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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellant, Brett Hendrickson, submits this Reply to the briefs of American Federation of State County and Municipal Employees, Council 18 ("AFSCME") (Dkt. 010110383567) ("AFSCME Br.") and Governor Michelle Lujan Grisham and Attorney General Hector Balderas (together, the "State" or "State Appellees") (Dkt. 010110359038) ("State Br."). Appellant has already addressed many of Appellees' arguments in addressing the District Court's holdings in his Opening Brief (Dkt. 010110338683) ("Hendrickson Br."). Therefore, this Reply Brief is limited to those points which require additional elaboration.

ARGUMENT

I. Hendrickson did not provide the knowing and voluntary waiver required by *Janus*.

AFSCME argues that Hendrickson consented to the restriction on his ability to end his union dues deduction to only two weeks a year when he signed his union membership application. AFSCME Br. at 20-23. Hendrickson concedes that he signed the application, but he points to the undisputed fact that he was not fully informed when he did so, and he argues that his consent, therefore, is invalid. *See* Hendrickson Br. at 10-17.

A. *Janus* applies to nonmembers like Hendrickson.

AFSCME's analysis allows for Hendrickson to be considered a nonmember with continuing dues obligations, but that violates the holding in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), that nonmembers cannot be forced to pay anything to the union. AFSCME states that, "Plaintiff could resign his union membership at any time, but . . . dues would to be deducted" until he revoked his authorization during the two-week escape window. AFSCME Br. at 8. While Hendrickson does not dispute that this factually happened, he vigorously disputes that it is constitutional. In fact, Hendrickson did resign his union membership, yet union dues continued to be deducted from his paycheck "until the second pay period in January [2019]." *Id*. at 10. This attempted separation between the requirement to pay the union and union membership is exactly what was struck down in *Janus*: "Neither an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages . . . ." *Janus*, 138 S. Ct. at 2486 (emphasis added).

Union dues may only be collected from employees who have consented to their deduction. If that consent is invalid or withdrawn, no money can be taken. AFSCME concedes that, upon resignation, Hendrickson was not a union member. Therefore, the Union should not have continued to take his money. *Janus* is not limited just to former union fee payers, as AFSCME contends, but to all

nonmembers of the union. The Janus decision is explicit on this point: "Neither an agency fee may nor any other payment to the union be deducted from a nonmember's wages . . . ." *Janus*, 138 S. Ct. at 2486. In addition, it is all "employees" who must consent to the withholding of money from the union: "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." 138 S. Ct. at 2486. In this case, Hendrickson did not consent to waiving his First Amendment right to pay nothing to the Union because that right had not yet been recognized.

AFSCME points out that the plaintiff in *Janus* was a nonmember of the union when dues began to be taken from him. *See, generally,* ASFCME Br. at 25. But so was Hendrickson at the time he signed his union membership application. AFSCME is missing the temporal applicability of the waiver requirement to Hendrickson's situation. Hendrickson's argument is that when he was a nonmember of the Union in 2007, agreeing to pay dues to the Union required him to waive his First Amendment right to pay nothing to the Union. This he did not do.

B. *Janus* requires a waiver.

Janus is clear that workers must not only consent to waive their First Amendment rights not to pay union dues, but they must "clearly and affirmatively consent before any money is taken from them." *Janus*, 138 S. Ct. at 2486. *Janus*

further explains:

> By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective the waiver must be freely given and shown by "clear and compelling" evidence.

Id. (internal citations omitted). Hendrickson's consent was not "freely given" because he was not informed of his right to pay nothing at all to the Union. That right had not yet been recognized by the Supreme Court. Therefore, the waiver of that right "cannot be presumed." *Janus*, 138 S. Ct. at 2486. Hendrickson could not possibly have waived a right that he did not know existed.

AFSCME claims that Hendrickson's provided affirmative consent to union membership because Hendrickson signed the membership agreement. ASFCME Br. at 25. ASFCME misunderstands or misstates the import of "affirmative consent." It is not simply affirmative consent to membership by signing a membership card. *Janus* requires that ASFCME show Hendrickson affirmatively consented to *waive his First Amendment rights*. *Janus,* 138 S. Ct. at 2486. ASFCME presumes that any union authorization suffices, but *Janus* holds that such a "waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by clear and compelling evidence." *Id.* (citations and quotation marks omitted). ASFCME cannot show by clear and compelling evidence that Hendrickson affirmatively consented to waive his *Janus* rights.

ASFCME cites various cases, but these citations amount to little more than a contention that a union authorization is a type of contract that can create binding obligations. AFSCME Br. at 21. Hendrickson does not dispute this and has never disputed it. What Hendrickson disputes is whether his particular contract was formed with full knowledge.

The undisputed wording of the union agreements that Hendrickson entered into shows that the agreements were executed without Hendrickson's knowledge of his rights. Since there was no such knowledge, there could not have been a knowing waiver of those rights. Because the right not to pay fees or dues to a union had not been announced by the Supreme Court, Hendrickson could not have known that he was waiving that constitutional right; therefore, he could not have "freely given" his "affirmative consent" as required by the *Janus* decision. 138 S. Ct. at 2486. AFSCME fails to recognize this flaw in the formation of the contracts on which it relies. Any such waiver must be freely given in a manner that is voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co*., 405 U.S. 174, 185-86 (1972). Because the alleged waiver was not voluntary, knowing, and intelligently made, the agreements cannot bind Hendrickson.

AFSCME claims Hendrickson's arguments amount to a First Amendment right to void contractual obligations. But Hendrickson doesn't assert that it is impossible to contract away First Amendment rights, only that the proffered

contract here is insufficient to do so.

ASFCME further asserts that one-year revocation periods are "commonplace," citing references to union contracts with private employers that are covered by the National Labor Relations Act and not *Janus*. AFSCME Br. at 21-22. But such opt-out window provisions were not commonplace prior to the Supreme Court granting cert. to hear the *Janus* case. They were added recently to preserve union revenue loss that would inevitably occur from the *Janus* decision. *See, e.g., Wolf v. University Professional and Technical Employees*, N. D. Cal. Case No. 3:19-cv-02881-WHA, ECF No. 78-2 at 8-9, Deposition of Jamie McDole pages 18 and 22 (Union President admitting her union's window period was adopted in anticipation of the *Janus* decision, to prevent employees from exercising their *Janus* rights). But preserving union revenues is not an excuse to violate First Amendment rights and attempt to limit their exercise to two weeks per year.

ASFCME quotes from *Fisk v. Inslee*, claiming that both the District Court and the Ninth Circuit endorsed ASFCME's argument regarding the contract. ASFCME Br. at 20-21, 36. But *Fisk* did *not* properly present the arguments that Hendrickson now submits to the Court regarding the invalidity of the pre-*Janus* agreement; therefore, the Ninth Circuit expressly *did not consider them*. The court found that the argument had not been made below, so it held that "this claim is not

properly before us and so we need not address the adequacy of [the employees'] putative waivers." *Fisk v. Inslee*, 759 F. App'x 632, 634 (9th Cir. 2019).

ASFCME relies on an extensive string cite to support the idea that the courts are on its side, but these citations are limited in their usefulness. AFSCME Br. at 2, n.1. For instance, *Babb* addresses a different and somewhat confusing argument that union members should be refunded a portion of their dues equal to agency fees because "such fees were subsumed within their membership dues." *Babb v. Cal. Teachers Ass'n*, No. 8:18-cv-00994-JLS-DFM, 2019 U.S. Dist. LEXIS 79812, at *34 (C.D. Cal. May 8, 2019). The *Babb* court did not address the sufficiency of a waiver; its discussion was about the availability of damages. *Bermudez* contains nothing but a conclusory judgment that the court rejected the plaintiff's claims. *Bermudez v. SEIU, Local 521*, No. 18-cv-04312-VC, 2019 U.S. Dist. LEXIS 65182, at *2 (N.D. Cal. Apr. 16, 2019). *Crockett* is helpful to AFSCME regarding the question of returning pre-*Janus* dues, but the dicta cited in the district court opinion is addressed simply to damages and says nothing about the right to revoke an authorization outside a proscribed time window. *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1008 (D. Alaska 2019). A few of the opinions do support AFSCME's view, but they are mostly district court orders denying motions for preliminary injunctions on the ground that the plaintiffs had not met their higher burden at that early state of the litigation. *See Cooley v. Cal. Statewide Law Enf't*

Ass'n, No. 2:18-cv-02961-JAM-AC, 2019 U.S. Dist. LEXIS 12545, at *9 (E.D. Cal. Jan. 25, 2019); *Smith v. Superior Court*, No. 18-cv-05472-VC, 2018 U.S. Dist. LEXIS 196089, at *2 (N.D. Cal. Nov. 16, 2018); *Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *14 (W.D. Wash. Oct. 11, 2018).

Finally, AFSCME claims that Hendrickson received consideration for joining the Union, which AFSCME terms "the rights and benefits of union membership." AFSCME Br. at 23. But AFSCME fails to mention that Hendrickson did not want these "benefits"; therefore, they in no way induced him to join the Union and cannot be considered consideration at all. On the contrary, Hendrickson jumped at his first chance to give up these "rights and benefits," asking to give them up fewer than 45 days after the *Janus* decision.

C. The contract was based on a mutual mistake.

AFSCME attempts to get around Hendrickson's argument that the contract at issue was based on a mutual mistake by arguing the doctrine does not apply because the mistake was a mistake of *law* rather than *fact*. AFSCME Br. at 35; *see also* State Br. at 33. But New Mexico law does not distinguish between mistake of law or mistake of fact. Any mutual mistake is grounds for rescission if it is material to the formation of the contract. As Hendrickson pointed out in his Opening Brief at 13, the mutual mistake doctrine in New Mexico can be found in *City of Raton v. Ark. River Power Auth.*, 611 F. Supp. 2d 1190, 1198 (D.N.M.

2008), which cited *State ex rel. State Highway and Transp. Dept. v. Garley*, 111 N.M. 383, 385, 806 P.2d 32, 34 (1991), which quoted the Restatement (Second) of Contracts § 152 (1979). The comments to the restatement's prior section explain this lack of distinction between fact and law:

> b. Facts include law. The rules stated in this Chapter do not draw the distinction that is sometimes made between "fact" and "law." They treat the law in existence at the time of the making of the contract as part of the total state of facts at that time. A party's erroneous belief with respect to the law, as found in statute, regulation, judicial decision, or elsewhere, or with respect to the legal consequences of his acts, may, therefore, come within these rules.

Restatement (Second) of Contracts § 151, Comment b. (1979). Because this restatement of the law has been adopted by the New Mexico Supreme Court in *Garley*, its reasoning applies to this case. Hendrickson's and AFSCME's erroneous belief with respect to the law, as found in judicial decision, makes this contract one subject to rescission under New Mexico law.

Further, this Court takes the position that a contract shall be rescinded when a change in the law made by the U.S. Supreme Court is material to the choices the parties had at their disposal when they entered the agreement. *United States v. Bunner*, 134 F.3d 1000, 1002 (10th Cir. 1998); *see also* Hendrickson Br. at 13-14.

II. Hendrickson's claims are not moot.

Appellees argue that Count I of the First Amended Complaint is moot.

ASFCME Br. at 15; State Br. at 19. Count I is not moot, however, as there is an ongoing case and controversy. See Hendrickson Br. at 18-23.

In brief, "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)). ASFCME continues to assert the legality of its policy to postpone dues deduction revocations and enforce it against all other New Mexico employees who have not taken the time to sue.

ASFCME claims this case is not an instance of voluntary cessation of unlawful conduct once sued because the cessation of the conduct was consistent with its membership agreement, which allowed dues deduction revocations once a year. ASFCME Br at 18. This argument constitutes an admission of the transitory nature of the claim because cessation of the unlawful conduct will occur once a year. This case, for example, was filed in November 2018; however, even without discovery, the District Court did not issue its ruling on summary judgment until January 2020. The one-year opt-out period had already come around twice during the short pendency of the case. A policy with a one-year duration can never be adjudicated if the Union is allowed to dodge in this way. Instead, this Court should agree with the Ninth Circuit that these "are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk v. Inslee*, 759 F. App'x 632, 633

(9th Cir. 2019).

ASFCME attempts to distinguish *Fisk* on the basis that the plaintiffs sought a class action, but the class allegations were not the basis of the court's reasoning. Indeed, the court explicitly stated, "Although *no class has been certified* and SEIU and the State have stopped deducting dues from Appellants, Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk*, 759 F. App'x at 633 (emphasis added). The clear import of the persuasive authority is that these inherently transitory claims deserve their day in court.

Next, ASFCME argues that the "voluntary cessation exception applies only if the plaintiff could again be subjected to the same alleged harm." AFSCME Br. at 18. But AFSCME's argument is not consistent with how the Supreme Court has addressed the doctrine of mootness. For example, Jane Roe was not required to submit an affidavit asserting that she would experience a future unwanted pregnancy. *Roe v. Wade*, 410 U.S. 113, 125 (1973). Similarly, union members in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) could not say they would be subject to a future special assessment by the union, but the case was determined not to be moot even after the union had sent notice of a full refund of the assessment.

The State Defendants' mootness arguments are no more convincing. For

instance, they cite to *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994) (superseded on other grounds) for the proposition that a claim for declaratory relief does not cure mootness. State Br. at 19. In *Cox,* an employee could not obtain declaratory relief on her claim of sexual harassment after her claim for monetary damages had been rejected. The Court reasoned there was no ongoing interest in simply declaring that she had been mistreated on the basis of sex. *Id.* at 1347. But the declaration sought in *Cox* was specific to the facts of the plaintiff's case. In this case, by comparison, Hendrickson has "show[n] the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest" of many state employees. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974).

The State Defendants also contend that Plaintiff's claim is incapable of repetition because the State of New Mexico has changed its policies regarding non-member agency fees to conform with *Janus.* State Br. at 25-26. But Hendrickson is not claiming that he was or will be charged an agency fee. He was a union member, not an agency fee payer. His claim regards the policy applied to union members, which the State Defendants have not changed. Therefore, the state change in policy is irrelevant to his case.

State Defendants attempt to get around this irrelevance by stating that since there is no longer an agency fee in place, future hires will not be subject to the

unconstitutional choice between dues and agency fees which Hendrickson faced. But future hires are not the relevant category of employee for analysis. Hendrickson is not challenging the agency fee policy but the revocation policy. There are countless similarly situated existing employees who remain subject to the unconstitutional revocation policy. These employees, like Hendrickson, signed union dues membership applications prior to *Janus* and have not signed new applications since *Janus*. Average state employees do not pay close attention to Supreme Court decisions and, like Hendrickson, they will likely learn of their right to pay nothing to the union in one of the fifty weeks a year in which the state is actively thwarting their efforts to end dues deductions.

III. The Union's actions constitute joint action with the state.

AFSCME also contends that there is no state action in this case. AFSCME Br. at 36. The Union fails to explain, however, how state government using the state payroll system to deduct union dues from state-issued paychecks of state employees is not state action. *See* Appellant Br. at 23. It also fails to acknowledge decades of Supreme Court precedents applying First Amendment standards to public sector unions, concluding with the Janus decision. *See Id*. at 28.

Moreover, AFSCME's limiting the time period in which Hendrickson can end his union dues deductions is enforced by the state through a state statute, N.M.

Stat. Ann. § 10-7E-17(C). Such statute is unconstitutional as applied to Hendrickson because it prohibits him from ending his dues deductions even though the contract by which he authorized them was not freely entered into with a "voluntary, knowing, and intelligent" waiver of his rights. *D.H. Overmyer Co.*, 405 U.S. at 174. The portion of the statute that is unconstitutional as it applies to Hendrickson states:

> The public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement and for so long as the labor organization is certified as the exclusive representative.

N.M. Stat. Ann. § 10-7E-17(C). This language allows the terms of the collective bargaining agreement between AFSCME and the state to determine when Hendrickson can end his dues deductions. In theory in New Mexico, and in practice in other states, that time period could occur years after Hendrickson's request that his dues stop. The statute makes no allowance for the fact that Hendrickson did not know of his right to pay nothing to the Union when he consented to his dues deductions. Because the statute is being enforced against Hendrickson as if he did "freely give . . . affirmative[] consent" to dues deductions, *Janus*, 138 S. Ct. at 2486, the statute is violating his rights to Free Speech and Freedom of Association. This Court should declare N.M. Stat. Ann. § 10-7E-17(C) unconstitutional as applied to Hendrickson.

Therefore, the state action in this case not only involves the same withholding of union dues that was found to constitute state action in all the cases similar to this one cited by Hendrickson in his Opening Brief at 23-28, but it also involves the extra element of enforcement of a state statute which was ignored by the District Court in its opinion in the case. This Court should consider both elements of state action and reverse the lower court.

IV. There is no "good faith" defense because there is no intent requirement under *Janus*.

ASFCME contends that it is entitled to a "good faith" defense. AFSCME Br. at 41. But as Appellant addressed in his Opening Brief, this Court has never recognized a "good faith" defense to liability under 42 U.S.C § 1983. *See* Hendrickson Br. at 32-33. First, the ostensible defense is incompatible with the text and purpose of the statute, which mandates that "every person" who deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . . ." 42 U.S.C § 1983; *see also* Hendrickson Br. at 32-35. Second, the "good faith" defense recognized by other circuits was only recognized to disprove elements of malice or lack of probable cause that are not at issue in this Free Speech case. *See* Hendrickson Br. at 35-39. Third, this Court should decline to recognize the new "good faith" defense recognized by other circuits for these same

reasons. *See* Hendrickson Br. at 39-44.

In addition, rejecting this new "good faith" defense complies with the Supreme Court's decision to hold private parties liable under § 1983. It complies with the Supreme Court's decision to decline to grant good-faith immunity to private parties. And any appeal to "fairness" should lead this Court to side with Hendrickson instead of the Union, which took his money without his consent.

A. The Supreme Court extends liability under § 1983 to private parties.

The Supreme Court applies § 1983 to private defendants like AFSCME. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court explained that it extends liability under § 1983 to private parties who "invoke the aid of state officials." *Id*. at 942. *Lugar* is controlling law in this case, and AFSCME does not question its authority on this point. *See* AFSCME Br. At 42.

In *Lugar*, a private company sued its lessee to collect an outstanding debt. The debt-collection lawsuit occurred, pursuant to state statute, through an *ex parte* proceeding. After the proceeding, a clerk of the state court issued a writ of attachment, which was executed by the county sheriff and prevented the debtor from disposing of any assets. A state trial judge later dismissed the attachment. The debtor then sued in federal court under § 1983, arguing that the *ex parte* attachment of his assets violated his right to due process.

The Supreme Court held that the private company could be held liable for the due process violation because there was sufficient state action where it had "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 942. While the dispute was over a private debt, "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Id.* at 941. Therefore, liability was appropriate "when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." *Id.* at 942.

Similar to the defendant in *Lugar*, AFSCME jointly participated with the State of New Mexico to expropriate money from Hendrickson. The defendants in both cases argued that their reliance on a state statute should save them from liability as a private litigant. But if a private party's reliance on a state law were, by itself, sufficient to shield its conduct from liability, almost no private party would ever be liable under § 1983. Because liability under § 1983 requires that a defendant act "under color of state law," a defendant cannot then rely on such action to escape liability. For that reason, the Supreme Court denied this argument in *Lugar*, and this Court should, as well.

B. The Supreme Court declined to grant good faith immunity to private parties in *Wyatt v. Cole*, 504 U.S. 158 (1992).

The decision in *Lugar* "left open the question whether private defendants charged with 42 U. S. C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional are entitled to qualified immunity from suit. 457 U.S. at 942, n. 23." *Wyatt v. Cole*, 504 U.S. 158, 159 (1992). The Supreme Court answered the question definitively in *Wyatt* and denied good faith immunity to private parties in § 1983 actions.

AFSCME tries to argue that *Wyatt* somehow stands for the opposite proposition: that "it would be unfair to subject a private party to retrospective liability for having followed the law at the time." AFSCME Br. at 43. This rewriting of the opinion ignores the clear pronouncement of the *Wyatt* majority: private litigants in § 1983 cases are *not* afforded immunity from liability simply because they had a good faith reliance on state law.

In *Wyatt*, disgruntled business partners had sued for replevin, pursuant to a state statute. Also pursuant to the statute, the sheriff had seized the property at issue without a hearing. *Id.* at 160. The question before the Court was whether a private party could invoke the qualified immunity available to state officials under § 1983 because the private party was relying in good faith on a state statute. The *Wyatt* Court determined that defendants were "not entitle[d] . . . to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id*. at 165. The reasoning for the holding was that the

"rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167.[1] Similarly, this Court should not extend good faith qualified immunity to AFSCME in this case under the guise of a "good faith" defense.

C. An appeal to "fairness" should lead the Court to side with Hendrickson.

AFSCME's rewriting of the *Wyatt* decision and the new "good faith" defense that other circuits have found claim it would be "unfair" to hold unions liable in this instance. AFSCME Br. at 43. But fairness to *victims* of constitutional deprivations supports enforcing § 1983 as written. It is not fair to make victims of constitutional deprivations pay for AFSCME's unconstitutional conduct. Nor is it fair to let wrongdoers keep ill-gotten gains: "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. Independence*, 445 U.S. 622, 654 (1980). The Supreme Court in *Owen* wrote those words when holding that municipalities are not entitled to a good faith immunity to § 1983. The Court's equitable justifications for so holding are equally applicable here.

First, the *Owen* Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith

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[1] The Supreme Court also denied qualified immunity to cities in *Owen v. Independence*, 445 U.S. 622 (1980) for similar reasons. The case is discussed in detail below in Section C.

defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id*. at 651. That injustice also should not be tolerated here. Countless victims of constitutional deprivations will be left remediless if defendants to § 1983 suits can escape liability by showing they had a good faith, but mistaken, belief their conduct was lawful. Those victims include not just Hendrickson and other employees who tried to stop their dues deductions. Under AFSCME's argument, every defendant to every § 1983 damages claim can assert a "good faith" defense. For example, the city governments that the Supreme Court in *Owen* held were not entitled to good faith immunity could then raise an equivalent "good faith" defense, leading to the very injustice the Court sought to avoid.

Second, the *Owen* Court further recognized that Section "1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, *whether committed in good faith or not*, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id*. at 651–52 (emphasis added). The same rationale weighs against a "good faith" defense to § 1983.

Third, the *Owen* Court held that "even where some constitutional

development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm rather "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 654. So too here, when Hendrickson's and AFSCME's interests are weighed together, the balance of equities overwhelmingly favors requiring AFSCME to return the monies it unconstitutionally seized from Hendrickson, who affirmatively requested that his dues deductions stop. Fairness should reward the victims of the constitutional deprivation and not the perpetrator.

In addition, even if the Court were to apply the "good faith" defense to the Union, it would not shield AFSCME from having to return Hendrickson's unconstitutionally paid union dues. When a "good faith" defense is found by the court, it shields defendants from further liability once they have returned the property that was unconstitutionally taken. It does not relieve defendants from returning what was taken. Here, Hendrickson is not asking for money damages incidental to the taking of his union dues. He is simply asking for those dues to be refunded; therefore, the "good faith" defense is inapposite.

V. The governor and attorney general are proper defendants under *Ex Parte Young*.

The State Defendants claim they are not proper defendants under *Ex Parte*

Young, 209 U.S. 123 (1908). State Br. at 7. Hendrickson has already refuted these arguments. *See* Hendrickson Br. at 28.

Multiple Tenth Circuit opinions have held the governor and attorney general to be proper parties when challenging executive branch policies and the constitutionality of state laws. *See, e.g., Kitchen v. Herbert*, 755 F.3d 1193, 1202 (10th Cir. 2014); *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 896 (10th Cir. 2017). As the circuit court explained in *Petrella v. Brownback*, 697 F.3d 1285, 1293-94 (10th Cir. 2012):

> It cannot seriously be disputed that the proper vehicle for challenging the constitutionality of a state statute, where only prospective, non-monetary relief is sought, is an action against the state officials responsible for the enforcement of that statute. *See Ex parte Young*, 209 U.S. 123, 161, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Nor can it be disputed that the Governor and Attorney General of the state of Kansas have responsibility for the enforcement of the laws of the state.

State Defendants cite for their proposition the Fifth Circuit case of *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), State Opposition at 8, but that case is easily distinguishable from this one. In *Okpalobi*, the statute at issue had created a private right of action; therefore, the governor and the attorney general were not charged with enforcing the law under its own terms. *Id*. at 427. In this case, no such private right of action exists; state officials are charged with enforcing the laws. The governor, in particular, is not only charged with enforcing

all state laws, as is the attorney general of New Mexico, but she is also the actual employer of Hendrickson. Plus, she is the only state official with authority over the actions of both the State Personnel Office and the Human Services Department, both of which contributed toward the unconstitutional act at issue. Lujan Grisham is a proper defendant in this case because she is Hendrickson's superior.

The State Defendants attempt to avoid culpability by arguing that New Mexico's Public Employee Labor Relations Board (PELRB) is the state entity that regulates labor relations in the state, and state law grants it some independence from the governor. State Opposition at 5. However, PELRB exists to adjudicate disputes on the application of New Mexico's labor law. It is not the proper venue nor party to defend the constitutionality of those laws. That is the province and expertise of this Court.

If this Court deems the New Mexico statutes at issue in this case are unconstitutional, it will need to enforce its order with the governmental actor that enters into the collective bargaining agreement with the Union. That entity was not PERLB but the State of New Mexico, which follows direction from the governor and attorney general when deciding which unconstitutional laws not to enforce.

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VI. Exclusive Representation violates Hendrickson's rights to Free Speech and Freedom of Association.

AFSCME contends that it is entitled to continue speaking on behalf of Hendrickson despite his objection. ASFCME Opposition at 43. Hendrickson has already explained why AFSCME's argument is in error. *See* Hendrickson Br. at 44. AFSCME can point to no Tenth Circuit ruling on the issue, and this Court should follow the teaching of *Janus*. The State Defendants likewise deny that that New Mexico's recognition of ASFCME as Hendrickson's exclusive representative violates his First Amendment rights to speech and association. State Br. at 37

Defendants assert that exclusive representation serves the state's interest in "labor peace," an interest which the Supreme Court in *Janus* found insufficient to overcome First Amendment rights. See Hendrickson Br. at 46-47. This Court should follow the ruling in *Janus*. The State makes much of the fact that when the Supreme Court said it would "assume" for purposes of discussion that labor peace was a compelling state interest, it did not include the magic words "without deciding." State Br. at 39. But the context of the passage demonstrates that it is distinct from the State's counter examples. The State cites cases where the Supreme Court used the phrase "without deciding" because the Court was declining to address an unresolved issue that was tangential to the holding of the case. *Id.* But *Janus* was not addressing an unresolved question; it was overturning

an existing precedent, *Abood v. Detroit Board of Education*, 431 U.S. 20 (1977). *Abood* had held that agency fees could be justified by labor peace, and the Court in *Janus* was overturning that holding. *Janus*'s assumption was that *even if* labor peace were a compelling state interest, it would not be an interest sufficient to overcome First Amendment rights without the sort of further factual showing that the Appellees are unable to make in this case:

> We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood's* fears were unfounded…Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees.

Janus, 138 S. Ct. at 2465. If the Appellees wish to stand on the premise that the Supreme Court declined to overturned *Abood*'s claimed state interest, they must take the bitter with the sweet, and acknowledge that *Janus* makes clear that an invocation of "labor peace" must come with a showing that the interest cannot be achieved "through means significantly less restrictive of associational freedoms."

The Appellants also misapply *Janus'* discussion of the ways in which "designation as the exclusive representative confers many benefits." *Id.* at 2467. The "benefits" in question are benefits *to the union*. Hendrickson is perfectly willing to admit that exclusive representative status grants AFSCME many

benefits. Perhaps it also confers benefits on the government of New Mexico. Appellant's contention is that those benefits should not be conferred at the expense of his First Amendment rights. And while the opinion in *Janus* discussed exclusive representative status with the understanding that it still existed because it was not at issue in the case, it did not do so with approval. Instead, *Janus* explicitly disapproved of exclusive representation: "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460.

CONCLUSION

For the reasons stated above, and those stated in Appellant's Opening brief, Hendrickson respectfully requests that this Court reverse the decision below and affirm his rights to free speech and association.

STATEMENT REGARDING ORAL ARGUMENT

Counsel request oral argument. Counsel believe that this is a case that raises important legal questions before this Court for the first time and that this Court's disposition of the case would be aided by oral presentation to this Court.

Dated: August 17, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(g)

This brief contains 6,148 words, excluding the items exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Brian K. Kelsey
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August 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I electronically filed the forgoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF REDACTION

I hereby certify that this brief and appendix complies with the redaction requirements of 10th Cir. Rule 25.5 and that there is no unredacted private information in this filing.

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August 17, 2020

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I hereby certify that within five days of this filing, I will furnish this Court with hard copies of this brief and that the hard copies submitted to the Court will be exact copies of the versions submitted electronically.

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