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 OPENING BRIEF

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STATEMENT OF RELATED CASES

There have been no prior appeals in this case, and counsel is not aware of any related cases in this circuit.

INTRODUCTION

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court held that unions cannot collect money from government workers' paychecks without their affirmative consent. Plaintiff-Appellant Brett Hendrickson ("Hendrickson") notified his employer, the State of New Mexico, that it did not have his consent to deduct union dues from his paycheck. For months afterward, the State of New Mexico and Defendant-Appellant American Federation of State County and Municipal Employees, Council 18 ("AFSCME" or "the Union") worked jointly to continue to deduct union dues from Hendrickson against his will. Therefore, he brought this case to vindicate his First Amendment rights under *Janus* not to join or support a union and not to be forced to accept the representation of a union for bargaining purposes.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331 because this claim arose under the First Amendment to the Constitution and, therefore, presented a federal question, and the District Court had jurisdiction under 28 U.S.C. § 1343 because relief was sought under 42 U.S.C. § 1983.

On February 19, 2020, Hendrickson filed a timely Notice of Appeal (A013) from the District Court's January 22, 2020 Final Order (A015) disposing of all parties' claims pursuant to that court's January 22, 2020 Memorandum Opinion and Order (A017). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See also* Fed. R. App. P. 4(a)(4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1) Whether a union can trap a public worker into paying dues without the "affirmative consent" required by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

2) Whether a state law designating a public sector union as the exclusive representative for bargaining purposes violates the rights to Free Speech and Freedom of Association of an employee who is not a member of the union.

STATEMENT OF FACTS

Hendrickson has served as an employee of the New Mexico Human Services Department, a public employer, since 2001. Opinion Below at 3 (A019). At all times relevant to this appeal, he has been represented in that employment by AFSCME, the union certified as the exclusive representative of his bargaining unit, pursuant to N.M. Stat. Ann. § 10-7E-15(A). Opinion Below at 3 (A019). Prior to June 2018, that employment was subject to a binary choice: employees who were

members of Hendrickson's bargaining union were required to either 1) join AFSCME as union members or 2) pay an agency fee (sometimes called a "fair share" fee) to the union in lieu of membership. *Id.* at 4 (A020).

Hendrickson relied on this false choice, by which he would have had to pay the union either way, and he became a member of the union, signing membership agreements in 2004, 2007, and 2017. *Id*. The 2017 agreement, relevant to this appeal, included language stating that "this authorization shall be revocable only during the first two weeks of every December, or such other time as provided in the applicable collective-bargaining agreement." *Id.* Therefore, unless Hendrickson sent a written notice during an arbitrary two-week period set by the union, his employer would not honor any request to withdraw his authorization of membership dues. *Id.*

On June 27, 2018, the Supreme Court issued its decision in *Janus,* holding that the binary choice to which Hendrickson had been subjected was unconstitutional. *See* 138 S. Ct. at 2486. No longer faced with the unconstitutional choice between union dues and agency fees, Hendrickson notified his employer on August 9, 2018 that he wished to withdraw his membership authorization and end the dues deduction. Opinion Below at 4 (A020). But his attempt to assert his First Amendment right was denied. *Id.*

Therefore, Hendrickson filed this case in the District Court on November 30,

2019. *Id.* His First Amended Complaint names AFSCME, as well as New Mexico Governor Michelle Lujan Grisham ("Lujan Grisham"), in her official capacity as the public official ultimately responsible for the policies and practices of the New Mexico Human Services Department and State Personnel Office, and New Mexico Attorney General Hector Balderas ("Balderas"), in his official capacity as the public official responsible for enforcement of the challenged New Mexico statutes. The First Amended Complaint includes two counts: Count I challenged the refusal to allow Hendrickson to withdraw from the union and the deduction of dues from his paycheck without his affirmative consent. Count II challenged the Union's status as exclusive representative for bargaining purposes.

After the filing of this suit, the Union informed Hendrickson that it would process his resignation and stop taking further dues from him after the second pay period in December 2018. *Id.* at 5-6 (A021-022). Hendrickson's employer initially refused to honor the request because Hendrickson had not met the strict requirements imposed by his union agreement and the collective bargaining agreement. *Id.* at 6 (A022). Eventually, dues deduction ceased in January 2019, and the dues taken from Hendrickson in December and January were refunded. *Id.* Hendrickson has received no refund of any dues taken prior to December 2018.

On May 31, 2019, Hendrickson filed a Motion for Summary Judgment. District of New Mexico Docket Report for Case No. 18-CV-1119-RB-LF, Dkt. 33

(A044). The same day, AFSCME filed its own Motion for Summary Judgment, *Id.* at Dkt. 32, and the governor and attorney general filed a Motion to Dismiss, *Id.* at Dkt. 37. On January 22, 2020, the District Court issued its Opinion and accompanying Final Order, denying Hendrickson's motion and granting the motions of the Union and the governor and attorney general. *Id.* at Dkt. 62-63.

SUMMARY OF ARGUMENT

Government employees like Hendrickson have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so. *Janus*, 138 S. Ct. at 2486. The Supreme Court in *Janus* required such affirmative consent to be "freely given" through a "waiver" of First Amendment rights that must be shown by "clear and compelling" evidence. *Id*. The Supreme Court has also required that a "waiver" of a constitutional right must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). When he signed a union membership agreement prior to the *Janus* decision, Hendrickson could not have knowingly waived a right that the Supreme Court had not yet recognized. Later, in August 2018, Hendrickson explicitly told his employer that it did not have his affirmative consent to withhold union dues. Trapping Hendrickson in the union until an annual escape period and continuing to deduct union dues violated Hendrickson's rights to Free Speech and Freedom of Association under *Janus*.

Hendrickson and Appellees were both operating under a mutual mistake of law when they gave Hendrickson the unconstitutional choice between paying union dues as a member of the union or paying union agency fee as a non-member of the union. This Court has held that a subsequent U.S. Supreme Court decision abrogates an agreement in which both parties were mistaken as to one party's constitutional rights. *United States v. Bunner*, 134 F.3d 1000, 1002 (10th Cir. 1998). *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), is inapposite because, in that case, there was no subsequent U.S. Supreme Court decision affecting the waiver of constitutional rights. Another case with irrelevant facts to this case is *United States v. Brady*, 397 U.S. 742 (1970), in which a criminal defendant was held to his plea agreement. The Court held that a subsequent U.S. Supreme Court decision involving a different criminal charge did not change the fact that the defendant had admitted his criminal charge in open court.

Hendrickson is a proper party to bring this lawsuit because New Mexico refused to stop deducting union dues from his paycheck. Hendrickson has standing to seek a declaration that the New Mexico statute directing the state to follow the terms of the union membership agreement in deducting union dues from him was an unconstitutional violation of his First Amendment rights as applied to him. Hendrickson's claim for prospective relief is not moot because he has a right to receive a declaration that the statute was unconstitutional as applied to him.

Because the constitutional violation at issue in this case is a two-week escape window that occurs every year, the District Court ruling that the occurrence of the window moots the case would allow the Union and the state to constantly evade review of their unconstitutional actions.

Joint action between the state actors, Lujan Grisham and Balderas, and the Union to use the state payroll system to deduct dues from state-issued paychecks of state employees is the very definition of state action required for a suit brought under 42 U.S.C. § 1983. At least five recent cases with similar facts to this one have reached this conclusion, and this Court should follow their reasoning.[1]

Lujan Grisham is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908), because she is the head of New Mexico state government, for whom Hendrickson works and from whom his paychecks are issued. Balderas is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908), because he is responsible for defending New Mexico statutes directing the state to follow union agreements in deducting union dues from state paychecks and designating AFSCME as the

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[1] *See Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus II*"); *Grossman v. Haw. Gov't Emples. Ass'n/AFSCME Local 152*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866, at *17 n.10 (D. Haw. Jan. 31, 2020); *Hernandez v. AFSCME Cal.*, No. 2:18-CV-02419 WBS EFB, 2019 U.S. Dist. LEXIS 219379, at *16 (E.D. Cal. Dec. 19, 2019); *Laspina v. SEIU Pa. State Council*, No. 3:18-2018, 2019 U.S. Dist. LEXIS 168917, at *21 (M.D. Pa. Sep. 30, 2019); *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392, at *14 (C.D. Cal. Sep. 30, 2019).

exclusive representative for bargaining purposes for Hendrickson. This Court has upheld suing a governor and attorney general as the chief executive and chief legal officer, respectively, under *Ex parte Young*. *Petrella v. Brownback*, 697 F.3d 1285, 1293-94 (10th Cir. 2012).

The Union cannot rely on a "good faith" defense for violating Hendrickson's Free Speech and Freedom of Association rights because there is no element of bad intent in a First Amendment violation. Such a requirement would be antithetical to a Section 1983 claim, which was designed to challenge duly enacted laws like the ones Appellees rely on.

Finally, it is a violation of the First Amendment to force citizens to associate with organizations or causes with which they do not wish to associate. Yet New Mexico law grants public sector unions the power to speak on behalf of employees as their exclusive representative. N.M. Stat. Ann. § 10-7E-15. Pursuant to this law, the Union purports to act as the exclusive representative of Hendrickson. This compelled arrangement abridges his rights of speech and association. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) is inapposite to this lawsuit because it dealt with whether the government had to listen to individual employees, not whether a union could claim to be speaking for them.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the

same standards used by the district court. *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) "A party is entitled to summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Young v. UPS*, 135 S. Ct. 1338, 1367 (2015) (quoting Fed. Rule Civ. Proc. 56(a)). "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). Hendrickson and Appellees stipulated below that "there are no material facts in dispute, [and] that all the relevant questions are matters of law." Joint Status Report, District of New Mexico Case No. 18-CV-1119-RB-LF, Dkt. 27 at 2 (A069).

The Tenth Circuit reviews a district court's ruling on a motion to dismiss *de novo*. *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1194 (10th Cir. 2008). To survive a motion to dismiss, Hendrickson need only state in his First Amended Complaint "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). He should prevail, provided his First Amended Complaint demonstrates something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. Trapping workers in the Union is incompatible with the affirmative consent required to deduct union dues by *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

Government employees have a First Amendment right not to join or make "any other payment to the union . . . unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486. Hendrickson's attempt to assert this right was denied.

A. *Janus* requires clear and convincing evidence of a voluntary, knowing, and intelligent waiver to prove affirmative consent.

Supreme Court precedent provides that certain standards be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Finally, the Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

In Hendrickson's case, he could not have waived his First Amendment right not to join or pay a union. First, at the time he signed his union membership application, he did not know about his right to pay nothing to the Union because

the Supreme Court had not yet issued its decision in *Janus.* Second, he could not have voluntarily, knowingly, or intelligently waived his right not to join or pay a union because neither the Union nor the State of New Mexico informed him he had a right not to join the union at all. Therefore, Hendrickson had no choice but to pay the Union, and he did not voluntarily waive his First Amendment right.

Because the Supreme Court does "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.*, 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence" that employees wish to waive their First Amendment rights not to pay union dues or fees. *Janus,* 138 S. Ct. at 2484. In addition, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) *(citing Aetna Ins. Co. v. Kennedy ex rel. Bogash,* 301 U.S. 389,393 (1937)).

The union applications Hendrickson signed did not provide a clear and compelling waiver of his First Amendment right not to join or pay a union because it did not expressly state that he had a constitutional right to pay nothing to the Union and because it did not expressly state that he was waiving that right.

After the decision in *Janus,* the Union maintained that Hendrickson could only withdraw his dues deduction during an arbitrary window of time of the Union's choice, despite Hendrickson's request to be removed from the union rolls

and to stop the deduction of dues from his paychecks.

The invalid union dues authorization applications signed by Hendrickson before the Supreme Court's decision in *Janus* cannot meet the standards set forth for waiving a constitutional right, as required by the Supreme Court in *Janus;* therefore, the Union cannot hold employees to the windows to withdraw their union membership set forth in the union applications.

Since he was apprised of his constitutional rights by the *Janus* decision, Hendrickson has not signed any additional union authorization applications. Therefore, Hendrickson has never been given his constitutional right to pay nothing to the union, and he has never given the Union the "affirmative consent" required by the *Janus* decision.

Hendrickson has a clearly established right not to support the Union, and he has not waived that right. This Court should find that there was no valid waiver of his rights under *Janus*.

B. Under the law of this circuit, a subsequent U.S. Supreme Court decision abrogates an agreement in which both parties were mistaken as to one party's constitutional rights.

For over 100 years, the Supreme Court has recognized that a contract based upon a mutual mistake is voidable by one of the parties upon discovery of the mistake: "It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or

accurately express the agreement and intention of the parties." *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389, 38 S. Ct. 513, 514 (1918). Here, Hendrickson discovered the mistake that agency fees were constitutional when the Supreme Court ruled otherwise in *Janus*. He then requested out of the contract, but the assertion of his First Amendment right was denied.

New Mexico law comports with this long history of voiding contracts for mutual mistake:

> The Supreme Court of New Mexico has also suggested that, under certain circumstances, a party might be able to "avoid" or "rescind" a contract "'[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances.'"

City of Raton v. Ark. River Power Auth., 611 F. Supp. 2d 1190, 1198 (D.N.M. 2008) (citing *State ex rel. State Highway and Transp. Dept. v. Garley*, 111 N.M. 383, 385, 806 P.2d 32, 34 (1991) (quoting Restatement (Second) of Contracts § 152 (1979)).

This Court recognizes that a change in law caused by a U.S. Supreme Court decision constitutes a material effect on the agreed exchange of performances when one of the choices for performance is found to be unconstitutional. *United States v. Bunner*, 134 F.3d 1000, 1002 (10th Cir. 1998). In *Bunner*, the prosecution chose to offer a plea deal to a criminal defendant: he could plead guilty to one

crime or take his chance at trial of being found guilty of three additional charges. He chose to enter an agreement pleading guilty to the one crime. Later, as in Hendrickson's case, a new Supreme Court case clarified the law. *Id.* at 1005. The Supreme Court ruled that the defendant's actions no longer constituted the crime to which he had pled. This Court ruled that the intervening Supreme Court decision so materially changed the nature of the agreement between the parties that performance of the contract was no longer required, and all options were back on the table. The defendant could void his conviction, but the prosecution could likewise now charge him for the other three counts it had forgone. Similarly, the Supreme Court has now given Hendrickson the constitutional option to pay nothing to the Union, and that is the option which he requests this Court to recognize. Moreover, it is not just an option, it is his constitutional right.

Instead, the district court relied on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), for the proposition that Hendrickson properly waived his First Amendment right. *Cohen* is inapposite because it involves an agreement between two private parties with equal bargaining position and with no enforcement mechanism by the government, as exists in this case. In *Cohen* newspaper reporters agreed with their source not to reveal the identity of the source. 501 U.S. at 665-66. Having made that agreement, their editors then changed their minds and published the identity of the source anyway. *Id*. at 666. When sued, the newspaper attempted

to cover its tracks by invoking the First Amendment. *Id*. The district court invoked *Cohen* to prove that parties can waive their Free Speech rights in a private agreement. Hendrickson does not deny this conclusion, which is consistent with *Janus*. The question before this Court is how and under what circumstances can such a waiver be given. *Cohen* involved an arms-length agreement between two private parties with equal bargaining positions.

The Supreme Court in *Janus* set a different standard for "employees." Employees are presented by unions with an adhesion contract, the terms of which they cannot negotiate. They are often, as in the case of Hendrickson, presented this contract on their jobsite, and the contract itself is enforced by their employer, who collects their dues. Such employer enforcement implies tacit approval of the terms of the agreement from a party who has tremendous power over workers—including the power to hire and fire them. This atmosphere presents a power imbalance that is totally foreign to the arms-length transaction in *Cohen*. In the public employee union context, the Supreme Court has prescribed a heightened standard for waiving one's constitutional rights: such a waiver "cannot be presumed. Rather, to be effective the waiver must be freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486.

Here, no clear and compelling evidence exists because, unlike in *Cohen*, Hendrickson did not know of the right the Union claims he was waiving: to pay

nothing at all to the Union. On the other hand, the First Amendment rights of newspapers were long established when *Cohen* was decided in 1991. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971). There was no intervening change in the law that recognized a new right of newspapers between when the promise was made and when the case was decided. In this case, by contrast, an intervening Supreme Court decision has clarified that Hendrickson signed his authorization subject to an unconstitutional choice between paying dues to the Union or paying agency fees to the Union.

Another case upon which the district court below relied is *United States v. Brady*, 397 U.S. 742 (1970), in which a criminal defendant was held to his plea agreement. In that case, the defendant pled guilty to kidnapping and was sentenced to fifty years' imprisonment. 397 U.S. at 743-44. He waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id*. at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id*. at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication: "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Id*. at 748. The finality of judgments is not something a court undermines lightly, and the Supreme Court determined it could "see no reason on this record to disturb the judgment of those

courts [who entered judgment against the defendant]." *Id.* at 749. There is nothing like that in this case. Hendrickson does not ask that this Court find its way around *res judicata*-- only that it find an alleged contract between the parties unenforceable.

II. Hendrickson is a proper party to bring this lawsuit because he was denied his First Amendment right to withdraw his affirmative consent to have union dues taken from his paycheck.

A. Hendrickson has standing to seek a declaration that N.M. Stat. Ann. § 10-7E-17(C) was used to violate his First Amendment rights.

The District Court held that Hendrickson could not seek a declaration that N.M. Stat. Ann. § 10-7E-17(C) violated his First Amendment rights because such a declaration "would affect the rights of others." Opinion Below at 7 (A023). But Hendrickson did not ask for the court to affect the rights of others, nor could he. Rather, Hendrickson requests a declaration that the escape window policy was unconstitutional *as applied to him*. In order to make such a declaration, a court would need to make a legal judgment about whether or not the policy is constitutional. The relevant sentence of the statute reads as follows:

> 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).[2]

It may be that the practical effect of *stare decisis* or preclusion principles means that declaring the statute unconstitutional would force Appellees to change policies in ways that affect the rights of others, but this is true of any judicial decision regarding a constitutional right. For example, in *United States v. Windsor*, 570 U.S. 744 (2013), the Supreme Court's jurisdiction was over the plaintiff, who had a specific claim for a refund of taxes. The legal principle announced in that case meant that Section 3 of the Defense of Marriage Act was unenforceable. Similarly, Hendrickson concedes he has standing to assert only his own rights, but that means he still has standing to ask for a declaration of what those rights are.

B. Hendrickson's claim for prospective relief is not moot, and the District Court opinion would allow the Union to evade review.

For months, Hendrickson was denied his constitutional right to withdraw consent for union dues deductions. Yet the District Court allowed Appellees to

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[2] On March 5, 2020, after the District Court issued its opinion in this case and before the filing of this brief, New Mexico enacted House Bill 364, which will take effect July 1, 2020. *See* 2020 N.M. ALS 48. The new version of § 10-7E-17 will move this relevant sentence from subsection (C) to subsection (D). It will also insert the words, "and this subsection" after "negotiated agreement" and go on to impose even stricter requirements on top of those requirements Hendrickson was subjected to. For purposes of this brief, Hendrickson refers to the subsection as "(C)" rather than "(D)" because that is where the relevant sentence was located at the time that Hendrickson's rights were violated, at the time the District Court issued its opinion, and at the time of the filing of this brief. Opinion Below at 3 (A019).

avoid judicial scrutiny by ruling that the occurrence of the annual escape window made Hendrickson's claim moot. This Court should not allow Appellees' constitutional violations to evade jurisdiction of the Court.

AFSCME, Lujan Grisham, and Balderas continue to enforce the unconstitutional escape window policy against any employee who is not determined enough to sue. For those, like Hendrickson, who do sue, it is almost inevitable that the annual escape window will occur prior to the conclusion of the lawsuit, and it certainly will occur before the case is decided by this Court.

Unions across the country have attempted to avoid judicial review of their unconstitutional policies by dodging lawsuits from employees that challenge their practices. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it would "instruct the State to end dues deductions for each Plaintiff on the one year anniversary" of their membership without requiring employees to send the notice their policy required). This Court should not allow the Union to avoid judicial review by picking off employees one by one. 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)). Yet that is precisely what the Union would like the Court to allow in this case. Hendrickson

respectfully submits that this Court should not countenance such gamesmanship.

This Court should join the Ninth Circuit in rejecting the exact same mootness argument that the District Court allowed in this case. As the Ninth Circuit explained,

> 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. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three years is "too short to allow for full judicial review." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

Fisk v. Inslee, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2-3 (9th Cir. Dec. 17, 2018). The Ninth Circuit recognized that claims like Hendrickson's would never be addressed by the court if the Union were allowed to moot them in this way.

The fact that *Fisk* was filed as a class action is irrelevant because the Ninth Circuit's reasoning occurred prior to certification of the class.[3] The proposed class

[3] The Ninth Circuit ultimately dismissed the case because of defective pleading that had failed to make the arguments in the district court that Hendrickson now

could not have been the basis for the ruling since "a class lacks independent status until certified." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Absent class certification, collective actions only survive the mooting of the named plaintiff's claim if a new named plaintiff joins the case in the named plaintiff's place. *See Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 73 (2013) ("In the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action").

Such avoidance tactics are not new; they are a typical and longstanding strategy by unions to avoid judicial scrutiny. In *Knox v. SEIU*, Local 1000, 567 U.S. 298 (2012), the Supreme Court rejected an attempt by the union to moot a case by sending a full refund of improperly exacted dues to an entire class:

> In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v.*

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presents to this Court. The circuit court found such arguments had been waived. *Id.* at *3.

> *Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Knox, 567 U.S. at 307. As in *Knox*, here the Union continues to assert the legality of its escape window policy but wishes to avoid this Court determining its legality. Unlike in *Knox*, the Union only managed to secure a refund from Lujan Grisham for dues that were taken from Hendrickson after December 2018. Hendrickson's claim is for all dues deducted since he became a union member more than ten years ago. First Amended Complaint ¶ 61 (A080). Even if this Court were to determine this claim is limited to the statute of limitations, that would amount to three years worth of dues. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (New Mexico's Statute of Limitations for §1983 claims is three years.).

These principles of law are not novel or unique to this case: it is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion.

The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire*, 416 U.S. at 125. The escape window that Hendrickson was subjected to is a policy of the State of New Mexico, embodied in an agreement it negotiated with the Union. It is so much the policy of Lujan Grisham that she initially continued Hendrickson's dues deductions even after the Union had told her to stop. FAC ¶ 38 (A079). This policy continues to impact present interests, as Lujan Grisham, the Union, and Balderas continue to enforce it and assert its legality. This continuing direct effect on the behavior of public employees is grounds for this Court's issuance of declaratory relief.

III. Joint action between the Union and state officials taking money from the paycheck of a state employee constitutes state action under 42 U.S.C. § 1983.

The District Court below mistakenly held that actions taken by state officers pursuant to a state statute do not constitute state action. Opinion Below at 13-16 (A029-032). When state employers use the state payroll system to deduct dues from state-issued paychecks of state employees, that is the very definition of state action required for a suit brought under 42 U.S.C. § 1983.

Among the tests for state action, joint action occurs "where there is a substantial degree of cooperative action between state and private officials or if

there is overt and significant state participation in the deprivation of a plaintiff's constitutional rights." *Schaffer v. Salt Lake City Corp.,* 814 F.3d 1151, 1157 (10th Cir. 2016) (internal quotation marks omitted). In this case, the government has overtly and significantly participated in deducting dues from Hendrickson's paychecks, and the Union has cooperated in the action by accepting the money. The state and the union sat down together and negotiated the contractual terms by which they would take members' dues, and the state carried out the union's instruction.

The escape window time limitations that AFSCME is enforcing are asserted pursuant to state statutes that expressly grant AFSCME this special privilege. New Mexico law requires that state employers "shall honor payroll deductions until the authorization is revoked in writing . . . in accordance with the negotiated agreement . . . ." N.M. Stat. Ann. § 10-7E-17(C). This statute dictates the manner by which the state acts towards employees, establishing "joint action" between the state and the Union that the District Court failed to recognize.

Other recent courts to consider the issue have disagreed with the District Court's opinion in this case. The Seventh Circuit found the deduction of union moneys to constitute state action. It recently issued its second decision in the case of *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus II*). In that decision, part of the ongoing post-Supreme Court litigation in the *Janus* case itself,

the issue was whether Janus could recover the agency fees that had been taken from him against his will. The Seventh Circuit held that the union had acted jointly with the state in deducting money from Janus: "[I]f AFSCME's receipt . . . of the fair-share fees is attributable to the state, then the 'color of law' requirement is satisfied." *Id*. at 361. The Seventh Circuit went on to quote *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988): "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Janus II* at 361.

The District of Hawaii recently came to the same conclusion of state action in a case identical to the one at hand. See *Grossman v. Haw. Gov't Emples. Ass'n/AFSCME Local 152*, No. 18-cv-00493-DKW-RT, 2020 U.S. Dist. LEXIS 17866, at *17 n.10 (D. Haw. Jan. 31, 2020). Like Hendrickson, Grossman involved a plaintiff being denied from withdrawing consent to have union dues deducted from her paycheck. The court found that state action gave it jurisdiction over the claim: "The Court notes that the 'under color of law' or 'state action' requirement of 42 U.S.C. Section 1983 is far more expansive than [the union] would have it." *Id*. The court noted, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id*., citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961). It further refused defendants' attempts to distinguish *Janus II*:

> Here, [the state] deducted fair-share fees from Grossman's paychecks and transferred that money to [the union] pursuant to Hawaii statute and a collective bargaining agreement. While Grossman initially had voluntarily agreed to pay these dues prior to *Janus*, the dues deducted after she sent her membership resignation letter were no longer voluntary or made pursuant to a "private" agreement. As such, *Janus II* is not inapposite merely because the case involved claims by nonmembers. 942 F.3d at 361. The dispositive fact is [the union] obtained Grossman's post-resignation dues (after she was effectively a nonmember), and that was made possible only because of [the union's] joint action with the State and its statutory regime. Therefore, [the union] is a proper defendant under Section 1983.

Grossman at *17 n.10 (citations omitted). The Eastern District of California, likewise, held that a claim such as Hendrickson's establishes state action:

> Because the state had to act for the deprivation to occur, defendants' argument that the deprivation resulted from decisions made by only the unions does not apply. In the union context, "actions taken pursuant to the organization's own internal governing rules and regulations are not state actions." *Hallinan v. Fraternal Order of Police of Chicago*, 570 F.3d 811, 817 (7th Cir. 2009) (finding that a union's decision to bar plaintiffs from membership was not state action). By contrast, where the union was "acting in concert . . . with the [state]" or "with powers delegated to it by the [state] or state law," the union's action is state action. *Id.*

Hernandez v. AFSCME Cal., No. 2:18-CV-02419 WBS EFB, 2019 U.S. Dist. LEXIS 219379, at *16 (E.D. Cal. Dec. 19, 2019). The Middle District of Pennsylvania and Central District of California have also recognized state action in circumstances such as Hendrickson's. *Laspina v. SEIU Pa. State Council*, No. 3:18-2018, 2019 U.S. Dist. LEXIS 168917, at *21 (M.D. Pa. Sep. 30, 2019); *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019

U.S. Dist. LEXIS 208392, at *14 (C.D. Cal. Sep. 30, 2019).

The court below mistakenly found that the conduct complained of in this case is not attributable to the state because it arises out of private agreements between private parties. But the fact of this case is that the state continued to deduct union dues from Hendrickson after he had requested to the state that they be stopped. State officials followed and continue to enforce N.M. Stat. Ann. § 10-7E-17(C), which directs the state to defer to the union rather than their employees when determining whether to take money from employees' paychecks.

The Supreme Court has gone much further to impart state action to unions in cases of unconstitutional dues deductions. This Court need look no further than the *Janus* decision itself, in which AFSCME did not question that the deduction of union fees constituted state action. An even more extreme example is the case of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), which held that a private debt collector's actions constituted state action under § 1983. In that case, the Court also struck down an unconstitutional state statute because the private parties "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 934. In the present case, AFSCME also invoked the aid of state officials to take advantage of a state statutory scheme to withdraw these dues. State actors carrying out these state statutes constitutes state action under § 1983, and the question of whether such action is constitutional is properly before this Court.

Allowing the District Court position on state action to stand would place this Court in conflict with a host of Supreme Court decisions on the subject. In *Knox v. SEIU*, union exactions were held to be a First Amendment violation with requisite state action. 567 U.S. 298, 315 (2012). Likewise, union accounting of chargeable and non-chargeable expenses from state employees amounted to state action. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). The District Court opinion would even mean that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977), which *Janus* overturned, was likewise a mistake, because there could be no First Amendment question presented to the Court if the union exaction had not constituted state action. Hendrickson humbly submits that this Court should find that decades of Supreme Court cases applying First Amendment standards to public sector unions were not in error. This Court should, therefore, reverse the District Court's holding that the conduct complained of in this case does not constitute state action.

IV. Governor Lujan Grisham is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908), because she is responsible for issuing paychecks to state workers like Hendrickson, and Attorney General Balderas is proper because he is responsible for enforcing N.M. Stat. Ann. §§ 10-7E-17(C) and 10-7E-15.

Governor Lujan Grisham is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908), because she is the head of New Mexico state government, for whom Hendrickson works and from whom his paychecks are issued. In this case,

the actions of two executive branch agencies are at issue, and the governor is the only public official who has responsibility for both of them. First, the New Mexico Human Services department is Hendrickson's employer and determines his bargaining unit covered by the AFSCME collective bargaining agreement with the state. The ultimate superior who directs Hendrickson's actions as an employee is the governor. Second, the State Personnel Office issues Hendrickson's paycheck. This is the office that e-mailed Hendrickson they could not stop his dues deduction based on his word but must follow the collective bargaining agreement. FAC ¶ 61 (A080). All employees of these two departments answer to the governor, and there is no other single person to whom they all answer. Therefore, she is the correct defendant to sue under *Ex parte Young*.

Attorney General Balderas is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908), because he is responsible for defending the two New Mexico statutes at issue in the case. N.M. Stat. Ann. § 10-7E-17(C) directed the state to follow the Union agreement in deducting dues from Hendrickson's paychecks. N.M. Stat. Ann. § 10-7E-15 grants AFSCME the status of exclusive representative for bargaining purposes for Hendrickson. Because Balderas is responsible for defending the constitutionality of these two statutes, he is a proper defendant under *Ex Parte Young*.

The District Court accepted the arguments of Lujan Grisham and Balderas

(the "State Defendants") that they are not proper parties under *Ex Parte Young* for two reasons: 1) they do not handle these matters day-to-day and 2) there is a separate labor board in New Mexico that regulates labor relations, the Public Employee Labor Relations Board ("PERLB"). Opinion Below at 23-26 (A039-042). But the question in this case is not whether the PELRB is properly interpreting New Mexico labor law. Hendrickson presumes that it is. The question is whether those laws violate Hendrickson's federal constitutional rights enumerated in the *Janus* decision. PERLB is irrelevant to that question, and PERLB took no actions against Hendrickson to deduct union dues from his paycheck.

In regards to day-to-day duties, the governor is the public official that oversees the departments of the state which entered into contracts with ASFCME to withhold union dues. And the attorney general is the public official who defends the constitutionality of state laws.

In support of their argument regarding duties, the State Defendants could muster from this Court only one unpublished case. *Bishop v. Okla.*, 333 Fed. Appx. 361 (10th Cir. Unpublished Opinion June 5, 2009). *Bishop* held that the governor of Oklahoma was not the proper party in a same-sex marriage case because marriage licenses were given out by clerks of the district court. It may well be that a governor is not a proper party when the relevant actions are being taken by an

entirely separate branch of government, the judiciary, but here the relevant conduct is that of two executive branch departments.

In far more analogous cases, this Court has issued published opinions in which it agreed there was subject matter jurisdiction over high ranking government officials for the enforcement of state policies. For instance, another same-sex marriage case, *Kitchen v. Herbert*, 755 F.3d 1193, 1202 (10th Cir. 2014), held that in Utah, where county clerks rather than court clerks issue marriage licenses, the governor and attorney general were the proper parties to defend state marriage laws. Similarly, in *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 896 (10th Cir. 2017), this Court agreed that the district court had subject matter jurisdiction in a suit against the governor of Colorado to challenge Colorado's Amendment 64, which had legalized recreational marijuana. In that case, the governor even had no discretion whether or not to adhere to the state constitutional amendment; nonetheless, he was found to be a proper party under *Ex Parte Young* because he was ultimately responsible for the policies implemented by the state.

Perhaps the clearest response to the State Defendants' contention comes from this Court's opinion 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.

Petrella made this observation in the context of a challenge to Kansas' school funding formula, where the plaintiffs claimed *the legislature* had failed to provide proper school funding in violation of the state constitution. *Id.* at 1289. The governor and attorney general were not the actors who determined school funding, but they were, nonetheless, the proper defendants under *Ex Parte Young*.

Moreover, in the Supreme Court case *Harris v. Quinn*, 573 U.S. 616, 626 (2014), the governor of Illinois was the proper party sued regarding Illinois' policy of deducting agency fees from home healthcare workers and remitting them to the union.

Each of the above cases is much more analogous to the present case than the State Defendants' unpublished opinion holding Oklahoma's governor was not responsible for the actions of Oklahoma's judiciary. This Court should follow its own precedence and find that the governor and attorney general are proper parties under *Ex Parte Young.*

V. The Tenth Circuit has never recognized a "good faith" defense to a Section 1983 claim, and the District Court erred in using it to prevent the Union from returning dues and fees taken before *Janus*.

Unlike other circuits, this Court has never recognized a "good faith" defense

to a Section 1983 claim. Therefore, this Court should decline to extend such a recognition, as several other circuits have done recently and as the District Court did, to cases like this one in which the union raises a "good faith" defense to liability for pre-*Janus* dues.

A. A "good faith" defense conflicts with the text and purpose of Section 1983.

The District Court allowed the Union to rely on a "good faith" defense to keep money taken from Hendrickson prior to the issuance of the *Janus* decision because the Union was relying on existing New Mexico statutes and Supreme Court precedent at the time when it gave Hendrickson the unconstitutional choice between paying the Union membership dues or paying the Union agency fees. Opinion Below at 16 (A032). But this Court has never granted this defense to a private party in a Section 1983 action because it has no basis in the text, purpose, or equitable principles of the statute.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or

> omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. Section 1983 means what it says: "[u]nder the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

A "good faith" or statutory reliance defense to Section 1983 cannot be reconciled with the statute's mandate that "every person"—not some persons, but "every person"—who deprives a party of constitutional rights under color of law "shall be liable to the party injured in an action at law . . . ." The term "shall" is not a permissive term, but a mandatory one.

Further, the "good faith" defense actually conflicts with Section 1983 in at least two ways. First, Section 1983 "contains no independent state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). A "good faith" defense would require penciling into Section 1983 a state-of-mind requirement absent from its text, in defiance of *Daniels*. Second, an element of Section 1983 is that a defendant must act "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. The District Court declared a statutory *element* of Section 1983 to be a *defense* to Section 1983.

Other recognized immunities or defenses to Section 1983 do have a statutory basis. Courts "do not have a license to create immunities based solely on [the court's] view of sound policy." *Rehberg v. Paulk*, 566 U.S. at 363. Courts accord an immunity only when a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine' when it enacted Section 1983." *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (citation omitted). Here, "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364.[4] The *Wyatt* Court held the policy reasons that justify immunities generally also are not applicable to private defendants. *Wyatt v. Cole*, 504 U.S. 158, 165-167 (1992).

B. The U.S. Supreme Court in *Wyatt* and early decisions of other circuit courts raised the possibility of a "good faith" defense for Section 1983 claims only for certain constitutional deprivations not at issue here.

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[4] *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 49 (2018) (concluding "[t]here was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (Justice Marshall rejecting a "good faith" defense: "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."); *Anderson v. Myers*, 238 U.S. 368, 378 (1915) (rejecting "good faith" defense).

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The elements and defenses material to different constitutional and statutory deprivations vary considerably. "In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts." *Manuel v. City of Joliet, Ill*., 137 S.Ct. 911, 920 (2017). "Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id*. "But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Id*. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)).

The issue in *Wyatt* was whether a private defendant who used an *ex parte* replevin statute to seize the plaintiff's property without due process of law was entitled to qualified immunity to Section 1983. 504 U.S. at 161. The Court recognized that the plaintiffs' claims were analogous to "malicious prosecution and abuse of process," and that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id*. at 164–65; *see id*. at 172–73 (Kennedy. J., concurring) (similar).

The *Wyatt* Court determined that "[e]ven if there were sufficient common

law support to conclude that respondents . . . should be entitled to a good faith *defense*, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id*. at 165. The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id*. at 167. *Wyatt* left open the question of whether the defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id*. at 168–69; see *Richardson*, 521 U.S. at 413 (recognizing that "*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense.").

Contrary to the conclusions of the lower court and some other courts, the defense the Justices' were suggesting in *Wyatt* was not a broad, statutory reliance defense to all Section 1983 damages claims. Rather, the Justices were referring to a defense to the malice and probable cause elements of claims arising from malicious prosecution and abuses of court processes. This is clear from all three opinions in *Wyatt*.

Chief Justice Rehnquist explained it was a "misnomer" to describe it as a good faith "defense" because "under the common law, it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice and without probable cause." *Id*. at 176 n.1. "Referring to the defendant as having a

good faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id*.

Justice Kennedy, in his concurring opinion joined by Justice Scalia, agreed that "it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." 504 U.S. at 172. Justice Kennedy further explained that "if the plaintiff could prove subjective bad faith on the part of the defendant, he had gone far towards proving both malice and lack of probable cause." *Id*. at 173. Indeed, often "lack of probable cause can *only* be shown through proof of subjective bad faith." *Id*. at 174 (emphasis in original) (citing *Birdsall v. Smith*, 122 N.W. 626 (Mich. 1909) (holding that a plaintiff alleging malicious prosecution failed to prove the prosecution lacked probable cause)).

Justice O'Connor's majority opinion in *Wyatt* recognized that the dissenting and concurring opinions were referring to a defense to the malice and probable cause elements of claims analogous to a malicious prosecution case. The majority opinion found that "[o]ne could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs *bringing an analogous suit* under § 1983 should be required to make a similar

showing to sustain a § 1983 cause of action." 504 U.S. at 167 n.2 (emphasis added).

In the wake of *Wyatt*, some circuit courts recognized that the "good faith" defense suggested in *Wyatt* was equivalent to the malice and probable cause elements of certain constitutional claims.[5] However, this Court did not do so and is not saddled with the task of distinguishing such cases because they dealt with claims with elements of malice and probable cause. The "good faith" defense recognized by the District Court has no antecedent in this Court's case law.

C. This Court should decline to recognize the new "good faith" defense that other circuits have recognized.

Other circuit courts have recently found that "fairness" to defendants that rely on laws later held invalid justified recognizing a "good faith" defense. *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Janus v. AFSCME, Council 31*, 942 F.3d 365 (7th Cir. Nov. 5, 2019) ("*Janus II*"); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 392 n.2 (6th Cir. 2020); *Wholean v. CSEA SEIU Local 2001*, No. 19-1563-cv, 2020 U.S. App. LEXIS 11864, at *2 (2d Cir. Apr. 15, 2020) . That rationale is inadequate on its own terms. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so.

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[5] *See Wyatt v. Cole*, 994 F.2d 1113, 1119–21 (5th Cir. 1993) (*Wyatt II*); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1256 (3d Cir. 1994) ; *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

"As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). "[I]n our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

Here, Congress mandated in Section 1983 that "every person who, under color of any statute" deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . . ." Courts cannot refuse to enforce this statutory command against defendants who acted pursuant to then-valid statutes because it would supposedly be unfair to those defendants. "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

Fairness to *victims* of constitutional deprivations supports enforcing Section 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 Section 1983. The Court's equitable justifications for so holding are equally applicable here.

Other circuits found that principles of equality justify extending to private defendants a defense similar to the immunity enjoyed by some public defendants. *Danielson*, 945 F.3d, 1101.[6] That makes little sense. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for qualified immunity.

Individual public servants enjoy qualified immunity for reasons not applicable to AFSCME and most other private entities: to ensure that the threat of personal liability does not dissuade individuals from acting as public servants. *See Wyatt*, 504 U.S. at 168. The fact that this interest does not apply to AFSCME is not grounds for creating an equivalent defense for the Union. "Fairness alone is not . . . a sufficient reason for the immunity defense, and thus does not justify its extension to private parties." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.13 (1998).

In any event, AFSCME still would not be entitled to a defense to paying damages under Section 1983, even if it were treated like its most equivalent government counterpart. A large organization like the Union is nothing like

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[6] *See also Janus II*, 942 F.3d at 366; *Lee*, 951 F.3d at 392 n.2; *Wholean*, 2020 U.S. App. LEXIS 11864, at *2

individual persons who enjoy qualified immunity. AFSCME is most akin to governmental bodies that lack qualified immunity, namely municipalities. *Owen*, 445 U.S. at 654.

Beyond their misunderstanding of fairness principles, other circuits failed to distinguish that, unlike in claims arising from abuses of judicial processes, malice and lack of probable cause are not elements of, or a defense to, a First Amendment deprivation. In general, "free speech violations do not require specific intent." *OSU Student All. v. Ray*, 699 F.3d 1053, 1074 (9th Cir. 2012). In particular, a compelled speech violation does not require any specific intent. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial. Good faith simply is not a defense to a union fee seizure under *Janus*.

Wyatt instructs courts to "look to the most closely analogous torts" to determine the elements or defenses to constitutional claims under Section 1983. *Wyatt*, 504 U.S. at 164. Other circuits missed the point when tersely declaring—after finding common law analogies *not* to be controlling—that abuse of process is the most analogous tort. *See Danielson*, 945 F.3d at 1102; *Janus II*, 942 F.3d at 366; *Lee*, 951 F.3d at 392 n.2; *Wholean*,2020 U.S. App. LEXIS 11864, at *2.[7]

[7] A subsequent Sixth Circuit panel in *Ogle v. OCSEA*, 2020 WL 1057389, at *2 (6th Cir. Mar. 5, 2020) was bound by Lee's holding on that point. The Ogle panel's

Even if that were accurate, it has no significance unless it means that the tort's malice and probable cause elements are now elements of Section 1983 claims for compelled subsidization of speech. Tellingly, the courts in *Danielson*, *Janus II*, *Lee*, and *Wholean* did not go that far. Nor could they do so without defying *Janus*.

The Seventh and Ninth Circuits admitted "'[n]one of these torts is a perfect fit.'" *Danielson*, 945 F.3d at 1102 n.5 (quoting *Janus II*, 942 F.3d at 365).[8] The courts, however, erroneously believed "'they need not be,'" *id*., because courts supposedly "are directed to find the most *analogous* tort, not the exact-match tort," *Janus II*, 942 F.3d at 365. That is not correct. "In *Heck* the Supreme Court said that the common law of torts was the starting point, not the only consideration, in analyzing a claim under § 1983." *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000). The Supreme Court reiterated that point in *Manuel*, and that "'§ 1983 is not simply a federalized amalgamation of pre-existing common-law claims.'" 137 S. Ct. at 920-21 (quoting *Rehberg v. Paulk*, 566 U.S. at 356, 366 (2012)). Unless malice and probable cause are to be made elements of a Section 1983 claim for compelled subsidization of speech—which would defy *Janus*—it makes no difference

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attempt to square *Lee* with *Wyatt* fails for the reasons stated here: irrespective of what tort is most analogous, what matters is that malice and lack of probable cause are simply not elements of a First Amendment claim under *Janus*.

[8] The Seventh Circuit also acknowledged "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Janus II*, 942 F.3d at 364.

whether abuse of process, or any other tort, happen to be the most analogous tort to the claim here.

Hendrickson's First Amendment compelled-speech claim has no common law analogue. The Supreme Court explained that "[c]ompelling a person to subsidize the speech of other private speakers" violates the First Amendment because it undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. This injury is unlike that caused by common law torts. It is peculiar to the First Amendment, which AFSCME violated. Thus, AFSCME lacks a cognizable basis for asserting a "good faith" defense.

VI. The Union's status as exclusive representative for bargaining purposes violates Hendrickson's right to Free Speech and Freedom of Association.

A. Exclusive Representation is not justified by a compelling state interest.

Under N.M. Stat. Ann. § 10-7E-15, "A labor organization that has been certified . . . shall be the exclusive representative of all public employees in the appropriate bargaining unit . . . [and] shall act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit." New Mexico's designating AFSCME as Hendrickson's exclusive representative for bargaining

purposes, pursuant to this statute, violates Hendrickson's rights to Free Speech and Freedom of Association for the following reasons.

Under N.M. Stat. Ann. § 10-7E-17(A)(1), as a condition of his employment, Hendrickson must allow the Union to speak on his behalf on "wages [and] hours," matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. This compelled association raises serious First Amendment concerns. *Janus*, 138 S. Ct. at 2464 (whenever "a State . . . compels [individuals] to voice ideas with which they disagree, it undermines" First Amendment values). New Mexico law goes further, granting the Union prerogatives to speak on Hendrickson's behalf on all manner of contentious matters. For example, the Union is entitled to speak on Hendrickson's behalf regarding the grievance procedure Hendrickson has to navigate to settle disputes with his employer. N.M. Stat. Ann. § 10-7E-17(F). It may even take a position directly contrary to Hendrickson's best interest in negotiating his salary or other terms of his employment. N.M. Stat. Ann. § 10-7E-17(A)(1). These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467.

Unions in other states agree with Hendrickson on this point. In Illinois, the International Union of Operating Engineers, Local 150, AFL-CIO brought a lawsuit against the State of Illinois precisely because they did not want to speak as the exclusive representative of non-union members: "[P]laintiffs assert that they,

and therefore their membership, will be compelled to speak on behalf of non-members, infringing on their First Amendment rights." *Sweeney v. Madigan*, No. 18-cv-1362, 2019 U.S. Dist. LEXIS 19389, at *6 (N.D. Ill. Feb. 6, 2019).

Legally compelling Hendrickson to associate with the Union demeans his First Amendment rights. Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). New Mexico laws command Hendrickson's involuntary affirmation of objected-to beliefs. The fact that he retains the right to speak for himself does not resolve the fact that the Union organizes and negotiates as his representative in his employment relations.

Unions and state governments have proffered various claimed interests for compelling the association of employees and, thereby, restricting First Amendment rights. One interest often proffered is "labor peace," meaning the "avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union" because "inter-union rivalries would foster dissension within the work force, and the employer could face 'conflicting demands from different unions.'" *Janus*, 138 S. Ct. at 2465. Other interests

typically asserted in support of exclusive representation status amount to much the same claim: that it is in the state's interest to have a "comprehensive system" that bundles all employees into a single bargaining representative with which the state can negotiate. *See, e.g.*, Brief for Respondents Lisa Madigan and Michael Hoffman at 4, *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (No. 16-1466).

This justification is particularly inapplicable to Hendrickson because he does not seek to introduce a competing union into the bargaining mix but only to ensure that the Union does not speak on his behalf. Furthermore, in *Janus* the Supreme Court assumed, without deciding, that labor peace might be a compelling state interest, but the Court rejected it as a justification for agency fees. The interest should, likewise, be rejected as a justification for exclusive representation. The Supreme Court recognized that "it is now clear" that the fear of "pandemonium" if the union couldn't charge agency fees was "unfounded." *Janus*, 138 S. Ct. at 2465. To the extent that individual bargaining is claimed to raise the same concerns of pandemonium, this too, remains insufficient. The Supreme Court rejected the invocation of this rationale due to the absence of evidence of actual harm. *Id*. It may be that the state finds it convenient to negotiate with a single agent, and the Union may find it convenient to accrue all bargaining power to itself, but that, in and of itself, is not enough to overcome First Amendment rights. The rights to speech and association cannot be limited by appeal to administrative convenience.

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 102 n.9 (1972) (in free speech cases, a "small administrative convenience" is not a compelling interest); *see also Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) (holding that a state could "no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party").

While it may be quicker or more efficient for Lujan Grisham to negotiate only with the Union, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Even if Lujan Grisham could claim that it saves monetary resources by negotiating only with the Union, the preservation of government resources is not an interest that can justify First Amendment violations. In other contexts where the state's burden was only rational basis review, the Supreme Court has rejected such justifications. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting the "interest in conserving public resources" in a case applying only heightened rational basis review); see also *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources"). Such claimed interests are not enough to leave Hendrickson "shanghaied for an unwanted voyage." *Janus*, 138 S. Ct. at 2466.

B. The District Court's reliance on *Knight* is misplaced.

In upholding N.M. Stat. Ann. § 10-7E-15, the District Court relied on *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). Opinion Below at 16 (A032). *Knight* held that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the issue, "The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273.

The plaintiffs in *Knight* were community college faculty who dissented from the certified union. *Id.* at 278. The Minnesota statute at issue required that their employer "meet and confer" with the union alone regarding "non-mandatory subjects" of bargaining. The statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276. The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations.

The Court explained the issue it was addressing well: "[A]ppellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. Confronted with this claim, the Court held that "[a]ppellees have no constitutional

right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny the government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Hendrickson does not claim that his employer—or anyone else—should be compelled to listen to his views. Instead, he asserts a right against the compelled association forced on him by exclusive representation. The District Court's misreading of *Knight* severely elevates and misinterprets dicta in the decision. Indeed, the district court admitted it was relying not on the central holding in *Knight*, but on "broad statements" not directly relevant to the Supreme Court's decision. Opinion Below at 18 (A034). The central issue of the *Knight* decision was whether the plaintiffs could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Hendrickson's claim that the government cannot compel him to associate with the Union by making the Union bargain on his behalf. In arguing that these two distinct claims are the same, the District Court pointed only to dicta towards the end of the *Knight* opinion that suggests the challenged policy "in no way restrained [the appellants'] freedom to speak on any education related issue or their freedom to associate or not associate with whom they please." *Knight*, 465

U.S. at 288. *See* Opinion Below at 18 (A034). But in that quotation, the *Knight* Court was still addressing the question of being heard. The *Knight* Court explained that the government's right to "choose its advisers" was upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288. The *Knight* Court raised the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id.* This, again, is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

Knight is, therefore, not responsive to the question Hendrickson now raises: whether someone else can speak in his name, with his imprimatur granted to it by the government. Hendrickson does not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify the Union's voice. He does not demand that the government schedule meetings with him, engage in negotiation, or any of the other demands made in *Knight*. He demands only that the Union not do so in his name, and he respectfully requests that this Court issue a ruling to that effect.

In the alternative, Hendrickson argues that, to the extent it justifies exclusive

representation, *Knight* should be overruled. *Knight* asserted that exclusive representation "in no way restrained [plaintiff's]…freedom to associate," *Knight*, 465 U.S. at 288. However, *Janus* stated that exclusive representation "substantially restricts the rights of individual employees," *Janus*, 138 S. Ct. at 2460. Therefore, *Knight* was in error on this point and should be overruled to bring greater clarity to the doctrine.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the District Court's orders granting summary judgment and dismissing the case.

Dated: April 24, 2020

Respectfully submitted,

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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: April 24, 2020

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

This brief contains 12,996 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
Brian K. Kelsey
April 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, I electronically filed the forgoing Appellant's Opening 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.

/s/ Brian K. Kelsey
Brian K. Kelsey
April 24, 2020

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.

/s/ Brian K. Kelsey
Brian K. Kelsey
April 24, 2020

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This Court normally requires a certification that the hard copies submitted to the Court are exact copies of the versions submitted electronically. However, this Court's General Order of March 16, 2020 instructed counsel not to submit hard copies at this time, in light of the ongoing Coronavirus pandemic. If, at a later time, the Court instructs counsel to provide hard copies of this brief, counsel affirms that those hard copies will be identical to this electronically filed version.

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Brian K. Kelsey
April 24, 2020

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/s/ Brian K. Kelsey
Brian K. Kelsey
April 24, 2020

ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRETT HENDRICKSON,

Plaintiff,

v. No. CIV 18-1119 RB/LF

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.

MEMORANDUM OPINION AND ORDER

For most of his employment with the New Mexico Human Services Department (HSD), Plaintiff Brett Hendrickson was a dues-paying member of Defendant AFSCME Council 18 (the Union). Recently in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the United States Supreme Court overruled long-standing precedent and found that the common union practice of collecting agency fees from nonunion members violates their constitutional rights. After *Janus*, Mr. Hendrickson resigned from his Union membership. He now brings suit against the Union, as well as Governor Lujan Grisham and Attorney General Balderas (the State Defendants), for violations of his First Amendment rights to free speech and free association. He seeks monetary damages for dues that he paid to the Union and declarations that the Union's dues authorization revocation policy and provisions of the related state statutory scheme are unconstitutional.

Mr. Hendrickson and the Union filed cross motions for summary judgment, and the State Defendants moved to dismiss. For the reasons discussed herein, the Court will grant the Union's motion for summary judgment, grant the State Defendants' motion to dismiss, deny Mr. Hendrickson's motion for summary judgment, and dismiss this lawsuit.

II. Legal Standards

A. Summary Judgment Standard of Review

Summary judgment is appropriate when the Court determines "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotation marks and citation omitted). The Court examines the record and makes all reasonable inferences in the light most favorable to the nonmoving party. *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016).

In analyzing cross-motions for summary judgment, a court "must view each motion separately, in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." *United States v. Supreme Court of N.M.*, 839 F.3d 888, 906–07 (10th Cir. 2016) (quotation marks and citations omitted). "Cross motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007) (quotation omitted).

The Court notes that Mr. Hendrickson fails to respond to or specifically dispute the material facts set forth in the Union's motion (*see* Docs. 42; 45 at 7) or in the Union's response to his own motion (*see* Docs. 39 at 8–11; 47) in contravention of Local Rule 56. *See* D.N.M. LR-Civ. 56(b). However, Mr. Hendrickson's material facts are largely consistent with the Union's statement of facts in its own motion. (*See* Doc. 39 at 8 (citing Doc. 32 at 2–8).) Consequently, for the purposes of both motions for summary judgment, the Court will accept as true the facts as presented in the

Union's motion (Doc. 32) and response (Doc. 39).

B. Motion to Dismiss Standard of Review

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *In re Gold Res. Corp. Sec. Litig.*, 776 F.3d 1103, 1108 (10th Cir. 2015) (quotation omitted). "To survive a motion to dismiss," the complaint does not need to contain "detailed factual allegations," but it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

II. Background

Mr. Hendrickson has been employed with the HSD, a public employer, since 2001. (Docs. 21 (Am. Compl.) ¶¶ 3, 16.) He is covered by the Public Employee Bargaining Act (PEBA), N.M. Stat. Ann. §§ 10-7E-1–-26 (1978), which gives public employees the right to join—or not to join—a labor organization for the purposes of bargaining with public employers regarding the terms of their employment. N.M. Stat. Ann. §§ 10-7E-5, 10-7E-15. The Union and the State are parties to a collective bargaining agreement (CBA), and Mr. Hendrickson is a member of a bargaining unit as defined in the CBA. (Doc. 32-4 ¶¶ 3–4.) *See also* § 10-7E-13. The Union is the democratically-elected exclusive representative for Mr. Hendrickson's bargaining unit for purposes of the PEBA. (*See* Doc. 32-4 ¶ 3.) *See also* § 10-7E-14.

While New Mexico has "never required membership in the Union as a condition of public

employment" (Doc. 32 at 11[1] (citing Doc. 32-4 ¶ 6); *see also* § 10-7E-5), employees in Mr. Hendrickson's pre-*Janus* bargaining unit were required to make a choice: pay dues and join the Union as a member to receive full member benefits, or decline to join and pay a lower amount of "fair share fees" as a nonmember. (Doc. 32-4 ¶¶ 7, 35, 63; Am. Compl. ¶¶ 16, 22.) *See also* 138 S. Ct. at 2459–60. At the time, these fair share fees were lawful under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and the PEBA. "Represented bargaining unit employees have never been required to become Union members nor required to publicly endorse the Union's positions in any respect." (Doc. 32-4 ¶ 29.)

Mr. Hendrickson chose to join the Union and authorized monthly dues deductions by signing the Union's membership agreement. (Doc. 32-4 ¶ 36.) He signed this agreement on three occasions: originally on May 7, 2004 (*id.*; *see also* Doc. 32-4-2); in 2007 when he returned to SPD after a short stint with a non-bargaining unit (Am. Compl. ¶¶ 17, 20; Docs. 32-4 ¶ 38; 32-4-2); and on April 7, 2017 (Docs. 32-4 ¶ 40; 32-4-3). The membership agreement provides:

> Effective: [April 7, 2017], I authorize AFSCME Council 18 as my exclusive bargaining representative, and I accept membership in AFSCME Council 18. I 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, or such other time as provided in the applicable collective-bargaining agreement.[2]

(Doc. 32-4-3.) Thus, Mr. Hendrickson was able to resign his "union membership at any time, but . . . he would continue to have union dues deducted from his paycheck unless he gave the Union and the State written notice of revocation of his dues deduction authorization during the first two

[1] The Court cites the CM/ECF pagination of the parties' briefs, rather than the internal pagination.

[2] The Union's membership agreements have included language similar to that quoted above since at least 2004. (*See* Doc. 32-4 ¶ 8.)

weeks of December in each calendar year." (Doc. 32-4 ¶ 44.)

On June 27, 2018, the United States Supreme Court decided *Janus*. 138 S. Ct. 2448. In *Janus*, the Court examined the constitutionality of requiring nonunion state employees to pay agency fees for union representation, such as the "fair share" fees in New Mexico. *Id.* at 2459–60. It found that this practice violates nonmembers' First Amendment rights, because it "compel[s] them to subsidize private speech on matters of substantial public concern." *Id.* at 2460. The Court held, therefore, that "States and public-sector unions may no longer extract agency fees from nonconsenting employees . . . 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." *Id.* at 2486 (citations omitted).

On July 2, 2018, the Union sent the State Personnel Office (SPO) a letter and "asked the State to immediately stop deducting fair share fees from non-members and to immediately stop transmitting those fees to the Union." (Docs. 32-4 ¶ 65; 32-4-13.) The State and the Union "have agreed that provisions of the [CBA] that required the payment of fair share fees by non-members are now invalid and unenforceable and . . . those provisions are accordingly no longer in effect." (Doc. 32-4 ¶ 71.)

Mr. Hendrickson emailed the SPO about withdrawing his Union membership on August 9, 2018. (Docs. 33-1 ¶ 5; 33-1-1.) He filed his original complaint in this Court on November 30, 2018. (Doc. 1.) He had not contacted the Union regarding resignation or termination of his dues deductions before he filed his original complaint. (*See* Doc. 32-4 ¶¶ 43, 47.) On December 6, 2018, Ms. Connie Derr, Executive Director of the Union, wrote a letter to Mr. Hendrickson and stated:

> It has come to our attention through the filing of a lawsuit that you wish to resign your union membership and cancel your authorization for the deduction of membership dues. We have no prior record that you made any such request to the union. Nevertheless, we have processed your resignation from membership.

> Additionally, your dues authorization provides that it is revocable during the first two weeks of December each year. Accordingly, we are notifying your employer to stop further membership dues deductions.

(Doc. 32-4-5; *see also* Doc. 33-1 ¶ 7.) Mr. Hendrickson faxed a membership withdrawal letter to the Union on December 8, 2018. (Docs. 32-4 ¶ 49; 32-4-6.)

After a series of communications between Mr. Hendrickson, the SPO, and Ms. Derr, the SPO stopped deducting dues beginning with Mr. Hendrickson second paycheck in January 2019, and the Union reimbursed him for the dues mistakenly deducted after the first pay period in December 2018. (*See* Docs. 32-4 ¶¶ 50–59; 32-4-10; 32-4-12; Am. Compl. ¶¶ 35–44.) Mr. Hendrickson is not currently a Union "member and is not required to support the Union, financially or otherwise." (Doc. 32-4 ¶ 60; *see also* Am. Compl. ¶¶ 10, 42.)

III. The Court will grant the Union's motion for summary judgment and deny Mr. Hendrickson's motion for summary judgment with respect to Count I.

In his first claim for relief, Mr. Hendrickson contends that Defendants violated his First Amendment rights to free speech and association when they refused to immediately allow him to withdraw from the Union after the Supreme Court decided *Janus*. (Am. Compl. ¶¶ 45–62.) He seeks damages and three separate declarations. (*Id.*)

A. Mr. Hendrickson's claim regarding fair share fees is moot.

Mr. Hendrickson seeks a declaration that N.M. Stat. Ann. § 10-7E-9(G), the statute that authorized "fair share fees" before *Janus*, is unconstitutional. (*Id.* ¶ 60.) He acknowledges, however, that the Union and SPO are no longer deducting fair share fees from nonunion employees. (*See* Docs. 32-4 ¶ 65, 70–71; 32-4-13; 32-4-17.) The Union argues that "a favorable judicial decision" on this issue would have no "effect in the real world." *Equal Emp't Opportunity Comm'n v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1173 (10th Cir. 2017) (citation omitted). (Doc. 32 at 15.) Mr. Hendrickson fails to respond to this argument and has thus waived this claim.

(*See* Doc. 42.) The Court agrees that this issue is moot and will grant summary judgment to the Union and deny Mr. Hendrickson's motion on this issue.

B. Mr. Hendrickson lacks standing to seek a declaration regarding the Union's opt-out window as it applies to other union members.

Mr. Hendrickson next seeks a declaration "that the Union and [Governor] Lujan Grisham cannot force public employees to wait for an opt-out window to resign their union membership and to stop the deduction of dues from their paychecks." (Am. Compl. ¶ 58.) The Court may not grant the requested relief, however, because Mr. Hendrickson "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Aid for Women v. Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (subsequent citation omitted); *see also Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1186–87 (D.N.M. 2010). As this lawsuit is not a class action, Mr. Hendrickson may not seek a declaration that would affect the rights of others. Thus, the Court will grant the Union's motion for summary judgment on this issue and deny Mr. Hendrickson's motion.

C. Mr. Hendrickson cannot show that N.M. Stat. Ann. § 10-7E-17(C) constitutes an unconstitutional violation of his First Amendment rights.

Mr. Hendrickson seeks a declaration that N.M. Stat. Ann. § 10-7E-17(C) violates his First Amendment rights to free speech and association "because it allowed the withholding of union dues from his paycheck until a two-week period specified in the Union agreement." (Am. Compl. ¶ 59.) This statute provides that the SPO "shall honor payroll deductions until the authorization is revoked in writing . . . in accordance with the negotiated agreement . . . ." N.M. Stat. Ann. § 10-7E-17(C). He also seeks "damages in the amount of all dues deducted . . . since he became a member" (Am. Compl. ¶ 61), or alternatively, "in the amount of all dues deducted . . . since the *Janus* ruling" (*id.* ¶ 62). The claims fail for a variety of reasons.

1. Mr. Hendrickson's claim for prospective relief is moot.

Mr. Hendrickson's requested declaration regarding the opt-out window for dues revocation is not justiciable, because he has resigned from Union membership and is no longer subject to dues or the opt-out window. "[I]t is well established that what makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior *of the defendant toward the plaintiff*." *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011) (quotation and citations omitted). "Hence, . . . a 'plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured [by the defendant] in the future.'" *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994), *superseded by statute on other grounds*, *Cody Labs. v. Sebelius*, 446 F. App'x 964 (10th Cir. 2011) (quotation omitted).

Mr. Hendrickson presents several arguments to show why his lawsuit is not moot. First, he cites *Fisk v. Inslee*, a similar case in which the Ninth Circuit found that the plaintiff union members' prospective relief claims were not moot because they were "the sort of inherently transitory claims for which continued litigation is permissible." *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019) (citations omitted). "While the facts here are very similar to *Fisk*, they differ in one significant respect: *Fisk* involved a putative class action, where prospective class members presumably remained subject to the challenged conduct." *See Stroeder v. Serv. Emp's Int'l Union*, No. 3:19-CV-01181-HZ, 2019 WL 6719481, at *3 (D. Or. Dec. 6, 2019). As Mr. Hendrickson does not bring a class action, *Fisk* is inapposite.

Mr. Hendrickson next argues that this lawsuit presents a case of "voluntary cessation," because the Union revoked his dues deduction only after he filed a lawsuit. (Doc. 33 at 15.) He relies on *Knox v. Service Employees International Union, Local 1000*, another class action in

which nonunion employees alleged that a special dues assessment was being used for political expenditures, and they sued to obtain a refund. 567 U.S. 298, 302–07 (2012). After the Supreme Court granted certiorari, the union sent a notice to the employees and promised a full refund then moved to dismiss for mootness. *Id.* at 307. The Supreme Court found that the offer did not moot the case, because the Union had not actually refunded the employees and had "include[d] a host of conditions, caveats, and confusions" regarding how the employees could request the refund. *Id.* at 308. But *Knox*, which dealt with the hypothetical refund of special assessment dues, is distinguishable from this case, which involves terms related to the expiration of the union membership agreement.[3]

Finally, Mr. Hendrickson argues that the circumstances of this case are "capable of repetition but will evade review," much like those in *Roe v. Wade*, 410 U.S. 113 (1973). (Doc. 33 at 16.) "To meet this exception to mootness," however, he must show that "there [is] a reasonable expectation that *the same* complaining party [will] be subject to the same action again." *Casad v. U.S. Dep't of Health & Human Servs.*, 301 F.3d 1247, 1254 (10th Cir. 2002) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*)) (emphasis added). Here, his opt-out window passed in December 2018. He is no longer a Union member, and the Union is no longer deducting dues from his paycheck. He has not alleged that he is likely to be subject to Union membership or the relevant dues policies again. Mr. Hendrickson's claim for prospective relief is moot.

2. Mr. Hendrickson has not shown that the Union violated his First Amendment rights to free speech and association.

Even if Mr. Hendrickson's claims regarding the opt-out window and the dues revocation

[3] The Court also finds Mr. Hendrickson's argument regarding voluntary cessation disingenuous, as he filed this lawsuit on November 30, 2018 (Doc. 1), 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.

agreement were justiciable, they would fail. Mr. Hendrickson essentially argues that *Janus* applies retroactively to void his membership contract with the Union. (Doc. 33 at 9–10.) In *Janus*, the Supreme Court found that a union may only deduct wages from a *nonmember* if that "employee affirmatively consents to pay." 138 S. Ct. at 2486. The Court disagrees that *Janus* applies here because *Janus* concerned a *nonunion employee's* fair share fees, not a *union member's* contracted-for dues.

The Union relies on the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), to argue that Mr. Hendrickson cannot use *Janus* to void a valid contract on the basis of any purported violation of his First Amendment rights. (*See* Doc. 32 at 20–22.) In *Cohen*, an individual (Cohen) contracted with two newspapers to provide confidential information, but only on the condition that he would remain anonymous. 501 U.S. at 665. The newspapers accepted and published the information, but they also revealed Cohen as the source. *Id.* at 666. Cohen sued, and the newspapers argued that enforcement of the parties' agreement would violate the newspapers' First Amendment rights. *Id.* at 667–68. The Supreme Court found that the newspapers self-imposed the restrictions on their First Amendment rights to reveal the confidential source, and state law would enforce that agreement. *Id.* at 671.

"*Cohen* amounts to a statement that one can waive a constitutional right, which [Mr. Hendrickson] acknowledges is consistent with *Janus*." (Doc. 42 at 11.) He argues, however, that *Cohen* is distinguishable because "[t]here was no intervening change in the law that recognized a new right of newspapers between when the promise was made and when the case was decided." (Doc. 42 at 11.) The court in *Cooley v. California Statewide Law Enforcement Ass'n* considered this same argument and relied on *Brady v. United States*, 397 U.S. 742, 757 (1970) to find that "an intervening change in law does not taint [the union member's] consent or invalidate his

contractual agreement." 385 F. Supp. 3d 1077, 1080 (E.D. Cal. 2019). The Union also cites *Brady*, a case in which the criminal defendant (Brady) entered a guilty plea rather than face a jury trial and, possibly, the death penalty. (Doc. 39 at 21 (citing *Brady*, 397 U.S. at 743).) Sometime later, the statute that would have allowed the death penalty in Brady's case was found to be unconstitutional. *See Brady*, 397 U.S. at 745–46. Brady "sought relief under 28 U.S.C. § 2255, claiming that his plea of guilty was not voluntarily given because" the now-unconstitutional statute "operated to coerce his plea . . . ." *Id.* at 744. The Supreme Court disagreed and found that "[t]he voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it." *Id.* at 749 (citations omitted). The same is true here: Mr. Hendrickson was faced with the then-constitutional choice under *Abood* to join the Union or pay fair share fees. His choice was voluntary, and he may not now void his choice after *Janus*.

Mr. Hendrickson's argument that the parties' contract is based on "mutual mistake" is similarly inapposite. (*See* Doc. 42 at 7–8.) He relies on *United States v. Bunner*, in which the criminal defendant pleaded guilty to a crime pursuant to 18 U.S.C. § 924(c). 134 F.3d 1000, 1002 (10th Cir. 1998). Three years later, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995), under which the *Bunner* "[d]efendant's actions no longer constituted a" crime. *Id.* The Tenth Circuit found that the very basis of the plea agreement (the admission of criminal conduct) was frustrated, and that because the conduct no longer constituted a crime, no jury could have convicted him. *Id.* at 1004–05. Thus, the defendant could not be bound to the plea agreement. *Id.* at 1005. But as the Union notes, this case is more akin to *Brady*, where the statute was later shown to be unconstitutional, rather than *Bunner*, where the conduct itself no longer constituted a crime. In cases closer to *Brady*, the Tenth Circuit has also found that a plea agreement is not voidable. *See, e.g.*, *United States v. Porter*, 405 F.3d 1136, 1144–45 (10th Cir. 2005) (finding that, as in

Brady, a plea agreement was valid after *Booker* changed the sentencing law).

Ultimately, Mr. Hendrickson fails to point to any decision that applied *Janus* to void a union membership contract under similar circumstances. On the contrary, each 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. *See, e.g.*, *Oliver v. Serv. Emp's Int'l Union Local 668*, No. CV 19-891, --- F. Supp. 3d ---, 2019 WL 5964778, at *2 (E.D. Pa. Nov. 12, 2019); *Seager v. United Teachers L.A.*, No. 219CV00469JLSDFM, 2019 WL 3822001, at *1 (C.D. Cal. Aug. 14, 2019); *Smith v. Bieker*, No. 18-cv-05472-VC, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019); *O'Callaghan v. Regents of the Univ. of Cal.*, Case No. CV 19-02289JVS (DFMx), 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019); *Belgau v. Inslee*, No. 18-5620 RJB, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018).

It is Mr. Hendrickson's voluntary choice—on three separate occasions—to contract with the Union that defeats his claim. *See Adams v. Int'l Bhd. of Boilermakers*, 262 F.2d 835, 838 (10th Cir. 1958) (noting that "[i]t is well settled that the relationship existing between a trade union and its members is contractual"). As part of the contract, he knowingly agreed that he could only revoke his dues deduction authorization during a two-week opt-out window. He does not allege that he was coerced, and the parties agree that he was not required by state law to join. He could have paid a lesser fair share fee as a nonmember, but instead he chose to join the Union. *See Oliver*, 2019 WL 5964778, at *2–3 (finding "no logic" in the plaintiff's position that "if only she had known of a constitutional right to pay nothing for services rendered by the Union—despite knowledge of her right at the time to refuse membership and pay less—she would have declined union membership completely"). Accordingly, the Court will grant the Union's motion for summary judgment on this issue and deny Mr. Hendrickson's motion.

3. Mr. Hendrickson cannot show that the Union is a state actor.

Finally, even if *Janus* could be construed to compel a finding that Mr. Hendrickson had a right to immediately resign his membership and cease paying dues in contravention of the parties' contract, he would be unable "to vindicate [his] rights against the Union through a § 1983 suit because the Union was not acting under 'color of state law.'" *See Oliver*, 2019 WL 5964778, at *4. "[M]ost rights secured by the Constitution are protected only against infringement by governments." *MS through Harris v. E. N.M. Mental Retardation Servs.*, No. CIV 13-628 RB-GBW, 2015 WL 13662789, at *2 (D.N.M. June 16, 2015) (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978)). Mr. Hendrickson invokes the First Amendment, which "requires state action," thus he must show that the Union's "actions may 'be fairly attributed to the State.'" *How v. City of Baxter Springs, Kan.*, 217 F. App'x 787, 791 n.3 (10th Cir. 2007) (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)) (citing *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976)).

"Whether the conduct may in fact be 'fairly attributed' to the state requires a two-part inquiry." *A.M. ex rel. Youngers v. N.M. Dep't of Health*, 108 F. Supp. 3d 963, 998 (D.N.M. 2015). "'First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible.'" *Id.* (quoting *Lugar*, 457 U.S. at 937). "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* (quoting *Lugar*, 457 U.S. at 937) (subsequent citation omitted).

"Here, the conduct complained of is the collection of union dues subject to a revocation window period." (Doc. 32 at 25 (citing Am. Compl. ¶¶ 53, 55, 58).) Mr. Hendrickson frames the conduct as the "state government using the state payroll system to deduct union dues from state-

issue paychecks of state employees" pursuant to a state statute. (Doc. 47 at 6; *see also* Doc. 42 at 14–15.) For purposes of this opinion, the Court will assume Mr. Hendrickson can satisfy the first part of the inquiry—that the deprivation was caused by the state's imposition of a state statutory scheme. Given that, the Court finds that he is unable to satisfy the second part, because the Union cannot be said to be a state actor.

To determine "whether a private entity can be considered a state actor, courts must analyze the claim under four well-defined tests: (1) the nexus test; (2) the public function test; (3) the joint action test; and (4) the symbiotic relationship test." *Harris*, 2015 WL 13662789, at *3 (citing *Wittner v. Banner Health*, 720 F.3d 770, 775 (10th Cir. 2013)). Mr. Hendrickson only argues that the Union is a state actor pursuant to the joint action test.[4] (*See* Doc. 42 at 15.)

"State action exists under the joint-action test if the private party is a 'willful participant in joint action with the State or its agents.'" *Youngers*, 108 F. Supp. 3d at 1001 (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)). "[I]f there is a substantial degree of cooperative action between state and private officials . . . or if there is overt and significant state participation, in carrying out the deprivation of the plaintiff's constitutional rights, state action is present." *Id.* (quoting *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995)). Mr. Hendrickson argues that there is a substantial degree of cooperation between the Union and the State because they "sat down together and negotiated the contractual terms by which they would take members' dues, and the state carried out the [U]nion's instructions . . . ." (Doc. 42 at 15.) This is similar, he contends, to *Janus*, "where the Supreme Court never questioned the matter of state action." (*Id.*)

[4] While Mr. Hendrickson did not argue that the Union is a state actor under the nexus test, the public function test, or the symbiotic relationship test, the Court has considered each and finds that he fails to provide evidence to establish that the Union is a state actor under any of these three tests.

The Court disagrees. First, the circumstances here are again distinguishable from *Janus* because this lawsuit involves the parties' voluntary contract, not the imposition of fair share fees on nonunion employees. In *Janus*, the nonunion employee did not have a choice under state law but to pay the fair share fees. Here, Mr. Hendrickson had a choice to pay union dues according to the contract that he voluntarily signed.

Second, Mr. Hendrickson fails to show that the State had a hand in drafting or controlling the terms of the parties' membership agreement. He claims that the CBA between the Union and the State "determine[d] when [he could] end his dues deductions." (Doc. 47 at 7.) But as the Union points out, it is the membership contract that controls the terms of the opt-out window; the CBA only "parrots the language of the private membership and dues deduction agreements." (Doc. 32 at 26 n.5.) Mr. Hendrickson fails to present any evidence to show that the State had a hand in drafting the terms of the controlling document—the membership contract. And even though the State enforced the terms of the opt-out window, the "State's mere acquiescence in a private action" does not convert the "action into that of the State." *Gallagher*, 49 F.3d at 1453 (quoting *Flagg Bros.*, 436 U.S. at 164). There is no evidence in the record from which a jury could reasonably conclude that the State jointly participated in creating the terms of the membership agreement.

Ultimately, the Court finds that Mr. Hendrickson fails to come forward with evidence necessary to show that the Union is a state actor. *See, e.g.*, *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1015 (W.D. Wash. 2019) (finding that the State's "obligation to deduct fees in accordance with the authorization agreements does not transform decisions about membership requirements [that they pay dues for a year] into state action") (quotation marks and citation omitted); *Oliver*, 2019 WL 5964778, at *6 (because "[t]he union's right to collect the dues is not created by the Commonwealth [but] by the union's contract with its members" and "[t]he Commonwealth's

role . . . is strictly ministerial, . . . the Union is not involved in state action by collecting dues"); *Cooley*, 385 F. Supp. 3d at 1082 (same).

Even if Mr. Hendrickson could show that the Union was a state actor, his claim for monetary damages would be foreclosed because the Union, in collecting his membership dues, relied in good faith on then-existing law. Every district court, and now two circuit courts, have found that the union defendants in post-*Janus* litigation have "a good-faith defense to liability for payments collected before" the Supreme Court's decision in *Janus*. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31; AFL-CIO*, 942 F.3d 352, 364 & n.1 (7th Cir. 2019) (collecting cases); *Danielson v. Inslee*, 945 F.3d 1096, 1098–99 (9th Cir. 2019) (holding that "a union defendant can invoke an affirmative defense of good faith to retrospective monetary liability under section 1983 for the agency fees it collected pre-*Janus*). Consequently, the Court will grant summary judgment to Defendant with respect to the § 1983 claims for damages and prospective relief.

IV. The Court will grant the Union's motion for summary judgment and deny Mr. Hendrickson's motion for summary judgment with respect to Count II.

A. Mr. Hendrickson's claim is foreclosed by *Knight*.

Mr. Hendrickson asserts in Count II that the State's recognition of the Union as the democratically elected exclusive representative for his collective bargaining unit violates his First Amendment rights to free speech and association. (Am. Compl. ¶¶ 63–73.) Specifically, he argues that because the Union is the exclusive representative for his bargaining unit—even for nonmembers such as himself—he is compelled "to associate with the Union against his will and . . . "to petition the government with a viewpoint in opposition to his own goals and priorities . . . ." (*Id.* ¶ 71.) He asks that the Court find it unconstitutional for the Union to negotiate with the State "in his name . . . ." (Doc. 33 at 23.)

The Union contends that the exclusive representation provisions of the PEBA do not implicate Mr. Hendrickson's First Amendment rights. (Doc. 32 at 27–34.) *See also*, N.M. Stat. Ann. § 10-7E-13–15. It asserts that the Supreme Court has already considered and rejected this claim in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). The plaintiffs there, community college faculty instructors who were not members of the union that was the exclusive representative for the faculty's bargaining unit, challenged the constitutionality of the state's exclusive representation scheme (PELRA). *Knight*, 465 U.S. at 278. Specifically, they argued that "meet and confer" sessions between the union and the employer on employment-related questions violated their First Amendment rights to speak on their own behalf. *See id.* at 274–75, 286. The Supreme Court disagreed and found that the faculty members had "no special constitutional right to a voice in the making of policy by their government employer." *Id.* at 286.

Mr. Hendrickson stresses that his claim is different, and *Knight* is inapplicable. He argues that the *Knight* case only stands for the proposition that nonunion members have "no constitutional right to force the government to listen to their views[,]" and that "he asserts a right against the compelled association forced on him by exclusive representation." (Doc. 33 at 20–21.) In other words, he "does not contest the right of the government to choose whom it meets with, to 'choose its advisors,' or to amplify the Union's voice. He does not demand" that the State listen to his views, as the *Knight* faculty sought. (Doc. 33 at 22–23.) Instead, he asks that the Court find it unconstitutional for the Union to speak on his behalf. (*Id.* at 23.) This, he argues, "compel[s] him to associate with the Union by making the Union bargain on his behalf." (*Id.* at 22.)

The Court agrees that the issue the Supreme Court decided in *Knight* was narrower than the Union cares to admit. *See Thompson v. Marietta Educ. Ass'n*, 371 F. Supp. 3d 431, 436 (S.D. Ohio 2019) (noting that *Knight* "is not directly dispositive of the claim" the plaintiff made in

Thompson, which was "that the very designation of the Union as [her] exclusive representative forces an association between [her] and the Union"). In discussing the question presented, however, the *Knight* "Court made broad statements about PELRA and the freedom of association." *Id.* The Court opined that the meet and confer sessions did not infringe on the faculty's speech *or* associational rights. *Knight*, 465 U.S. at 288. The statutory scheme allowing for exclusive representation "has in no way restrained [the faculty's] . . . freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* The Court reiterated that their "associational freedom has not been impaired" because they "are free to form whatever advocacy groups they like. They are not required to become members of" the union, and the pressure they may feel to join the union because of its unique position "does not create an unconstitutional inhibition on associational freedom." *Id.* at 289–90.

Thus, while the ultimate issue the *Knight* Court considered does not squarely align with the issue presented here, the Court finds that language in the decision is directly on point and dispositive of this claim. "Indeed, every court that has considered [whether an exclusive representation arrangement] forces [nonunion members] into an expressive association with [unions] has rejected [the argument] as foreclosed by *Knight*." *Thompson*, 371 F. Supp. 3d at 437 (citing *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 863 (7th Cir. 2017) ("rejecting claim that designation of exclusive representative forced employees into an 'agency-like association with the [union]'" and finding that, "under Knight, the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny"); *Jarvis v. Cuomo*, 660 F. App'x 72, 74 (2d Cir. 2016) ("finding the plaintiff's claim that designation of an exclusive representative amounted to forced association was 'foreclosed' by *Knight* where the employees were not required to join the union"); *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016)

("finding *Knight* contained the implied premise 'that exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit'"); *Reisman v. Associated Faculties of the Univ. of Maine*, 356 F. Supp. 3d 173 (D. Maine 2018) ("rejecting the plaintiff's compelled association claim as foreclosed by *Knight*")) (subsequent citation omitted).

Janus only serves to affirm the conclusion that exclusive representation schemes are constitutional. There, the Supreme Court observed:

> **It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees**—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. 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.

Janus, 138 S. Ct. at 2478 (emphasis added); *see also Mentele v. Inslee*, 916 F.3d 783, 786–90 (9th Cir.), *cert. denied* 140 S. Ct. 114 (2019) (relying on *Janus* and *Knight* to find that an exclusive collective bargaining representative arrangement does not infringe on nonunion members' First Amendment rights); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019) (finding that *Janus* "do[es] not supersede *Knight*").

B. Exclusive representation is justified by compelling state interests.

Even if the Court found that *Knight* was not dispositive of the claim in Count II or that *Janus* overruled *Knight*, the claim would fail because exclusive representation serves compelling state interests. "Mandatory associations are subject to exacting scrutiny, meaning they require a compelling state interest that cannot be achieved through significantly less-restrictive means." *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861, 863 (7th Cir. 2017) (citing *Knox*, 567 U.S. at 310 (noting that "mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational

freedoms'") (internal quotation omitted)); *see also Mentele*, 916 F.3d at 790 (same); *Harris v. Quinn*, 573 U.S. 616, 648–49 (2014) (applying exacting scrutiny to an agency-fee provision that impinged on associational freedoms).

Here, the State enacted the PEBA "to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." N.M. Stat. Ann. § 10-7E-2. The State Defendants note *Janus*'s approval of the State's interest in "labor peace" as a compelling state interest—that is, "avoidance of the conflict and disruption" that may occur "if the employees in a unit were represented by more than one union." *See Janus*, 138 S. Ct. at 2465 ("[w]e assume that 'labor peace,' in this sense of the term, is a compelling state interest"). (*See also* Doc. 41 at 11.) Mr. Hendrickson contends that *Janus* disapproved of labor peace as a compelling state interest, but this is only partially true. (Docs. 33 at 18; 47 at 12; 48 at 8.) *Janus* found that labor peace was not a sufficient justification to continue charging agency fees—it did not conclude that labor peace was an insufficient interest to justify exclusive representation. 138 S. Ct. at 2466; *see also Mentele*, 916 F.3d at 791 (noting *Janus*'s "reaffirm[ation] that '[s]tates can keep their labor-relation systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions'") (quoting *Janus*, 138 S. Ct. at 2485 n.27).

The State Defendants also emphasize the State's interest in affordable and efficient management by "allowing a public agency or entity to enter into one contract for an entire bargaining unit, rather than having to negotiate with multiple competing unions or, perhaps worse, with many individuals." (Doc. 41 at 17.) In *Mentele*, the Ninth Circuit also highlighted this compelling state interest: "[The State] has an interest in negotiating with only one entity, at least

for the sake of efficiency and managerial logistics . . . .” 916 F.3d at 791. Eliminating exclusive representation would create “confusion . . . from multiple agreements[] and possible dissension among the” employees. *Id.* (citing *Janus*, 138 S. Ct. at 2465–66). Mr. Hendrickson contends that the interest in “sav[ing] monetary resources by negotiating only with the Union . . . is not an interest that can justify First Amendment violations[,]” but the cases he cites are all inapplicable in this context.[5] (Doc. 33 at 19.) The Court finds that Defendants have advanced compelling state interests sufficient to justify any purported impingement on Mr. Hendrickson’s associational freedom.

Moreover, Mr. Hendrickson points to no other means that are significantly less restrictive than the exclusive representation system now in place. The *Mentele* court also stated that it “know[s] of no alternative [to exclusive representation] that is ‘significantly less restrictive of associational freedoms.’” 916 F.3d at 791 (quoting *Janus*, 138 S. Ct. at 2465). He does not want the Union to speak for him, but it is unclear what significantly less restrictive system New Mexico might implement. Thus, the Court finds that PEBA’s exclusive bargaining system is constitutionally permissible and will grant the Union’s motion for summary judgment and deny Mr. Hendrickson’s motion with respect to Count II.

V. The Court will grant the State Defendants’ motion to dismiss.

A. The Court will dismiss Mr. Hendrickson’s claims in Count I.

Mr. Hendrickson asserts the same claims for prospective relief against the State Defendants in Count I: (1) that Defendants “cannot force public employees to wait for an opt-out window to resign their union membership and to stop the deduction of dues from their paychecks” (Am.

[5] Mr. Hendrickson cites: (1) *Romer v. Evans*, 517 U.S. 620, 635 (1996), where the Supreme Court found that a purported state “interest in conserving public resources to fight discrimination against other groups” was “so far removed” from the referendum as to be a legitimate objective; and (2) *Plyler v. Doe*, 457 U.S. 202, 227 (1982), where “an interest in the preservation of the state’s limited resources for the education of its lawful residents[,]” standing alone, did not justify the State’s “intent[] to discriminate” (quotation marks and citation omitted). Mr. Hendrickson fails to explain how either of these cases is on point.

Compl. ¶ 58); (2) that his rights were violated because he had to pay union dues until the opt-out window specified in the parties' contract (*id.* ¶ 59); and (3) that the statute allowing fair share fees is unconstitutional (*id.* ¶ 60). (*See also* Doc. 37 at 9.) His claims fail for the same reasons the Court described above.

First, Mr. Hendrickson does not have standing to enforce the rights of other public employees. *See Aid for Women*, 441 F.3d at 1111; *Begay*, 710 F. Supp. 2d at 1186–87. Thus, the Court will dismiss the requested declaration regarding the constitutionality of the opt-out window as it applies to other public employees. (*See* Am. Compl. ¶ 58.)

Second, Mr. Hendrickson is no longer a member of the Union and has not shown there is a good chance he will be likewise injured in the future. *See Cox*, 43 F.3d at 1348. Moreover, *Janus* does not apply to void his membership contract with the Union, and his claim would also fail on the merits. *See* 138 S. Ct. at 2486. Thus, the Court will dismiss the requested declaration regarding the withholding of Union dues until the two-week opt-out window. (*See* Am. Compl. ¶ 59.)

Third, the requested declaration regarding N.M. Stat. Ann. § 10-7E-9(G) is moot, because Mr. Hendrickson does not assert that the Union and SPO are still deducting fair share fees from nonunion employees.[6] Accordingly, the Court will dismiss the requested declaration regarding the fair share fee provision. (*See* Am. Compl. ¶ 60.)

[6] The State Defendants ask the Court to take judicial notice of a July 6, 2018 letter from the director of the SPO announcing that it would immediately cease payroll deductions of fair share fees pursuant to *Janus*. (*See* Doc. 37 at 10 (citing Doc. 37-A).) Mr. Hendrickson does not object to this request or argue that the SPO has unlawfully deducted fair share fees since *Janus*. (*See* Doc. 43; Am. Compl.) Even if it was improper to take judicial notice of the proffered letter, the Court notes that the PELRB Practice Manual also provides that the PEBA provision regarding fair share fees has been "rendered moot" by *Janus*. PELRB Practice Manual at 9, State of N.M. PELRB (Aug. 31, 2019), https://www.pelrb.state.nm.us/pdf/peba/Practice%20manual%20revd%2011-15-19%20003.pdf. Judicial notice of this record is proper, because the record "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b)(2).

B. The Court will dismiss the claim in Count II.

1. The State Defendants are not responsible for enforcing the PEBA and are not proper defendants.

With respect to the remaining claim, the State Defendants first contend that this Court lacks subject matter jurisdiction because they are not proper defendants for purposes of the *Ex parte Young* exception to the Eleventh Amendment. (Doc. 37 at 5.) "Suits against state officials in their official capacity . . . should be treated as suits against the State." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citation omitted)). And while "[t]he Eleventh Amendment generally bars suits against a state in federal court commenced by citizens of that state[,]" the *Ex parte Young* doctrine permits an exception where the plaintiff sues "a state official in federal court [and] seeks only prospective equitable relief for violations of federal law . . . ." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1285, 1286 (10th Cir. 1999) (quoting *Elephant Butte Irrigation Dist. of N.M. v. Dep't of the Interior*, 160 F.3d 602, 607–08 (10th Cir.)). To properly name an official as a defendant, he or she "must have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (quoting *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007)).

The State Defendants argue that neither of them has enforcement duties over the PEBA, which is instead the responsibility of the Public Employee Labor Relations Board (PELRB). (Doc. 37 at 7 (citing N.M. Stat. Ann. §§ 10-7E-23(A), 10-7E-4(D)).) The PELRB "consists of three members appointed by the governor[,]" N.M. Stat. Ann. § 10-7E-8, and "has the power to enforce provisions of the [PEBA] through the imposition of appropriate administrative remedies." § 10-7E-9(F).

In *Sweeney v. Madigan*, another post-*Janus* case on collective bargaining, the plaintiffs named the attorney general of Illinois. 359 F. Supp. 3d 585, 592 (N.D. Ill. 2019). The attorney

general argued that the Eleventh Amendment barred the action against her because she did not have prosecutorial authority over the statutory scheme. *Id.* The district court held that although the Illinois Labor Relations Board enforced the statutes, the attorney general "is responsible for prosecuting violations of" orders of the board. *Id.* Thus, the attorney general was properly named. *Id.* The same is not true here. The PEBA authorizes the PELRB to enforce the PEBA, § 10-7E-9(F), and enforcement of PELRB orders is reserved to the courts, not the Attorney General. *See* § 10-7E-23. Mr. Hendrickson has not demonstrated that either the governor or the attorney general have enforcement powers over the PEBA.

The State Defendants cite to an unpublished Tenth Circuit case in support of their position. In *Bishop v. Oklahoma*, two couples sued the governor and attorney general and sought a declaration that an amendment to the state constitution was unconstitutional. 333 F. App'x 361, 362–63 (10th Cir. 2009). The Tenth Circuit held that the state "officials' generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a constitutional amendment they have no specific duty to enforce." *Id.* at 365 (citations omitted). The *Bishop* court cited several cases from other circuits in support of its decision. First, in *Women's Emergency Network v. Bush*, the Eleventh Circuit held that "[w]here the enforcement of a statute is the responsibility of parties other than the governor (the cabinet in this case), the governor's general executive power is insufficient to confer jurisdiction." 323 F.3d 937, 949–50 (11th Cir. 2003) (citation omitted). Similarly in *Waste Management Holdings, Inc. v. Gilmore*, the Fourth Circuit concluded that "[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." 252 F.3d 316, 331 (4th Cir. 2001) (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)). In *Okpalobi v. Foster*, the Fifth Circuit found that the plaintiff could not maintain a suit

against the governor and attorney general where neither official had an "enforcement connection with . . . the statute at issue." 244 F.3d 405, 422 (5th Cir. 2001) (*en banc*) (emphasis omitted). In *1st Westco Corp. v. School District of Philadelphia*, the Third Circuit opined that "[i]f we were to allow [plaintiffs] to join . . . [the State officials] in this lawsuit based on their general obligation to enforce the laws . . . , we would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it." 6 F.3d 108, 112–13, 116 (3d Cir. 1993).

Mr. Hendrickson attempts to distinguish *Bishop* on the basis that the enforcement of the statute was delegated to a branch other than the executive branch. (Doc. 43 at 6.) But this argument fails in looking at the cases the Tenth Circuit cited in support of its holding in *Bishop*: enforcement in *Women's Emergency Network* was the responsibility of the cabinet, which is also part of the executive branch. 323 F.3d at 949–50. In *Waste Management Holdings*, the statutory scheme was enforced by a board, the members of which were appointed by the governor. *See* 252 F.3d at 323; Va. Code Ann. §§ 10.1-1401, 10.1-1455. The Court is not convinced that enforcement by another branch is the determining factor.

Mr. Hendrickson urges the Court to follow the Tenth Circuit's reasoning in *Petrella v. Brownback*, 697 F.3d 1285 (10th Cir. 2012), where it found that the attorney general and governor were proper defendants in a lawsuit "challenging the statutory scheme by which the state of Kansas fund[ed] its public schools." *Id.* at 1289, 1293–94. The Tenth Circuit rejected the state officials' argument that they were not proper defendants:

> 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 (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. See Kan. Const. Art. I § 3; Kan. Stat. Ann. § 75-702.

Id. But as the State Defendants note, the school funding statute is "encompassed by [the executive branch's] general enforcement power. If a local school district were to violate the [statute at issue in *Petrella*], it would be the governor and the attorney general that would take any enforcement action, as provided by the Kansas State Constitution." (Doc. 46 at 3 (citing *Petrella*, 697 F. Supp. 3d at 1294).) But "enforcement of New Mexico public employee union contracts is not encompassed by this general authority." (*Id.*) Instead, enforcement of the PEBA rests with the PELRB. Accordingly, the Court holds that Governor Lujan Grisham and Attorney General Balderas are not proper defendants in this matter.

2. Mr. Hendrickson has failed to state a claim in Count II.

Even if the State Defendants were properly named, the Court would dismiss Count II for failure to state a claim. As the Court found above, *Knight* forecloses the claim. And if *Knight* was not dispositive or if *Janus* overruled *Knight*, the arrangement is justified by compelling state interests. Consequently, the Court will grant the motion to dismiss with respect to Count II.

THEREFORE,

IT IS ORDERED that Defendant AFSCME Council 18's Motion for Summary Judgment, Statement of Undisputed Material Facts, and Memorandum of Points and Authorities in Support of AFSCME Council 18's Motion for Summary Judgment (Doc. 32) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment and Memorandum of Law in Support Thereof (Doc. 33) is **DENIED**;

IT IS FURTHER ORDERED that Defendants Michelle Lujan Grisham and Hector Balderas's Motion to Dismiss (Doc. 37) is **GRANTED**; and

IT IS FURTHER ORDERED that this case is **DISMISSED**.

ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRETT HENDRICKSON,

Plaintiff,

v. No. CIV 18-1119 RB/LF

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.

FINAL ORDER

Having granted Defendant AFSCME Council 18's Motion for Summary Judgment (Doc. 32) and Defendants Michelle Lujan Grisham and Hector Balderas's Motion to Dismiss (Doc. 37), and denied Plaintiff's Motion for Summary Judgment (Doc. 33) by Memorandum Opinion and Order entered contemporaneously with this Final Order,

IT IS ORDERED that Plaintiff's lawsuit is **DISMISSED with prejudice**.

ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE