any action. If there is no authorization of fair share fees, section 575 has no effect. More

importantly, however, the case at hand is distinguishable from the cases cited by Plaintiffs because in those cases, the plaintiffs had standing to bring their claims as the laws called into question were still being enforced.

2. PSEA's Voluntary Cessation of Fee Collection

Plaintiffs' claims grounded in an unconstitutional application of section 575(h) are based on the presupposition that a fair share fee may be coerced from them. They claim the fair share fee should be directed to the charity they select. However, because it is now clear that "States and public-sector unions may no longer extract agency fees from nonconsenting employees," Janus, 138 S.Ct. at 2486, it is also clear that there will be no need for an exception that permits such extracted fees to be designated to a charity by the objecting employee. In this sense, the four-year conflict over the designation of a charity in which the parties have been engaged, is not capable of repetition. Plaintiffs argue that PSEA's voluntary cessation of fee collection does not moot the case because PSEA has not met the high burden of showing that the conduct will not recur. Plaintiffs cite cases describing defendants not meeting this burden where the conduct involves a high school student who allegedly switched school districts for athletic reasons,[5] a wastewater treatment plant that allegedly violated provisions of the Clean Water Act,[6] a university with an unconstitutional sexual harassment policy,[7] and corporations allegedly violating antitrust law.[8] None of these involves a defendant who was engaged in conduct that

[5] Pa. Interscholastic Athletic Ass'n, Inc. v. Greater Johnstown Sch. Dist., 463 A.2d 1198 (Pa. Cmwlth. 1983) (action not mooted where high school athlete graduated, where other athletes could repeat the conduct in their final year of high school and evade appellate review if case mooted when they graduated).
[6] Friends of the Earth v. Laidlaw Env. Servs. (TOC), Inc., 528 U.S. 167, 168 (2000) (finding that lower court "erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, after commencement of the litigation, ha[d] come into compliance with its NPDES permit").
[7] DeJohn v. Temple Univ., 537 F.3d 301, 309 (3rd Cir. 2008) (finding that where university did not change its sexual harassment policy until more than a year after the start of the litigation, and where university still defends its prior policy as constitutional and necessary, the change in policy does not render claim moot).
[8] United States v. W.T. Grant Co., 345 U.S. 629, 635 (1953) (Trial court did not abuse its discretion in finding that "there was no significant threat of future violation," where affidavits from defendant corporations stated that

was widely regarded as constitutional at the time, and ceased the conduct when a change in law showed it to be unconstitutional.

To determine whether a defendant's voluntary cessation of an activity renders a legal question moot, a court "consider[s] (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." Cox v. City of Chester, 464 A.2d 613, 616 (Pa. Cmwlth. 1983). PSEA's intention to discontinue the collection of fair share fees has been clearly stated. PSEA has reached out not only to the plaintiffs in this case, but to all nonmembers who had been subject to fair share fees. PSEA demonstrated the good faith of its intention by ceasing collection immediately, and the effectiveness of the discontinuance by refunding any already collected fees attributable to any time subsequent to the Supreme Court's decision in Janus.[9] The "character of the past violation" here weighs in PSEA's favor, as the collection of fair share fees was recognized to be constitutional until the Supreme Court's decision in Janus overturned Abood. Therefore all three factors weigh in favor of a finding that PSEA's cessation of fair share fee collection renders the legal question at hand moot.

D. Plaintiffs' As-Applied Challenge

Plaintiffs' claims alleged in their second amended complaint, grounded in an allegedly unconstitutional application of section 575(h), are based on the presupposition that a fair share fee may be coerced from them as provided for in section 575(b). Section 575(b) provides, "If the provisions of a collective bargaining agreement so provide, each nonmember of a collective

defendants had been unaware until the suit was filed that their conduct violated governmental antitrust law, and had not committed more than one violation.).

[9] The Pennsylvania Department of Labor and Industry recently released guidance on the impact of Janus in Pennsylvania, instructing public employers to stop collecting fair share fees from non-union members. Pa. Dep't Labor & Indus., Guidance Regarding the June 2018 Janus Supreme Court Decision, Sept. 6, 2018. This further confirms the remoteness of the possibility of PSEA resuming its collection of fair share fees.

bargaining unit shall be required to pay to the exclusive representative a fair share fee." 71 Pa.C.S. § 575(b). However, section 575 is no longer being applied to plaintiffs at all. The harm alleged by plaintiffs in their second amended complaint is that "[a]s a direct result of the PSEA's construction of section 575, [plaintiffs] have suffered in the past, and will continue to suffer in the future, nonmonetary damages including violations of their constitutional and statutory rights and the inability to donate to a 'nonreligious charity' in accordance with section 575(h)." Second Am. Compl. ¶ 13. Plaintiffs have not demonstrated that there is any reason to expect that PSEA would reinstate the collection of fair share fees.

Plaintiffs' second amended complaint seeks declaratory and injunctive relief. Under the Pennsylvania Declaratory Judgments Act, declaratory relief is appropriate when a plaintiff's "rights, status, or other legal relations are affected by a statute." 40 Pa.C.S. § 7533. A plaintiff must have standing to seek a declaratory judgment:

> For standing to exist, the underlying controversy must be real and concrete, such that the party initiating the legal action has, in fact, been aggrieved. . . . [T]he core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not "aggrieved" thereby and has no standing to obtain a judicial resolution to his challenge. A party is aggrieved for purposes of establishing standing when the party has a substantial, direct and immediate interest in the outcome of litigation. A party's interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party's interest is immediate when the causal connection with the alleged harm is neither remote nor speculative.

Com., Office of Governor v. Donahue, 98 A.3d 1223, 1229 (Pa. 2014) (citations, quotations, and alterations omitted). Now that PSEA has stopped collecting fair share fees, section 575 no longer affects either plaintiff's "rights, status, or other legal relations." The permanent injunction sought by plaintiffs is only appropriately granted in cases where the plaintiffs "establish [their] clear right to relief. . . . The part[ies] need not establish either irreparable harm or immediate

relief, and a court may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law." Pestco, Inc. v. Associated Prods., Inc., 880 A.2d 700, 710 (Pa. Super. 2005) (quoting Buffalo Twp. v. Jones, 813 A.2d 659, 663–64 (Pa. 2002)). Whether or not the application of section 575 to plaintiffs would constitute a "legal wrong for which there is no adequate redress at law," here there is simply no basis for a finding that an injunction is necessary to prevent any legal wrong to plaintiffs. Because the relief sought by plaintiffs would have no real effect, the issue is moot.

E. Public Interest Exception to the Mootness Doctrine

Alternatively, plaintiffs contend that even if the case is moot the court should decide it because of public policy implications. Plaintiffs argue that the public interest exception applies here because of the first-amendment issues involved. The public interest exception allows courts to "decide[] moot questions or erect[] guideposts for future conduct or actions," but applies "only in very rare cases where exceptional circumstances exist or where matters or questions of great public importance are involved." Wortex Mills v. Textile Workers Union of Am., C.I.O., 85 A.2d 851, 857 (Pa. 1952). There is no compelling reason to extend the public interest exception to the case at hand, where the defendant agrees that collection of fair share fees is now unconstitutional under Janus and even the state Department of Labor and Industry has issued guidance confirming that fair share fees are no longer to be collected.[10] Given the remoteness of the possibility that PSEA would reinstate fair share fees in this circumstance, as well as the lack of a need for "guideposts for future conduct or actions," the court declines to decide the case under the public interest exception.

F. Attorney's Fees and Costs Under 42 U.S.C. 1988

[10] See supra, note 7.

Plaintiffs brought their claims under 42 U.S.C. 1983, and seek to have the court award them attorney's fees and costs incurred in this suit. If plaintiffs believe they are the "prevailing parties" as defined in 42 U.S.C. 1988, they shall file a motion with supporting documentation by November 23, 2018. Any opposition to the motion shall be filed by December 7, 2018, and any reply shall be filed by December 14, 2018.

VI. CONCLUSION

While the change in law at the United States Supreme Court level did not automatically render the legal issue at hand moot, PSEA's voluntary actions—its good-faith cessation of fair share fee collections and the steps it has taken to refund fair share fees and prevent their future collection—have created a change in facts sufficient to moot this case. No exception to the mootness doctrine is applicable here, because there is no basis for a reasonable anticipation that PSEA would resume collection of fair share fees from plaintiffs. There being no actual controversy in this case, the action must be dismissed for lack of subject matter jurisdiction.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

JANE LADLEY and CHRISTOPHER MEIER, Plaintiffs	:	
v.	:	No. CI-14-08552
PENNSYLVANIA STATE EDUCATION ASSOCIATION, Defendant.	:	

ORDER

AND NOW, this 29th day of October 2018, upon review of plaintiffs' and defendant's crossclaims for summary judgment and supporting briefs, plaintiffs' motion is hereby DENIED and defendant's motion is GRANTED. The above-captioned action is DISMISSED. If plaintiffs believe they are the "prevailing parties" as defined in 42 U.S.C. 1988, they shall file a motion with supporting documentation by November 23, 2018. Any opposition to the motion shall be filed by December 7, 2018, and any reply shall be filed by December 14, 2018. The prothonotary is directed to close this case.

BY THE COURT:

LEONARD G. BROWN, III, JUDGE

ATTEST:

Copies to: David R. Osborne, Esquire
Justin T. Miller, Esquire
Joseph F. Canamucio, Esquire
Thomas W. Scott, Esquire