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

BRETT HENDRICKSON,

Plaintiff,

v. **No. 18-CV-1119 RB-LF**

AFSCME COUNCIL 18 and
NEW MEXICO HUMAN SERVICES
DEPARTMENT,

Defendants.

AFSCME COUNCIL 18'S MOTION TO DISMISS COUNT II OF THE COMPLAINT;
MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT

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MOTION

Defendant AFSCME Council 18 hereby moves to dismiss Count II of the Complaint. The Motion should be granted pursuant to Fed. R. Civ. P. 12(b)(6) because Count II fails to state a viable claim for relief. Plaintiff's legal theory that the exclusive representation provision of New Mexico's public employee collective bargaining statute violates First Amendment freedom of speech and association is foreclosed by *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984), and also is contrary to other Supreme Court precedents about compelled speech and compelled expressive association. To the extent that Count II also seeks prospective relief against a New Mexico statute that authorizes fair-share fee requirements in collective bargaining agreements, the claim should be dismissed for lack of a justiciable controversy pursuant to Fed. R. Civ. P. 12(b)(1).

This motion is based on the accompanying Memorandum of Points and Authorities, the accompanying Declaration of Connie Derr, the complete files and records of this action, and such other matters as the Court may properly consider in ruling on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

New Mexico's Public Employee Bargaining Act ("PEBA") provides for a democratic system of exclusive representative collective bargaining in which the majority of employees in a bargaining unit may, if they choose, select a union representative to negotiate and administer a single collective bargaining agreement to cover the entire unit. *See* NMSA 1978, § 10-7E-1 *et seq*. In such systems, the exclusive representative, when acting in that capacity, owes a duty of fair representation to the entire bargaining unit, including to employees who have chosen not to

join the union. *See, e.g.*, NMSA 1978, § 10-7E-15(A); *Akins v. United Steelworkers of America, Local 187*, 148 N.M. 442, 445-46, 237 P.3d 744, 747-48 (N.M. 2010). The same democratic system of collective bargaining has been used in the United States for decades for millions of public and private sector employees, including federal employees. *See Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2466 (2018).

Plaintiff Brett Hendrickson is an employee of the New Mexico Human Services Department who alleges, in Count II of his Complaint, that the State of New Mexico's recognition of defendant AFSCME Council 18 ("AFSCME") as his unit's chosen PEBA representative violates his First Amendment rights. That legal claim is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). The Supreme Court held in *Knight* that an indistinguishable system of majority exclusive representation "in no way restrained [non-union members'] freedom to speak … or their freedom to associate or not to associate with whom they please, including the exclusive representative." *Id.* at 288; *see also id.* at 291 (plaintiffs in *Knight* were "[u]nable to demonstrate an infringement of any First Amendment right"). Plaintiff's legal theory is also contrary to other Supreme Court precedents about the meaning of compelled speech and compelled association for purposes of the First Amendment. Accordingly, Plaintiff's challenge to exclusive representative collective bargaining should be dismissed as failing to state a viable claim.

Plaintiff's Count II also appears to seek prospective relief against a PEBA provision that authorizes requirements that non-members pay fair-share fees to support collective bargaining activities. That claim does not present a justiciable controversy. Plaintiff never paid fair-share fees; *Janus* already declared fair-share fees unconstitutional; and the collection of fair-share fees

for plaintiff's bargaining unit already permanently ended as a result of *Janus*. The "mere presence on the statute books of an unconstitutional statute" does not create an Article III case or controversy. *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006). Accordingly, this part of Count II should be dismissed for lack of jurisdiction.

BACKGROUND

I. New Mexico's Public Employee Bargaining Act

The PEBA was enacted in 2003 "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." NMSA 1978, § 10-7E-2.[1] The PEBA provides that public employees in New Mexico have the right to "form, join, or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any such activities." NMSA 1978, § 10-7E-5.

The PEBA permits public employees, if they so choose, to designate an "exclusive representative" by submitting proof of majority support or by majority vote in a secret ballot election, and also provides a process for employees to decertify a representative that no longer enjoys majority support. NMSA 1978, §§ 10-7E-14, 10-7E-16. A labor organization that is certified by the New Mexico Public Employee Labor Relations Board as representing the

[1] The New Mexico Legislature originally enacted the PEBA in 1992, with a sunset provision that took effect in 1999. The Legislature reenacted the PEBA in 2003. *See Int'l Ass'n of Firefighters Local 1687 v. City of Carlsbad*, 216 P.3d 256, 258 (N.M. App. 2009).

employees in an appropriate bargaining unit "shall be the exclusive representative of all public employees" in that 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." NMSA 1978, § 10-7E-15(A).

The PEBA also defines the scope of a public employer's obligation to bargain with a majority exclusive representative. If the employees choose a representative, the public employer "shall bargain [with the exclusive representative] in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties," and "shall enter into written collective bargaining agreements covering employment relations." NMSA 1978, § 10-7E-17(A). The public employer's obligation to bargain with an exclusive representative does not authorize the bargaining parties to enter into an agreement that conflicts with any provision of any other state statute. NMSA 1978, § 10-7E-17(B).

The PEBA does not require, and has never required, unit employees to become members of the labor organization that serves as the unit's exclusive representative, or to prohibit them from joining other labor organizations. To the contrary, the PEBA makes it unlawful for public employers or majority-supported exclusive representatives to interfere with the rights of employees to form, join, and participate in the activities of employee organizations of their own choosing, or to exercise their "right to refuse any such activities." NMSA 1978, § 10-7E-5 (granting public employees rights, including the right to refuse to form, join or assist a labor organization); *see also* NMSA 1978, § 10-7E-19(B) (making it a prohibited practice for a public employer to interfere with, restrain or coerce a public employee in the exercise of a right guaranteed by PEBA); § 10-7E-20(B) (making it a prohibited practice for a labor organization to

interfere with, restrain or coerce a public employee in the exercise of a right guaranteed by PEBA). The designation of a PEBA exclusive representative also does not preclude unit employees from speaking and petitioning the government about issues of public concern, just like all other citizens, whether individually or through organizations of their own choosing.[2]

The PEBA requires the exclusive representative to "represent the interests of all public employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization." NMSA 1978, § 10-7E-15(A); *see also Akins*, 148 N.M. at 445-46; *Callahan v. New Mexico Federation of Teachers - TVI*, 139 N.M. 201, 205-06, 131 P.3d 51, 55-56 (N.M. 2006). The PEBA further provides that individual public employees, "acting individually," may also present a grievance to the public employer "without the intervention of the exclusive representative." NMSA 1978, § 10-7E-15(B).

After the Supreme Court's decision in *Janus*, public employees represented by labor unions who choose not to be members of those unions can no longer be required to provide any financial support to cover the costs of union representation. 138 S.Ct. at 2486; *see also* "Attorney General Advisory Guidance for Public Sector Employers and Employees after *Janus v. AFSCME Council 31*," available at https://www.nmag.gov/attorney-general-advisory-on-janus-decision.pdf (New Mexico Attorney General's advisory that "under *Janus* … public

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[2] *See City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 173-76 & n.10 (1976) (bargaining unit members have the same First Amendment rights as other citizens to speak in opposition to union); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 230 (1977) ("The principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express [her] view about governmental decisions concerning labor relations."), *overruled on other grounds in Janus*, 138 S.Ct. 2448; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace.").

employers may no longer deduct agency fees from a nonmember's wages, nor may a union collect agency fees from a nonmember, without the nonmember employee's affirmative consent."). Although non-members no longer can be required to pay for the costs of collective bargaining, the exclusive representative still must fairly represent the entire bargaining unit. *See* NMSA 1978, § 10-7E-15(A).

The democratic, majority exclusive representation model of collective bargaining established by the PEBA is the same model used for collective bargaining for public employees of the federal government and about 40 other States, the District of Columbia, and Puerto Rico, *see, e.g.*, *Janus*, 138 S.Ct. at 2466, 2499; and for private-sector employees covered by the federal National Labor Relations Act and the Railway Labor Act, *see* 29 U.S.C. §159(a); 45 U.S.C. §152, Fourth. Democratic, majority-supported exclusive representation has been the foundation of labor relations and collective bargaining in this country since the 1930s.

II. Plaintiff's Lawsuit

Plaintiff Hendrickson is an employee of the Human Services Department. Complaint ¶¶ 3, 8, 13 (Dkt. 1). His bargaining unit is represented by AFSCME for purposes of the PEBA. *Id.* ¶ 9. Until August 2018, plaintiff was an AFSCME member. *Id.* ¶¶ 3, 20. Plaintiff alleges that he tried to withdraw from AFSCME in August 2018, but was informed that he could only withdraw pursuant to terms of the collective bargaining agreement. *See, e.g.*, *id.* ¶¶ 22-23. Plaintiff's complaint contains no allegation that he was ever a "fair share" fee payer to AFSCME. (For purposes of this motion, AFSCME assumes the truth of these allegations.)

Plaintiff's Complaint asserts claims against AFSCME and the New Mexico Human Services Department. Count I alleges that AFSCME is refusing to allow plaintiff to withdraw

from the union and terminate the deduction of membership dues from his paycheck. *Id.* ¶¶ 30-42.[3] Count II alleges that the designation of AFSCME as the PEBA exclusive representative of plaintiff's bargaining unit violates his First Amendment rights of speech and association because he does not want to be represented by AFSCME. *Id.* ¶¶ 43-53. Count II also appears to seek prospective relief against the PEBA provision that authorizes the inclusion of fair-share provisions in collective bargaining agreements. *See* Complaint, ¶¶52-53 (citing NMSA 1978, § 10-7E-9(G)). The collection of fair-share fees for plaintiff's bargaining unit already ended after *Janus*. Declaration of Connie Derr, ¶¶4-8 & Exhs. 1-3.

LEGAL STANDARD

"To survive a motion to dismiss" under Rule 12(b)(6), the allegations of the complaint, "accepted as true," must "'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)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A motion to dismiss should be granted without leave to amend pursuant to Rule 12(b)(6) "when it would be futile to allow the plaintiff an opportunity to amend his complaint." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006).

"In deciding whether a case is moot, the crucial question is whether granting a present determination of the issues offered will have some effect in the real world. When it becomes

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[3] In fact, plaintiff's withdrawal from membership has been processed, the deduction of dues from his paycheck stopped, and he was refunded all the dues deducted after the date of his attempted withdrawal from membership. AFSCME will move for summary judgment on Count I at the appropriate time.

impossible for a court to grant effective relief, a live controversy ceases to exist, and the case becomes moot. Put another way, a case becomes moot when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision." *Ind v. Colorado Dep't of Corrections*, 801 F.3d 1209, 1213 (10th Cir. 2015) (citations omitted). The court has "wide discretion to allow affidavits [and] other documents" in considering a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

ARGUMENT

I. The Government May Use a Democratic System of Exclusive Majority Representative Collective Bargaining to Set Employment Terms for its Public Employees.

Plaintiff alleges in Count II that AFSCME's designation as the chosen PEBA representative of his bargaining unit "compels Hendrickson to associate with the union and, through its representation of him, to petition the government with a certain viewpoint in opposition to his own goals and priorities for the State of New Mexico." Complaint ¶ 51 (Dkt. 1). According to plaintiff, this results in "an unconstitutional abridgment of Hendrickson's right under the First Amendment not to be compelled to associate with speakers and organizations without his consent." *Id.* ¶ 52.

But the PEBA does not impose any personal obligation on plaintiff whatsoever. He need not join AFSCME or endorse its positions and, since *Janus*, he need not provide any financial support to AFSCME. Nor is he precluded from speaking and petitioning about any issues, whether individually or through organizations of his own choosing. Plaintiff's theory that exclusive representation collective bargaining, by itself, violates the First Amendment rights of

bargaining unit workers is foreclosed by the Supreme Court's decision in *Knight*, as every court to consider the issue has recognized. The Supreme Court reaffirmed in *Janus* that public employers may continue to use exclusive representative collective bargaining to set employment terms for their employees. Plaintiff's claim of compelled speech and compelled expressive association would also be meritless even in the absence of precedents specific to the collective bargaining context.

A. *Knight* Forecloses Plaintiff's First Amendment Theory

In *Knight*, a group of Minnesota college instructors asserted—like plaintiff here—that the exclusive representation provisions of that state's public employee labor relations act violated the First Amendment speech and associational rights of employees who did not wish to associate with the union that a majority had chosen as their bargaining unit's exclusive representative. 465 U.S. at 273, 278-79. The state law granted their bargaining unit's majority-elected representative the exclusive right to "meet and negotiate" over employment terms. *Id.* at 274. The state law also granted the unit's representative the exclusive right to "meet and confer" with campus administrators about employment-related policy matters outside the scope of mandatory negotiations. *Id.* at 274-75. Only the designated representative had the right to participate in the "meet and negotiate" and "meet and confer" processes, and the designated representative's views were treated as the faculty's "official collective position." *Id.* at 273, 276.

The district court rejected the *Knight* plaintiffs' constitutional challenge with respect to the meet-and-negotiate process. *See id.* at 278. On appeal, the Supreme Court summarily affirmed the lower court's rejection of the *Knight* plaintiffs' "attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment." *Id.* at 278-79;

Knight v. Minnesota Cmty. Coll. Faculty Ass'n, 460 U.S. 1048 (1983).[4] The district court also concluded that the meet-and-confer process violated the rights of faculty members who had not joined the union that served as their exclusive representative. In a separate, full opinion, the Supreme Court reversed the district court's judgment with respect to the meet-and-confer process, holding that even with respect to matters not involving terms and conditions of employment subject to bargaining, exclusive representation does not infringe the First Amendment speech or associational rights of non-member employees. *Knight*, 465 U.S. at 278, 288.

The *Knight* Court began its analysis by recognizing that government officials have no obligation to negotiate or confer with faculty members, and that the meet-and-confer process (like the meet-and-negotiate process) was not a "forum" to which plaintiffs had any First Amendment right of access. *Id.* at 280-82. The Court explained that non-members also had no constitutional right "as members of the public, as government employees, or as instructors in an institution of higher education" to "force the government to listen to their views." *Id.* at 283. The government, therefore, was "free to consult or not to consult whomever it pleases." *Id.* at 285; *see also Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979) (government did not violate speech or associational rights of union supporters by accepting grievances filed by individual employees while refusing to recognize union's grievances). The *Knight* Court then went on to consider whether Minnesota's public employee labor relations act violated those First Amendment rights that non-members *could* properly assert—namely, the

[4] The *Knight* summary affirmance remains binding precedent. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

right to speak and the right to "associate or not to associate." 465 U.S. at 288. The Court concluded that Minnesota's law "*in no way* restrained appellees' freedom to speak on any education-related issue *or their freedom to associate or not to associate* with whom they please, including the exclusive representative." *Id.* (emphasis added).

Non-members' speech rights were not infringed by Minnesota's system of exclusive representation because, while the exclusive representative's status "amplifie[d] its voice in the policymaking process," that amplification did not "impair[] individual instructors' constitutional freedom to speak." As the Court explained, such amplification is "inherent in government's freedom to choose its advisers" and "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Id.*

The Supreme Court found no infringement of non-members' associational rights because they were "free to form whatever advocacy groups they like" and were "not required to become members" of the organization acting as the exclusive representative. 465 U.S. at 289. The Court acknowledged that non-members may "feel some pressure to join the exclusive representative" to serve on its committees and influence its positions. *Id.* at 289-90. But the Court held that this "is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 290. Such pressure "is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." *Id.*

Knight thus considered whether exclusive representation, by itself, violates the speech or associational rights of public employees who are not members of the union that has been designated as their exclusive representative, and held that it does not do so—thereby foreclosing the contrary claim plaintiff asserts in Count II. *See id.* at 288 ("[T]he First Amendment

guarantees the right both to speak and to associate. *Appellees' speech and associational rights, however, have not been infringed* ....") (emphasis added); *id.* at 290 n.12 (non-members' "speech and associational freedom have been wholly unimpaired").

Every court to consider the issue has concluded that *Knight* forecloses any claim that a democratic system of exclusive representative collective bargaining violates the First Amendment. *See Miller v. Inslee*, __ F.3d __, Case No. 16-35939 (9th Cir. Feb. 26, 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Hill v. Serv. Employees Int'l Union*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S.Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S.Ct. 2473 (2016); *Thompson v. Marietta Education Ass'n*, No. 2:18-cv-00628-MHW-CMV, ECF Dkt. 52 (S.D. Ohio Jan. 14, 2019); [5] *Reisman v. Associated Faculties*, 2018 WL 6312996 (D. Me. Dec. 3, 2018); *Uradnik v. Inter Faculty Organization*, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018).

B. *Janus* Did Not Overrule *Knight*.

Plaintiff relies on the Supreme Court's recent decision in *Janus*. *See* Complaint ¶¶44-45, 47-48 (Dkt. 1). But *Janus* held only that public employees who are not union members cannot be required to pay "fair share" or "agency" fees to an exclusive representative for collective bargaining representation. *Janus* did not hold that exclusive representation itself violates the First Amendment. 138 S.Ct. at 2460.[6] As the Eighth Circuit recently explained, *Janus* "never

[5] A copy of the Order in *Thompson* is attached hereto as Exhibit 1.

[6] *Knox v. SEIU Local 1000*, 567 U.S. 298 (2012), cited in the Complaint at ¶ 46, likewise involved only the collection of money from non-union members.

mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue." *Bierman*, 900 F.3d at 574.

The majority opinion in *Janus*, moreover, distinguished between compelled financial support for an exclusive representative and the underlying system of exclusive representation. *Janus*, 138 S.Ct. at 2465, 2467. The majority opinion explained that while the States may no longer require public employees to pay fair-share fees to their exclusive representatives, the States can otherwise "keep their labor-relations systems exactly as they are," including by "requir[ing] that a union serve as exclusive bargaining agent for its employees." *Id.* at 2478, 2485 n.27; *see also id.* at 2466, 2485 n.27 (States may "follow[]the model of the federal government," in which "a union chosen by majority vote is designated as the exclusive representative of all the employees"); *id.* at 2471 n.7 ("[W]e are not in any way questioning the foundations of modern labor law."). *Janus* observed that exclusive representation might not be permissible "in other contexts," but recognized that in the collective bargaining context, the imposition of a duty of fair representation on the exclusive representative *avoids* any constitutional questions. *Id.* at 2469, 2478.

As such, both *Knight* and *Janus* require rejection of plaintiffs' claim that the exclusive representation model of collective bargaining violates the First Amendment.

C. Plaintiffs' Theory is Also Inconsistent With Other Precedent About Compelled Speech and Association.

Even if plaintiff's First Amendment claim were not foreclosed by on-point and longstanding precedent, it still would be meritless.

A compelled speech claim arises when "an individual is obliged personally to express a message he disagrees with." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005).

Plaintiff does not allege any facts to show that he is being compelled to personally express any message. Thus, his claim does not involve the kind of compelled speech at issue in cases like *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Likewise, plaintiff does not allege any facts to show that he is being required personally to do or say anything to join or endorse AFSCME. Nor does he allege any facts to show that the PEBA interferes with his ability to express his own message. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (holding that a State may not require a parade to include a group if the parade's organizer disagrees with the group's message). Finally, neither support for AFSCME nor AFSCME's speech is attributed to plaintiff in the sense that matters for First Amendment purposes because reasonable people would not believe that all bargaining unit workers necessarily *agree with* the exclusive representative or its positions.

In *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), for example, law schools were required to "'associate' with military recruiters in the sense that they interact[ed] with them," but there was no impingement of the law schools' First Amendment rights because the presence of military recruiters on campus would not lead reasonable people to believe the "law schools agree[d] with any speech by recruiters." *Id.* at 65, 69; *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457-59 (2008) (Roberts, C.J., concurring) (explaining that certain cases involved "forced association" because outsiders would believe that parties "endorsed" or "agreed with" another party's message); *Jarvis v. Cuomo*, 2015 WL 1968224, at *6 (N.D.N.Y. Apr. 30, 2015) (explaining that "[t]he public's perception is relevant in forced association cases").

Under the PEBA, the chosen exclusive representative serves as the representative of the bargaining unit *collectively* and *as a whole*, rather than serving as the individual representative or

agent of any particular bargaining unit member. *See, e.g.*, *Reisman*, 2018 WL 6312996, at *5 ("The Union is not … [a non-member's] individual agent. Rather, the Union is the agent for the bargaining-unit which is a distinct entity separate from the individual employees who comprise it."). Indeed, when negotiating or enforcing a collective bargaining agreement, the exclusive representative must often weigh the competing interests of different employees within the bargaining unit and determine what is best for the unit as a whole.

Because different viewpoints exist within every democratic system and because exclusive representatives represent the bargaining unit as a whole, public employers in systems of exclusive representation-based collective bargaining like that established by the PEBA understand that not all unit employees necessarily agree with the union that a majority has designated as the exclusive representative. *See Knight*, 465 U.S. at 276 ("The State Board considers the views expressed … to be the faculty's official collective position. It recognizes, however, that not every instructor agrees with the official faculty view…."). Moreover, just as reasonable people understand that the views of a parent-teacher association, alumni association, elected congressional representative, or bar association are not necessarily shared by every parent, alumnus, constituent, or attorney, reasonable people understand that individuals in the bargaining unit represented by AFSCME do not necessarily agree with every position taken by AFSCME. *See, e.g.*, *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) ("[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual."); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (high school students understand that school does not endorse speech of school-recognized student groups); *PruneYard Shopping Ctr. Robbins*, 447

U.S. 74, 87 (1980) (views of individuals handing out pamphlets in mall not likely to be identified with mall).

For these reasons, AFSCME's views are not attributed or imputed to individual bargaining unit employees in a First Amendment sense. *D'Agostino*, 812 F.3d at 244 (Souter, J., sitting by designation) ("[W]hen an exclusive bargaining agent is selected by majority choice, it is readily understood that employees in the minority, union or not, will probably disagree with some positions taken by the agent answerable to the majority."); *Jarvis*, 2015 WL 1968224, at *6 ("[The Union's] representation of Plaintiffs would not be likely to create the perception that Plaintiffs endorse [the Union's] expressive activities.... A reasonable person would not perceive that the activities of [the Union], as a majority-elected representative, ... are identical with the views of the providers it represents."). In the absence of any facts showing that plaintiff is personally required to do anything, such attribution is a necessary element of plaintiff's compelled speech and association claim, and Count II fails for this reason as well.

II. Plaintiff's Challenge to PEBA's Fair Share Provision Does Not Present a Live Controversy

As stated above, plaintiff's Count II also appears to challenge Section 10-7E-9(G) of the PEBA. That provision authorized public employers in New Mexico to enter into collective bargaining agreements providing that represented employees who chose not to become union members would be charged a fair share fee covering the portion of union dues that was germane to collective bargaining. *Janus* invalidated an indistinguishable Illinois law, holding that a public employer may not require public employees who choose not to be union members to pay any amount to the union for the costs of representation. 138 S.Ct. at 2486. Plaintiff seeks an

injunction against the enforcement of §10-7E-9(G). Complaint ¶¶ 25, 52-53, 10 ¶ i (Dkt. 1). This aspect of Count II must be dismissed because it presents no cognizable case or controversy.

"The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue … ." *Winsness*, 433 F.3d at 732. The collection of fair-share fees for plaintiffs' bargaining unit already ended after *Janus*. Derr Decl., ¶¶ 4-8 & Exhs. 1-3. There is no likelihood plaintiff would be required to pay fair-share fees in the future because the Supreme Court has held that fair share fee requirements are unconstitutional, and the Complaint contains no allegations that any union or public employer is attempting to enforce any contract that contains such provisions after *Janus* was decided.. As such, there is no live controversy for this Court to decide. *See D.L.S. v. Utah*, 374 F.3d 971, 974-75 (10th Cir. 2004) (no case or controversy where Supreme Court's invalidation of anti-sodomy law eliminated any risk of enforcement of comparable Utah law); *see also Winsness*, 433 F.3d at 736 (Supreme Court's invalidation of Texas anti-flag burning law made it "absolutely clear" there was no threat of prosecution for violation of comparable Utah law); *Doe v. Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003).

It also bears emphasis that plaintiff never paid fair share fees. Plaintiff alleges that he was an AFSCME member until he sought to withdraw his union membership after *Janus* was decided in 2018. Complaint ¶17 (Dkt. 1). As an AFSCME member, he paid union dues (*id.* ¶18), not fair share fees.[7] Plaintiff faces no risk of paying fair share fees in the future because the State

[7] *See also* Complaint ¶ 3 (plaintiff was "coerced to join Defendant AFSCME Council 18 … and to pay union dues"); ¶ 4 (AFSCME is violating plaintiff's rights "by refusing to allow him to withdraw his membership"), ¶ 5 (State is violating plaintiff's rights "by continuing to withhold union dues from his paycheck"); ¶ 17 (plaintiff "signed a Union membership card"); ¶ 23 (State

cannot require non-members to pay fair share fees. Plaintiff thus lacks standing to challenge § 10-7E-9(G). *Winsness*, 433 F.3d at 727 ("A plaintiff who himself is not injured cannot sue to enjoin enforcement of a statute on the ground that it violates someone else's rights."); *D.L.S.*, 374 F.3d at 976 (even in First Amendment context, plaintiffs "still must show that they themselves have suffered some cognizable injury from the statute"); *Cook v. Brown*, No. 18-cv-1085-AA, ECF Dkt. 44 at 10 (D.Or. Feb. 28, 2019). [8]

Even if plaintiff did suffer some past injury from the fair share statute, moreover, that would not create a justiciable controversy about prospective relief. Every court to consider a post-*Janus* constitutional challenge to a state statute authorizing fair share fees has concluded that even when (unlike here) the plaintiff *did* pay fair share fees in the past, the plaintiff's claim for prospective relief did not present a judiciable controversy where the collection of fair share fees already ended. *See Babb v. California Teachers Ass'n*, Case No. 8:18-cv-00994-JLS-DFM, ECF Dkt. 76 at 2 (C.D. Cal. Dec. 7, 2018);[9] *Yohn v. California Teachers Ass'n*, 2018 WL 5264076, at *3-4 (C.D. Cal. Sept. 28, 2018); *Lamberty v. Conn. St. Police Union*, 2018 WL 5115559, at *8-9 (D. Conn. Oct. 19, 2018); *Danielson v. Inslee*, 345 F.Supp.3d 1336, 1340 (W.D. Wash. 2018); *Danielson v. AFSCME Council 28*, 340 F.Supp.3d 1083, 1085-86 (W.D. Wash. 2018);*Cook*, ECF Dkt. 44 at 7-10.

Personnel Office told plaintiff that collective bargaining agreement controlled "when he could exercise his First Amendment right to withdraw as a member of the Union").

[8] A copy of the Order in *Cook* is attached hereto as Exhibit 2.

[9] A copy of the Order in *Babb* is attached hereto as Exhibit 3.

CONCLUSION

For the foregoing reasons, Count II of the First Amended Complaint should be dismissed.

Dated: March 1, 2019

Respectfully submitted,

/s/ Eileen B. Goldsmith

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I hereby certify that a true and correct copy of the foregoing pleading was electronically filed and served through the CM/ECF system this 1st day of March 2019, on all registered parties.

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