IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
STATE OF OHIO

LUKAS DARLING, et al.,	:	Appellate Case No. 23 AP 00645
Plaintiff-Appellants,	:	Trial Court Case No. 22 CV 008864
v.	:	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, et al.,	:	ACCELERATED CALENDAR
Defendant-Appellees.	:	

ASSIGNMENTS OF ERROR AND MERIT BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred by treating the Plaintiffs' complaints, which related to their private contracts with the Defendant Union, as unfair labor practices subject to the exclusive jurisdiction of SERB.

ISSUES PRESENTED FOR REVIEW

Ohio's Public Employee Collective Bargaining Act created the State Employee Relations Board and gave it exclusive jurisdiction to disputes arises out of the "new rights and remedies." *Franklin Cnty. Law Enforcement Assoc. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167,171(1991) But where "a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court." *Id.* Here, the Appellants raised state law contractual challenges to their union-membership agreements. **Are the Appellants' contractual rights independent of R.C. 4117 and thus cognizable in common pleas court?** Yes.

I. STATEMENT OF THE CASE

A. Procedural Background

This is an appeal from an Order granting Defendant Ohio Association of Public School Employees/AFSCME' Local 4, AFL-CIO's ("OAPSE's") Motion to Dismiss pursuant to Ohio R. Civ. P. 12(C). Originally, twelve plaintiffs filed a Complaint against several public sector unions and employers, alleging that the unions' membership

contracts, from which the obligation to pay dues arose, were invalid and that the unions had improperly continued to deduct union dues from the employees' pay after they had resigned from the union. (Complt., 12/19/22). The Complaint asserted five causes of action, all sounding in Ohio's common law of contracts: (1) the contract between the employees and the unions were rescinded based on mutual repudiation, (2) the contracts were rescinded based on mutual mistake, (3) the continued assessment of Union dues after the Plaintiffs had resigned from the Union amounted to unreasonable liquidated damages the Union had been unjustly enriched by renouncing the membership contracts, but continuing to take dues while providing no additional benefits beyond the statutory services that they are required to provide to members and non-members alike.

Many of the plaintiffs settled their claims with their respective unions, leaving five plaintiffs (now Appellants, Chelsea Kolacki, Kristy Kolacki, Laura Langsdale, Ronnie Legg, and Steven Tulga) and one union (OAPSE) as parties to this the case. On April 21, 2023, the remaining Appellants filed an Amended Complaint reflecting the various dismissals

and clarifying the remaining parties. (Amend. Complt., 4/21/23.) The Court granted the Motion to Amend. (Order, 5/26/23). On June 9, 2023, OAPSE filed a Motion to Dismiss the complaint on the basis that the Court lacked jurisdiction to hear the case, arguing that the State Employee Relations Board had exclusive jurisdiction. (Mot.to Dismiss, 6/9/23). The Plaintiffs opposed the Motion and OAPSE filed a Reply in Support. (Mem. Contra., 6/26/23; Reply, 7/3/23). On October 3. 2023, the trial court granted OAPSE's Motion to Dismiss. (Order, 10/3/23). The Appellants filed a timely Notice of Appeal on October 23, 2023. (Not. of Appeal, 10/23/23).

B. Statement of Facts

1. The Post-*Janus* Legal Landscape and the *Belgau* Decision

While the factual background of this case is simple, the legal context and background in which the Appellants' claims arise is important to understanding them. In *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, the U.S. Supreme Court held that the First Amendment protects public-sector employees from being compelled "to subsidize private speech on matters of substantial public concern" without prior

affirmative consent. 138 S.Ct. 2448, 2460, 201 L.Ed.2d 924 (2018). The Court rejected the requirement that forced government employees either to pay monthly dues or agency fees, used to support union policies and union lawyers, even when employees objected to those policies and actions. Non-payment would trigger employment termination. But "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.* at 2463. *Janus* made clear that unions and governments cannot continue to compel "free and independent individuals to endorse ideas they find objectionable." *Id.* at 2464. Notably, the plaintiff in *Janus* was not and had never been a union member when he sought to escape the agency fees forced upon him.

Several federal appellate courts have seized on this distinction to hold that the *Janus* rule does not apply to employees who have voluntarily entered into a contract with a union. In those cases, courts have held that an employee's ability to opt-out of union membership after he has signed a contract with the union—typically a post-card sized union membership

card—is governed solely by that contract and the applicable state contract law. *See Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020)("When 'legal obligations ... are self-imposed,' state law, not the First Amendment, normally governs."); *see also, Bennett v. Council 31 of the Am. Fedn. of State, Cnty. & Mun. Employees, AFL-CIO*, 991 F.3d 724 (2nd Cir. 2021)(following *Belgau*). As the Third Circuit explained, "[b]ecause *Janus* does not abrogate or supersede Plaintiffs' contractual obligations, which arise out of longstanding, common law principles of 'general applicability,' *Janus* does not give Plaintiffs the right to terminate their commitments to pay union dues unless and until those commitments expire under the plain terms of their membership agreements." *Fischer v. Governor of New Jersey*, 842 Fed.Appx. 741, 753, *cert. denied sub nom. Fischer v. Murphy*, 142 S.Ct. 426, 211 L.Ed.2d 250 (internal citations omitted).

In the wake of these decisions, many Unions began relying on "opt-out windows" in their contracts with their members. Thus while union members retained an absolute right to resign from union membership at any time, *see, e.g., Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012),

those who did so outside of the contractual opt-out window could still be compelled—as a matter of contract law—to continue to pay dues to a union to which they now longer belonged.

2. The Appellants' Contract Law Challenges to the Membership Agreements.

Each of the Appellants in this case notified his or her respective union that he or she was opting out, and no longer wanted to be a member of or otherwise associated with his or her respective union. (Am. Complt., 4/21/23). Each Plaintiff specifically requested that he or she be removed from the union roll immediately and that union membership dues no longer be deducted from his or her paychecks. (Id.) All of these requests were made outside of each Appellant's respective contractual opt-out window. (Id.)

In each case where the Appellants have correspondence from the union, the union acknowledged in writing that the Appellant was no longer a member of the union. *Id.* In the letter acknowledging each Plaintiff's termination of union membership, OAPSE urged the Plaintiffs to reconsider and rejoin the union. The letters touted benefits available

only to members, most notably the ability to vote in union elections. Upon the termination of the respective Appellant's union membership, OAPSE terminated the Appellants' "membership only" benefits. Importantly, these "membership only benefits"—such as the right to vote in union elections—arise from the membership agreement and not from the collective bargaining agreement. These "membership only" benefits are distinct from OAPSE's duty, as the designated exclusive bargaining representative, to represent members and nonmembers alike in collective bargaining activities. See R.C. 4117.05.

Following their resignations from their respective unions, certain Appellants again demanded that the union immediately cease its unauthorized withdrawal of union membership dues and refund all union membership dues withdrawn from the date of the employee's resignation. OAPSE refused to cease withdrawing dues as of the date of resignation, stating that each Appellant continued to be bound by his or her alleged membership contract with the union which required the payment of dues for the entire term of the contract or until the next opt-out window.

Since courts have held that an employee's decision to resign from a union is governed by "longstanding, common law principles of 'general applicability'" to state contract law, the Appellants brought a state contract law case, alleging that the membership contracts on which OAPSE relies are invalid under several long-standing contractual defense, or to the extent that they are valid and the Appellants have breached them by resigning, the provision requiring the continued payment of dues after they have left the Union is an unenforceable penalty and not liquidated damages.

Although the Plaintiffs raised contractual claims, the trial court held that those claims, in essence, alleged unfair labor practices, and that exclusive jurisdiction rests with SERB. This appeal followed.

LAW AND ARGUMENT

Standard of Review

An appellate court reviews a trial court order granting a motion to dismiss pursuant to Civ. R. 12(B)(6) under a de novo standard of review.

Perrysburg Twp. v. Rossford, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. In reviewing whether a motion to dismiss should be granted, an appellate court must accept as true all factual allegations in the complaint and all reasonable inferences must be drawn in favor of the nonmoving party. *Rossford* at ¶ 5; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "To prevail on a Civ. R. 12(B)(6) motion to dismiss, it must appear on the face of the complaint that the plaintiff cannot prove any set of facts that would entitle him to recover." *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

A. Ohio's Public Employee Collective Bargaining Act, R.C. 4117.01, et seq., Does Not Divest Courts of Jurisdiction Over Private Contractual Disputes.

The Ohio Supreme Court has long held that "SERB does not have exclusive jurisdiction over every claim that can somehow be cast in terms of an unfair labor practice." *Keller v. Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 14. Indeed, the Ohio Supreme Court has specifically rejected the Defendants' view of SERB's broad pre-emption power stating that "to hold that only SERB has jurisdiction to

hear or determine anything that "arguably" constitutes an unfair labor practice is neither a complete nor totally correct statement of the law set forth in R.C. Chapter 4117 or the decisions of this court." *E. Cleveland v. E. Cleveland Firefighters Local 500, I.A.F.F.,* 70 Ohio St.3d 125, 127–29, 637 N.E.2d 878, 880 (1994).

While Ohio law grants SERB exclusive jurisdiction in disputes relating to the "new rights and remedies" created by R.C. 4117, "if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court." *Franklin Cnty. Law Enforcement Assoc. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167,171(1991). Indeed, the *Franklin Cnty. Law Enf't Ass'n* Court specifically noted "common-law contractual rights that exist independently of R.C. 4117" as an example of claims where SERB's jurisdiction would not be exclusive. *Id.* That is exactly what the Appellants did here. They brought claims under the common law of contracts.

The test for whether SERB preempts the claims is whether the rights asserted "exist independently of R.C. Chapter 4117." *Id.* at 172. If so,

"such claims may be raised in common pleas court even though they may touch on the collective bargaining relationships between employer, employee, and union." *Id.*; *see also*, *Ohio Assn. of Pub. School Emps./AFSCME Local 4, AFL-CIO v. Madison Local School Dist. Bd. of Edn.*, 11th Dist. No. 2009-L-148, 190 Ohio App.3d 254, 2010-Ohio-4942, 941 N.E.2d 834, ¶ 47 ("It is well established that if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may be properly heard in common pleas court.").

The trial court relied on *Murray v. Columbus*, 10th Dist. Franklin No 13AP-912, 2014-Ohio-2790, for the proposition that a claim that essentially requires a trial court to rule on an unfair labor practice is subject to SERB preemption. As set forth below, *Murray*—which dealt with core collective bargaining and a union's duty of fair representation under R.C. 4117.11—inapplicable to private contracts unrelated to bargaining activity. The trial court thus erred in treating the Appellants' declaratory judgment claims regarding the validity of the membership contracts as unfair labor practices subject to SERB's exclusive jurisdiction.

1. Nature of the Contracts at Issue

First, though obvious, it bears repeating that the contracts in dispute are not collective bargaining agreements between public employers and the union. They are instead the private contracts of union membership between OAPSE and the Appellants. These contracts do not touch on any collective bargaining topic. Nor do they relate to any collective bargaining services that OAPSE is statutorily required to provide to all employees in the bargaining unit regardless of whether they are union members or nonmembers. They are instead limited to the relationship between the union and the Appellants. Under the contracts, the Appellants agree to become union members, exchanging consideration in the form of dues for some benefits or privileges from union outside of the services that the union is already statutorily required to provide to all bargaining unit employees. See R.C. 4117.03-06.

OAPSE cannot disclaim those obligations or condition them on membership any more than the employees can opt-out of the bargaining unit. *See Janus*, 138 S. Ct. at 2460. The membership contracts in question govern only the conditions under which employees join or resign from the

Union and any additional benefits that are necessarily separate and apart from OAPSE's statutory obligations as the bargaining unit representative.

2. The Appellants' Claims Do Not Arise From or Depend On the Collective Bargaining Agreement or R.C. 4117.

Ohio's enactment R.C. 4117 was not intended to broadly preempt any claims that might relate to public employment. Instead, as the *Franklin Cnty. Law Enf't* Court made clear, "[t]hat chapter [R.C. 4117] was meant to regulate in a comprehensive manner the labor relations between public employees and employers." *Id.* It was not intended "to give SERB exclusive jurisdiction over claims that a party might have in a capacity other than as a public employee, employer, or union asserting collective bargaining rights." *Id.* While this dispute is plainly tangential to their public employment, the Appellants are not asserting any rights related to collective bargaining or pursuing causes of action created by R.C. 4117.

Rather, the Plaintiffs' contract-based claims arise entirely from common law independent of R.C. 4117. Specifically, the Plaintiff's claims for declaratory judgment that the contracts have been repudiated,

rescinded for mutual mistake, that the continued imposition of dues constitutes an unenforceable penalty for the Plaintiff's breach of the contract, that the contract that does not disclose the price of the goods or services—in this case the dues to be collected—is unconscionable, and unjust enrichment. All of these contract-based theories and the legal remedies sought under them existed long before R.C. 4117's 1983 enactment.

For example, the rule against unreasonable liquidated damages as an unenforceable penalty that the Plaintiffs seek to enforce in Count Three of the Amended Complaint appears as far back in Ohio law as 1853. *See Lange v. Werk,* 2 Ohio St. 519, 533, 1853 WL 117 (1853)("[A]s the stipulated sum may greatly exceed the actual injury, courts have uniformly regarded it as a in the nature of a penalty to secure the actual damages, unless it was *clearly* intended otherwise by the parties . . .)(emphasis in original)*; see also, American Financial Leasing & Serv. Co. v. Miller*, 41 Ohio App.2d 69, 72 (10th Dist. 1974)("Stipulations for liquidated damages are often treated as penalties because of the inequities that would result from the strict enforcement of the stipulations, and there is a marked

tendency on the part of the courts to construe stipulations for liquidated damages as penalties." (internal citations omitted).

In comparison, *Murray v. Columbus*, 10th Dist. Franklin No 13AP-912, 2014-Ohio-2790, on which the trial court relied, dealt with core collective bargaining activity—the union's settlement of a grievance without notifying the plaintiff. *Murray*, 2014—Ohio—2790 at ¶18. The grievance procedure was a creature of the collective bargaining agreement. The settlement of the grievance related directly to the union's duty to represent the plaintiff, which again, arose out of R.C. 4117.11(B)(6) and the collective bargaining agreement. The *Murray* court thus correctly held that it could not address the plaintiff's complaint without ruling on an "unfair labor practice."

There is no such danger here because issues like whether the membership contract fails for mutual mistake, fails as a contract of adhesion, or contains an impermissible penalty disguised as liquidated damages have nothing to do with the union's statutory duties of fair representation or to "restrain or coerce" an employee's the exercise of rights under 4117. In fact, R.C. 4117.11 (B)(1)—on which the trial court

appeared to have relied—carves out an exception to union activities related to the "acquisition or retention of membership therein." R.C. 4117.11 (B)(1). Indeed, a plain reading of that statute precludes a union's enforcement of its own membership rules from ever being an unfair labor practice.

Instead, the Appellants' seek a declaratory judgment excusing their breach of the membership contract by resigning from the union outside of an opt-out window. In other words, if the membership contracts between the Plaintiffs and the OAPSE are valid—and OAPSE insists that they are—the Appellants breached those contracts and the question whether those breaches can be excused, and if not, are OAPSE's damages in the form continued payment of dues appropriate liquidated damages or an unenforceable penalty?

Despite no longer providing services, OAPSE continued to receive dues paid through forced paycheck deductions from the Plaintiffs. Plaintiffs thus seek a declaratory judgment that the continuation of dues deductions after the Union acknowledged their resignations and ceased providing them any member benefits is an unenforceable penalty. Ohio

courts have held that "[p]enalty provisions in contracts are held invalid on public policy grounds because a penalty attempts to coerce compliance." *Satterfield v. Adams Cnty./Ohio Valley School Dist.*, 4th Dist. Adams No. 95CA611, 1996 WL 655789, *7 (citing *Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376 at 381(1993)).

The trial court erred when construing this argument to allege "payment without representation" that might form the basis of an unfair labor practice (Ord., at 6, 10/3/23). The concept of an unfair labor practice based on "payment without representation" carries no currency in the post-*Janus* world. One of *Janus's* primary effects was to sever a bargaining unit member's duty to pay fair share fees from a public-sector union's duty of representation:

> Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit.

Janus, 138 S.Ct. at 2469.

The Appellants' decision to leave OAPSE, has nothing to do with the collective bargaining rights created and protected by R.C. 4117.

Instead—as OAPSE told the Sixth Circuit Court of Appeals in *Littler v. OAPSE*—"whether a union can collect membership dues from a given employee turns on the 'private judgments' of the employee and the union.'" *Littler v. OAPSE*, U.S. Court of Appeals for the Sixth Circuit, Case No. 22-4056, Brief of Appellee, OAPSE, Document 20, p. 24(citing *Hoekman v. Education Minnesota*, 41 F. 4th 969, 978(8th Cir. 2022)). The Appellants are not complaining that OAPSE is failing to represent them in collective bargaining. They are complaining that they are asked to continue to pay dues for "members only" benefits that they contend are de minimis at best and not related to any injury suffered by their withdrawal.

Similarly, the Plaintiffs' claims going to the validity of their membership contracts with the Union all arise under theories that were ancient in Ohio law before R.C. 4117 was glimmer in the eyes of its drafters. *See e.g. Irwin v. Wilson*, 45 Ohio St. 426 (1887)(recission for mutual mistake); *Curtis v. Factory Site Co.*, 12 Ohio App 148 (8th Dist. 1919) (recission by repudiation); *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E. 2d 923 (1938)(unjust enrichment); *Miller v. Blockberger*, 111

Ohio St. 798, 146 N.E. 206 (1924)(recognizing unenforceability of liquidated damages clauses that constitute a penalty); *Matson v. Marks*, 32 Ohio App.2d 319, 291 N.E. 2d 491 (10th Dist. 1972)(Recognizing remedies for contract of adhesion). SERB, on the other hand, was not created until 1983. See S.B. 133, as enacted, 115th General Assembly.

In other words, if R.C. 4117 had never been enacted, the Appellants would still have the same claims under Ohio's common law of contracts. The Appellants' claims, thus cannot be said to "arise from or depend on the collective bargaining rights created by R.C. Chapter 4117." *See Franklin Cnty. Law Enf't, Ass'n*, 59 Ohio St. 3d at 171. Stated in the alternative, the question of whether the Plaintiff's claims "arise from or depend on" the collective bargaining statute can be answered by a simple thought experiment: If R.C. 4117 were repealed in its entirety tomorrow, could the Plaintiffs' claims go forward? Because the membership contracts between the Union and the Plaintiffs could not be legislated out of existence, the answer is plainly yes.

And while the Union posits that the Plaintiffs might have sought relief under R.C. 4117.03(A)(1)'s right to "refrain from . . . assisting"

OAPSE, the fact that a statutory remedy might also exist does not oust the Court from jurisdiction:

> Where a statute which creates a new right, prescribes the remedy for its violation, the remedy is exclusive; but when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option.

Fletcher v. Coney Island, Inc. 165 Ohio St. 150, 154, 134 N.E. 2d 371 (1956)(quoting *Zanesville v. Fannan* (1895), 53 Ohio St. 605, 42 N.E. 703, at paragraph two of the syllabus, (1895)). Public sector unions have insisted, in cases like *Belgau* and *Littler*, that opt-out disputes are matters of private contract law between the member-employee and the union. The Plaintiffs here have thus sought to pursue their private contract remedies, which do not arise from, depend upon, or otherwise implicate R.C. 4117.

B. The Cases OAPSE Cites Below Are Inapposite

At the trial court level, OAPSE relied on *Fletcher v. Coney Island, Inc.* for the proposition that when "the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional

remedy." 165 Ohio St. 150, 154, 134 N.E. 2d 371 (1956). OAPSE will get no argument from the Plaintiff/Appellants on that point, which has unarguably been the law in Ohio for decades. But OAPSE, and the trial court, failed to note the paragraph (cited above) that precedes the cited sentence, which establishes that the creation of an additional statutory remedy for a pre-existing right does not oust the Court from jurisdiction but gives the plaintiff the option of pursuing either route. *See Fletcher*, 165 Ohio St. at 154 ("when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option").

Further, context is important. Read in its entirety, *Fletcher* teaches that statutory remedies are exclusive only when the statute creates a new right. In *Fletcher*, the plaintiff was an African-American woman who sued the defendant amusement park for racial discrimination under Ohio's civil rights statutes. Those statutes subjected amusement park operators who barred citizens on the basis of race to fines and potential imprisonment, as well as civil damages, but did not provide for injunctive

relief[1]. But rather than seeking the remedies expressly provided by the statutes, Ms. Fletcher sought an injunction to prevent the park from refusing to admit her in the future. *Id.* at 154. The Court held that because "the General Assembly granted by the enactment of Section 12940, General Code, new rights and provided two remedies or penalties and only two for their violation," it could not provide the injunctive relief requested, which was not allowed under the statute. *Id.* at 155.

The key question, again, is whether the statute creates a *new* right or cause of action or simply provides an additional remedy for an existing right. Sadly, as in the federal system, Ohio had no common law protections against racial discrimination by a private entity[2]. Prohibitions against and remedies for racial discrimination thus had to be created by statute. Unlike Ms. Fletcher's request for an injunction to prohibit continued racial discrimination—a concept that had no common law

[1] The statutes were essentially the Ohio Public Accommodations Law of 1884, re-enacted in 1953 when the General Assembly recodified the old General Code into the current Ohio Revised Code.

[2] Although subsequent civil rights statutes have rendered the question moot, as a point of historical interest, Ms. Fletcher apparently argued that she did in fact have a common law right to the judicial remedy she sought under the Ohio Constitution. Modern courts might well have agreed with her and decided *Fletcher* differently.

antecedent—the Plaintiffs here can point to black-letter contract law that existed long before R.C. 4117's enactment. Since the rights they are seeking are *not* new or statutorily created, there is no SERB preemption. Stated another way, the unionization of public sector employees in Ohio began decades before the enactment of R.C. 4117 in 1983. *See* Calvin William Sharpe, *The Ohio Public Sector Collective Bargaining Law: First Anniversary Colloquium*, Case W. Res. L. Rev. 345, 346-47 (1985). Those public employees who entered into contracts with their unions before R.C. 4117's enactment would obviously have had the same common law contractual rights that the Plaintiffs seek to vindicate here.

Next, the OAPSE pointed out that SERB has heard similar (through by no means identical) cases relating to union resignation and payment of dues. *See, e.g. Koch v. OAPSE*, No. 2023-ULP-01-0006 (Ohio SERB Mar. 9, 2023). But it does not follow that because SERB has exercised jurisdiction in similar cases that its jurisdiction is therefore exclusive. As discussed above, SERB has ***concurrent*** jurisdiction to hear complaints related to public workplaces. *Franklin Cnty. Law Enf't, Ass'n*, 59 Ohio St. 3d at 171. Claimants can choose either route. *Id.*; *see also*, *Ohio Assn. of*

Pub. School Emps./AFSCME Local 4, AFL-CIO v. Madison Local School Dist. Bd. of Edn., 11th Dist. No. 2009-L-148, 190 Ohio App.3d 254, 2010-Ohio-4942, 941 N.E.2d 834, ¶ 47 ("It is well established that if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may be properly heard in common pleas court.") But its ***exclusive*** jurisdiction applies only to cases arising from collective bargaining agreements or the rights created by R.C. 4117. This case involves neither.

Further, SERB has no authority to determine the jurisdiction of the court of common pleas. Nor are its decisions entitled to any deference from this Court. The Ohio Supreme Court made this clear last year in *TWISM Enterprises, LLC v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio 4677, where it held that "it is never mandatory for a court to defer to the judgment of an administrative agency." 2022-Ohio-4677 at ¶42.

But regardless of what precedential value or deference this Court might assign to a SERB decision, OAPSE's reliance on *Koch* is misplaced because in *Koch*, the Board essentially found that enforcing a contractual

opt-out window was not an unfair labor practice, but the union's refusal to honor a request within the window would be. *See Koch*, 2023-ULP-01-006 ("Mr. Koch did not provide sufficient information or documentation to show that he submitted his dues revocation authorization during the contractual time period . . ."). In other words, according to SERB's decision in *Koch*, in a case like this, where the Appellants admit that they submitted their opt-out request outside of the contractual window, there is no unfair labor practice claim.

OAPSE also relied heavily on *State ex. Rel. Cleveland v. Sutula*, 127 Ohio St. 3d 131, 937 N.E. 2d 88 (2010). There, the City of Cleveland sought a writ of prohibition to prevent Sutula, a Cuyahoga County judge, from exercising jurisdiction over a labor dispute where the union claimed that the city had violated employees collective bargaining rights by "refusing to bargain collectively with the union [and] by ignoring a valid collective-bargaining agreement." *Id.* at 133. These issues, of course, fall squarely within SERB's exclusive jurisdiction over statutorily created collective-bargaining rights and the enforcement of a collective-bargaining agreement. The Appellants facts are much different and deal

only with each Appellant's private contractual relationship with the union.

Lastly, OAPSE's reliance below on a 1976 Pennsylvania Supreme Court case—*Hollinger v. Department of Welfare*, 469 Pa. 358, 365 A. 2d 1245 (1976)— provides no assistance. First, that case was decided long before *Janus* and *Belgau* changed the contours of public employment law. Second, there is no indication that the Pennsylvania plaintiffs raised any of the contract issues raised here. Instead, they simply sought an injunction, the basis for which is unclear. Again, in this case, the Plaintiffs are not disputing that their membership contracts limited the times when they could opt-out, they are disputing whether those contracts were valid and if so, whether the continued deduction of dues is an unenforceable penalty for their breach of that membership contract. Finally, Ohio law is well-developed, and more importantly, controlling.

CONCLUSION

For the foregoing reasons, SERB does not have exclusive jurisdiction over the Appellants' common law contract claims and this Court should reverse the dismissal of the Plaintiffs' case below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of November 2023, the forgoing Assignments of Error and Brief of Appellants was served on all counsel of record via the Court's electronic filing system.

/s/ Jay R. Carson
Attorney for Appellants