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

BRETT HENDRICKSON,

Plaintiff,

v.

No. 18-CV-01119-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.

DEFENDANT AFSCME COUNCIL 18'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff has been a state employee for the past 18 years, during most of which he was a union member. He was among the group of employees who democratically elected AFSCME Council 18 ("AFSCME" or the "Union") as their exclusive representative. Plaintiff voluntarily chose to pay union dues in exchange for membership rights and benefits. The agreements that he signed clearly stated on their face that he authorized the deduction of membership dues from his paycheck, and that his dues deduction authorization was only revocable during the specified annual revocation period. He does not claim, nor do any of the facts suggest, that he was under duress or did not understand the agreements when he signed them. Nonetheless, he now claims that the enforcement of his own voluntary agreements violated his First Amendment rights. As demonstrated below, that claim is meritless, as every court to consider this issue has recognized.

Plaintiff also claims that New Mexico's system of exclusive-representative collective bargaining under the Public Employee Bargaining Act ("PEBA") violates his First Amendment rights. This claim is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), as every court to consider this issue has recognized.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Union does not dispute Plaintiff's material facts, which are consistent with AFSCME's Statement of Facts in Support of its Motion for Summary Judgment ("Union MSJ") (Dkt. 32) at 2-8. The Union submits the following additional material facts, which are not inconsistent with Plaintiff's facts.

A. Plaintiff signed an AFSCME union card for purposes of certifying the bargaining unit in 2003. Affidavit of Connie Derr ("Derr Aff.") (Dkt. 32-4) ¶ 31 & Ex. 1.

B. After the bargaining unit elected AFSCME as their representative in 2003, Plaintiff could either join the Union and receive membership rights and benefits in exchange, or decline to join the Union and instead pay an agency fee. Plaintiff chose membership. Union MSJ at 3, ¶ 3.

C. By choosing to become union members, workers obtain rights and benefits that are not enjoyed by nonmembers, such as the right to vote on ratification of a collective bargaining agreement ("CBA"), to serve on bargaining committees, to vote in union elections and to run for union office, and access to various members-only benefits. Union MSJ at 4, ¶ 10.

D. Plaintiff exercised his right as a union member to vote on the election of the bargaining team on July 9, 2003 and on whether to ratify the collective bargaining agreement on January 14, 2004. Derr Aff. ¶¶ 33-34 & Ex. 1.

E. Plaintiff signed a union membership agreement and dues deduction authorization on May 7, 2004. Union MSJ at 3, ¶ 6.

F. In 2004 and 2005, Plaintiff volunteered as an alternate for the Bargaining Committee to participate in negotiations with the State. Plaintiff could only participate on the committee because he was an AFSCME member. Derr Aff. ¶ 37 & Ex. 1.

G. Plaintiff signed another membership agreement and authorization for dues deduction on April 7, 2017. The agreement he signed states in part: "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." Union MSJ at 4, ¶ 9; Derr Aff. ¶ 40 & Ex. 3.

H. Since at least 2004, the Union's membership agreements have included language accepting membership, language authorizing the deduction of dues, and language limiting the revocation of the authorization to two weeks in December. Derr Aff. ¶ 8.

I. Plaintiff could resign his union membership at any time but, under the terms of his membership agreement, dues would continue to be deducted from his paycheck until he revoked his dues deduction in writing to AFSCME and the State during the first two weeks of December. Derr Aff., ¶ 44; FAC, ¶ 59.

J. While Plaintiff contacted his employer in August 2018 asking whether he could withdraw as a union member, he did not contact the Union. Plaintiff's Mot. for Summary Judgment ("Pl. MSJ") (Dkt. 33) at 8.

K. Pursuant to the terms of the membership agreement that Plaintiff signed and the CBA, the two-week dues revocation period was open from December 1-14, 2018. Derr Aff., ¶ 46 & Ex. 3.

L. AFSCME first learned of Plaintiff's desire to withdraw from union membership and cancel his dues revocation on the filing of his lawsuit on November 30, 2018. Derr Aff. ¶ 47.

M. On December 6, 2018, AFSCME wrote to Plaintiff notifying him that, although it had no prior record of his request, it had processed his resignation from membership; and, since his dues authorization was revocable during the first two weeks of December each year, it would notify the State to stop further membership deductions. Hendrickson Dec. Ex. 2 (Dkt. 33-1).

N. On December 8, 2018, Plaintiff also faxed a membership withdrawal letter to AFSCME. Derr Aff., ¶ 49, Ex. 6.

O. AFSCME thereafter contacted the State to cease deductions from Plaintiff. The State did not cease his deductions until the second pay period in January 2019; however, AFSCME reimbursed Plaintiff for all dues deducted after the first pay period of December 2018. Union MSJ at 5-7, ¶¶ 18-32.

P. At the present time, Plaintiff is not an AFSCME member and is not required to support the Union, financially or otherwise. Pl. MSJ at 8; Union MSJ at 7, ¶ 33.

ARGUMENT

I. Plaintiff's claims for prospective relief are moot

Plaintiff seeks declaratory and injunctive relief against the deduction of union dues and the revocation window for dues deductions. Those claims are moot because Plaintiff is no longer a union member and is not subject to dues deductions. *See* Union MSJ at 9-10 (and cases cited); *see also O'Callaghan v. Regents of the Univ. of Cal.*, slip op. at 5 (C.D. Cal. June 10, 2019) (denying request for injunctive relief as moot where plaintiff's resignation from membership already had been processed) (attached hereto).[1] Plaintiff asks the court to "declare that a request to end dues deductions is effective immediately." Pl. MSJ at 13. This Court lacks jurisdiction to consider such relief because it would have no impact on the relationship between the parties. *See Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011).

Plaintiff incorrectly asserts that his claim for prospective relief is not moot because the conduct complained of is "capable of repetition [yet] evad[ing] review." Pl. MSJ at 16 (citing *Super Tire Eng'g Co. v. McCorckle*, 416 U.S. 115, 122 (1974)). For that doctrine to apply, however, there must be a "reasonable expectation that the *same* complaining party [will] be subjected to the same action again." *Casad v. U.S. Dept. of Health and Human Services*, 301 F.3d 1247, 1254 (10th Cir. 2002). Here, there is no "reasonable expectation" that Plaintiff would sign another union membership agreement because Plaintiff has made clear that he does *not* want

[1] Plaintiff does not plead a class action and cannot assert the rights of other employees. *Begay v. Pub. Serv. Co. of N.M.*, 710 F.Supp.2d 1161, 1186-87 (D.N.M. 2010).

to be associated with the Union. Plaintiff also relies on *Fisk v. Inslee*, 759 F.App'x 632, 633 (9th Cir. 2019). Pl. MSJ at 14. But *Fisk* was a putative class action and applied the well-established rule that "termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (cited in *Fisk*, 759 F.App'x at 633). This case is not a putative class action so that rule is inapplicable here, regardless of whether Plaintiff's prospective relief claim was "transitory."

Nor is this a "voluntary cessation" case, because – as the letter attached to Plaintiff's declaration makes clear – his dues deductions ceased "by operation of the membership agreement," not because of his litigation. *Smith v. Bieker*, 2019 WL 2476679, at *1 (N.D. Cal. June 13, 2019) (citing *ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) (expiration of contract by its own terms is not voluntary cessation)). Moreover, even voluntary cessation will moot a claim for prospective relief when, as here, (because Plaintiff does not does not intend to join the Union again) there is no reasonable likelihood the plaintiff could be subject to the challenged conduct in the future. *See Casad*, 301 F.3d at 1254. Plaintiff is not helped by *Knox v. SEIU Local 1000*, 567 U.S. 298 (2012). Pl. MSJ at 15. The plaintiffs in *Knox* "d[id] not seek any prospective relief" and the claim for retrospective relief was not moot because there was a dispute about the adequacy of that retrospective relief. 567 U.S. at 307-08. Moreover, *Knox* involved a voluntary refund, not the expiration of a membership agreement in accordance with its terms. As such, *Knox* is not remotely on point.[2]

[2] Plaintiff's accusation that the Union engaged in gamesmanship makes no sense. His dues deductions ended by their own terms. And the legal issues will not evade review because Plaintiff has a live claim for retrospective damages.

In sum, Plaintiff's claims for prospective relief do not present a justiciable controversy and should be dismissed on that basis. In any event, his argument that union members have a First Amendment right to halt dues deductions, regardless of their own agreements, is meritless for the reasons explained below.

II. The deduction of dues pursuant to Plaintiff's own voluntary agreement did not violate his First Amendment rights

Plaintiff also seeks recovery of the union dues he paid. But it is undisputed that Plaintiff signed a union membership and dues agreement and received membership rights and benefits in return. Statement of Facts ("SOF"), *supra* ¶¶ B-G. Plaintiff omits the language of the agreement, which reveals he voluntarily agreed to join the Union, to authorize membership dues deductions from his paycheck, and that his dues deductions would continue until he revoked his authorization during the annual revocation window. *Id.* ¶¶ G-H; Derr Aff. Ex. 3. The language was plain, clear, and easy to read. Plaintiff does not claim that he was under duress or that he did not understand the agreement. Nor does Plaintiff dispute that the only union dues he paid were those authorized by the terms of the agreement.[3] That agreement was a binding contract between two private parties. *See* Union MSJ at 11-12 (and cases cited); *see also N.L.R.B. v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987) ("dues-checkoff authorization is a contract" and binds "employee to abstain from revoking the authorization" even if he resigns union membership); *N.L.R.B. v. U.S. Postal Serv.*, 833 F.2d 1195, 1196 (6th Cir. 1987) (dues authorization not

[3] The record refutes Plaintiff's assertion that the Union infringed on Plaintiff's right to resign his membership. Pl. MSJ at 9. The membership agreement does not impose any restriction on resigning membership (as opposed to cancelling dues deductions). Nor does the CBA or state law prevent workers from resigning membership. As soon as the Union learned that Plaintiff wished to resign membership, the Union acknowledged his resignation. SOF ¶¶ L-M.

revocable despite resignation from membership); *United Steelworkers of Am. Local 4671 (National Oil Well, Inc.)*, 302 NLRB 367, 368 (1991) (same).

Plaintiff nevertheless urges that his First Amendment rights were violated by the deduction of union dues because his membership agreement was not a valid waiver of his First Amendment rights. But that analysis is wrong, as every court to consider this issue has recognized. The terms of a voluntary private agreement are not state action, so there is no First Amendment right against enforcement of those terms for Plaintiff to waive. Even if a waiver analysis were required, moreover, Plaintiff's agreement would qualify as a waiver.

A. The enforcement of voluntarily assumed private obligations does not restrain First Amendment rights, so no waiver analysis is required

The First Amendment addresses government restraints on freedom of speech and association, not purely private conduct or private agreements. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1926, 1928 (2019). The State's enforcement of Plaintiff's private agreement with the Union to pay membership dues in exchange for membership rights and benefits did not restrain Plaintiff's First Amendment rights, because "the First Amendment does not confer ... a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991); *see also Fisk*, 759 F.App'x at 633 (enforcement of dues deduction commitment in voluntary union membership agreements "does not violate [employees'] First Amendment rights"); *Bieker*, 2019 WL 2476679, at *2 ("[Plaintiff's] constitutional rights were not violated by the union's insistence on continuing to collect dues from him a few more months after he resigned … until the next revocation period … []as authorized by [the] membership agreement."); *O'Callaghan*, slip op. at 5 ("Since Plaintiffs affirmatively agreed to the terms of union membership, including the terms

regarding dues deductions, they have not … demonstrat[ed] a likelihood of success in proving that the continued deductions violate their First Amendment rights."); Union MSJ at 11-12 (and cases cited).

In *Cohen*, the Supreme Court rejected the claim that the First Amendment prohibited enforcement by the state of a newspaper's promise not to reveal the identity of a confidential source. The Court recognized that the doctrine of promissory estoppel simply "requires those who make certain kinds of promises to keep them." 501 U.S at 672. The application of promissory estoppel therefore did not "offend the First Amendment." *Id.* at 669. *Cohen* did not apply a heightened waiver analysis to the newspaper's promise, because the government's enforcement of the promise did not give rise to a First Amendment objection that needed to be waived. The same is true here.

Accepting Plaintiff's theory would require a revolution in contract law. Countless private agreements touch upon First Amendment rights. Plaintiff's dues authorizations are indistinguishable from the dues authorizations signed by millions of other public employees, all of which would be invalid under Plaintiff's theory. *See, e.g.*, Declaration of Stefanie L. Wilson, submitted herewith, Ex. A (federal employee dues authorization form). Plaintiff's theory would also invalidate millions of authorizations for charitable deductions signed by public employees. *See, e.g., id.* Ex. B (federal employee charitable deduction form). The courts would have to reconsider the enforcement of private arbitration agreements, which implicate parties' First Amendment right to petition the government, *see, e.g., Youssofi v. Wells Fargo Bank*, 2016 WL 7404522, at *1-2 (S.D. Cal. Dec. 21, 2016) (rejecting argument that plaintiff did not knowingly waive First Amendment rights by signing arbitration agreement, because agreement expressly

required arbitration). The same test would apply to a college endowment pledge or to an agreement to provide annual support to a PBS station in exchange for promotional merchandise. That absurd result, however, has no basis in law.

Plaintiff urges that *Janus v. AFSCME Council 31*, 138 S.Ct. 2448 (2018), requires a heightened First Amendment waiver whenever a public employee elects to join a union. But the only question *Janus* addressed was whether *non*members can be compelled by a state statute to pay union fees as a condition of public employment. Even Plaintiff concedes this point: "The Court in *Janus* explained that payments to a union could be deducted from a *non-member's* wages only if that employee 'affirmatively consents' to pay." Pl. MSJ at 9 (emphasis added) (quoting 138 S.Ct. at 2486). The quoted paragraph also makes clear the limits of *Janus*'s holding:

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

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

The Supreme Court cited "waiver" cases in this passage, *see id.*, not to tacitly overrule *Cohen*, but to make clear that States cannot presume that nonmembers wish to support unions and require them to "opt out" of such payments. Prior to *Janus*, many courts had held that opt-out systems for nonmembers were consistent with the First Amendment. *See, e.g.*, *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258, 263 (9th Cir. 1992). The *Janus* petitioners had urged the Supreme Court to hold that such opt-out systems place an unconstitutional burden on First Amendment rights. *See* Br. for Pet'r, *Janus v. AFSCME, Council 31*, 2017 WL 5952674 (U.S.), at *62 (Nov. 29, 2017); Reply Br. for Pet'r, *Janus v. AFSCME, Council 31*, 2018 WL

835271 (U.S.), at *24-25 (Feb. 22, 2018). That is what the Court held in the passage from *Janus* on which Plaintiff relies. None of the waiver cases the Supreme Court cited involved a plaintiff like Hendrickson who *affirmatively* assumed an obligation, much less a plaintiff who received consideration – such as the rights and benefits of union membership – in return.[4] *See* SOF ¶¶ C-F. *Janus* does not hold that voluntary, affirmative agreements to pay union dues in exchange for membership are legally different from agreements to pay money to any other organization or from the promise in *Cohen*. The other waiver cases Plaintiff cites are not to the contrary. *D.H. Overmeyer Co. v. Frick Co.* involved the enforceability of a contract wherein the parties agreed to use a collection procedure that infringed upon their due process rights; in contrast, here, the deduction of membership dues is not unconstitutional. 405 U.S. 174, 184-85 (1972). Moreover, the Court assumed, arguendo, that waiver analysis applied, and found a valid waiver where the agreement was not a contract of adhesion and was thus voluntary. *See id.* at 186-87; *see also Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 306-07 (1937) (considering whether objection was waived when not raised in earlier proceedings).

Plaintiff also fails to mention that every court to decide the issue has rejected arguments identical to his and instead recognized that, "*Janus* says nothing about people [who] join a

[4] *See Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (considering whether state "constructively waived" sovereign immunity and suggesting analysis would be different had state made "contractual commitment") (quotation marks omitted); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-45 (1967) (considering whether litigant waived legal arguments by failing to assert them); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (considering whether criminal defendant waived right to counsel by failing to request counsel); *Cf. Knox v. SEIU, Local 1000*, 567 U.S. 298, 312-13 (2012) (criticizing presumption that "*non*members" who failed to object to non-chargeable component of union dues impliedly consented to payment (emphasis added)).

Union, agree to pay dues, and then later change their mind about paying union dues." *Belgau v. Inslee*, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018); *see also* Union MSJ at 15-16 (and cases cited). As one such decision explains:

> Plaintiffs argue that their consent to dues deductions was not freely given because … they were not given the option to pay nothing to the union and they thus could not have known that they were waiving that constitutional right…. But, … nothing in *Janus*'s holding requires unions to cease deductions for individuals who have affirmatively chosen to become union members and accept the terms of a contract that may limit their ability to revoke authorized dues-deductions in exchange for union membership rights, such as voting, merely because they later decide to resign membership.

O'Callaghan, slip op. at 5; *see also Bieker*, 2019 WL 2476679, at *2 ("[Plaintiff] contends that *Janus* entitles him to elect to stop paying dues to the union at the drop of a hat. But *Janus* did not concern the relationship of unions and members; it concerned the relationship of unions and nonmembers. Besides, 'the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law.'" (quoting *Cohen*, 501 U.S. at 672; citing *Fisk*, 759 F.App'x at 633, *Belgau v. Inslee*, 359 F.Supp.3d 1000, 1009 (W.D. Wash. 2019)).

B. Even if a waiver analysis were required, Plaintiff's agreement would constitute a waiver

By entering into a private contract to pay money that is enforceable under state law, a party necessarily "waives" any objection to the State's enforcement of that obligation. *Janus* "acknowledges in its concluding paragraph" that even *non*members "can waive their First Amendment rights by affirmatively consenting to pay union dues." *Smith v. Super. Ct., Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018) (citing *Janus*, 138 S.Ct. at 2486). Although *Janus* did not address the relationship between unions and their *members*, the

undisputed facts here establish that "affirmatively consenting to pay" is precisely what Plaintiff did. It is undisputed that the agreements that Plaintiff voluntarily signed expressly authorized the union dues payments Plaintiff now challenges. SOF ¶¶ G-H; Derr Aff. Ex. 3.

There is no support for Plaintiff's claim that his voluntary agreement to pay union dues did not qualify as a waiver of First Amendment rights because the agreement did not explicitly inform him that he has a First Amendment right not to pay agency fees. Pl. MSJ at 10. Even "assum[ing] ... an agreement between private parties to restrict speech implicates the first amendment," a voluntary "agreement [that] clearly sets forth the restrictions" is enforceable without the need for "the talismanic recital of the words 'first amendment.'" *Perricone v. Perricone*, 292 Conn. 187, 210 & n.22 (2009). For example, the newspaper's promise in *Cohen* was enforceable notwithstanding the absence of any special First Amendment disclaimers. *See* 501 U.S. at 672. *D.H. Overmeyer*, cited by Plaintiff, further confirms that no talismanic recitations are required to satisfy constitutional waiver. 405 U.S. at 180-81, 185-87 (agreement to use collection procedure without notice or process was "voluntary, knowing, and intelligent," although contract did not mention the specific constitutional amendment or right waived). And the exact kind of waiver Plaintiff claims was necessary has been rejected because it infringed upon employees' equal right to *join* the union. *Mont. Fed'n of Pub. Emps. v. Vigness*, No. DV 19-0217, at 3, 9-10 (Mont. 13th Dist. Yellowstone Cty. Apr. 11, 2019) (Dkt. 32-1) (granting preliminary injunction against employer's union dues form, which stated that employees "voluntarily and affirmatively waive [their] first Amendment rights" by signing the form, finding

this "waiver" was *not* contemplated by *Janus* and violates unions' and their members' freedom of association).[5]

Plaintiff also urges that he could not have "knowingly" waived his First Amendment rights before the Supreme Court first recognized them in *Janus*. Pl. MSJ at 10. It is important to clarify what constitutional "right" is allegedly "waived" here. The First Amendment right recognized in *Janus* is not relevant to Plaintiff, who agreed to union membership. The Supreme Court made clear long before *Janus* that the First Amendment precludes the government from compelling union membership. Plaintiff's "First Amendment right to opt out of union membership was clarified in 1977 [in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)], and yet he waived that right by affirmatively consenting to be a member" of AFSCME. *See Smith*, 2018 WL 6072806, at *1 (rejecting plaintiff's argument that dues agreement was not "'knowing' before *Janus*").

Plaintiff also argues that his choice to join the Union and pay dues was "compelled," rather than "voluntary" because, at that time, nonmembers were required to pay fair-share fees. The thrust of his argument is that he would not have joined the Union if nonmembers had been permitted to pay nothing. But that reasoning is foreclosed by *United States v. Brady*, 397 U.S. 742, 748 (1970).

[5] Plaintiff's contention that voluntary agreements with a union are void based on standards not applicable to other private contracts is thus incompatible with the First Amendment rights of public employees to associate with one another on their own agreed-upon terms. *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("Union membership is protected by the right of association under the First and Fourteenth Amendments.").

The defendant in *Brady* was also presented with a choice: agree to plead guilty and forgo the right to a trial by jury, or exercise that right and risk the death penalty, under a statute that the Supreme Court later held to be unconstitutional. Brady argued that he did not voluntarily waive his right to a jury because he would not have agreed to plead guilty but for the risk of the death penalty. The Court rejected that argument, because, even "assum[ing] that Brady would not have pleaded guilty except for the death penalty provision," his plea nevertheless was "knowing" and "voluntary" because he understood what he was agreeing to. *Id.* at 750, 755. *Brady* thus establishes that an agreement can be knowing and voluntary even if an *alternative* to that agreement is later held to be unconstitutional. *See also Parker v. North Carolina*, 397 U.S. 790, 794-95 (1970) (guilty plea not invalid although subsequent case law arguably rendered the imposition of the death penalty unconstitutional in petitioner's case); *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016) ("Although [a subsequent Supreme Court opinion], in hindsight, altered the calculus underlying Dingle's decision to accept a plea agreement, it does not undermine the voluntariness of his plea."). This rule has been applied in civil contexts as well. *See, e.g.*, *Coltec Indus. v. Hobgood*, 280 F.3d 262, 277 (3d Cir. 2002) (rejecting claim for relief against insurance premiums paid in light of statute subsequently declared unconstitutional).[6]

[6] Plaintiff relies on cases that hold that parties were entitled to recovery of taxes or fines collected by the government pursuant to statutes later held unconstitutional. Pl. MSJ at 11 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993); *United States v. Lewis*, 342 F.Supp. 833, 834 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976); *Pasha v. United States*, 484 F.2d 630, 631 (7th Cir. 1973)). But those cases are not on point because Plaintiff chose to be a union member and pay dues, and *Janus* did not hold that union membership or dues payments are unconstitutional. Moreover, in those cases, parties had not received consideration in exchange for their payment of taxes or fines. Here Plaintiff entered into a private agreement with the Union and received the rights and benefits of union membership in return for the payment of dues.

Plaintiff ignores the post-*Janus* decisions that have, on indistinguishable facts, rejected the same argument he makes here. As explained by the court in *Bieker*:

> [Plaintiff] argues that even if *Janus* doesn't automatically undo the membership agreement, the agreement was invalid at its inception because [he] couldn't have knowingly waived a right he didn't yet have (namely, the right to avoid paying union fees as a non-member). But changes in intervening law – even constitutional law – do not invalidate a contract.

2019 WL 2476679, at *2 (citing *Brady*, 397 U.S. at 757, *Dingle*, 840 F.3d at 174-76); *see also O'Callaghan*, slip op. at 5 (rejecting argument that plaintiffs "could not have known they were waiving that constitutional right" because nothing in *Janus* allows them to renege on prior voluntary commitments to pay dues in exchange for membership rights (quotation marks omitted)); *Bermudez v. SEIU Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019) ("The plaintiffs' claims for a refund of their membership dues fail … because the dues were not wrongfully collected – the decision to pay dues was not coerced and payment was a valid contractual term."); *Crockett v. NEA-Alaska*, 367 F.Supp.3d 996, 1007-08 (D. Alaska 2019) ("Plaintiffs' … agreement to become union members in exchange for benefits created a contract between them and their unions that remains enforceable after *Janus*. Plaintiffs cannot seek to claw back money paid in exchange for already-provided contractual benefits … based on later changes in the law." (quotation marks omitted, second omission original) (citing *Hobgood*, 280 F.3d at 277)); *Cooley v. Cal. Statewide Law Enforcement Ass'n*, 2019 WL 331170, at *3 (E.D. Cal. Jan. 25, 2019) ("[T]he Supreme Court has made clear [in *Cohen*] that a person can contract away and waive his or her First Amendment rights…. *Janus* does not invalidate such agreements…. The notion that Mr. Cooley may have made a different choice in 2013 (or before) if he knew the Supreme Court would later invalidate public employee agency fee arrangements

does not void his previous, knowing agreement." (citation omitted)); *Smith*, 2018 WL 6072806, at *1 ("*Janus* actually acknowledges in its concluding paragraph that employees can waive their First Amendment rights by affirmatively consenting to pay union dues…. That's what Smith did, and he is likely on the hook to pay dues through the end of the contractual period."); *Babb v. Cal. Teachers Ass'n*, 2019 WL 2022222, at *9 (C.D. Cal. May 8, 2019) ("Plaintiffs voluntarily chose to pay membership dues in exchange for certain benefits, and '[t]he fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time of their decision does not mean their decision was therefore coerced.'" (quoting *Crockett*, 367 F.Supp.3d at 1008)).

C. Plaintiff's § 1983 claim also fails for lack of state action

Plaintiff's 42 U.S.C. § 1983 claim also must be rejected because he fails to demonstrate that any state action caused his purported constitutional harm. That is because the source of Plaintiff's alleged harm is not the State but the private dues authorization agreements that Plaintiff signed. *See* Union MSJ at 17-20; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (courts first look to "the specific conduct of which the plaintiff complains") (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

Plaintiff attempts to rely on the CBA, but the CBA merely parrots the language of the membership agreements he signed; and it only permits the State to conduct membership dues deductions when authorized by the employee. *See* Derr Aff. Ex. 4 ("The duty of the Employer to *honor* membership dues deduction authorizations shall continue until *the employee instructs* the Employer and the Union in writing to end such deduction [provided such instruction is within the window period]." (emphasis added)). The CBA does not set the terms of the membership

agreement, nor does it authorize any dues deductions absent the employee's authorization. Likewise, PEBA only allows public employers to deduct dues from employees who, like Plaintiff, affirmatively authorize them. NMSA 1978, § 10-7E-17(C) ("The public employer shall *honor* payroll deductions until the authorization is revoked in writing *by the public employee* in accordance with the negotiated agreement" (emphases added)). It is not alleged that the State drafted the membership agreements or compelled him to sign them. Plaintiff thus has failed to establish any "state policy" as required to make his § 1983 claim.

Plaintiff's motion is also entirely devoid of any facts or argument demonstrating that the person responsible for the alleged constitutional harm can "fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). At any rate, this prong cannot be met, since it is undisputed that the State did not require or compel Plaintiff to join AFSCME or to pay membership dues. *See In re: Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d 1094, 1113 (10th Cir. 2017) (neither judicial approval nor potential enforcement "constitutes state action for purposes of the First Amendment"); *Bronner v. Duggan*, 249 F.Supp.3d 27, 41 (D.D.C. 2017) ("[W]hen a court merely enforces obligations explicitly assumed by the parties, there is no state action."). Plaintiff does not even attempt to argue that the State's ministerial role in processing payroll deductions makes the Union a state actor, and this argument would fail for the reasons stated in AFSCME's motion at 19-20. *See also Blum*, 457 U.S. at 1004-05 (state's adjustment of patients' Medicaid benefits in response to decisions about patients' discharge or transfer made by privately employed doctors was insufficient to convert doctors' decisions into state action).

Therefore, Plaintiff has failed to demonstrate that his alleged constitutional deprivation is "fairly attributable to the state" and he is not entitled to relief for this reason as well. *See Lugar*, 457 U.S. at 937; *Belgau*, 359 F.Supp.3d at 1015 ("Because the Plaintiffs' constitutional claim [against revocation window in union membership agreement] fails at the state action stage, no decision is necessary on whether the … membership agreements violate the First Amendment.").

D. The Union has a good faith defense to § 1983 liability

Finally, the essence of Plaintiff's claim is that his voluntary dues deduction agreement is unlawful because, prior to *Janus*, the Union was collecting fair share fees from nonmembers. Every court to consider the issue has ruled that unions are entitled to a defense to § 1983 liability for relying in good faith on the law then in effect, which expressly authorized the collection of fair share fees. *See Abood*, 431 U.S. 209; *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1190-91 (10th Cir. 2002). This good faith defense applies to claims, like Plaintiff's, that challenge the collection of union dues based on voluntary membership agreements. *See Babb*, 2019 WL 2022222 at *8-9; *Crockett*, 367 F.Supp.3d at 1007.[7]

[7] Other decisions finding a good faith defense to § 1983 liability for pre-*Janus* fees and dues include: *Cook v. Brown*, 364 F.Supp.3d 1184, 1192-93 (D. Or. 2019); *Carey v. Inslee*, 364 F.Supp.3d 1220, 1233 (W.D. Wash. 2019); *Danielson v. Inslee*, 340 F.Supp.3d 1083, 1087 (W.D. Wash. 2018); *Janus v. AFSCME Council 31*, 2019 WL 1239780, at *3 (N.D. Ill. Mar. 18, 2019); *Hough v. SEIU Local 521*, 2019 WL 1274528, at *1 (N.D. Cal. Mar. 20, 2019), *amended*, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019); *Lee v. Ohio Educ. Ass'n*, 366 F.Supp.3d 980, 983 (N.D. Ohio 2019); *Mooney v. Illinois Educ. Ass'n*, 372 F.Supp.3d 690, 707 (C.D. Ill. Apr. 11, 2019); *Bermudez*, 2019 WL 1615414, at *1; *Akers v. Maryland Educ. Ass'n*, 376 F.Supp.3d 563, 2019 WL 1745980, at *5 (D. Md. 2019); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021, at *3 (D. Conn. Apr. 26, 2019); *Hernandez v. AFSCME Cal.*, ---F.Supp.3d---, 2019 WL 2546195, at *3 (E.D. Cal. June 20, 2019).

III. Exclusive-representative collective bargaining does not violate the First Amendment

Although Plaintiff is not a union member and is not required to support the Union in any way, he protests that his First Amendment rights are violated by the system of exclusive-representative collective bargaining. As demonstrated in AFSCME's motion, this claim is foreclosed by *Knight*, which *Janus* did not overrule. Union MSJ at 20-27. Plaintiff's arguments to the contrary are meritless.

Plaintiff fails to demonstrate any actual infringement or compulsion of his speech or association. He does not present any evidence that he was compelled to speak or silenced. By his own admission, Plaintiff retains the right to "speak for himself" and he does not claim any First Amendment right "to introduce a competing union into the bargaining mix," or to force the "the government [to] schedule meetings with him, [or] engage in negotiation." Pl. MSJ at 17-18, 23. Nor does Plaintiff claim that he is being forced to join, support or endorse the Union or its positions or that he is prevented from joining, supporting or endorsing the positions of other organizations. Nor does Plaintiff dispute that the government and reasonable outsiders would understand that not every bargaining unit worker necessarily agrees with a democratically chosen union representative.

As such, there is no material difference between this case and *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied*, ---S.Ct.---, 2019 WL 2078110 (U.S. May 13, 2019) and *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019), and these decisions should be followed here.

Bierman reasoned that the claim that exclusive-representative collective bargaining violates the First Amendment "is foreclosed by *Knight*" because the Supreme Court in *Knight* held that "the State 'in no way restrained' the instructors' 'freedom to associate *or not to*

associate with whom they please, *including the exclusive representative*.'" 900 F.3d at 574 (quoting 465 U.S. at 274, 288 (emphasis original)). Similarly, *Mentele* reasoned that *Knight* foreclosed a challenge by non-union members to exclusive representation that raised the precise arguments that Hendrickson raises here:

> *Knight* addressed the First Amendment rights of non-union members who were excluded from union meetings with the State, and [Plaintiff] claims that her First Amendment rights are infringed when SEIU purports to speak on her behalf even though she abhors the union. *Knight* acknowledged that exclusive bargaining required the State to treat the union representatives as expressing 'the faculty's official collective position' *even though* 'not every instructor agrees with the official faculty view on every policy question.' 465 U.S. at 276. In this way, *Knight* addresses [Plaintiff's] objection because Minnesota's exclusion of non-union faculty members from meet and confer sessions necessarily meant that union representatives expressed the faculty's 'official collective position' on behalf of even dissenting non-union members. *Knight* expressly concluded that such a system 'in no way restrained appellees' … freedom to associate *or not to associate with whom they please, including the exclusive representative,' id.* at 288…. [A]nd it approved the requirement that bound non-union dissenters to exclusive union representation.

Mentele, 916 F.3d at 788-89 (emphasis, first omission original).[8]

Plaintiff claims that *Knight* only addressed whether represented employees had a right to meet independently with the government employer, but the Eighth Circuit correctly rejected the same claim in *Bierman*:

> [Plaintiffs] urge that *Knight* addressed only whether it was constitutional for a public employer to exclude employees from union meetings, but a fair reading of *Knight* is not so narrow. The Court summarily affirmed the constitutionality of exclusive representation for subjects of mandatory bargaining. 465 U.S. at 279. And the Court discussed more broadly the fact that the State treated the position of the exclusive representative as the official position of the faculty, even though not

[8] Plaintiff incorrectly characterizes as dicta the statements in *Knight* that the employees' freedom to speak and freedom to associate were "wholly unimpaired" by the exclusive representative. *See Mentele*, 926 F.3d at 788 (concluding that these statements are not dicta).

> every instructor agreed, *id.* at 276, but nonetheless ruled that the exclusive representation did not impinge on the right of association. *Id.* at 288-90.

Bierman, 900 F.3d at 574. Plaintiff's narrow reading of *Knight* was also expressly rejected in *Mentele*, 916 F.3d at 788-89, *Thompson v. Marietta Education Association*, 371 F.Supp.3d 431, 436-37 (S.D. Ohio 2019), and *Reisman v. Associated Faculties*, 356 F.Supp.3d 173, 176-77 (D. Me. 2018).

Janus did not overrule *Knight*'s holding that exclusive-representative bargaining, by itself, does not infringe upon public employees' First Amendment rights. *See* Union MSJ at 25.[9] Rather, *Janus* reaffirms *Knight*, by "distinguishing between compelled financial support for a union's exclusive representation and the underlying system of exclusive union representation." *Crockett*, 367 F.Supp.3d at 1009; *Babb*, 2019 WL 2022222, at *18; *see also Janus*, 138 S.Ct. at 2485 n.27 ("States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.").[10]

Equally to the point, even if exclusive-representative bargaining were an infringement on First Amendment rights that triggers exacting scrutiny (and it is not), the system would satisfy such scrutiny. *See* Union MSJ at 25-27; *see also Mentele*, 916 F.3d at 791 ("Even assuming that

[9] *See also Bierman*, 900 F.3d at 574; *Mentele*, 916 F.3d at 789; *Grossman v. Haw. Gov't Emps. Ass'n/AFSCME Local 152*, ---F.Supp.3d---, 2019 WL 2195206, at *2 (D. Haw. May 21, 2019); *Babb*, 2019 WL 2022222, at *18; *Crockett*, 367 F.Supp.3d at 1009; *Thompson*, 371 F.Supp.3d at 438; *Reisman*, 356 F.Supp.3d at 177; *Uradnik v. Inter Faculty Org.*, 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, No. 18-719 (U.S. Apr. 29, 2019).

[10] Plaintiff also relies on *Sweeney v. Madigan*, 359 F.Supp.3d 585 (N.D. Ill. 2019). But in that case the union was complaining about a statutory requirement that the exclusive representative expend resources and act in the interest of free-riding non-members. Here Plaintiff is not required to personally do anything. Moreover, *Sweeney* was decided on jurisdictional grounds without addressing the merits of the union's argument. *See id.* at 591-92.

Knight no longer governs the question presented, we would still conclude that [the state's] exclusive bargaining arrangement with [the union] is constitutionally permissible.").

Plaintiff wrongly belittles the State's interest in using an exclusive-representative bargaining system. Pl. MSJ at 18-19. This system not only promotes a compelling interest in labor peace but also the State's interests in providing a stronger voice for public employees, improving employee morale, and creating better dialogue between the employer and employees. Declaration of Joseph Grodin ("Grodin Dec.") (Dkt. 33-22) ¶ 14; *see also* NMSA 1978, § 10-7E-2 (PEBA's purpose is to "promote harmonious and cooperative relationships between public employers and public employees and … protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions."); Union MSJ at 26. As the court in *Mentele* recognized, public employers "ha[ve] an interest in negotiating with only one entity, *at least* for the sake of efficiency and managerial logistics, *and* … [an] interest in avoiding the competing demands of rival representatives, the potential confusion that would result from multiple agreements, and possible dissention among the providers." 916 F.3d at 791 (emphases added).

The cases Plaintiff cites (at p.19) for the proposition that administrative efficiency is not a compelling government interest are not helpful because, in each of these cases – unlike here – the *only* viable justification asserted was efficiency. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101-02 & n.9 (1972); *Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

Furthermore, for the reasons discussed in AFSCME's motion at 26-27, the exclusive-representative bargaining system here is the least restrictive means to achieve these compelling state interests. Indeed, the only collective bargaining systems that have been successful in the United States have been based on the principle of exclusive representation; experiments with other systems were abandoned as failures. Grodin Decl. ¶¶ 10-13. Hendrickson, like the plaintiff in *Mentele*, "wants to be left alone, but it is unclear what sort of system [the state] would or could implement to satisfy this demand, apart from unilaterally deciding the terms of employment." *Mentele*, 916 F.3d at 791; *see also Uradnik*, 2018 WL 4654751, at *3 (reasoning that exclusive-representative bargaining would satisfy exacting scrutiny if such scrutiny applied).

CONCLUSION

For the reasons stated herein, Plaintiff's motion for summary judgment should be denied, and summary judgment should be granted for Defendant AFSCME Council 18 instead, for the reasons stated in its motion.[11]

Dated: June 27, 2019

Respectfully submitted,

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[11] Although Plaintiff's brief offers no argument in support, the conclusion of that brief requests declaratory relief that NMSA 1978, § 10-7E-9(G), which made fair share fees a permissive subject of collective bargaining pre-*Janus*, is unconstitutional. Pl. MSJ at 25. Plaintiff is not entitled to any relief on that claim. *See* Union MSJ at 8.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was electronically filed and served through the CM/ECF system this 27th day of June, 2019, on all registered parties.

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