

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

LINDA MISJA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No.: 1:15-cv-01199-JEJ
	:	
PENNSYLVANIA STATE	:	The Honorable John E. Jones, III
EDUCATION ASSOCIATION,	:	
	:	
Defendant.	:	ELECTRONICALLY FILED
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**BRIEF OF THE DEFENDANT PENNSYLVANIA STATE EDUCATION  
ASSOCIATION IN SUPPORT OF ITS MOTION TO DISMISS**

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Respectfully submitted,

Date: September 1, 2015

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
I. STATEMENT OF THE CASE .....	1
A. Nature of the Action and Identity of the Parties .....	1
B. Relevant Facts .....	1
II. QUESTIONS PRESENTED .....	4
III. ARGUMENT .....	5
A. Federal Abstention Principles Apply in this Case requiring this Court to Dismiss or Stay this Proceeding .....	5
1. The Plaintiff’s complaint should be dismissed under the <i>Younger</i> abstention doctrine because the existing state court action involves substantial state interests in education and public sector labor relations .....	5
a. <u>There are ongoing state judicial proceedings:</u> <u><i>Ladley and Meier v. PSEA</i>, No. CI-14-08522,</u> <u>Lancaster County Court of Common Pleas, filed</u> <u>September 18, 2014</u> .....	5
b. <u><i>Ladley</i> implicates important Pennsylvania interests in</u> <u>education and public sector labor relations</u> .....	6
c. <u><i>Ladley and Meier</i> affords The Fairness Center the</u> <u>opportunity to raise federal claims</u> .....	7
2. The Application of <i>Pullman</i> Abstention is also Appropriate .....	7
B. Plaintiff’s Section 1983, state and federal due process constitutional claims should be dismissed as Defendant PSEA is not a state actor .....	9

C. Plaintiff’s First Amendment and Free Speech Claims must fail....	11
D. Plaintiff’s claim that the statute is unconstitutional is Unsupported .....	12
IV. CONCLUSION .....	13
CERTIFICATE OF LOCAL RULE 7.8(b)(2) COMPLIANCE .....	15

**TABLE OF AUTHORITIES**

**Page**

**Cases**

*Abood v. Detroit Bd. of Educ.*,  
431 U.S. 209 (1977)..... 11, 12

*Artway v. Attorney Gen. of N.J.*,  
81 F.3d 1235, 1270 (3d Cir. 1996) .....8

*Bellotti v. Baird*, 428 U.S. 132, 147 (1976) .....7

*Chez Sez III Corp. v. Township of Union*,  
945 F.2d 628, 631 (3d Cir. 1991) .....8

*Chicago Teachers Union v. Hudson*,  
475 U.S. 292 (1986)..... 11, 12

*Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992) .....12

*Hudson v. Chicago Teachers Union Local No. 1*,  
743 F.2d 1187 (7<sup>th</sup> Circ. 1984)..... 10, 12

*Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983).....10

*Ladley and Meier v. PSEA*, No. CI-14-08522..... 5, 6, 7, 12, 13

*Lazaridis v. Wehmer*, 591 F.3d 666, 670 (3d Cir. 2010) .....5

*Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991) .....11

*Planned Parenthood of Central N.J. v. Farmer*,  
220 F.3d 127, 149 (3d Cir. 2000) .....8

*Railroad Comm’n of Tex. v. Pullman Co.*,  
312 U.S. 496 (1941)..... 7, 8, 9

*Schall v. Joyce*, 885 F.2d 101, 107 (3d Cir. 1989) .....6

*White v. Communication Workers of America*,  
370 F.3d 346 (3d Cir. 2004).....9, 10

*Williams v. Red Bank Bd. of Educ.*,  
662 F.2d 1008, 1018 (3d Cir. 1981) .....6

*Younger v. Harris*, 401 U.S. 37 (1971).....5, 6

**Statutes**

71 P.S. § 575 .....1

71 P.S. § 575 (e)(2) .....2

71 P.S. § 575(a).....1, 2

71 P.S. § 575(h).....2, 10

71 P.S. 575(a).....11

**Rules**

Fed.R.Civ.P. 12(b)(6).....3

**Constitutional Provisions**

Pennsylvania Constitution .....1

United States Constitution .....1

**I. STATEMENT OF THE CASE**

**A. Nature of the action and identity of the parties**

This is a civil action for declaratory and injunctive relief. This dispute involves the application of the Pennsylvania Fair Share Fee Law, 71 P.S. § 575 (the Law) by Defendant, Pennsylvania State Education Association (PSEA) to Plaintiff, Linda Misja. The Plaintiff claims PSEA violated the First and Fourteenth Amendments to the United States Constitution and Article 1, sections 1, 7, 9, 11 and 26 the Pennsylvania Constitution. (Compl. ¶1)

**B. Relevant facts.**

Plaintiff is currently an employee of the Apollo-Ridge School District. She was previously employed by the Bellefonte Area School District. (Compl., Exhibits A, E). Defendant PSEA is an “employee organization” as defined in the Law. 71 P.S. § 575(a). The professional employees in both the Bellefonte and Apollo Ridge school districts have selected the local affiliates of PSEA as their exclusive representative for collective bargaining. The collective bargaining agreements in both districts contain “fair share fee agreements,” as authorized by

the Law, requiring the employer to deduct a “fair share fee” from the wages paid to the nonmember, and to remit those fees to the exclusive representative.<sup>1</sup>

Plaintiff is a “nonmember,” defined in the Law as “an employee 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.” 71 P.S. § 575(a) Plaintiff is also feepayer.

The Law provides that feepayers who object to paying fees to a union on religious grounds are permitted to file a *bona fide* religious objection to payment of the fair share fee to the union. 71 P.S. § 575 (e)(2). If the union accepts the objection, the equivalent of the fair share fee is paid over to a nonreligious charity “agreed upon by the nonmember and the exclusive representative.” 71 P.S. § 575(h). Plaintiff objected to paying fair share fees on religious grounds and PSEA accepted Plaintiff as a *bona fide* religious objector. (Compl. ¶¶ 14, 16). However, when Plaintiff informed PSEA that she wanted her fair share fee to be paid to “People Concerned for the Unborn Child,” PSEA advised her that it could not agree to send the fee to that organization because to do so “would be tantamount to

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<sup>1</sup> In Pennsylvania, fair share feepayers are never charged full union dues. The “fair share fee” is the regular membership dues of the exclusive representative, less the cost incurred in the previous fiscal year for activities and undertakings that were not reasonably employed to implement the representative activities as the exclusive representative. 71 P.S. § 575(a). For the 2014-2015 year, a fee payer pays 74 percent of the PSEA dues paid by a member and 38.11 percent of NEA Dues. <http://www.psea.org/general.aspx?id=11507>

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.”

(Compl. ¶ 19) Shortly thereafter Plaintiff selected the National Rifle Association Foundation as her alternate charity. She also requested arbitration of the selection if there was no agreement. (Compl. ¶¶ 21, 22)

In May of 2014, PSEA advised Plaintiff that it would not agree to send the fair share fees to the NRA Foundation because it was the charitable subsidiary of a political organization. PSEA also advised Plaintiff that it was rejecting her request for arbitration because the Law does not provide for arbitration over the “agreement” on a suitable charity to receive the funds. (Compl. ¶¶ 25-27). To date the parties have not been unable to agree on a charity to receive the funds. Fair share fees collected from the Plaintiff’s wages by her employer are remitted to PSEA, which holds them in an interest bearing escrow account, awaiting agreement on a proper non-religious, non-political charity. Plaintiff has not selected any alternate charity.

The Plaintiff filed her complaint on June 18, 2015. The Defendant accepted service and filed a Motion to Dismiss pursuant to Rule 12(b)(6) on August 18, 2015. This brief is filed in support of the motion to dismiss filed by Defendant, PSEA.

## **II. QUESTION PRESENTED**

**1. Should this Court apply principles of abstention and dismiss or stay this matter pending the outcome of an existing state court proceeding asserting precisely the same claims filed in the Lancaster County Court of Common Pleas by Plaintiff's counsel, the Fairness Center?**

**Suggested Answer: Yes.**

**2. Should Plaintiff's due process claims under Section 1983 and the First and Fourteenth Amendments to the United States Constitution and Article 1 of the state Constitution (first and second causes of action) be dismissed as no constitutional issues lie because PSEA is not a state actor?**

**Suggested Answer: Yes.**

**4. Should Plaintiff's state and federal constitutional counts relating to free speech, association and expression (third and fourth causes of action) be dismissed as no federal or state constitutional issues lie?**

**Suggested Answer: Yes.**

**5. Should Plaintiff's fifth cause of action claiming a "plain language" violation of the Fair Share Law be dismissed because it is Plaintiff who is plainly ignoring the language of the statute which requires agreement on the selected charity?**

**Suggested Answer: Yes.**

**6. Should the Plaintiff's sixth cause of action claiming the statute is facially unconstitutional be dismissed?**

**Suggested Answer: Yes.**

### III. ARGUMENT

#### A. **Federal Abstention Principles Apply in this Case requiring this Court to Dismiss or Stay this Proceeding.**

##### 1. **The Plaintiff's complaint should be dismissed under the *Younger* abstention doctrine because the existing state court action involves substantial state interests in education and public sector labor relations.**

*Younger* abstention (*Younger v. Harris*, 401 U.S. 37 (1971)) is appropriate when three elements are met: “(1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interest; and (3) the state proceedings afford an adequate opportunity to raise the federal claims.” *Lazaridis v. Wehmer*, 591 F.3d 666, 670 (3d Cir. 2010) When *Younger* applies, dismissal of the federal complaint is proper. *Id.* at 671.

- a. There are ongoing state judicial proceedings: *Ladley and Meier v. PSEA*, No. CI-14-08522, Lancaster County Court of Common Pleas, filed September 18, 2014

Plaintiff Misja is represented by The Fairness Center. In September of 2014 the Fairness Center filed essentially the same complaint in Lancaster County, raising the same issues, on behalf of two other disgruntled religious objectors who wanted to select politicized “charities” to receive their fair share fees. The counts in *Ladley and Meier* mirror those asserted here. (Appendix B). On June 30, 2015 Judge Cullen of the Lancaster County Court granted preliminary objections filed

by PSEA: dismissed the claim for injunctive relief, dismissed the claims grounded on both state and federal constitutional principles; dismissed the claims that PSEA's refusal to agree to the charities selected by the plaintiffs violated the act; and dismissing the claim that the local associations had to act on the charitable requests. (Appendix D) The Fairness Center has filed an amended complaint in *Ladley and Meier v. PSEA*, in an attempt to remedy fatal flaws identified by the court. (Appendix E) PSEA has filed preliminary objections (still pending) which challenge the amended complaint. (Appendix F) The case is indisputably an ongoing judicial proceeding that predates this matter.

b. *Ladley* implicates important Pennsylvania interests in education and public sector labor relations.

The crux of any *Younger* analysis is whether an important state interest is at stake such as maintaining the federal suit risks a breach of federal-state comity. *See Schall v. Joyce*, 885 F.2d 101, 107 (3d Cir. 1989). The Fair Share Law implicates two significant Pennsylvania interests: public education and public sector labor relations. The Third Circuit has declared that a state's interest in education "is precisely the sort of interest which the notions of comity and federalism, embodied in the *Younger* doctrine command the federal courts to respect." *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1018 (3d Cir. 1981), *overruled on other grounds, Schall*, 885 F.2d at 108. Similar important state

interests surround the regulation of public sector employers, labor unions and their members.

- c. *Ladley and Meier* affords The Fairness Center the opportunity to raise federal claims.

The Fairness center has raised precisely the same federal claims in *Ladley and Meier* as in this action. They were dismissed initially. If the County Court persists in rejecting those claims, they can be appealed as of right to the Superior Court and permissively to the Supreme Court. The heart of this dispute is the application of a Pennsylvania statute, the state courts should decide it.

## **2. The Application of *Pullman* Abstention is also Appropriate.**

“*Pullman* abstention: takes its name from the seminal Supreme Court case *Railroad Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* abstention “is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.” *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (internal quotations and citation omitted). The Third Circuit Court of Appeals has identified the rationale for *Pullman* abstention as “twofold: (1) to avoid a premature constitutional adjudication which could ultimately be displaced by a state court adjudication of state law; and (2) to avoid ‘needless friction with state policies.’”

*Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 149 (3d Cir. 2000) (quoting *Pullman*, 312 U.S. at 500).

The three “special circumstances” required for *Pullman* abstention exist here: (1) To the extent that the Plaintiff challenges the manner PSEA has applied the fair share fee law, uncertain issues of state law underly the federal constitutional claims brought in federal court; (2) the state law issues are amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; and (3) a federal court’s erroneous construction of state law would be disruptive of important state policies. *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991). If the court weighs such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants” abstention clearly becomes the preferred result. *Planned Parenthood*, 220 F.3d at 150 (quoting *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1270 (3d Cir. 1996)). The Lancaster County Court should be given an opportunity to resolve the state law questions in the context of that proceeding, which will provide clarity to this Court on any claims that might remain after state court proceedings have concluded. Moreover, it is entirely possible that the resolution of the state law claims would eliminate, narrow or alter the federal constitutional issues raised by The Fairness Center.

The discretionary factors also weigh in favor of the application of *Pullman* abstention. The Fairness Center cannot fairly dispute that it has an adequate state remedy in the Lancaster County Court. The state court action was filed before the present action and has been proceeding expeditiously. It is almost certain that the state court will have issued a ruling on the threshold state law issues well before this Court will have the opportunity to address the merits of The Fairness Center's claims in this federal action. The Lancaster County Court's ruling will either make the present action unnecessary or provide this Court with a clear interpretation of the applicability of state law in question while clarifying whether any federal constitutional questions remain.

**B. Plaintiff's Section 1983, state and federal due process constitutional claims should be dismissed as Defendant PSEA is not a state actor.**

The Third Circuit Court of Appeals has held that there is no state action when unions collect agency fees. In *White v. Communication Workers of America*, 370 F.3d 346 (3d Cir. 2004), the court noted that, for state action to be present, a plaintiff must demonstrate: (1) that "the conduct at issue must be mandated by the state or must represent the exercise of a state-created right or privilege"; and (2) that "the party who engaged in the challenged conduct must be a person or entity that can 'fairly be said to be a state actor.'" *White*, 370 F.3d at 347. The Third Circuit held that *White* could not prove the second requirement, namely, that a

union was a state actor. As stated by the Third Circuit, “agency-shop clauses result from agreements between employers and unions,” and not from some specific governmental action. *White*, 370 F.3d at 351. The D.C. Circuit similarly found that agency fee collection by a union does not constitute state action. *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983).

The Pennsylvania Fair Share Fee Law allows a governmental employer and a public sector union to bargain a fair share provision. However, the state action stops with the authorization. All decisions regarding the feepayer’s religious objection are determinations made solely by the union and *entirely independent* of a government actor. 71 P.S. § 575(h).

*Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7<sup>th</sup> Circ. 1984), *aff’d* 475 U.S. 292 (1986), clearly holds that there is no state action in the collection of fees from a public sector employee unless the public employer, along with the union, “acts in concert . . . to deprive people of their federal constitutional rights.” No federal constitutional right of Plaintiff Misja was ever violated. With no federal constitutional violation at issue, she cannot make a claim of state action by a state actor. Plaintiffs’ state constitutional equal protection discrimination claim under Article 1, Section 26, of the State Constitution also requires state action, which simply does not exist in this case.

**B. Plaintiff's First Amendment and Free Speech Claims must fail.**

There are no First Amendment implications when a feepayer is assessed a fee that equates to only the chargeable portion of membership dues attributable to collective bargaining expenses and does not include expenditures for political, legislative, or ideological expenses. The constitutionality of charging public employees a fair share fee in recognition of the services that a public sector labor union provides to all bargaining unit members has been firmly established for almost four decades,. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). First Amendment implications do not outweigh the concern that, to allow nonmembers to escape the obligation to pay for the services provided on their behalf by a union promotes an unfavorable public policy that would allow nonmembers to become “free-riders,” enjoying the fruits of union effort, but not paying for any of those benefits

Pennsylvania feepayers are **not** charged full membership dues.

Pennsylvania feepayers are only ever charged for collective bargaining, contract administration, and other expenses that are reasonably related to a union's effort to provide services to a bargaining unit, but are **never** charged for ideological, political, or lobbying expenditures. 71 P.S. 575(a). The First Amendment implications that apply to fair share collection focus only upon ensuring that no

portion of a nonmember's fair share fee is used for political, legislative, or ideological purposes. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (citing *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977)). *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992).

In *Ladley & Meier v. PSEA*, which raises identical claims as this case, the Lancaster County Court sustained PSEA's preliminary objections to the plaintiffs' First Amendment and federal due process claims, stating: "The Court cannot say on the current record that Pennsylvania's fair share fee statute runs afoul of the U.S. Constitution." "Neither *Abood* nor *Hudson* supports Plaintiffs' proposition that the inability to unilaterally direct a fair share fee to the charity of Plaintiffs' own choosing is an infringement upon First Amendment rights." *Id.*

**D. Plaintiff's claim that the statute is unconstitutional is unsupported.**

Plaintiff makes unsupported and unsupportable claims that the Law's requirement that the feepayer and the union agree upon the charity to receive the fee means that the union must do as the feepayer demands or be in violation of the constitution or the Law is unconstitutional. That claim has no merit. Similarly, the claim that the feepayer had a right to deal only with her local education association, not the state affiliate, PSEA, is without support or merit. *See, Ladley v Meier.*

#### IV. CONCLUSION

The Fairness Center, which advertises itself as a “public interest law firm offering free legal services to those facing unjust treatment from public employee union leaders,” is forum shopping. It filed this same lawsuit, with the same basic facts and the same relief requested, eleven months ago in the Lancaster County Court of Common Pleas. *Ladley and Meier v. PSEA*, No. CI-14-08552. In June the County Court granted preliminary objections filed by PSEA, dismissing central elements of the Fair Share case, including all state and federal constitutional claims. Now we are here. That case and this one come from the same mold: religious objectors to fair share fee payments who refuse to direct their withheld fair share fees to reasonable charities that the exclusive representative can agree to. Instead, they insist that they alone have the right to select the recipient, even though the fair share fee law clearly states that the charity is to be agreed upon by the fee payer and the exclusive representative – in this case, PSEA. One of the Lancaster County plaintiffs insists he is being denied his statutory and constitutional rights because PSEA will not agree to have his fair share fees given to the National Right to Work Foundation. The Complaint should be dismissed with prejudice.

Respectfully submitted,

*/s/Thomas W. Scott*

Date: September 1, 2015

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**CERTIFICATE OF LOCAL RULE 7.8(b)(2) COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitation set forth in Local Rule 7.8(b)(2). This brief contains 3684 words.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of the Pennsylvania State Education Association in Support of its Motion to Dismiss has on this date been forwarded to the individual listed below as addressed, and in the manner indicated:

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