No. 20-2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRETT HENDRICKSON,

Plaintiff-Appellant,

v.

AFSCME COUNCIL 18; MICHELLE LUJAN GRISHAM, in her official capacity as Governor of New Mexico; and HECTOR BALDERAS, in his official capacity as Attorney General of New Mexico,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
No. 18-CV-1119-RB-LF
Hon. Robert C. Brack

BRIEF OF DEFENDANT-APPELLEE AFSCME COUNCIL 18

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Oral Argument Requested

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee American Federation of State County and Municipal Employees Council 18 has no parent corporation or any stock held by any publicly held corporation.

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STATEMENT OF RELATED CASES

There are no prior or related appeals. Tenth Circuit Rule 28.2(C)(3).

INTRODUCTION

Plaintiff-Appellant Brett Hendrickson is a New Mexico state employee who voluntarily signed several membership agreements to join and recommit to his membership in Defendant-Appellee American Federation of State County and Municipal Employees Council 18 ("Union" or "AFSCME Council 18"). At all times, New Mexico law guaranteed his right to decline union membership.

Hendrickson's most recent union membership agreement authorized the deduction of dues from his pay for one-year time periods, unless Hendrickson revoked his authorization in accordance with the agreement. Once the Union became aware that Hendrickson had resigned his Union membership and wished to terminate his dues deductions, the Union ended his dues deductions pursuant to the agreement's terms. When the State mistakenly continued deductions for two months, the Union refunded the $33.96 directly to Hendrickson. Nevertheless, Hendrickson has pursued this 42 U.S.C. §1983 lawsuit against the Union, as well as New Mexico Governor Michelle Lujan Grisham and Attorney General Hector Balderas (the "State Defendants"). Hendrickson claims that his First Amendment rights were violated when he paid the dues he agreed to pay.

Because Hendrickson's dues deductions have ended, his claim for prospective relief regarding dues deductions does not present a live controversy. Hendrickson's claim for retrospective monetary relief is meritless. The only dues

Hendrickson paid were the dues he voluntarily agreed to pay in exchange for the rights and benefits of union membership. "[T]he First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

Hendrickson contends that *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), precluded the deduction of dues pursuant to his own agreements. To the contrary, *Janus* addressed whether the government could compel public employees who chose not to become union members to pay fees to that union. The district court below joined more than 20 other federal district courts in recognizing that *Janus* did not void voluntary union membership agreements.[1]

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[1] *See Creed v. Alaska State Emps. Ass'n/AFSCME Local 52*, __ F.3d __, 2020 WL 4004794 (D. Alaska July 15, 2020); *Molina v. Pa. Soc. Serv. Union, SEIU*, __ F.Supp.3d ___, 2020 WL 2306650, at *7-10 (M.D. Pa. May 8, 2020); *Durst v. Oregon Educ. Ass'n*, __ F.Supp.3d ___, 2020 WL 1545484, at *3-4 (D. Or. Mar. 31, 2020); *Bennett v. AFSCME, Council 31, AFL-CIO*, __ F.Supp.3d __, 2020 WL 1549603, at *3-5 (C.D. Ill. Mar. 31, 2020); *Allen v. Ohio Civil Service Emps. Ass'n AFSCME, Local 11*, 2020 WL 1322051 (S.D. Ohio Mar. 20, 2020); *Loescher v. Minnesota Teamsters Pub. & Law Enf't Employees' Union, Local No. 320*, __ F.Supp.3d __, 2020 WL 912785, at *6-8 (D. Minn. Feb. 26, 2020); *Quirarte v. United Domestic Workers AFSCME Local 3930*, 438 F.Supp.3d 1108, 1114-20 (S.D. Cal. 2020); *Few v. United Teachers Los Angeles*, 2020 WL 633598, at *6 (C.D. Cal. Feb. 10, 2020); *Grossman v. Hawaii Gov't Employees Ass'n/AFSCME Local 152*, __ F.Supp.3d __, 2020 WL 515816, at *6 n.9 (D. Haw. Jan. 31, 2020); *Mendez v. Cal. Teachers Ass'n*, 419 F.Supp.3d 1182, 1184-87 (N.D. Cal. 2020); *Hernandez v. AFSCME California*, 424 F.Supp.3d 912, 923-25 (E.D. Cal. 2019); *Crockett v. NEA-Alaska*, 367 F.Supp.3d 996, 1008 (D. Alaska 2019); *Aliser v. SEIU Cal.*, 419 F.Supp.3d 1161, 1163 (N.D. Cal. 2019); *Smith v. Teamsters Local 2010*, 2019 WL 6647935, at *9 (C.D. Cal. Dec. 3, 2019) ("*Smith v. Teamsters*"); *Smith v. N.J. Educ. Ass'n*, 425 F.Supp.3d 366, 373-75 (D.N.J.

Hendrickson also claims that his First Amendment rights are violated by New Mexico's system of exclusive-representative collective bargaining. The district court correctly rejected that claim as foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) ("*Knight*"). Every court to consider this issue has reached the same conclusion.

JURISDICTIONAL STATEMENT

There is no live case or controversy with respect to Hendrickson's claim for prospective relief regarding his Union membership agreement and dues payments. *See infra* 15-20. With that exception, the Union concurs in Hendrickson's jurisdictional statement.

STATEMENT OF ISSUES

1. Whether this Court has jurisdiction over Hendrickson's claim for prospective relief regarding his Union membership agreement and dues payments,

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2019) ("*Smith v. NJEA*"); *Oliver v. SEIU Local 668*, 415 F.Supp.3d 602, 606-08 (E.D. Pa. 2019); *Seager v. United Teachers Los Angeles*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019); *Anderson v. SEIU Local 503*, 400 F.Supp.3d 1113, 1117 (D. Or. 2019); *Belgau v. Inslee*, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) ("*Belgau I*"), *subsequent order*, 359 F.Supp.3d 1000, 1016 (W.D. Wash. 2019) ("*Belgau II*"); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 6330686, at *4 (C.D. Cal. Sept. 30, 2019); *Babb v. Cal. Teachers Ass'n*, 378 F.Supp.3d 857, 877 (C.D. Cal. 2019); *Bermudez v. SEIU, Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 385 F.Supp.3d 1077, 1079 (E.D. Cal. 2019); *Smith v. Superior Court*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018) ("*Smith v. Superior Court*"), *subsequent order*, *Smith v. Bieker*, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019).

where Hendrickson is no longer a Union member, his dues deductions have ended, and he does not intend to join the Union and pay dues in the future.

2. Whether Hendrickson is entitled to a refund of the membership dues he paid to the Union, on the theory that those payments violated his First Amendment rights, even though Hendrickson voluntarily and affirmatively agreed to join the Union and to pay those dues in exchange for the rights and benefits of union membership.

3. Whether New Mexico's system of exclusive-representative collective bargaining violates Hendrickson's First Amendment rights against compelled speech and association, even though Hendrickson is not compelled to say or do anything and the Supreme Court rejected an indistinguishable claim in *Knight*.

STATEMENT OF THE CASE

I. Background.[2]

A. New Mexico Authorizes Public Employee Collective Bargaining.

New Mexico has a long history of public-sector collective bargaining and, even before comprehensive state legislation was adopted, "New Mexico courts

[2] The district court "accept[ed] as true the facts presented [by] the Union[]" because Hendrickson failed to dispute those facts. Appellant's Appendix ("AA") 051. Hendrickson omitted from his Appendix on appeal the factual record in support of the Union's summary judgment motion. The relevant documents are included in Appellees' Joint Supplemental Appendix ("SA") filed June 9, 2020 (Dkt. 010110359088).

consistently upheld the implied right of public entities to enter into [collective bargaining agreements]." New Mexico Public Employee Labor Relations Board ("PELRB") Practice Manual, at 1.[3] To unify the "patchwork" of state- and local-level collective bargaining rules dating to the 1970s, the state legislature enacted the Public Employee Bargaining Act ("PEBA") in 1993. *Id.* at 2. The legislature reenacted PEBA in its current version in 2003. *Id.* at 4.

PEBA "guarantee[s] public employees the right to organize and bargain collectively with their employers, … promote[s] harmonious and cooperative relationships between public employers and public employees and … protect[s] the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." NMSA 1978, §10-7E-2. To this end, PEBA grants to public employees the rights to "form, join or assist" a union, or "to refuse those activities" free from "interference, restraint or coercion." *Id.* §§10-7E-5; 10-7E-19(B); 10-7E-20(B).

PEBA adopts the same democratic system of exclusive-representative collective bargaining that is essentially universal in the United States. SA103. Under PEBA, designated units of public employees may, if they so choose, elect an "exclusive representative" by submitting proof of majority support or by majority vote in a secret ballot election. Employees may also decertify or change

[3] Exhibit A to AFSCME Council 18's Request for Judicial Notice ("RJN").

representatives. NMSA 1978, §§10-7E-14; 10-7E-16. PEBA requires the chosen representative to represent all employees in the bargaining unit regardless of union membership. *Id.* §10-7E-15(A). Bargaining unit employees are not required to endorse the Union's positions. SA019.

B. Employees Are Not Required To Become Union Members.

New Mexico has never required membership in a union as a condition of public employment. SA019. Neither public employers nor unions may "discriminate against a public employee with regard to labor organization membership." NMSA 1978, §10-7E-20(A); *see also* 10-7E-19(A).

PEBA permits employers and unions to agree to payroll deduction of membership dues for employees who voluntarily choose to join the union. *Id.* §10-7E-17(D). Such agreements may provide limitations on the period during which employees may terminate their authorized dues payments. *Id.* If an employee voluntarily chooses to be a union member and authorize dues deductions, "[t]he public employer shall honor [those] payroll deductions until the authorization is revoked in writing by the public employee[.]" *Id.*

Prior to the Supreme Court's *Janus* decision issued on June 27, 2018, *non*members could be required to pay "agency" fees to cover their portion of the costs of collective bargaining representation. *See* PELRB Manual, at 4; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that First Amendment allowed

public employers to require employees to pay proportionate share of costs of union collective bargaining representation, but not for union's political or ideological activities). In *Janus*, the Supreme Court ruled that its precedent permitting such fees "is now overruled" and that requiring nonmembers to pay any fee to a union as a condition of public employment "violates the First Amendment." 138 S.Ct. at 2486. After *Janus*, AFSCME Council 18 and the State immediately ceased the collection of nonmember agency fees. SA019.

C. Hendrickson Voluntarily Agrees To Become A Union Member And To Authorize Dues Deductions.

Since 2003, AFSCME Council 18 has been the democratically elected PEBA representative of a bargaining unit of State employees, including Hendrickson. SA017-18. Hendrickson signed an AFSCME authorization card so the Union could become certified as his unit's bargaining representative. SA035. Hendrickson was a voluntary member from 2004-2018 (except for a short period when Hendrickson worked outside the bargaining unit), and he executed three separate membership agreements. SA018.[4]

Hendrickson's most recent membership and dues deduction authorization agreement, signed April 7, 2017, provided:

> I authorize AFSCME Council 18 as my exclusive bargaining representative, and I accept membership in AFSCME Council 18. I

[4] Hendrickson paid nothing to the Union when he worked outside of the bargaining unit. SA018.

> request and authorize the State of New Mexico to deduct union dues from my pay and transmit them to AFSCME Council 18. The amount of dues deduction shall be the amount approved by AFSCME's membership as set forth in the AFSCME constitution and certified in writing to my employer. This authorization shall be revocable only during the first two weeks of every December….

SA018-19. Accordingly, Hendrickson could resign from membership at any time, but he agreed that dues would be deducted from his paycheck until he revoked his dues authorization during the first two weeks of December. SA020.

Each of the three times that Hendrickson chose to sign a union membership agreement and authorize dues deductions, he had the option to decline membership and pay a lesser amount of agency fees. SA018. By choosing instead to become a member and pay dues, Hendrickson received rights not enjoyed by nonmembers, such as the right to vote whether to ratify a collective bargaining agreement ("CBA"), to serve on bargaining committees, to vote in Union elections, and to run for Union office, as well as access to various members-only benefits. SA019. Hendrickson took full advantage of his membership rights by voting on the election of a bargaining team, voting on whether to ratify a CBA, and serving as an alternate member of the Union's bargaining committee in negotiations with the State. SA116.

D. Hendrickson Resigns Union Membership And Cancels Dues Deductions.

At some point, Hendrickson apparently soured on his Union membership. In an August 9, 2018 email to the State Personnel Office, he asked, "[a]re we able to withdraw as full members now or do we have to wait for a certain amount of time?" SA110. The Office responded, "[i]f your deductions are occurring and you are satisfied with your current payroll status, you do not need to do anything further with the form." SA109-10. The record contains no other communications between Hendrickson and his employer regarding termination of his membership or dues deductions. Neither Hendrickson nor the State contacted the Union regarding this exchange. SA020.

The Union first learned of Hendrickson's desire to resign membership when he filed this lawsuit on November 30, 2018. *Id.* Pursuant to Hendrickson's April 7, 2017 membership agreement, he could resign membership at any time and revoke his dues deduction authorization from December 1 to 14. *Id.* The Union treated the filing of the complaint as a request to resign membership and terminate dues deductions in the December window period, and notified Hendrickson on December 6, 2018 that the Union had processed his resignation and would inform his employer to stop his dues deductions. SA020-21. Hendrickson then faxed a membership withdrawal letter to the Union on December 8, 2018. SA021.

The Union promptly notified the State Personnel Office that Hendrickson had canceled his dues deduction authorization, attaching his withdrawal letter. *Id.* The State did not cease Hendrickson's dues deductions until the second pay period in January. SA021-22. The Union therefore reimbursed Hendrickson directly for the $33.96 in dues deducted from his paychecks after December 1, 2018. SA022. As such, Hendrickson never paid any money to the Union that he had not agreed to pay.

II. Procedural History.

Hendrickson's First Amended Complaint asserted §1983 claims against the Union and State Defendants. SA008-12. Count I sought declaratory and injunctive relief against the provisions of New Mexico law relating to dues deduction authorizations.[5] Hendrickson also sought a refund of all dues that he paid as a Union member on the theory that the payments violated his First Amendment rights. SA008-10. Count II alleged that the State's system of exclusive-representative collective bargaining violates the First Amendment. SA011-12.

The State Defendants moved to dismiss Hendrickson's claims against them. The Union and Hendrickson filed cross-motions for summary judgment. The

[5] Count I also sought declaratory and injunctive relief against agency fees. Hendrickson has abandoned this claim. *See* Appellant's Opening Brief ("AOB") 2.

district court dismissed the claims against State Defendants and entered summary judgment for the Union. AA050-77.

The district court ruled that Hendrickson's claim for prospective relief regarding his union dues payments was moot because "he has resigned from [u]nion membership and is no longer subject to dues or the opt-out window," and he lacks standing to seek relief regarding the membership and dues deduction agreements of other employees. AA057.

The district court ruled that, on the undisputed facts, Hendrickson's claim for retrospective monetary relief failed as a matter of law because Hendrickson's own voluntary choice to join the Union and authorize dues deductions did not violate his First Amendment rights. AA057-61. The district court explained that Hendrickson's reliance on *Janus* was misplaced because *Janus* involved a nonmember's statutorily compelled payments for union representation, not payments made pursuant to a voluntary union membership agreement. AA061. The district court also rejected Hendrickson's argument that his membership agreements were void under the "mutual mistake" doctrine. AA060. The district court ruled, in the alternative, that Hendrickson's §1983 claim against the Union failed for lack of state action, AA062, and also because the Union was entitled to the affirmative defense of good-faith reliance on then-existing law, AA065.

The district court ruled that Hendrickson's challenge to exclusive-representative collective bargaining was foreclosed by the Supreme Court's decision in *Knight*, reasoning that "*Janus* only serves to affirm the conclusion that exclusive representation schemes are constitutional." AA067-68. The district court also concluded that, even if Hendrickson's claim were not foreclosed by precedent, it "would fail because exclusive representation serves compelling state interests." AA068-70.

SUMMARY OF ARGUMENT

The district court properly granted summary judgment to the Union.[6]

1. Hendrickson's claim for prospective relief concerning union membership dues payments are moot. He is no longer a union member and no longer pays dues. There is no reasonable likelihood that he will be subject to Union dues deductions again, so he has no interest in prospective relief. This case was not pled as a class action, and Hendrickson lacks standing to seek prospective relief regarding the membership agreements of other employees.

2. Hendrickson's §1983 claim for a dues refund fails because Hendrickson was not compelled to join the Union or to pay dues, as would be required to establish a violation of his First Amendment rights. *Cf. Janus*, 138

[6] The Union joins State Defendant-Appellees' arguments that the district court properly dismissed the claims against them. Dkt. 10746308, at 7-18.

S.Ct. at 2464 (First Amendment prohibits "compelled subsidization" of private speech). Hendrickson's dues deduction revocation was processed along with his membership resignation, and the Union refunded Hendrickson all dues deducted from his pay after he resigned. Thus, Hendrickson paid only dues that he voluntarily had agreed to pay.

Hendrickson contends that his decision to join the Union was not voluntary because individuals who made the *opposite* decision not to join the Union were, at that time, required to pay fair-share fees. That employees who do not join the Union *now* pay nothing, however, does not render Hendrickson's prior decision involuntary. Hendrickson does not have a First Amendment right to disregard his contract to pay dues in exchange for the rights and benefits of union membership (which he has already received and cannot return). *See Cohen*, 501 U.S. at 672. That conclusion is not changed because Hendrickson now finds the alternative to joining the Union more appealing. *See, e.g.*, *Brady v. United States*, 397 U.S. 742 (1970) (subsequent invalidation of death penalty statute did not invalidate plea agreement made to avoid possible death sentence).

Because Hendrickson's decision to join the Union and pay dues did not infringe his First Amendment rights, the Court need not consider whether he validly "waived" such rights. However, if a waiver analysis were required, Hendrickson's membership agreement would constitute a valid waiver because

Hendrickson voluntarily, clearly, and affirmatively agreed to pay the dues that he paid.

Hendrickson's §1983 claim against the Union also fails for the independent reason that his membership and dues deduction authorization agreements do not constitute state action. The State's ministerial role in deducting dues from Hendrickson's paycheck pursuant to his voluntary authorization does not transform the Union into a state actor subject to §1983 liability. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (state's adjustment of benefits in response to private parties' decisions does not create state action). The source of Hendrickson's claimed injury (his payment of union dues) was his own voluntary membership agreement with the Union, not a requirement imposed by the State or the manner in which the dues were collected.

Finally, Hendrickson's refund claim also fails because the Union acted in reliance on then-valid state laws and then-binding Supreme Court precedent in collecting fair-share fees from non-members, giving the Union a "good-faith" defense to §1983 liability premised on the existence of a fair-share requirement. *See, e.g.*, *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*").

3. Hendrickson's First Amendment challenge to exclusive-representative collective bargaining is foreclosed by *Knight*, which rejected a First Amendment

challenge to an indistinguishable collective bargaining system. 465 U.S. at 288. Even if not foreclosed by *Knight*, Hendrickson's challenge is meritless. Hendrickson failed to demonstrate any infringement of his First Amendment rights against compelled speech or compelled expressive association. He need not do or say anything to join, support, or subsidize the Union, and reasonable outsiders understand that not all bargaining unit workers necessarily agree with the Union's speech. Moreover, even if heightened First Amendment scrutiny applied, exclusive-representative bargaining would satisfy such scrutiny. The undisputed facts show the system is narrowly tailored to serve compelling governmental interests.

ARGUMENT[7]

I. Hendrickson's Claim For Prospective Relief Against Union Dues Deductions Is Moot Because His Dues Deductions Have Already Ended.

Hendrickson brought his complaint individually, not as a class representative. He sought declaratory and injunctive relief against enforcement of the revocation window in his voluntary union dues deduction authorization agreement. However, he suffered no injury from this window. Hendrickson did not notify the Union of his desire to resign membership until he filed his lawsuit on November 30, 2018, the day before his window opened, and the Union processed

[7] Hendrickson's statement of the standard of review is satisfactory.

his resignation and dues revocation during the window. In any event, Hendrickson did not show any reasonable likelihood of paying dues through payroll deductions in the future. The district court therefore correctly dismissed Hendrickson's claim for prospective relief as moot. AA055-58.

A plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 185 (2000). Hendrickson is no longer a Union member and is no longer having dues deducted from his paycheck. He is no longer subject to the dues revocation window he complains about.[8] "[N]umerous courts have ruled that cases similar to this one" seeking prospective relief challenging dues deductions "are moot once the dues collection has ended." *Mayer v. Wallingford-Swarthmore Sch. Dist.*, 405 F.Supp.3d 637, 641 & n.27 (E.D. Pa. 2019) (collecting cases).[9] Likewise here, Hendrickson cannot pursue declaratory or injunctive relief because he did not show any likelihood he would pay Union dues again. *Utah Animal Rights Coal'n v. Salt*

[8] Hendrickson is not affected by the amended statute that took effect July 1, 2020 (*see* AOB 18 n.2), some two years after he resigned his union membership and ceased paying union dues.

[9] The district court cited numerous cases in accord. A056-58; *see also Creed*, 2020 WL 4004794, at *10; *Durst*, 2020 WL 1545484, at *2; *Bennett*, 2020 WL 1549603, at *2 n.5; *Loescher*, 2020 WL 912785, at *4; *Few*, 2020 WL 633598, at *4-5; *Grossman*, 2020 WL 515816, at *9-12; *Aliser*, 419 F.Supp.3d at 1166; *Stroeder v. SEIU*, 2019 WL 6719481, at *3 (D. Or. Dec. 6, 2019); *Oliver*, 415 F.Supp.3d at 613.

Lake City Corp., 371 F.3d 1248, 1256-57 (10th Cir. 2004) (action for declaratory relief was moot where it involved past conduct not likely to recur).

Hendrickson's reliance on the "capable of repetition yet evading review" doctrine is unavailing. AOB 18-23. Hendrickson points to *Fisk v. Inslee*, 759 F.App'x 632 (9th Cir. 2019) (unpublished), but that case applied the exception to mootness for class actions announced in *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975), where the class representative's individual claim inevitably terminates before a class can be certified. *Fisk*, 759 F.App'x at 633. *Gerstein* did not create "a freestanding exception to mootness outside the class action context," but, rather, states a rule that is "tied … the class action setting from which it emerged." *United States v. Sanchez-Gomez*, 138 S.Ct. 1532, 1538-39 (2018). Therefore, *Fisk* cannot save Hendrickson's prospective relief claims.

Nor does *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) (AOB 22-23), help Hendrickson. The employers in *McCorkle* demonstrated an ongoing "immediate[] and direct[] injur[y]" from a statute allowing strikers to collect welfare benefits because the employers might be subject to a future strike. *Id.* at 125. Likewise, in *Roe v. Wade*, 410 U.S. 113 (1973) (AOB 22), it was plausible that the *same* plaintiff might become pregnant again. *Id.* at 125. Hendrickson, by contrast, faces no plausible likelihood of being subject to dues deductions again. *See Marks v. Colorado Dep't of Corr.*, 958 F.3d 1001, 1007-08

(10th Cir. 2020) (distinguishing *Roe* on same grounds; holding that a plaintiff's prospective claims were moot because she was "unlikely to experience the same wrongdoing in the future").

Hendrickson's voluntary cessation argument (AOB 19-21) fares no better. As the district court explained, Hendrickson's claim that the Union ceased his dues solely to moot his lawsuit is "disingenuous, as he filed [his] lawsuit on November 30, 2018 … and the two-week opt-out window began the next day. The Union did not terminate the dues authorization only in response to the lawsuit, but in response to his resignation." AA058 n.3. Because Hendrickson's dues deductions ceased by operation of his membership agreement, the voluntary cessation doctrine does not apply. *See O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005) ("A defendant cannot be said to have voluntarily ceased allegedly illegal conduct where, as here, the controversy has become moot through the normal course of events rather than through the unilateral action of the defendant."); *ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) (expiration of contract by its own terms is not voluntary cessation).

In any event, the voluntary cessation exception applies only if the plaintiff could again be subjected to the same alleged harm. Here, it is undisputed that Hendrickson does not intend to re-join the Union and sign a new agreement, so

"the challenged conduct cannot reasonably be expected to recur." *Already, LLC v. Nike*, 568 U.S. 85, 95 (2013).[10]

Finally, Hendrickson cannot avoid mootness by focusing on declaratory relief because Article III's case or controversy requirement applies equally to declaratory relief as to injunctive relief. *See Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969) (absent ongoing First Amendment injury, plaintiff is not entitled to "a general adjudication of unconstitutionality"); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990) ("[T]he Article III question is not whether the requested relief would be nugatory as to the world at large, but whether *Continental* has a stake in that relief.") (emphasis original); *Jordan v. Sosa*, 654 F.3d 1012, 1026 (10th Cir. 2011) ("that a declaration might guide *third parties* (i.e., those not parties to the lawsuit) in their future interactions" is not an exception to mootness) (emphasis original).

Hendrickson concedes he cannot continue litigating only for the benefit of others. AOB 17. He himself faces no future risk of harm from the dues policies he challenges, and, as this Circuit has held, "our cases prevent us from applying the mootness exception based on a risk to others." *Marks*, 958 F.3d at 1008; *see also*

[10] Mootness was not at issue in the order denying a preliminary injunction in *Belgau I* (AOB 19). *Belgau* was also a putative class action. Hendrickson also relies on *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) (AOB 22). But the issue in *Knox* was whether a claim for retrospective relief had been fully satisfied, not whether a claim for prospective relief had become moot. *See id.* at 307-08.

Oliver, 415 F.Supp.3d at 613 (plaintiff who was no longer a union member lacked standing for declaratory relief against dues collection policies).

II. Hendrickson Is Not Entitled To A Refund Of The Union Dues He Voluntary Agreed To Pay.

Summary judgment was properly granted to the Union on Hendrickson's §1983 claim for a refund of his union dues payments for three independently sufficient reasons: (1) Hendrickson suffered no First Amendment violation because he voluntarily joined the Union and agreed to pay the dues he now seeks to recover; (2) Hendrickson's obligation to pay dues pursuant to his private agreement with the Union did not constitute state action, so it does not give rise to a §1983 claim against the Union; and (3) even if there were both a First Amendment violation and state action (neither of which is the case), Hendrickson's damages claims would still be barred by the Union's good faith defense.

A. The Enforcement Of Hendrickson's Voluntary Membership Agreement Did Not Infringe His First Amendment Rights.

The First Amendment is concerned with government restraints on freedom of speech and association, not private agreements. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1926, 1928 (2019). Moreover, "[t]he First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law," *Cohen*, 501 U.S. at 672, because such restraints on free speech or association are "self-imposed," *id.* at 671; *see also*

Fisk v. Inslee, 2017 WL 4619223, at *5 (W.D. Wash. Oct. 16, 2017), *aff'd*, 759 F.App'x 632 (every worker has right to refuse union membership, "[b]ut, once she joins voluntarily, in writing, she has the obligation to perform the terms of her agreement. The freedom of speech and the freedom of association do not trump the obligations and promises voluntarily and knowingly assumed.").

As discussed *supra* 5-7, New Mexico law makes union membership voluntary. Neither a public employer nor a union may coerce or interfere with an employee's choice to refrain from joining a union. NMSA 1978, §§10-7E-19(B); 10-7E-20(B). Public employers may only deduct those union dues that employees have authorized. NMSA 1978, §10-7E-17(D). Against this legal backdrop, Hendrickson chose to become a Union member and authorize dues payments through payroll deductions. In exchange, he received the rights and benefits of membership. Hendrickson could have declined membership and paid agency fees, SA004, which were less than membership dues, SA018.

As Hendrickson concedes, his membership and dues authorization agreements were contracts. AOB 13; *see also Adams v. Int'l Bhd. of Boilermakers*, 262 F.2d 835, 838 (10th Cir. 1958) ("It is well settled that the relationship existing between a trade union and its members is contractual."). Moreover, union dues deduction agreements that are irrevocable for one-year periods are commonplace. The National Labor Relations Act ("NLRA")—which PEBA is patterned upon,

Las Cruces Prof'l Fire Fighters v. City of Las Cruces, 123 N.M. 239, 243 (1997)—has long authorized written dues deduction commitments that are irrevocable for one year. 29 U.S.C. §186(c)(4); *see also United Steelworkers of Am., Local 4671 (National Oil Well, Inc.)*, 302 NLRB 367, 368 (1991) (dues authorization not revocable despite resignation from membership when worker agrees in writing to pay dues for a fixed period, regardless of membership). Congress has also authorized one-year dues commitments for railway employees, postal employees, and federal employees. *See* 5 U.S.C. §7115(a)-(b) (Railway Labor Act); 39 U.S.C. §1205 (Postal Service employees); SA125 (federal employee dues authorization form).

Hendrickson does not dispute that the language of his membership agreement was clear or that he took advantage of the rights and benefits of Union membership. *See supra* 7-8. It is also undisputed that Hendrickson did not inform the Union of his desire to resign his membership and revoke his dues-deduction authorization before filing this lawsuit on November 30, 2018, the day before his agreed-upon window period for cancelling deductions. *Id.* at 9. The Union thereafter notified the State to cease his dues deductions and refunded Hendrickson all dues deducted after December 1, 2018. *Id.* These undisputed facts establish that Hendrickson only paid the dues that he agreed to pay.

Under these circumstances, Hendrickson's First Amendment claim must fail. Hendrickson voluntarily entered into a private agreement to pay union dues that was enforceable under general principles of contract law and received consideration in return. *Cohen* holds that the enforcement of such "self-imposed" obligations does not "offend the First Amendment." *Id.* at 669, 671. *Cohen* also makes clear that because First Amendment rights are not infringed by the enforcement of voluntarily assumed private obligations, no "waiver" analysis is required for such obligations to be enforceable. *Compare id.* at 668 (concluding that newspaper's promise not to publish plaintiff's identity was enforceable without conducting any waiver analysis) *with id.* at 677-78 (Souter, J., dissenting) (criticizing majority for failing to conduct waiver analysis).

B. *Janus* Does Not Apply To Hendrickson, Who Affirmatively Agreed To Pay Union Dues.

Janus did not abrogate the holding of *Cohen*. Hendrickson "wants *Janus* to stand for the proposition that any union member can change his mind at the drop of a hat, invoke the First Amendment, and renege on his contractual obligation to pay dues." *Smith v. Superior Court*, 2018 WL 6072806, at *1. But "*Janus* says nothing about people who join a [u]nion, agree to pay dues, and then later change their mind about paying union dues." *Belgau I*, 2018 WL 4931602, at *5. "[E]ach court that examined this issue has rejected the claim that *Janus* entitles union members to resign and stop paying dues on their own—rather than on the

contract's—terms." AA061 (district court decision); *see also supra* n.1 (collecting cases).

The question in *Janus* was whether it was consistent with the First Amendment for a State to compel *non*members of a union—i.e., individuals who have *not* affirmatively chosen to join a union and have *not* agreed to pay dues—to pay fees to a union as a condition of government employment. 138 S.Ct. at 2460. Thus, *Janus* does not undermine Hendrickson's prior union membership and dues deduction agreements. The passage from *Janus* on which Hendrickson rests his case, AOB 10, makes clear that *Janus* concerned nonmembers who had never affirmatively agreed to pay dues:

> Neither an agency fee nor any other payment to the union may be deducted from a *nonmember's* wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, *nonmembers* are waiving their First Amendment rights, and such a waiver cannot be presumed.

138 S.Ct. at 2486 (emphases added).

The Supreme Court cited "waiver" cases in this passage, *see id.*, not to tacitly overrule *Cohen* and overturn basic principles of contract law, but to make clear that states cannot *presume* that nonmembers wish to support unions and require them to "opt out" of such payments. Prior to *Janus*, many courts had held that opt-out systems for nonmembers were consistent with the First Amendment. *See, e.g.*, *Abood*, 431 U.S. at 232; *Wessel v. City of Albuquerque*, 299 F.3d 1186,

1190-91 (10th Cir. 2002). The *Janus* petitioners urged the Supreme Court to hold that such opt-out systems place an unconstitutional burden on First Amendment rights. *See* Brief for Petitioner, *Janus v. AFSCME, Council 31*, 2017 WL 5952674 (U.S.), at *62 (Nov. 29, 2017); Reply Brief for Petitioner, *Janus v. AFSCME, Council 31*, 2018 WL 835271 (U.S.), at *24-25 (Feb. 12, 2018). The passage from *Janus* on which Hendrickson relies addressed such opt-out systems by expressly distinguishing the employee who "affirmatively consents to pay" by joining the union and signing a union dues deduction agreement, as Hendrickson did here, from nonmembers who never provided any form of consent, like the plaintiff in *Janus*. 138 S.Ct. at 2486; *Quirarte*, 438 F.Supp.3d at 1118 ("The *Janus* waiver requirement does not apply" to voluntary union membership agreement).

None of the "waiver" cases on which Hendrickson relies supports his argument that his own voluntary, private agreement with the Union impinged his First Amendment rights and triggers any constitutional waiver requirement. AOB 10-12. These cases involved litigants who had not affirmatively undertaken any obligations, much less executed bilateral contracts to perform those obligations in exchange for consideration. Each case concerned whether waiver could be found solely from the plaintiff's *inaction*, which is the issue that *Janus* addressed. *See Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (whether criminal defendant waived right to counsel by failing to request counsel); *Coll. Sav. Bank v. Fla.*

Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676, 679 (1999) (whether state "constructively waived" sovereign immunity; suggesting analysis would be different had state made "contractual commitment") (quotations omitted); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972) (whether litigant could waive legal defenses to financial obligation by contract); *Ohio Bell Tel. Co v. Public Util. Comm'n*, 301 U.S. 292, 306-07 (1937) (whether objection was waived when not raised in earlier proceedings).[11]

Contracts between private parties in which the parties agree to forgo constitutional rights are ubiquitous, whether in a confidentiality or non-disclosure clause (where a party forgoes its First Amendment right to speak publicly) or in an arbitration clause in a commercial contract (where a party forgoes its First Amendment right to petition the courts and its Seventh Amendment right to a jury trial). If such contracts are valid as a matter of state law, they are enforced; no heightened constitutional waiver need be satisfied. *See, e.g.*, *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 844 (9th Cir. 2017) (rejecting First Amendment

[11] Amicus's cases (Amicus Br. 11, 15) are distinguishable for the same reason. *See Knox*, 567 U.S. at 312-13 (criticizing presumption that "*non*members" who failed to object to non-chargeable component of union agency fees impliedly consented to payment) (emphasis added); *Curtis Pub'ing Co. v. Butts*, 388 U.S. 130, 145 (1967) (considering whether litigant waived legal arguments by failing to assert them); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430 (6th Cir. 1990) (considering whether *non*member waived challenge to agency fees by failing to object to non-chargeable component).

challenge to enforcement of arbitration agreement); *Bronner v. Duggan*, 249 F.Supp.3d 27, 41 (D.D.C. 2017) ("[W]hen a court merely enforces obligations explicitly assumed by the parties, there is no state action.… To hold otherwise would mean that courts could never enforce non-disclosure agreements."); *Youssofi v. Wells Fargo Bank, N.A.*, 2016 WL 7404522, at *1-2 (S.D. Cal. Dec. 21, 2016) (rejecting First Amendment challenge to arbitration agreement); *Encore Prods., Inc. v. Promise Keepers*, 53 F.Supp.2d 1101, 1112-13 (D. Colo. 1999) (rejecting plaintiff's First Amendment challenge to arbitration before religious tribunal where plaintiff agreed to that tribunal); *cf. MAI Basic Four v. Basis*, 880 F.2d 286, 287-88 (10th Cir. 1989) (enforcing confidentiality and nondisclosure agreements on state law grounds).

Furthermore, reading *Janus* as Hendrickson does, to invalidate private agreements between unions and their members on grounds that do not apply to any other private contracts, would conflict with unions' and their members' own First Amendment rights to associate. *See AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("Union membership is protected by the right of association under the First and Fourteenth Amendments."). Private associations, including labor unions, have a First Amendment right to associate with their members on their own agreed-upon terms. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Government actions that may unconstitutionally burden th[e] freedom [of

association] may take many forms, one of which is intrusion into the internal structure or affairs of an association.") (quotations omitted).

Nor can *Cohen* be distinguished on the theory that it involved an "arms-length agreement," while Hendrickson signed "an adhesion contract." AOB 15. This argument is waived for failure to raise it below. *See Rosewood Servs. v. Sunflower Diversified Servs.*, 413 F.3d 1163, 1167 (10th Cir. 2005) (arguments not made in district court are waived); AA061 (district court decision; plaintiff "does not allege that he was coerced"); AA025-49, SA131-74. In any event, under New Mexico law, contracts of adhesion are enforceable absent a further showing of unconscionability. *Padilla v. State Farm Mut. Auto. Ins. Co.*, 133 N.M. 661, 667 n.3 (2003). Here, the record shows that Hendrickson chose to join the Union and pay full dues, and in exchange received the rights and benefits of membership. SA004, 106 (admission that Hendrickson "joined AFSCME"); *see Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 292-93 (4th Cir. 1991) ("Where the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily."). There is no basis for voiding his agreement.[12]

[12] Hendrickson's claim of a "power imbalance" between him and the State (AOB 15) is misplaced because the State was not party to his union membership agreements, just as courts are not made parties to contracts that they enforce. *Cf. United Egg Producers v. Standard Brands*, 44 F.3d 940, 943 (11th Cir. 1995) (court enforcement of private settlement agreement restricting speech "is not

C. Even If A Waiver Analysis Were Required, Hendrickson Waived His Right Not To Financially Support The Union When He Joined The Union And Affirmatively Agreed To Pay Membership Dues.

Hendrickson's voluntary agreements to join the Union and pay dues foreclose his First Amendment claim without need for a separate waiver analysis. *See Cohen*, 501 U.S. at 668. Even if a separate waiver analysis were required, moreover, Hendrickson's dues deduction authorization agreement would be a valid waiver of his right not to pay union dues.

Hendrickson's written dues deduction authorization agreements are simple and clear. *See, e.g.*, SA050. The essence of those agreements is Hendrickson's promise to pay the money that he now seeks to recover, as consideration for union membership rights and benefits. By agreeing in a private contract enforceable under state law to pay money to a private organization, a party necessarily "waives" any rights it may have against performing its contractual obligations. *Janus* itself recognizes that even *nonmembers* "can waive their First Amendment rights by affirmatively consenting to pay union dues." *Smith v. Superior Court*, 2018 WL 6072806, at *1; *see Janus*, 138 S.Ct. at 2486 ("*By agreeing to pay*, nonmembers are waiving their First Amendment rights….") (emphasis added). Hendrickson's agreements clearly stated he was accepting membership in the

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governmental action for First Amendment purposes"). In any event, contracts are not invalid because of a "power imbalance." If they were, almost all employment contracts would be invalid.

Union and authorizing dues deduction that was revocable only during the first two weeks of December of each year. "Affirmatively consenting to pay" is exactly what Hendrickson did.

Hendrickson argues that any "waiver" was invalid because he did not know about the not-yet-issued *Janus* decision when he signed these agreements. AOB 10-12. However, because Hendrickson was a member, not a nonmember, "it's not the rights clarified in *Janus* that are relevant." *Smith v. Superior Court*, 2018 WL 6072806, at *1. Hendrickson's "First Amendment right to opt out of union membership was clarified in 1977 [in *Abood*], and yet he waived that right by affirmatively consenting to be a member." *Id.*; *Allen*, 2020 WL 1322051, at *8.

While Hendrickson may now regret his previous choices to join the Union and pay dues in light of *Janus*, subsequent legal developments that affect an alternative to a party's agreement do not render a contractual waiver involuntary or unknowing. *See Brady*, 397 U.S. at 748; *U.S. v. Porter*, 405 F.3d 1136, 1144 (10th Cir. 2005) (by entering into an agreement, parties "may waive both rights in existence and those that result from unanticipated later judicial determinations"); *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016) ("Contracts in general are a bet on the future.").

In *Brady*, for example, a criminal defendant (Brady) pled guilty and accepted a lengthy prison sentence at a time when he could otherwise have faced

the death penalty. 397 U.S. at 743-44. The Supreme Court later held unconstitutional the death penalty provision. *Id.* at 746. Brady petitioned for federal habeas corpus relief to set aside his plea agreement. *Id.* at 744. This Circuit denied his petition, "specifically approving the [trial court's] finding that petitioner's plea of guilty was voluntary." *Id.* at 745. The Supreme Court affirmed. *Id.*

Brady argued that he would not have pled guilty but for the risk of the death penalty. *Id.* at 749-50. The Supreme Court held, however, that even assuming "the statute caused [his guilty] plea in this sense[, that] does not necessarily prove that the plea was coerced and invalid as an involuntary act." *Id.* at 750. Nor did the subsequent change in the law alter the fact that Brady understood what he was agreeing to when he entered his plea. *Id.* at 750, 755. The same is true here: Hendrickson's membership and dues deduction agreements made clear that he was agreeing to the deductions that he now challenges.

Hendrickson argues that *United States v. Bunner*, 134 F.3d 1000 (10th Cir. 1998), holds that *any* subsequent changes in the law will abrogate contracts. AOB 12-14. That is incorrect. In *Bunner*, the defendant, in his plea deal, agreed to plead guilty and serve prison time on one of the charges in exchange for the government dropping the remaining charges. 134 F.3d at 1002. When the conduct to which the defendant pled guilty was later ruled not to be a crime, the defendant

successfully moved to vacate his sentence. *Id.* As a result, the government's motion to void the plea agreement and reinstate the dismissed charges was granted. *Id.* *Bunner* applied the ordinary contract principle that a contract may be voidable when, through no fault of either party, changed circumstances defeat the contract's fundamental purpose and the basis of the parties' bargain. 134 F.3d at 1004-05 (government could reinstate the forgone charges because the "basis of the government's bargain [was] destroyed" when Bunner's sentence was vacated). Unlike in *Bunner*, the change in law effected by *Janus* did not alter the fundamental purpose of Hendrickson's agreements. Hendrickson agreed to join the Union and authorize dues deductions in exchange for the rights and benefits of Union membership, which he received. The contract's purpose was achieved.

This Court has recognized the distinction between the situation in which a defendant agrees to plead guilty to conduct that is later held not to be a crime (as in *Bunner*) and the situation in which the defendant pleads guilty to crime and subsequent case law merely renders an alternative to the plea deal unconstitutional. In the latter situation, the agreement is not voidable. *See Bailey v. Cowley*, 914 F.2d 1438, 1441 (10th Cir. 1990) ("One of the risks a defendant assumes when he pleads guilty is that the consequences he seeks to avoid will not be later nullified by a change in the law."). Similarly, Hendrickson's membership agreements were not rendered voidable simply because *Janus* invalidated agency fees for

nonmembers. *See, e.g.*, *Bieker*, 2019 WL 2476679, at *2 ("[C]hanges in intervening law – even constitutional law – do not invalidate a contract.").

Brady's analysis of voluntariness is not limited to the context of finality of judgments or to criminal law, as Hendrickson suggests (AOB 16-17), but applies a general principle. *See, e.g.*, *Coltec Indus. v. Hobgood*, 280 F.3d 262, 274-75 (3d Cir. 2002) (Supreme Court decision invalidating statute did not permit rescission of earlier contract entered into in reliance on that statute, especially where plaintiff had received "valuable consideration"); *Bennett*, 2020 WL 1549603 at *4 ("If incarcerated defendants cannot rescind agreements as involuntary in light of subsequently developed constitutional caselaw, civil litigants disputing property rights should fare no differently."). For these reasons, Hendrickson's agreements cannot be invalidated for lack of "knowledge" of the as-yet-undecided *Janus* case.

Amicus's waiver arguments fare no better. Amicus argues for something akin to a *Miranda* warning before an employee can waive his First Amendment rights (Amicus Br. 14), but there is no support in the caselaw for such a requirement outside the context of criminal defendants in custody or pleading guilty in court. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973) ("Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection."); *Overmyer*, 405 U.S. at 185-86 (contracting party's waiver was "voluntary,

knowing, and intelligent," although contract did not mention the specific constitutional amendment or right waived); *Perricone v. Perricone*, 292 Conn. 187, 210 & n.22 (2009) (voluntary agreement that restricts parties' speech is enforceable without "the talismanic recital of the words 'first amendment.'").

Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192 (3d Cir. 2012) (Amicus Br. 9, 11) confirms that even a private agreement restricting speech is enforceable "without violating the restricted party's First Amendment rights if the party received consideration in exchange for the restriction." *Id.* at 205-06; *see also id.* at 205 ("a private agreement to limit a party's ability to speak or associate does not necessarily violate the First Amendment"). Here, Hendrickson received consideration in exchange for his agreement to pay dues. *Supra* 7-8.[13]

[13] Amicus's remaining cases, Amicus Br. 9-11, turn on facts not present here. In many of those cases, the agreements were not clear about the matter at issue, whereas Hendrickson clearly promised to pay dues. *See Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (ancillary, "fine print" term in consumer contract was not "clear" that consumer was forgoing procedural protections); *U.S. v. Chavez-Salais*, 337 F.3d 1170, 1172-73 (10th Cir. 2003) (criminal defendant did not knowingly waive right to modify his sentence, by waiving the separate right to appeal his sentence); *U.S. v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (the language "nothing herein constitutes … a waiver of any right, power, or authority of any other representatives of the United States … to bring other actions" could not be read to include waiver of criminal *defendant's* double jeopardy rights). The other cases involve agreements with the *government*, not contracts between private parties. *See Leonard v. Clark*, 12 F.3d 885, 886 (9th Cir. 1993), and *Erie Telecomms. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988).

D. Hendrickson's Remaining Contract Law Arguments Lack Merit.

Contrary to Hendrickson's contention, the contract law doctrine of mutual mistake (*see* AOB 13-14) does not apply to Hendrickson's agreements with the Union. For this doctrine to apply, the "mistake" "must relate to the *facts* as they exist at the time of the making of the contract." *State ex rel. State Hwy. & Transp. Dept. v. Garley*, 111 N.M. 383, 387 (1991) (emphasis supplied; quotations omitted). Hendrickson's "discover[y]" when *Janus* issued "that agency fees were [un]constitutional," AOB 13, is not a "mistake" about *facts* existing when he signed Union membership agreements. Even if a mistake of *law* could support rescission (and it does not), any purported "mistake" here also did not concern the case law "at the time of the making of the contract." At the time, the case law permitted agency fees.

Nor does *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385 (1918) (AOB 12-13), support Hendrickson's argument. *Philippine Sugar* concerned a mistake about the *contents* of the agreement, such that the agreement should be reformed to reflect the parties' intent. *Id.* at 389-93.

Amicus urges that Hendrickson's agreement should not be enforced because is "against public policy." Amicus Br. 14-17. Because Hendrickson never raised this argument below, it is waived. AA025-49, SA131-74. In any event, the argument is meritless. Amicus places the First Amendment on the scale twice:

first in determining whether Hendrickson validly waived a First Amendment right by agreeing to pay dues, and then a second time by arguing that the First Amendment precludes enforcement of all such agreements. But Amicus's case—*Town of Newton v. Rumery*, 480 U.S. 386 (1987)—rejected precisely this reasoning. *See id.* at 394 ("Because Rumery voluntarily waived his right to sue under §1983, the public interest opposing involuntary waiver of constitutional rights is no reason to hold this agreement invalid.").

One-year dues commitments like those Hendrickson signed are commonplace, have been blessed by Congress, and serve legitimate interests. SA030-31; *see also Fisk v. Inslee*, 2017 WL 4619223, at *3 (period of irrevocability "provides [union] with financial stability" and allows union to "make long-term financial commitments without the possibility of a sudden loss of revenue."). Public policy favors the enforcement of voluntary contracts.

E. Hendrickson Also Failed To Demonstrate State Action.

The foregoing is dispositive of Hendrickson's §1983 claim. Moreover, his claim against the Union also fails for lack of state action. To prevail on a §1983 claim, Hendrickson must demonstrate both that AFSCME Council 18 can "fairly be said to be a state actor" *and* that his payment of dues was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Neither prong of the *Lugar* test is satisfied here. Accordingly, the district court correctly found no state action, AA062-65, agreeing with numerous other courts.[14]

1. The State's ministerial role in implementing Hendrickson's private agreements does not make the Union a state actor.

Hendrickson relies on the "joint action" test for state action.[15] Under this test, "courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1157 (10th Cir. 2016). "[C]oncerted action" requires "a *substantial degree* of cooperative action between state and private officials or … overt and significant state participation in the deprivation of a plaintiff's constitutional rights. *Id.* (quotations omitted; emphasis added). "A private individual does not engage in state action simply by availing herself of a state procedure." *Scott v. Hern*, 216 F.3d 897, 906 (10th Cir. 2000). The State's "mere acquiescence in a private action" also does not convert the action "into that

[14] *See, e.g.*, *Molina*, 2020 WL 2306650, at *10; *Quirarte*, 438 F.Supp.3d at 1115-16; *Mendez*, 419 F.Supp.3d at 1184-1187; *Smith v. Teamsters*, 2019 WL 6647935, at *4-8; *Oliver*, 415 F.Supp.3d at 609-612; *Belgau II*, 359 F.Supp.3d at 1012-15; *Bain v. Cal. Teachers Ass'n*, 2016 WL 6804921, at *7 (C.D. Cal. May 2, 2016).

[15] By failing to raise them below or in his Opening Brief, Hendrickson has waived reliance on any of the other state action tests. *Rosewood*, 413 F.3d at 1167; AA025-49, SA131-74, AA063 n.4 (district court; Hendrickson "fail[ed] to provide evidence to establish" state action under the other tests).

of the State." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995) (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978)).

Here, the State "mere[ly] acquiesce[d]" to Hendrickson's voluntary authorization of dues deductions. *Id.*; NMSA 1978, §10-7E-17(D) (the State "shall honor" payroll deductions that employees have authorized). That authorized union dues deductions are implemented through the State's payroll system does not amount to "a substantial degree of cooperative action" or "overt and significant state participation." *Schaffer*, 814 F.3d at 1157. The State's "ministerial obligation to deduct dues for members" like Hendrickson "under a collective bargaining agreement does not transform decisions about membership requirements into state actions." *Bain*, 2016 WL 6804921, at *7; *see also Blum*, 457 U.S. at 1005 (that government actor may respond to private party's actions "by adjusting [its own conduct] does not render it *responsible* for those actions") (emphasis original); *Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1337 (10th Cir. 1992) (filing of lien statement by court clerk does not convert private party's allegedly unconstitutional seizure of property into state action); *Hern*, 216 F.3d at 906 (doctor's submission of affidavit supporting petition for plaintiff's involuntary commitment was not state action).

2. Hendrickson paid union dues because of his own private agreements with the Union.

Because the Union is not a state actor, the Court need not reach *Lugar*'s second prong, whether Hendrickson's alleged constitutional injury was caused by some state policy. *Lugar*, 457 U.S. at 937; *see Gallagher*, 49 F.3d at 1457 (affirming summary judgment against plaintiff who failed to prove private defendants were state actors, without addressing second prong). In any event, the second prong is not satisfied either.

The source of the alleged harm here was Hendrickson's voluntary union membership agreement, which was not compelled by the State. Hendrickson points to NMSA 1978 §10-7E-17 and to the CBA between the Union and the State. AOB 24. But the statute does not require employees to join unions, and only provides for public employers to "honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement." NMSA 1978, §10-7E-17(D).[16] Likewise, the CBA does not require union membership and merely parrots the language of the Hendrickson's own private dues deduction agreement regarding the cancellation of deductions. SA038. In sum, and as the district court correctly found, "Hendrickson [has]

[16] Unlike the state statutes invoked by Amicus (Amicus Br. 3), the statute here did not impose a time period for revoking dues deductions that Hendrickson had not agreed upon; rather, the revocation period is contained in Hendrickson's own voluntary private agreement.

fail[ed] to present any evidence to show that the State had a hand in drafting the terms of the *controlling* document—the membership contract." AA064 (emphasis added).

Hendrickson's reliance on *Janus II* to establish state action, AOB 24-26, does not help him here because *Janus II* involved government-compelled payments, not voluntary dues. *See* 942 F.3d at 361; *see also Grossman*, 2020 WL 515816, at *3 (dues revocation window established by operation of state law, not private agreement, required employees to pay dues they had not agreed to pay); *O'Callaghan*, 2019 WL 6330686, at *5-6 (same).[17]

[17] Hendrickson cites other cases that are not on point here because they concern *non*members' compulsory payment of fair-share fees by operation of state law, not union members who voluntarily agreed to pay dues. AOB 26, 28; *see LaSpina v. SEIU Pa. State Council*, 2019 WL 4750423, at *8 (M.D. Pa. 2019) (pre-*Janus* state requirements that nonmembers pay fair-share fees); *Knox*, 567 U.S. at 303 (increases to fair-share fees for nonmembers); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 296 (1986) (procedures for nonmembers to opt out of objectionable portion of fair-share fees); *Abood*, 431 U.S. at 211 (chargeable portion of fair-share fees for nonmembers). While *Hernandez*, 424 F.Supp.3d at 924, does reason that a public employer's deduction of voluntary dues makes the union a state actor, that portion of the ruling is dicta because the district court went on to hold that enforcing union members' dues deduction agreements does *not* infringe on their First Amendment rights.

F. The Union Also Has A Good Faith Defense To Hendrickson's Damages Claim.

While the above discussion is dispositive, and the Court therefore need not reach Hendrickson's arguments regarding the Union's "good-faith" defense, AOB 32-44, that defense also independently bars Hendrickson's §1983 damages claim.

The gravamen of Hendrickson's claim is that his First Amendment rights were violated because, at the time Hendrickson joined the Union and agreed to pay dues, nonmembers were required to pay agency fees. But agency fees were authorized by state law and then-controlling Supreme Court precedent. *Supra* 6-7. While the Tenth Circuit has not yet addressed this issue, every Circuit to reach the question has recognized that private parties that are following presumptively valid state laws have a "good-faith" defense to retrospective §1983 liability if the state law is subsequently invalidated.[18]

Since *Janus*, moreover, every Circuit to consider the issue has held that the good-faith defense bars §1983 claims for monetary relief arising from unions' pre-*Janus* receipt of agency fees.[19] That defense applies equally to claims for recovery

[18] *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993) (recognizing the good faith defense on remand from Supreme Court), *cert. denied*, 510 U.S. 977 (1993); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Pinsky v. Duncan*, 79 F.3d 306, 311-12 (2d Cir. 1996); *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008); *Janus II*, 942 F.3d at 367.

[19] *Ogle v. Ohio Civil Serv. Emps. Ass'n, AFCME Local 11*, 951 F.3d 794, 796-97 (6th Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 334-

of union dues on the theory that members only agreed to pay the dues because of the existence of agency fees. *See, e.g.*, *Grossman*, 2020 WL 515816, at *6-7; *Oliver*, 415 F.Supp.3d at 612-13; *Babb*, 378 F.Supp.3d at 876-77.

Hendrickson urges that there can be no good-faith defense to §1983 liability because §1983 imposes liability on "every person" who violates constitutional rights under color of state law and because this defense would impermissibly impose a "state-of-mind" requirement on §1983 claims. AOB 33-34. But accepting those arguments would require the reversal of decades of settled authority recognizing judicially created immunities and defenses to §1983 liability. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (although text of §1983 "on its face" admits of no immunities or defenses to liability, the view that statute "should be applied as stringently as it reads … has not prevailed"); *see also supra* nn.18 & 19.

When the Supreme Court first held in *Lugar* that private parties can be considered state actors if they are invoking an unconstitutional state process to receive government assistance, the Court also recognized the need for a defense to protect private parties from retrospective liability. *See Lugar*, 457 U.S. at 942 n.23. The Court reiterated that concern in *Wyatt v. Cole*, 504 U.S. 158, 168-69

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336 (2d Cir. 2020); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 391-92 (6th Cir. 2020); *Janus II*, 942 F.3d at 365-66; *Danielson v. Inslee*, 945 F.3d 1096, 1099-1105 (9th Cir. 2019); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368, 370-71 (7th Cir. 2019).

(1992), explaining that while private parties sued for damages under §1983 cannot assert qualified immunity, they "could be entitled to an affirmative defense based on good faith." Every Justice in *Wyatt* agreed that it would be unfair to subject a private party to retrospective liability for having followed the law at the time. *See Wyatt*, 994 F.2d at 1118.

Application of the good-faith defense is justified here because "[t]he Union bears no fault for acting in reliance on state law and Supreme Court precedent"; Hendrickson availed himself of membership rights and benefits in exchange for his dues, "an exchange that cannot be unwound"; and "it would not be equitable to order the transfer of funds from one innocent actor to another, particularly where the latter received a benefit from the exchange." *Danielson*, 945 F.3d at 1103 (citations omitted).[20]

III. Hendrickson's Challenge To Exclusive-Representation Collective Bargaining Is Both Foreclosed By Supreme Court Precedent And Meritless.

Hendrickson contends that, even though he need not join or financially support the Union, New Mexico's democratic system of exclusive-representation collective bargaining violates his First Amendment rights against compelled

[20] Hendrickson's argument that there is no tradition of a good faith defense rooted in common law, AOB 35, is waived for failure to raise it below. *Rosewood*, 413 F.3d at 1167; AA025-49, SA131-74. Moreover, the common law does support the application of the defense here. *See Ogle*, 951 F.3d at 794-97.

speech and association. But that contention is foreclosed by the Supreme Court's decision in *Knight*, which held that an indistinguishable system of exclusive representation "in no way restrained [non-union members'] freedom to speak … or their freedom to associate or not to associate with whom they please, including the exclusive representative." 465 U.S. at 288. Five Circuits have rejected identical claims on this basis.[21] Even if Hendrickson's claim were not foreclosed by precedent, it would be meritless.

A. Exclusive-Representative Collective Bargaining Does Not Infringe First Amendment Rights.

PEBA adopts the same democratic system of exclusive-representative collective bargaining that is essentially universal in the United States. SA100. The federal government and 41 other states authorize collective bargaining for at least some public employees through similar exclusive-representative systems based on

[21] *D'Agostino v. Baker*, 812 F.3d 240, 242-44 (1st Cir. 2016), *cert. denied*, 136 S.Ct. 2473 (2016); *Jarvis v. Cuomo*, 660 F.App'x 72, 74 (2d Cir. 2016) (unpublished), *cert. denied*, 137 S.Ct. 1204 (2017); *Hill v. SEIU*, 850 F.3d 861, 864-65 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 446 (2017); *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751, at *2-4 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S.Ct. 1618 (2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied*, 139 S.Ct. 2043 (2019); *Mentele v. Inslee*, 916 F.3d 783, 786-90 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 114 (2019); *Reisman v. Assoc. Fac. of Univ. of Maine*, 939 F.3d 409, 414 (1st Cir. 2019); *see also Adams v. Teamsters Local 429*, 2020 WL 1558210, at *1 (M.D. Pa. Mar. 31, 2020); *Bennett*, 2020 WL 1549603, at *5-6; *Oliver*, 415 F.Supp.3d at 607; *Thompson v. Marietta Educ. Ass'n*, 2019 WL 6336825, at *7 (S.D. Ohio Nov. 26, 2019) (collecting additional district court cases); *Branch v. Commonwealth Emp't Rels. Bd.*, 481 Mass. 810, 819-25 (2019).

majority rule. SA103. These systems reflect a longstanding legislative judgment based on experience that democratic, exclusive representative systems provide the only practical mechanism for negotiating contract terms for an entire workforce. *See, e.g.*, House Rep. No. 1147 (1935), *reprinted in* 2 Leg. Hist. of the NLRA 3070 (1949) ("[T]he making of agreements is impracticable in the absence of majority rule."). Such systems of exclusive representation have been broadly successful in preventing labor strife, disruption to public services, and discrimination against non-union members, and "cover[] millions of employees in almost every type of industry." SA102, 105.

PEBA requires a union, once elected by a majority vote of the bargaining unit, to represent the interests of *all* bargaining unit employees regardless of membership status. NMSA 1978, §10-7E-15(A). PEBA has never required bargaining unit employees to become union members; and public employees may individually present grievances to their employer "without the intervention of the exclusive representative," *id.* §10-7E-15(B).

Hendrickson failed to demonstrate any way in which PEBA compels him to speak or to form an expressive association with the Union. He concedes that he is not required to become a Union member or provide financial support to the Union. AOB 3-4. He does not claim that he is required to espouse any Union message, and he concedes that "he retains the right to speak for himself," AOB 46. The

undisputed facts establish that Hendrickson is not compelled to join, support, or endorse the Union in any way, nor is he prevented from speaking out against the Union or filing a grievance with his employer without the Union's participation. SA033.[22]

Hendrickson complains that his First Amendment rights are being violated because the Union "speak[s] on his behalf." AOB 45. To the contrary, the Union serves as representative of the *unit*, and does not speak for each individual worker in the unit. *See Reisman*, 939 F.3d at 413 (exclusive representation statute "is not properly read to designate [the union] as Reisman's personal representative, as he contends. Rather, that provision merely makes clear that a union, once it becomes the exclusive bargaining agent for a bargaining unit, must represent the unit as an entity, and not only certain of the employees within it, and then solely for the purposes of collective bargaining.") (emphasis original).

Moreover, reasonable outsiders understand that not every bargaining unit worker necessarily agrees with every position taken by a majority-elected exclusive representative. SA034. Thus, that the Union serves as the unit's PEBA

[22] *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace."); *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Rels. Com'n*, 429 U.S. 167, 173-76 & n.10 (1976) (bargaining unit members have the same First Amendment rights as other citizens to speak in opposition to union).

representative says nothing about Hendrickson's *own* views. *See D'Agostino*, 812 F.3d at 244 ("[I]t is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority."). The Supreme Court has never validated a claim of compelled speech or compelled expressive association where the plaintiff was not required to do *anything* and reasonable outsiders would not attribute any message to the plaintiff personally.[23]

Hendrickson's claim reduces to the contention that all exclusive-representative bargaining should be treated as a violation of the First Amendment. And that contention is foreclosed by the Supreme Court's decision in *Knight*.

In *Knight*, a group of college instructors argued that the exclusive representation provisions of the Minnesota public employee labor relations law violated the First Amendment rights of instructors who did not wish to associate with the faculty union. 465 U.S. at 273, 278-79. State law granted their bargaining unit's elected representative the exclusive right to "meet and negotiate" over employment terms, and to "meet and confer" with campus administrators

[23] Hendrickson's reliance on *Sweeney v. Madigan*, 359 F.Supp.3d 585 (N.D. Ill. 2019), AOB 45-46, is misplaced. The union in *Sweeney* asserted that the *union's* First Amendment rights were being violated because the union was required to expend resources to represent all bargaining unit employees, even if an employee contributed nothing for such representation. Hendrickson, by contrast, need not do anything. Moreover, the *Sweeney* court did not suggest that the union's argument had any legal merit. *Id.* at 591-92.

about certain employment-related policy matters outside the scope of mandatory negotiations. *Id.* at 274-75.

The lower court rejected the *Knight* plaintiffs' "attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment." *Id.* at 278. On appeal, the Supreme Court summarily affirmed. *Id.*; *Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 460 U.S. 1048 (1983). The lower court had ruled in plaintiffs' favor on their challenge to the meet-and-confer process. *Knight*, 465 U.S. at 278-79. The Supreme Court reversed that ruling in a full opinion, holding that exclusive representation does not infringe First Amendment rights. *Id.* at 288.

The *Knight* Court began its analysis by recognizing that government officials have no obligation to negotiate or confer with employees, and that the meet-and-confer process (like the meet-and-negotiate process) was not a "forum" to which plaintiffs had any First Amendment right of access. *Id.* at 280-82. The Court explained that plaintiffs, who were not union members, also had no constitutional right "as members of the public, as government employees, or as instructors in an institution of higher education" to "force the government to listen to their views." *Id.* at 283. The government, therefore, was "free to consult or not to consult whomever it pleases." *Id.* at 285; *see also Smith v. Ark. State Hwy. Emps., Local 1315*, 441 U.S. 463, 464-66 (1979) (government did not violate

union supporters' speech or associational rights by accepting individual employee grievances while refusing to recognize union's grievances).

The *Knight* Court went on to consider whether exclusive representation violated the non-members' First Amendment rights to speak and to "associate or not to associate." 465 U.S. at 288. The Court held that nonmembers' speech rights were not infringed because, while the exclusive representative's status "amplifie[d] its voice in the policymaking process," that amplification did not "impair[] individual instructors' constitutional freedom to speak." *Id.* As the Court explained, such amplification is "inherent in government's freedom to choose its advisers" and "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.*

The Supreme Court found no infringement of non-members' associational rights because they were "free to form whatever advocacy groups they like" and were "not required to become members" of the exclusive-representative union. *Id.* at 289. The Court acknowledged that non-members may "feel some pressure to join the exclusive representative" to influence its positions, and reasoned that this "is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 289-90. The Court concluded that such pressure "is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.* at 290.

Knight thus considered whether exclusive representation, by itself, violates the speech or associational rights of public employees who are not members of the union that has been designated as their exclusive representative, and held that it does not do so—foreclosing Hendrickson's claim. *See id.* at 288 ("[T]he First Amendment guarantees the right both to speak and to associate. Appellees' speech and associational rights, however, have not been infringed[.]"); *id.* at 290 n.12 (non-members' "speech and associational freedom have been wholly unimpaired").

Contrary to Hendrickson's contention, AOB 46-47, *Janus* did not overrule *Knight*, as every court to decide the issue has concluded. *See supra* n.21. *Janus* held only that a nonmember cannot be required to pay agency fees to a union. *Janus* distinguished between compelled financial support for a union and the underlying system of exclusive representation. 138 S.Ct. at 2465, 2467. *Janus* explained that while fair share fees are unconstitutional, states can otherwise "keep their labor-relations systems exactly as they are," including by "requir[ing] that a union serve as exclusive bargaining agent for its employees." *Id.* at 2478, 2485 n.27; *see also id.* at 2466, 2485 n.27 (states may "follow the model of the federal government," in which "a union chosen by majority vote is designated as the exclusive representative of all the employees"); *id.* at 2471 n.7 ("[W]e are not in any way questioning the foundations of modern labor law."). Thus, *Janus* did not disturb settled precedent about exclusive representation collective bargaining.

B. In Any Event, Exclusive-Representative Collective Bargaining Would Satisfy Heightened Constitutional Scrutiny.

Because exclusive-representative collective bargaining, by itself, does not infringe on First Amendment rights, no heightened constitutional scrutiny is triggered. Even if such scrutiny were required, moreover, the undisputed summary judgment record, including undisputed expert testimony, demonstrates that New Mexico's system would survive any level of scrutiny.[24]

Janus acknowledged that states have a "compelling . . . interest" in organizing labor relations with their public-sector employees through a system of exclusive-representation collective bargaining in order to achieve "labor peace" and avoid "the conflict and disruption that . . . would occur if the employees in a unit were represented by more than one union." 138 S.Ct. at 2465. *See also* NMSA 1978, §10-7E-2 (PEBA's purpose is to "promote harmonious and cooperative relationships between public employers and public employees and . . . protect[ing] the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions"); AFSCME Council 18's RJN, Exh. B, *NEA-Belen & Belen Fed'n of Sch. Emps. v. Belen Consolidated Schs.*, Case Nos. CP 38-49 (SD), CP 46-93 (SD), at 3-4 (PELRB 1994) ("[T]he

[24] *Janus* applied "exacting scrutiny," which is "a less demanding test than … 'strict' scrutiny," to mandatory agency fees, 138 S.Ct. at 2465, and Hendrickson asserts that exacting scrutiny should apply here. AOB 44.

principle of 'efficient administration of government'" justifies preventing employees from fragmenting bargaining units in order to protect government efficiency and stability).

An exclusive-representative system is necessary to achieve these goals. In the early days of public-sector collective bargaining, several states experimented with alternative systems that did not utilize exclusive representation. SA102-03; *see also* Fisk & Malin, *After Janus*, 107 CAL. L. REV. 1821, 1836-37 (2019). Those systems were quickly abandoned as failures, as they "made bargaining more difficult[,] and costly" for public employer and "tended to divide employees, increasing the likelihood of labor unrest and diminishing the benefits of collective bargaining in producing a mutually productive relationship." SA103. Accordingly, courts have recognized that an exclusive-representation system is necessary to avoid "competing demands of rival representatives," and the difficulty of administering multiple agreements that apply to similar employees. *Mentele*, 916 F.3d at 791; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) (exclusive representation "may reasonably be considered a means of insuring labor-peace within the schools."); *Branch*, 481 Mass. at 828 ("[T]o have the employee representatives speak with one voice at the bargaining table is critical to the efficient resolution of labor-management disputes and

protects the bargaining unit employees from divide-and-conquer tactics by employers.").[25]

Moreover, *Janus* acknowledged that exclusive representation is the "means significantly less restrictive" than agency fees to achieve those compelling state interests. 138 S.Ct. at 2465-66; *see also id.* at 2485 n.27 ("States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions."); *Reisman*, 356 F.Supp.3d 173, 178 (D. Me. 2018), *aff'd* 939 F.3d 409 (1st Cir. 2019) ("*Janus* itself suggests that [exclusive representation] satisfies the exacting scrutiny standard."). In this regard, it bears emphasis that there is no history of successful collective bargaining systems in the United States that did not adopt the principle of exclusive representation. SA100, 103.

None of Hendrickson's arguments support a different conclusion. *Janus*'s holding that labor peace did not justify state-compelled *agency fees* (AOB 47) did

[25] Hendrickson asserts that State's interest in labor peace does not apply here because he does not seek to force the government to deal with a rival union or to negotiate with him personally, AOB 47, only to stop the Union from speaking "on his behalf." For the reasons stated in text, however, the Union does not speak "on his behalf" but as representative of the unit. *See supra* 46-47. Moreover, to the extent Hendrickson is suggesting a system in which a union would negotiate unit-wide terms but not have a duty of fair representation toward nonmembers, Hendrickson gets the constitutional analysis backwards. The duty of fair representation protects nonmembers rights' not to associate with the union. *See Janus*, 138 S.Ct. at 2468 (stating that constitutional concerns would arise *in the absence* of a duty of fair representation); *D'Agostino*, 812 F.3d at 244 (same).

not question the constitutionality of exclusive representative bargaining. *See* 138 S.Ct. at 2478 ("It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees…. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views."). The cases Hendrickson cites for the proposition that mere administrative efficiency is not a compelling government interest, AOB 48, are distinguishable because in those cases *only* viable justification asserted for an infringement on constitutional rights was efficiency. *See Romer v. Evans*, 517 U.S. 620, 635 (1996); *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Here, exclusive representation also serves the State's interests in labor peace by allowing the state to deal with a single representative. *Supra* 51-53.

Thus, even if heightened scrutiny applied, NMSA 1978, §10-7E-15(A) would pass constitutional muster.

CONCLUSION

The district court's judgment should be affirmed.

Dated: July 28, 2020

/s/ Eileen B. Goldsmith
Eileen B. Goldsmith

STATEMENT REGARDING ORAL ARGUMENT

While, for the reasons stated in AFSCME Council 18's brief, the issues raised in Appellant Hendrickson's appeal have been authoritatively decided, AFSCME Council 18 submits that oral argument is appropriate. The case concerns the extent and limitations of a recent U.S. Supreme Court decision. Oral argument may be useful for exploring these issues.

Date: July 28, 2020

/s/ Eileen B. Goldsmith

Attorney for Defendant-Appellee
AFSCME Council 18

RULE 31.3 CERTIFICATE OF COUNSEL

Pursuant to Tenth Circuit Rule 31.3(B), counsel for AFSCME Council 18 hereby submits that this separate brief is necessary. First, the State Defendants-Appellees, Governor Michelle Lujan Grisham and Attorney General Hector Balderas, were sued in their official capacities only, and therefore are exempt from the single briefing requirement as government entities under Tenth Circuit Rule 31.3(D). Second, the State Defendants-Appellees and AFSCME Council 18 each have arguments and defenses not applicable to the other, therefore, separate briefs are necessary to fully present the issues before the court. Third, the COVID-19 pandemic has led to closures significantly disrupting our respective law firm's operations. These constraints resulting from the pandemic would have precluded coordination with the Government Appellees on a single brief.[26] Therefore, separate briefs were necessary for the Defendants-Appellees to efficiently complete and file their response briefs in a reasonably timely manner.

Date: July 28, 2020

/s/ Eileen B. Goldsmith

Attorney for Defendant-Appellee
AFSCME Council 18

[26] The constraints caused by the COVID-19 pandemic were detailed in the separate requests for extension submitted by AFSCME Council 18 (Dkt. 10340357; granted, Dkt. 10340577) and the Government Appellees (Dkt. 10349916; granted, Dkt. 10741494).

CERTIFICATE OF COMPLIACE WITH TYPE-VOLUME LIMIT

I hereby certify that with respect to the foregoing:

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Date: July 28, 2020

/s/ Eileen B. Goldsmith

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) this ECF submission is an exact copy of the additional hard copies to be submitted to the Court pursuant to 10th Cir. R. 31.5;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender (Windows 10 version), and according to the program are free of viruses.

Date: July 28, 2020

/s/ Eileen B. Goldsmith

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AFSCME Council 18

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2020, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following:

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