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

HOLLIE ADAMS, JODIE WEABER,	:	
KAREN UNGER *and* CHRIS	:	No. 1:19-CV-0336
FELKER,	:	
	:	(Judge Rambo)
Plaintiffs,	:	
	:	MEMORANDUM OF LAW
v.	:	IN SUPPORT OF MOTION
	:	OF COMMONWEALTH
TEAMSTERS UNION LOCAL 429, *et*	:	DEFENDANTS
al.,	:	FOR SUMMARY JUDGMENT
	:	
Defendants.	:	

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I. INTRODUCTION

Defendants, Attorney General Josh Shapiro, James M. Darby, Albert Mezzaroba, and Robert H. Shoop, Jr., in their official capacities (collectively, "Commonwealth Defendants"), by their undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment regarding the Complaint of Plaintiffs, Hollie Adams, Jody Weaber, Karen Unger, and Chris Felker. Plaintiffs challenge whether portions of the Pennsylvania Public Employe Relations Act ("PERA"), 43 Pa. Cons. Stat. §§ 1101.101-1101.2301, and the Collective Bargaining Agreement between Lebanon County and Defendant Teamsters Union Local 429 ("Union") are unconstitutional on their face and/or as applied to them under the First and Fourteenth Amendments to the United States Constitution. The dispute is moot, and summary judgment should be granted pursuant to Fed. R. Civ. P. 56. Further, summary judgment should be granted in favor of Commonwealth Defendants as there is no genuine dispute as to any material fact pursuant to Fed. R. Civ. P. 56 and Commonwealth Defendants are entitled to judgment as a matter of law.

Because Plaintiffs are no longer members of the Union and have no continuing dues deductions, there is no active controversy and the claims for prospective relief are moot. Moreover, any retroactive relief sought against the Commonwealth Defendants, sued only in their official capacities, is barred by the Eleventh

Amendment to the United States Constitution. Further, and as more fully discussed below, there is no genuine dispute as to any material fact and Commonwealth Defendants are entitled to summary judgment as a matter of law. Therefore, for any and all of the reasons set forth herein, Commonwealth Defendants respectfully request that this Honorable Court grant summary judgment in favor of the Commonwealth Defendants and dismiss Plaintiffs' Complaint, with prejudice.

II. PROCEDURAL HISTORY

Plaintiffs filed a Complaint on February 27, 2019, alleging that portions of PERA, 43 Pa. Cons. Stat. §§ 1101.101-1101.2301, and the Collective Bargaining Agreement ("CBA") between Lebanon County and the Union, are unconstitutional on their face and/or as applied to them under the First and Fourteenth Amendments to the United States Constitution.

On March 27, 2019, Lebanon County and Commonwealth Defendants filed an uncontested joint motion to extend the time within which to respond to the Complaint until May 20, 2019, which was granted by this Honorable Court with respect to Lebanon County. A second uncontested motion seeking an extension was filed by Commonwealth Defendants on April 12, 2019, which was again granted by this Honorable Court.

On May 20, 2019, Commonwealth Defendants filed a Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) to dismiss, with

prejudice, all claims against the Commonwealth Defendants for lack of jurisdiction and failure to state a claim upon which relief may be granted.

On May 22, 2019, the Court issued an Order that all parties show cause as to why Defendants' Motions to Dismiss should not be converted to motions for summary judgment. The parties conferred and agreed that conversion was appropriate. On May 31, 2019, the Court issued a Notice cancelling the Case Management Conference scheduled for June 6, 2019, and acknowledging the conversion of the pending motions to dismiss to motions for summary judgment. In support of the Commonwealth Defendants' converted Motion to Dismiss, the Commonwealth Defendants now submit this Memorandum of Law pursuant to Local Rule 7.5.

III. FACTS RELEVANT TO THE PENDING MOTION

Only the facts pertinent to Commonwealth Defendants' Motion are herein provided. A more expansive factual narrative regarding this matter is contained in the Defendants' joint statement of undisputed facts filed with the Court on June 18, 2019 pursuant to Local Rule 56.1. (Dkt. 36). Defendant Josh Shapiro is the Attorney General of Pennsylvania. Defendants James M. Darby, Albert Mezzaroba, and Robert H. Shoop, Jr. are members of the Pennsylvania Labor Relations Board ("PLRB"). All Commonwealth Defendants have been sued in their official capacities only.

Plaintiffs are employed by Lebanon County. (Complaint, ¶ 9). Lebanon County is a public employer subject to PERA, which extends collective bargaining rights and obligations to all Pennsylvania public employers. In pertinent part, PERA provides that:

> It shall be lawful for public employes [sic] to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such *employes shall also have the right to refrain from any or all such activities*, except as may be required pursuant to a maintenance of membership provision of a collective bargaining agreement.

43 Pa. Cons. Stat. § 1101.401 (emphasis added). The elected representative, in this case Teamsters Local 429, is "the exclusive representative of all the employes in such unit to bargain on wages, hours, terms and conditions of employment . . . ." 43 Pa. Cons. Stat. § 1101.606. However, "any individual employe or a group of employes shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract," and the exclusive representative may be present. *Id.*

PERA further provides that "'[m]aintenance of membership' means that all employes who have joined an employe organization . . . must remain members for the duration of a collective bargaining agreement . . . with the proviso that any such employe . . . may resign from such employe organization during a period of fifteen

days prior to the expiration of any such agreement." 43 Pa. Cons. Stat. § 1101.301(18)). Such dues deductions and maintenance provisions "are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition." 43 Pa. Cons. Stat. § 1101.705.

Pursuant to the provisions of PERA, Lebanon County entered into a CBA with Teamsters Local 429. The terms of the CBA wholly adhere to PERA in general, and specifically in regard to the "Maintenance of Membership and Dues Checkoff" provisions, as noted above. Section A of the CBA provides that:

> Each employee who, on the effective date of this Agreement, is a member of the Union and each employee who becomes a member after that date shall, as a condition of employment, maintain his/her membership in the Union. An employee may, however, resign from the Union within fifteen (15) days prior to the expiration of this Agreement without penalty . . . .

(Article 3, Section 1 of CBA; Exhibit A to Complaint).

Article 4 of the CBA includes provisions regarding dues deductions and states:

> The County agrees to deduct the Union membership initiation fees, assessment and once each month, either dues from the pay of those employees who individually request in writing that such deduction be made or fair share. . . . This authorization shall be irrevocable during the term of this Agreement.

(Article 4, Section 1 of the CBA; Exhibit A to Complaint).

Plaintiff Adams is an administrative case manager, employed by Lebanon County since April 2003. (Complaint, ¶ 23). Adams joined the Union at the start of her employment. (Complaint, ¶ 23). Plaintiff Weaber is an administrative case manager, employed by Lebanon County since June 2007. (Complaint, ¶ 24). Likewise, Weaber joined the Union at the start of her employment. (Complaint, ¶ 24). Plaintiff Unger is an administrative case manager, employed by Lebanon County since October 2015. (Complaint, ¶ 25). Unger paid a fair share fee at first, but joined the Union in November 2017. (Complaint, ¶ 25; Decl. of Bolig, ¶ 23-24). Plaintiff Felker is a resource coordinator, employed by Lebanon County since December 2009. (Complaint, ¶ 26). Felker joined the Union at the start of his employment. (Complaint, ¶ 26).

Plaintiffs sent letters to Lebanon County requesting to end their dues deductions. (Complaint, ¶ 29). During the negotiated resignation window, Plaintiffs Unger and Felker resigned from Union membership. (Complaint, ¶ 30-31; Decl. of Bolig, ¶ 27). Accordingly, dues deductions for Plaintiffs Unger and Felker ceased with the payroll checks dated September 13, 2018, and October 25, 2018, respectively. (Aff. of Edris, ¶ 4, 5). Plaintiffs Adams and Weaber resigned their membership and requested an end to their dues deductions by letters sent in July 2018. (Decl. of Bolig, ¶ 6, 34). The last payroll checks with dues deductions for Plaintiffs Adams and Weaber were dated February 28, 2019. (Aff. of Edris, ¶ 6, 7).

In May 2019, the Union refunded all of Plaintiffs' dues, plus interest, from the time they requested resignation to the date deductions ceased. (Decl. of Bolig, ¶ 13, 21, 30, 40).

IV. QUESTIONS INVOLVED

A. Whether the dispute is moot, depriving this Court of jurisdiction over the matter.

Suggested answer: Yes; because Plaintiffs have been made whole, there is no live controversy, and no meaningful prospective relief may be entered, this matter should be dismissed for lack of jurisdiction.

B. Whether there is no genuine dispute as to any material fact and the Commonwealth Defendants are entitled to summary judgment as a matter of law.

Suggested answer: Yes; because Plaintiffs cannot seek retroactive relief against the Commonwealth Defendants, and there is no ongoing illegal conduct to enjoin, the Commonwealth Defendants are entitled to summary judgment as a matter of law.

V. ARGUMENT

A. Standard of Review

If a court finds it lacks subject matter jurisdiction over a complaint, the court must dismiss the action. Fed. R. Civ. P. 12(h). Jurisdictional challenges may come in two forms: facial challenges and factual challenges. *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007). Facial challenges dispute

whether a pleading sufficiently states a claim for relief as a matter of law on its face. *Id*. Factual challenges, on the other hand, may incorporate evidence outside the pleadings to determine if the claims "comport with the jurisdictional prerequisites . . . ." *Id*.

Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in its favor, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a); *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 288 (3d Cir. 2018). A fact is material, for the purpose of a summary judgment motion, if it would affect the outcome of an action under applicable law. *Bland v. City of Newark,* 909 F.3d 77, 83 (3d Cir. 2018).

Conversely, if a nonmoving party is unable to establish "the existence of an essential element of its case on which it bears the burden of proof at trial, there is not a genuine dispute with respect to a material fact" and the moving party is entitled to summary judgment. *Jutrowski*, 904 F.3d at 289 (citing *Goldenstein v. Repossessors, Inc.*, 815 F.3d 142, 146 (3d Cir. 2016)). To withstand a motion for summary judgment, a nonmoving party "may not rest upon the mere allegations or denials of his pleadings[,]" but "must set forth specific facts showing that there is a genuine issue for trial." *D.E. v. Central Dauphin Sch. Dist.*, 765 F.3d 260, 268-69

(3d Cir. 2014) (citing *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985)). Further, "[b]are assertions, conclusory allegations, or suspicions" do not suffice. *Id.*

Finally, when a plaintiff brings suit against a state in federal court, it is necessary to examine whether the action is barred by the doctrine of sovereign immunity. *See Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 101 (1984). The Eleventh Amendment "limits the grant of judicial authority in [U.S. Const.] Art. III" due to "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Id.* at 98. Unless a plaintiff can show that Congress has abrogated Eleventh Amendment immunity, the state in question has consented to be sued, or that the plaintiff seeks only prospective injunctive and declaratory relief to end an ongoing violation of federal law, a claim against a state in federal courts may not proceed. *Pa. Fed. of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002).

As discussed further below, applying these standards to the case at bar, it is respectfully submitted that the Commonwealth Defendants are entitled to judgment as a matter of law and Plaintiffs' Complaint should be dismissed, with prejudice.

B. Plaintiff's claims are moot.

The inability of courts to review claims that are moot "derives from the requirement of Article III of the Constitution[,] under which the exercise of [courts'] judicial power depends[,] [of] the existence of a case or controversy." *New Jersey*

Tpk. Auth. v. Jersey Cent. Power & Light, 772 F.2d 25, 30-31 (3d Cir. 1985) (citations omitted). In order to avoid dismissal for mootness, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id*. at 31. A case is moot where "(1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (quoting *Galda v. Bloustein*, 686 F.2d 159, 162-63 (3d Cir. 1982)).

Voluntary cessation of an official activity or policy satisfies the first element of mootness where the likelihood that a defendant will resume the same allegedly unlawful conduct is speculative. *Thompson v. United States Dep't of Labor*, 813 F.2d 48, 51 (3d Cir. 1987). For instance, in *Marcavage v. Nat'l Park Service*, a protester who was arrested and issued a citation for violating the terms of a permit for protesting on a sidewalk that was not designated as a First Amendment area under Independence National Historical Park regulations alleged that his arrest violated his First, Fourth, and Fourteenth Amendment rights. 666 F.3d 856, 857-858 (3d Cir. 2012). The United States Court of Appeals for the Third Circuit affirmed the dismissal of his claims for declaratory and injunctive relief, holding that the violation could not reasonably be expected to recur given subsequent changes to the regulations, and plaintiff's failure to overcome the presumption that the regulatory changes were made in good faith. *Marcavage*, 666 F.3d at 861.

Post-*Janus* cases concerning voluntary cessation of the collection of agency fees are particularly instructive. *See Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). In both *Lamberty v. Conn. State Police Union*, and *Danielson v. Inslee*, state agencies voluntarily ceased collecting agency fees from employees that were not members of the unions representing them in collective bargaining following the Supreme Court's decision in *Janus*. No. 15-378, 2018 WL 5115559 at *3 (D. Conn. Oct. 19, 2018);[1] 345 F. Supp. 3d 1336, 1338 (W.D. Wash. 2018). In both cases, courts found that, in light of *Janus*' holding, there was no reasonable likelihood that the states would resume collecting agency fees, satisfying the first element of mootness. *Lamberty*, 2018 WL 5115559 at *8-9; *Danielson*, 345 F. Supp. 3d at 1339-40.

Here, there can be no reasonable expectation that Lebanon County will resume deducting union dues from Plaintiffs' wages in the future. As soon as the County was notified that Plaintiffs had been released from their membership agreements with the Union, it stopped collecting union dues. Unlike the plaintiffs in Connecticut and Washington in *Lamberty* and *Danielson*, respectively, Plaintiffs voluntarily joined the Union and gave their consent before any dues were deducted, and they would have to rejoin the Union and sign another authorization before dues could be withheld again. A plaintiff "cannot reasonably be expected to suffer another . . .

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[1] Attached hereto as exhibit "A."

violation" when that alleged violation depends on her taking affirmative steps. *See Sands v. N.L.R.B.*, 825 F.3d 778, 784-85 (D.C. Cir. 2016) (holding that the case was moot when plaintiff was not likely to return to work at former employer and subsequent change of law prohibited alleged violation against other employees). The terms of the CBA between Lebanon County and the Union provides that union dues may only be deducted from employees' wages upon the employee's written request. Thus, under the CBA, Lebanon County is constrained from collecting any dues or fees in the future *unless Plaintiffs first decide to authorize their collection*.

Nor have Plaintiffs offered any evidence that they are in imminent danger of being subjected to agency fees now that they are no longer members of the Union, as Lebanon County has not withheld agency fees since the Court's decision in *Janus*. Given the presumption of good faith afforded government actors–which Plaintiffs do not offer any evidence to rebut–any allegation that Lebanon County will recommence collecting union dues after the Complaint is dismissed is factually impossible, unless Plaintiffs become members, authorize dues deductions, change their minds again, request resignation and are denied that request–an attenuated and highly unlikely possibility.

A case or controversy is only "live" if the court may enter an order granting some affirmative relief. *See Matter of Kulp Foundry, Inc.*, 691 F.2d 1125, 1128-29 (3d Cir. 1982) (holding a controversy was not "live" when reversal of the trial court's

order that had already been executed and had "no on-going effect" would provide no relief); *see also Int'l Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers v. Kelly*, 815 F.2d 912, 915 (3d Cir. 1987) (explaining a live issue must "be a real and substantial controversy admitting of specific relief through a decree of a conclusive character," distinguishing from advisory opinions (internal quotation omitted)). Plaintiffs seek declaratory and injunctive relief, as well as monetary damages.

To the extent that Plaintiffs seek any retroactive relief, their claims are barred as to the Commonwealth Defendants by the Eleventh Amendment to the United States Constitution. *Pennhurst State Sch.*, 465 U.S. at 102-03 ("When a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief."). Plaintiffs' Complaint, thus, only seeks prospective relief against the Commonwealth Defendants. It is clear, however, that there is no ongoing or imminent violation for which Plaintiffs are entitled to prospective relief.

A plaintiff must demonstrate "sufficient immediacy and reality" of harm to obtain declaratory judgment under the Declaratory Judgment Act. *Golden v. Zwickler*, 394 U.S. 103, 108-09 (1983); 28 U.S.C. § 2201. Where it is "highly unlikely" that a challenged policy will be applied to the plaintiff again, declaratory relief is inappropriate. *Versarge v. Township of Clinton*, 984 F.2d 1359, 1369-70

(3d Cir. 1993). In *Versarge*, a volunteer firefighter sought declaratory judgment that an article of a volunteer fire department's constitution prohibiting the use of "insulting language to an officer in command[,] . . . any conduct calculated to bring disgrace on the [volunteer fire department], or divulg[ing] any transactions or business of same to persons not members" violated the First Amendment. 984 F.2d at 1362-63, 1368. Because it was highly unlikely the terminated firefighter would ever again be a member of the volunteer fire company, declaratory judgment was inappropriate. *Id.* at 1369-70. The court explained that the likelihood the provision would be applied to him again was so remote that his claim lacked "sufficient immediacy and reality" to permit a declaratory judgment order, "even if the infirmity did not exist when the action was initiated." *Id.* (internal citations omitted).

Similarly, abstract injury is insufficient to demonstrate that a plaintiff is entitled to injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). A plaintiff must show that he is likely to suffer future injury from a defendant's conduct to obtain injunctive relief. *Roe v. Operation Rescue*, 919 F.2d 857, 864 (3d Cir. 1990). Past wrongs alone do not amount to the real and immediate threat of injury required to obtain injunctive relief. *Lyons*, 461 U.S. at 103; *see also Lundy v. Hochberg*, 91 F. App'x 739, 743 (3d Cir. Oct. 22, 2003) (holding that an attorney was not entitled to seek injunction against a former partner for unauthorized practice

of law because there was no risk of future injury where re-forming the partnership was highly unlikely).[2]

Plaintiffs were released from their membership agreement and no further dues deductions have been taken since their release. As in *Versarge* and *Lundy*, it is highly unlikely that Plaintiffs will ever again be members of Local 429, be subjected to the dues deductions authorized by the CBA, or the challenged provisions of PERA; in fact, the only instance under which Plaintiffs would be subject to these provisions is *if Plaintiffs themselves choose to rejoin the Union and reauthorize dues deductions*. Any threat of injury they might identify is simply too conjectural for declaratory judgment or injunctive relief to be appropriate.

C. Plaintiffs' claims against the Commonwealth Defendants are barred by the Eleventh Amendment.

Eleventh Amendment sovereign immunity bars citizens from bringing an action in federal court against a state. *Pennhurst State Sch.*, 465 U.S. at 100. That bar extends to suits against departments or agencies of the state having no existence apart from the state. *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). The United States Court of Appeals for the Third Circuit recognizes three principal exceptions to Eleventh Amendment immunity: congressional abrogation; waiver by the state; and suits against individual state officers for prospective injunctive and

[2] Attached hereto as exhibit "B."

declaratory relief to end an ongoing violation of federal law. *Pa. Fed. of Sportsmen's Clubs, Inc.*, 297 F.3d at 323.

Section 1983 does not abrogate Eleventh Amendment immunity or subject states to suits for money damages. 42 U.S.C. § 1983; *see Burns v. Alexander*, 776 F. Supp. 2d 57, 72 (W.D. Pa. 2011) (citing *Quern v. Jordan*, 440 U.S. 332, 342-43 (1979) and *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 62-71 (1989)). Further, the Commonwealth of Pennsylvania has expressly declined to waive its Eleventh Amendment immunity. 42 Pa. Cons. Stat. § 8521.

The third exception to Eleventh Amendment immunity allows an action to proceed where a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Pa. Fed. of Sportsmen's Clubs, Inc.*, 297 F.3d at 324. However, even where a complaint properly invokes the exception, there must be "a close official connection" between the state official and the enforcement of the law in order for the exception to apply to a Commonwealth defendant. *See Ex parte Young*, 209 U.S. 123, 156 (1908). A sufficient connection exists where the defendant has a duty to enforce a challenged law or regulation, not merely a general power to review or approve it. *Plaza at 835 W. Hamilton Street LP v. Allentown Neighborhood Improvement Zone Dev. Auth.*, No. 15-6616, 2017 WL 4049237, at *7 (E.D. Pa. Sept. 12, 2017)[3] (citing *Rode v. Dellarciprete*, 845

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[3] Attached hereto as exhibit "C."

F.2d 1195, 1208 (3d Cir. 1980); *1st Westco Corp. v. School Dist. of Phila*., 6 F.3d 108, 112–116 (3d Cir. 1993)).

Assuming, *arguendo*, that the Commonwealth Defendants have a sufficient connection to the challenged statutory and contractual provisions, there is no reasonable likelihood that any challenged provision of PERA or the CBA will be applied to Plaintiffs. Again, Plaintiffs were released from their membership agreement with the Union and, thereafter, Lebanon County stopped deducting dues from their wages. The only way any challenged provision of PERA or the CBA could ever be applied to Plaintiffs in the future is if they voluntarily enter into a new membership agreement with the Union and reauthorized dues deductions from their paychecks. There is simply no injunction this Court could enter against the Commonwealth that would provide relief to Plaintiffs.

None of the Commonwealth Defendants has a connection to the enforcement of the challenged provisions of PERA or the CBA that would create a sufficient nexus to except them from Eleventh Amendment immunity. However, even if they did, as noted, any chance that any of the provisions would be applied against Plaintiffs is speculative at best. Therefore, all Commonwealth Defendants are shielded from any liability in the instant action by the Eleventh Amendment.

D. There is no genuine dispute as to any material fact and the Commonwealth Defendants are, regardless of the threshold jurisdictional question, entitled to judgment as a matter of law.

The incorporated joint statement of material facts demonstrates that there are no facts in dispute and judgment may be entered as a matter of law in favor of the Commonwealth Defendants. Pursuant to the Eleventh Amendment, Plaintiffs may not seek retroactive relief against the Commonwealth; they may only seek prospective relief from an ongoing violation of federal law. *Pa. Fed. of Sportsmen's Clubs*, 297 F.3d at 323. While the Union is Plaintiffs' designated exclusive bargaining representative, as discussed more fully below, designation of an exclusive bargaining representative does not violate their First and Fourteenth Amendment Rights under *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). Thus, in order to withstand summary judgment, Plaintiffs must demonstrate that there is a reasonable likelihood that the challenged provisions of PERA and the CBA will be applied to them by the Commonwealth Defendants. *See Rode*, 845 F.2d at 1208 (holding that the official must have a duty to enforce the regulation in question, and the plaintiff must demonstrate a "real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff's interests"); *see also 1st Westco Corp.*, 6 F.3d at 112–116.

Even if Plaintiffs show that the Commonwealth Defendants have the required nexus to the enforcement of PERA and the CBA, undisputed facts preclude them

from showing any reasonable likelihood that the challenged provisions will be applied to them. Plaintiffs have all been released from their membership agreements with the Union, and there can be no reasonable expectation that dues deductions will resume in the future without Plaintiffs' consent. Nor can Plaintiffs reasonably allege that they are in any danger of being subjected to agency fees, as Lebanon County stopped withholding such fees after the Supreme Court's decision in *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). As there is no genuine dispute of material fact and no ongoing violation of federal law, Plaintiffs have failed to demonstrate their entitlement to relief and the Commonwealth Defendants are entitled to summary judgment.

E. Recognition of an exclusive bargaining representative under PERA does not violate Plaintiffs' First Amendment rights.

The democratic exclusive representation model reflects a legislative judgment that such a system is the only practical mechanism for collective bargaining. *See*, *e.g.*, House Rep. No. 1147 (1935), *reprinted in* 2 Leg. Hist. of the National Labor Relations Act ("NLRA") 3070 (1935) ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides."); Sen. Rep. No. 573 (1935), *reprinted in* 2 Leg. Hist. of the NLRA 2313 ("[T]he making of agreements is impracticable in the absence of majority rule."). The model gained widespread acceptance because it "is in accord with American traditions of political democracy, which empower representatives elected by the

majority of the voters to speak for all the people." *See In re Houde Engineering Corp.*, 1 N.L.R.B. (Old) 35, 43 (1934).

Count II of the Complaint alleges that the designation of a democratically elected exclusive bargaining representative under PERA itself constitutes an infringement of Plaintiffs' First Amendment right to be free of compelled expressive association. Plaintiffs' theory is in error, lacks support, and is contrary to long-settled United States Supreme Court precedent.

1. *The Supreme Court's Decision in* Minn. State Bd. for Cmty. Colls. v. Knight *is Dispositive.*

The particular question raised by Count II–whether designation of an exclusive bargaining representative violates individuals' First Amendment right to free expressive association–was answered conclusively by the Supreme Court's decision in *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). In *Knight*, community college instructors that chose not to join a majority-elected union challenged provisions of Minnesota's Public Employee Labor Relations Act[4] that required government employers to "meet and negotiate" only with duly elected exclusive representatives on mandatory bargaining subjects, and to "meet and confer" only with those same representatives on non-mandatory bargaining subjects. *Id.* at 278-79. The nonmembers asserted the exclusive representation scheme

[4] Minn. Stat. §§ 179.01 to 179.17.

infringed upon their rights to free speech and association. *Id.* Recognizing that the First Amendment "does not require government policymakers to listen or respond to individuals' communications on public issues[,]" the Court held that the nonmembers' First Amendment rights were not violated. *Id.* at 288-90. The Court explained that the statute did not "restrain [their] freedom to speak . . . or their freedom to associate or not associate with whom they please, including the exclusive representative. Nor has the state attempted to suppress any ideas." *Id.* . The Court squarely held that the nonmembers' "associational freedom ha[d] not been impaired." *Id.* at 289. In fact, nonmembers were "free to form whatever advocacy groups they like." *Id.* Any "pressure" to join the Union to be heard "is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 290. Finally, "such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.*

Recently, the First, Second, Seventh, Eighth, and Ninth Circuits have rejected claims substantially similar to Plaintiffs' Count II. *All five Courts of Appeals held* that under *Knight*, designating a democratically elected exclusive representative for the purpose of collective bargaining, does not violate the First Amendment rights of those who decline to join a union. *See, e.g., Mentele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019), *petition for cert. filed sub nom. Miller v. Inslee*, (U.S. May 29, 2019) (No. 18-1492) (affirming entry of summary judgment against plaintiff, holding that

the "degree of First Amendment infringement inherent in mandatory union representation is tolerated in the context of public sector labor schemes"); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (holding that the argument that exclusive representation scheme "violates [plaintiffs'] right to free association under the First and Fourteenth Amendments . . . is foreclosed by *Knight*."), *cert. denied*, No. 18-766, ___ S. Ct. ____, 2019 WL 2078110 (May 13, 2019); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 864, 866 (7th Cir. 2017) (holding because plaintiffs were not required to join or financially support Union, the "exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny"), *cert. denied*, 138 S. Ct. 446 (2017);[5] *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. Sept. 12, 2016) (unpublished summary order) (holding argument that State's recognition of exclusive representative violates First Amendment by compelling Union association was foreclosed for *Knight*),[6] *cert. denied*, 137 S. Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240, 243-45 (1st Cir.) (holding the nonmembers' ability to "speak out publicly on any subject" and "free[dom] to associate themselves together outside the [U]nion however they might desire" defeated claim of compelled association), *cert. denied*, 136 S. Ct. 2473 (2016).

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[5] Counsel for Plaintiffs also represented the plaintiffs in *Hill*.

[6] Attached hereto as exhibit "D."

PERA is at least as accommodating of associational freedoms as the statute held to be constitutional in *Knight*. It explicitly provides for a "right to refrain" from joining or assisting employee organizations. 43 Pa. Cons. Stat. § 1101.401. The very section that Plaintiffs seek to enjoin grants individual employees or groups of employees "the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative[,]" should an employee so choose. 43 Pa. Cons. Stat. § 1101.606. Like the nonmember instructors in *Knight*, they are free to associate or not associate with whomever they please, including the exclusive representative. They do not allege that the Commonwealth has attempted to suppress their speech in any way. Accordingly, *Knight* is dispositive and Count II of the Complaint should be dismissed, with prejudice.

2. *The Supreme Court's Decision in* Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31 *Did Not Alter or Abrogate* Knight.

Plaintiffs assert that the Supreme Court's decision in *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31* supports their claim. Plaintiffs are in error. The *Janus* Court did not mention–much less question–the well settled precedent of *Knight*. 138 S. Ct. 2448 (2018).

In *Janus*, the Court held that public employees that choose not to become members of a union cannot be required to pay agency fees to an exclusive representative for collective bargaining representation because the compulsory fees constitute "compelled subsidization of private speech" in a manner that violates the

First Amendment. *Id.* at 2464. In fact, the Court explained that there is a distinction between a requirement to pay agency fees and the designation of an exclusive bargaining representative. *See id.* at 2465, 2478, 2486.[7] The Court determined that "the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked," *id.* at 2480, and *expressly approved of exclusive representation schemes*. *Id.* at 2478 ("It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees . . . . We simply draw the line at allowing the government" to require nonmembers to pay agency fees). The Court could not have been clearer that, other than requiring nonmembers to pay agency fees, "States can keep their labor-relations systems exactly as they are . . . ." *Id.* at 2485 n.27.[8] *Janus* did not cite *Knight*, much less overrule it.

The courts that have analyzed the applicability of *Knight* in the wake of *Janus* have all come to the same conclusion: *Janus* did not overrule *Knight*, and the designation of a democratically elected exclusive representative remains

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[7] The Court drew the same distinction in *Harris v. Quinn*, 573 U.S. 616, 649 (2014) ("A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.").

[8] Interestingly, the Court noted that if a collective bargaining representative did not represent nonmembers and, therefore, did not owe them a duty of fair representation, "serious constitutional questions [would] arise . . . ." *Janus*, 138 S. Ct. at 2469 (internal citations omitted).

permissible. *See Bierman*, 900 F.3d at 574, *cert. denied*, No. 18-766, ___ S. Ct. ____, 2019 WL 2078110 (May 13, 2018); *Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751, at *2 (D. Minn. Sept. 28, 2018) (denying Plaintiff's motion for preliminary injunction),[9] *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, No. 18-719, ___ S. Ct. ____ (Apr. 29, 2019); *Mentele*, 916 F.3d at 787-89;[10] *Reisman v. Associated Faculties*, 356 F. Supp. 3d 173, 178-79 (D. Me. 2018) (holding "*Janus* did not overrule or unsettle the *Knight* or *D'Agostino* decisions, both of which are binding precedent" and dismissing for failure to state a claim), *appeal pending*, No. 18-2201 (1st Cir.); *Thompson v. Marietta Educ. Ass'n*, 371 F. Supp. 3d 431, 435 (S.D. Ohio 2019) (denying Plaintiff's motion for preliminary injunction and concluding "that [*Knight*] applies to Plaintiff's forced association claim, and although *Knight* did not itself involve a forced association claim, the broad reasoning in the opinion forecloses such a claim."). Therefore, Count II of Plaintiffs' Complaint should be dismissed, with prejudice.

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[9] Attached hereto as exhibit "E."

[10] *Mentele* also held that, even if *Knight* were no longer applicable, it would still find that designation of an exclusive bargaining representative is constitutionally permissible. 916 F.3d at 790-91.

VI. CONCLUSION

For the reasons set forth above, the Commonwealth Defendants respectfully request that this Honorable Court grant the motion for summary judgment.

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