IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

BRETT HENDRICKSON,

Plaintiff,

v. **NO. 1:18-CV-01119-RB**

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.

DEFENDANTS MICHELLE LUJAN GRISHAM AND HECTOR BALDERAS' AMENDED RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants 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, (collectively "State Defendants") by and through their counsel of record, Park & Associates, L.L.C. (Alfred A. Park and Lawrence M. Marcus), and hereby file this Response Brief in Opposition to Plaintiff's Motion for Summary Judgment against them. For their Response, State Defendants **STATE**:

I. PLAINTIFFS' FAILED TO INCLUDE A NUMBERED LIST OF UNDISPUTED MATERIAL FACTS; ACCORDINGLY, NO MATERIAL FACTS ARE DEEMED UNDISPUTED

Under the Federal Rules of Civil Procedure, a Motion for Summary Judgment must contain a memorandum in support. Fed. R. Civ. P. Rule 56. Pursuant to the Local Rules for the U.S. District Court for the District of New Mexico, this "Memorandum ***must*** set out a concise statement of all of the material facts as to which the movant contends no genuine issue exists.

The facts ***must*** be numbered and ***must*** refer with particularity to those portions of the record upon which the movant relies." D.N.M.LR-Civ Rule 56.1(b). (emphasis added). Accordingly, none of the facts upon which Plaintiff bases his Motion should be considered to be undisputed. Under the Federal Rules of Civil Procedure, the court shall grant summary judgment *if the movant shows 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. Rule 56(a) (emphasis added). Plaintiff has not successfully alleged any undisputed material facts, so he is not entitled to summary judgment. Accordingly, Plaintiff's Motion should be denied.

II. NEITHER GOVERNOR LUJAN-GRISHAM NOR ATTORNEY GENERAL BALDERAS ARE PROPER DEFENDANTS

Moreover, even if Plaintiff were deemed to have alleged some undisputed material facts, his Motion must still be denied, because he is not entitled to a judgment as a matter of law. As set forth below, neither Count I nor Count II of Plaintiff's Complaint has any legal support, as neither a limited revocation period for union membership nor exclusivity of representation violates the First Amendment to the Constitution. However, it is not even necessary to reach those merits, because neither the Governor nor the Attorney General are proper Defendants for a suit for injunctive or declaratory relief under the Ex Parte Young exception to Eleventh Amendment immunity.

The Eleventh Amendment to the United States Constitution states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." While the plain language of the amendment does not include suits by citizens of the same state, the Supreme Court has repeatedly construed the

amendment to bar such suits, as well. *e.g.* Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Hans v. Louisiana, 134 U.S. 1 (1890). This immunity extends to state officials in their official capacities. Edelman, 415 U.S. at 663. However, there are some exceptions to this immunity. Among these exceptions is the doctrine articulated by the United States Supreme Court in Ex Parte Young, 209 U.S. 123 (1908). This doctrine allows for suit for injunctive and declaratory relief against state officials under certain circumstances.

However, the exception to immunity conferred by Ex Parte Young is not open ended. It "requires a 'special relation' between the state officer sued and the challenged statute to avoid the Eleventh Amendment's bar." Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001), citing Young, 209 U.S. at 157. Moreover, "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law. Thus, the mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action challenging the constitutionality of a state statute." Gilmore, 252 F. 3d at 331 (citations omitted)

In Gilmore, while the governor was "under a general duty to enforce the laws of Virginia by virtue of his position as the top official of the state's executive branch, he lacks a specific duty to enforce the challenged statute." Id. Thus, the Fourth Circuit dismissed the claim against the governor, stating that "[t]he purpose of allowing suit against state officials to enjoin the enforcement of an unconstitutional statute is not aided by enjoining the actions of a state's official not directly involved in enforcing the subject statute." Id.

Similarly, the Fifth Circuit has barred claims against both the state governor and the state attorney general, when neither are responsible for enforcing the law in question. Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (en banc). In Okpalobi, several physicians challenged a

Louisiana statute that provided for a private right of action by women who have undergone abortions, against the physicians who performed said abortions. 244 F.3d at 409. The Court held that, because the statute in question created a private right of action, "[t]he plaintiffs have never suggested that any act of the defendants has caused, will cause, or could possibly cause any injury to them." Id. at 426. The Court noted that there exists "a long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute." Id. Moreover, the harm of which the plaintiffs complained was not redressable by either the Governor or the attorney general, noting that "[t]he governor and attorney general have no power to redress the asserted injuries. In fact, under Act 825, no state official has any duty or ability to do *anything.* The defendants have no authority to prevent a private plaintiff from invoking the statute in a civil suit." Id. at 427. Accordingly, the *en banc* court reversed the panel's decision that the statute was unconstitutional.

The Tenth Circuit has also applied the principle that a federal suit against state officials will only be available if these officials have enforcement power, and used the principle to dismiss a claim against the Governor and Attorney General of Oklahoma. Bishop v. Okla., 333 Fed. Appx. 361 (10th Cir. Unpublished Opinion June 5, 2009). In Bishop, two same-sex couples attempted to challenge the constitutionality of an amendment to the Oklahoma constitution that barred same sex marriages. 333 Fed. Appx. at 362-363. In their lawsuit, the plaintiffs claimed "they desire to be married but are prevented from doing so, or they are married, but the marriage is not recognized in Oklahoma." Id. at 365. The Court noted that the couples' claims are "simply not connected to the duties of the Attorney General or the Governor. Marriage licenses are issued, fees collected, and the licenses recorded by the district court clerks." Id. As the Governor and Attorney General were not involved with the process of issuing and recording marriage

licenses, and despite their general enforcement powers, the Tenth Circuit held that "[b]ecause the plaintiff failed to name a defendant having a causal connection to their alleged injury that is redressable by a favorable court decision, we conclude the Couples do not have standing." Id. at 364.

In the instant case, Plaintiff challenges the constitutionality of several provisions of the Public Employee Bargaining Act, N.M.S.A. § 10-7E-1 *et seq* ("PEBA") Enforcement of PEBA, at least at the level of state agencies, is the responsibility of the Public Employee Labor Relations Board. N.M.S.A. §§ 10-7E-23(A) & 10-7E-4(D). This board is generally independent of the governor and attorney general. While the governor selects the members of the board, she cannot simply select any member she wishes. Rather, the governor appoints the membership of the three member board as follows: "The governor shall appoint one member recommended by organized labor representatives actively involved in representing public employees, one member recommended by public employers actively involved in collective bargaining and one member jointly recommended by the other two employees." N.M.S.A. § 10-7E-8 (A). Moreover, the influence of the governor over the board members begins and ends with their appointments. Members of the board serve fixed three year terms. N.M.S.A. § 10-7E-8(B). Further, the governor does not have the authority to remove any board members from their positions. Am. Fed.of State, County, & Muni. Employees v. Martinez, 2011-NMSC-018, 150 N.M. 132. In fact, in Martinez, the New Mexico Supreme Court noted that the independence of the board was put in place for good reason: the PERLB adjudicates disputes involving departments of the executive branch, creating a conflict of interest for the governor. 2011-NMSC-018, ¶ 11. The Court went on to note that:

> Because the PELRB is empowered to make decisions that may adversely affect the executive branch, the PELRB must remain free

> from the executive's control. The PELRB cannot remain free from the executive's control or coercive influence if we conclude that the members of the PELRB serve at the pleasure of the Governor. The Act's statutory scheme for the appointment of PELRB members provides adequate guarantees that an independent, unbiased decision maker will be selected, and thus comports with the requirements of due process. However, interpreting Article V, Section 5 to empower the Governor to arbitrarily remove its members would not comport with the requirements of due process.

Id.

Because of the clear legislative intent to keep the governor from exerting control over the PERLB, beyond a heavily constrained appointment power, there is nothing that the governor can do to enforce the contested statutes. Further, the PEBA does not create any enforcement role whatsoever for the attorney general. Accordingly, this case closely resembles Gilmore, Okpalobi, and Bishop, in which federal appellate courts have held that a plaintiff cannot assert a claim against a state governor or attorney general. Accordingly, Plaintiff is not entitled to summary judgment against either of these officials.

III. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO COUNT I OF HIS COMPLAINT, BECAUSE THAT COUNT IS MOOT, AND BECAUSE THE LIMITED REVOCABILITY CLAUSE IS NOT UNCONSTITUTIONAL UNDER THE JANUS DECISION

Moreover, even assuming, *ad arguendo*, that the Governor and the Attorney General are appropriate defendants, Count I of Plaintiff's Complaint must still be dismissed. Further, Plaintiff has not stated a claim under Count I of his Complaint. Plaintiff alleges that he joined the union because the alternative was to pay fair share non-member fees, which were declared to be unconstitutional under the decision in Janus v. American Federation of State, County, and Municipal Employees, 138 S. Ct. 2448 (2018). Plaintiff claims that, because he believed that he would have to pay some fees in any event, he joined the union. Plaintiff then alleges that he was not permitted to withdraw from the union immediately upon the issuance of the Janus decision,

that he had to wait until the revocation period. Plaintiff was later permitted to leave the union during the revocation period. However, Plaintiff argues that he is entitled to declaratory and injunctive relief stating that this limited revocation period was unconstitutional.

As set forth below, Plaintiff's claim must fail for two reasons: One, Plaintiff's claim is moot. Plaintiff alleges that he joined the union because he would have had to pay fees, either fair share fees or union dues, in any event, and that he would not have joined the union had fair share fees been held to be unconstitutional earlier. Therefore, he claims that his constitutional rights were violated by the fact that Defendants refused to let him leave the union the instant that Janus was decided. However, because Plaintiff has since left the union, and because a change in State of New Mexico policy will effectively prevent the facts of the instant case from repetition in the future, the requirements for mootness are satisfied. Two, the limited revocation period is not unconstitutional, even after the Janus decision, and even as applied to employees who claimed that they joined the union because they would have to pay fees (either union dues or fair share fees) in any event. Accordingly, Count I of Plaintiff's complaint must be dismissed.

Plaintiff's claim is clearly moot. "Under Article III of the constitution, federal courts may adjudicate only actual, ongoing cases or controversies." Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Accordingly, to the extent that a party seeks equitable relief to halt actions that are confined to the past, and do not have ongoing effects that can be remedied through the judicial process, this case concerns a moot question, and a federal court does not have jurisdiction over the case. *See, e.g.*, Buchanan v. Snedeker, 588 F.3d 1281 (10th Cir. 2009) (holding that a court has no subject matter jurisdiction over a moot case). This is true even if the party seeks declaratory relief. Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 (10th Cir. 1994) (superseded on other grounds).

The State of New Mexico will no longer deduct fair share fees from employees who do not join the union. On July 6, 2018, Justin Najaka, then Director of the New Mexico State Personnel Board, sent a letter to all state employees informing them of the Janus decision, and stating that "[t]o comply with this ruling, the State personnel Office will immediately cease payroll deductions to public sector unions from non-union members effective pay period June 30, 2018. Justin Najaka Letter of July 6, 2018, attached as Exh. A to State Defendants' Motion to dismiss [Doc. No. 37, filed May 31, 2019]. Plaintiff claims that he joined the union only because he would have to pay fees in any event: he would have had paid union dues because he joined the union, but he would have paid fair share fees if he had not. Therefore, he argues that he should have been permitted to leave the union as soon as the Janus holding rendered the fair share fees unconstitutional.

Plaintiff's claim is moot, because not only has he since been permitted to leave the union, but his particular situation is incapable of repetition. New Mexico state policy, as described in the Najaka letter, now prevents state agencies from longer deduct fair share fees from employees who are not union members. Accordingly, as long as Janus remains good law, no New Mexico state employee will ever join a union because he or she would have to pay fair share fees anyway. Moreover, the first revocation period after Janus has come and gone, so all union members who joined a union because of the fair share fees have had the opportunity to quit. Quite simply, Plaintiff's argument that his situation is capable of repetition is without merit.

Further, even assuming, *ad arguendo,* that Plaintiff's claim under Count I is not moot, it must also fail on the merits: the limited revocation period is not unconstitutional under Janus, even when applied to union members who claim that they only joined because of the fair share fees. Janus concerned the rights of individuals who were not members of the union, who had fair share fees deducted from their pay without authorizing the deduction. Plaintiff, however, was a

union member, who seeks to be retroactively relieved of the duties under his contact with the union. Quite simply, Plaintiff seeks a "broad expansion of the holding in Janus." Belgau v. Inslee, 359 F. Supp. 3d 1000, 1016 (W.D. Wash. 2019). In Belgau, the plaintiffs sued over a revocation clause in their union contract similar to the one at issue in the present case: the employees were required to give notice between 10 and 20 days prior to the end of each yearly period. Id. Nonetheless, the Court held that this requirement was not unconstitutional. Id. at 1016-17.

Contrary to Plaintiffs' contentions, it is well settled that 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). In Cohen, a political insider agreed to provide information relating to a candidate to newspaper reporters on the condition that the newspapers protected the insider's anonymity. 501 U.S. at 665. The newspaper mentioned the insider by name, breaking its promise. Id. at 666. The court held that the First Amendment did not bar a promissory estoppel claim by the insider. Id. at 671-72.

Similarly, in the instant case, Plaintiff entered into a contractual agreement with the union, which is otherwise enforceable under state law. The First Amendment cannot bar Plaintiff's contractual obligations. As the Court in Belgau noted,

> Janus does not apply here – Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here. The relationship between unions and their voluntary members was not at issue in *Janus. The notion that the Plaintiffs may have made a different choice if they knew the Supreme Court would later invalidate public employee agency fee arrangements [in Janus] does not void their previous knowing agreements.*

359 F. Supp. 3d at 1016-17 (citations omitted) (emphasis added).

The Ninth Circuit reached a similar determination in another Washington state case. In Fisk v. Inslee, 759 Fed. Appx. 632 (9th Cir. Unpublished opinion Jan. 9. 2019), the Court held that "deduction of union dues in accordance with membership cards' dues irrevocability provision does not violate Appellants' First Amendment rights." 759 Fed. Appx. at 633. Moreover, the Court noted that "temporarily irrevocable payment authorizations are common and enforceable in many consumer contracts—e.g., gym memberships or cell phone contracts—and we conclude that under state contract law those provisions should be similarly enforceable here." Id. at 644.

Finally, in Smith v. Sup. Ct., County of Contra Costa, 2018 WL 6072806 (N.D. Cal. Slip Copy Nov. 16, 2018), the Northern District of California denied a motion for a preliminary injunction enjoining a court system from continuing to deduct fees from union members who wished to leave a union. In so doing, it also distinguished Janus, noting that

> the Janus plaintiffs had opted out of union membership prior to the case; by contrast, Smith had opted in to union membership until Janus was decided. Smith want Janus to stand for the proposition that any union member can change his mind at the drop of a hat, invoke the First Amendment, and renege on his contractual obligation to pay dues. Far from standing for that proposition, 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 (November 30, 2018).

2018 WL 6072806 at *1.

The Contra Costa Court also noted that the plaintiffs' waiver of their First Amendment rights to not join a union was valid, noting that "it's not the rights clarified in Janus that are relevant to Smith – Smith's First Amendment right to opt out of union membership was clarified in 1977, and yet he waived that right by affirmatively consenting to be a member of Local 2700."

Id. Quite simply, the Contra Costa decision is indistinguishable from the instant case. As such, the opinion should be seen as highly persuasive. Quite simply, Janus did not overturn the well-settled principle that the First Amendment cannot be used to avoid pre-existing contractual obligations. Consequently, Plaintiff is not entitled to summary judgment as to Count I of Plaintiff's Complaint.

IV. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO COUNT II OF HIS COMPLAINT BECAUSE THE EXCLUSIVE REPRESENTATION STATUTE IS NOT UNCONSTITUTIONAL UNDER JANUS

Further, Plaintiff is not entitled to summary judgment as to Count II of his Complaint. This Count seeks to invalidate the state statute that allows a union to become an exclusive representative for a public employee bargaining unit. As with Count I, Plaintiff seeks a major expansion of Janus that was clearly not contemplated by the decision itself. In fact, as set forth below, the Janus decision was justified by the idea that unions would continue to have exclusive bargaining rights.

In Janus, the U.S. Supreme Court acknowledged that the rationale for the fair share agency fees, the interest of the state in maintaining labor peace, was a compelling state interest. 138 S. Ct at 2465. Plaintiff argues that the Court "assumed, without deciding, that labor peace might be a compelling state interest." Plaintiff's Mot. [Doc. No. 33, filed May 31, 2019, at 18. However, it is clear from the Janus decision that the Court actually decided that labor peace is a compelling state interest, because it stated "[w]e assume that labor peace in this sense of the term, is a compelling state interest." 138 S. Ct.at 2465. If the Court wished to indicate that it was not deciding this issue, it could have stated that it "assumes, without deciding" this issue. The Court has used the phrase "assume, without deciding" numerous times in its history, including multiple times in the past few years. *See, e.g.*, Nat. Aeronautics & Space Admin. v. Nelson, 562

U.S. 134, 138 (2011) ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in Whalen and Nixon"); RJR Nabisco, Inc.v. European Community, 136 S. Ct. 2090, 2103 (2016) ("We therefore decline to reach this issue, and assume without deciding that § 1962(d)'s extraterritoriality tracks that of the provision underlying the alleged conspiracy."); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 73 (2013) ("We, therefore, assume, without deciding, that petitioners' Rule 68 offer mooted respondent's individual claim.")

Significantly, both Nelson and RJR Nabisco were written by Justice Alito, who also provided the opinion in Janus. If Justice Alito wanted to indicate that the Court was not deciding the issue, he would have said so explicitly. It is thus evident that the Court wished to accept the premise that labor peace is a compelling state interest, just without further elaboration. Further, in a post Janus decision, the Ninth Circuit noted that the State of Washington's "exclusive bargaining agreement with SEIU serves the compelling -- and enduring-- state interest of labor peace." Mentele v. Inslee, 916 F.3d 783, 790 (9th Cir. 2019). The Mentele decision went on to state that "Janus did not revisit the longstanding conclusion that labor peace is a 'compelling state interest' and the Court has long recognized that exclusive representation is necessary to facilitate labor; without it, employers might face 'inter union rivalries' fostering 'dissention within the workforce,' 'conflicting demands from different unions,' and confusion from multiple agreements or employment conditions." 916 F.3d at 790, citing Janus, 138 S. Ct. at 2465.

Quite simply, the Janus decision overturned part of the holding of Abood v. Detroit Board of Education, 431 U.S. 209 (1977), allowing states to deduct "fair share" fees from employees' paychecks. However, the Court did not overturn the broader principles embodied in the Abood decision, that exclusive representation is necessary for the compelling state interest of labor peace. Rather, the Court rejected the "fair share" agency fees on the grounds that "it is now

undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." Id. at 2466. This raises the question of the nature of the less restrictive means contemplated by the Supreme Court. In fact, the decision includes a lengthy discussion regarding how to avoid the "free rider" problem, and encourage unions to represent members, as well as non-members. For instance, the Court stated that

> Even without agency fees, *designation as the exclusive representative confers many benefits*. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See § 315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union.

Id. at 2467. (emphasis added). The Court went on to describe additional benefits of exclusive representation. Id. In addition, the Court noted that bargaining units of employees of the federal government, the Postal Service, and many states enter into union contracts providing for exclusive representation, despite the fact that these governmental entities do not allow for fair share agency fees:

> Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U.S.C. §§ 7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members. The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U.S.C. §§ 1203(a), 1209(c), and about 400,000 are union members. Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are *represented by unions that serve as the exclusive representatives of all the employees.*

Id. at 2466 (emphasis added)

In other words, the Janus opinion devoted a substantial amount of space to discussing the reasons why unions would continue to act as exclusive representatives for public employee bargaining units, even in the absence of fair share agency fees. Thus, the Court clearly anticipated the continuation of exclusivity provisions after the Janus decision. In fact, it is apparent from the decision that the Court determined that the less restrictive means available to maintain labor peace was to continue to allow unions to serve as exclusive representatives, with the advantages associated with that status. Therefore, based on the reasoning of the Janus decision, it is clear that allowing unions to continue as exclusive representatives is necessary to serve the compelling state interest of maintaining labor peace, which allows it to survive First Amendment scrutiny. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 199-200 (1992). Quite simply, the Janus decision clearly assumed that unions would maintain their status as exclusive representatives for public employee bargaining. Accordingly, such exclusive representation passes constitutional muster, so Plaintiff is not entitled to summary judgment as to Count II of his Amended Complaint. It is true, as Plaintiff notes, that one union has challenged the exclusive representation requirement on constitutional grounds. Sweeney v. Madigan, 359 F.Supp.3d 585 (2019). However, the Court did not actually find that this requirement was unconstitutional, so it is irrelevant to Plaintiff's claims.

Further, contrary to Plaintiff's contentions, the decision in Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) confirms the fact that exclusive representation provisions pass constitutional muster. Moreover, Knight remains good law. In his Motion, Plaintiff has oversimplified the procedural history of Knight. It is true that, in a separate opinion, the Supreme Court summarily affirmed the portion of the district court decision that upheld the 'meet and negotiate" process. However, the bulk of the Knight opinion was devoted to

reversing the district court holding that the negotiating procedure described in the state statute, which granted the union the right to select the representatives for the "meet and confer committees" from its own membership ranks, was unconstitutional. 465 U.S. at 278. The District Court decision was based on the First and Fourteenth Amendments, not on the non-delegation doctrine. Id. Nonetheless, the Supreme Court held that the non union members' freedom of speech and freedom of association were not impaired. Id. at 288-89. In so doing, it held that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." Id. at 288.

In the Knight opinion, the Court cited Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979). In Smith, the Supreme Court held that a public employees' union did not have its First Amendment rights abridged by a rule that required employees to file their grievances directly with the employer. The Smith Court noted "[t]he public employee surely can associate, and speak freely and openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." 441 U.S. 665, cited in Knight, 465 U.S. at 286.

The Knight holding noted the conduct challenged in that case was the converse of the policy at issue in Smith. Knight, 465 U.S. at 286-87. However, the applicable constitutional principle is the same: "When government makes general policy, it is under no greater constitutional obligation to listen to any specifically affected class than it is to listen to the public at large." Id. at 287. When a public entity names a labor organization as the exclusive representative for negotiation with employees, it is not preventing a government employee from

speaking, it is simply choosing not to listen. Accordingly, it is not violating the employees' First Amendment rights to speak or freely associate.

It is also clear that the Knight holding survives the Janus decision. The Janus decision did not even mention Knight. Moreover, as the Eighth Circuit noted, under Janus, "a state cannot compel public employees…to pay fees to a union of which they are not members, but the providers here do not pay a mandatory fee." Bierman v. Dayton, 900 F.3d 570, 574 (2018). The Court noted that the Janus decision never mentioned Knight, and the constitutionality of exclusive representation standing alone was not at issue." Id. Similarly, the Ninth Circuit noted in Mentele that it was appropriate to "apply Knight's more directly applicable precedent" rather than Janus, "and hold that Washington's authorization of an exclusive bargaining representative does not infringe [the plaintiff's] First Amendment rights." 916 F.3d at 783. Quite simply, Knight remains good law, so exclusive bargaining rights continue to pass constitutional muster. Accordingly, Plaintiff is not entitled to summary judgment.

The cases cited by Plaintiff regarding administrative convenience are irrelevant. In each of these cases, the administrative burden was relatively minor, and in most of the cases, ancillary to the true discriminatory purpose of the statutes. In Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) the Supreme Court noted that the burden on the state caused by allowing an open Republican primary, such as adding a few more voting machines, was not substantial, that it would be similar to the burden created "if a third major-party should come into existence in Connecticut, thus requiring the State to fund a third major party primary." 479 U.S. at 218.

Likewise, in Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972), the administrative convenience argument in favor of allowing a distinction between labor and non-labor picketing was noted to be "an attenuated interest," and "*at best*, a claim of small

administrative convenience and perhaps a confession of legislative laziness. 408 U.S. at 102, n.9 (emphasis added). In those cases, the Supreme Court took pains to note that the administrative convenience at issue was very small. In the instant case, exclusive representation serves a much more compelling state interest, that of labor peace and 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. This interest in labor peace is, as noted in Janus, a compelling state interest. In the Janus decision, the Court noted that the concerns raised in the Abood decision included the possibility that "'inter-union rivalries' would foster 'dissension within the work force,' and also noted that

> and the employer could face "conflicting demands from different unions." Id., at 220–221, 97 S.Ct. 1782. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." Id., at 220, 97 S.Ct. 1782. And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]."

138 S. Ct. at 2465, citing Abood, 431 U.S. at 220-221.

As noted above, while it overturned the portion of Abood that allowed for mandatory fees, the Court did so only because it disputed the portion of the Abood reasoning that stated that "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked." Significantly, it did not dispute the consequences described above, that could follow from the elimination of union as exclusive representatives. These consequences are indeed severe, and rendered the labor peace secured by exclusive representation a compelling state interest. The state's interest in avoiding the purchase of a few more voting machines is not nearly as compelling.

The remainder of the cases cited by Plaintiff are similarly irrelevant. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); Romer v. Evans, 517 U.S. 620 (1996); and Plyler v. Doe, 457 U.S. 202 (1982). In each of these cases, the Court determined that the claims of administrative convenience were not substantial, and were wholly ancillary to the main purpose of the challenged legislation which, in each case, was discrimination against a particular group. In Stanley, the plaintiff challenged an Illinois state statute which automatically made children of unwed fathers wards of the state upon the death of the mother, rather than placed in the custody of the father. 405 U.S. at 646. The State of Illinois argued that unwed fathers were presumed to be unfit parents, so no hearing was necessary. Id. at 647. The Supreme Court held that the law was unconstitutional, stating that its reasoning should be similar to that used to decide Bell v. Burson, 402 U.S. 535 (1971), in which the Court held that "the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered." Stanley, 405 U.S. at 657. In other words, the supposed administrative convenience was so attenuated that was merely stated as a weak excuse for a discriminatory presumption against unwed fathers.

Likewise, in Plyler v. Doe, 457 U.S. 202 (1982) the issue before the Court was whether claims of administrative convenience were a mere excuse for a discriminatory policy. In considering whether Texas' exclusion of undocumented aliens from public schools was constitutional, the Court stated that "[t]he State must do more to justify its classification with a concise explanation of its attempt to discriminate." 457 U.S. at 227. The Court evaluated three colorable state interests: that undocumented immigrants allegedly imposed a significant burden on the state's economy, that they allegedly had special needs that reduced the overall quality of education in the state, and that they were allegedly more likely to leave the country, depriving

the state of the benefits resulting from their education. Id. at 227-30. The Court found no evidence in support of any of these claims of an economic hardship, stating that "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc." Id. at 228. Quite simply, the Court found that the policy in question did not conserve state resources, and was merely a pretext for discrimination.

Finally, Romer v. Evans, 517 U.S. 620 (1996), can also be readily distinguished from the instant case. In striking down a Colorado statute barring protections for the legal rights of homosexuals, the Court noted that a secondary rationale offered by the state for the statute was "its interest in conserving resources to fight discrimination against other groups." 517 U.S. at 635. However, the Court pointed out that "the breadth of the amendment is so far removed from [this and other] particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective." Id. Thus, the Court found that there was no indication that the statute in question actually conserved resources, and this claim was again merely an excuse for discrimination.

The New Mexico statute that provides for a union to serve as the exclusive representative for a given bargaining unit of public employees exists to serve the compelling state interest of labor peace. This interest is far greater than a state's interest in marginally increased administrative efficiency. Moreover, it is the genuine reason for the statute, and it is not an excuse for any kind of discrimination or other hidden agenda, as opposed to the policies and statutes struck down in Stanley, Plyler, and Romer. Exclusivity of representation is not unconstitutional, even after the Janus decision, which clearly anticipated a continuation of this

policy. Plaintiff is thus not entitled to a judgment as a matter of law, so his Motion for Summary Judgment should be denied.

V. CONCLUSION

Plaintiff's Motion for summary judgment fails on both procedural and substantive grounds. Plaintiff did not include a numbered list of Undisputed Material facts, so it is not a proper Motion under the Local Rules. Moreover, this Court lacks jurisdiction over Plaintiff's claims against the governor and the attorney general, as they are not proper defendants for the purposes of the Ex Parte Young exception to the Eleventh Amendment immunity. Further, neither the limited revocation period nor the exclusivity of representation are unconstitutional. Accordingly, Defendants Michelle Lujan Grisham, in her official capacity as Governor of New Mexico, and Hector Balderas, in is official capacity as Attorney General of New Mexico, respectfully request that this Honorable Court deny Plaintiff's Motion for Summary Judgment.

Respectfully Submitted,

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I hereby certify a true and correct copy
of the above pleading was served by the Court's
CM/ECF system on this 27th day of
June 2019 to all counsel of record

/s/ Lawrence M. Marcus
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