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 REPLY TO DEFENDANT AFSCME'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff, Brett Hendrickson, submits this Reply to Defendant AFSCME Council 18's Opposition to Plaintiff's Motion for Summary Judgment (Dkt. 39) ("ASFCME Opposition"). Because Plaintiff has already addressed the arguments made in the AFSCME Opposition in his Motion for Summary Judgment (Dkt. 33) ("Plaintiff MSJ"), in his Opposition to AFSCME's Motion for Summary Judgment (Dkt. 42) ("Plaintiff Opposition to MSJ"), in his Opposition to State Defendants' Motion to Dismiss (Dkt. 43) ("Plaintiff Opposition to MTD"), and in his Reply to State Defendants' Opposition to Plaintiff's Motion for Summary Judgment (filed simultaneously) ("Plaintiff Reply to State Defendants"), Plaintiff hereby incorporates those arguments and limits his reply to the points which require further elaboration. Plaintiff further limits his reply to arguments of law because "[t]he Union does not dispute Plaintiff's material facts." AFSCME Opposition at 1.

ARGUMENT

I. AFSCME's forcing Hendrickson to wait until a specified time period to withdraw his consent for union dues deductions violates his First Amendment rights to Free Speech and Freedom of Association under *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

A. Hendrickson's decision to join AFSCME was not fully informed, as required by *Janus*.

Defendant AFSCME Council 18 ("AFSCME") argues that Hendrickson consented to only being able to end his union dues deduction two weeks a year when he signed his union membership application. AFSCME Opposition at 6-18. Hendrickson concedes that he signed the application, but he points to the undisputed fact that he was not fully informed when he did so, and he argues that his consent, therefore, is invalid. *See* Plaintiff MSJ at 9-13; Plaintiff Opposition to MSJ at 7-13.

Janus is clear that workers must not only consent to waive their First Amendment rights not to pay union dues, but they must "clearly and affirmatively consent before any money is taken from them." *Janus*, 138 S. Ct. at 2486. *Janus* further explains:

> 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.

Id. (internal citations omitted). Hendrickson's consent was not "freely given" because he was not informed of his right to pay nothing at all to the union. Declaration of Brett Hendrickson ("Hendrickson Dec.") (Dkt. 33-1) ¶ 4. That right had not yet been recognized by the Supreme Court. Therefore, the waiver of that right "cannot be presumed." *Janus*, 138 S. Ct. at 2486. Hendrickson could not possibly have waived a right that he did not know existed.

Instead of citing to *Janus*, AFSCME asks the Court to rely on the holding of *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), which *Janus* overruled. AFSCME Opposition at 13. It is true that, under the terms of *Abood*, Hendrickson had the right not to join the Union when he did so in 2007. But he was not informed of the right to pay nothing at all to the Union. His consent to have union dues deducted was not fully informed, as *Janus* requires such consent to

be. Therefore, Hendrickson did not knowingly waive his right to pay nothing to the Union.

Curiously, AFSCME begins its argument by stating that no waiver is necessary. AFSCME Opposition at 7-11. AFSCME states that the *Janus* reasoning above applies only to nonmembers of the union and not to members like Hendrickson. It is true that the plaintiff in *Janus* was a nonmember of the union. But so was Hendrickson at the time he signed his union membership application. AFSCME is simply missing the temporal applicability of the waiver requirement to Hendrickson's situation. Hendrickson's argument is that when he was a nonmember of the Union in 2007, agreeing to pay dues to the Union required him to waive his First Amendment right to pay nothing to the Union, and such waiver "cannot be presumed" but must be "freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486. To argue that no waiver is required is to ignore the *Janus* decision.

Furthermore, AFSCME's analysis allows for Hendrickson to be considered a nonmember with continuing dues obligations even today, further violating the holding in *Janus* that nonmembers cannot be forced to pay anything to the union. It its additional material facts offered in the AFSCME Opposition, AFSCME states that, "Plaintiff could resign his union membership at any time but . . . dues would continue to be deducted . . .." AFSCME Opposition at 3 (I). While Hendrickson does not dispute this fact, he vigorously disputes its constitutionality. In fact, Hendrickson did resign his union membership, yet union dues continued to be deducted from his paycheck "until the second pay period in January 2019." *Id*. at 3 (O). This bifurcation of union membership from the requirement to pay the union is exactly what was struck down in *Janus*: "Neither an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages . . .." *Janus*, 138 S. Ct. at 2486 (emphasis added).

AFSCME likens union membership to a simple contract between private parties.

AFSCME Opposition at 11-16. In the examples AFSCME cites, however, the parties know which constitutional rights they are waiving by entering into the contract and do so voluntarily. Hendrickson, on the other hand, was forced to pay the Union whether he entered into the contract or not. He did not knowingly give up the right to pay nothing to the Union because he was not offered that right. Hendrickson Dec. ¶ 4.

Thus, applying the reasoning of *Janus* would not require this Court to "invalidate millions of authorizations for charitable deductions." AFSCME Opposition at 8. Such authorizations are made knowingly and voluntarily. No one ever forced a public employee to either donate a dollar to charity or have 80 cents taken from his paycheck without his permission. Similarly, the analogy to arbitration agreements is inapposite because such waivers of constitutional rights are made knowingly and voluntarily.

AFSCME claims that Hendrickson received consideration for joining the Union, but it fails to mention that Hendrickson did not want this consideration, which AFSCME terms "the rights and benefits of union membership." AFSCME Opposition at 10. Hendrickson jumped at his first chance to give up these rights and benefits, asking to give them up fewer than 45 days after the *Janus* decision. *See* Hendrickson Dec. ¶ 5.

AFSCME acknowledges that a waiver of a constitutional right must be "voluntary, knowing, and intelligent." AFSCME Opposition at 12 (quoting *D.H. Overmeyer* [sic] *Co. v. Frick Co.*, 405 U.S. 174 (1972)). However, AFSCME tries to distinguish *D.H. Overmyer Co.* in tautological fashion by acknowledging that in that case a constitutional right was being waived, but "here, the deduction of membership dues is not unconstitutional." AFSCME Opposition at 12. But the deduction of membership dues without giving the right to pay nothing to the union was unconstitutional, and it was unconstitutional because the waiver was not made knowingly, as

required by *D.H. Overmyer Co.* Therefore, a waiver of a First Amendment right must be "knowing," and AFSCME does not challenge that in this case it wasn't. Hendrickson Dec. ¶ 4.

Having acknowledged that a waiver was required in this case, AFSCME goes on to argue that a waiver was made. AFSCME Opposition at 11-16. ASFCME relies on *United States v. Brady*, 397 U.S. 742 (1970), in which a criminal defendant was held to his plea agreement. In that case, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment. *Id*. at 743-44. He waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id*. at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id*. at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication: "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Id*. at 748. The finality of judgments is not something a court undermines lightly, and the Supreme Court determined it could "see no reason on this record to disturb the judgment of those courts [who entered judgment against the defendant]." *Id.* at 749. There is nothing like that in this case. Hendrickson does not ask that this Court find its way around *res judicata*, only that it find an alleged contract between the parties unenforceable.

The better analogy in criminal law is to *United States v. Bunner*, 134 F.3d 1000 (10th Cir. 1998). *See* Plaintiff Opposition to MSJ at 8. In *Bunner*, the Supreme Court struck down the actual crime to which the defendant had plead guilty; therefore, the judgment was reversed. *Bunner*, 134 F.3d at 1002. The prosecution, however, like Hendrickson, was not stuck with its choice of plea agreement after one of its options was later found unconstitutional. It could pursue a plea agreement to different crime that it had chosen earlier not to pursue. The Tenth Circuit ruled that the intervening Supreme Court decision had so materially changed the nature of the

agreement between the parties that performance of the contract was no longer required. *Id*. at 1005. Similarly, the intervening *Janus* Supreme Court decision has materially changed the nature of the agreement Hendrickson entered into, and he should also be relieved of performance.

Hendrickson concedes that some other courts have recently endorsed ASFCME's misreading of *Janus*. AFSCME Opposition at 10-11. Most of the cases cited, however, are orders denying motions for preliminary injunction. *See* Plaintiff Opposition to MSJ at 11-12. Most importantly, ASFCME is unable to cite any such case in the Tenth Circuit; therefore, the question for this Court is one of first impression.

B. AFSCME's actions constitute state action.

ASFCME contends that there is no state action in this case. AFSCME Opposition at 16-18. It fails to explain, however, how state government using the state payroll system to deduct union dues from state-issued paychecks of state employees is not state action. *See* Plaintiff Opposition to MSJ 14. It also fails to acknowledge decades of Supreme Court precedents applying First Amendment standards to public sector unions, concluding with the *Janus* decision. *See* Plaintiff Opposition to MSJ 15.

Moreover, AFSCME's limiting the time period in which Hendrickson can end his union dues deductions is enforced by the state through a state statute, N.M. Stat. Ann. § 10-7E-17(C). Such statute is unconstitutional as applied to Hendrickson because it prohibits him from ending his dues deductions even though the contract by which he authorized them was not freely entered into with a "voluntary, knowing, and intelligent" waiver of his rights. *D.H. Overmyer Co.*, 405 U.S. at 174. The portion of the statute that is unconstitutional as it applies to Hendrickson states:

> The public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement and for so long as the labor organization is certified as the exclusive representative.

N.M. Stat. Ann. § 10-7E-17(C). This language allows the terms of the collective bargaining agreement between AFSCME and the state to determine when Hendrickson can end his dues deductions. In theory in New Mexico and in practice in other states, that time period could occur years after Hendrickson's request that his dues stop. The statute makes no allowance for the fact that Hendrickson did not know of his right to pay nothing to the Union when he consented to his dues deductions. Because the statute is being enforced against Hendrickson as if he did "freely give . . . affirmative[] consent" to dues deductions, *Janus*, 138 S. Ct. at 2486, the statute is violating his rights to Free Speech and Freedom of Association. This Court should declare N.M. Stat. Ann. § 10-7E-17(C) unconstitutional as applied to Hendrickson.

C. Hendrickson's claim is not moot.

AFSCME argues in its Opposition that Hendrickson's claim in Count I of the First Amended Complaint is moot. ASFCME Opposition at 4-6. Count I is not moot, however, as there is an ongoing case and controversy. *See* Plaintiff MSJ at 13-16; Plaintiff Opposition to MSJ at 5-7. Plaintiff Reply to State Defendants at 5-6.

In brief, "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)). ASFCME continues to assert the legality of its policy to postpone dues deduction revocations and enforce it against all other New Mexico employees who have not taken the time to sue.

ASFCME claims this case is not an instance of voluntary cessation of unlawful conduct once sued because the cessation of the conduct was consistent with its membership agreement, which allowed dues deduction revocations once a year. ASFCME Opposition at 5. This argument constitutes an admission of the transitory nature of the claim because cessation of the

unlawful conduct will occur once a year. This case, for example, was filed in November 2018, and summary judgment with no discovery is being presented to the Court in August 2019. A policy with a one-year duration cannot be adjudicated if the Union is allowed to dodge in this way. Instead, this Court should agree with the Ninth Circuit that these "are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk v. Inslee*, 759 F. App'x 632, 633 (9th Cir. 2019).

ASFCME attempts to distinguish *Fisk* on the basis that the plaintiffs sought a class action, but the class allegations were not the basis of the court's reasoning. Indeed, the court explicitly stated, "*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." *Fisk,* 759 F. App'x at 633 (emphasis added).

Next, ASFCME argues that there must be a "reasonable expectation that the same complaining party [will] be subjected to the same action again." AFSCME Opposition at 4 (quoting *Casad v. U.S. Dept. of Health and Human Services*, 301 F.3d 1247, 1254 (10th Cir. 2002)). But AFSCME's argument is not consistent with how the Supreme Court has addressed the doctrine of mootness. For example, Jane Roe was not required to submit an affidavit asserting that she would experience a future unwanted pregnancy. *Roe v. Wade,* 410 U.S. 113, 125 (1973). Similarly, union members in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) could not say they would be subject to a future special assessment by the union, but the case was determined not to be moot even after the union had sent notice of a full refund of the assessment.

ASFCME attempts to distinguish *Knox* by arguing that the plaintiffs in *Knox* sought retrospective relief but not prospective relief. In doing so, AFSCME acknowledges that there is a

live case and controversy regarding whether Hendrickson is owed a refund of the union dues he already paid. AFSCME Opposition at 5, n.2. This retrospective relief is similar to the retrospective relief sought in *Knox* for a full refund of the special assessments paid.

AFSCME goes on to quote that the plaintiffs in *Knox* did not seek prospective relief. AFSCME Opposition at 5. AFSCME fails to acknowledge that, whether the Court called it "prospective" or not, what the plaintiffs in *Knox* sought was exactly what Hendrickson seeks in this case: a declaration of rights. Because AFSCME concedes that Hendrickson has a live damages claim for the union dues taken from him, his challenge to the revocation policy cannot be moot. Whether Hendrickson should have been allowed to end his dues deduction when he first requested it in August is a necessary question for the Court to answer when determining whether he is owed damages. As was the case in *Knox*, one question is a logical predicate of the other. If AFSCME acknowledges that one question is not moot, it must acknowledge that the other is also not moot.

D. The "good faith" defense does not relieve AFSCME of returning Hendrickson's money.

Finally, ASFCME contends that it is entitled to a "good faith" defense. But courts have long held there is no "good faith" defense to liability under 42 U.S.C § 1983. First, the ostensible defense is incompatible with the plain meaning of the statutory text, which mandates that "every person" who deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . .." 42 U.S.C § 1983. Second, the alleged defense is incompatible with the statutory basis for immunities. Third, the defense is incompatible with "[e]lemental notions of fairness [that] dictate that one who causes a loss should bear the loss." *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980). Creating this sweeping mistake-of-law defense would undermine §

1983's remedial purposes and burden courts with evaluating defendants' motives for depriving others of their constitutional rights.

First, § 1983 "on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Courts can only "accord[] immunity where a 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine.'" *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 164–65 (1992)). Such traditional immunities include "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 566 U.S. 377, 389–90 (2012) (citing *Richardson*, 521 U.S. at 409–11). AFSCME is not entitled to qualified immunity in § 1983 damage claims unless these exacting strictures are satisfied. *See, e.g., Owen*, 445 U.S. at 657 (holding municipalities lack qualified immunity from § 1983 claims).

Second, private defendants like unions are almost never entitled to qualified immunity. *See Richardson*, 521 U.S. at 409–11; *Wyatt*, 504 U.S. at 164–65. The narrow exception to that rule, not applicable here, is made for private individuals who "perform[ ] duties [for the government] that would otherwise have to be performed by a public official who would clearly have qualified immunity." *Williams v. O'Leary*, 55 F.3d 320, 324 (7th Cir. 1995) (citation omitted) (private physician contracted to provide medical services at state prison); *see, e.g., Filarsky*, 566 U.S. at 393–94 (holding private attorney retained by a city to conduct an official investigation entitled to qualified immunity).

Third, it is unfair for courts to grant defendants who lack statutory qualified immunity the

functional equivalent of immunity under the guise of a "defense." "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990). That is especially true in this case because what is equitable is providing victims of constitutional violations relief for their injuries, not depriving them of relief.

Hendrickson concedes that some other district courts have recently been persuaded to create a "good faith" defense for unions in a § 1983 action. AFSCME Opposition at 18, n.7. However, ASFCME is, once again, unable to cite to any such case in the Tenth Circuit; therefore, this Court is not bound by such a novel construct of law but is bound by the long-standing prohibition of such a finding.

In addition, even if the Court were to apply the "good faith" defense to the Union, it would not shield AFSCME from having to return Hendrickson's unconstitutionally paid union dues. Plaintiff MSJ at 11-12. When a "good faith" defense is found by the court, it shields defendants from further liability once they have returned the property that was unconstitutionally taken. *Id*. It does not relieve defendants from returning what was taken. *Id*. Here, Hendrickson is not asking for money damages incidental to the taking of his union dues. He is simply asking for those dues to be refunded; therefore, the "good faith" defense is inapposite.

II. AFSCME's status as Hendrickson's exclusive representative violates his rights of speech and association.

AFSCME contends that it is entitled to continue speaking on behalf of Hendrickson despite his objection. ASFCME Opposition at 19-23. Hendrickson has already explained why *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018) and *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019) were wrongly decided. *See* Plaintiff Opposition to MSJ at 16-23. Again, AFSCME can

point to no 10th Circuit ruling on the issue, and this Court should follow the reasoning of *Janus*.

AFSCME asserts that exclusive representation serves state interests such as "providing a stronger voice for public employees, improving employee morale, and creating better dialogue between the employer and employees." Declaration of Joseph Grodin (Dkt. 33-22). Grodin's unproven assertions confuse the purported benefits of *unionization* with the benefits of exclusive representation. To the extent an employer's interaction provides stronger employee voices or creates dialog, it is because the employer is dealing with a trained union negotiator, not because that negotiator is entitled to speak on behalf of dissenting employees. Furthermore, a claim that exclusive representation improves employee morale is an invocation of "labor peace" by another name, an interest which the Supreme Court in *Janus* found insufficient to overcome First Amendment rights. *See* Plaintiff MSJ at 18-19. This Court should follow the ruling in *Janus*.

CONCLUSION

For the reasons stated above, the Court should grant Plaintiff's Motion for Summary Judgment and deny ASFCME's motion.

Respectfully Submitted,

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I hereby certify that the foregoing pleading was electronically filed the 1st day of August, 2019, through the Court's CM/ECF filing system, which causes all parties of record to be served.

/s/ Brian K. Kelsey