

No. 20-2018

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRETT HENDRICKSON,

Plaintiff-Appellant,

v.

AFSCME COUNCIL 18; MICHELLE LUJAN GRISHAM, in her
official capacity as Governor of New Mexico; and HECTOR
BALDERAS, in his official capacity as Attorney General of New
Mexico,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
No. 18-CV-1119-RB-LF
Hon. Robert C. Brack

APPENDIX TO APPELLANT'S OPENING BRIEF

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U.S. District Court
District of New Mexico - Version 6.2.4 (Albuquerque)
CIVIL DOCKET FOR CASE #: 1:18-cv-01119-RB-LF

Hendrickson v. AFSCME Council 18 et al
Assigned to: Sr. District Judge Robert C. Brack
Referred to: Magistrate Judge Laura Fashing
Case in other court: USCA, 20-02018
Cause: 42:1983 Civil Rights Act

Date Filed: 11/30/2018
Date Terminated: 01/22/2020
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Brett Hendrickson

represented by **Brian K Kelsey**
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Defendant

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Defendant

New Mexico Human Services

represented by **Alfred A Park**

A004

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Defendant

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in her official capacity as Governor of New Mexico

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Lawrence M Marcus
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Defendant

Hector Balderas
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lawrence M Marcus
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/30/2018	1	COMPLAINT against AFSCME Council 18, New Mexico Human Services Department (Filing Fee - Online Payment), filed by Brett Hendrickson. (Rogers, Patrick) (Entered: 11/30/2018)
11/30/2018		Filing and Administrative Fees Received: \$ 400 receipt number 1084-6160224 re 1 Complaint filed by Brett Hendrickson (Payment made via Pay.gov)(Rogers, Patrick) (Entered: 11/30/2018)
11/30/2018	2	NOTICE by Brett Hendrickson re 1 Complaint <i>Civil Cover Sheet</i> (Rogers, Patrick) (Entered: 11/30/2018)

11/30/2018		United States Magistrate Judge Jerry H. Ritter and United States Magistrate Judge Laura Fashing assigned. (jg) (Entered: 11/30/2018)
11/30/2018	3	PLEASE TAKE NOTICE that this case has been randomly assigned to United States Magistrate Judge Jerry H. Ritter to conduct dispositive proceedings in this matter, including motions and trial. Appeal from a judgment entered by a Magistrate Judge will be to the United States Court of Appeals for the Tenth Circuit. It is the responsibility of the case filer to serve a copy of this Notice upon all parties with the summons and complaint. <i>Consent is strictly voluntary, and a party is free to withhold consent without adverse consequences. Should a party choose to consent, notice should be made no later than 21 days after entry of the Order setting the Rule 16 Initial Scheduling Conference.</i> For e-filers, visit our Web site at www.nmd.uscourts.gov for more information and instructions. [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (jg) (Entered: 11/30/2018)
01/07/2019		Summons Issued as to AFSCME Council 18 (Derr and Padilla), New Mexico Human Services Department (Scrase). (ln) (Entered: 01/07/2019)
01/16/2019	4	NOTICE of Appearance by Shane C Youtz on behalf of AFSCME Council 18 (Youtz, Shane) (Entered: 01/16/2019)
01/16/2019	5	NOTICE by AFSCME Council 18 of <i>Agreed Extension of Time to File Answer or Responsive Pleading to Complaint</i> (Youtz, Shane) (Entered: 01/16/2019)
01/17/2019	6	ASSOCIATION of Attorney Licensed Outside the District for Defendant AFSCME Council 18 by Shane C Youtz on behalf of: Eileen Goldsmith Altshuler Berzon LLP 177 Post St. Suite 300 San Francisco, CA 94108 4154217151 egoldsmith@altshulerberzon.com (Association Dues - Online Payment) (Youtz, Shane) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 01/17/2019)
01/17/2019	7	ASSOCIATION of Attorney Licensed Outside the District for Defendant AFSCME Council 18 by Shane C Youtz on behalf of: Scott Kronland Altshuler Berzon LLP 177 Post St. Suite 300 San Francisco, CA 94108 4154217151 skronland@altshulerberzon.com (Association Dues - Online Payment) (Youtz, Shane) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 01/17/2019)
01/17/2019		Association Dues Received: \$ 100 receipt number 1084-6232852 re: # 6 Association of Attorney Licensed Outside the District, filed by AFSCME Council 18 (Payment made via Pay.gov)(Youtz, Shane) (Entered: 01/17/2019)

01/17/2019		Association Dues Received: \$ 100 receipt number 1084-6232858 re: # 7 Association of Attorney Licensed Outside the District, filed by AFSCME Council 18 (Payment made via Pay.gov)(Youtz, Shane) (Entered: 01/17/2019)
01/17/2019	8	NOTICE by AFSCME Council 18 of <i>Certification of Good Standing of Eileen Goldsmith and Scott Kronland</i> (Attachments: # 1 Affidavit Goldsmith, # 2 Affidavit Kronland) (Youtz, Shane) (Entered: 01/17/2019)
01/22/2019	10	PLEASE TAKE NOTICE that this case has been reassigned to Sr. District Judge Robert C. Brack as the trial judge. Under D.N.M.LR-Civ. 10.1, the first page of each document must have the case file number and initials of the assigned judges. <i>Accordingly, further documents filed in this matter must bear the case number and the judges' initials shown in the case caption and the NEF for this document. Kindly reflect this change in your filings.</i> Magistrate Judge Jerry H. Ritter no longer assigned to this case. [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (ln) (Entered: 01/22/2019)
01/24/2019	11	NOTICE REGARDING DOCUMENT ENTRIES: Because this case has been reassigned to a district judge, please be advised that any documents filed by the parties under Rule 73(b) have been permanently removed from the docket. Document(s) removed: No. 9. [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (bl) (Entered: 01/24/2019)
02/08/2019	12	ASSOCIATION of Attorney Licensed Outside the District for Plaintiff Brett Hendrickson by Patrick Joseph Rogers on behalf of: Brian K. Kelsey Liberty Justice Center 190 S. LaSalle St., Suite 1500 Chicago, IL 60603 312-263-7668 Fax 312-263-7702 bkelsey@libertyjusticecenter.org (Association Dues - Online Payment) (Rogers, Patrick) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 02/08/2019)
02/08/2019		Association Dues Received: \$ 100 receipt number 1084-6275346 re: # 12 Association of Attorney Licensed Outside the District, filed by Brett Hendrickson (Payment made via Pay.gov)(Rogers, Patrick) (Entered: 02/08/2019)
02/08/2019	13	NOTICE by Brett Hendrickson re 12 Association of Attorney Licensed Outside the District, <i>Notice and Certificate of Good Standing for Brian K. Kelsey</i> (Rogers, Patrick) (Entered: 02/08/2019)
02/22/2019	14	NOTICE of Appearance by Lawrence M Marcus on behalf of New Mexico Human Services Department (Marcus, Lawrence) (Entered: 02/22/2019)
02/22/2019	15	ANSWER to 1 Complaint by New Mexico Human Services Department. Related document: 1 Complaint filed by Brett Hendrickson.(Marcus, Lawrence) (Entered: 02/22/2019)

02/22/2019	16	NOTICE of Appearance by Alfred A Park on behalf of New Mexico Human Services Department (Park, Alfred) (Entered: 02/22/2019)
03/01/2019	17	MOTION to Dismiss <i>Count II of the Complaint</i> by AFSCME Council 18. (Attachments: # 1 Exhibit 1 to the Memorandum of Points of Authorities In Support of Motion to Dismiss, # 2 Exhibit 2 to the Memorandum of Points of Authorities In Support of Motion to Dismiss, # 3 Exhibit 3 to the Memorandum of Points of Authorities In Support of Motion to Dismiss, # 4 Affidavit of Connie Derr In Support of Motion to Dismiss Count II of the Complaint, # 5 Exhibit 1 to the Declaration of Connie Derr, # 6 Exhibit 2 to the Declaration of Connie Derr, # 7 Exhibit 3 to the Declaration of Connie Derr) (Goldsmith, Eileen) (Entered: 03/01/2019)
03/02/2019	18	INITIAL SCHEDULING ORDER by Magistrate Judge Laura Fashing setting a telephonic Rule 16 Initial Scheduling Conference for 5/1/2019 at 02:30 PM in Albuquerque - Telephonic Hearing/Conference before Magistrate Judge Laura Fashing. Joint Status Report and Provisional Discovery Plan due by 4/24/2019. (pv) (Entered: 03/02/2019)
03/12/2019	19	NOTICE by AFSCME Council 18 re 17 MOTION to Dismiss <i>Count II of the Complaint - Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to the Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 03/12/2019)
03/15/2019	20	NOTICE by Brett Hendrickson re 17 MOTION to Dismiss <i>Count II of the Complaint Notice of Agreed Extension</i> (Rogers, Patrick) (Entered: 03/15/2019)
03/15/2019	21	AMENDED COMPLAINT against New Mexico Human Services Department, AFSCME Council 18., filed by Brett Hendrickson. (Rogers, Patrick) (Entered: 03/15/2019)
03/26/2019	22	ASSOCIATION of Attorney Licensed Outside the District for Defendant AFSCME Council 18 by Shane C Youtz on behalf of: Stefanie Wilson Altshuler Berzon LLP 177 Post St. Suite 300 San Francisco, CA 94108 4154217151 swilson@altshulerberzon.com (Association Dues - Online Payment) (Youtz, Shane) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 03/26/2019)
03/26/2019		Association Dues Received: \$ 100 receipt number 1084-6355922 re: # 22 Association of Attorney Licensed Outside the District, filed by AFSCME Council 18 (Payment made via Pay.gov)(Youtz, Shane) (Entered: 03/26/2019)
03/26/2019	23	NOTICE by AFSCME Council 18 of <i>Certification of Good Standing of Stefanie Wilson</i> (Attachments: # 1 Affidavit) (Youtz, Shane) (Entered: 03/26/2019)
03/29/2019	24	ANSWER to 21 Amended Complaint by AFSCME Council 18.(Goldsmith, Eileen) (Entered: 03/29/2019)
04/05/2019	25	RESPONSE in Opposition re 17 MOTION to Dismiss <i>Count II of the Complaint</i> filed by Brett Hendrickson. (Rogers, Patrick) (Entered: 04/05/2019)
04/10/2019	26	NOTICE OF WITHDRAWAL OF DOCUMENT as to document 17 Motion to Dismiss,, by AFSCME Council 18 (Goldsmith, Eileen) (Entered: 04/10/2019)
04/24/2019	27	Joint Status Report by Brett Hendrickson (Rogers, Patrick) (Entered: 04/24/2019)

04/26/2019		Summons Issued as to Hector Balderas, Michelle Lujan-Grisham. (jg) (Entered: 04/26/2019)
04/30/2019	28	ORDER VACATING RULE 16 SCHEDULING CONFERENCE by Magistrate Judge Laura Fashing. (cda) (Entered: 04/30/2019)
05/22/2019	29	ASSOCIATION of Attorney Licensed Outside the District for Plaintiff Brett Hendrickson by Patrick Joseph Rogers on behalf of: Reilly Stephens Liberty Justice Center 190 South LaSalle Street, Suite 1500 Chicago, IL 60603 3122637668 rstephens@libertyjusticecenter.org (Association Dues - Online Payment) (Rogers, Patrick) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 05/22/2019)
05/22/2019	30	NOTICE by Brett Hendrickson <i>Notice and Certificate of Good Standing for Reilly Stephens</i> (Rogers, Patrick) (Entered: 05/22/2019)
05/22/2019	31	Association Dues received online: \$ 100 paid, receipt number # 1084-6443378 (bap) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 05/23/2019)
05/31/2019	32	MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities</i> by AFSCME Council 18. (Attachments: # 1 Exhibit 1 to Motion for Summary Judgment, # 2 Exhibit 2 to Motion for Summary Judgment, # 3 Exhibit 3 to Motion for Summary Judgment, # 4 Affidavit of Connie Derr in Support of Motion for Summary Judgment, # 5 Exhibit 1 to Affidavit of Connie Derr, # 6 Exhibit 2 to Affidavit of Connie Derr, # 7 Exhibit 3 to Affidavit of Connie Derr, # 8 Exhibit 4 to Affidavit of Connie Derr, # 9 Exhibit 5 to Affidavit of Connie Derr, # 10 Exhibit 6 to Affidavit of Connie Derr, # 11 Exhibit 7 to Affidavit of Connie Derr, # 12 Exhibit 8 to Affidavit of Connie Derr, # 13 Exhibit 9 to Affidavit of Connie Derr, # 14 Exhibit 10 to Affidavit of Connie Derr, # 15 Exhibit 11 to Affidavit of Connie Derr, # 16 Exhibit 12 to Affidavit of Connie Derr, # 17 Exhibit 13 to Affidavit of Connie Derr, # 18 Exhibit 14 to Affidavit of Connie Derr, # 19 Exhibit 15 to Affidavit of Connie Derr, # 20 Exhibit 16 to Affidavit of Connie Derr, # 21 Exhibit 17 to Affidavit of Connie Derr, # 22 Affidavit of Professor Joseph R. Grodin in Support of Motion for Summary Judgment) (Goldsmith, Eileen) (Entered: 05/31/2019)
05/31/2019	33	MOTION for Summary Judgment by Brett Hendrickson. (Attachments: # 1 Exhibit Declaration of Hendrickson) (Rogers, Patrick) (Entered: 05/31/2019)
05/31/2019	34	**ENTERED IN ERROR** NOTICE of Appearance by Lawrence M Marcus on behalf of Hector Balderas, Michelle Lujan-Grisham (Attachments: # 1 Exhibit) (Marcus, Lawrence) Modified on 6/3/2019 (yc). (Entered: 05/31/2019)
05/31/2019	35	NOTICE of Appearance by Lawrence M Marcus on behalf of Hector Balderas, Michelle Lujan-Grisham (Marcus, Lawrence) (Entered: 05/31/2019)
05/31/2019	36	NOTICE OF WITHDRAWAL OF DOCUMENT as to document 34 Notice of Appearance by Hector Balderas, Michelle Lujan-Grisham (Marcus, Lawrence) (Entered: 05/31/2019)
05/31/2019	37	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Hector Balderas, Michelle Lujan-Grisham. (Attachments: # 1 Exhibit) (Marcus, Lawrence) (Entered: 05/31/2019)

A009

		05/31/2019)
06/04/2019	38	NOTICE by AFSCME Council 18 of <i>Agreed Extensions of Time for Responses and Replies on Motions for Summary Judgment and Motions to Dismiss</i> (Youtz, Shane) (Entered: 06/04/2019)
06/27/2019	39	RESPONSE in Opposition re 33 MOTION for Summary Judgment filed by AFSCME Council 18. (Attachments: # 1 Exhibit 1 to Defendant AFSCME Council 18's Response to Plaintiff's Motion for Summary Judgment, # 2 Affidavit of Stefanie L. Wilson in Support of Defendant AFSCME Council 18's Response to Plaintiff's Motion for Summary Judgment, # 3 Exhibit A to Affidavit of Stefanie L. Wilson in Support of Defendant AFSCME Council 18's Response to Plaintiff's Motion for Summary Judgment, # 4 Exhibit B to Affidavit of Stefanie L. Wilson in Support of Defendant AFSCME Council 18's Response to Plaintiff's Motion for Summary Judgment) (Goldsmith, Eileen) (Entered: 06/27/2019)
06/27/2019	40	RESPONSE in Opposition re 33 MOTION for Summary Judgment filed by Hector Balderas, Michelle Lujan-Grisham. (Marcus, Lawrence) (Entered: 06/27/2019)
06/27/2019	41	RESPONSE in Opposition re 33 MOTION for Summary Judgment <i>Amended Response</i> filed by Hector Balderas, Michelle Lujan-Grisham. (Marcus, Lawrence) (Entered: 06/27/2019)
06/27/2019	42	MEMORANDUM in Opposition re 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities</i> filed by Brett Hendrickson. (Kelsey, Brian) (Entered: 06/27/2019)
06/27/2019	43	MEMORANDUM in Opposition re 37 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Brett Hendrickson. (Kelsey, Brian) (Entered: 06/27/2019)
07/23/2019	44	NOTICE by Hector Balderas, Michelle Lujan-Grisham <i>Agreed Extensions of Time for Replies on Motions for Summary Judgment and Motions to Dismiss</i> (Marcus, Lawrence) (Entered: 07/23/2019)
08/01/2019	45	REPLY to Response to Motion re 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities</i> filed by AFSCME Council 18. (Goldsmith, Eileen) (Entered: 08/01/2019)
08/01/2019	46	REPLY to Response to Motion re 37 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Hector Balderas, Michelle Lujan-Grisham. (Marcus, Lawrence) (Entered: 08/01/2019)
08/01/2019	47	REPLY to Response to Motion re 33 MOTION for Summary Judgment <i>against AFSCME</i> filed by Brett Hendrickson. (Kelsey, Brian) (Entered: 08/01/2019)
08/01/2019	48	REPLY to Response to Motion re 33 MOTION for Summary Judgment <i>against State Defendants</i> filed by Brett Hendrickson. (Attachments: # 1 Exhibit) (Kelsey, Brian) (Entered: 08/01/2019)
08/02/2019	49	NOTICE of Briefing Complete by AFSCME Council 18 re 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities</i> filed by AFSCME Council 18 (Youtz, Shane) (Entered: 08/02/2019)
08/02/2019	50	NOTICE of Briefing Complete by Brett Hendrickson re 33 MOTION for Summary Judgment filed by Brett Hendrickson (Rogers, Patrick) (Entered: 08/02/2019)
08/02/2019	51	NOTICE of Briefing Complete by Hector Balderas, Michelle Lujan-Grisham re 37 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Michelle Lujan-Grisham, Hector Balderas (Marcus, Lawrence) (Entered: 08/02/2019)

08/15/2019	52	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities - Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 08/15/2019)
08/29/2019	53	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 08/29/2019)
09/10/2019	54	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 09/10/2019)
09/30/2019	55	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 09/30/2019)
10/07/2019	56	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 10/07/2019)
10/31/2019	57	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 10/31/2019)
11/22/2019	58	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority, # 2 Exhibit B to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 11/22/2019)
12/02/2019	59	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 12/02/2019)
12/10/2019	60	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities, 45</i> Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 12/10/2019)
01/17/2020	61	NOTICE by AFSCME Council 18 re 39 Response in Opposition to Motion,, 47 Reply to Response to Motion, 45 Reply to Response to Motion - <i>Notice of Supplemental Authority</i> (Attachments: # 1 Exhibit A to Notice of Supplemental Authority) (Goldsmith, Eileen) (Entered: 01/17/2020)

01/22/2020	62	MEMORANDUM OPINION AND ORDER by Sr. District Judge Robert C. Brack GRANTING 32 MOTION for Summary Judgment , <i>Statement of Undisputed Material Facts, and Memorandum of Points and Authorities</i> , DENYING 33 MOTION for Summary Judgment . AND GRANTING 37 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , (yc) (Entered: 01/22/2020)
01/22/2020	63	FINAL ORDER by Sr. District Judge Robert C. Brack. (yc) (Entered: 01/22/2020)
02/19/2020	64	NOTICE OF APPEAL as to 63 Order, 62 Memorandum Opinion and Order, by Brett Hendrickson. (Filing Fee - Online Payment) (Rogers, Patrick) (Entered: 02/19/2020)
02/19/2020	65	USCA Appeal Fees received online: \$ 505.00 receipt number 1084-6969573 re 64 Notice of Appeal filed by Brett Hendrickson (bap) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 02/20/2020)
02/21/2020	66	Transmission of Preliminary Record to US Court of Appeals re 64 Notice of Appeal (Attachments: # 1 Supplement Preliminary Record, # 2 Supplement Docket Sheet) (arn) (Entered: 02/21/2020)
02/21/2020	67	USCA Information Letter with Case Number 20-2018 for 64 Notice of Appeal filed by Brett Hendrickson. (arn) (Entered: 02/21/2020)
03/04/2020	68	TRANSCRIPT ORDER FORM by Brett Hendrickson for the 64 Notice of Appeal (Rogers, Patrick) (Entered: 03/04/2020)
03/04/2020	69	NOTICE by Brett Hendrickson <i>No Transcript Ordered</i> (Rogers, Patrick) (Entered: 03/04/2020)
03/04/2020	70	NOTICE TO USCA that Record is Complete re 64 Notice of Appeal. (cer) (Entered: 03/04/2020)

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Transaction Receipt			
04/17/2020 14:12:18			
PACER Login:	briankelsey:3784564:0	Client Code:	
Description:	Docket Report	Search Criteria:	1:18-cv-01119-RB-LF
Billable Pages:	8	Cost:	0.80

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

BRETT HENDRICKSON,)	
)	
Plaintiff,)	
)	
v.)	Case No. 18-CV-1119 RB-LF
)	
AFSCME COUNCIL 18; MICHELLE)	
LUJAN GRISHAM, in her official capacity)	
as Governor of New Mexico; and HECTOR)	
BALDERAS, in his official capacity as)	
Attorney General of New Mexico,)	
)	
Defendants.)	

**PLAINTIFF’S FIRST AMENDED COMPLAINT
SEEKING DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND
DAMAGES FOR DEPRIVATION OF FIRST AMENDMENT RIGHTS**

INTRODUCTION

1. Government employees have a First Amendment right not to be compelled by their employer to join a union or to pay any fees to that union unless the employee “affirmatively consents” to waive that right. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be “freely given and shown by ‘clear and compelling’ evidence.” *Id.*

2. Union dues deduction agreements signed in jurisdictions that required agency fees before the Supreme Court’s decision in *Janus* are no longer enforceable. Union members who signed such agreements could not have freely waived their right not to join or pay a union because the Supreme Court had not yet recognized that right. All government employees must be given the choice either to join the union or not to join the union without paying dues or fees to the union.

with the Department, the Union sent an e-mail to SPO requesting that they end Hendrickson's dues deductions.

37. On January 7, 2019, Hendrickson sent an e-mail to SPO requesting, once again, to stop having Union dues deducted from his paycheck, attaching the December 6, 2018 letter, in which the Union had told Hendrickson it would notify his employer.

38. On January 8, 2019, SPO replied to Hendrickson's e-mail that it would not process his request to stop having Union dues deducted from his paychecks because it had not received notification to do so within the two-week window.

39. On January 8, 2019, Hendrickson sent yet another letter to the Department to request to stop his Union dues deduction.

40. On January 15, 2019, Lujan Grisham deducted Union dues from Hendrickson's paycheck once again.

41. On January 29, 2019, the Union sent Hendrickson a letter stating this his dues deduction should have ended on December 31 and that the Union would reimburse any dues deducted after that date.

42. On January 31, 2019, Lujan Grisham finally stopped deducting Union dues from Hendrickson's paycheck.

43. On February 1, 2019, SPO sent Hendrickson an e-mail that it would be reimbursing him on February 15, 2019 in the amount of \$33.96 for Union dues deducted on December 31, 2018 and January 15, 2019.

44. On February 28, 2019, SPO finally reimbursed Hendrickson \$33.96 for Union dues deducted on December 31, 2018 and January 15, 2019.

57. In an effort to moot this case and avoid the jurisdiction of this Court, the Union, as its affiliates have done in numerous cases throughout the country, acted in concert with Lujan Grisham to stop the dues deduction for Hendrickson and to reimburse him for the dues deducted on December 31, 2018 and January 15, 2019; however, the Union did not reimburse Hendrickson for the prior dues it had taken from him, and it took action only after Hendrickson had filed this lawsuit. The Union continues to deduct dues from other employees in Hendrickson's situation, and Lujan Grisham and Balderas continue to execute and defend state laws that allow the Union to violate such employees' First Amendment rights.

58. Hendrickson is entitled under 28 U.S.C. § 2201(a) and 42 U.S.C. § 1983 to a declaratory judgment from this Court that the Union and Lujan Grisham cannot force public employees to wait for an opt-out window to resign their union membership and to stop the deduction of dues from their paychecks.

59. Hendrickson is entitled under 28 U.S.C. § 2201(a) and 42 U.S.C. § 1983 to a declaration that N.M. Stat. Ann. § 10-7E-17(C) constitutes an unconstitutional violation of his First Amendment rights to free speech and freedom of association because it allowed the withholding of union dues from his paycheck until a two-week period specified in the Union agreement.

60. Hendrickson is entitled under 28 U.S.C. § 2201(a) and 42 U.S.C. § 1983 to a declaration that N.M. Stat. Ann. § 10-7E-9(G) constitutes an unconstitutional violation of First Amendment rights to free speech and freedom of association because it allows unions to demand contract provisions providing for "fair share" fees from non-members.

61. Hendrickson is entitled under 42 U.S.C. § 1983 to damages in the amount of all dues deducted and remitted to the Union since he became a member.

**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.**

JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN

Pursuant to FED. R. CIV. P. 26(f), a meeting was held on April 16, 2019, at 2:30 p.m.

and was attended by:

Patrick J. Rogers, Brian K. Kelsey, and Reilly Stephens for
Plaintiffs

Lawrence M. Marcus, Attorney for prospective Defendants
Michelle Lujan Grisham and Hector Balderas Department (“State
Defendants”)

Eileen B. Goldsmith, Stephen Curtice, and Stefanie Wilson,
Attorneys for AFSCME Council 18

Defendants Michelle Lujan Grisham and Hector Balderas (in their
official capacities) will accept service or will be served shortly,
with the First Amended Complaint.

NATURE OF THE CASE

This action was brought pursuant to 42 U.S.C. § 1983 alleging an abridgement of First Amendment rights. Plaintiff Brett Hendrickson asserts two claims. Count I of the First Amended Complaint (“FAC”) alleges that Defendant AFSCME Council 18’s membership dues collection practices abridged Plaintiff’s rights of speech and association. Count II alleges that AFSCME

Council 18's status as the exclusive representative of Plaintiff's bargaining unit likewise abridges his rights to speech and association. Defendants deny all claims and liability. At this stage of the proceedings, the parties believe that there are no material facts in dispute, that all the relevant questions are matters of law, and propose to postpone discovery, including initial disclosures, until after the resolution of dispositive motions each party intends to submit no later than May 31, 2019.

AMENDMENTS TO PLEADINGS AND JOINDER OF PARTIES

If the case is not fully resolved on the parties' proposed dispositive motions (*see infra* at 8); plaintiffs should be allowed until 60 days after the Court's ruling on motions to dismiss/summary judgment (which will be filed no later than May 31, 2019) to amend the pleadings or to join additional parties in compliance with the requirements of Fed. R. Civ. P. 15(a), provided the Court grants him leave to amend and/or all parties stipulate to amending the Complaint.

Defendants(s) should be allowed until 90 days after the Court's ruling on the motions to dismiss/summary judgments to move to amend the pleadings or to join additional parties in compliance with the requirements of Fed. R. Civ. P. 15(a).

STIPULATIONS

The parties hereto stipulate and agree that venue is properly laid in this District; that the United States District Court for the District of New Mexico has personal jurisdiction over the parties and the case presents federal questions because this case is brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution, except that Defendants deny Plaintiff's claims present justiciable controversies.

The parties are willing to further stipulate to the following facts:

1. Hendrickson is an employee of the New Mexico Department of Human Services, and has been since 2001.
2. AFSCME Council 18 is the certified exclusive bargaining representative for Hendrickson's bargaining unit pursuant to NMSA 1978, § 10-7E -15(A).
3. Michelle Lujan Grisham took office as Governor of New Mexico on January 1, 2019.
4. Hector Balderas is the Attorney General of New Mexico.

PLAINTIFF'S CONTENTIONS:

Plaintiff Brett Hendrickson is an employee of the New Mexico Department of Human Services ("DHS") who signed a union membership card in 2007 for the Defendant AFSCME Council 18, prior to the U.S. Supreme Court decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). From 2007 through 2018, AFSCME deducted dues of approximately \$32 per month from Hendrickson's paycheck. These dues were deducted before and after the United States Supreme Court decision in *Janus v AFSCME*, 138 S. Ct. 2448 (2018). From 2008 to 2018 "fair share" payers were charged approximately 85 percent of union membership dues.

On August 9, 2019, Hendrickson submitted a request to withdraw from the union that was denied. He was only allowed to withdraw his union membership in January after the filing of this lawsuit. AFSCME Council 18 obtains dues from employees of the State of New Mexico by using the State's payroll system to collect money directly from employees' pay. Employees who are not members of AFSCME Council 18 but are in bargaining units it represents are subject to the terms of the contracts it negotiates with the State. Employees who are not members of AFSCME Council 18 may not vote in union leadership elections, or vote on other matters that affect the bargaining unit, such as whether to approve a collective bargaining agreement. Subjects of negotiation

between AFSCME Council 18 and the State of New Mexico include wages, hours, working conditions, and other terms and conditions of employment. Michelle Lujan Grisham took office as Governor of New Mexico on January 1, 2019, and currently serves as the chief executive overseeing the operations of the New Mexico Human Services Department.

Count I of the First Amended Complaint asserts that Defendants Lujan Grisham and AFCME Council 18 have violated Mr. Hendrickson's First Amended rights to free speech and freedom of association by deducting union dues from his wages both before and after Mr. Hendrickson's request to resign his union membership and by attempting to limit withdrawal from the union to an arbitrary "window" imposed by Defendants. Legal issues presented by Count I include whether Defendants violated Plaintiff's First Amendment rights to free speech and freedom of association both before and after his attempted resignation from union membership; whether Plaintiff is entitled to a refund of past union dues paid to AFSCME Council 18; and whether N.M. Stat. Ann. § 10-7E-17(C) constitutes an unconstitutional violation of Plaintiff's First Amendment rights to free speech and freedom of association because it allowed the withholding of union dues from his paycheck until a two-week period specified in the Union agreement.

Count II asserts that Plaintiff has a constitutional right not to be represented by AFSCME Council 18 as his exclusive representative without his affirmative consent and that neither Lujan Grisham nor AFSCME Council 18 may recognize the union as representing Plaintiff in its collective bargaining negotiations. The legal issue presented by Count II is whether the exclusive representation provision of N.M. Stat. Ann. § 10-7E-15(A) and all related provisions are an unconstitutional abridgement of Plaintiff's right under the First Amendment not to be compelled to associate with speakers and organizations without his consent.

DEFENDANTS' CONTENTIONS

Defendant AFSCME Council 18's Contentions:

AFSCME Council 18 ("the Union") denies all liability to Plaintiff. Plaintiff Brett Hendrickson is an employee of the New Mexico Human Services Department and a former member of AFSCME Council 18. Plaintiff voluntarily joined the union and agreed to pay membership dues. His dues authorization agreement provided that deductions could be cancelled only during an annual window period.

Plaintiff alleges in Count I of his First Amended Complaint ("FAC"; Dkt. 21) that the deduction of union dues from his paycheck violated his First Amendment rights. Count I of the FAC also challenges the New Mexico statute that, until *Janus* issued, permitted a certified public employee union to charge the cost of union representation to non-members who were represented by the union ("fair share fees"), NMSA 1978, § 10-7E-9(G).

Count II of the FAC alleges that New Mexico's statute authorizing exclusive-representation collective bargaining, NMSA 1978, § 10-7E-15(A), violates Plaintiff's First Amendment rights.

Plaintiff's demands for prospective relief regarding the collection of union dues are all moot. The State and the Union have already terminated dues deductions from Plaintiff. Moreover, the Union has already unconditionally refunded to him all union dues deducted from his pay after his window period for cancelling deductions. Further, Plaintiff's claim for reimbursement of dues paid while he was a union member is barred by a valid and enforceable contract. Plaintiff's 42 U.S.C. § 1983 claims against AFSCME Council 18 are barred for the additional reasons that there is no state action, or, in the alternative, by the defense of good faith reliance on the law in effect at the time. Finally, because Plaintiff brings this suit solely on his

own behalf, he lacks standing to seek prospective relief on behalf of “public employees like [him].” FAC at 13 ¶ (e).

Plaintiff’s claim for prospective relief against fair share fees does not present a justiciable controversy because *Janus* already declared such fees unconstitutional and the State and the Union have permanently and unequivocally ceased collection of fair share fees from non-members. There is no reasonable likelihood that such deductions will be resumed. Plaintiff also lacks standing to challenge NMSA 1978, § 10-7E-9(G), which authorized public employers and unions to negotiate fair share fee provisions in their collective bargaining agreements, because Plaintiff was at all times a union member and so never paid fair share fees.

Plaintiff’s challenge to NMSA 1978, § 10-7E-15(A), which provides for exclusive-representation collective bargaining, is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). Nothing in *Janus* alters or undermines the analysis in *Knight*. Every court to consider the issue, both before and after *Janus*, has ruled that exclusive-representation collective bargaining does not violate the First Amendment.¹

State Defendant’s Contentions:

State Defendants deny Plaintiff’s Contentions and assert affirmative defenses. First, State Defendants have not been served, and Plaintiff cannot assert a cause of action against them until they are served. State Defendants are entitled to the dismissal of Count I of Plaintiff’s claim, regarding the fair use deductions from Plaintiff’s paycheck. State Defendants note at the outset that Plaintiff never had standing to bring the claim, because he never had forced “fair share” fees

¹ See *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Hill v. Serv. Emp. 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); *Akers v. Md. State Educ. Ass’n*, Civil Action No. RDB-18-1797, 2019 WL 1745980 (D. Md. Apr. 18, 2019); *Thompson v. Marietta Educ. Ass’n*, No. 2:18-cv-00628-MHW-CMV, 2019 WL 1650113 (S.D. Ohio Jan. 14, 2019); *Reisman v. Associated Faculties*, No. 1:18-cv-00307-JDL, 2018 WL 6312996 (D. Me. Dec. 3, 2018); *Uradnik v. Inter Faculty Organization*, Civ. No. 18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff’d*, No. 18-3086 (8th Cir. Dec. 3, 2018).

deducted from his paycheck, because he was a union member. Moreover, even assuming, ad arguendo, that Plaintiff can assert a cause of action on the grounds that he joined the union because he would otherwise have to pay fair share fees, he no longer has standing, because he is no longer a member of the union, and his fees have been refunded to him. Also, because the state is no longer deducting fair share fees from paychecks, Plaintiff will no longer have such an incentive to join a union. Plaintiff does not appear to make a claim for damages from prior to the Janus decision. In any event, such a claim would be barred by the Eleventh Amendment, and by the fact that the State of New Mexico acted in good faith when it allowed for union contracts with fair share deductions. The Janus decision overturned 40 years of valid precedent, allowing for such deductions. Thus, the only relief that Plaintiff can request is prospective relief, and this claim for prospective relief is now moot.

Moreover, neither the Governor nor the Attorney General are proper Defendants. While the Governor generally oversees the State executive branch, she does not assert the day to day control over payroll deductions that would render her a proper Defendant. Further, while the Attorney General is responsible for enforcing various provisions of state law, no such enforcement action is currently underway, so Plaintiff's claims would not be ripe. Even if such an action were currently ongoing, a federal action against the Attorney General would violate the Younger abstention doctrine and/or the Rooker Feldman doctrine. Plaintiff's claims would be more proper as a defense to an enforcement action, rather than as a separate federal claim.

Further, the restrictions on withdrawing from a union to a two week period are not unconstitutional. Unlike the situation in Janus, which concerned a non-union member having fees deducted without prior agreement, the narrow window for withdrawal from the union in this case applies only to union members who chose to join the union, and who agreed to contractual terms. Nothing in Janus or any other Supreme Court decision could be interpreted to bar such a

requirement. In fact, the federal constitution strongly discourages interference with contractual relations.

Finally, Count II of Plaintiff's Complaint, which challenges the fact that AFSCME is the exclusive representative of the bargaining unit that includes Plaintiff, is without merit. The Janus decision cannot be extended to bar such exclusive representation. In fact, the decision clearly states that such exclusive representation is appropriate. Accordingly, Count II of Plaintiff's cause of action should be dismissed.

PROVISIONAL DISCOVERY PLAN

The parties believe the issues presented are legal issues, susceptible to dispositive motions. The parties are proposing a deadline of May 31, 2019 for summary judgment motions/motions for judgment on the pleadings. The parties do not believe that discovery will be necessary. The parties are proposing to submit to the Court that portion of the Provisional Discovery Plan that addresses discovery and trial planning details after the Court's rulings on the proposed dispositive motions, if further proceedings are necessary.

PRETRIAL MOTIONS

Plaintiff intends to file: Plaintiff believes both Claims I and II may be determined by motion for summary judgment/motions on the pleadings.

Defendants intend to file: Defendants believe both Claims I and II may be determined by motion for summary judgment/motions on the pleadings.

ESTIMATED TRIAL TIME

The parties believe the issues presented are legal issues, susceptible to resolution by dispositive motions. Hence, the parties plan to file dispositive motions and are proposing to submit

to the Court that portion of the Provisional Discovery Plan that addresses discovery details and trial planning after the Court has ruled on the dispositive motions.

SETTLEMENT

The parties believe that settlement in this case is unlikely. The parties request a settlement conference on a date to be submitted after the Court has ruled on the dispositive motions, if any claims remain in the case.

EXCEPTIONS

State Defendant's Exceptions

Governor Lujan Grisham and Attorney General Balderas hereby state that they have not yet been served, and are only agreeing to this JSR out of an abundance of caution, due to the Court's Initial Scheduling Order. These Defendants are merely entering a special appearance, do not hereby waive service, and reserve the right to contest any deadlines contained in the report.

Plaintiffs Exception

Plaintiff affirms that the State Defendant's will receive service in time to ensure their opportunity to participate in this case.

APPROVED WITH EXCEPTIONS

/s/ Brian K. Kelsey
For Plaintiff

/s/ Eileen B. Goldsmith
For Defendant AFSCME Council 18

/s/ Lawrence M. Marcus
Special Appearance for Defendants Michelle Lujan
Grisham and Hector Balderas

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

BRETT HENDRICKSON,

Plaintiff,

v.

NO. 18-CV-1119 RB-LF

AFSCME COUNCIL 18 *et al.*,

Defendants.

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

MOTION FOR SUMMARY JUDGMENT

Plaintiff, Brett Hendrickson, hereby moves this Court for Summary Judgment on both counts of the First Amended Complaint, pursuant to Federal Rule of Civil Procedure 56, and submits below this memorandum of law in support of the motion.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT
THEREOF

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INTRODUCTION

Government employees have a First Amendment right not to join or pay any fees to a union “unless the employee affirmatively consents” to do so. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Plaintiff, Brett Hendrickson (“Hendrickson”), repeatedly notified his employer, the New Mexico Human Services Department (“HSD”), that it did not have his affirmative consent to withdraw union dues from his paychecks. These requests were denied. Instead, HSD insisted that Hendrickson would have to wait to exercise his First Amendment right not to pay union dues until an opt-out period determined by the HSD collective bargaining agreement with the union, Defendant AFSCME Council 18 (the “Union”).

Forcing employees to continue to pay union dues until the union’s preferred opt-out period is unconstitutional. Hendrickson’s union membership application is not valid because he was not given the option to pay nothing to the Union. The burden is on the Union to prove by “clear and compelling” evidence that Hendrickson provided “affirmative consent” to pay union dues, and the Union cannot meet this burden because of the unconstitutional nature of the choice it gave him. *Id.* Hendrickson was given the unconstitutional choice between paying union dues as a member of the Union or paying union agency fees as a non-member of the Union. The Supreme Court in *Janus* recognized that Hendrickson should have been given the choice to pay nothing at all to the Union as a non-member of the Union. Because he was not given this choice, his union authorization cards are no longer valid.

Also, it is a violation of the First Amendment to force citizens to associate with organizations or causes with which they do not wish to associate. Yet New Mexico law grants public sector unions the power to speak on behalf of employees as their exclusive representative. N.M. Stat. Ann. § 10-7E-15(A). Pursuant to this law, the Union purports to act as the exclusive

representative of Hendrickson. This compelled arrangement abridges his rights of speech and association.

Plaintiff has brought this case under 42 U.S.C § 1983 and 28 U.S.C. § 2201(a), seeking declaratory and injunctive relief, as well as damages in the amount of the dues previously deducted from his paychecks.

Plaintiff and Defendants agree that “there are no material facts in dispute, [and] that all the relevant questions are matters of law.” Joint Status Report and Provisional Discovery Plan (“JSR”) at 2 (Dkt. 27). Hendrickson, therefore, submits this memorandum in support of his motion for summary judgment. The court should grant the motion because the case primarily presents questions of law appropriate for summary disposition.

STATEMENT OF FACTS

Defendant Hector Balderas (“Balderas”) is the Attorney General of New Mexico. JSR at 3. Defendant Michelle Lujan Grisham (“Lujan Grisham”) took office as Governor of New Mexico on January 1, 2019. *Id.* Hendrickson is an employee of HSD and has been since 2001.¹ *Id.* Defendant AFSCME Council 18 is the certified exclusive bargaining representative for Hendrickson’s bargaining unit, pursuant to N.M. Stat. Ann. § 10-7E-15(A). *Id.* The collective bargaining agreement between the Union and HSD, signed in 2004, stated that employees who were not members of the Union, as a condition of continuing employment, were required to pay the Union each pay period a fair share payment in an amount certified by the Union. Defendant AFSCME Council 18’s Answer to First Amended Complaint (“Answer”) ¶ 16. Hendrickson

¹ Hendrickson switched to another department in state government for a year and returned to HSD, so he has been continuously employed by HSD since 2006. See Hendrickson Declaration ¶ 2, Attached as the only Exhibit to this Motion; First Amended Complaint (“FAC”) ¶ 17 (Doc. 38).

signed a Union membership card on or about March 8, 2007. Answer ¶ 20; Hendrickson Declaration ¶ 3. At the time Hendrickson signed the Union membership card, neither the Union nor HSD could have informed him about his constitutional right not to pay fair share, or agency, fees because the *Janus* ruling was not decided by the Supreme Court until June 27, 2018. Hendrickson Declaration ¶ 4. After he signed the Union membership card, dues were deducted from Hendrickson's paycheck and transmitted to the Union. Answer ¶ 5. Hendrickson's monthly dues payment in 2008 was approximately \$26, and the monthly dues increased by nominal amounts annually. Answer ¶ 21.

On August 9, 2018, Hendrickson sent an e-mail to the State Personnel Office ("SPO") expressing his desire to withdraw from union membership, asking whether he could do so immediately or whether he had to wait. Hendrickson Declaration ¶ 5. The same day SPO replied that the collective bargaining agreement between HSD and the Union controlled when he could cease union dues deductions from his paycheck. Hendrickson Declaration ¶ 6. Union dues continued to be deducted from Hendrickson's paycheck through December 2018. Answer ¶ 21. On December 6, 2018, the Union sent Hendrickson a letter explaining that the collective bargaining agreement stated his dues authorization is revocable during the first two weeks of December of each year; that the Union had processed his resignation from membership; and that it was notifying his employer to cease his union dues deductions. Answer ¶ 34; Hendrickson Declaration ¶ 7. Hendrickson has not been refunded any union dues paid prior to December 2018. Hendrickson Declaration ¶ 8.

SUMMARY JUDGMENT STANDARD

"A party is entitled to summary judgment if there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law.” *Young v. UPS*, 135 S. Ct. 1338, 1367 (2015) (quoting Fed. Rule Civ. Proc. 56(a)). “An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim.” *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). Plaintiff and Defendants stipulate that “there are no material facts in dispute, [and] that all the relevant questions are matters of law.” JSR at 2.

ARGUMENT

I. Refusing to withdraw Hendrickson’s union membership and continuing to deduct dues from his paycheck violated his First Amendment rights under *Janus*.

A. Under *Janus*, Unions may only claim membership and deduct dues if they first receive “affirmative consent.”

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:

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. Rather, to be effective, the waiver must be freely given and shown by “clear and compelling” evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted).

Supreme Court precedent provides that certain standards be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a

“known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Finally, the Court has long held that it will “not presume acquiescence in the loss of fundamental rights.” *Ohio Bell Tel. Co. v. Public Utilities Comm’n*, 301 U.S. 292, 307 (1937).

In Hendrickson’s case, he could not have waived his First Amendment right to not join or pay a union. First, neither the Union nor his employer informed him of his right not to pay a union because, at the time he signed his union membership application, the Supreme Court had not yet issued its decision in *Janus*. Second, neither the Union nor his employer informed him of his right not to pay a union because such a right was prohibited by the collective bargaining agreement in place at the time. Therefore, Hendrickson had no choice but to pay the Union and did not voluntarily, knowingly, or intelligently waive his First Amendment right.

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

The union application Hendrickson signed did not provide a clear and compelling waiver of his First Amendment right not to join or pay a union because it did not expressly state that he had a constitutional right not to pay a union and because it did not expressly state that he was waiving that right.

Nor can the Union rely on the extant case law at the time Hendrickson signed his union authorization. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), the Supreme Court explained that “[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

The Union’s liability for dues paid by Hendrickson, therefore, extends backward before *Janus*, limited only, if at all, by a possible statute of limitations defense. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). “Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]” *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972).

While there are some circuit court decisions finding good faith to be a defense to a prejudgment replevin or attachment of property without due process of law, even in those cases the defendant had to return the property at issue. In *Wyatt v. Cole*, 994 F.2d 1113, 1115 (5th Cir. 1993), the defendants seized the plaintiff’s cattle and tractor based on a replevin statute later held unconstitutional on due process grounds. While a good faith defense shielded the defendants

from liability from incidental damages, they still had to return the cattle and tractor. *Id.* In *Pinsky v. Duncan*, 79 F.3d 306, 311-13 (2d Cir. 1996), where a defendant attained an unconstitutional attachment on plaintiff's real property, the defendant did not retain that property. In *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1258 (3d Cir. 1994), where the defendant attained an unconstitutional attachment on plaintiff's checking account, the state court "vacated the attachment of [plaintiff's] checking account."

Under *Harper* and these precedents, the Union has no good faith basis to hold Hendrickson to his union authorization or to keep the monies it seized from his wages before the Supreme Court put an end to this unconstitutional practice. Hendrickson is due a refund of these dues.

B. Requiring employees to withdraw their union membership only within arbitrary windows set by the union violates *Janus*.

After the decision in *Janus*, the Union maintained that Hendrickson could only end his dues deduction during an arbitrary window of the Union's choice, despite Hendrickson's repeated requests to stop the dues deduction from his paycheck. Lujan Grisham also maintained that Hendrickson could only end his dues deduction during an arbitrary window of the Union's choice. In her official capacity as governor of New Mexico, Lujan Grisham is the official responsible for past and present actions of both HSD and SPO. Such actions were undertaken pursuant to N.M. Stat. Ann. § 10-7E-17(C), which provides that a "public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement."

The union dues authorization applications signed by Hendrickson before the Supreme Court's decision in *Janus* cannot meet the standards set forth for waiving a constitutional right, as required by the Supreme Court in *Janus*. 138 S. Ct. at 2484. Therefore, Lujan Grisham and the Union cannot hold employees like Hendrickson to a time window to withdraw their union membership based on these invalid authorizations.

Since being informed of his constitutional rights by the *Janus* decision, Hendrickson has not signed any additional union authorization application. Therefore, he has never knowingly waived his constitutional right to pay nothing to the union, and has, therefore, never given the union the "affirmative consent" required by the *Janus* decision. In the absence of "affirmative consent," this Court should declare that a request to end dues deductions is effective immediately.

C. The Union cannot avoid a judgment of this Court by releasing Hendrickson from union membership on its own timing after the filing of this lawsuit.

For months, Hendrickson was denied his right to withdraw his union membership. Yet soon after the filing of this lawsuit, in a ploy to avoid the jurisdiction of this Court, the Union attempted to placate Hendrickson without subjecting their policies to judicial scrutiny. Defendants now contend the case is moot, and they should not have to defend the unconstitutional policy that they and Lujan Grisham continue to enforce against any employee who is not determined enough to sue. This is the same avoidance strategy that other unions have employed across the country, as they attempt to dodge employees who would challenge them. *See, e.g., Belgau v. Inslee*, No. 18-5620 RJB, 2018 U.S. Dist. LEXIS 175543, at *7 (W.D. Wash. Oct. 11, 2018) (where, after being sued, the union changed course and said it would "instruct the

State to end dues deductions for each Plaintiff on the one year anniversary” of their membership without requiring employees to send the notice their policy required). This court should not allow the Union to avoid judicial review by picking off employees one by one. A “defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U. S. 283, 289 (1982)). Yet that is precisely what the Union would like the Court to allow in this case. Hendrickson respectfully submits that this Court should not countenance such gimmicks.

The Ninth Circuit has already rejected the exact same mootness argument plaintiffs present here. As it explained:

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

Fisk v. Inslee, No. 17-35957, 2018 U.S. App. LEXIS 35317, at *2-3 (9th Cir. Dec. 17, 2018). The Ninth Circuit recognized that claims like Hendrickson’s would never be addressed by the Court if the union is allowed to moot them in this way. Indeed, since most windows are annual, few cases would reach judgment in a district court, much less have the opportunity for appellate review.²

² The Ninth Circuit ultimately dismissed the case because of defective pleading that had failed to make the arguments in the district court that Hendrickson now presents to this Court. The circuit court found such arguments had been waived. *Id.* at *3.

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

“In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. *See City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283-284, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.”

Knox, 567 U.S. at 307. As in *Knox*, here the Union continues to assert the legality of its withdrawal window policy but wishes to avoid this Court determining its legality. Unlike in *Knox*, the Union has not even offered Hendrickson a full refund of his dues. The Union only managed to secure a refund from Lujan Grisham for dues that were taken from Hendrickson after December 2018. Hendrickson’s claim is for all dues deducted since he became a union member more than ten years ago. FAC ¶ 61. Even if this Court were to determine this claim is limited to the statute of limitations, that would amount to three years worth of dues, which the Union has neither paid nor offered to furnish. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (New Mexico’s Statute of Limitations for §1983 claims is three years). Nor did the Union ever offer Hendrickson anything in satisfaction of his claims for declaratory relief, nor attempt to satisfy his demand for attorneys’ fees.

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

These principles of law are not novel or unique to this case: it is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that “[i]t is sufficient...that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest.” The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), where the birth of the plaintiff’s child did not moot claims regarding a right to abortion. The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was “governmental action directly affecting, and continuing to affect, the behavior of citizens in our society.” *Super Tire*, 416 U.S. at 125. The opt-out window Hendrickson was subject to is a policy of the State of New Mexico, embodied in an agreement it negotiated with the Union. It is so much the policy of Lujan Grisham that she initially continued Hendrickson’s dues deductions even after the Union had told her to stop. FAC ¶ 38. This policy continues to impact present interests, as Lujan Grisham, the Union, and Balderas continue to enforce it and assert its legality. This continuing direct effect on the behavior of public employees is grounds for this Court’s issuance of declaratory relief.

II. Recognizing the Union as Hendrickson’s exclusive representative for bargaining purposes violates his First Amendment rights of speech and association.

A. Hendrickson cannot be forced to associate with a group that he disagrees with.

Under N.M. Stat. Ann. § 10-7E-17(A)(1), as a condition of his employment, Hendrickson must allow the Union to speak on his behalf on “wages [and] hours,” matters that *Janus*

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

Unions in other states agree with Hendrickson on this point. In Illinois, the International Union of Operating Engineers, Local 150, AFL-CIO brought a lawsuit against the State of Illinois precisely because they did not want to speak as the exclusive representative of non-union members: “[P]laintiffs assert that they, and therefore their membership, will be compelled to speak on behalf of non-members, infringing on their First Amendment rights.” *Sweeney v. Madigan*, No. 18-cv-1362, 2019 U.S. Dist. LEXIS 19389, at *6 (N.D. Ill. Feb. 6, 2019).

Legally compelling Hendrickson to associate with the Union demeans his First Amendment rights. Indeed, “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence.” *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). New Mexico laws command Hendrickson’s involuntary affirmation of objected-to beliefs. The fact that he retains

the right to speak for himself does not resolve the fact that the Union organizes and negotiates as his representative in his employment relations.

B. No state interest is compelling enough to sustain Hendrickson’s forced association.

Unions and state governments have proffered various claimed interests for compelling the association of employees and, thereby, restricting First Amendment rights. One interest often proffered is “labor peace,” meaning the “avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union” because “inter-union rivalries would foster dissension within the work force, and the employer could face ‘conflicting demands from different unions.’” *Janus*, 138 S. Ct. at 2465. Other interests typically asserted in support of exclusive representation status amount to much the same claim: that it is in the state’s interest to have a “comprehensive system” that bundles all employees into a single bargaining representative with which the state can negotiate. *See, e.g.*, Brief for Respondents Lisa Madigan and Michael Hoffman at 4, *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (No. 16-1466).

This justification is particularly inapplicable to Hendrickson because he does not seek to introduce a competing union into the bargaining mix but only to ensure that the Union does not speak on his behalf. Furthermore, in *Janus* the Supreme Court assumed, without deciding, that labor peace might be a compelling state interest, but the Court rejected it as a justification for agency fees. The interest should, likewise, be rejected as a justification for exclusive representation. The Supreme Court recognized that “it is now clear” that the fear of “pandemonium” if the union couldn’t charge agency fees was “unfounded.” *Janus*, 138 S. Ct. at 2465. To the extent that individual bargaining is claimed to raise the same concerns of

pandemonium, this too, remains insufficient. The Supreme Court rejected the invocation of this rationale due to the absence of evidence of actual harm. *Id.* It may be that the state finds it convenient to negotiate with a single agent, and the Union may find it convenient to accrue all bargaining power to itself, but that, in and of itself, is not enough to overcome First Amendment rights. The rights to speech and association cannot be limited by appeal to administrative convenience. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972) (in free speech cases, a "small administrative convenience" is not a compelling interest); *see also Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) (holding that a state could “no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party”).

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

C. The Union’s reliance on *Knight* is misplaced.

In its withdrawn motion to dismiss Hendrickson’s exclusive representation claim, the Union relied heavily on *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271(1984). Motion to Dismiss Count II (Dkt. 17) (“MTD”). Hendrickson anticipates the Union will renew this argument at the summary judgment stage of litigation, and therefore, addresses it now.

The *Knight* case holds that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the issue, “The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees.” 465 U.S. at 273.

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

The court explained the issue it was addressing well: “[A]ppellees’ principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting.” *Id.* at 282. Confronted with this claim, the court held that “[a]ppellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education.” *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, Hendrickson does not claim that his employer—or anyone else—should be compelled to listen to his views. Instead, he asserts a right against the compelled association forced on him by exclusive representation.

The Union’s invocation of *Knight* makes two important missteps. First, it asserted in its Motion to Dismiss that the “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.’” MTD at 15 (quoting *Knight*, 465 U.S. at 278-79). But the Union did not clarify what was summarily affirmed. What was summarily affirmed was a rejection of the argument that collective bargaining violates the non-delegation doctrine, not that it violates a right of association, as the relevant portion of the lower court opinion makes clear. *See Knight v. Minn. Cmty. Coll. Faculty Ass’n.*, 571 F. Supp. 1, 4 (D. Minn. 1982). That the non-delegation doctrine is at issue is proven when the Supreme Court cites to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), neither of which address a right to freedom of association. *Knight*, 465 U.S. at 279. The plaintiffs in *Knight* viewed the granting of negotiating rights to the union as a delegation of legislative power to a private organization, and the district court rejected the claim, explaining simply that the claim “is clearly foreclosed by the Supreme Court’s decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 (1977).” *Knight*, 571 F. Supp. at 4. The statutory arrangement did not violate the non-delegation doctrine “merely because the employee association is a private organization.” *Id.* at 5. In its own *Knight* decision, the Supreme Court was

not affirming a claim of exclusive representation equivalent to Count II of Hendrickson’s First Amended Complaint.

AFSCME’s second misreading of *Knight* severely elevated and misinterpreted dicta in the decision. The central issue of the *Knight* decision is whether plaintiffs could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Hendrickson’s claim that the government cannot compel him to associate with the Union by making the Union bargain on his behalf.

In arguing that these two distinct claims are the same, the Union pointed only to dicta towards the end of the *Knight* opinion that suggests the challenged policy “in no way restrained [plaintiffs’] freedom to speak on any education related issue or their freedom to associate or not associate with whom they please.” *Knight*, 465 U.S. at 288. Yet the Union’s own quotations from that portion of the opinion reinforced that the Court was still addressing the question of being heard. *See* MTD at 17. The Court explains that the government’s right to “choose its advisors” is upheld because a “person’s right to speak is not infringed when the government simply ignores that person while listening to others.” *Knight*, 465 U.S. at 288. The Court raises the matter of association only to address the objection that exclusive representation “amplifies [the union’s] voice in the policymaking process. But that amplification no more impairs individual instructors’ constitutional freedom to speak than the amplification of individual voices” impairs the ability of others to speak as well. *Id.* This, again, is another path to the same conclusion: First Amendment “rights do not entail any government obligation to listen.” *Id.* at 287.

Knight is, therefore, not responsive to the question Hendrickson now raises: whether someone else can speak in his name, with his imprimatur granted to it by the government. Hendrickson does not contest the right of the government to choose whom it meets with, to

“choose its advisors,” or to amplify the Union’s voice. He does not demand that the government schedule meetings with him, engage in negotiation, or any of the other demands made in *Knight*. He demands only that the Union not do so in his name, and he respectfully requests that this Court issue a declaration to that effect.

CONCLUSION

For the forgoing reasons, the Court should grant Hendrickson Summary Judgment on Claim I for union dues deducted without his affirmative consent. In relief, the Court should declare that signing a union card prior to the *Janus* decision cannot provide a basis for affirmative consent to waive the First Amendment rights upheld in *Janus* because such authorization was based on the unconstitutional choice between paying the union as a member or paying the union as a non-member. The Court should declare that, absent affirmative consent, deducting union dues after a government employee has requested that they stop is a violation of the First Amendment. The Court should declare that N.M. Stat. Ann. § 10-7E-17(C) constitutes an unconstitutional violation of the First Amendment rights to free speech and freedom of association because it allows the withholding of union dues until a time period specified by a collective bargaining agreement. The Court should declare that N.M. Stat. Ann. § 10-7E-9(G) constitutes an unconstitutional violation of First Amendment rights to free speech and freedom of association because it allows unions to demand contract provisions providing for “fair share” fees from non-members. The Court should award monetary damages against the Union for all union dues collected from Hendrickson without his affirmative consent. The Court should award Hendrickson his costs and attorneys’ fees under 42 U.S.C. § 1988.

For the forgoing reasons, the Court should grant Hendrickson Summary Judgment on Claim II not to be forced to associate with the Union as his exclusive representative for bargaining purposes. In relief, the Court should declare that government employees have a constitutional right not to be represented by unions as their exclusive representative without their affirmative consent. The Court should declare that N.M. Stat. Ann. § 10-7E-15(A) and all related provisions constitute an unconstitutional violation of the First Amendment rights to free speech and freedom of association for requiring unions to serve as the exclusive representative of government employees for bargaining purposes.

Dated: May 31, 2019

Respectfully Submitted,

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT
THEREOF

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I hereby certify that the foregoing pleading was electronically filed the 31st day of May, 2019, through the Court's CM/ECF filing system, which causes all parties of record to be served.

/s/ Patrick J. Rogers

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

BRETT HENDRICKSON,

Plaintiff,

v.

No. CIV 18-1119 RB/LF

AFSCME COUNCIL 18; MICHELLE LUJAN GRISHAM,
in her official capacity as Governor of New Mexico; and
HECTOR BALDERAS, in his official capacity as Attorney
General of New Mexico,

Defendants.

MEMORANDUM OPINION AND ORDER

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

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

II. Legal Standards

A. Summary Judgment Standard of Review

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

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

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

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

B. Motion to Dismiss Standard of Review

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

II. Background

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

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

employment” (Doc. 32 at 11¹ (citing Doc. 32-4 ¶ 6); *see also* § 10-7E-5), employees in Mr. Hendrickson’s pre-*Janus* bargaining unit were required to make a choice: pay dues and join the Union as a member to receive full member benefits, or decline to join and pay a lower amount of “fair share fees” as a nonmember. (Doc. 32-4 ¶¶ 7, 35, 63; Am. Compl. ¶¶ 16, 22.) *See also* 138 S. Ct. at 2459–60. At the time, these fair share fees were lawful under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and the PEBA. “Represented bargaining unit employees have never been required to become Union members nor required to publicly endorse the Union’s positions in any respect.” (Doc. 32-4 ¶ 29.)

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

Effective: [April 7, 2017], I authorize AFSCME Council 18 as my exclusive bargaining representative, and I accept membership in AFSCME Council 18. I request and authorize the State of New Mexico to deduct union dues from my pay and transmit them to AFSCME Council 18. The amount of dues deduction shall be the amount approved by AFSCME’s membership as set forth in the AFSCME constitution and certified in writing to my employer. This authorization shall be revocable only during the first two weeks of every December, or such other time as provided in the applicable collective-bargaining agreement.²

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

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

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

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

On June 27, 2018, the United States Supreme Court decided *Janus*. 138 S. Ct. 2448. In *Janus*, the Court examined the constitutionality of requiring nonunion state employees to pay agency fees for union representation, such as the “fair share” fees in New Mexico. *Id.* at 2459–60. It found that this practice violates nonmembers’ First Amendment rights, because it “compel[s] them to subsidize private speech on matters of substantial public concern.” *Id.* at 2460. The Court held, therefore, that “States and public-sector unions may no longer extract agency fees from nonconsenting employees . . . unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.” *Id.* at 2486 (citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³ The Court also finds Mr. Hendrickson’s argument regarding voluntary cessation disingenuous, as he filed this lawsuit on November 30, 2018 (Doc. 1), and the two-week opt-out window began the next day. The Union did not terminate the dues authorization only in response to the lawsuit, but in response to his resignation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.

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

B. Exclusive representation is justified by compelling state interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It cannot seriously be disputed that the proper vehicle for challenging the constitutionality of a state statute, where only prospective, non-monetary relief is sought, is an action against the state officials responsible for the enforcement of that statute. *See Ex parte Young*, 209 U.S. 123, 161 (1908). Nor can it be disputed

that the Governor and Attorney General of the state of Kansas have responsibility for the enforcement of the laws of the state. See Kan. Const. Art. I § 3; Kan. Stat. Ann. § 75-702.

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

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

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

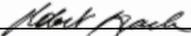
THEREFORE,

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

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

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

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



ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

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

BRETT HENDRICKSON,

Plaintiff,

v.

No. CIV 18-1119 RB/LF

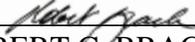
AFSCME COUNCIL 18; MICHELLE LUJAN GRISHAM,
in her official capacity as Governor of New Mexico; and
HECTOR BALDERAS, in his official capacity as Attorney
General of New Mexico,

Defendants.

FINAL ORDER

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

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



ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

BRETT HENDRICKSON,

Plaintiff,

v.

NO. 1:18-CV-01119-RB

**AFSCME COUNCIL 18 and NEW
MEXICO HUMAN SERVICES
DEPARTMENT,**

Defendants.

NOTICE OF APPEAL

Plaintiff, by the undersigned counsel, hereby gives notice pursuant to Rule 4 of the Federal Rules of Appellate Procedure that he appeals to the United States Court of Appeals for the Tenth Circuit from the Memorandum Opinion and Order (Doc. 62) and the final Order (Doc. 63), both filed January 22, 2020.

Respectfully Submitted,

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Attorneys for Brett Hendrickson

I hereby certify that the foregoing pleading was filed electronically and served through the CM/ECF system this ___ day of February, 2020, which causes all parties of record to be served.

/s/ Patrick J. Rogers

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, I electronically filed the forgoing Appendix to Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) All required privacy redactions have been made pursuant to 10th Cir.R. 25.5;
- (2) That the ECF submission is an exact copy of the foregoing;
- (3) The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, AVG Antivirus Free, Version 20.2.3116, and according to the program are free of viruses.

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