COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
PENNSYLVANIA LABOR RELATIONS BOARD

MARY TROMETTER,	:	
	:	
Complainant	:	
	:	Case No.
vs.	:	PERA-M-14-366-E
	:	
PENNSYLVANIA STATE EDUCATION ASSOCIATION and NATIONAL EDUCATION ASSOCIATION,	:	Hearing Officer Jack Marino
	:	
Respondents	:	

COMBINED POSTHEARING BRIEF OF RESPONDENTS PENNSYLVANIA STATE EDUCATION ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION

Richard E. Burridge, Esquire
Attorney I.D. # 68737
Katherine M. Voye, Esquire
Attorney I.D. # 206516
PENNSYLVANIA STATE
EDUCATION ASSOCIATION
400 North Third Street
P.O. Box 2225
Harrisburg, PA 17105-2225
(717) 255-7054
rburridge@psea.org

Attorneys for Respondent Pennsylvania State Education Association

Jason Walta, Esquire
NATIONAL EDUCATION
ASSOCIATION
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035
jwalta@nea.org

Attorney for Respondent National Education Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Pennsylvania

Federal

Other Jurisdictions

MISCELLANEOUS AUTHORITIES

INTRODUCTION

Mary Trometter ("Trometter") has filed a charge with the Pennsylvania Labor Relations Board ("PLRB" or "Board") alleging that the National Education Association ("NEA") and the Pennsylvania State Education Association ("PSEA") (collectively, "the Unions") violated a criminal provision of the Pennsylvania Employe Relations Act ("PERA"), 43 P.S. §§ 1101.101–1101.2301, by engaging in and funding their own independent speech on political matters—even though such speech normally "occupies the highest rung of the hierarchy" of constitutionally protected expression. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

More specifically, Trometter alleges that the Unions violated Section 1701 of PERA ("PERA § 1701" or "§ 1701"), which provides for civil and criminal penalties against an employe organization that makes "any contribution out of the funds of the employe organization either directly or indirectly to any political party or organization or in support of any political candidate for public office." 43 P.S. § 1101.1701. According to Trometter's amended charge, the Unions violated this anti-contribution provision by making independent political communications to their members, and NEA committed a further violation by funding its own political committee for independent political communications regulated by federal law.

After a full hearing on this matter, the Unions submit the relevant facts of record are both undisputed and legally insufficient to support the alleged violation. Trometter's amended charge turns on a single issue concerning the proper interpretation of PERA § 1701: whether a union's communications to its members and funding of its own independent political speech qualify as "contribution[s] . . . either directly or indirectly to any political party or organization or in support of any political candidate for public office" prohibited under the statute. As we will show

in this brief, such an interpretation of § 1701 is both statutorily and constitutionally unsustainable. The Board therefore has no choice but to dismiss the amended charge.

BACKGROUND AND STATEMENT OF FACTS

A. Background: Relevant Campaign-Finance Principles and Legal Protections for Union Political Activity

When it comes to laws regulating political spending, there is a long-standing and well understood distinction between political "contributions" and political "expenditures." A *contribution* is generally defined as a donation or gift made to another for a political purpose, while an *expenditure* is generally defined as spending to communicate a political message. *See Buckley v. Valeo*, 424 U.S. 1, 19–23 (1976) (per curiam).

Pennsylvania law recognized this distinction in its very first campaign-finance enactment, The Corrupt Political Practices Act of 1906, 1906 P.L. 78. *See In re Bechtel's Election Expenses*, 39 Pa. Super. 292, 302–03 (1909) (recognizing that the Act distinguishes between an "individual citizen . . . giv[ing] his money to aid the success of the political party" and "undertaking himself the expenditure of . . . his own money"). And, today, the Commonwealth explicitly codifies this distinction in its Election Code. *Compare* 25 P.S. § 3241(b) (defining "contribution" as a "payment, gift, subscription, assessment, contract, payment for services, dues, loan, forbearance, advance or deposit of money or any valuable thing" given "*to* a candidate or political committee"), *with id.* § 3241(d) (defining "expenditure" as a "payment, distribution, loan or advancement of money or any valuable thing *by* a candidate, political committee or other person for the purpose of influencing the outcome of an election") (emphases added); *see also General Majority PAC v. Aichele*, No. 1:14-CV-332, 2014 WL 3955079, at *1 (M.D. Pa. Aug. 13, 2014) (recognizing a clear distinction under Pennsylvania law between "making a direct monetary donation to a political campaign" and "expending resources in an effort to promote particular

candidates or policies"). Indeed, this distinction—between "contributions" as political donations and "expenditures" as political spending—is so well established that it appears in federal law and the campaign-finance laws of every state.[1]

The law distinguishes between contributions and expenditures so consistently—not merely because political giving and political spending are two distinct activities—but also because they implicate different constitutional considerations. As the U.S. Supreme Court explained in its seminal decision in *Buckley*:

> A *contribution* serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support

---

[1] *Compare* 52 U.S.C. § 30101(8) (defining "contribution" by reference to political giving) *with id.* § 30101(9) (defining "expenditure" by reference to political spending); *compare also* Ala. Code § 17-5-2(a)(3) *with id.* § 17-5-2(a)(7); Alaska Stat. § 15.13.400(4) *with id.* § 15.13.400(6); Ariz. Rev. Stat. § 16-901(11) *with id.* § 16-901(25); Ark. Code § 7-6-201(4) *with* § 7-6-201(8); Cal. Gov't Code § 82015(a) *with id.* § 82025; Colo. Const. art. XXVIII, § 2(5) *with id.* § 2(8); Conn. Gen. Stat. § 9-601a *with id.* § 9-601b; Del. Code tit. 15, § 8002(8) *with id.* § 8002(12); Fla. Stat. § 106.011(5) *with id.* § 106.011(10); Ga. Code § 21-5-3(7) *with id.* § 21-5-3(12); Haw. Rev. Stat. § 11-302 *with id.*; Idaho Code § 67-6602(c) *with id.* § 67-6602(h); 10 Ill. Comp. Stat. 5/9-1.4 *with id.* 5/9-1.5; Ind. Code § 3-5-2-15 *with id.* § 3-5-2-23; Iowa Code § 68A.102(10) *with id.* § 68A.404(1); Kan. Stat. § 25-4143(e) *with id.* § 25-4143(g); Ky. Rev. Stat. § 121.015(6) *with id.* § 121.015(12); La. Rev. Stat. § 18:1483(6) *with id.* § 18:1483(9); 21-A Me. Rev. Stat. § 1012(2) *with id.* § 1012(3); Md. Code, Elec. Law § 1-101(o) *with id.* § 1-101(aa); Mass. Gen. Laws ch. 55, § 1 *with id.* ; Mich. Comp. Laws § 169.204(1) *with id.* § 169.206(1); Minn. Stat. § 10A.01(11) *with id.* § 10A.01(9); Miss. Code. § 23-15-801(e) *with id.* § 23-15-801(f); Mo. Rev. Stat. § 130.011(12) *with id.* § 130.011(16); Mont. Code § 13-1-101(9) *with id.* § 13-1-101(17); Neb. Rev. Stat. § 49-1415 *with id.* § 49-1419; Nev. Rev. Stat. § 294A.007(1) *with id.* § 294A.0075; N.H. Rev. Stat. § 664:2(VIII) *with id.* § 664:2(IX); N.J. Admin. Code § 19:25-1.7 *with id.*; N.M. Stat. § 1-19-26(F) *with id.* § 1-19-26(J); N.Y. Elec. Law § 14-100(9) *with id.* § 14-107(1)(a); N.C. Gen. Stat. § 163-278.6(6) *with id.* § 163-278.6(9); N.D. Cent. Code § 16.1-08.1-01(5) *with id.* § 16.1-08.1-01(7); Ohio Rev. Code § 3517.01(C)(5) with § 3517.01(C)(6); Okla. Stat. tit. 74, ch. 62, Appx. I, Rule 2.2(6) *with id.* Rule 2.2(8); Or. Rev. Stat. § 260.005(3) *with id.* § 260.005(8); R.I. Gen. Laws § 17-25-3(3) *with id.* § 17-25-3(15); S.C. Code § 8-13-100(9) *with id.* § 8-13-100(14); S.D. Codified Laws § 12-27-1(6) *with id.* § 12-27-1(11); Tenn. Code § 2-10-102(4) *with id.* § 2-10-102(6); Tex. Elec. Code § 251.001(2) *with id.* § 251.001(6); Utah Code § 20A-11-101(6) *with id.* § 20A-11-101(15); 17 Vt. Stat. § 2901(4) *with id.* § 2901(7); Va. Code § 24.2-945.1 *with id.*; Wash. Rev. Code § 42.17A.005(13) *with id.* § 42.17A.005(20); W. Va. Code § 3-8-1a(7) *with id.* § 3-8-1a(16); Wis. Stat. § 11.0101(8) *with id.* § 11.0101(16); Wyo. Stat. § 22-25-102(a) *with id.* § 22-25-102(k).

> evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

424 U.S. at 21 (emphasis added and footnote omitted).

In contrast, the *Buckley* Court explained that limits on *expenditures* "impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." *Id.* at 23. That is because a "restriction on the amount of money a person or group can spend on political communication . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19 (footnote omitted). As a result, expenditure limits "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.*

Because of these differing constitutional considerations, states like Pennsylvania can, and sometimes do, permissibly prohibit unions from using general treasury funds to make *contributions* to candidates or political parties in connection with elections. *See, e.g.*, 25 P.S. § 3253(a) & 43 P.S. § 1101.1701; *but cf.* Nat'l Conference of State Legislatures, *State Limits on Contributions to Candidates 2015–2016 Election Cycle* (May 2016) (listing 34 states that permit unions to make direct contributions to political candidates), https://goo.gl/sshZ07. But, when it comes to the use of treasury funds for political *expenditures*, the law gives unions considerably greater freedom. *See Pinto v. State Civil Serv. Comm'n*, 912 A.2d 787, 796 (Pa. 2006) (noting that public-sector unions in the Commonwealth are generally "free to take public positions on partisan political matters"); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2295 (2012) ("Public-sector unions have the right under the First Amendment to express their views on political and social issues without government interference.").

To begin with, the U.S. Supreme Court has held that a law cannot prohibit unions from using treasury funds to communicate with their members about an election without raising "the gravest doubt[s] . . . as to its constitutionality" under the First Amendment. *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 121 (1948) ("*CIO*"). In keeping with that holding, Pennsylvania's Election Code declares that "*no provision* of the laws of this Commonwealth" may be construed to prohibit "communications . . . on *any subject*" made by unions or other associations to "members and their families." 25 P.S. § 3253(c) (emphases added). This blanket statutory protection for unions and other associations to communicate freely with members and their families is hardly unique; similar provisions exist in federal law and in the vast majority of states that otherwise restrict or prohibit unions' political contributions.[2]

The First Amendment also guarantees the right of unions to make expenditures for independent political advocacy addressed to the general public. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the U.S. Supreme Court held that the First Amendment prohibited Congress from restricting the use of corporate or union treasury funds for "independent expenditures"—that is, political speech presented to the public that is not coordinated with a candidate. *Id.* at 318–19, 365. This holding applies with equal force to state laws, including those of Pennsylvania, that would otherwise restrict unions' independent political expenditures. *See Am.*

---

[2] *See* 52 U.S.C. § 30118(b)(2)(A); *see also* Ala. Code § 17-5-8(j); 2 Alaska Admin. Code § 50.990(7)(C)(iv); Ariz. Rev. Stat. § 16-911(B)(10); Ark. Code § 7-6-201(5); Cal. Gov't Code § 85312; Colo. Const. art. XXVIII, § 2(8)(b)(III); Conn. Gen. Stat. § 9-601a(b)(2); Del. Code tit. 15, § 8002(15); Fla. Stat. § 106.011(10)(a); Idaho Code § 67-6602(f)(2)(iii); 10 Ill. Comp. Stat. 5/9-1.14(b)(5); Ind. Code § 3-9-5-15(b); Iowa Code § 68A.503(6); La. Rev. Stat. § 18:1483(9)(d)(ii); 21-A Me. Rev. Stat. § 1012(3)(B)(3); Md. Code, Elec. Law § 13-306(a)(6)(ii)(2); Mass. Gen. Laws ch. 55 § 1; Mich. Comp. Laws § 169.206; Mo. Rev. Stat. § 130.011(16)(e)(b); Mont. Code § 13-1-101(14)(b)(iv); Neb. Rev. Stat. § 49-1419(3)(b); N.J. Stat. § 19:44A-29(f); N.Y. Elec. Law § 14-100(13); N.C. Gen. Stat. § 163-278.19(b); Ohio Rev. Code § 3599.03(F)(3); Okla. Stat. tit. 74, ch. 62, Appx. I, Rule 2.29; Or. Rev. Stat. § 260.007(7); R.I. Gen. Laws § 17-25-3(14)(ii)(C); S.D. Codified Laws § 12-27-1(11); Tenn. Code § 2-10-102(4)(D); Tex. Elec. Code § 253.098(a); Utah Code § 20A-11-1404(4); Wash. Rev. Code § 42.17A.005(13)(b)(v); W. Va. Code § 3-8-1a(12)(B)(vi); Wis. Stat. § 11.0101(8)(b)(10); Wyo. Stat. § 22-25-102(d).

Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam); *see also* Pa. Dept. of State, *Statement Regarding the Effect of the U.S. Supreme Court's Decision in Citizens United v. FEC on Pennsylvania Law* (March 4, 2010) (advising that existing Pennsylvania campaign laws cannot be applied to prohibit union or corporate independent expenditures), https://goo.gl/tODapn.

The First Amendment's robust protection for independent political speech even guarantees the right of unions to make certain political *contributions*—namely, donations of general treasury funds to political action committees and other organizations that, in turn, make independent expenditures. This principle was recognized by the U.S. Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. FEC*, where the court held that provisions of federal campaign-finance law were unconstitutional insofar as they limited corporate or union contributions to independent expenditure committees. 599 F.3d 686, 694–96 (D.C. Cir. 2010) (en banc). In the wake of that decision, the Federal Election Commission ("FEC") has expressly acknowledged in its regulations that unions may make contributions to independent expenditure committees (sometimes called "SuperPACs"), *see* 11 C.F.R. § 114.10, note to para. (a), and it has established procedures for those committees to register with the FEC and report their spending and receipts, *see* FEC Advisory Opinion 2010-09 (July 10, 2010).

That is also the case under Pennsylvania law. In *General Majority PAC v. Aichele*, a federal district court struck down a provision of the Election Code, 25 P.S. § 3253, insofar as it prohibited corporations and unions from making contributions to independent expenditure committees in connection with state and local elections in the Commonwealth—a conclusion that was so obvious that the Commonwealth "agree[d] that the challenged Election Code provision cannot stand constitutional scrutiny." *See* 2014 WL 3955079 at *4. The Department of State,

which administers the Commonwealth's campaign-finance laws, then issued guidance establishing procedures for the registration and reporting by independent expenditure committees and explicitly acknowledging that unions cannot be prevented from making contributions to those entities. *See* Pa. Dep't of State, *Statement on General Majority PAC v. Aichele*, https://goo.gl/XzRBLx.

B. Facts Regarding the Unions' Challenged Political Activities

The Unions are affiliated labor organizations that represent public-education employees in Pennsylvania and, in the case of NEA, across the United States. (Joint Stipulation of Facts ("Stips.") ¶¶ 1, 2.) The Unions are incorporated entities, and they are "employe organization[s]" for purposes of PERA. (Stips. ¶ 3.) At all times relevant to this matter, Trometter was a member of both PSEA and NEA. (Ex. 1, at 2a; Stips. ¶ 4.)

In accordance with the statutory and constitutional protections for union political expression noted above, the Unions paid for and disseminated two communications during the lead-up to the 2014 general election that are at issue in these proceedings.

The first communication involves a semi-monthly magazine published by PSEA called *The Voice*. (Ex. 1, at 61a; Stips. ¶ 7.) This publication is PSEA's "house organ"—a print subscription is included as part of each PSEA member's annual dues, and the magazine serves as one of the primary means by which PSEA communicates with its members on a variety of topics.[3] (Ex. 1, at 21a, 61a; Stips. ¶¶ 7, 8.) PSEA pays for the publication and distribution of *The Voice* with general treasury funds. (Ex. 1, at 61a; Ex. 3; Stips. ¶ 12.)

[3] Subscriptions to *The Voice* are also available to non-members for a fee. (Ex. 1, at 21a; Stips. ¶ 8.) In October, 2014, *The Voice* was distributed to approximately 15 non-member subscribers and approximately 150,000 members. (Ex. 1, at 61a; Transcript of Hearing ("Tr.") 49 (Feb. 1, 2017).)

The Voice contains advertisements, for which PSEA charges an advertising fee. (Tr. 70.) The advertising content in *The Voice* is separate from the magazine's news and editorial content, and advertisers have no role in determining *The Voice*'s editorial stance or content. (Tr. 48, 50.)

On October 17, 2014, PSEA mailed out the November 2014 edition of *The Voice*, which contained articles urging members to vote in the then-upcoming elections and, specifically, to vote for Tom Wolf ("Wolf") for governor.[4] (Ex. 1, at 20a–51a, 62a; Stips. ¶ 11.) Included in the magazine was an article featuring Wolf's answers to questions on certain policy and legislative issues. (Ex. 1, at 32a, 62a.) PSEA did not discuss the contents of that article, or of any other article or advertisement that appeared in the magazine, with Wolf or his campaign. (Tr. 50, 54; Ex. 1, at 62a; Stips. ¶ 11.)

All of the content dealing with Wolf in the November 2014 edition of *The Voice* was editorial in nature. (Tr. 50, 54.) That is, it reflected PSEA's own views on the 2014 gubernatorial election, and was not paid for or influenced by any advertiser. (*Id.*) And, apart from Wolf's answers to the legislative and policy inquiries, no aspect of the magazine's content was made or created in consultation with Governor Wolf or his campaign. (*Id.*; Ex. 1, at 62a; Stips. ¶ 11.)

As a member of PSEA, Trometter received a copy of the November 2014 edition of *The Voice* at her home address. (Ex. 1, at 3a; Stips. ¶ 13.)

The second communication at issue in these proceedings is a letter dated October 28, 2014, that NEA addressed to the household family members of its members living in Pennsylvania. (Ex. 1, at 63a–64a; Stips. ¶ 14.) The October 28 letter encouraged the recipient to

[4] PSEA also posted an electronic copy of the November 2014 edition of *The Voice* for members and families to access on PSEA's website. (Ex. 1, at 85a; Stips. ¶ 10.) That copy could only be accessed through the "Membership Center" section of the PSEA website, and only then by clicking a link indicating that the content of the publication "is intended for PSEA members and their immediate families." (Ex. 1, at 78a; Stips. ¶ 10.) That electronic copy was accessed fewer than 50 times before PSEA decided to remove it from its website. (Tr. 59.)

vote for Wolf for governor. (*Id.*) The letter was conceived, drafted, published, and sent without coordination or consultation with Wolf or his campaign. (Ex. 1, at 64a.; Tr. 33; Stips. ¶ 17.) A copy of the October 28 letter was sent to Trometter's husband, Jeffrey Trometter, who is not a PSEA or NEA member. (Ex. 1, at 3a; Stips. ¶ 18.)

A disclaimer at the bottom of the October 28 letter states that is was "Paid for by the NEA Advocacy Fund," which is an independent expenditure committee controlled by NEA, registered with the FEC, and funded in large part by transfers from NEA's general treasury.[5] (Ex. 1, at 3a, 63a–64a, 72a–77a; Stips. ¶ 15.) As it turns out, however, the disclaimer on the letter was incorrect; production and distribution of the letter was in fact paid for out of NEA's general treasury funds and not from the NEA Advocacy Fund. (Ex. 5; Ex. 6, at 183; Stips. ¶ 16.)

C. Earlier Proceedings

After receiving these two communications at her home, Trometter filed a charge with the PLRB contending that the Unions violated PERA § 1701's criminal prohibition against any covered "employe organization" making a "contribution" out of its general treasury funds "either directly or indirectly to any political party or organization or in support of any candidate," 43 P.S. § 1101.1701. (Ex. 1, at 1a–2a; Stips. ¶ 19.) On July 21, 2015, the Board issued an order transferring Trometter's charge to the Attorney General in accordance with a Board regulation, 34 Pa. Code § 95.112(c). (Ex. 7; Stips. ¶ 20.) Trometter then petitioned the Commonwealth Court for review of the Board's referral to the Attorney General. (Ex. 8; Stips. ¶ 21.)

On May 23, 2016, the Office of Attorney General issued a letter indicating that the case "would not be an appropriate case for criminal prosecution, based on the facts of the case and the review of the relevant statutes," and informing the Board that the office had closed its file on the

[5] The remainder of the NEA Advocacy Fund's funding came from a single transfer from NEA's traditional political action committee, the NEA Fund for Children and Public Education. (Ex. 1, at 72a–77a; Ex. 4; Stips. ¶ 15.)

matter. (Ex. 9; Stips. ¶ 22.) On September 8, 2016, however, the Commonwealth Court ruled that the Board's referral was premature and that the Board had a statutory responsibility to conduct its own review of Trometter's charge. *See Trometter v. PLRB*, 147 A.3d 601, 610 (Pa. Commw. Ct. 2016). The Commonwealth Court declined to address the merits of Trometter's charge or the Unions' response and defenses. *See id.* at 606.

On October 20, 2016, the Board issued an order and notice of hearing to be held on February 1, 2017. (PLRB Order and Notice of Hr'g (Oct. 20, 2016).) Prior to the hearing, Trometter amended her charge to make clear that she challenged three actions as "contributions" violating § 1701: (1) PSEA's payment for the production and distribution of the November issue of *The Voice*; (2) NEA's payment for the production and distribution of the October 28 letter; and (3) transfers of NEA general treasury funds to the NEA Advocacy Fund. (Amended Charge of Illegal Contributions (Jan. 23, 2017).) A full hearing on the amended charge was conducted on February 1, 2017.

ARGUMENT

The facts relevant to Trometter's amended charge are largely undisputed. Both Unions spent treasury funds to make independent political communications to their members, and NEA used treasury funds to support its own federally registered independent expenditure committee. The result in this case therefore comes down to an interpretive question: does any of the Unions' conduct proven at the hearing qualify as a "contribution . . . either directly or indirectly to any political party or organization or in support of any political candidate for public office" for purposes of PERA § 1701?

The answer is no. As we explain in greater detail below, § 1701 does not—and cannot—reach the Unions' conduct. First and most straightforwardly, once the relevant terms of the

statute are given their most reasonable interpretation, it becomes apparent that § 1701's reference to "contributions" applies only to a union's donations of money or other things of value to another, and not to an organization's use of funds for its own speech. It also becomes apparent that § 1701 applies only to contributions made in connection with state and local elections, and not contributions made to federally-registered independent expenditure committees. So understood, § 1701 does not reach any of the activity at issue here, and Trometter's amended charge must therefore be dismissed.

Furthermore, Trometter's expansive reading of § 1701—which would prohibit *any* expenditure of union funds that in some sense supports *any* political organization or candidate for political office—is statutorily and constitutionally unsustainable. It would plainly violate the free-speech protections of the United States and Pennsylvania Constitutions. It is unconstitutionally vague. It impermissibly seeks to regulate activity governed by federal law and the laws of other states. It conflicts with a provision of the Pennsylvania Election Code. And, it violates the standards for interpreting criminal statutes. Indeed, there is practically no end to the problems Trometter's reading of § 1701 would create. The Board should avoid these problems by rejecting Trometter's interpretation of the statute. Failing that, the Board must conclude that § 1701 is unconstitutional as applied to the conduct identified in the amended charge.

A. The Proper Interpretation of PERA § 1701 and Its Application to the Violations Alleged in the Amended Charge

PERA § 1701 provides for civil and criminal penalties against an "employe organization" that uses its general treasury funds to make a "contribution . . . either directly or indirectly to any political party or organization or in support of any political candidate for public office." 43 P.S. § 1101.1701. Properly understood, this provision applies only to a PERA-covered union's donation of money or other things of value to a candidate, party, or political organization in

connection with Pennsylvania state and local elections. It does not apply to a union's expenditure of funds for its own political speech, nor does it apply to a union's funding of its own independent expenditure committee that is regulated solely by federal law. As we now show, the Board need only apply two fundamental principles of statutory construction to arrive at that conclusion.

1. A "contribution" under § 1701 is a donation of money or other things of value to another, not an organization's use of funds for its own speech

As used in PERA § 1701, the term "contribution" is limited to donations of money or other things of value to another based on the "text-book" rule of statutory interpretation "that terms of art in a statute . . . are to be taken in their technical sense, because they have a definite meaning." *Brocket v. Ohio & Pa. R.R. Co.*, 14 Pa. 241, 243 (1850); *see also Smrekar v. Jones & Laughlin Steel Corp.*, 8 A.2d 461, 464 (Pa. Super. Ct. 1939) ("[T]he rule is well settled that words having precise and well-settled meaning in the jurisprudence of a country have the same sense in its statutes unless a different meaning is plainly intended."); 1 Pa. C.S. § 1903(a) ("[T]echnical words and phrases and such others as have acquired a peculiar and appropriate meaning . . . shall be construed according to such peculiar and appropriate meaning or definition.").

That rule applies here because the term "contribution" has acquired a specific meaning in the context of laws regulating election-related spending. In the words of the *Buckley* Court, "the general understanding of what constitutes a political contribution" is "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary." 424 U.S. at 24 n.24; *see also* 25 P.S. § 3241(b) (establishing a similar definition under the Election Code). As we have already shown, this sense of the term "contribution"—as

being both limited to political donations and distinct from the term "expenditure" that applies to political spending generally—is consistent not only with the relevant caselaw, but with every state and federal campaign-finance statute currently in existence. *See supra* at 2–4 & n.1. Indeed, these sources are in such complete agreement on the basic distinction between "contributions" and "expenditures" that our research has revealed *no* jurisdiction that defines an election-related "contribution" to include an entity's own independent speech supporting or opposing a candidate. Accordingly, the term "contribution" in § 1701 should be limited to donations of money or other things of value to another, and not extended to an organization's use of funds for its own speech. *See DePaul v. Commonwealth*, 969 A.2d 536, 548 (Pa. 2009) (construing a Pennsylvania statute banning "contributions" by individuals involved the gaming industry to apply to "political donations" made to candidates, parties, and political committees); *see also Joint Heirs Fellowship Church v. Ashley*, 45 F. Supp. 3d 597, 631–37 (S.D. Tex. 2014) (rejecting a claim that the term "contribution" in a state campaign-finance statute includes independent political advocacy), *aff'd*, 629 F. App'x 627 (5th Cir. 2015).

Construing the term "contribution" in this manner is also consistent with its use in a variety of other legal contexts. For example, federal tax law allows a taxpayer to deduct any charitable "contribution" from his or her taxable income. 26 U.S.C. § 170(a). Common sense tells us that this deduction is only available for an actual gift of money or property to a charity, *see Pauley v. United States*, 459 F.2d 624, 626 (9th Cir. 1972), and that a taxpayer could not claim it merely by spending money to broadcast his supportive views about the charity's mission. Likewise, no one would say than an employer can discharge its obligation under Pennsylvania law to make "contributions" for unemployment compensation insurance, 43 P.S.

§ 781(a), by taking out an advertisement in a local paper to extol the importance of unemployment benefits.

This reading of the term is also fully consonant with ordinary, everyday understandings of what qualifies as a "contribution." *See* 1 Pa. C.S. § 1903 (providing that, when statutory terms do not have a technical or specialized meaning, they should be construed "according to their common and approved usage"). As Trometter herself acknowledges, a common dictionary definition of the term refers "primarily . . . 'to giv[ing] or supply[ing]'" something to another. Complainant's Posth'g Br. 23 (quoting *Webster's Seventh New Collegiate Dictionary* 182 (1965)). Accordingly, all of the relevant indications point toward defining "contribution" in PERA § 1701 as a donation of money or other things of value to another, and not as an organization's use of funds for its own speech.

What that means for Trometter's amended charge is that two of the alleged violations—PSEA's publication of *The Voice* and NEA's distribution of the October 28 letter—are obvious non-starters. Neither one of these involved donating money or other things of value to Wolf's campaign. Instead, both were instances of a union expending funds for its own political speech, which does not amount to a "contribution" under § 1701.

No one disagrees with Trometter's suggestion that, if PSEA had provided free advertising space in *The Voice* to Wolf's campaign, that gift would amount to an in-kind contribution with a specific monetary value. *See* Complainant's Posth'g Br. 27. But those are not the facts of this case. On the contrary, there is no dispute that the articles about Wolf in *The Voice* were editorial content—in other words, PSEA's *own speech*—and were published independently and without coordination with Wolf's campaign. (Ex. 1, at 62a; Tr. 50; Stips. ¶ 11.) That is also the case with

NEA's October 28 letter, which was conceived, drafted, published, and sent without coordinating or consulting with Wolf or his campaign.[6] (Ex. 1, at 64a.; Tr. 33; Stips. ¶ 17.)

Indeed, Trometter effectively concedes that the Unions did not actually donate anything to Wolf's campaign, arguing instead that spending for independent speech in support of a candidate is an "indirect" contribution prohibited by § 1701. *See* Complainant's Posth'g Br. 23. That is not a fair reading of the statute. Not only would it obliterate the well-established distinction between contributions and expenditures, it would run contrary to the settled understanding of what an "indirect" contribution is in the context of campaign-finance laws. *See Joint Heirs Fellowship Church*, 45 F. Supp. at 632–37 (rejecting a claim that independent political advocacy qualifies as an "indirect" contribution). As the *Buckley* Court explained, an "indirect[]" contribution is a donation of money that is made "through an intermediary" to a candidate, party, or campaign. 424 U.S. at 24 n.24; *see also United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010) ("A straw donor contribution is an *indirect* contribution . . . .") (emphasis in original). Both federal and Pennsylvania law explicitly ban such indirect contributions because they can be used as means for evading contribution limits or requirements for disclosing a contribution's source. *See* 52 U.S.C. § 30122; 25 P.S. § 3254. There is no allegation or evidence here that the Unions made such an "indirect" contribution by donating funds to Wolf through a straw or intermediary. Thus, there is no basis for treating the Unions' communications in *The Voice* and the October 28 letter as prohibited "contributions."

Nor should the term "contribution" apply to NEA's funding of its own independent expenditure committee. After all, a contribution requires giving or donating *to another*. The NEA

[6] To be sure, a communication or other expenditure made *in coordination* with a candidate's campaign can be considered an in-kind contribution to the candidate. *See FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 438 (2001). But, here, it is undisputed that both PSEA and NEA made their communications independently and absent any coordination with a candidate or campaign.

Advocacy Fund, however, is wholly owned and controlled by NEA, and it exists only to convey NEA's independent political speech. So, in the most basic sense, NEA's funding to the NEA Advocacy Fund is simply a mechanism for disseminating NEA's own speech. Accordingly, none of the Unions' activities identified in the amended charge qualify as "contributions" for purposes of PERA § 1701, and the violations alleged in connection with those activities should be dismissed.

2. PERA's ban on contributions to a "political party or organization" or in support of a "political candidate for public office" is limited to Pennsylvania state and local elections

Even if NEA's transfer of funds to the NEA Advocacy Fund might otherwise qualify as a "contribution," there is still no violation § 1701. That is because the statute's reference to contributions made to a "political party or organization" or in support of a "political candidate for public office" must be understood to apply only in connection with Pennsylvania state and local elections, and not to activity involving federal or other states' elections. To hold otherwise would be inconsistent with the Commonwealth's long-standing rule of statutory interpretation presuming that legislative enactments "have no extraterritorial force, and . . . that they were intended to operate within the limits of the state." *Brownback v. Burgess of Borough of N. Wales*, 45 A. 660, 660 (Pa. 1900); *see also* Antonin Scalia & Bryan A. Garner, READING LAW 268 (2012) ("It has long been assumed that legislatures enact their laws with this territorial limitation in mind.").

The Commonwealth's Election Code illustrates precisely the kind of territorial limitation that should apply to PERA § 1701. The Election Code regulates contributions and expenditures in connection with an "election," which is defined as "any retention, primary, special, municipal or general election at which *candidates* appear on the ballot for nomination or election." 25 P.S.

§ 3241(c) (emphasis added). A "candidate" for this purpose is any individual who seeks nomination or election to "public office," *id.* § 3241(a), which is in turn defined as any "office to which persons can be elected . . . *under the laws of this State*," *id.* § 2602(a) (emphasis added). In other words, the Election Code's campaign-finance provisions are limited to elections for state and local office in the Commonwealth. They do not extend to federal or other states' elections, which are instead governed by the laws of those other jurisdictions.

The same limitation should apply to PERA § 1701's reference to contributions made to a "political . . . organization." Nothing in the text of the statute indicates that the Legislature intended to depart from the usual presumption against extra-territorial legislation (which, as we explain *infra* at 35, would be unconstitutional in any event). *See* Scalia & Garner, READING LAW 268–69 (noting that a legislature "need not qualify each law by saying 'within the territorial jurisdiction of this State'" because "[t]hat is how statutes have always been interpreted"). There is no evidence the transfers from NEA (located in Washington, D.C.) to the NEA Advocacy Fund (also located in Washington, D.C.) have any nexus whatsoever to Pennsylvania or its state or local elections. Moreover, because the NEA Advocacy Fund is registered with the FEC and regulated solely by federal law, *see* 52 U.S.C. §§ 30102–04, 30143(a), it is not a Pennsylvania "political . . . organization" covered by PERA § 1701. Any alleged violation that stems from NEA's funding for the NEA Advocacy Fund must therefore be dismissed.

* * *

What we have argued up to this point is enough for the Board to correctly resolve the entire case based on ordinary principles of statutory interpretation. Under those principles, neither Trometter's amended charge nor the evidence presented at the hearing describe a violation of PERA § 1701 because none of the Unions' conduct at issue qualifies as a

"contribution" and because the federally-registered NEA Advocacy Fund is not a Pennsylvania "political . . . organization" covered by the statute. The amended charge should therefore be dismissed in its entirety.

B. Trometter's Proposed Interpretation of § 1701 is Both Constitutionally and Statutorily Unsustainable

Trometter argues for a radically different interpretation of PERA § 1701. In her posthearing brief, Trometter contends that § 1701 prohibits *any* expenditure of union funds that could be construed as "generally 'in support of' a candidate for office." Complainant's Posth'g Br. 23. This would include a union's paid communications made independently of any candidate, as well as those directed solely to the union's own members or their families. *Id.* And, as Trometter's counsel made clear in the hearing, as long as a union qualifies as a PERA-covered "employe organization," her expansive reading of § 1701 would prohibit these kinds of communications even when they are otherwise lawfully made in connection with federal or out-of-state elections. Tr. 101–02.

This stands in stark contrast to the Pennsylvania Supreme Court's understanding that public-sector unions in the Commonwealth are generally "free to take public positions on partisan political matters." *Pinto*, 912 A.2d at 796. It should therefore come as no surprise that Trometter's reading of § 1701 as a complete ban on political expression by public-sector unions is fatally flawed. If adopted by the Board, it would be ruled unconstitutional on numerous grounds, recognized as repealed by later enactments of the Legislature, and rejected as inconsistent with basic principles for interpreting laws with criminal applications. Such a result can and should be avoided.

1. Trometter's proposed interpretation of § 1701 should be avoided because it would violate the United States and Pennsylvania Constitutions

"[T]he General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa. C.S. § 1922(3). It is therefore a fundamental principle of Pennsylvania law that an interpretation of a statute that raises "grave and doubtful constitutional questions" must be avoided whenever possible. *MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n*, 844 A.2d 1239, 1249 (Pa. 2004). This principle applies to the Board's interpretations of PERA. *See Brown v. Montgomery County*, 918 A.2d 802, 807 n.10 (Pa. Commw. Ct. 2007) (declaring that an agency should interpret the statute it enforces "in a way that is consistent with the demands of applicable constitutional principles"). When applying the doctrine of constitutional avoidance, the Board must consider—not just the many constitutional concerns that Trometter's proposed interpretation of § 1701 creates when applied to the Unions' conduct—but also any other constitutional problems that would predictably arise from that interpretation. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) ("If one [interpretation] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

Here, Trometter's amended charge does more than raise "grave and doubtful constitutional questions." *MCI WorldCom*, 844 A.2d at 1249. Rather, it is an absolute certainty that, if the Board were to adopt Trometter's interpretation of § 1701, a reviewing court would declare that interpretation unconstitutional as applied to the Unions' conduct. It is also certain that Trometter's interpretation of § 1701 would be unconstitutional in a host of other foreseeable circumstances. The Board should therefore construe § 1701 to avoid these problems. And, if such a saving construction of the statute is not possible, the only appropriate course is to

recognize that § 1701 is unconstitutional as applied here. *See Lehman v. Pa. State Police*, 839 A.2d 265, 276 (Pa. 2003) (noting that, although administrative agencies cannot declare that the statutes they administer facially unconstitutional, they are authorized to find those statutes unconstitutional as applied to particular circumstances).

a. Trometter's proposed interpretation of § 1701 violates constitutionally protected rights of free speech

"[P]ublic-sector unions have the right under the First Amendment to express their views on political and social issues without government interference." *Knox*, 132 S. Ct. at 2295. That right receives even greater protection under Article I, § 7 of the Pennsylvania Constitution, which broadly ensures the right of "free communication of thoughts and opinions" and the right to "freely speak, write and print on any subject." Pa. Const. art. I, § 7. Laws that purport to regulate election-related speech raise special concerns because constitutional protections for free speech have their "'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *FOP Lodge No. 5 ex rel. McNesby v. City of Phila.*, 763 F.3d 358, 367 (3d Cir. 2014) (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014)). Such laws must therefore be read to "give the benefit of any doubt to protecting rather than stifling speech." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007).

Trometter's proposed interpretation of § 1701 takes the opposite approach and seeks to stifle as much speech as possible. In so doing, Trometter runs roughshod over constitutional protections for a union's communications with its members, over recent and controlling judicial authority assuring a union's right to engage in and fund independent political speech, and over the special protections for political expression afforded by the Pennsylvania Constitution. Nothing justifies this reckless approach to suppressing speech, and the Board should reject it.

i. The First Amendment protects a union's communications with its own members and their families

A union is "an archetype of an expressive association." *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 301 (4th Cir. 1991). The First Amendment guarantees such entities the "freedom to engage in association for the advancement of beliefs and ideas," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984), including beliefs on "political . . . matters," *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). Any reading of § 1701 that prevents the Unions from communicating with members and their families about electoral issues is flatly inconsistent with that constitutional guarantee.[7]

In *CIO*, the Court considered a federal statute that banned unions from making "contributions or expenditures" in connection with certain elections. 335 U.S. at 107 n.1. The case arose when a union advocated for the election of a member of Congress in its weekly periodical. *Id.* at 108. The Court observed that, if the statute were construed to prohibit a union from communicating with its members about the election, "the gravest doubt would arise in our minds as to its constitutionality" under the First Amendment of the U.S. Constitution. *Id.* at 121. The Court therefore held that the federal ban on both "contributions" and "expenditures" could not be read to reach a union's communication with its own members. *Id.*

The *CIO* Court's decision is directly applicable here. It protects associational rights of unions and their members to send and receive publications and communications—like *The Voice* and the October 28 letter—that express a union's independent views on political and electoral

[7] Trometter's broad reading of § 1701 implicates—not just the *Unions'* right to speak on political matters—but also the *members'* right under the First Amendment "to hear what [their unions] ha[ve] to say." *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *see also Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (explaining that the "right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech . . . and political freedom") (plurality opinion).

matters.[8] *See id.* at 121–23; *see also Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 74–78 (Colo. 2008) (recognizing that the First Amendment requires broad protections for communications between a union and its members). Because Trometter argues for an interpretation of PERA § 1701 that would ban such protected communications entirely, that interpretation must be rejected or declared unconstitutional as applied to the conduct at issue here.

ii. The First Amendment protects independent political speech and funding for others' independent political speech

Trometter's broad interpretation of PERA § 1701 is also impossible to reconcile with the Unions' First Amendment right to engage in and fund independent political speech.

As noted above, the *Citizens United* Court struck down a federal statute that prohibited corporations and unions "from using their general treasury funds to make independent expenditures . . . for speech expressly advocating the election or defeat of a candidate." 558 U.S. at 318–19. In so holding, the Court recognized that certain campaign-finance restrictions—such as limits on *contributions* to candidates—may be justified based on a "sufficiently important governmental interest in the prevention of corruption and the appearance of corruption." *Id.* at 345 (citation and quotation marks omitted). The Court concluded, however, that this justification was inapplicable to expenditures for speech made independently of any candidate. As the Court explained:

> The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

[8] Because *CIO* was on the books at the time PERA § 1701 was enacted in 1970, the Board should construe the statute's reference to "contributions" in a matter that is consistent with the Court's holding. *See* 1 Pa. C.S. § 1922(4) (creating the statutory presumption that "when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.").

Id. at 357 (citation and quotation marks omitted). Accordingly, the Court held there is "no basis" for allowing the government to limit corporate independent expenditures, and that laws purporting to do so violate the First Amendment. *Id.* at 365. "There can be no serious doubt" that this holding applies with equal force to state laws, including those of Pennsylvania. *Am. Tradition P'ship*, 132 S. Ct. at 2491; *see also* Pa. Dept. of State, *Statement Regarding Citizens United, supra* at 5–6.

Here, the undisputed facts are that both *The Voice* and the October 28 letter were independent political communications, made without coordination with any candidate or political committee. (Stips. ¶¶ 11, 17.) Trometter's interpretation of PERA § 1701 would therefore bring the statute into direct conflict with *Citizens United* and *American Tradition Partnership*. The Board should adopt an interpretation that avoids that result or declare § 1701 unconstitutional as applied to the Unions' communications at issue here.

The First Amendment's protection for independent political speech also extends to NEA's funding of its own independent expenditure committee, the NEA Advocacy Fund. In the wake of the District of Columbia Circuit's decision in *SpeechNow.org*, every court to face the issue has agreed with its core holding and has struck down, on First Amendment grounds, state laws that limit union or corporate contributions to independent expenditure committees. *See, e.g., Republican Party v. King*, 741 F.3d 1089, 1095–96 (10th Cir. 2013); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enterprise v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010). Indeed, as one of those courts observed, "few contested legal questions are answered so consistently by so many courts and judges." *Walsh*, 733 F.3d at 488; *see also*

McCutcheon, 134 S. Ct. at 1442 n.2 (recognizing this principle as settled law); *General Majority PAC*, 2014 WL 3955079 at *3 (applying this principle to strike down provisions of the Pennsylvania Election Code insofar as they limit contributions to independent expenditure committees.).

Trometter's reading of PERA § 1701—which would criminalize NEA's funding of its own independent expenditure committee—flies in the face of every ruling to address restrictions on contributions to such committees. The Board should reject Trometter's interpretation of the statute (based on the principles explained *supra* at 22–24) or declare it unconstitutional as applied to NEA's funding of the NEA Advocacy Fund.

iii. The Pennsylvania Constitution broadly protects all forms of political expression

Trometter's interpretation of PERA § 1701 also raises insurmountable concerns under Article I, Section 7 of the Pennsylvania Constitution, which "provides protection for freedom of expression that is broader than the federal constitutional guarantee." *Com., Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340, 343–44 (Pa. 1999). In particular, any interpretation of § 1701 that completely bans the Unions from communicating with their own members about political candidates—or from funding their own independent political speech about such matters—would render the statute unconstitutional under the Pennsylvania Supreme Court's decision in *DePaul v. Commonwealth*, which applies strict scrutiny to all restrictions on political speech and contributions.

DePaul involved a challenge under Article I, Section 7 to a provision of the Commonwealth's Gaming Act that prohibited certain individuals affiliated with licensed gambling from "contributing any money or in-kind contribution" to a candidate, political parties, or "any group, committee or association organized in support of a candidate, political party

committee or other political committee." 4 Pa. C.S. § 1513. The Court began its analysis of the challenge by noting that any "restriction upon the expressive conduct represented by political donations is subject to strict scrutiny" and, as such, could only survive if it was "narrowly tailored to meet a compelling state interest." 969 A.2d at 548, 550.[9] Applying that highest level of constitutional scrutiny, the Court concluded that the challenged contribution ban was invalid on its face. The Court acknowledged the government's asserted interest—preventing actual or perceived corruption—was sufficiently compelling, but concluded that a complete ban on all political contributions was not narrowly tailored when more limited restrictions like monetary limits on contributions would serve the state's interest. *Id.* at 552–53.

In reaching that conclusion, the *DePaul* Court noted that the "experience of other jurisdictions" was "helpful in assessing the importance of the asserted governmental interest and the relationship between the governmental interest itself and the means of advancing that interest." *Id.* at 548. And on that score, the Court noted that the "vast majority" of states that allow gaming "do not regulate political contributions by individuals involved in the gaming industry" at all. *Id.* The Court therefore had no trouble concluding that the complete ban on contributions "palpably and plainly" violated Article I, Section 7. *Id.* at 553.

Trometter's interpretation of § 1701 is unconstitutional under *DePaul*. To begin with, Trometter is proposing a restriction on political expression that goes far beyond the one *DePaul* struck down as overbroad. Not content with the idea that Unions are already prohibited from giving money to candidates and political parties (as was the case with the Gaming Act's ban in *DePaul*), Trometter asks the Board to go even further by banning the Unions from engaging in

[9] The *DePaul* Court's decision to apply strict, rather than intermediate, scrutiny to restrictions on political contributions is a concrete example of the greater protection to speech afforded by the Pennsylvania Constitution. *Cf. Randall v. Sorrell*, 548 U.S. 230, 246–47 (2006) (acknowledging that, for purposes of the First Amendment, restrictions on contributions are subject to a lower level of scrutiny than restrictions on expenditures).

virtually any form of political expression—including communicating with their own members or funding their own independent political speech. Nothing in PERA § 1701 indicates what "compelling interest" might be served by such a thoroughgoing ban on speech, and Trometter's own efforts to conjure up such an interest are not entitled to any credence at all. *See DePaul*, 969 A.2d at 552–53 (rejecting the Attorney General's attempt to rely on post-hoc justifications for banning political contributions that were not articulated by the Legislature).

Further, to the extent *DePaul* calls for a comparison between Trometter's interpretation of PERA § 1701 and the "experience of other jurisdictions," 969 A.2d at 548, it is clear Trometter seeks a degree of political censorship on unions that exists nowhere else in the country.[10] The vast majority of jurisdictions expressly recognize and protect the right of unions to communicate with their members on political matters. *See supra* note 2. Still other jurisdictions do not restrict union political activity at all. *See* Nat'l Conference of State Legislatures, *State Limits on Contributions to Candidates,* above (listing seven states that allow unions to make unlimited contributions to political candidates). And every jurisdiction to face the issue has concluded that unions are free to engage in funding their own independent political speech. *See supra* 23–24. The complete muzzle on union political expression sought by

[10] Trometter claims that two states have laws that impose restrictions on union political speech that are as broad or broader than Trometter's proposed interpretation of § 1701. The first is a Kansas statute, Kan. Stat. § 75-4333(d), which is indeed broad. But that statute has no published history of enforcement whatsoever—possibly because the relevant authorities are aware the statute is unconstitutional under the federal authorities discussed *supra* at 20–24. The second, Iowa Code § 20.26, is nearly identical to the relevant provisions of PERA § 1701, but it has only been interpreted as prohibiting the payment of dues funds to candidates or traditional political committees, not as muzzling all union political speech. *See* Complainant's Posth'g Br. 18 n.17 (collecting cases); *see also* 1990 Iowa Op. Att'y Gen. 94 (1990). At any rate, Iowa's track record for enacting unconstitutional restrictions on independent political speech is not one that should be emulated. *See, e.g., Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 582 (8th Cir. 2013) (striking down as unconstitutional Iowa's efforts to restrict corporate and union independent expenditures).

Trometter in this proceeding would "palpably and plainly" violate Article I, Section 7.[11] *DePaul*, 969 A.2d at 553.

iv. Trometter's proffered justifications for an expansive reading of § 1701 do not withstand constitutional scrutiny

These grave free-speech concerns have been flagged at every stage of this case. The Unions raised them in their initial response to Trometter's charge. They were argued (albeit prematurely) in the appeal to the Commonwealth Court. And, they were discussed at length during the hearing. Yet, Trometter's posthearing brief has remarkably little to say about the subject, and what little it does offer to justify a broad reading of § 1701 can be dispatched quite easily.[12]

First, Trometter suggests that an interpretation of § 1701 that effectively muzzles all political activity by public-sector unions does not present free-speech concerns because it is no different than a law regulating the existence or scope of public-sector collective bargaining. *See* Complainant's Posth'g Br. 16–18. But the difference is both obvious and consequential: while there is no constitutional right requiring a government employer to engage in collective bargaining with a public-sector union, *see Phila. Frat. Order of Corr. Officers v. Rendell*, 736 A.2d 573, 577 (Pa. 1999), those unions have a well-established constitutional right "to express

[11] Indeed, it could easily be argued that § 1701 is facially unconstitutional and cannot be applied even to direct political contributions from public-sector unions to candidates. *See DePaul*, 969 A.2d at 552–53 (facially invalidating a ban on contributions by individuals involved in the gaming industry). However, the Unions are not asserting such a challenge before the Board, which lacks the authority to resolve that issue. *See Lehman*, 839 A.2d at 275. The Unions nevertheless reserve their right to assert a facial challenge to § 1701 before a reviewing court. *See id.*

[12] It is worth noting up-front that Trometter can point to nothing in PERA or its legislative history that actually announces a rationale to support her expansive reading of § 1701. All of Trometter's arguments on this score are therefore mere post-hoc rationalization entitled to no particular credence by the Board or a reviewing court. *See DePaul*, 969 A.2d at 552–53; *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that, in the context of assessing whether a governmental action survives heightened constitutional scrutiny, the asserted governmental justification for the action "must be genuine, not hypothesized or invented post hoc in response to litigation").

their views on political and social issues without government interference," *Knox*, 132 S. Ct. at 2295; *see also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359(2009) ("[P]ublic employee unions are free to engage in such speech as they see fit . . . ."); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 190 (2007) (Public-sector unions "remain[] as free as any other entity to participate in the electoral process with all available funds other than . . . agency fees . . . ."). It is the Board's obligation to avoid construing § 1701 in a way that violates that right.

Second, Trometter contends that her broad interpretation of § 1701 is needed to prevent "*quid pro quo corruption* or the appearance of corruption." Complainant's Posth'g Br. 19. While the government surely has an interest in preventing actual or apparent corruption, that interest does not support Trometter's reading of § 1701. As the *Citizens United* Court explained, independent political speech "do[es] not lead to, or create the appearance of, *quid pro quo* corruption." 558 U.S. at 360. Therefore, if § 1701 were read to cover such speech, it would be unconstitutional based on its "chilling effect extending well beyond the . . . interest in preventing *quid pro quo* corruption." *Id.* at 357; *see also Commonwealth v. Ickes*, 873 A.2d 698, 702 (Pa. 2005) (noting that the "overbreadth doctrine" invalidates laws that "inhibit the exercise of First Amendment rights" if their "impermissible applications . . . are substantial when judged in relation to [their] plainly legitimate sweep") (citation and quotation marks omitted).

Third, Trometter claims that unions subject to § 1701 are somehow akin to government contractors that voluntarily accept certain limitations on their political activity. *See* Complainant's Posth'g Br. 19–20 (citing *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016)). There are several problems with this argument. To begin with, the case Trometter relies on, *Wagner*, is off-point because it deals only with a ban on government

contractors making actual *contributions* to candidates and does not address the kind of independent political speech at issue here.[13]

Moreover, public-sector unions are not comparable to government contractors, and their political activities do not create the same corruption concerns. As the Colorado Supreme Court explained when striking down a broad restriction on public-sector union political activity:

> [T]he appearance of impropriety . . . cannot exist in negotiating collective bargaining agreements because the government does not and cannot select the union with which it contracts. . . . [A] negotiated collective bargaining agreement shares few, if any, common characteristics with the standard procurement contract. The State must contract with the one elected union and the benefits from the contract flow through to the employees without benefitting the union in any direct way. . . . These attributes make the potential of pay-to-play corruption in a collective bargaining agreement exceedingly remote, so the government lacks a sufficiently important interest to justify . . . heavy-handed regulation.

Dallman v. Ritter, 225 P.3d 610, 633 (Colo. 2010).

At any rate, Trometter is wrong to suggest § 1701 applies only to public-sector unions that might qualify in some general sense as "government contractors." After all, a union may be a PERA-covered "employe organization" even if it has no collective-bargaining agreement with a public employer, or even if it is not the certified bargaining representative for *any* public-sector employees. All that is required for coverage under the statute's definition is that the union's "membership includes public employes" and that the union "exists for the purpose, in whole or in part, of dealing with *employers*"—not just *public* employers—concerning working conditions. 43 P.S. § 1101.301(e) (emphasis added). Thus, even giving Trometter's "government contract" argument its fair due, her interpretation of PERA § 1701 is overbroad.

---

[13] *See Wagner*, 793 F.3d at 3–4 (noting that the plaintiffs framed their challenge "narrowly" to address only a ban on actual campaign contribution and not to challenge the law insofar as it might cover "a contractor's independent expenditures on electoral advocacy" or "donations to PACs that themselves make only independent expenditures"); *see also id.* at 5 (recognizing that "[l]aws that limit a person's independent expenditures on electoral advocacy are subject to strict scrutiny," while "[l]aws that regulate campaign contributions . . . are subject to a lesser . . . standard of review") (citations and quotation marks omitted).

Finally, Trometter argues that her expansive interpretation of § 1701 is needed to protect the rights of dissenting employees. *See* Complainant's Posth'g Br. 20–21. Again, this argument is foreclosed by *Citizens United*, which explicitly rejected the notion that a ban on independent speech could be justified by an interest in protecting an organization's members or shareholders. As the Court said, there is "little evidence of abuse" that could not be corrected through an organization's internal democratic procedures. 558 U.S. at 911. This point holds especially true for unions, where a dissenting employee can address any supposed abuse either through union's democratic procedures, *see Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 12–14 (1st Cir. 2012), or by becoming a fair-share feepayer whose funds are not used for political purposes at all, *see Otto v. PSEA-NEA*, 330 F.3d 125, 128 (3d Cir. 2003).

In sum, Trometter does not—and cannot—offer anything that would insulate her broad reading of § 1701 from a finding of unconstitutionality on free-speech grounds. The Board should therefore reject her interpretation or declare § 1701 unconstitutional as applied here.

b. Trometter's proposed interpretation of § 1701 violates the Due Process Clause because it is impermissibly vague

Trometter's broad interpretation of § 1701 would also violate the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague. *See United States v. Williams*, 553 U.S. 285, 304 (2008) (noting that "[v]agueness doctrine is an outgrowth . . . of the Due Process Clause."). The vagueness doctrine enforces a "fundamental principle in our legal system" that laws must give "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations*, Inc., 132 S. Ct. 2307, 2317 (2012) (citation and quotation marks omitted). A law falls short of that standard if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (citation and quotation marks omitted). Particularly when a law

regulates speech, "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.*; *see also Buckley*, 424 U.S. at 40–41 ("Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests.").

Under Trometter's interpretation of PERA § 1701, the term "contribution" would encompass anything a public-sector union does that might support an aspiring political candidate. *See* Tr. 85 (counsel suggesting that "contribution" should be defined as "[s]omething that one gives or does in order to help an endeavor be successful"); *see also* Complainant's Posth'g Br. 23. Faced with such an open-ended standard, a union subject to § 1701 could not know in advance how to comply with the law unless it avoids any and all speech on issues of public importance. As the *Buckley* Court explained:

> Public discussion of public issues which are also campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.

424 U.S. at 42 n.50 (citations and quotation marks omitted).

These concerns were on full display in the hearing. On questioning from the Hearing Examiner, Trometter's counsel was repeatedly unable to say whether praise or a criticism of a legislator's actions would be criminalized under the very interpretation of § 1701 he was advocating.[14] If even the lawyer proposing this definition of § 1701 does not know how it applies, how much more of a trap would it be for non-lawyer union officials who must decide

[14] *See, e.g.*, Tr. 93 (saying, in response to a question about whether § 1701 would cover paid statements opposing a particular candidate, "the PLRB has yet to sort of implement this to any particular situation . . . we need to see how the statute is applied in real time"); *id.* (saying, in response to another question about paid statements opposing candidates, "I'm not the PLRB, but that's a more difficult question than what we presented you today"); *id.* at 96 (saying, in response to yet another question along the same lines, "that's an interesting question, but it's not what you've been presented with today").

how to conduct themselves on a day-to-day basis: Are they committing a crime by telling members about a favorable bill a legislator has introduced because such information might engender positive views of that candidate when he stands for re-election? Do they face imprisonment for criticizing the actions of elected officials because it could bolster the electoral chances of their opponents? Trometter's proposed interpretation of § 1701 offers no clear guidance. And it is no answer to say—as Trometter's counsel did in the hearing, *see* note 14, *supra*— that the PLRB can address these uncertainties on a case-by-basis. One of the main evils of an impermissibly vague law is that it "delegates policy matters" to public officials or agencies "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

"First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Yet, Trometter's broad interpretation of § 1701 would give unions "no security for free discussion," would "blanket[] with uncertainty whatever may be said," and would compel them "to hedge and trim" at every turn. *Thomas*, 323 U.S. at 535. The Board should avoid Trometter's vague interpretation of the statute or declare it unconstitutional as applied to the Unions' conduct at issue here.

c. Trometter's proposed interpretation of § 1701 conflicts with the Supremacy Clause and the elementary constitutional principle that a state's laws have no operation outside of its territory

Trometter contends that, as long as a union qualifies as a PERA-covered "employe organization," § 1701 applies without any geographic or jurisdictional limitation to prohibit contributions made to *all* candidates or political organizations, even when such contributions are otherwise lawfully made in connection with federal or out-of-state elections. Tr. 101–02. Such a reading of the statute is unconstitutional. With respect to federal elections, it violates the

Supremacy Clause, U.S. Const. art. VI, cl.2. And with respect to out-of-state elections, it would violate the elementary constitutional principle that a state's laws have no operation outside of its territory.

i. The Supremacy Clause and Federal Election Campaign Act preempt state laws purporting to regulate advocacy in connection with federal elections

The Supremacy Clause of the United States Constitution provides that the "Constitution and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl.2. "It is through this clause that the United States Congress may preempt state law." *Office of Disciplinary Counsel v. Marcone*, 855 A.2d 654, 664 (Pa. 2004). Congress did that explicitly when it passed the Federal Election Campaign Act (FECA), 52 U.S.C. § 30101 *et seq.*, the law that governs the financing of federal elections. Trometter's interpretation of § 1701 conflicts directly with FECA's preemption provision because it restricts contributions from a union to a federally registered independent expenditure committee. As a result, that interpretation of § 1701 is preempted and therefore unconstitutional.

FECA's express preemption provision states that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law." 52 U.S.C. § 30143. In accordance with that provision, the FEC has enacted a regulation stating, in part, that "[f]ederal law supersedes State law concerning the . . . [l]imitation on contributions and expenditures regarding Federal . . . political committees." 11 C.F.R. § 108.7(b)(3). If applied in the way that Trometter urges here, § 1701 would surely qualify as preempted. After all, Trometter asks for PERA § 1701 to be read as a complete "[l]imitation" on NEA making contributions to its own federally registered committee. *Id.*; *see also* FEC Advisory Opinion 2001-19 (citing several FEC decisions for the proposition that FECA "preempt[s] State laws that

purport[] to disqualify an entire class of potential contributors" to federal political committees); FEC Advisory Opinion 1999-12 (concluding that FECA preempts Pennsylvania's charitable solicitation law insofar as it applies to federal political committees).

Worse yet, Trometter's interpretation of the statute directly conflicts with the FEC's rulings and regulations expressly *allowing* contributions to such committees. *See* 11 C.F.R. § 114.10, note to para. (a) (allowing unions to make contributions to independent expenditure committees); FEC Advisory Opinion 2010-09 (establishing procedures for the registration of such committees). In other words, Trometter's interpretation of § 1701 would categorically prohibit activity that the FEC expressly allows, resulting in a preempted application of state law that "squarely conflicts with the accomplishment and execution of the full purposes of federal law." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984).

In order to avoid preemption, the Board must read the statute's reference to "contribution[s] . . . to any political . . . organization" to exclude contributions to federally registered independent expenditure committees.[15] *See supra* at 19. And, again, if such an interpretation is not possible, the Board must find that § 1701 is preempted and unconstitutional as applied to NEA's funding of the NEA Advocacy Fund. *See Lehman*, 839 A.2d at 276.

[15] In deciding whether to adopt Trometter's expansive interpretation of § 1701, the Board should also consider the many other preemption problems that interpretation would create. *See Clark*, 543 U.S. at 380–81. As Trometter's counsel made clear in the hearing, her reading of § 1701 would criminalize the use of union treasury funds that support a federal candidate or federally-registered political committee in any way. Tr. 102. Yet, FECA and its regulations explicitly protect the right of unions to use treasury funds for communications to members advocating the election or defeat of federal candidates, 11 C.F.R. § 114.3(c), for public announcements of candidate endorsements in federal elections, *id.* § 114.4(c)(6)(i), for independent expenditures advocating the election or defeat of federal candidates, *id.* § 114.10(a), and for payment of the administrative and solicitation costs of a union's federally registered political action committee, *id.* § 114.5. The Board should avoid any interpretation of the statute that would pile up so many obvious preemption issues.

ii. The constitutional prohibition on extraterritorial state legislation prevents states from regulating advocacy in connection with out-of-state elections

Trometter argues for an interpretation of § 1701 that would prohibit a PERA-covered "employe organization" from using treasury funds even when it is lawful to do so in connection with another state's elections. *See* Complainant's Posth'g Br. 23; Tr. 101–02. This violates the "elementary principle" of the nation's constitutional design "that the laws of one State have no operation outside of its territory." *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

As the U.S. Supreme Court has explained:

> [I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914). This principle holds especially true where a state seeks to punish "conduct that may have been lawful where it occurred." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003).

Trometter's interpretation of § 1701 would impose a vast degree of censorship on national unions that qualify as PERA-covered "employe organizations" and also engage in advocacy on behalf of workers all over the country. As far as our research reveals, every state allows unions to communicate with their members, no states enforce limits on unions' independent speech in the wake of *Citizens United*, and the majority of states allow unions to make direct political contributions. *See supra* at 4–5, 22–24. Yet, under Trometter's reading of § 1701, all of this otherwise lawful out-of-state activity would be punishable as a crime in Pennsylvania. The Board must avoid that result, which violates the constitutional limits imposed

on the Commonwealth "as [a] coequal sovereign[] in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

2. Trometter's proposed interpretation of § 1701 conflicts with the later-enacted provisions of the Election Code

As noted earlier, the Election Code declares that "no provision of the laws of this Commonwealth" may be construed to prohibit "communications . . . on any subject" made by unions or other associations to "members and their families." 25 P.S. § 3253(c). Trometter's proposed interpretation of § 1701 would conflict with this later-enacted statute and should therefore be rejected.

It is a fundamental maxim of statutory interpretation that "a conflict between various statutes . . . is to be avoided." *Hous. Auth. v. State Civil Serv. Comm'n*, 730 A.2d 935, 946 (Pa. 1999). This holds equally true where one of the statutes involved is construed and enforced by an administrative agency, which cannot read the statute it administers "so single-mindedly that it . . . wholly ignore[s] other and equally important [legislative] objectives." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143 (2002) (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

NEA's October 28 letter and PSEA's *The Voice* are exactly the kind of communications the Election Code protects. NEA's letter was sent directly to the families of members. (Ex. 1, at 64a; Stips. ¶ 14.) Likewise, PSEA's member magazine is a communication intended solely for union members and their families, and any circulation outside of that group is *de minimis*. (Tr. 59.) Copies of the magazine are mailed directly to PSEA members' households. (Ex. 1, at 61a; Tr. 49; Stips. ¶ 9.) While online copies of the magazine do exist, they are only accessible through the "Membership Center" section of the PSEA website and, to access the magazine, a user would have to deliberately click on the hyperlink and ignore the prominent disclaimer that reads: "Note:

This content is intended for PSEA members and their immediate families." (Ex. 1, at 78a.; Stips. ¶ 10.) Based on these facts, both the October 28 letter and PSEA's *The Voice* qualify for the Election Code's protection for communications between a union and members and their families. 25 P.S. § 3253(c). Trometter's reading of PERA § 1701 therefore sets up a direct conflict between statutes.

Trometter has argued that neither PSEA nor NEA is entitled to communicate directly with their own members under the Election Code because each union is an incorporated, rather than unincorporated, membership organization. *See* Tr. 85–86. The protections of the Election Code for membership and shareholder communications, however, apply with equal force to both incorporated and unincorporated entities. *See* 25 P.S. § 3253(c). Moreover, to construe the Election Code's protection for membership communications as applying only to unincorporated unions would itself raise grave constitutional concerns that the Board should avoid.[16] *See Citizens United,* 558 U.S. at 349 (holding that the government cannot "ban political speech simply because the speaker is an association that has taken on the corporate form"); *CIO*, 335 U.S. at 121–22 (holding, without regard to whether a union is incorporated, that a federal ban on union "contributions" and "expenditures" in connection with certain elections would raise "grave and doubtful constitutional questions" if construed to reach the union's communications with its members). Finally, even if Trometter were correct about the scope of the Election Code's protections, the Board should still avoid an interpretation of § 1701 that would create a conflict between the statutes as applied to membership communications made by unincorporated

[16] If the Board cannot read 25 P.S. § 3253(c) as protecting communications made by an incorporated union to members and their families, the Unions submit that the Board has the authority to declare the statute's exclusion of incorporated unions unconstitutional under *Citizens United* as applied to the circumstances of this case. *See Lehman*, 839 A.2d at 275.The Unions also reserve the right to argue before a reviewing court that such an exclusion is unconstitutional. *See id.*

"employe organizations." *See Clark*, 543 U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").

To avoid a conflict, the Board should read PERA § 1701 as not reaching a union's communications with its own members and their families. *See supra* at 19; *see also CIO*, 335 U.S. at 121–22. But, even if the Board decides that § 1701 does reach a union's use of general treasury funds to communicate with members and their families about political candidates, it still cannot find for Trometter. That is because Election Code § 3253(c) repealed PERA § 1701 to the extent there is any conflict between the two statutes. The Election Code explicitly declares that "[*n*]*o provision* of the laws of this Commonwealth"—which include § 1701—can "be deemed to prohibit direct private communications" by a union or other association "to its members and their families on any subject." 25 P.S. § 3253(c) (emphasis added). This language "clearly indicate[es] the intent and meaning of the legislature that certain acts or character of legislation theretofore existing were repealed." *Durr v. Commonwealth*, 12 A. 507, 508 (Pa. 1888). Moreover, even if the Election Code contained no explicit language demonstrating an intent to repeal conflicting provisions of Pennsylvania law, its protections are controlling under the rule that "[w]henever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." 1 Pa. C.S. § 1936; *compare* General Laws, Session of 1978 No. 171 § 1633 (adopting provision currently codified as 25 P.S. § 3253(c) of the Election Code), with General Laws, Session 1970, No. 195 §1701 (adopting provision currently codified as PERA § 1701).

The Board can harmonize these two statutes by reading § 1701 not to reach union communications with members or their families. Alternatively, the Board can decide that PERA § 1701 was repealed by Election Code § 3253(c) to the extent it does reach those communications. In either event, the Unions did not violate Pennsylvania law by sending *The Voice* or the October 28 letter to members or their families.

3. Trometter's proposed interpretation of § 1701 violates the rule of lenity

Finally, Trometter's interpretation of § 1701 conflicts with the provision of Pennsylvania law stating explicitly that "[p]enal statutes" must "be strictly construed." 1 Pa. C.S. § 1928(b)(1). This requirement—known as the rule of lenity—demands that "where doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt." *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001). "Underpinning the rule of lenity is the fundamental principle of fairness that . . . requires a clear and unequivocal warning in language that people generally would understand as to what actions would expose them to liability for penalties. . . ." *Sondergaard v. Com., Dep't of Transp.*, 65 A.3d 994, 997 (Pa. Commw. Ct. 2012) (citation and quotation marks omitted).

There is no question that § 1701 qualifies as a penal statute for purpose of the rule of lenity. Violations of the statute are punishable by fines of up to $2,000 and imprisonment of up to 30 days. *See* 43 P.S. § 1101.1701. These are the hallmarks of a penal statute.[17] *See Commonwealth v. Stone & Co.*, 788 A.2d 1079, 1082 (Pa. Commw. Ct. 2001) (noting that a municipal noise ordinance enforceable through fines and incarceration is penal in nature); *cf.*

[17] Trometter seeks only civil remedies in this hearing, but her counsel indicated that the matter could still be referred to the Attorney General for criminal prosecution. *See* Tr. 99–100. And, even so, the rule of lenity applies to the interpretation of key terms of a statute in a civil setting when that statute also "has criminal applications." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 & n.10 (1992) (plurality opinion).

also NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1287 & n.5 (10th Cir. 2003) (noting that a criminal provision of the National Labor Relations Act must be interpreted consistent with the rule of lenity).

A reading of § 1701 that is consistent with the rule of lenity is precisely the one that the Unions have argued for throughout these proceedings. That is, in order to give the Unions the benefit of the doubt regarding the statute's interpretation, *Booth*, 766 A.2d at 846, and to ensure fair warning of what the statute prohibits, *Sondergaard*, 65 A.3d at 997, § 1701's reference to "contribution[s]" must be read to encompass only donations made to another—and not to include a union's communications with its members or the funding of its own independent political speech.

CONCLUSION

For the foregoing reasons, the Unions respectfully request that the Board dismiss Trometter's amended charge in its entirety.

Respectfully submitted:

Richard E. Burridge, Esquire
Attorney I.D. # 68737
Katherine M. Voye, Esquire
Attorney I.D. # 206516
PENNSYLVANIA STATE
EDUCATION ASSOCIATION
400 North Third Street
P.O. Box 2225
Harrisburg, PA 17105-2225
(717) 255-7054
rburridge@psea.org

Attorneys for Respondent Pennsylvania State Education Association

Jason Walta, Esquire
NATIONAL EDUCATION
ASSOCIATION
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035
jwalta@nea.org

Attorney for Respondent National Education Association