IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3876

SHALEA OLIVER,

Appellant

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668; SECRETARY PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES; SECRETARY PENNSYLVANIA OFFICE OF ADMNISTRATION; ATTORNEY GENERAL PENNSYLVANIA; JAMES M. DARBY, Chairman Pennsylvania Labor Relations Board; ALBERT MEZZAROBA, Member, Pennsylvania Labor Relations Board; ROBERT H. SHOOP, JR., Member, Pennsylvania Labor Relations Board, In Their Official Capacities

---

BRIEF FOR COMMONWEALTH APPELLEES

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
ENTERED NOVEMBER 12, 2019

JOSH SHAPIRO
Attorney General

BY: CLAUDIA M. TESORO
Senior Deputy Attorney General

Office of Attorney General
1600 Arch Street
Suite 300
Philadelphia, PA 19103
Phone: (215) 560-2908
FAX: (717) 772-4526

NANCY A. WALKER
Chief Deputy Attorney General
Chief, Fair Labor Section

J. BART DELONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

DATE: April 22, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

This is a civil rights action brought against several Commonwealth parties (and a labor union) pursuant to 42 U.S.C. § 1983. In general, the district courts have subject matter jurisdiction over such claims pursuant to 28 U.S.C. §§ 1331 and 1343. In this case, however, the plaintiff's lead claim against the Commonwealth parties, regarding collection of union dues, became moot. As a result, the district court no longer had subject matter jurisdiction to adjudicate that aspect of the controversy.

This appeal is from two final orders, entered on November 12, 2019, granting the Commonwealth parties' and the Union's respective motions for summary judgment and dismissing the plaintiff's claims against all of them (*See* App. 005-006). The notice of appeal was filed on December 11, 2019 (App. 003-004). This Court has appellate jurisdiction by virtue of 28 U.S.C. § 1291.

STATEMENT OF ISSUES

In this litigation, the plaintiff (now appellant) brought claims against her union and against several Commonwealth of Pennsylvania parties. The viability of the claims against the Commonwealth parties is the focus of this brief. As to those claims, the issues to be addressed are as follows:

I. Following the Supreme Court's 2018 *Janus* decision, was there any justiciable First Amendment case or controversy between plaintiff Oliver and the Commonwealth parties she sued, entitling her to prospective injunctive relief, given that she resigned from her union; sums deducted from her pay post-*Janus* were refunded to her; and the applicable CBA was updated?

II. Insofar as Pennsylvania's Public Employee Relations Act (PERA) continues to allow for exclusive representation of public sector employees by a single union, is PERA constitutional?

STATEMENT OF THE CASE

On June 27, 2018, the Supreme Court decided *Janus v. Am. Fed. of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). The Court concluded that the "agency fee" scheme for public sector unions in Illinois violated the free speech rights of non-member public employees by compelling them to subsidize their unions' private speech.[1] In this action, plaintiff Shalea Oliver (now appellant), who works for the Commonwealth of Pennsylvania, sued a number of Commonwealth parties, as well as her union. She seeks to expand the *Janus* ruling to authorize a personal refund of membership dues she voluntarily paid to her union. The district court properly rebuffed that attempt.

Factual Background

All parties sought summary judgment in this case, and their respective claims were resolved on that basis (*See* App. 005-031 – orders and memoranda). Thus, as Ms. Oliver specifically recognizes (*see* Appellant's Opening Brief ["Opening Brf."], at 8-9), the operative facts are not in dispute.

[1] Under the challenged scheme, employees who declined to join a union selected by their co-workers were not assessed full union dues but were instead assessed an "agency fee" (amounting to a percentage of the union dues). *Janus*, 138 S.Ct. at 2460.

Ms. Oliver is a public sector employee. Since December 2014, she has worked for the Pennsylvania Department of Human Services (DHS) (App. 048 – stip. ¶¶ 1-2). She is a caseworker at the Department's Philadelphia County Assistance Office (*Id.*). In accordance with the Pennsylvania Public Employee Relations Act (PERA), employees of that office were and are represented in collective bargaining by the Service Employees International Union (SEIU), Local 668 (App. 048-049 – stip. ¶¶ 3-4) ("Local 668" or "the Union").

When Ms. Oliver filed this lawsuit, a collective bargaining agreement between the Commonwealth and Local 668, covering the period from July 1, 2016, through June 30, 2019, was in effect (App. 049 – stip. ¶ 5). As of April 2, 2019, a "Side Letter" modified and superseded certain terms of that agreement (App. 049 – stip. ¶ 6). Thereafter, the Commonwealth and Local 668 entered into a successor agreement covering the period from July 1, 2019, through June 30, 2023 (App. 049 – stip. ¶ 7).

Ms. Oliver was not required to join Local 668 as a condition of her DHS employment (App. 050 – stip. ¶ 12). Rather, she was entitled either to become a full-fledged member of Local 668 – in which case full membership dues would be deducted from her paychecks – or to decline membership (App. 050 – stip. ¶ 13). Should she decline to join the Union, a lesser sum would be deducted from her

paychecks as a "fair share fee" (*Id.*).[2] This arrangement was consistent with then-existing case law, dating back to *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and with Pennsylvania law, *see, e.g.*, 71 P.S. § 575.[3]

While not required to do so, Ms. Oliver did choose to become a member of Local 668 in December 2014, when she first accepted employment with the Commonwealth (App. 050 – stip. ¶ 12). To accomplish this, she submitted an electronic application form that was presented to her at that time (*Id.*). On the form it says, "I hereby apply for membership in the Union. I further request and authorize the Commonwealth of Pennsylvania to deduct from my earnings an amount sufficient to provide for the regular payment of the current rate of union dues" (App. 055).

To confirm her "wish to apply for Union Membership," Ms. Oliver had to click an electronic "button" labeled "Join," and she did so (*Id.* *See also* App. 050 – stip. ¶¶ 12, 14). According to her complaint, in making that choice back in 2014,

---

[2] For present purposes, the terms "agency fee" (as used in, *e.g.*, the *Janus* case) and "fair share fee" (in Pennsylvania parlance) are interchangeable.

[3] Agency fees deducted from non-members' pay and forwarded to a union were only meant to cover activities germane to the union's duties as a collective bargaining representative (*e.g.*, contract administration and grievance adjustment). *See Abood*, 431 U.S. at 232-236; 71 P.S. § 575. Agency fees were not permitted to subsidize political and ideological activities; only the dues that union members opted to pay voluntarily could be utilized for such purposes. *Id.*

she reasoned that – whether she became a union member or not – "she would have been required to pay money to the union" either way, that is, in the form of membership dues or in the form of the "fair share fees" imposed on non-members (*See* App. 039 – compl. ¶ 23).

The Supreme Court's *Janus* decision, overruling *Abood*, was issued in June of 2018. With that, according to Ms. Oliver, she learned that she did not have to be a union member any longer and, moreover, that she did not have to pay any money to Local 668 at all (*See* App. 40 – compl. ¶ 25).[4] On August 10, 2018, Ms. Oliver sent a letter to the Union, asking to withdraw as a member and stating that the Union was no longer authorized to enforce the 2014 payroll dues authorization she had submitted (App. 050 – stip. ¶ 15).

Article 2, Section 1 of the collective bargaining agreement in effect when Ms. Oliver first asked to withdraw from Local 668 (and for nearly 10 months beyond that) set forth specific procedures to be followed by union members seeking to withdraw from the Union (App. 050-051 – stip. ¶ 16). The precise details of those procedures are no longer germane, however, because the April 2, 2019 Side Letter between the Commonwealth and Local 668, referenced earlier,

[4] As further discussed *infra*, at 14, Ms. Oliver was never *required* to become a member of Local 668. Nevertheless it is undisputed that – for whatever reason – she chose to become a member.

eliminated the former requirements (App. 049 – stip. ¶ 6). Similarly, the 2019-2023 "Successor Agreement" between the Commonwealth and Local 668 no longer includes any "requirements to maintain membership" in the Union (App. 049 – stip. ¶ 7).

On three separate occasions (September 20, 2018, November 27, 2018, and January 23, 2019), "the Union sent a letter to the Commonwealth's Office of Administration enclosing a copy of Ms. Oliver's August 10 letter and instructing the Office of Administration to discontinue the payroll deduction of Union dues for Ms. Oliver effective immediately" (App. 051-052 – stip. ¶¶ 17-19).[5] Days after the last of these written communications (that is, on January 30, 2019), "the Union sent a letter to Ms. Oliver stating that the Union had received her request to withdraw her participation in the Union and enclosing a check for $263.01" (App. 052 – stip. ¶ 20). In this way, Ms. Oliver was reimbursed for all dues that had been withheld from her paychecks for the pay period beginning August 4, 2018, through the pay period ending January 4, 2019 (*Id.*).

Finally, on March 20, 2019, the Union sent Ms. Oliver an additional check, in the amount of $24.48, to reimburse her for the dues withheld from her February

[5] For reasons that are not apparent, Ms. Oliver was not copied on the Union's letters or otherwise informed of these efforts on her behalf (App. 052 – stip. ¶ 21).

1, 2019 paycheck (which covered the January 4 – January 18, 2019 pay period) (App. 052 – stip. ¶¶ 22-23). That pay period was the last one for which Ms. Oliver had had any union dues deducted from her wages (App. 052 – stip. ¶ 22).

Procedural History

Ms. Oliver filed her two-count First Amendment complaint, against seven separate defendants, on February 28, 2019 (App. 034-047). In addition to her union, identified in that pleading as "Defendant SEIU," she named six Commonwealth parties: Teresa D. Miller, Secretary of DHS, Ms. Oliver's employing agency; Michael Newsome, Secretary of the Office of Administration, said to be "responsible for human relations for employees of the Commonwealth"; Attorney General Josh Shapiro, the official purportedly "charged with the enforcement of Commonwealth laws, including PERA"; and James M. Darby, Albert Mezzaroba, and Robert H. Shoop, Jr., all members of the Pennsylvania Labor Relations Board (PLRB), which "certified SEIU as the exclusive bargaining representative" for Ms. Oliver's "employee unit" (App. 036-037 – compl. ¶¶ 9-13).[6] As to all seven defendants, the complaint sought declaratory and injunctive relief, plus damages, costs, and attorneys' fees (*See* App. 046-047).

[6] Hereinafter, the six Commonwealth parties sued by Ms. Oliver will be referred to collectively as "Commonwealth defendants."

In response to the complaint, the Commonwealth defendants filed a joint answer with affirmative defenses (ECF No. 22),[7] while the Union, which is separately represented, filed its own answer (ECF No. 23). In due course, all parties filed dispositive motions. First, the Commonwealth defendants sought summary judgment (ECF No. 29); Ms. Oliver responded (ECF No. 31) and later filed a motion of her own (ECF No. 34); and the Union filed a cross-motion, accompanied by a summary of undisputed facts (ECF Nos. 35-36). After receiving several additional filings in support of and in opposition the parties' respective summary judgment submissions (*see* ECF Nos. 32, 38, 39, 40), the district court issued separate orders and explanatory opinions granting the Union's motion and the Commonwealth defendants' motion, and denying Ms. Oliver's motion (*See* App. 005-031).[8]

With respect to the Commonwealth defendants, the district court concluded that Count I – regarding the collection of union dues from Ms. Oliver in the past – was moot because all post-*Janus* union dues had been refunded to her and there

[7] A copy of the full district court docket is in the Appendix, at App. 059-065. In this brief, documents of record that are not themselves in the Appendix will be cited by ECF number alone.

[8] The decision in favor of the Commonwealth defendants is now reported at *Oliver v. Service Employees Int'l Union Local 668*, 418 F. Supp. 3d 93 (E.D. Pa. 2019). The decision in favor of the Union is reported at *Oliver v. Service Employees Int'l Union Local 668*, 415 F. Supp.3d 602 (E.D. Pa. 2019).

was no realistic likelihood of any future dues-related violations of her rights (App. 025-029). Further, regarding Count II of the complaint, the court found that Ms. Oliver was not entitled to an injunction against "the system of exclusive representation enacted by PERA" (App. 029-031).[9]

Ms. Oliver filed a timely notice of appeal from both of the decisions against her (App. 003).

[9] While Ms. Oliver had pled the same general claims against her union, the district court's summary judgment decision in favor of Local 668 is similar but not identical to its decision in favor of the Commonwealth defendants. Inasmuch as the Union has its own interests and is separately represented, it will defend the ruling on its dispositive motion.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. There are no pending or completed cases to which it is related.

SUMMARY OF ARGUMENT

When Ms. Oliver started at DHS, she chose to join Local 668. When *Janus* was decided, it did not actually address her personal situation. Nevertheless, she asked to resign from the Union; she did so; and she received a full refund of her post-*Janus* dues. Even assuming, *arguendo*, that she initially had standing to bring some type of First Amendment claim against the Commonwealth defendants for prospective relief, that claim unquestionably became moot. Ms. Oliver was made whole financially, and there was no reasonable prospect that she would ever suffer a comparable (alleged) constitutional violation in the future. This is so because one-time limitations on individuals' right to resign from the Union were eliminated (first via a "side letter" between the Union and the Commonwealth, then in their next formal collective bargaining agreement). Amorphous concerns about what should have happened sooner, or about the rights of others not before the court, cannot justify Ms. Oliver's pursuit of a no-longer-justiciable individual claim.

Ms. Oliver's constitutional challenge to the exclusive representation provision at 43 P.S. § 1101.606 was rightly rejected as well. The Supreme Court resolved this issue in the *Knight* case, as five other circuits have since recognized. *Janus*, which does not even mention *Knight*, is not to the contrary. It only dealt with agency fees and, in fact, *approved* of exclusive representation schemes.

ARGUMENT

All the parties that Ms. Oliver sued properly prevailed on summary judgment. As the district court found, the Commonwealth defendants were entitled to summary judgment on Count I – primarily concerning payroll deductions in light of the Supreme Court's *Janus* decision – because Ms. Oliver's self-styled First Amendment claim against them became moot. And Count II – questioning PERA's exclusive representation provision – was foreclosed under existing law.

* * * * *

Standard of Review:

"Questions of mootness are considered under a plenary standard of review." *International Brotherhood of Boilermakers v. Kelly*, 815 F.2d 912, 914 (3d Cir. 1987). *See also Biear v. Attorney General United States*, 905 F.3d 151, 155 n.11 (3d Cir. 2018). Similarly, and more generally**,** this Court exercises plenary review over an order granting a motion for summary judgment. *E.g., Karns v. Shanahan*, 879 F.3d 504, 512 (3d Cir. 2018); *Egolf v. Witmer*, 526 F.3d 104, 106 (3d Cir. 2008).

I. The District Court Correctly Decided That Ms. Oliver's First Amendment Claim Against The Commonwealth Defendants Was Moot.

Count I of Ms. Oliver's complaint, at ¶¶ 33-47, sought declaratory and injunctive relief, and damages, from all defendants for alleged violations of her

First Amendment right to free speech and free association. To understand why the district court's mootness conclusion in favor of the Commonwealth defendants on Count I was correct, a brief review of pivotal events giving rise to this controversy is required.

When Ms. Oliver began working for DHS in late 2014, *Abood* had been the law of the land for decades. As a new employee, she could have declined to join Local 668 (and, consistent with *Abood*, only paid a fair share fee, as opposed to regular union dues, via payroll deductions). However, "Ms. Oliver *chose* to become a member of the Union" (App. 050 – stip. ¶ 12) (emphasis added). Once she did that, full dues were regularly deducted from her paychecks. And there things stood, for over three and a half years.

Janus was decided on June 27, 2018. On August 10, 2018, Ms. Oliver first wrote to her union, asking to withdraw as a member and revoking her dues-deduction authorization. Despite the timing of this request, and regardless of what Ms. Oliver herself may have been thinking at the time, *Janus* itself cannot properly be viewed as "authority" for her individual overture to the Union. This is so because *Janus* only invalidated the imposition of agency fees on *non*-members of public employee unions; it says nothing about the rights or obligations of *members*, such as Ms. Oliver.

It is undisputed that Ms. Oliver's August request was not acted upon immediately, but it was acted upon. Specifically, by January 30, 2019, the Union had explicitly instructed the Commonwealth to discontinue deducting dues from Ms. Oliver's pay (which the Commonwealth duly did). What is more, the Union had refunded to her all the money that had been deducted for the pay periods between August 4, 2018, and January 4, 2019.

Having thus been afforded what she, through her union, had requested in writing (though one more pay period remained to be addressed), Ms. Oliver nevertheless filed this lawsuit on February 28, 2019. She was then made completely whole financially as of March 20, 2019, with a final dues refund of $24.48, which was for the pay period ending January 18, 2019 – the last for which any dues had been deducted from her pay. Furthermore, the April 2, 2019 "side letter" between the Commonwealth and the Union prospectively eliminated any restrictions on how and when individuals may resign from the Union (and there are no such restrictions in the 2019-2023 collective bargaining agreement either). Finally, all parties have explicitly agreed that "Ms. Oliver is not obligated to become or remain a member of the Union" and, in fact, "is not currently a member" (App. 052-053 – stip. ¶¶ 24-25).

Taking all this into account, it follows that Ms. Oliver did not have grounds to initiate, let alone continue litigating, Count I of her suit against the Commonwealth defendants.

A. Legally, Ms. Oliver's First Amendment claim against the Commonwealth defendants was circumscribed from the outset.

Neither in her complaint nor in her opening brief to this Court has Ms. Oliver spelled out discrete theories of liability applicable to the Commonwealth defendants on one hand, and the Union on the other.[10] Nor has Ms. Oliver ever expressed any awareness of established legal doctrines that constrain private litigants' ability to secure broad relief against state parties, such as the Commonwealth defendants.

1. The Eleventh Amendment and individual accountability.

Ms. Oliver has sued all six Commonwealth defendants in their respective official capacities. In general, suits against state officials in their official capacities are considered suits against the state itself. *See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). And by virtue of the Eleventh Amendment,

[10] If anything, the emphasis (in the complaint and elsewhere) appears to be on the Union.

suits against states directly, for legal or equitable relief, are barred by sovereign immunity. *See, e.g., Alabama v. Pugh*, 438 U.S. 731 (*per curiam*).

To be sure, the Eleventh Amendment is not absolute. Notably, in accordance with *Ex Parte Young*, 209 U.S. 123 (1908), "individuals, who as officers of the state, are clothed with some duty to enforce . . . an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action." *Id.* at 156. But that does not mean Ms. Oliver had an unqualified right to bring, *and* to continue litigating, a First Amendment claim against any of the Commonwealth defendants, let alone all of them. The *Ex Parte Young* exception only allows for *prospective* injunctive relief to cure an *ongoing* violation of federal law; it is not a vehicle to secure redress for past wrongs. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S.139, 146 (1993). Moreover, a named state defendant must have some "close official connection" to whatever is being challenged. *Young*, 209 U.S. at 156. Otherwise, suing such a defendant amounts to "merely making him a party as a representative of the state and thereby attempting [inappropriately] to make the state a party." *Id.* at 157.

The statutory vehicles through which Ms. Oliver formally raised her First Amendment claims are 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) (*See* App. 035 – compl. ¶ 7). These provisions do authorize declaratory and injunctive relief in

appropriate cases (against a range of possible defendants), assuming liability is established. But initial pleading deficiencies, or subsequent developments, or both, may derail a plaintiff's case, as occurred here.

In a federal civil rights action, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution. . . . [E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 676-677 (2009).[11] That Ms. Oliver only sought declaratory and injunctive relief from the Commonwealth defendants does not eliminate this bedrock requirement. *See, e.g.*, *Rizzo v. Goode*, 423 U.S. 362, 375-376 (1976) (no equitable relief against police officials "without a showing of direct responsibility" for subordinates' actions); *Brown v. Grabowski*, 922 F.2d 1097, 1119-1120 (3d Cir. 1990).[12]

[11] *Iqbal* was a *Bivens* action against federal officials, but the same principle applies in § 1983 cases against state actors. *See, e.g., Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 290 (3d Cir. 2018).

[12] As mentioned, Ms. Oliver did also pray for money damages (additional dues reimbursement, essentially). However, she appears only to have sought that form of relief from the Union, not from the Commonwealth defendants (*See* App. 047). At least indirectly (*see* Opening Brf., at 25-28), she seems to recognize that the Commonwealth defendants would have an ironclad qualified immunity defense to any such damages claim, inasmuch as the collection of fair share fees was entirely consistent with clearly established law until *Janus* overruled *Abood*.

2. Declaratory judgments.

Any lurking issue relating to each individual Commonwealth defendant's possible personal responsibility for the events Ms. Oliver has questioned, or the lack thereof, need not be explored in depth at this point. On the other hand, summarizing the overarching prerequisites for a declaratory judgment will be particularly useful at this juncture, because those prerequisites mirror constitutional case-or-controversy requirements.

The Declaratory Judgment Act provides: "In the case of *actual controversy* within its jurisdiction, [any federal court] may declare the rights and other legal relations of any interested party seeking such relief[.]" 28 U.S.C. § 2201(a) (emphasis added). The "controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). It cannot be hypothetical or abstract. *Id.* at 240. The point is to afford "specific relief through a decree of a conclusive character," not an advisory opinion. *Id.* at 241.

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273

(1941)). "*[A] constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance*." *Golden*, 394 U.S. at 110 (emphasis added). And a declaratory judgment action is inherently forward-looking. *See Green v. Mansour*, 474 U.S. 64, 73 (1985) (no basis for "declaratory judgment that respondent violated federal law in the past"). *See also Delaware State Univ. Student Hous. Found. v. Ambling Mgmt. Co.*, 556 F. Supp.2d 367, 374 (D. Del. 2008) ("declaratory judgment is inappropriate solely to adjudicate past conduct") (internal citations omitted).[13]

B. By mid-2019 at the latest, there was no justiciable case or controversy between Ms. Oliver and the Commonwealth defendants.

The foregoing prerequisites for a declaratory judgment dovetail perfectly with the hallmarks for establishing standing, and for avoiding mootness, that

[13] Despite arising in a different procedural context, the following observation by the Supreme Court is also illuminating:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces. . . . This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt v. Helms, 482 U.S. 755, 761 (1987) (emphasis in original).

underlie the district court's decision in favor of the Commonwealth defendants on Count I. In both doctrinal arenas, the *sine qua non* is an active, actual dispute necessitating judicial intervention. If that prerequisite was ever met in this case (a point not conceded), things unquestionably changed before dispositive motions were decided. Ms. Oliver's First Amendment claim against the Commonwealth defendants in Count I became moot, as the district court correctly concluded (App. 025-029).[14]

There is no shortage of case law articulating applicable analytical principles. Most fundamentally, "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). This means, in practical terms, that a person who invokes the power of a federal court by filing a lawsuit must demonstrate standing to do so. *Id.*; *accord Clapper v. Amnesty International USA*, 568 U.S. 398, 408 (2013).

To have standing, a federal court plaintiff must have suffered an "injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be

[14] It should be noted that the district court only held that the claim raised by Ms. Oliver against the Commonwealth defendants in Count I of her complaint – as opposed to her entire case against them – was moot (*See* App. 025-029). That does not change the mootness analysis. A portion of a case may become moot, even if another portion (involving a different plaintiff or a separate legal claim) remains viable. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("a plaintiff must demonstrate standing separately for each form of relief sought").

redressed by the requested relief." *Already, LLC*, 568 U.S. at 91 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). *See also Clapper*, 568 U.S. at 409; *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Moreover, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citation omitted).

A case becomes moot when the issues are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980)). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already, LLC*, 568 U.S. at 91 (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

Solely for the sake of argument, the Commonwealth defendants here assume that Ms. Oliver may, conceivably, have suffered some injury-in-fact, for standing purposes, before she filed her district court complaint. The situation was not static, however. As the litigation unfolded, she – having resigned from Local 668 – was

fully reimbursed for any remaining post-*Janus* payroll deductions;[15] *per* the April 2019 side letter between the Union and the Commonwealth, limitations on employees' ability to resign from the Union were eliminated; and the successor collective bargaining agreement between the Union and the Commonwealth does not contain any maintenance-of-membership provisions. Thus, Ms. Oliver had made a clean break from her union, and she would never be expected or required to lend it any type of support in the future.

In light of these developments, Ms. Oliver had achieved what she originally sought and no longer had anything to gain, herself, by continuing to litigate a First Amendment claim against the Commonwealth defendants. Regardless of any subjective feelings or opinions she might harbor, about past events or no-longer-applicable policies, there had ceased to be "any *actual* controversy about [Ms. Oliver's] *particular* legal rights." *See Alvarez*, 558 U.S. at 93 (emphasis added). *Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982) ("standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy").

[15] Implicitly acknowledging the significance of this detail, Ms. Oliver concedes her post-*Janus* dues were refunded in full (*see* Opening Brf., at 16), even though she still believes herself entitled to reimbursement, from the Union only, for pre-*Janus* dues deductions. *See* n. 12, *supra*.

Without drawing any meaningful distinction between the Commonwealth defendants and the Union, Ms. Oliver attempts to neutralize this blatant mootness problem in four ways, none of which is persuasive.

First, Ms. Oliver takes the position that she is entitled to, and has not received, "a full refund of all her dues," going back to when she first started working for DHS (*See* Opening Br., at 15-16). As previously noted, however, *supra*, at n.12, any such claim against the Commonwealth defendants would be barred by qualified immunity, if not also on other grounds, so it cannot serve to keep Ms. Oliver's attempted Count I claim against *them* alive.[16]

Second, Ms. Oliver dismisses the April 2019 Side Letter and the 2019-2023 Collective Bargaining Agreement, under which there are no maintenance-of-membership provisions (*See* Opening Br., at 16-17). She appears to assume that comparable terms will not be extended included in collective bargaining agreements for other public sector workers in Pennsylvania, who are not represented by Local 668, because PERA itself still includes sections that, in her

[16] The impact of this point on the status of Ms. Oliver's First Amendment claim against the Union is a separate matter, beyond the scope of this brief. The Union may be expected to address it in its own brief.

view, touch upon maintenance of membership and, she claims, violate people's rights.[17]

Even if this were an accurate interpretation of the law overall – and it is not, as the district court cogently explained (*see* App. 026-028) – this has no bearing on the mootness of Ms. Oliver's own First Amendment claim, the only one at issue. *Cf. Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (noting that, ordinarily, "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation"). *She* is fully protected for the foreseeable future. To suggest otherwise is, at most, rank speculation about hypothetical events that may never materialize. That is insufficient to defeat a mootness argument. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (finding no case or controversy given "speculative nature" of plaintiff's claim that he would again experience injury, even if challenged practice continued).

Third, Ms. Oliver argues that her First Amendment claim is not moot because in any event she remains entitled to declaratory (as opposed to monetary) relief (*See* Opening Br., at 30-33). According to her, even though Local 668 refunded her money and allowed her to resign, that "does not relieve the Union and the Commonwealth from having to defend the unconstitutional policy that they

[17] *See* 43 P.S. §§ 1101.301(18), 1101.401, 1101.705.

continue to enforce against any employee who is not determined enough, or has the means, to sue" (*Id.* at 30). In other words, she thinks she can still pursue this case to aid other alleged victims of the defendants' allegedly unconstitutional policies.

This argument cannot withstand scrutiny. Ms. Oliver does not appear to understand that a named plaintiff's ability to defeat an opponent's mootness argument – and keep litigating – will vary, depending on whether that plaintiff is or is not the only plaintiff before the court. Ms. Oliver cannot simply proclaim her willingness and determination to keep fighting the good fight, attacking past actions and former policies that no longer affect her, on the assumption that they affect others. Her case is, and has always been, an individual lawsuit, not a class action. As in *Murphy v. Hunt*, a single named plaintiff, who no longer has a live ongoing claim, and therefore no longer has a personal stake in the case's outcome, cannot continue litigating for the purported benefit of other people. 455 U.S. at 482 (case was moot where individual plaintiff no longer had legally cognizable claim, did not seek damages, and had not sought to represent a class).[18]

[18] In contrast, "[i]n the class action context, special mootness rules apply." *Brown v. Phila. Housing Auth.*, 350 F.3d 338, 343 (3d Cir. 2003). This, again, is not and never was a class action, so any such "special rules" do not apply. *Cf. Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 73-76 (2013) (summarizing prior case law on when class claims may or may not proceed, despite mootness of named plaintiff's individual claim).

Fourth, somewhat obliquely, Ms. Oliver attempts to invoke either of two generic exceptions to the mootness rule (or perhaps both) to salvage the claim in Count I of her complaint. But neither is applicable on this record.

Ms. Oliver suggests it is "well-settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments" (Opening Brf., at 32). But this mootness exception only comes into play in exceptional situations, when "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration[.]" *Murphy*, 455 U.S. at 482 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). This was not one of those situations. Moreover, the capable-of-repetition exception to mootness only applies "where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *Alvarez*, 558 U.S. at 93 (quoting *Los Angeles v. Lyons*, 461 U.S. at 109). As already explained, Ms. Oliver cannot meet that test.

Nor can Ms. Oliver avail herself of the "voluntary cessation" doctrine. While "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued[,]" *Already, LLC*, 568 U.S. at 92, that is not what occurred here. The Union took its initial steps to satisfy Ms. Oliver even before she filed suit and, *in toto*, its actions were definitive. Because – as to her and more generally – there is no reason to suppose any of the defendants will return to their

"old ways," she cannot rely on the voluntary cessation exception to mootness either. *See id.*

II. Contrary To Ms. Oliver's Contention, PERA's Exclusive Representation Provision Is Constitutional.

In Count II of her complaint, Ms. Oliver alleged that PERA's exclusive representation provision, at 43 P.S. § 1101.606, amounts to an "unconstitutional abridgement of [her] right under the First Amendment not to be compelled to associate with speakers and organizations without her consent" (App. 045 – compl. ¶ 59). She continues to press that point on appeal (*See* Opening Brf., at 33-38).

It is not self-evident that the mere existence of 43 P.S. § 1101.606 has resulted in a cognizable injury-in-fact to Ms. Oliver herself, by the Commonwealth defendants, simply because she is a public sector employee. Nevertheless, for present purposes her standing will be assumed. In addition, the Attorney General, one of the Commonwealth defendants, has a statutory "duty to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction." 71 P.S. § 732-204(a)(3). And the statute Ms. Oliver questions is indeed constitutional.

The exclusive representation model has a venerable pedigree. It 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).

The particular question Ms. Oliver now raises – whether designation of an exclusive bargaining representative violates an individual's First Amendment right to free expressive association – was answered in *Minn. State Bd. for Comty. Colls. v. Knight*, 465 U.S. 271 (1984). There, community college instructors who had declined to join a majority-elected union challenged portions of Minnesota's Public Employee Labor Relations Act, analogous to PERA, that required government employers to "meet and negotiate" only with duly elected representatives on mandatory bargaining subjects, and to "meet and confer" only with those same representatives on non-mandatory bargaining subjects. *Id.*, 465 at 278-279. Non-members challenged this scheme, asserting that it infringed upon their rights to free speech and association. *Id.*

The Supreme Court rejected the non-members' challenge, specifically recognizing that the First Amendment does not "require government policymakers to listen or respond to individuals' communications on public issues." *Id.* at 288-290. 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 [had] the state attempted to suppress any ideas." *Id.* Thus, *Knight* squarely held that the non-members' "associational freedom ha[d] not been impaired." *Id.* at 289. In fact, non-members 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. In the Court's view, "such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.*

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. *See* 43 P.S. § 1101.401. The very section that Ms. Oliver seeks to prevent the Commonwealth defendants from enforcing grants individual employees or groups of employees "the right at any time to present grievances to their employer[,]" should an employee so choose. 43 P.S. § 1101.606. Ms. Oliver does not allege that the Commonwealth has attempted

to suppress her individual speech in any way. Like the non-member instructors in *Knight*, she is free to associate or not associate with whomever she pleases, including the exclusive representative. Accordingly, *Knight* is dispositive.

Moreover, post-*Knight* decisions from other circuits reinforce this conclusion. The United States Courts of Appeals for the First, Second, Seventh, Eighth, and Ninth Circuits have each rejected claims substantially similar to Ms. Oliver's. All five have 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. In Circuit order (for ease of reference), the state of the law on this point is as follows:

- *D'Agostino v. Baker*, 812 F.3d 240, 243-245 (1st Cir. 2016) (Souter, J. by designation), *cert. denied*, 136 S. Ct. 2473 (2016) – held non-members' ability to "speak out publicly on any subject" and "free[dom] to associate themselves together outside the union however they might desire" defeated compelled association claim. *See also Reisman v. Associated Faculties of Univ. of Maine*, 939 F.3d 409, 414 (1st Cir. 2019), *petition for cert. filed* (U.S. Jan. 2, 2020) (No. 19-847) – held *D'Agostino* is still good law after *Janus* and again found exclusive representation permissible.
- *Jarvis v. Cuomo*, 660 Fed. Appx. 72, 74 (2d Cir. 2016) (non-precedential) – concluded plaintiffs could not demonstrate constitutionally impermissible

burden on their right to free association, due to exclusive representation scheme.

- *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 864 (7th Cir.), *cert. denied*, 138 S. Ct. 446 (2017) – plaintiffs were not required to join or financially support union, so "exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny."
- *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019) – challenge to exclusive representation scheme under First and Fourteenth Amendments was foreclosed by *Knight*, and *Janus* did not supersede *Knight*.
- *Mantele v. Inslee*, 916 F.3d 783, 789-791 (9th Cir. 2019), *petition for cert. filed sub nom. Miller v. Inslee* (U.S. May 29, 2019) (No. 18-1492) – summary judgment against plaintiff affirmed because "degree of First Amendment infringement inherent in mandatory union representation is tolerated in the context of public sector labor schemes." *Janus* did not overrule *Knight sub-silentio*, and even if *Knight* did not apply, exclusive representation would be permissible.

Without mentioning any of these instructive appellate decisions, Ms. Oliver flatly rejects the premise that *Knight* is controlling (*see* Opening Brf., at 36-38).

She argues instead that the more recent decision in *Janus* supports her challenge to exclusive representation. She is wrong.

Janus holds that public employees who choose not to become union members cannot be required to pay agency fees to an exclusive representative because compulsory fees constitute "compelled subsidization of private speech," contrary to the First Amendment. 138 S. Ct. at 2464. But the Court in *Janus* took care to explain that there is a distinction between a requirement to pay agency fees and the designation of an exclusive collective bargaining representative. *See id.* at 2465, 2478, 2486. That opinion further observed that "the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked." *Id.* at 2480.[19] Indeed, the Court *expressly approved of exclusive representation schemes*, explaining 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 non-members to pay agency fees." *Id.* at 2478.

The message in *Janus* was crystal clear: While mandatory agency fees were prohibited, "States can keep their labor-relations systems exactly as they are[.]" *Id.*

[19] The Court had drawn 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.").

at 2485 n.27. *Janus* did not even cite *Knight*, much less overrule it, as the post-*Janus* decisions in *Reisman*, *Bierman*, and *Mantele*, *supra*, have confirmed.

In short, no constitutional flaw infects the PERA exclusive representation scheme. The district court's conclusion to that effect was legally sound and it, too, should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court, granting the Commonwealth defendants' motion for summary judgment and dismissing Ms. Oliver's claims against them.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: */s/ Claudia M. Tesoro*

CLAUDIA M. TESORO
Senior Deputy Attorney General
Bar No. 32813 (Pa.)

NANCY A. WALKER
Chief Deputy Attorney General
Chief, Fair Labor Section

J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
1600 Arch Street
Suite 300
Philadelphia, PA 19103
Phone: (215) 560-2908
FAX: (717) 772-4526

DATE: April 22, 2020

CERTIFICATE OF COUNSEL

I, Claudia M. Tesoro, Senior Deputy Attorney General, hereby certify as follows:

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

2. The text of the electronic version of this brief is identical to the text of the paper copies.

3. A virus detection program was run on the file and no virus was detected.

4. This brief contains 7,259 words within the meaning of Fed.R.App.P. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Claudia M. Tesoro

CLAUDIA M. TESORO
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I, Claudia M. Tesoro, Senior Deputy Attorney General, hereby certify that the foregoing Brief For Commonwealth Appellees is this day being filed electronically, using the Court's CM/ECF system, and thus will be served electronically on any/all Filing User(s) involved in this case, including counsel of record for appellant and counsel of record for appellee SEIU Local 668.

/s/ Claudia M. Tesoro

CLAUDIA M. TESORO
Senior Deputy Attorney General

DATE: April 22, 2020