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

JOHN M. WEATHERS, et al. Plaintiffs, v. **THE SCHOOL DISTRICT OF PHILADELPHIA, et al.,** Defendants.	Civil Action No. 18-3982-MMB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO SEVER AND REMAND STATE LAW CLAIMS

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INTRODUCTION

The Plaintiffs in this case are all Pennsylvania residents. The principal relief they seek is an injunction requiring the School District of Philadelphia ("School District") to follow Pennsylvania state law. Thus, the central issue in this case is whether a court should order a Pennsylvania governmental entity to comply with Pennsylvania law at the request of Pennsylvania citizens. That question should be decided by the Pennsylvania state courts, rather than a federal court.

The Defendants were able to remove this case to federal court only because one plaintiff that was added while the case was pending in state court has an unrelated claim against the Defendants that arises under federal law, namely a First Amendment retaliation claim. But that lone federal claim, which arises out of entirely different facts, cannot support federal jurisdiction over this entire lawsuit. Accordingly, the bulk of the claims in this case should be severed and remanded to state court because this Court lacks subject matter jurisdiction over them.

Although a straightforward application of the federal question and supplemental jurisdiction statutes is enough to resolve the issues raised in this Motion, there are two additional, independent grounds that warrant a remand of the bulk of Plaintiffs' claims. *First*, under the principles embodied in the Supreme Court's *Burford* and *Thibodaux* decisions, this Court should abstain so that a Pennsylvania state court may determine whether and to what extent a Pennsylvania governmental entity should be enjoined under Pennsylvania state law. *Second*, under a recent Third Circuit decision, the Taxpayers Plaintiffs appear to lack Article III standing to bring their claims, which requires those claims to be remanded to state court, where different standing rules apply.

FACTUAL BACKGROUND

I. Proceedings In State Court

The case originated in state court as an action by three School District taxpayers (the "Taxpayer Plaintiffs") to enjoin a professional services contract that the School District had recently awarded to a very expensive – and very well-connected – bidder, rather than others who could have performed at least as well at a much lower cost. *See generally* Plaintiffs' Complaint, ECF No. 1-2.[1] While investigating that claim, the Taxpayer Plaintiffs learned that the procurement problems extended far beyond that one contract. Thus, the Taxpayer Plaintiffs withdrew their request to preliminarily enjoin the specific contract that started this dispute in favor of pursuing a comprehensive and permanent solution to the School District's wrongdoing.

In the preliminary objections that it filed in state court in response to the Taxpayer Plaintiffs' original complaint, the School District did not dispute that its process failed to live up to its own procurement rules. Instead, the School District argued that (i) under Pennsylvania law on taxpayer standing, the Taxpayer Plaintiffs lacked standing to seek any relief other than an injunction against a specific contract, and thus were not entitled to any of the broader injunctive or declaratory relief they sought; and (ii) on the merits, the School District was not bound by its own procurement rules, because they purportedly constitute internal guidance, rather than School Reform Commission ("SRC") or Board of Education ("BoE") rules that have the force of law.

In response to the School District's preliminary objections, the Taxpayer Plaintiffs amended their complaint to specify the SRC and BoE rules that the School District was violating. *See* Am. Compl. (ECF 1-3) ¶¶ 44-67. In addition, the Taxpayer Plaintiffs added as an additional

[1] Plaintiffs' original and amended state court complaints are attached to Defendants' Notice of Removal and can be found at ECF No. 1-2 and ECF No. 1-3, respectively.

plaintiff The 21st Century Partnership for STEM Education ("21PSTEM"), which is a repeat bidder for professional services contracts, and thus has standing in its capacity as a bidder in the event the Taxpayer Plaintiffs lack standing in their capacity as taxpayers. *See id.* ¶¶ 9-12, 71. In the amended complaint, 21PSTEM – and only 21PSTEM – also asserted a new claim for retaliation in violation of the First Amendment to the U.S. Constitution. *See id.* ¶¶ 76-82. That claim is based on the School District's practice of punishing bid protestors by refusing to give them valuable information that it provides to those who do not file bid protests. *See id.*

II. Defendants Remove The Case To This Court On The Ground Of Federal Question Subject Matter Jurisdiction

Rather than respond to the amended complaint in state court, the School District removed it to this Court. *See* Notice of Removal (ECF No. 1). The Notice of Removal correctly asserts that this Court has federal question jurisdiction over 21PSTEM's First Amendment retaliation claim. *See id.* ¶¶ 7-8. Thus, Plaintiffs do not seek remand of that claim to state court.[2]

The School District's Notice of Removal also wrongly asserts that this Court has federal question jurisdiction over the Plaintiffs' broader procurement-related claims because a portion of those allegations refer to certain federal procurement regulations. *See id.* ¶¶ 6, 8-9.

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[2] Plaintiffs also have a pending Motion for Leave to file a Second Amended Complaint. *See* ECF No. 6. The Second Amended Complaint adds, on behalf of 21PSTEM only, a retaliation claim under the Pennsylvania Constitution based on the same facts as its First Amendment retaliation claim. This Court has supplemental jurisdiction over 21PSTEM's state constitutional claim. *See Lyon v. Whisman*, 45 F.3d 758, 761 (3d Cir. 1995) ("[D]istrict courts will exercise supplemental jurisdiction if the federal and state claims are merely alternative theories of recovery based on the same acts.") (quotation marks omitted). Thus, 21PSTEM does not seek remand of its state constitutional claim.

III. Plaintiffs Seek To Amend Their Complaint In Federal Court

Shortly after removal, Plaintiffs sought leave to amend their complaint to, among other things, clarify the relevance of the federal regulations to their procurement claims. As of the filing of this Motion, Plaintiffs' Motion for Leave (ECF No. 6) is pending before this Court.

As Plaintiffs' proposed Second Amended Complaint explains, a binding SRC regulation called Policy 1000 specifically directs the School District to follow federal procurement regulations when procuring professional services with federal grant money. *See* proposed Second Amended Complaint ("SAC") ¶¶ 30-39.[3] It is Policy 1000, *i.e.*, ***state law***, along with other provisions of state law that Plaintiffs seek to enforce in this litigation, not the federal procurement regulations themselves, which contain no private right of action.

Plaintiffs also split their procurement claim, which was previously Count I of their Amended Complaint, into two counts: Count I on behalf of 21PSTEM based on its standing as a bidder, and Count II on behalf of the Taxpayer Plaintiffs based on their potential standing as taxpayers. *See* SAC ¶¶ 75-89. Plaintiffs seek to clarify that 21PSTEM is suing in its capacity as a bidder because the School District ignored that fact in its pending Motion to Dismiss and instead argued that *all Plaintiffs'* claims should be dismissed because of purported limitations on the ability of taxpayers to bring claims under Pennsylvania law. *See* Motion to Dismiss (ECF No. 4) at 6-8. In addition, there are significant questions about whether the Taxpayer Plaintiffs have Article III standing to bring the Procurement Claims. *See* pp. 14-15, *infra.*

Plaintiffs are now filing this Motion to Sever and Remand their procurement claims, *i.e.*, Counts I of their Amended Complaint and Counts I and II of their Second Amended Complaint,

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[3] Plaintiffs' proposed Second Amended Complaint is attached to their Motion for Leave and can be found at ECF No. 6-1.

because the Court lacks subject matter jurisdiction over those claims. In this memorandum, Plaintiffs refer to those claims as their "Procurement Claims," and they refer to the retaliation claims asserted by 21PSTEM in Count II of the Amended Complaint and Counts III and IV of the proposed Second Amended Complaint as the "Retaliation Claims."

LEGAL STANDARD

When a defendant removes an action that includes both a claim that arises under federal law and a claim over which the Court lacks subject matter jurisdiction, "the district court shall sever from the action all claims [over which there is no subject matter jurisdiction] and shall remand the severed claims to the State court from which the action was removed." 28 U.S.C. § 1441(c)(2). "Removal statutes are to be strictly construed, with all doubts to be resolved in favor of remand." *Manning v. Merrill Lynch Peirce Fenner & Smith, Inc.*, 772 F.3d 158, 162 (3d Cir. 2014) (quotation marks omitted).

ARGUMENT

The Procurement Claims should be severed and remanded for three independent reasons: (i) this Court lacks subject matter jurisdiction over them; (ii) the Court should abstain from deciding them; and (iii) the Taxpayer Plaintiffs lack Article III standing to bring them.

I. There Is No Federal Subject Matter Jurisdiction Over Plaintiffs' Procurement Claims

This Court lacks subject matter jurisdiction over the Procurement Claims because they do not "arise under" federal law and there is no supplemental jurisdiction over them.

A. The Procurement Claims Do Not Arise Under Federal Law

Plaintiffs' Procurement Claims do not arise under federal law because they are created by state law, and they do not fall within the vary narrow category of state-created claims that can be deemed to "arise under" federal law.

1. State Law Creates Plaintiffs' Cause of Action

Under 28 U.S.C. § 1331, this Court has federal question subject matter jurisdiction over claims that "aris[e] under the Constitution, laws or treaties of the United States." Ordinarily, a claim "arises under" federal law for the purposes of Section 1331 only if "federal law creates the cause of action asserted." *Gunn v. Minton*, 568 U.S. 251, 257 (2013). That test is not met here, because Plaintiffs' Procurement Claims are created by state law.

Plaintiffs seek a court order requiring the School District to comply with (i) state common law procurement standards developed by the Pennsylvania courts; (ii) School Reform Commission and Board of Education regulations, which are promulgated under authority granted to them by Pennsylvania's Public School Code and (iii) the terms of the School District's own RFPs. *See, e.g.,* SAC ¶¶ 81, 89. And Plaintiffs are relying on Pennsylvania state law as the authority upon which a court may issue such an order. *See, e.g., Lasday v. Allegheny County*, 453 A.2d 949, 953-54 (Pa. 1982) (relying on Pennsylvania common law to require a Pennsylvania political subdivision to comply with the terms of an RFP it issued); 24 P.S. §§ 4-407, 5-510 (authorizing Pennsylvania school boards to issues regulations that have the force of law); *Stansbury v. Sch. Dist. of City of Chester*, 50 Pa. D. & C. 2d 348, 354 (Delaware Cty. 1970) (enjoining a school district from violating its own regulations). Thus, it is Pennsylvania law that creates Plaintiffs' causes of action.

To be sure, the Procurement Claims also refer to federal grant-related procurement regulations and allege that the School District must follow them. *See* SAC ¶¶ 38-39. But as the Second Amended Complaint explains, the reason that Plaintiffs may seek such order in this case is because a binding SRC regulation – SRC Policy No. 1000 – specifically directs the School District to follow those regulations. *Id.* ¶¶ 33-35. It is Policy 1000 – a ***state*** regulation – that

Plaintiffs seek to compel compliance with in this proceeding. Indeed, the federal regulations themselves do not create any private right of action. Thus, the only reason the federal regulations have any relevance to this case is Policy 1000, which is a ***state*** regulation that the School District is required to follow as a matter of ***state*** law. Therefore, it is state law that creates all of Plaintiffs' Procurement Claims.

2. The Procurement Claims Are Not One Of The "Slim Category" Of State Law Claims That Are Deemed To Arise Under Federal Law

There is also a "slim category" of claims that are deemed to "arise under" federal law for the purposes of Section 1331 despite being created by state law. *Gunn*, 568 U.S. at 258. But the Procurement Claims do not meet the exacting requirements for that "special and small category of cases." *Id.* (quotation marks omitted).

In *Gunn v. Minton*, the Supreme Court explained that a claim created by state law can be deemed to arise under federal law only if that state-law claim: (1) necessarily raises a federal issue, (2) that is actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Id.* Only when "all four of these requirements are met" may a state-law claim be deemed to arise under federal law. *Id.* None of them is met here.

a. The Procurement Claims Do Not "Necessarily Raise" An Issue Of Federal Law That Is "Actually Disputed"

To begin with, this case does not "necessarily raise" the meaning of the federal regulations. "For a federal issue to be necessarily raised, vindication of a right under state law must necessarily turn on some construction of federal law." *Manning*, 772 F.3d at 163 (internal punctuation and quotation marks omitted). That test is not met where the plaintiffs' claims are only "***partially*** predicated on federal law[.]" *Id.* at 164 (emphasis in original). Thus, where a

claim for relief could be granted solely based on state law, "no federal question is necessarily raised," even if federal law might be relevant to an alternative ground for granting the same relief. *Id.*; *accord Ramos v. Wal-Mart Stores, Inc.*, 202 F. Supp. 3d 457, 468-69 (E.D. Pa. 2016) (federal issue not necessarily raised where alleged violation of federal regulation was only one of multiple methods the plaintiff could use to prove his state-law tort claim).

Here, a court may afford the Plaintiffs complete relief without ever addressing the meaning or application of the federal regulations. Specifically, Plaintiffs allege that SRC Policy 610 – a ***state*** regulation – requires the School District to abide by its Procurement Manual. *See* SAC ¶¶ 17-21. The Procurement Manual, in turn, requires RFPs to disclose all criteria that will be considered and their relative importance. *Id.* ¶¶ 25-28. It is those entirely state-created standards that the School District is systematically violating. *See id.* ¶¶ 54-64. Thus, a court may grant the injunctive relief Plaintiffs seek based solely on state law.

Only if a court were to conclude that SRC Policy 610 and the Procurement Manual were not judicially enforceable would it need to turn to Policy 1000 and the federal regulations. As the Second Amended Complaint explains, it is Policy 1000 – a ***state*** regulation – that directs the School District to follow the federal regulations. *See* SAC ¶¶ 30-39. The federal regulations, in turn, require the School District to do nothing more than follow the procedures outlined in the Procurement Manual. Specifically, the regulations require the School District to (i) follow "its own documented procurement procedures," *i.e.*, the Procurement Manual, and (ii) in the event those "document procedures" would not otherwise require it, disclose in its RFPs "all evaluation factors and their relative importance," *i.e.*, the same obligation that the Procurement Manual already imposes on the School District. *See id.* ¶¶ 38-39. In short, Policy 1000 and the federal regulations are merely an alternative theory for affording Plaintiffs the same relief to which they

are entitled under state law. Thus, Plaintiffs' Procurement Claims do not "necessarily raise" any federal issue.

Moreover, with respect to the second *Gunn* requirement, the meaning of the federal regulations is not "actually disputed." The School District has never asserted, either in state court or this Court, any dispute about the meaning of those regulations. Rather, it has argued only that they are not judicially enforceable and that Plaintiffs lack standing to seek any relief.

b. The federal issue in this case is not "substantial"

Any federal issue in this case also "is not substantial in the relevant sense." *Gunn*, 568 U.S. at 260. Under this requirement, "it is not enough that the federal issue be significant to the particular parties in the immediate suit[.]" *Id.* Rather, "[t]he substantiality inquiry . . . looks instead to the importance of the issue to the federal system as a whole." *Id.* Typically, courts consider three factors: (i) "whether the issue will have a broad impact on the Federal Government," (ii) "whether the issue presents a pure legal question," and (iii) "whether federal law underlying the issue provides for a federal cause of action." *Ali v. DLG Development Corp.*, 283 F. Supp. 3d 347, 354 (E.D. Pa. 2017). All of these factors weigh against a finding of "substantiality" here.

First, this case will not create a broad impact on the federal government. A ruling on whether Plaintiffs are entitled to a court order requiring the School District to abide by Policy 1000 and, in turn, the federal regulations, turns on state law, *i.e.*, whether Policy 1000 is a judicially enforceable SRC regulation under Pennsylvania's Public School Code. The only federal issue that may arise is whether or not the School District is in fact violating the regulations and is therefore a proper subject of equitable relief. Only if a court were to reach that fact-specific question would it have to interpret the meaning of the federal regulations. But any

result it came to on that question would only be binding on the parties to this litigation; it would have no bearing on the Federal Government's ability to enforce the regulations in an administrative action against the School District or any other recipient of federal grant funds. *See Ali*, 283 F. Supp. 3d at 354; *see also Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 700 (2006) (explaining that broad federal interests are much more likely to be implicated where a federal agency's compliance with federal law is at issue, rather than where a third party's compliance with federal law is at issue).

Second, a case is likely to have broad significance to the federal system if it "present[s] a nearly pure issue of law, one that could be settled once and for all and thereafter would govern" a wide range of future case. *Empire Healthcare*, 547 U.S. at 700. In contrast, a "fact-bound and situation specific" question would not warrant federal jurisdiction. *Id.* at 701. As discussed above, the only potential federal issue here is whether the School District's specific practices actually comport with the federal regulations. That is exactly the type of fact-bound and situation-specific inquiry that does not warrant federal jurisdiction. *See id.*; *Ali*, 283 F. Supp. 3d at 355; *Ramos*, 202 F. Supp. 2d at 470.

Third, the federal regulations themselves contain no private right of action. That is "further evidence" that Congress did not intend to extend federal jurisdiction to state-law claims that might implicate the regulations. *Ali*, 283 F. Supp. 3d at 356; *accord Ramos*, 202 F. Supp. 3d at 470.

For all of these reasons, any federal issue that may arise is this case is "not substantial in the relevant sense." *Id.* at 260.

c. Federal jurisdiction would disrupt the federal-state balance

With respect to the fourth *Gunn* requirement, asserting federal jurisdiction here would "disrupt[] the federal-state balance[.]" *Gunn*, 568 U.S. at 258. In *Gunn*, the Supreme Court explained that this requirement was not met because states "have a special responsibility for maintaining standards among members of the licensed professions," and there was no reason to believe that Congress nevertheless intended to permit federal jurisdiction over a malpractice case simply because it arose out of a botched patent case. *Id.* at 264. Similarly, it is the States, not the federal government, that have a paramount interest in ensuring that their political subdivisions comply with state law. That is particularly true in the context of public schools, which have always been considered a state and local responsibility. *See, e.g., Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

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Because none of the four *Gunn* requirements is met here, Plaintiffs' Procurement Claims cannot be deemed to "arise under" federal law.

B. There Is No Supplemental Jurisdiction Over The Procurement Claims

There also is no supplemental jurisdiction over the Procurement Claims for two independent reasons: (i) they do not arise out of the same facts as 21PSTEM's federal Retaliation Claim; and (ii) the discretionary factors in 28 U.S.C. § 1367(c) weigh against federal jurisdiction.

1. The Procurement Claims And Retaliation Claims Do Not Arise Out Of A Common Nucleus Of Operative Fact

In their Notice of Removal, Defendants did not allege supplemental jurisdiction over the Procurement Claims, nor could they do so. Under 28 U.S.C. § 1367, this Court has supplemental jurisdiction over a state law claim only if it "derive[s] from a common nucleus of operative facts" as a federal claim that is properly before the Court. *Lyon v. Whisman*, 45 F.3d 758, 760 (3d Cir. 1995) (quotation marks omitted). That standard requires an analysis of the specific facts that give rise to the federal and state claims. *Id.* at 760.

The test is not met here because 21PSTEM's federal Retaliation Claim does not arise out of any of the same facts as the Plaintiffs' Procurement Claims. The Procurement Claims arise out of the School District's practices for preparing and issuing RFPs for professional services and its practices for evaluating responses to those RFPs. 21PSTEM's federal Retaliation Claim, on the other hand, arises out of the School District's refusal to provide bid protestors with a debriefing. How the School District issues and evaluates RFPs has no bearing whatsoever on the Retaliation Claim. Because there is no factual overlap between the claims, the federal Retaliation Claim cannot support supplemental jurisdiction over the Procurement Claims. *See, e.g., Barr v. Diguglielmo*, 348 Fed Appx. 769, 774 (3d Cir. 2009) (no supplemental jurisdiction where the facts supporting state-law claim "d[id] not undergird any of his other [federal] claims"); *Doherty v. Teamsters Pension Trust Fund of Philadelphia*, 142 Fed. Appx. 573, 575 (3d Cir. 2005) (similar); *Barnes v. Borough of Pottstown*, 1993 WL 239314, at *1 (E.D. Pa. June 30, 1993) (similar).

2. The Section 1367(c) Factors Favor Remand

Even where the "common nucleus of operative fact" test is met, Section 1367(c) permits this Court to decline supplemental jurisdiction if the state law claims "substantially

predominate[] over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(2). "State claims can substantially predominate over federal claims in terms of proof, of the scope of issues raised, or of the comprehensiveness of the remedy sought." *Mitich v. Lehigh Valley Restaurant Group, Inc.*, 2012 WL 6209957, at *9 (E.D. Pa. Dec. 12, 2012) (Baylson, J.) (quotation marks omitted). All of those factors weigh in favor of declining supplemental jurisdiction because the Procurement Claims address the School District's entire process for preparing, issuing and evaluating RFPs and seek comprehensive injunctive relief with respect to those activities. The federal Retaliation Claim, on the other hand, addresses a discrete practice that can be remedied with pinpoint injunctive relief. Thus, the state law Procurement Claims substantially predominate over the federal Retaliation Claim. *See id.* at *10 (declining to exercise supplemental jurisdiction where the federal claim "is but a federal button on a suit made with state fabric by state tailors").

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For all of the reasons discussed above, the Court lacks subject matter jurisdiction over Plaintiffs' Procurement Claims and should remand them.

II. Abstention Under *Burford* and *Thibodaux* Is Warranted Here

Even where a federal court has subject matter jurisdiction, it may decline to exercise it under the doctrine of abstention. *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 103 (3d Cir. 1999). As the Third Circuit has explained, the overarching goal of abstention doctrines is to "soften tensions" that arise within the federal-state system:

> The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.

Id. Two abstention concepts – *Burford* and *Thibodaux* abstention – are particularly relevant here. *Burford* and *Thibodaux* abstention, are designed "to avoid needless conflict with the administration by a state of its own affairs" and to "leave to the states the resolution of unsettled questions of state law[.]" *Id.* Under *Burford* and *Thibodaux*, "federal courts more readily abstain from a case that contains no issue of federal law." *Lac D'Amiante du Quebec v. Am. Home Assur. Co.*, 864 F.2d 1033, 1044 (3d Cir. 1988). Likewise, abstention may be warranted to avoid unnecessary federal interference -- particularly via injunctions -- in state and local government practices. *See Ala. Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 350 (1951) ("[F]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies.").

Two examples illustrate how abstention has been applied to cases similar to this one. In *Rucci v. Cranberry Township*, 130 Fed. Appx. 572 (3d Cir. 2005), the plaintiff challenged a Pennsylvania township's refusal to grant him a zoning variance to construct a residential subdivision. The Third Circuit affirmed the District Court's decision to abstain from deciding the plaintiff's state law claims because of the long-standing tradition of local control over land-use regulations. *See id.* at 577. Similarly, *Brown v. Knepp*, 412 F. Supp. 2d 446, 450 (E.D. Pa. 2005), the Court abstained from deciding claims arising from a Pennsylvania political subdivision's effort to discipline a police officer, because related claims were pending in state court and "[t]enure in public employment is certainly a matter of 'substantial concern[.]'"

The common theme in *Rucci*, *Brown* and many other abstention cases is the reluctance of federal courts to invoke state law to enjoin or otherwise interfere with the actions of state or local governments. That is particularly true where there is little state law precedent to guide the federal court's discretion. The Procurement Claims implicate both of those concerns, because

they rely on state law, seek injunctive relief against a Pennsylvania political subdivision, and there is little state-court precedent addressing the scope of judicial relief available to taxpayers or bidders against a renegade school district. Accordingly, the Court should remand the Procurement Claims so that the Pennsylvania courts may rule on them.

III. The Taxpayer Plaintiffs Lack Article III Standing

There is another, independent ground upon for remanding the Taxpayer Plaintiffs' claims: Under Third Circuit precedent, the Taxpayer Plaintiffs lack Article III standing to bring the Procurement Claims. Under Article III, federal and state taxpayers have no standing to challenge generally applicable laws or practices in their capacity as taxpayers. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345-46 (2006).[4] But despite significant questions about the continued validity of the doctrine, the Supreme Court has held that municipal taxpayers have Article III standing to challenge municipal actions in certain circumstances. *See id.* at 349; *ASARCO v. Kadish*, 490 U.S. 605, 613-14 (1989) (plurality op.).

In *Nichols v. City of Rehoboth Beach*, 836 F.3d 275 (3d Cir. 2016), the Third Circuit examined in detail the scope of municipal taxpayer standing under Article III. There, the plaintiff – a taxpayer in the City of Rehoboth Beach – alleged that the rules the city put in place regarding a referendum on a $52.5 million city bond issuance were unlawful. The Third Circuit first explained that, to satisfy Article III, a municipal taxpayer must "establish a municipal expenditure on the ***challenged aspect*** of the disputed practice in order to have municipal taxpayer standing." *Id.* at 281 (emphasis in original); *accord id.* at 282 ("In order for a plaintiff

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[4] Pennsylvania state courts do not follow this rule and allow broad taxpayer standing. *See, e.g., Common Cause/Pennsylvania v. Pennsylvania*, 710 A.2d 108, 115 (Commw. Ct. 1998) (permitting state taxpayers to challenge procedures used by the General Assembly to enact changes to Pennsylvania's Public Transportation Law and Vehicle Code).

to gain access to federal court using municipal taxpayer standing, she must show that the municipality has actually expended funds on the allegedly illegal elements of the disputed practice."). The plaintiff in *Nichols* did not meet that test, the Court held, because she "did not allege that there was anything illegal about what the $52.5 million was to be expended ***on***." *Id.* at 282 (emphasis in original).

As the dissent in *Nichols* observed, the distinctions drawn by the majority are not altogether clear. But *Nichols* remains binding precedent and appears to hold that municipal taxpayers lack Article III standing if they are attempting to challenge an unlawful process that leads to the expenditure of municipal funds on a good or service that is not itself *per se* unlawful. Under that test, the Taxpayer Plaintiffs lack Article III standing to bring the Procurement Claims because professional services are not *per se* unlawful for the School District to purchase under Pennsylvania law. Because under *Nichols* the Taxpayer Plaintiffs lack Article III standing to bring their Procurement Claims, those claims must be remanded to state court. *See Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 540 (3d Cir. 1994) ("[A determination that there is no standing does not extinguish a removed state court case. Rather, federal law only requires us to remand [plaintiff's case] to state court.") (quotation, citation, and ellipsis omitted); *Katz v. Six Flags Great Adventure, LLC*, 2018 WL 3831337, at *8-*9 (D.N.J. Aug. 13, 2018) ("[C]ourts addressing this precise issue have consistently found that, where a defendant removes a case from state court based on a federal question, but Article III standing is lacking, the proper recourse is to remand the case, rather than to dismiss the action.").

CONCLUSION

For the foregoing reasons, Plaintiffs' Procurement Claims should be severed and remanded to the Court of Common Pleas of Philadelphia County.

Respectfully submitted,

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